Realistic Estate Planning

By: George Meng

After 36 years handling the results of the estate planning of many lawyers and too many people who thought they could do it without the help of a lawyer, I believe it worthwhile to revisit some of the things many of us take for granted.

1. Should it be a Will or a Trust - The number one reason for most people to consider a Trust instead of a Will is to avoid probate. But what might be a good idea now may very well turn into a bad idea years from now. I am seeing an increasing number of people who have no real property in another State and no reason for estate tax planning, but have Trusts that were established years ago. These Trusts include estate tax planning provisions that no longer make sense. They do nothing but confuse the situation. Invariably, assets exist that were not transferred into the Trust. Thus, Trustee is faced not only with the tasks associated with closing down the Trust but also with the tasks of probate. The time for handling it all and the work involved in the end was increased - the precise opposite of the original intent.

In recommending estate planning, we must look into the future and ask whether what we recommend makes sense **for the particular individuals involved**. Do they understand, what funding the Trust is all about? Are they likely to remember about the Trust the next time they buy a vehicle, open a bank account, or buy stock? Will they follow our advice to periodically review the Trust with a lawyer for necessary changes? Is their personality suited to a Trust that requires maintenance or would they be better with a Will that they can sign and forget?

2. No Bond !! - I admit that my form basic Will provides that the PR serve without bond. The issue of bond for the PR or the Trustee is becoming more significant. The bonding agencies and the carriers are tightening their requirements and for good reason. In my experience, the level of theft, negligence, and simply poor management of probate estates and Trusts is increasing. Theft is no longer uncommon and it is most often carried out by someone close the beneficiaries. The tasks involved in handling a probate estate or the closing of a Trust are often mundane. But, there are always some that require specialized knowledge. We seem to think that any adult can handle these tasks. That is simply not reality. I visit the Orphans' Court in Prince George's County frequently. It is rare to see a docket that is not filled with Show Cause Order hearings. I often sit in and listen to these hearings. Many times I see people who should never have been selected as Prs.

To reverse the position many of us have had for years and change our forms by deleting the bond waiver, is too simple a solution. We owe it to our clients to explain the issues surrounding the choice to waive bond for a PR or Trustee. And, having reviewed the issues with our clients, when they make the choice to require bonding, we must delve into the question of whether the right person has been chosen to act as PR or Trustee.

3. We Have Wills and Trusts Witnessed for a Reason - Those of us with even minimum experience can often spot a potential Will or Trust contest. A typical example is the elderly person who wants to make a change to a long standing distribution plan by distributing to a new person in their life. As lawyers, we are in the best position to do what is necessary to avoid the contest. It starts with spending the necessary time with your client. And, **keep notes**. The lawyer will almost always be the star witness. If you did not take notes, lost your file, or took only a few minutes with your client, then you will be a lousy witness. And, you will be a witness even if you did not sign the Will or Trust as a witness.

Select witnesses who are likely to be alive when the time comes for their testimony. And one final note - if you cannot read a witness' signature have them block print it and provide an address and any other information that might assist someone to find them.

4. Co-PRs or Co-Trustees - In my experience, providing for Co-PRs or Co-Successor Trustees is almost always a mistake. Whenever a client expresses the desire to name more than one, I find that it results from a desire to avoid disputes among people, usually siblings, who have a history of disputes. There must be another solution. If there is a history of dispute, seek for someone who is likely to be a calming influence.