

Frequently Asked Questions about Estate Planning

Estate Planning Overview

- What is Estate Planning?
 - Estate Planning is the process of arranging for the disposal of an individual's estate. This can take many forms depending on what goals the client wishes to achieve. The following is an inexhaustive list of examples of what an estate plan can do:
 - An estate plan can lay out how certain assets are distributed upon death.
 - An estate plan can eliminate many of the uncertainties that surround probate.
 - An estate plan can maximize the value of an individual's estate distributed to his or her heirs by reducing taxes and other expenses upon death.
 - An estate plan can also designate a guardian for minor children or appoint a trustee to manage the assets on behalf of the beneficiaries of a trust.
 - An estate plan can give directions to medical care providers and family members regarding end-of-life care.
- Glossary of Terms
 - *If Legal Aid doesn't already have one, this might be nice to include!*
 - There's a good one here:
http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/glossary.html

Wills

- What does a will do?
 - A will is a written testament which provides for the distribution of property owned by you at the time of your death. You have very broad discretion to designate how you want your property to be divided and distributed, although state statutes may place certain limitations on your discretion. For example, most states have specific laws that prevent you from absolutely disinheriting your spouse.
 - Aside from providing for the intended disposition of your property to your spouse, children, close friends, etc., there are a number of other objectives that may be accomplished in your will:
 - You may designate a guardian for your minor children if you have survived the other parent and, by judicious use of a trust and appointment of a trustee, eliminate the need for bonds and supervision by the court regarding the care of each minor child's estate.
 - You may designate an executor of your estate and eliminate the need for a bond.

- You may choose to acknowledge or provide for a child (e.g., stepchild, godchild, etc.), an elderly parent, or other vulnerable individual.
 - If you are acting as custodian for the assets of a child or grandchild, you may designate your successor custodian and avoid the expense of a court appointment.
- What a will does NOT do.
 - A will does not govern the transfer of certain types of assets, called non-probate property, which by operation of law or contract passes directly to someone else upon your death. For example, real estate and other assets owned with rights of survivorship pass automatically to the surviving owner. Likewise, an insurance policy payable to a named beneficiary passes outside the will.
- What happens if I die without a will?
 - If you die intestate (without a will), your state's laws of descent and distribution will determine who receives your property. These laws typically distribute your estate to your spouse and/or living children or to other family members if you do not have a living spouse or children. Your state's intestacy laws reflect the typical manner by which most people would dispose of their estates, but they may not reflect your actual wishes. A will allows you to create your own plan to suit your own preferences.
- How do you execute a will?
 - For a will to be considered valid, certain formalities must be observed. Wills are typically required to be signed in the presence of several witnesses and a notary. A later amendment to a will is called a *codicil* and must be signed with the same formalities.
 - In order to provide flexibility and reduce the need for amendments to your will, some state's statutes will allow you to refer in your will to a memorandum which describes your wishes regarding how to dispose of your tangible personal property, such as furniture, jewelry, automobiles, etc. Such a memorandum is a separate document which only requires your signature and the date of signing to be effective. Additionally, a new memorandum may be created at any time to add additional property descriptions or alter the disposition of your property. The last executed memorandum will govern the distribution of your tangible personal property at your death.
 - In many states, a will that is formally executed in the presence of witnesses and a notary is deemed to be "self-proved" and may be admitted to probate without testimony of witnesses or other additional proof.
- What is a living will/advance health care directive?
 - A living will is your written expression of how you want to be treated in certain medical conditions. This document may permit you to express whether or not you wish to be given life-sustaining treatments in the event you are terminally ill or

injured, to decide in advance whether you wish to be provided food and water via intravenous devices ("tube feeding"), and to give other medical directions that impact the end of your life.

