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Report From Counsel

Insights and Developments in the Law Winter 2021

Estate Planning When Time Is Short

The COVID-19 pandemic has caused some people to contemplate their own future or that of a family member. For those whose life expectancies are short — because of COVID-19 or for other reasons — estate planning can be difficult. But while money matters may be the last thing you want to think about when time is limited, a little planning can offer you and your family financial peace of mind.



Jason
Smolen



Daniel
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Actions to take

Here are some (but by no means all) of the steps you should take if you have a short life expectancy. These steps are also helpful if a loved one has been told that time is limited.

Gather documents.

Review all estate planning documents, including your:

- Will
- Revocable or “living” trust
- Other trusts
- General power of attorney
- Advance medical directive, such as a “living will” or health care power of attorney

Make sure these documents are up-to-date and continue to meet your estate planning objectives. Modify them as appropriate.

Take inventory.

Catalog all your assets and liabilities, estimate their value, and determine how assets are titled to ensure that they’ll pass to their intended recipients. For

example, do you own assets jointly with your ex-spouse? If so, the title will pass to your ex-spouse on your death. There may be steps you can take to separate your interest in the property and dispose of it as you see fit.

If you have a safe deposit box, make sure someone is authorized to open it. If you have a personal safe, be sure that someone you trust knows its location and combination.

Review beneficiary designations.

Take another look at beneficiary designations in your IRAs, pension plans, 401(k) plans and other retirement accounts, insurance policies, annuities, deferred compensation plans and

Accolades

SmolenPlevy is honored to announce that Alan Plevy and Kyung (Kathryn) Dickerson have once again been recognized as “Top Lawyers” for 2020 by *Northern Virginia Magazine*.

- Alan Plevy (*Divorce and Family Law*)
- Kathryn Dickerson (*Divorce and Family Law*)

SmolenPlevy was selected for U.S. News & World Report’s “*Best Law Firms*” 2021. This is the seventh consecutive year the firm has received this distinguished honor. “*Best Law Firms*” are recognized for professional excellence with consistently impressive ratings from clients and peers.

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Establishing Paternity

Paternity is the recognition of a legal parent-child relationship where a biological relationship exists. In most instances, paternity is established at the time a child is born and is confirmed on the child's birth certificate. However, there are certain situations in which paternity will need to be established later on in the child's life and requires the use of the court system.



Alan Plevy

Being a parent to a child comes with legal responsibility — even if you have little to no relationship with an offspring. As a biological parent, you are obligated to pay child support until the child is 18 years of age (or longer, depending on the circumstances). You may also be granted the right to

contact the child and develop a relationship with that child. In addition, certain paternal obligations can be retroactive to the time the child was born. This means that, if paternity is established, the father can be held accountable for reimbursing the mother for pregnancy and other expenses.



Kyung (Kathryn)
Dickerson

A child or maternal parent may want to establish paternity for the following reasons:

- Receive child support
- Gain rights to inheritance
- Receive benefits upon the death of a parent (such as Social Security)
- Learn about family history

The Process

In order to establish paternity, the

father, the child or the mother of the child must file a petition with the appropriate court. The other party must then consent to or deny the establishment of paternity. If the party denies the paternal relationship, a DNA test is ordered for confirmation. The party that requests the DNA test is typically the party that is required to pay for it.

Once paternity is established, a judge will enter an Order, making a legal finding of paternity and granting certain relief, like the payment of child support or permitting the father to file for custody and visitation with the child.

Contact Alan Plevy at ablevy@smolenplevy.com or Kyung (Kathryn) Dickerson at knickerson@smolenplevy.com for more information.

Contractual Capacity

When two or more parties enter into a contract, they are creating a legally binding promise or set of promises. The contract itself is an agreement between the parties to uphold these promises and abide by the rules set forth in the agreement.

The law requires that these parties have the contractual capacity to enter into this agreement when signing the contract. Someone who has contractual capacity is essentially a person who entered into a contract consciously and voluntarily; he or she was aware of the conditions of the contract and agreed to them by signing the contract. The law does not recognize contracts in which one party was coerced into signing or those that require an illegal act be performed by one of the parties.

There are some people who do not

have the legal capacity to enter into a contract due to a certain characteristic. These people include:

Minors

Those who are under the age of 18 are not considered by law to have the capacity to enter into a contract. It is believed that, prior to age 18, people do not have the maturity or experience necessary to fairly enter into contracts. Minors have the ability to cancel most contracts that they have entered into with adults, but it is not as clear if the minor has since turned 18 when he or she decides to void the contract. In some states, a contract must either be disavowed or ratified within a certain period of time once a minor has reached majority.

Mentally Incompetent People

People who suffer from mental incapacity cannot be held responsible

for the terms in a contract. A person who is declared legally incompetent — by a proper court of administrative agency — at the time the contract was signed does not have to fulfill the duties of a contract and the contract is considered to be void.

Intoxicated Person

A person who is under the influence of alcohol or drugs cannot legally enter into a contract if he or she has reached the point of incompetence at the time of entering into such a contract. The contract is only voidable by the intoxicated party, not the party who had contractual capacity at the time the contract was signed, if such a party exists. Additionally, a contract can only be voided if the person had reached a point of intoxication that deemed him or her incapable of understanding the nature of the contract.

