SMITH LAW, P.A.
49 Pleasant Street
Brunswick, Maine 04011

ESTATE PLANNING MEMORANDUM

Estate planning is more than simply signing a will. It is your comprehensive plan for the enjoyment, use and disposition of your assets during your lifetime, while you are disabled, and after your death. It may also include asset protection and tax considerations, beneficiary designations, and asset re-titling. The primary focus of an effective estate plan is planning for death or disability. A good estate plan has three primary objectives:

1. To establish a plan for your care and for the benefit of loved ones during your disability;

2. To minimize exposure of assets to taxes & creditors, unnecessary fees and expenses, and publicity; and

3. To control the efficient use and eventual distribution of assets in the manner you direct after your death by a person who you choose to act as fiduciary.

It can take a lifetime of hard work to accumulate assets. People's goals vary with respect to the disposition of assets upon death, but everyone wishes to preserve their assets in order to meet their goals. A well-thought-out estate plan will ensure your loved ones are provided for and your end-of-life goals are accomplished.

Typical Estate Planning Documents

A typical estate plan includes the following documents:

- Last Will and Testament

- Durable Financial Power of Attorney

- Advance Health-Care Directive (i.e. Medical Power of Attorney with Living Will)

Additional documents may be required depending upon the circumstances. Examples include the following:

1. Beneficiary designation forms
2. Living trust (i.e. "revocable trust")
3. Business agreements for the self employed
4. Irrevocable trusts for ownership of life insurance or other assets
5. Prenuptial or postnuptial agreements
6. Various asset transfer documents

Your Will

Every competent adult should consider signing a will, regardless of wealth, age, marital status or health. A will is a formal written document which becomes operative at your death. Its major functions are as follows:

- Appoint a guardian for minor children (if necessary);
- Direct how your assets are to be distributed; and
- Designate the Personal Representative (a.k.a. "executor") who is responsible for taking inventory of your property, paying debts and taxes, and distributing your assets as you direct.

If You Die Without a Will ("Intestate")

Maine law contains "default" rules on how your assets will pass to family members if you die without a will. These default rules may conflict with what you would have provided for in your will. Without a will, the Probate Court will choose guardians for your minor children, and a Personal Representative or Administrator will be appointed to handle your financial matters (typically after the purchase of a surety bond).

Probate

Assets that pass under Probate Court administration include assets which you own in your sole name at death without a surviving joint tenant or beneficiary designation. Small estate affidavits can sometimes be used to transfer assets in Maine when the assets in a decedent's name total under $20,000. Unlike many other states, Maine probate is relatively inexpensive and hassle-free. Lawyers do not charge a percentage of the estate for a fee but are limited to an hourly rate. Probate in Maine can often be accomplished informally by mail and without the need for any court hearings. Establishing and funding trusts for the purpose of avoiding probate used to be a popular and effective planning technique. With the adoption of the Uniform Probate Code and its streamlined administration process, however, this strategy is generally no longer cost effective.

Non-Probate Assets

Non-probate assets do not require probate administration and pass automatically to a survivor. Examples of non-probate assets include:

- Assets titled in a revocable living trust (i.e. owned by you in your name as trustee of your living trust);
- Assets with "pay on death" designations naming surviving beneficiaries (e.g. IRAs and retirement accounts, POD bank or brokerage accounts, life insurance); and
- Assets held in joint tenancy with right of survivorship (i.e. the asset passes to one or more surviving joint tenants). Most couples choose to own their homes in this manner.

Distribution of Assets at Death via Trusts

Sometimes a will may include provisions which initiate one or more "testamentary trusts" that come into existence only after death. Such provisions allow you to direct how, when and to whom trust property will be distributed. You can establish trusts for your spouse and/or minor children, special needs trusts for disabled beneficiaries, spendthrift trusts, and trusts to protect beneficiaries

from creditors. The designated trustee will hold and manage trust property in a manner designed to minimize estate taxes and limit interference by subsequent spouses, creditors and other parties. The trust terms can direct the trustee to hold funds for minors until they reach a certain age, and distributions of principal can be staggered over a period of years while still providing income to assist with the beneficiary's needs. Assets can also be held for future generations. Living trusts (as opposed to testamentary trusts established pursuant to the terms of a will) are administered privately and do not subject your personal and financial matters to public probate proceedings.

Federal Estate and Gift Taxes

United States citizens can give unlimited amounts to a spouse and to qualified charities without incurring gift or estate tax. Assets which remain in your surviving spouse's taxable estate at death however are subject to estate taxes. Current law imposes a gift tax when assets are given to someone other than your spouse or a charity, but the "gift tax" is a bit of a misnomer. There is no tax. Rather the amount of the gift simply reduces your federal exemption amount discussed below. You can make "annual exclusion" tax-free gifts totaling up to $15,000 per donee per calendar year without incurring gift tax and without affecting your lifetime estate and gift tax "exemption equivalency amount." The "exemption amount" is $11,400,000 for calendar year 2019 for each decedent. It is indexed for inflation for future years. For obvious reasons, *federal estate taxes are relevant for only a small minority of estates*.