- In addition, most states permit you to express your preferences as to treatment regarding life-sustaining equipment and/or tube feeding for medical conditions that leave you permanently unconscious or without detectable brain activity.
- Living wills do not determine your medical treatment in situations that do not affect your continued life, such as routine medical treatment and non-life-threatening medical conditions. In all states the determination as to whether or not you are in such a medical condition is determined by medical professionals, usually your attending physician and at least one other medical doctor who has examined you and/or reviewed your medical situation.
- What about organ and tissue donation?
 - In many states, you can include in your advance directive your preference to become an organ or tissue donor at the time of death. Even if your driver's license contains an organ or tissue donor statement, you should express this further by letting your health care proxy, your family, and your physician know your desire to become a donor.
- What is a Durable Medical Power of Attorney?
 - A "durable medical power of attorney," sometimes called a "health care proxy" or "health care surrogate" is the appointment of a person to whom you grant authority to make medical decisions in the event you are unable to express your preferences. Normally, a single individual is appointed as your health care proxy, though it is common to designate one or more alternates in the event your first choice is unavailable. As with the living will, medical professionals will make the initial determination as to whether or not you have the capacity to make your own medical treatment decisions.

Probate

- What is probate?
 - If you own property in your individual name at your death (ie not in trust), it is most likely that your assets will be subject to what is known as "probate" or the "probate process." The probate process includes two parts: probate and estate administration. "Probate" is the process by which your will (if you have executed one during your life) is submitted to the probate court to be "proved" or validated, and an estate administrator is appointed. "Estate administration" is the process by which your assets are collected and then distributed to your heirs.
 - If you execute a will during your life, the "proving" of your will establishes that it is indeed your final statement and intention regarding the distribution of your estate assets and the appointment of the person or institution you have named to administer your estate.

- If you do not execute a will during your life, an estate administrator will be appointed in compliance with state statutes.
- Once your will has been “proven” and an administrator has been appointed, such administrator will have the responsibility to gather all of your estate assets, pay your final debts, taxes, and expenses of administration, and distribute your assets to those designated as beneficiaries in your will. The choice of your administrator is an important one as your administrator will most likely be entitled to receive a reasonable fee or commission and will be held accountable to your beneficiaries for the proper administration of your estate. Depending on state law, an administrator will either be formally or informally supervised by the probate court.
- Should I try to avoid probate?
 - All of your estate assets must be distributed after your death either through the probate process or by direct transfer of ownership. Based on the statutes of some states, the probate process can be a very slow and costly endeavor; therefore, many lawyers and other professionals advocate for the avoidance of probate by using certain techniques or instruments which remove the ownership of your assets from your estate. However, many states have simplified and streamlined their probate processes over the years, which means there is less reason to avoid probate in these states.
 - The techniques and instruments which may be employed to avoid probate may in themselves be very costly; therefore before you take any action, you should compare the cost of probate versus the cost to avoid probate.
- How can I avoid probate?
 - If you have determined that avoiding probate would be more efficient or less costly, the living/revocable trust is one option that will allow you to avoid probate. Any assets owned by the trust at your death will not be considered part of your estate and will therefore not be subject to probate.
 - In addition to the trust, there are other types of property that automatically avoid, or “pass outside of” the probate process, including:
 - Jointly-owned property, including real estate or bank accounts held jointly with right of survivorship
 - Assets or account that have a beneficiary designation, such as life insurance policies, annuities, bank accounts, or retirement benefits that pass to a named beneficiary
 - Although the options listed above are some of the more common techniques of probate avoidance, they do not represent an exhaustive list; therefore, it is suggested that you consult with an attorney if you have additional questions.

Trusts

- What is a trust?
 - The term “trust” describes the holding of property by a “trustee” (which may be one or more persons or a corporate trust company or bank) for the benefit of one

or more persons called “beneficiaries.” The holding of the property must be in accordance with the provisions of the written trust instrument. A person may be both a trustee and a beneficiary of the same trust.

- A trust created by your will is called a testamentary trust and the trust provisions are contained in your will.
- If you create a trust during your lifetime, you are the trust's “grantor” or “settlor,” and the trust is called a “living trust” or “inter vivos” trust. The trust provisions are contained in the trust agreement and will designate what happens to the property in the trust upon your death (as opposed to your will or your state’s intestacy statutes).
- A living trust may be revocable (subject to change and terminated by the settlor) or irrevocable. Either type of trust may be designed to accomplish the purposes of property management, assistance to the settlor in the event of physical or mental incapacity, and disposition of property after the death of the settlor of the trust.
- It is important to note that trusts are not only for the wealthy. Even young parents with limited assets may choose to create trusts for the benefit of their children in case both parents die before their children have reached maturity. The provisions of such a trust could be tailored to meet the specific desires and intentions of the grantors. For example, the trust could provide that the trust estate will be held as a single undivided fund to be used for the support and education of the grantors’ minor children, according to their respective needs, with eventual division of the trust among the children when the youngest has reached a specified age. This type of arrangement has an obvious advantage over a will’s more inflexible division of property among children of different ages and levels of maturity or individual needs at the time of distribution.

