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Essential Predeath Planning for Postdeath

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Much of the discussion about estate planning now centers on tax reduction, as it generally does. This article addresses the problems that are too seldom discussed but that are of equal importance: things to do to ensure that your heirs, or your client's, are not left in the lurch.

I have recently had the sad experience of dealing with two deaths close in time and in relationship to me: that of my mother, in 2009; and that of my older brother, two days after Christmas in 2010. The purpose of this article is not to evoke your sympathy and condolences but to point out things that must be done to ensure that the people taking care of things are aided, not impeded, by your own situation. Of course, substitute "your client" for "your"; these recommendations are not sophisticated but practical.

To start, understand the context in that both my mother and brother had wills executed many years before their deaths, and both looked at sophisticated estate planning for tax reduction and other purposes, but this after the loss of someone close to them. My mother did hers two years after my father's death. My brother was in the process of doing his after our mother's death, but never completed it. My brother started his estate planning much later in life than my mother, and both had children in their 30s at the time. One lived in Illinois, one in New Jersey. My mother had gone to an expensive attorney in a large firm who gave her very good advice that met her goals. My brother was in the process of talking with me and meeting with someone to do something similar.

Funeral Arrangements

Plan your own funeral. You get what you want and avoid stressing everyone, particularly children without any experience in doing this. My mother was in hospice for a week before her death. I knew that her death was imminent. I called the funeral home where we waked my father and told them to pull out his file

because we would be doing the same thing for my mother. For my brother, I followed the ambulance to the hospital in his car and arrived after he had passed away: it was that quick. My brother was divorced. I was there with my niece, neither one of us lived in the area, and we had no knowledge of funeral homes in the area. By looking through his cell phone call records, we narrowed down a small list of local people he was in frequent communication with, and they gave us advice about not only a funeral home but one that would be near the school where he taught, which would help all the teachers, students, and their parents wanting to attend.

Burial

Plan your burial. My mother had a double headstone made when we buried my father's ashes in a family cemetery. All we had to do was have the date of her death carved underneath the date of her birth. My brother let everyone know that he wanted to be cremated but never said anything further about what should be done with the ashes. I directed that they be sent to me to be buried in that same family cemetery. I once worked in a law firm that had as a client a man who buried his first wife and then, years later, decided to dig up the corpse to have it cremated, much to the unhappiness of his second wife and the children from his first marriage, who fought him in court. Avoid this.

Funeral Expenses

Either prepay a funeral or open an account for that purpose, with a trusted friend or relative(s) as joint tenant. Make it clear to everyone what the purpose of the money is for. I had access to my mother's "operating account" to pay her funeral expenses. My brother had no one else on any of his accounts. I was fortunate to be able to put the expenses on a credit card. I had a client who told me that the hearse stopped in front of the bank on the way to the burial so that she could beg the bank officer to release sufficient funds to pay the funeral expenses. The decedent had money in various accounts, but his children had none of their own and no access to his. The hearse was not going to the cemetery without the payment. Poor families often will assign small life insurance policies to a funeral home to pay the expenses. Years ago, a probate judge in Cook County fought using the policies for this on the basis that the children were the intended beneficiaries of the policies and that they had no obligation to pay this expense or their parent's debts.

Will

Whatever the estate planning, you should at least have a will that designates the executor and waives bond. I am the executor of both estates. The designation of an executor helps to avoid family problems, if one of the children thinks that they should handle the estate and cannot, and it also speeds up getting letters of office in certain states.

Waiving bond not only saves the estate the cost of the bond, assuming that the designated executor is trustworthy and will not bring into effect the reason for the bond, but it also saves time because no credit check has to be made of a proposed administrator.

Tell someone where the will is. I knew where my mother's will was. It took us five days to find a copy of my brother's will and an additional two days to find the original. He was in such apparent good health that it never occurred to us to discuss this, and we knew that he would have a new one within a few weeks because he had already made the appointment with an estate planning attorney.

