Completing the Circle:

Planning Your Estate to Leave a Legacy of Positive Memories

In the last issue of South Georgia Business, we talked about how advance planning can go a long way in preserving the value of your business by protecting your investments and assets from foreseeable threats. Using the strategies discussed in the last issue should help to secure the financial legacy you are able to leave to your family.

In this issue, we focus on how to complete that legacy by looking at ways in which you can plan during your life to avoid unnecessary costs, delays and heartaches once you are gone. The good news is that a little planning can go a long way toward making the legacy you leave be a positive memory in the eyes of your spouse, your children and your community.

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Imagine for a moment that you have a few months to live. What would you do?

After you recover from the initial shock, you would begin getting your affairs in order. First, you might tend to some paperwork-type matters, like collecting your records, deeds, recurring bills, bank statements, brokerage statements, retirement plan statements, life insurance policies, keys and combinations and putting them in one place where someone could find them. You'd confirm that any beneficiary designations you've made for retirement accounts and life insurance policies are up to date. If you keep your records in a safety deposit box, you'd make sure that someone other than yourself had the key and was on the list to access the safety deposit box.

Next, you might meet with an attorney to get your will up to date. You'd also put down on paper your wishes regarding treatment measures and life support during your final illness. You'd meet with a financial advisor to go over your investments. If you're a business owner, you'd take a hard look at your business and the interests and capabilities of your children to see whether to plan for the transition down to the next generation or to take advantages of opportunities to sell or simplify your operations in order to avoid your spouse or children having to search for a buyer once you are gone.

Last, you would probably meet with your family, together and one-on-one, to let them know you love them, that you've made preparations for them to the best of your abilities and resources and that your principal hope is for them to stay together as a family and look out for one another once you are gone.

The estate planning process is really nothing more than the above. However, since most of us don't know how long we have to live, you need a little initiative and a little discipline to tackle this and see it through to completion. But, aren't those the skills that got you where you are in the first place? The good news is that, like most things, imagining the process is a lot worse than actually going through it. So, let's get started.

This article contains a collection of tips that are designed to get you thinking about ways in which you may want to plan your estate to avoid or minimize problems once you are gone. If these tips are followed, I submit that you will sleep easier at night knowing that you have done what you needed to do to prepare best for your family after your death. Your family will be thankful that you did. Remember, your family's last impression of you as a provider and a business person will come from how well or poorly you set up your estate. If you've worked hard all of your adult life to be an outstanding provider and business person, now is the time to do the planning that will secure your reputation in the eyes of your family as someone who did things right.

Tip No. 1:

Collect your important papers, documents, statements and put them in one, secure location that can be accessed by someone other than yourself.

Probate vs. Non-Probate Assets

Wills only control the disposition of probate assets; non-probate assets pass to the named beneficiary (as in a life insurance policy), the survivor on a joint account or to the designated individuals in a trust.

Probate assets consist of real estate, cars, furniture, jewelry, personal possessions and mementoes.

Non-probate assets include life insurance policies, joint checking accounts, real estate held jointly with right of survivorship and retirement plan assets that have beneficiary designations.

If there's a conflict between the will and the non-probate asset, the non-probate asset will normally control. For example, if your will splits your cash between Sam and Sally, but Sally is listed as a joint owner with you on the checking account that holds the cash, Sally will probably end up with the cash.

It will be your responsibility to make sure the non-probate assets pass the way you wish. Because people hold so much now in accounts and retirement plans, these often can be the majority of an estate, so look at them carefully to avoid surprises.

There are two good reasons to do this. The first is that you don't want to put your grieving family through a scavenger hunt to find the will, find the statements, find the deeds, locate the safety deposit box, find the keys, get a court order to access the safety deposit box and on and on. You can find entire books devoted to systems for getting your records together or you can take a lockable, fireproof box, label it "Important Stuff" and put everything in neatly labeled file folders. Whatever works for you.

The second reason to get your things together is that you're going to need this information when you meet with your attorney. The better prepared you are, the more you can save on attorneys' fees.

Tip No. 2:

Get with an attorney to put your estate plan in place and follow up to ensure that your estate planning documents are signed and ready to go.

If you die without a will, the intestacy rules apply, which means that your spouse and children regardless of age will get equal shares of your probate assets. If you have more than two children, your spouse will get a third of your probate assets and your children (again, regardless of age) will split the rest evenly. If you don't have a will, the process of settling your estate takes longer, costs more money and is generally a hassle for all involved. Plus, your survivors will have very little planning they'll be able to do to avoid estate taxes if they're applicable.

You'll notice that I mention probate assets only. As you are putting your will in place, you'll want to make sure that the treatment of your non-probate assets (see box) is also considered. Follow up on beneficiary designations you've made to ensure your assets pass the way you intend. If you're in a second marriage, make sure the right spouse is listed on the form!

As part of the planning process, you will want to designate a representative to make health care decisions on your behalf and make known your treatment preferences in the event you are unable to speak for yourself (see box).

Tip No. 3:

Consider carefully the abilities and interests of your children to determine whether to leave the family business to a child.

You may have dreams of your children taking over the family business once you are gone. Your children may have other ideas. You need to assess carefully whether passing the business down to the children is in their best interests or the family as a whole. Talk to them to get a sense of what their preferences are.

If you're thinking about selling, know that it's currently a seller's market – you have the skills, you have the experience and the knowledge of the industry: aren't you a better choice to find a potential buyer and maximize what can be obtained than a child not involved in the business having a fire sale once you're gone?

It may be that your children are capable of managing a portion, but not all, of your various investments and enterprises. Liquidating some of these investments (i.e., turning them into cash) may make it easier and more manageable for your children to tackle what remains.

