Originally published in the Laguna Beach Independent March 16, 2007

Tying up the Loose Ends

By Leslie Daff

They met on Match.com and married after a quick courtship. Shortly thereafter, while on a trip to her French chateau, Barbara, in her 50s, died unexpectedly. The cause of death was never determined. The second husband had her body cremated in France before Cathy, Barbara's only daughter from a former marriage, had an opportunity to investigate. When it came time to distribute Barbara's estate, Cathy was shocked to find that under California law, Barbara's new husband was entitled to a substantial portion of Barbara's estate even though Barbara had personally prepared a will leaving the bulk of her estate to her daughter. The problem? The will, although witnessed, was not signed. Litigation ensued.

Many adults - some estimates run as high as 60 to 80% - do not have an estate plan. Barbara thought ahead and assumed she had taken care of her estate planning. However, either in an attempt to save money or time, did not do so correctly, which resulted in costly and time-consuming litigation, and additional anguish for her daughter.

I witnessed this anguish firsthand when my cousin, Phillip, died unexpectedly of a massive cerebral hemorrhage in January. Over the holidays he had been the picture of health and happiness, and then the next thing we knew, he was on life support. With no advance health directive to indicate his preferences regarding life-sustaining care, or a designated agent to make medical decisions for him, he was kept alive on life support for days while different family members struggled with competing perspectives about whether or not to discontinue medical intervention. Compounding the stress on his loved ones, no one had a power of attorney to handle Phillip's financial affairs while he was incapacitated, and no one knew the first steps to take after his death.

Both situations could have been avoided if Phillip and Barbara had basic estate plans, ordinarily consisting of a revocable living trust, will, advance health care directive, and power of attorney for financial matters.

Barbara thought a will would properly handle her estate, but she actually needed more. It is true that if her will had been executed properly, her assets would have gone to her specified beneficiaries according to her wishes, but only after going through the probate court for months and having her estate reduced by probate fees. Assuming Barbara had $2 million in real estate, equivalent to the approximate median home price in Laguna Beach in February, statutory probate fees alone would total $66,000 ($33,000 each for the executor/administrator and attorney). With a relatively small investment in a well-drafted estate plan, these probate fees could be avoided.

A revocable living trust is often used to avoid probate. Property held in the name of the trust is not subject to probate proceedings. If you become incapacitated, your named successor trustee can manage your affairs and property without a probate court having to appoint a conservator. At your death, your successor trustee distributes assets to your beneficiaries according to the terms of the trust. Trusts are drafted to regulate the timing of the distribution of assets, if desired, and to take advantage of certain tax benefits.

Once the trust is executed, however, you must also "fund" the trust, meaning you need to change title on your assets, such as real property and bank accounts to the name of the trust. Typically this is done by, or with the assistance of an attorney.

In many estate plans, a "pourover" will is used in conjunction with a living trust to catch any assets that may not have been titled in the name of the trust and "pour" them over into the trust so they can be distributed according to the trust's terms. Wills are also used to nominate guardians for minor children.

Other components of a basic estate plan include an advance health care directive and a power of attorney for financial matters. In an advance health care directive, you designate the person(s) you would like to make health care decisions for you in the event you are incapacitated so that your wishes carried out and there is no argument among individuals over your care. You can also indicate your wishes regarding life-sustaining care. A power of attorney for financial matters is also a useful document, permitting your designated agent to handle your financial affairs, such as paying your bills, in the event you become incapacitated.

Neither Barbara nor Phillip intended to add to the grief and anguish of their loved ones by not putting their affairs in order before they died, but their stories are a reminder to take a moment to consider the effect on your loved ones of leaving behind loose ends.

Leslie R. Daff, J.D., M.B.A, is a Laguna Beach attorney specializing in estate planning and administration. She welcomes your questions or comments: LDaff@estateplaninc.com.