Legal Matters®

Estate Planning
spring 2010

How to talk with aging parents about estate planning

©istockphoto.com

Many people are concerned about their aging parents and want to talk with them about estate planning, but this can be a difficult conversation to have. Frequently, parents don't want to discuss the subject because they don't like thinking about their own death, and because they're afraid that estate planning will involve a loss of independence and control. Also, children may be afraid that bringing up the topic will make them seem greedy.

Yet this is one of the most important conversations a family can have. Parents who don't engage in estate planning risk losing their assets to taxes, having their assets go to people they wouldn't have chosen, and making it difficult for their children to care for them and make the right decisions in an emergency.

So what's the best way for children to broach this difficult topic?

One of the best ways to begin is to make sure that your *own* estate planning is in order. You should execute a will, a durable power of attorney, and an advance medical directive. Then you can talk to your parents in a non-threatening way about what you've done and what you've learned in the process. Often, this will lead naturally to your parents thinking and talking with you about the same issues in their own life.

It's not always a good idea to ask parents directly if they have made a will. This can be awkward, and may make parents feel afraid of their own mortality.

A better approach may be to begin by asking if your parents have a power of attorney or a medical directive, so that someone can make decisions for them and help them if they have a temporary disability.

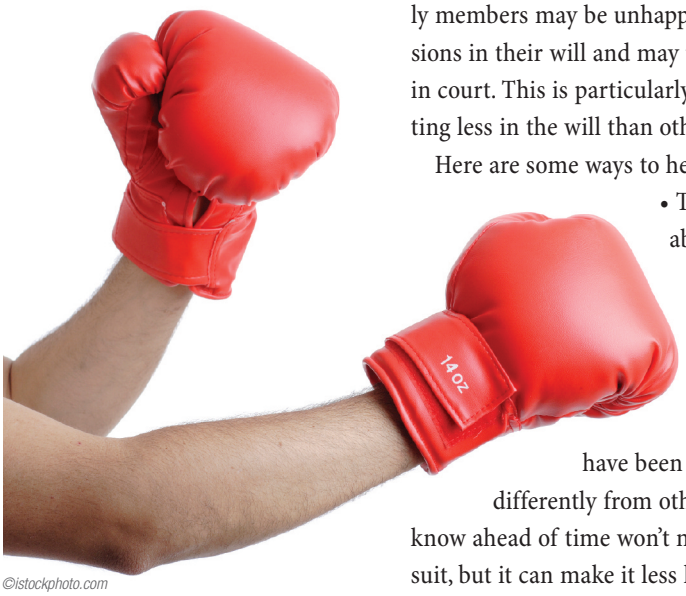
If your parents are still reluctant to discuss the subject, you might consider approaching a

continued on page 3

One of the most important conversations a family can have can also be among the most difficult.

JUDITH A. JARASHOW, ATTORNEY AT LAW
60 Walnut Street, Wellesley, MA 02481
Tel.: (781) 943-4144 • Fax: (781) 943-4199
judy@jarashowlaw.com
www.jarashowlaw.com

Some ideas that can prevent a will contest



©istockphoto.com

Some people are worried that after they die, family members may be unhappy about certain provisions in their will and may try to challenge the will in court. This is particularly true if one child is getting less in the will than others, for instance.

Here are some ways to head off a will contest:

• Talk to your heirs now about what you're doing and why. Many will contests are triggered because a relative is surprised to discover after a death that they have been disinherited or treated differently from others. Letting the person know ahead of time won't necessarily prevent a lawsuit, but it can make it less likely.

• A common claim in a will contest is that the person who made the will was mentally incapacitated at the time it was written. So when you make your will, have a doctor certify that you're of sound mind and able to make intelligent decisions. Also, explaining in detail in the will exactly why you're treating one relative differently can help show that what you did wasn't the result of inadvertence or senility.