Communicating Your Intentions Regarding Health Care

Until recently, Georgians who wished to make known their treatment preferences if they couldn't speak for themselves typically used two documents: a living will, which authorized removal of life support, food and/or water in certain terminal situations, and a durable power of attorney for health care, which allowed someone to designate their health care agent to speak for them in end of life and in non-terminal situations.

These two documents are now combined into a new form called an advance directive. The new legislation became effective July 2007. Existing living wills and health care powers of attorney are not affected; however, if you're signing a new document, make sure you have the latest form. To see the form, go to www.gabar.org, click on "New Advance Directive for Health Care Act Signed" under "Bar News and Events" and follow the link.

Tip No. 4:

If leaving the family business to a child, make sure that the child has been trained and exposed to all aspects of the business.

If your child is interested and able, bring her in the business and let her learn from the master; that is, you. Don't wait until the day before handing her the keys to introduce her to the business. Allow her to see the operation of the business from a number of levels, including sales, marketing, production, administration and customer relations. This will help raise her capabilities as well as enable you to assess her interest and abilities for the job.

If your business relies on the presence and commitment of a senior employee, use an employment agreement with incentive compensation as appropriate to ensure the person will be around to assist your child when the senior employee is needed most.

Tip No. 5:

If leaving the family business for one child to run, make separate arrangements for the other children's inheritances rather than making all of the children shareholders in a business that only one runs.

This is a tough one, because a lot of times the business is the most valuable asset in the estate. Absent extraordinary circumstances (and I mean truly extraordinary), it is a bad idea to leave the business to two or more children when only one child is expected to work in the business.

Some years ago, Gerald Le Van identified the "parasite vs. plunderer" syndrome to describe this situation. The child not involved in running the business (we'll call her the outsider) views the child running the business (the insider) as a plunderer – the outsider looks at the salary and perks enjoyed by the insider and thinks the insider is bleeding the business dry and diverting what otherwise would be a nice, fat dividend coming to the outsider.

The insider, however, sees himself as having all of the stresses, challenges and ulcers of running the business and views the outsider as a parasite whose constant complaints and demands for dividends drag the business down.

You don't want your children viewing one another as plunderers OR parasites. So, do something about it. Find assets to give to the outsider, purchase life insurance for her, designate retirement funds for her, but don't leave the business to the both of them.

Tip No. 6:

Consider the use of trusts to provide for your spouse and surviving children, but be careful in whom you choose to serve as trustee.

Trusts can be wonderful things: they can provide money management where a surviving spouse or child lacks the experience and they can avoid the problem of children getting too much too soon. They also can offer nice tax savings.

But, you need to be careful about whom you choose to be trustee. Being a good trustee requires a lot of experience, an ability to be fair in the face of competing demands and the ability to invest wisely or pick wise investors for the trust assets. Good choices include professional trustees (usually affiliated with a bank or investment firm), experienced accountants and, more rarely, family members with a great deal of financial acumen who can avoid playing favorites.

Bad choices include: someone much older than yourself, stepchildren (where the non-parent is a beneficiary and vice versa), the bookkeeper in the family business and inexperienced family members. You want someone who can be fair and who is capable of doing the job. Some people avoid the choice by making too many people trustees, which invites deadlock, dissension and litigation. At most, you should have two trustees (for example, a corporate trustee and a family member). Some corporate trustees charge MORE when they're asked to serve as a co-trustee rather than the sole trustee.

Tip No. 7:

Consider leaving specific bequests to children and grandchildren, even if they are to receive an inheritance later.

You know you've provided for your spouse and someday he will take care of the children, but why not go on and leave something outright now to the children? Be creative. Again, it's part of the legacy you leave and it will always be appreciated.

If you have personal items of with financial or sentimental value, specify who should receive them or set up a procedure in your will for a fair process to divide the assets. For suggestions and resources, see "Who Gets Grandma's Yellow Pie Plate?™" at www.yellowpieplate.umn.edu.

Tip No. 8:

Consider gifts to charities.

If you've got enough, spread it around. If you are uncomfortable leaving it to one charity, consider a bequest to a community foundation such as the Community Foundation of South Georgia, www.cfsga.org. A community foundation allows you to set up an account that is invested. You or your estate receives the deduction and your children are able to request where the funds go.

Tip No. 9:

Update your estate plan from time to time

As a lawyer, I'd like to believe my documents are impervious to the ravages of time, like the Magna Carta, the US Constitution and Donald Trump's hairstyle, but the reality is that estate plans need to be looked at from time to time. If you've had a significant life event, such as a birth, divorce or death in the family or if your financial picture has changed, you should go back and revisit the plan with an advisor. Even if you haven't experienced any major changes, the law itself changes periodically and there may be new legislation to be considered.

Hopefully, your plan should last longer than your computer, cost a little less and not be obsolete nearly as quickly!

It's also helpful for some people to throw away the idea of getting a perfect plan in place to withstand the next 20 or 30 years. If you try to do it all now to last forever, it can get overwhelming. If you can get something together, you can revisit it over time and make improvements. It's far better to have an imperfect something than a perfect nothing.

Tip No. 10:

Let your spouse and children know what you are planning to do.

I know it's private. I know it's your money and you can do with it what you want. I also know that you can take some of the sting out of what might otherwise be perceived as a slight if you take the time to talk to your spouse and your children while you can and explain to them what you've done and why you've done it.

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I hope that you find these tips helpful as you plan your estate or revisit an existing plan. Remember, it only takes a little hard work now to avoid a lot of cost, problems and heartache later. Take the time to put in place the right plan. You, your spouse, your children and your community will be glad you did.

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