WILLS, TRUSTS AND PROBATE

Quick Guide

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CAUTION: This guide is intended to introduce some of the basic issues and steps involved in estate planning. It is not intended to be all-inclusive. There are many issues and topics to be addressed in a complete estate plan, and working with a qualified professional is strongly recommended.

Introduction

The object of estate planning is to conserve your assets while making sure they are properly distributed, either during your lifetime or after you're gone. You want to be sure that your family and loved ones will be provided for after you die.

Estate planning lasts a lifetime. You'll need to monitor your situation to ensure it is current and meets your wishes.

Providing for your loved ones in the event of your death is an extremely important process that cannot be delayed. While we all hope to live long, happy, and productive lives, the reality is that death can occur at any time. If you haven't taken steps beforehand to make your wishes clear, those decisions will be made by others, perhaps in a much different way than you would want.

What Is Estate Planning?

Estate planning requires you to invest your time and effort today to provide for your loved ones in the future. We will focus on steps you can take to protect and transfer your assets to your heirs, before and after you die.

Estate planning, simply put, is the collection of steps you need to take to make sure that your loved ones are provided for in the best possible way, including lifetime planning and disposition of your property at death. It may not seem obvious, but your obligations to your family and friends continue even after you die.

Estate planning is carried out with legal documents such as wills and trusts; it typically involves a lawyer and may be very complicated if you have a lot of assets. However, every estate plan should start at the same point: You will have to decide who needs your financial support after you die and how you want to protect them. As difficult as it is to sit down and plan for the day you die, it is essential and a real show of love for your family and friends.

Why Estate Planning Is So Important

Your obligations to your loved ones do not stop once you die. You may die while you are still providing for a minor child. You may die with a large amount of assets and debts. If you do not make certain decisions regarding who will take care of your small children, or how and by whom your financial affairs will be settled, the courts in your state will make these decisions for you. And they may rule very differently from how you would have chosen. Without proper estate planning, you give up your right to overrule the decisions that other people will make for you in these very important areas. In essence, your ability to plan and protect your loved ones dies when you do.

Remember, estate planning is not just for the wealthy. Plan ahead to avoid complications, save money, and protect the people you love. Estate planning is a critical part of your overall personal financial plan.

Wills

Let the World Know Your Desires: Prepare a Will

The first tool you will need in your estate plan is a will. A will (the actual name is a "last will and testament") is a formal legal document stating how you want your estate distributed. After you die, it is submitted to the court and probated.

SUGGESTION: You and your spouse should have separate wills. The way you distribute your assets if you survive your spouse will be different than if you are the first to die. You may also want different executors.

IMPORTANT NOTE: Although there are many do-it-yourself kits for will preparation, it is very important that an attorney help you prepare this critical document. Each state has different rules, and what you might think is a very simple situation may in fact require special planning. A simple will should not cost a lot of money, yet a mistake can render the document worthless just when you need it most.

What is in a Basic Will?

- Your name, city, and state where you are domiciled (i.e., place where you currently live and intend to reside). The person who is signing the will and whose estate is being discussed in the will is called the "testator" (some attorneys may call a woman preparing a will a "testatrix;" we will use "testator" for both genders).
- Appointment of the executor (and alternates) of the estate. In many cases, the testator will state that the executor does not have to post a bond (insurance).
- Appointment of the guardian for minor children.
- Statement of specific transfers. When you decide to give assets to heirs at the time of your death, the transfer is called a "bequest" (or a "devise").
- Statement of who gets the balance of the estate.
- Instructions for the executor to follow and powers granted.
- Description of controls you want over bequests (or devises) to minors or other parties.
- A place for the testator to sign and date the will.
- A declaration that the witnesses sign stating that they witnessed the signing and that the testator was of sound mind. A notary public usually signs this section too.
- Provisions to allow or state the GST exemption allocation, since there is no ability to allocate a decedent's unused exemption to a surviving spouse.

Community Property's Special Rules

Community Property is property that is acquired while living in certain states while married. Each spouse owns an undivided one-half interest in the property, regardless of how the property is titled. Property acquired before marriage, through gift or inheritance or under a nuptial agreement, is generally not community property. At the time of your death, half of any community property will go automatically to your spouse without being part of your probate estate. Of course, you can leave the other half to your spouse in your will.