• Some people put clauses in their will saying that if anyone challenges the will in court, that person will be disinherited. This can discourage people from bringing a challenge. Such clauses have appeared in many famous people's wills, including those of Michael Jackson and William Randolph Hearst. You should be aware that some states prohibit such clauses, and if you move to such a state after you make the will, the clause might become invalid. Also, if you disinherit someone entirely, the clause will be useless. You have to leave the person enough assets in the will that the risk of losing them will discourage the person from challenging the will to try to get more.

It's important to revise your estate planning if you're diagnosed with a serious disease

If you or a loved one has recently been diagnosed with a serious disease, it's a good idea to review your estate planning documents and adjust them to reflect the diagnosis.

For instance, if someone is diagnosed with the early stages of Alzheimer's disease – or any other disease that could affect cognitive functioning down the road – it's wise to expedite your estate planning. Sign documents as soon as possible, while mental competency is not yet in question. You might want to get a letter from a doctor confirming that you or your loved one is still competent to make decisions.

It's a good idea to review your living will and make additions based on possibilities that are likely to arise with the specific disease, such as experimental treatments.

If you expect to be in and out of a hospital or temporarily incapacitated, consider signing a limited power of attorney for such occasions. This document could give someone the power to pay your bills and handle routing financial matters, but not to sell assets or make gifts.

If a long, debilitating illness is a possibility, consider a durable power of attorney that names successor agents, in case your first agent stops being willing or able to handle the job. If you expect one agent to handle your affairs over a very long period, you might want to provide compensation, even if he or she is a family member. (There can be some tax benefits in this arrangement, since paying compensation can get assets out of your taxable estate.)

You might want to consolidate multiple bank or brokerage accounts into one, because that will probably be easier for you – or your agent – to handle if you become impaired.

Finally, if you have a disease such as Parkinson's or multiple sclerosis that affects motor skills, the appearance of your signature may change. You might want to execute an affidavit explaining this fact in case anyone questions the validity of your signature.

You might need a trust if your spouse isn't a U.S. citizen

Ordinarily, there's no estate tax on assets that pass at death to someone's spouse. But that's true only if the surviving spouse is a U.S. citizen. If the spouse isn't a citizen, then the estate tax generally applies…unless you set up something called a "Qualified Domestic Trust," or QDOT.

Instead of leaving your assets directly to your spouse, you can put them into a QDOT for his or her benefit. When you die, there is no estate tax on these assets. Your spouse can receive income from the trust during the rest of his or her lifetime. When your spouse dies, the assets will then be taxed as though they were part of your estate (not as though they were part of the spouse's estate).

The trustee can also give some of the trust principal to the spouse, but only if there is a genuine hardship. If there's no hardship, then any principal given to the spouse will be subject to estate tax right away.

There are some limits on who can be a trustee. Generally, there must be at least one trustee who is either a U.S. citizen or a U.S. bank. If the trustee is a U.S. citizen and the trust is worth $2 million or more (or if 35% of the trust consists of real estate outside the U.S.), then the trustee must provide a bond or irrevocable letter of credit covering some portion of the assets.

Why all this complexity? Well, generally the government doesn't impose an estate tax on assets bequeathed to a spouse because it figures it can tax them later when the second spouse dies. But if the second spouse is a non-citizen, then the spouse could take the assets and leave the country, and the government wouldn't collect any tax at all. The idea of the QDOT is to make sure that the government gets some tax revenue even if the second spouse isn't a citizen.

Of course, this complexity can be avoided if the spouse is willing to become a U.S. citizen – which is a step that is sometimes considered when planning an estate since it can have a significant effect on taxes.

Put burial or cremation instructions in writing

If you have strong preferences regarding burial or cremation, it's a good idea to put these in writing in your will or in your health care power of attorney.

You may have expressed your wishes verbally to your loved ones, but people can become uncertain in a time of crisis, and family members might have differing views. If there is ever a dispute, having a written direction will be vital evidence of your intent.