Had I been able to give the original of the will to that attorney before I flew back home after the funeral, I might have been able to sign the New Jersey court forms while there, rather than having to have them sent by FedEx to the presiding judge of the Circuit Court of Cook County so that I could sign everything under oath. The delay in getting letters of office delayed my being able to talk with the bank to learn why it blocked my brother's bank accounts, particularly the one with the automatic bill pay procedure.

Safe Deposit Box

It is easier to find important documents, and they are less likely to be damaged or destroyed, if they are in a safe deposit box. But put someone onto the account so that they can get into the box. Give them the second key. Do not put your burial instructions in that box. My mother had one, I had access to it, and I easily retrieved her will after her passing. My brother had given up his safe deposit box when he moved into his current home. We found his will buried in a box in one of his daughter's closets, which is why it took so long to find. Probate case books are replete with stories of people finding wills under floorboards. Not only does this method risk the heirs never finding the will, but it also risks a disadvantaged heir finding the will and destroying it.

PINS, Passwords, and User IDs

This will be the new Waterloo of probate lawyers, or maybe their assurance of a comfortable retirement. Make these available to someone you trust. I have a hard enough time with my own PINs, passwords, and user IDs, and it is worse trying to figure out someone else's. I knew what my mother's numbers were because we set them up together, and they were on a slip of paper underneath her computer screen. That system failed when one of my siblings set up an account for online transfers, which she never did, and did not adequately record everything. Fortunately, I could walk over to the bank with my letters of office and obtain access. My brother had a perfect system to remember these things. Everything was coded, and he wrote the code down, but you had to know how to apply it. I knew that one series revolved around telephone numbers from when he was growing up, but I did not know how he applied it, whether certain things were capitalized, whether there was a hyphen, and whether he had a revolving end number to distinguish one password from another. He fortunately had some very smart children, with a son particularly gifted in this area.

With the number of people who keep everything in their computers and do not keep paper copies, it is vital to know how to get access to their information, whether it be the value of an account or the simple existence of an account. With paperless statements, the risk of not knowing of the existence of estate assets increases daily. For my own part, I have let my sister know how to get into things, but I am slowly writing up the list of PINs, passwords, and user IDs that I will keep in my safe deposit box. I will then issue a durable power of attorney to both my sister and nephew authorizing them access to this box after my death for a set amount of time.

Accounts to Pay Bills

Put some money into an account, and a trusted person in joint tenancy on that account, to pay postdeath bills. There are many stories about friends and family having access to all of the funds and stealing them. But they do not need access to all of the funds, just enough to pay bills for a few months, until an estate is open. Otherwise, you risk the mortgage not being paid, the utilities being shut off, and

any number of other disasters taking time to straighten out. I had signatory authority on my mother's operating account for a number of years. She would transfer just enough money from her trust account to have her bills paid. I did not gain access to the trust account until I became the successor trustee and assumed fiduciary responsibilities. My brother had no one on any account. He had direct debit of certain bills. The bank blocked access to that account a few days after his death, which resulted in bills being unpaid and potential insufficient fund charges. I could not do anything about this until I got those letters of office. I am still blocked from collecting his assets and monitoring his stock because he died in New Jersey, which requires a tax waiver for the executor to have full access. Put someone in title on a joint tenancy account with enough money to pay your bills for a month or so, and make it clear to everyone that this is a convenience account, and not a gift to the joint tenant. That should cut down those fights over whether grandma put grandson onto her account because she wanted him to have the money or because she just wanted him to help her pay bills.

Whatever you do, do something, and do not get superstitious that doing estate planning speeds up death. My mother had her headstone 26 years and her estate planning documents executed 24 years before she passed away. My brother had seriously discussed options with me but not done more than make the appointment when he died unexpectedly. I myself have not yet done half of these things because I am spending my free time trying to track down my brother's assets and liabilities and set things up to pay them. His system worked quite efficiently and well for him, but I have not yet figured everything out.

Lynne R. Ostfeld is a solo practitioner in Chicago with a general practice divided among probate and estate planning, civil litigation, business law, and international agribusiness. She has an associated office in France and has often helped clients retrieve funds left there or get inherited land sold and the money distributed. She is adjunct professor of international agribusiness law at the John Marshall Law School.

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