Planning for the Worst

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Did you know that three out of four Americans die without a will, and financial planners estimate that at least half of us are underinsured or not insured at all?

It’s the type of topic we’d rather not think about—too reminiscent of our own mortality. No one wants to contemplate the possibility of a spouse’s death. No one wants to talk about how the survivor will sort out the final details.

The death of a spouse or loved one is horrific enough, yet it is during this period of emotional upheaval that we make some of our most important financial arrangements. Our advice is that no matter how relaxed you feel or how much you think it’s not going to happen to you, you should still sit down and talk about it before catastrophe strikes, despite the difficulty of asking hard questions.

So what can you do now to plan for the worst? Here are some guidelines:

Get a will. A will is the foundation for determining how personal and real property in an estate is divided. A will can also name a guardian to care for minor children, in the event both parents die. Hiring an attorney to write your will is relatively inexpensive ($100 to $300) if you do not have a complicated or large estate. Dying intestate (without a will) leaves the disposition of your assets, and perhaps your children, to the court’s discretion.

Write a letter of instruction. This is not a legal document; it’s a list of everything the deceased person owns and owes and where it can be located. It should list the location and policy numbers of life insurance,
mortgage insurance, checking and savings accounts, investments, real estate titles, stock certificates, safety deposit boxes, credit cards, motor vehicle titles, employee benefits, debts, and other personal property.

**Purchase enough life insurance to ensure your family will be taken care of.** How much you need depends on your age, your assets, how many years you want to provide for your family, and your current lifestyle. It is best to consult a financial advisor or insurance agent to determine the proper coverage for your particular situation.

**Maintain a relationship with a lawyer, an accountant, and a financial advisor.** It’s much easier to deal with unexpected problems when a professional knows your situation ahead of time. Experts can also provide you with timely advice, such as whether you need a trust to protect your assets from taxes.

**Arrange for durable powers of attorney.** Durable powers of attorney can be useful tools when planning for the possibility of physical or mental incapacity. Durable powers of attorney allow for the management of one’s financial affairs or the making of medical decisions in the event of an incapacity.

In order to understand a durable power of attorney, it is necessary to first understand powers of attorney in general. A power of attorney gives one person the right to act on another person’s behalf. The person who grants the power of attorney is called the “principal.” The individual who is given the power is called the “attorney-in-fact.” There are two types of powers of attorney: special and general. A special power of attorney gives the attorney-in-fact the right to act for the principal in connection with a specific transaction or for some other limited purpose. For example, you could use a properly drafted special power of attorney to give your Florida lawyer the right to handle a real estate closing in Florida while you remain in New York. A general power of attorney is much broader. A general power of attorney grants the attorney-in-fact the ability to do for you almost anything you could do for yourself. Effectively, a general power of attorney creates a legal clone. Because of the broad powers granted by a general power of attorney, they should be used very carefully.

Traditionally, powers of attorney expired under three circumstances: when revoked by the principal, when the principal died, and when the principal became incapacitated. A durable power of attorney is durable because it does not expire if the principal becomes incapacitated. It is this durability that makes it such a useful tool.

A variation of the durable power of attorney is the “durable power of attorney for healthcare” (sometimes called a “healthcare proxy” or designation of “healthcare surrogate”). With this type of power of attorney, the principal designates another to make healthcare decisions in the event of the principal’s incapacity. This type of durable power of attorney is broader in scope than a living will. Generally, a living will is used to place limits on heroic medical treatment in the event of a life-threatening illness. Be careful, though, because state laws vary in this area.

**Take time to understand the nature of a living trust.** Technically, living trusts are “revocable inter vivos (during life)” trusts. If a trust is “revocable,” the person who establishes the trust can change all or any part of the trust, so long as that person is competent. At death, the living trust becomes irrevocable. Assets owned by living trusts generally are not included as part of the probate process at death. By avoiding probate court, living trusts may save on associated attorney fees and court costs. However, there are still income and estate tax returns to file and legal, administrative, and asset transfer work to do. This claim is not fiction, although it is hyperbole. Living trusts do not necessarily save federal estate taxes. Estate tax-saving provisions can be incorporated into living trusts. However, those same provisions can be incorporated into a will. Therefore, living trusts do not offer any inherent tax-saving advantages.

A living trust can, however, help in the event of incapacity provided you have either placed assets in the trust before incapacity or a device exists to place your assets into the trust in the event of incapacity.

A trust is not appropriate for every individual. You should discuss the advantages of a trust with your estate-planning attorney. AE