Also, if you have specific instructions regarding cemetery plots, funeral homes, etc., putting these in writing can be a big help to your loved ones as they try to sort through matters quickly in a difficult time.

Have you changed your investment manager recently?

A large number of people have changed their investment manager recently – or have decided to become their own manager – as a result of the 2008 market collapse that led to widespread terrible returns.

That's fine – but keep in mind that if you change your manager, you should check with your estate planner to make sure that any new account you create is titled properly and in accordance with your estate plan.

Many estate plans are carefully constructed to title certain assets as solely owned, jointly owned, owned with a transfer-on-death provision, owned by a revocable trust, etc. It's possible to destroy much of the benefit of a well-built estate plan by moving accounts and not thinking carefully about how to title them.

How to talk with aging parents about estate planning

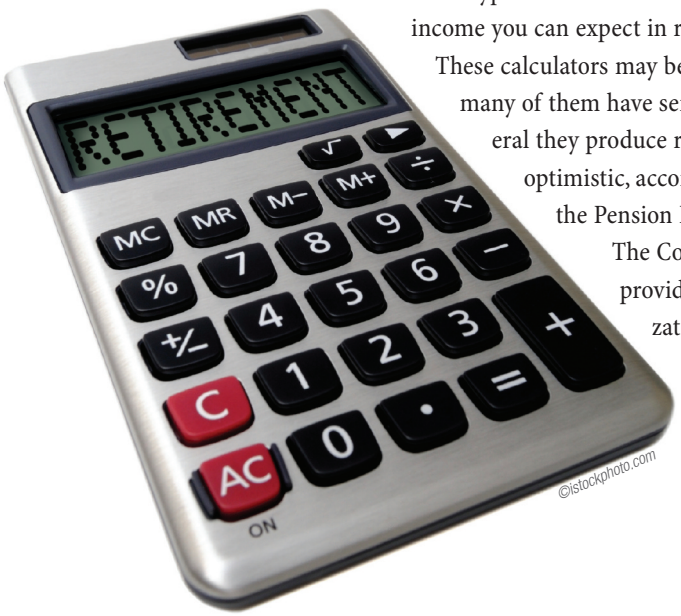
continued from page 1

trusted friend of the family and asking them to bring up the topic and gently suggest a family dialogue.

In a crisis, it's very helpful to know where your parents keep important documents, such as insurance policies, bank statements, tax documents, deeds, etc., as well as keys to a safe deposit box. If your parents don't want to share these with you, you might want to ask them to make a list and let you know how you can access it in an emergency.

After a discussion, your parents might ask you to make an appointment for them with an estate planning attorney. You should be aware that if you do so, your parents will be the clients, not you, so it will be up to your parents how much of what they discuss can be disclosed to you.

Be wary of online retirement planning calculators



A lot of websites offer retirement planning calculators, where you can enter your age, assets, and other types of information and find out how much income you can expect in retirement.

These calculators may be somewhat useful, but many of them have serious flaws, and in general they produce results that are way too optimistic, according to a new study by the Pension Research Council.

The Council studied calculators provided by reputable organizations such as Fidelity, MetLife, AARP and the U.S. Department of Labor.

According to the study, many calculators are flawed because they:

- Don't consider what will happen if you outlive your "average" life expectancy;
- Don't consider the possibility of a spike in inflation;
- Don't consider possible large medical or long-term care expenses;
- Allow people to enter unrealistic assumptions, such as risk-free rates of return over 10%;
- Assume everyone will receive the same Social Security benefits; and
- Ignore the effect of taxes, inheritances, the value of housing, and the possibility of unusual events like the 2008 financial meltdown.

JUDITH A. JARASHOW, ATTORNEY AT LAW
60 Walnut Street, Wellesley, MA 02481
Tel.: (781) 943-4144 · Fax: (781) 943-4199
judy@jarashowlaw.com
www.jarashowlaw.com