

Legal Lingo:

COUNT TO 10 BEFORE YOU ACT

By GEORGE E. ZOLA
CARLILE PATCHEN & MURPHY LLP
366 E. BROAD STREET
COLUMBUS, OHIO 43215
Gez@cpmlaw.com
614.228.6135

You have received the bad news that a loved one has died or is dying. Sometimes the news is expected and sometimes it is a shock. It does not matter if the news is expected or not, it will still be a difficult and stressful time for everyone. Hopefully proper planning has occurred. But unfortunately, that may not be the case. The actions you take or do not take may have consequences both financially and emotionally. The following are several items to consider when faced with these circumstances.

1. **DO NOT TRANSFER ASSETS IMMEDIATELY BEFORE DEATH.** When family members learn that a loved one is dying, they are always tempted to transfer assets prior to the individual's death. Under the current Federal estate and gift tax laws, an individual is subject to tax on gifts made during lifetime or at death. Therefore, gifting immediately prior to death will not result in reducing the size of the individual's taxable estate. Several states, including Ohio, which do not tax lifetime gifts, have provisions which require that gifts made within three (3) years of death be brought back into the taxable estate for estate tax purposes. So unless the individual has a pattern of making lifetime gifts, a gift immediately preceding death will accomplish nothing.

Gifting immediately prior to death can result in additional income taxes for the donee which could have been avoided if the assets were allowed to pass through the individual's estate. When assets pass through a decedent's estate the assets receive a stepped up basis for income tax purposes. The basis in the property is established by the date of death value rather than the original purchase price for the assets. If assets have appreciated during the decedent's ownership, the tax on the capital gain will be eliminated when the assets pass through decedent's estate. When assets are gifted, the donee takes the donor's

basis in the assets and when the donee sells the assets they will pay capital gains based upon the original purchase price rather than the date of death value.

2. **DO NOT RELY UPON A DURABLE POWER OF ATTORNEY.** Previous articles have discussed the importance of having a Durable Power of Attorney. The Power of Attorney authorizes someone to act on your behalf or designates you to act on their behalf in all legal matters. A Power of Attorney is only effective while the person granting the power is alive. Upon death, the Power of Attorney terminates. During lifetime, the individual may have granted you access to bank accounts, safe deposit boxes or any other financial instruments they may have owned. Since the Power of Attorney will terminate at death, if your sole access to a bank account was through a Power of Attorney, you will no longer have access to the funds at the time of the individual's death. If you wish to continue to have access to bank accounts following death of the account owner you should have the account designated as joint tenants with rights of survivorship which, once a tax release form is obtained, will grant you continued access to the account. Being listed as an owner on the Safe Deposit box rather than attorney in fact will allow immediate access to the box rather than waiting for an executor or commissioner to be appointed.
3. **ATTEMPT TO LOCATE VALUABLE DOCUMENTS AND FINANCIAL STATEMENTS.** It is important to locate the original will and other estate planning documents. While you may assume that you know who has been designated as the executor of the estate or successor trustee, sometimes the decedent may feel uncomfortable in notifying the family members that they have amended their plan and designated another individual. Locating the original documents will eliminate any confusion. If possible, determine the location of the tax returns and financial statements to obtain valuable information.
4. **SECURE PERSONAL PROPERTY.** The decedent's residence and contents should be secured immediately following death. Published obituaries will list calling hours and the time of funeral services which is notification to thieves that the decedent's house will be vacant during the published hours. If there are contents which are of extreme value i.e. jewelry, art work, antiques etc. the items should be removed and

brought to a secure location. If there are multiple beneficiaries of the estate, involve as many beneficiaries as possible in this move to prevent a claim that the individual removing the property is doing it for personal gain rather than for security. The decedent's automobile should not be driven until it is determined that insurance coverage extends beyond decedent's death. Consider changing the locks on the house. The decedent may have willingly or unwillingly given copies of the house keys to neighbors and other individuals.

5. **NOTIFY SOCIAL SECURITY.** In most cases, the funeral home will notify social security of the decedent's death. Depending upon the decedent's date of death, social security may recover the last month's benefit. The decedent's account which is the recipient of the social security benefits should not be closed out or the balance in the account be allowed to drop below the last month's benefit to prevent an overdraft situation if social security electronically withdraws the payment. If Social Security and other payors of regular benefits (e.g. pensions) are not notified the benefits will continue, making repayment more difficult in the future.
6. **ORDERING DEATH CERTIFICATES.** The number of death certificates which will be required will be determined by the type of assets the individual owns. Life insurance companies and various mutual funds will require that an original death certificate be sent to them to close the account or recover life insurance proceeds. Counties are charging up to Twenty Dollars (\$20) for each certified death certificate and at least initially you should order a minimal supply. Additional copies can be obtained in a relatively short amount of time.
7. **CHANGE OF ADDRESS.** A change of address form should be completed to forward the decedent's mail or resident of a nursing home or hospice to the person designated as executor. This will eliminate the accumulation of mail at the decedent's residence which is further indication to possible thieves that no one is residing at the home. It will also provide the executor with outstanding bills, financial statements and other information which is received at the residence. It may be necessary to gain access to electronic information on individual's computers, therefore, it may be necessary to obtain the decedent's various passwords and access codes.

8. **DO NOT PAY BILLS.** When an individual dies, the survivors are anxious to pay any outstanding bills; however, even if you are listed on a joint account with the decedent, you should proceed cautiously when using the decedent's accounts. The law states which of the decedent's assets may be used to pay outstanding obligations and if you improperly use funds, you may be responsible for reimbursing the estate for the improper use of the assets or may not be eligible for reimbursement if you advance funds on behalf of the estate. If death has not occurred, you should discuss how the funeral bill will be paid or even prepaying for the funeral arrangements if time allows. The remainder of the bills can wait until you have met with your attorney or other advisors to discuss the administration of the estate.

9. **ALLOW TIME TO GRIEVE.** The time immediately following a loved ones death is a very difficult and stressful time for the survivors. Everyone is anxious to get the process started and in most cases they do not provide sufficient time to grieve for their loss. The probate and/or estate tax procedure does not require the immediate opening of an estate. The major concern is usually access to funds to pay for the funeral and other ongoing expenses. The use of joint ownership and co-owned accounts will alleviate this fear. While it is sometimes helpful for the survivors to remain active and the commencement of the legal proceedings will keep the survivors busy, it should not be the source of unnecessary stress during this difficult time.

If there is one consistent theme which has applied throughout the *Dream Weaving* articles I have read over the years, it is that advanced planning should be utilized to assist in the administration of an individual's estate. Unfortunately, as a result of unforeseen circumstances, procrastination or the failure to admit our own mortality, the planning is not always in place when a loved one dies or if we are informed that death is imminent.

The above information addresses the questions we most often receive from client's who are faced with these circumstances but they in no way replace the need for advanced planning. The death or impending death of a loved one is a stressful time and is not the ideal time to be making decisions which may have significant financial consequences. - G.E.Z.

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