The following states have community property laws:

- Arizona
- California
- Idaho
- Louisiana
- New Mexico
- Texas
- Washington
- Wisconsin

IMPORTANT NOTE: If you move from a common law state to a community property state, see an estate planning attorney who is familiar with the community property laws of your state.

Changing Your Will

There are certain circumstances where it will be necessary to revisit your estate plan and perhaps change your will. You can do this by adding an attachment to the will called a "codicil". Your attorney may ask you to sign a new will if you are making major changes.

IMPORTANT NOTE: You should never make a change to the will yourself. Crossing out something or by otherwise making a mark on the original document will not only prevent your change from being effective, it will probably make the entire document invalid. See your attorney to make a change.

IMPORTANT NOTE: You should never hold the original will in a safety deposit box. When you die, the box will be sealed by state law, and your executor will have a hard time proving his or her authority without the original will. In fact, you should have your bank or your attorney hold the original copy of your will, and ask for a copy for your records.

SUGGESTION: Sign only one copy of the will. It will be easier to prove the authenticity of the document if only one original exists. If you have the original will, never remove the staples or otherwise deface it. It will render the document useless. Return it to your bank or your attorney.

You should review and consider changing your will if the following events occur:

- You move to another state.
- You become separated, get divorced, or remarried.
- You inherit or otherwise acquire a lot of money.
- You have a new child through adoption or birth.
- A person named in the will develops financial problems or severe medical problems, becomes a Medicaid recipient, or has other issues listed in the section Important Steps.
- A person you named in your will to receive a bequest dies or is very ill and near death.
- The tax or estate laws change.

- Your will was prepared before 1981.
- You change your mind about who should be included in your will, or how specific assets should be handled.
- To ensure proper GST exemption allocations are included.
- Consider the Executor's ability to elect to transfer your unused estate exemption (but not GST) to a surviving spouse, based on your asset transfer objectives. In the event of your death and your spouse's remarriage, utilization of your unused estate tax exemption may not be available to your former spouse.

Remember, these are your decisions and you can change your point of view.

What a Will Cannot Do for You

A will is an extremely important document and the cornerstone of your estate plan. However, it cannot do everything. Understanding its limitations will help you prevent having any important issues from being overlooked.

Some People Can Override the Will

Your spouse will be allowed to override the will (using a power called the "right of election") to get a certain amount of your estate when you die. Even if you specifically leave him or her nothing, this power prevails. The way around this is to have him or her sign an agreement waiving this right. This is typically included in a document called a "pre-nuptial agreement" (or an "antenuptial agreement") if signed before marriage, or a "post-nuptial agreement" if signed after marriage.

SUGGESTION: If you are currently separated from your spouse waiting for a divorce to become final, ask to have him or her sign a post-nuptial agreement (you might want to sign one too just to be fair). Until your divorce is final, he or she still has the ability to exercise the right of election without this extra step. If you are in the process of divorcing, your attorney might try to win this agreement for you as part of the bargaining process.

IMPORTANT NOTE: If for any reason, you do not want to leave a child any inheritance, specifically mention it in your will (or leave him or her a very small amount, say $10). If you fail to mention him or her by name, it is possible that he or she could claim that you forgot them and therefore, must not have been of sound mind when you signed your will.

Assets may go elsewhere, even if you specifically mention them in your will.

The will controls your probate estate. Your probate estate is your estate (everything you own less everything you owe) less assets that transfer automatically at death. The two groups of assets that are outside your probate estate include:

- Property that has a named beneficiary: Examples include 401(k) plans, other retirement plans, insurance policies, and accounts with named beneficiaries.
- Property that is titled as joint property: The other person on a joint account would automatically inherit the property when you die. If you have an account with someone that is titled "Tenants in Common" (each of you own separate interests in the same property), this rule does not apply.

SUGGESTION: Remember, review your beneficiary designations and how your property is titled. Your will cannot control this, and you may be leaving people in your will a lot less than you think.