Maine Estate Tax

In addition to the federal estate tax, the State of Maine imposes its own estate tax. Amounts in excess of $5,600,000 which pass to someone other than a surviving spouse are taxed at rates ranging from 8%-12%. A properly drafted will (or trust) includes provisions designed to delay the payment of Maine tax until after the death of the surviving spouse while preserving the benefit of the federal exemption equivalency amount. Moreover, a well-thought-out estate plan can take advantage of both spouses' $5,600,000 exemptions so that couples can pass a total of $11,200,000 to their beneficiaries free of Maine estate tax. Maine does not have a gift tax; however, any assets conveyed out of a decedent's estate within one year of death are pulled back into the decedent's gross estate for purposes of calculating the Maine estate tax. Again, for obvious reasons, *Maine estate taxes are relevant for only a small minority of estates*.

Financial Durable Power of Attorney

Under a Financial Durable Power of Attorney, you empower another person to act in your name and for your benefit in a fiduciary capacity during your lifetime. Your named agent has the authority to manage your financial affairs as enumerated in the document. Should you become mentally disabled without a Financial Durable Power of Attorney, a conservator must be appointed by the Probate Court to manage your finances.

Financial Durable Powers of Attorney can either be effective immediately (i.e. no need for the agent to demonstrate your incapacity) or "springing". As you might have guessed, a springing Power of Attorney takes effect only after you (the "principal") become incapacitated. Although a springing Power of Attorney by its nature safeguards against potential fraud and abuse, it can also

be cumbersome since banks or other third parties require proof of the principal's incapacity (i.e. doctor's letter) before they accept it. To add to the hassle associated with springing Powers of Attorney, doctor's letters must be periodically updated and submitted to financial institutions in order to maintain the document's effectiveness. A common approach to addressing this problem is to hold Financial Durable Powers of Attorney "in escrow," meaning they will not be "delivered" to the agent (and thereby become effective) until the principal's incapacity is demonstrated. Attorneys or other third parties can act as escrow agents in order to facilitate this arrangement.

For more information and explanation, please see the separate memorandum regarding Financial Durable Powers of Attorney on our website.

Advance Health-Care Directive

Maine has adopted the Uniform Health Care Decisions Act which combines two legal documents into one. The first part of the Advance Health-Care Directive is a medical Power of Attorney which authorizes your agent to make healthcare decisions on your behalf in the event you become incapacitated. You can name alternate agents in the event that your primary agent is unavailable or deceased. The second part is what used to be referred to as a "living will." This portion of the document allows you to make a declaration regarding your end-of-life decisions. Under Maine law, if you are determined to be either 1) in a persistent vegetative state with no likelihood of recovery; or 2) terminally ill and likely to die in a short period of time, you may direct medical providers to withhold life support including nutrition and hydration. Obviously, these forms can be further refined to meet your specific goals and unique circumstances. These forms are readily available through medical institutions and are often provided upon admission to a hospital.

Getting Started

1. The first step is to make a list of your assets, including estimated values, how assets are titled and any debts, ownership obligations and restrictions (e.g. prenuptial agreement or divorce decree) which may limit your ability to dispose of your property. To assist you with this process, we provide clients with an estate planning questionnaire. You can find this questionnaire on our website.
2. Next, consider your goals regarding distribution of assets and how and when you want assets available for your beneficiaries. Is there a need for a trust?
3. Consider the impact of taxes on your estate and take simple steps now to protect your assets from future creditors. Minimizing income tax should be considered – especially the impact of capital gains tax and the step up in basis for all capital assets upon death under IRC § 1014.
4. Review your insurance policies (e.g., life, professional, business, liability, auto, real estate, umbrella, collectibles, long term care, property, casualty) and consider the amounts and types of coverage, the pros and cons of keeping or increasing coverage, who is named beneficiary and related matters.
5. Make sure that your beneficiary designations on your IRA and other retirement accounts are properly filled out.

6. Finally, choose your fiduciaries (i.e. Personal Representative, Trustee (if any) and agent under Power of Attorney and Advance Health-Care Directive). See the separate memorandum ("Selecting Fiduciaries") on our website for more information.

Our attorneys can assist you with all these issues.

Conclusion

This memorandum addresses basic aspects of estate planning only, and in very general terms. The guidance of an experienced estate lawyer should be sought before taking any action with regard to your estate plan.