Federal Estate Taxation

When a loved one passes away, it is important to ensure that all of his or her affairs are in order. This includes paying off any debts, as well as paying any necessary federal and state taxes required on an estate. An estate is generally taxed on the transfer of assets from the decedent to the beneficiaries in states which have an estate tax. There is also a federal estate tax. For both states and the federal government, there are exemptions and estates that fall under the exemption amount will not owe an estate tax. However, estates are also responsible for the payment of taxes on the income generated by the assets of the estate.

The person responsible for overseeing the estate — the fiduciary, personal representative, executor, etc. — is required to ensure that the estate pays the income tax for each year, similar to how an individual is required to pay a tax on his or her income. If the estate generated a gross income of more than \$600 that year, then the estate can be taxed on this income.

Filing an estate tax return covers the transfer of estate property and will require that you calculate the value of all of the decedent's assets. The federal government will tax the value of the entire estate or the total value of all of your assets at the date of death. The property that may be included in the taxable estate consists of cash and securities, real estate, insurance, trusts, shares of a company, and more.

Just prior to 2018, most estates with assets that did not exceed \$5.6 million did not require that you file a federal estate tax return. In 2018, the Tax Cuts and Jobs Act of 2017 increased this number to \$11.2 million with this number expiring in 2025. By 2026, if the law is not renewed, the number will return to \$5.6 million. Unless the law is changed, this means that, until the end of 2025, a decedent can leave an estate valued at up to \$11.2 million without incurring federal estate taxes.

Married couples get an even bigger tax break: the threshold essentially doubles, meaning that a married couple's estate does not get taxed

unless their estate totals over \$22 million. This is because the federal estate tax applies to each individual.

If handled in a timely fashion, there are a number of ways of reducing a taxable estate. The planning is complex and includes donations to charity and/or giving away property during your life. People are allowed to give away the amount of the estate tax exemption in gifts completely tax-free. So, until 2025, a person can gift his or her heirs up to \$11.2 million without being taxed, allowing the growth on the gifts to continue outside of their estate. There are numerous vehicles, with various types of trusts being an important tool, that can be utilized for those individuals for which this planning is important and may deliver significant tax savings.

While most Americans do not have to pay the federal estate tax, some states have their own estate or inheritance taxes that must be paid, and often the local estate tax kicks in at a lower threshold than the federal estate tax.

Divorce and College: Planning Ahead is Crucial

What's their major? Who's their roommate? Dorm room or fraternity house? These are all questions on the minds of parents who are sending their children off to college this fall. But if you are divorced — or thinking about getting a divorce — one of the most pressing questions you'll have to answer is "Who will pay for college?"

Child support generally ends when children reach the age of emancipation. Depending on the state in which you

reside, the age of majority can be 18, 19 or 21 years old; in Virginia, child support ends when the child is 18, unless the child is still in high school, then upon the child's graduation, but no later than 19. Unless there is an agreement between parents before the child reaches this age, there is no legal obligation for either parent to pay for college or any post-high school training or education. So, even if your children are very young when

you and your spouse separate, and you can't imagine them old enough to cross the street without holding your hand, much less graduating from high school. It is critical you negotiate how college expenses will be handled in your divorce agreement.

Education is one of the best gifts a parent can give their child. But a court cannot order either parent to pay for

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other assets. Make sure a beneficiary is named and that the designation continues to meet your wishes. For example, a divorced individual may find that an ex-spouse is still named as beneficiary of a life insurance policy. And though there are laws to address that, you may still end up with unintended consequences.

Review digital assets.

Ensure that your family or representatives will have access to digital assets, such as email accounts, online bank and brokerage accounts, online photo galleries, digital music and book collections, social media accounts, websites, domain names, and cloud-based documents. You can do this by creating a list of usernames and passwords or by making arrangements with the custodians of these assets to provide access to your authorized representatives.

Make gifts.

Do you have a taxable estate? You may wish to make certain gifts to reduce your estate.

For more information, contact Jason Smolen at jdsmolen@smolenplevy.com or Dan Ruttenberg at dh Ruttenberg@smolenplevy.com.

Divorce and College: Planning Ahead is Crucial

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his or her child's college education, so you must take this into consideration when negotiating an agreement.

Some important items to discuss with an attorney:

- Public or private and in-state or out-of-state tuition?
- What percentage of college expenses will each parent be responsible for?
- If you wish to take advantage of a state's 529 college savings plan, will both parents contribute? How much and how often? Which parent is the custodian of the plan?
- Should you restrict where the children can attend college or the limit of each parent's obligation? State schools are significantly less expensive than out-of-state ones.
- What about living expenses during college? Will anyone pay for the plane tickets home? Room and board? Books and extracurricular activities?
- Will either parent be obligated to purchase a computer or other equipment for the student? What if the student regularly changes majors and cannot decide what to

do with their education — is there a limit in years or by maintained GPA as to how long each parent is obligated to support the student?

Another important item to keep in mind — if either or both parents remarry, there could be other children to support and educate which could dilute a parent's financial resources. An agreement cannot be modified, unless both sides agree. Obligations to pay for college for children of a prior marriage are generally not reduced or excused because the paying parent subsequently chooses to have more children or to assume obligations for other children.

We recommend that divorcing parents do their best to leave their emotions behind and work together to provide for the best they can for their children. By reaching a consensus early on in the process, each party will have an understanding of what their obligations will be when their child or children are ready to tackle the challenge of higher education and the parents can budget and plan now for that future obligation.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.