Using Trusts to Help Protect Assets

Throughout this section, we mention transferring assets to loved ones. The problem is, once your heirs receive their property, they may still need continued protection from outside creditors or even themselves. You can provide continued protection by making transfers to a trust.

A trust is a separate legal entity that controls the assets you place into it (these assets are called the "trust principal" or "trust corpus.") You are known as the "grantor" of the trust, since you were the one who created it. The grantor decides who gets income and/or actual principal payouts from the trust. The people receiving the payouts are known as "beneficiaries." The person who administers the trust and makes sure all the beneficiaries are provided for is the "trustee." Some trusts also have someone in the role of "trust protector." A trust protector has powers set forth in the trust document to assist in guiding both trustees and trust beneficiaries through legal and tax complexities to realize the grantor's original intent.

The rules that you dictate the trust to follow (how long the trust should last, who gets what, and other rules the trustee has to follow) are known as the "trust terms." An attorney is needed to do the paperwork to get a trust started. The document that defines the trust is known as the "trust agreement." Trusts become active as soon as they receive assets, either by you transferring assets to the trust during your life or through your will.

Trusts can be powerful tools when used properly. Let's go through a hypothetical example. If you want to give your child a large inheritance, but you want to make sure that he is a certain age before he manages the money, while at the same time the money is available if your spouse faced an emergency, your trust might say (we'll simplify the language here—an actual trust agreement would be much longer):

- Trustee shall collect and invest all income until such time that David (your son) becomes 25, then pay him one-half the amount in the trust. At age 30, the trustee shall pay the balance of the trust principal to David.
- If David dies before Jack, distribute all principal to Jack immediately. If Jack dies before David, and David dies before age 25, the trustee shall give all trust principal to the Easter Seals Society.

Work with your attorney to develop specific language for any trust arrangement you make.

When prepared properly, a trust can protect the assets from creditors of the beneficiaries. It is also difficult for spouses of your beneficiaries to attack the principal in a divorce proceeding or as a right of election if your beneficiary dies. The best part is that the beneficiaries can't waste the entire amount in the trust, just the amount that is distributed to them.

IMPORTANT NOTE: The instructions that you give the trustee in the trust agreement should be very clear and designed to avoid any confusion. Any gray areas may lead to legal troubles, and battles between trustees and beneficiaries can become complex.

SUGGESTION: Always pick a trustee who will be fair to all beneficiaries. As is the case with executors and guardians, pick alternate trustees. The trustee and all alternates should be trustworthy and have ordinary good business sense. This could be an individual. However, it may make sense to name a bank or trust company to oversee your estate or trust.

SUGGESTION: If the amount being transferred is very small, you may want to give the amount outright. If you do decide to create a trust, consider giving the trustee the right to pay out principal if the amount in the trust becomes very small.

SUGGESTION: Timing is everything. The only way to have the following documents become legal – this applies to wills and trusts too – is if you are of "sound mind" when you sign them (this mental ability is called "capacity"). If you wait too long to have these documents prepared, injury or illness may cause you to lose capacity. Then it is too late.

When you die, the court will step in and review the estate before they allow the executor to distribute any assets. Understanding a little bit about how this process works will help you design your estate to easily help you overcome this hurdle. The longer it takes, the longer your loved ones will have to wait to get the assets you want them to have.

The process of reviewing your will and estate by the court is called "probate." The court in the state in which you live when you die will review the will to see whether it is authentic and consistent with state law. It will consider any arguments from people who feel the will should be overturned or from a spouse who is exercising the right of election. The courts will also make sure that all debts are settled, and that all taxes are paid. Once the will is validated and the executor can satisfy the courts that all claims have been paid, then he or she is free to pay out the balance of the estate to the beneficiaries in the will.

Based on the complexity of your estate and whether you owe estate taxes, probate can take a long time. Typically, the probate process takes a few months to a year. Remember, your heirs will not get their inheritance (money they might need to live on) until the process is complete.