Power of Attorney

- What is a power of attorney?
 - A power of attorney is a document that gives another person or entity the power to act on your behalf. The person or entity which has been granted a power of attorney is often called an “agent” or “attorney-in-fact.” With a valid power of attorney, your agent can take any action permitted in the power of attorney document; however, your agent may be required to present the actual document to invoke such power.
 - You may limit the power you give to your agent to relate only to a particular activity (e.g., closing the sale of your home), or you may make your agent’s powers broad, allowing your agent to act on your behalf in a variety of situations. You can also specify whether your agent’s power will take effect immediately or upon the occurrence of a future event (e.g., a determination that you are unable to act for yourself), often referred to as a “springing” power of attorney. You can also specify whether the power you have given your agent is temporary or permanent.

- When your agent is signing a document on your behalf, your agent's signature must include a reference to the fact that he or she is exercising his, her, or its authority as a power of attorney. For example:
 - Assume Bonnie Parker appoints her husband, Clyde Barrow, as her agent in a written power of attorney. Clyde, as agent, must sign: *Bonnie Parker, by Clyde Barrow under POA* or *Clyde Barrow, attorney-in-fact for Bonnie Parker*.
- Why give someone such authority?
 - One important reason to use a power of attorney is to prepare for situations when you may not be able to act on your own behalf due to absence or incapacity. Such a disability may be temporary (e.g., due to travel, accident, or illness) or it may be permanent. Another reason to use a power of attorney is for convenience. If you are buying or selling assets and do not wish to appear in person to close the transaction, you may take advantage of a power of attorney.
 - If you do not have a power of attorney and become unable to manage your personal or business affairs, it may become necessary for a court to appoint someone to act for you (e.g., a guardian or conservator). This person may or may not be someone you would have chosen to appoint. With a power of attorney, you choose who will act on your behalf, and you define their authority and its limits.
- Who should be my agent?
 - There are no special qualifications necessary for someone to act as an attorney-in-fact except that the person must not be a minor or otherwise incapacitated. The best choice is someone you trust.
 - Many people choose a family member to act on their behalf, such as a spouse or a child. In naming an agent, be aware of the possibility that the person you have chosen may not be available to act when needed, or they may not agree. You should consider naming two or three successor agents to address this possibility.
- How can I revoke a power of attorney?
 - In general, you may revoke a power of attorney at any time, but most states require written notice of revocation to your agent.
 - Some states previously required renewal of powers of attorney for continuing validity. Today, most states permit a "durable" power of attorney that remains valid once signed until you die or revoke the document.
 - You should periodically reevaluate your powers of attorney and whether your choice of agents still meets your needs. You might also consider meeting with an attorney to help you reevaluate your powers of attorney, which would include learning about developments in state law that might affect your powers of attorney.

The Lawyer

- Do I need a lawyer to come up with my own estate plan?
 - Many organizations and internet-based companies advertise that you can save time and money by drafting your own will using do-it-yourself software or fill-in-the-blank will kits. While the basic premise might be true in some circumstances, it is unlikely that these systems will generate a suitable will that accomplishes all your objectives. Only a qualified lawyer can interpret the maze of laws bearing on property rights, taxes, wills, probate, and trusts.
 - On the other hand, you can save time and money by preparing thoroughly for a meeting with your estate planning lawyer. You can organize your information regarding your assets, liabilities, and title arrangements and discuss your feelings about providing for various family members. You should provide copies of important documents such as previous wills or trusts, powers-of-attorney, life insurance policies, employment benefits, and prenuptial agreements or divorce decrees.
- What is the lawyer's role in the estate planning process?
 - The advice and direction of your attorney will be essential to implementing an estate plan that both disposes of your assets according to your wishes and meets your other personal objectives.