Minimizing the Delays in Probate

If you want to streamline the probate process, and make sure that you get the assets to your loved ones as soon as possible, follow these steps:

1. **Have a Valid Will.** This is the single most important thing you can do to speed up the probate process. When you die without a will (as discussed later in this section), the courts will appoint attorneys and accountants to serve as administrators for the purpose of valuing your estate and supervising the process of liquidating it. These individuals are paid from estate property, which will reduce the amount of the inheritance going to your heirs. If you have a will and an executor, the chances of speeding through probate improve immeasurably.

2. **Consider Placing Out-of-State Real Estate in a Trust.** Each state in which you own real estate (property) has the right to probate your estate. This can be expensive, especially if your executor has to travel back and forth to represent the estate. Talk to an attorney or other estate planning professional about placing the real estate in a trust while you are still alive. This will still enable you to enjoy the property, yet remove it from your probate estate.

3. **Make Sure You Have Adequate Insurance and Other Non-Probate Property.** Even if you expect to leave behind a large amount of wealth for your family, if all the assets are probate assets, you may be creating a situation of hardship while the courts are reviewing the estate. Look to see which of your assets are non-probate assets (i.e., assets in joint name, pensions, IRAs, or life insurance not made payable to your estate). If you think the remainder of your estate is less than adequate to provide for your family during probate, then you may want to buy additional life insurance. Remember, do not make the insurance payable to you or your estate as this can create estate tax exposure.

A Living Trust

If you have listened to any financial planning expert, he or she has probably warned you about the difficulties of probate. They may have even recommended that you hire them to help you create a Living Trust. A Living Trust is a trust where you are both grantor and trustee. You place all your assets into this trust and spell out how to distribute the principal when you die (as you would in a will). Property held in a living trust does not pass through probate court before it reaches the people you want to inherit it. A side benefit of the living trust is that the trustee you pick as an alternate will have an easier time accessing assets (if you become incapacitated) than will an agent acting under a Power of Attorney.

Although there are cases where the probate process can get very complicated, in most cases, it is not that big of a deal. Creating a living trust can be expensive (you have to transfer ownership of all your assets to the trust), and it doesn't always avoid probate completely since there may be assets that you will own outright. Since you control the assets in the trust by being the trustee, the assets are included in your estate for tax purposes, so Living Trusts do not save estate taxes. Many people, therefore, do not really need living trusts. Discuss this with your attorney when you are reviewing your estate plan.

When You Don't Have a Will

We already discussed that the courts will choose guardians for your minor children, and select attorneys

and accountants to serve as administrators for your estate when you don't have a will. There are also rules that each state follows on who gets your assets when there is no valid will. These rules are called the "laws of intestacy." Generally, your spouse will get your probate estate outright or share it with your children.

Sample Intestacy Rules

Although each state is different, a person might have his or her estate divided in the following order without a valid will:

1. Spouse and surviving children
2. Surviving grandchildren
3. Parents
4. Siblings
5. Grandparents
6. Aunts or uncles
7. Cousins
8. The State where the property is located (it is treated as abandoned property)

The rules are different for every state so make sure you check with your attorney to get the specifics.

Nightmares Without a Proper Will

A will is an important document. Without a will, look at what could happen in the following situations:

Situation	What Happens without a Will
You have a husband and a young child.	The State may force a percentage (probably half) to go to your young child and the balance to your husband. This means your husband may not have the money he needs because half the estate is tied up in restricted accounts for your child. This also means that, as soon as your child reaches the age of majority (18–21, depending on your state), he or she gets the money with no strings attached.
You do not want any of your money to go to your son—only your wife and brother.	The State will probably split your estate between your son and your wife, effectively cutting out your brother.
When you die, you promise the house to your daughter for all her devotion, care, and financial support. Your son ignored you for many years.	The State will probably split the estate between your daughter and your son. Your daughter may never recoup the support costs she incurred on your behalf.
You do not want your assets going to your adult children but to your place of worship.	The State will assign assets to family members first.
Both you and your spouse are in an accident. You die at the scene of the accident; your spouse dies the next day.	Your estate will go to the family of your spouse if you have no children. Your family gets nothing. ♦

DISCLAIMER: For a comprehensive review of your personal situation, consult your tax professional.