Estate Planning Basics

One of the most important yet overlooked aspects of a family’s affairs is how to plan for what will happen if a family member dies or becomes incapacitated. A well-thought-out estate plan is important because it implements your wishes if you should die or become unable to manage your own affairs. If you have minor children or disabled adult children who depend on you for their livelihood, then this is especially important, because your estate planning documents can take steps to provide for the well-being of your children as well as to appoint guardians to take care of your children if you are unable to do so.

Common Estate Planning Questions

⇒ Why do I need a Will?
⇒ What is probate?
⇒ How does having minor children affect my estate plan?
⇒ What is a Durable Power of Attorney and what does it do?
⇒ What is a Medical Power of Attorney?
⇒ Who should I name as beneficiaries on my life insurance policies and retirement plans?

“Planning is bringing the future into the present so that you can do something about it now.”

- Alan Lakein
Why Do I Need a Will?

Dying Without a Will

Hardly anyone intends to die without a will or proper estate plan in place, but it happens frequently, and can often lead to unintended consequences and strife within the family. If you die without a will (in legalese this is referred to as dying “intestate”), your property will be distributed according to Texas law. Under state laws, if you are married with no children, and assuming all of your property is the community property of you and your spouse, your property will pass to your surviving spouse. This is also true if all your children are the biological children of both of you. However, even in this simple scenario, it is advantageous to have a will in place to ensure that the administration of your estate can proceed as smoothly and efficiently as possible. For instance, your will can provide for an “independent administration” for your estate, meaning your executor (the person who will administer your estate) will have broad powers in dealing with your estate and the court will have minimal involvement in the administration process. This ultimately means that your estate may be settled much more quickly and for less cost than if you die without a will.

Blended Families

Things can get more complicated if you have a blended family where one or both spouses have children from prior relationships. In this case, how your property is distributed if you die without a will depends on whether it is real or personal property and whether the property in question is your separate property or the community property of you and your spouse. Proving which property is community property as opposed to the separate property of one spouse can prove quite difficult and can lead to discord between family members. Additionally, a spouse will often want to make sure that the surviving spouse’s needs are taken care of while still providing for his or her own children. In these situations, the surviving spouse and the decedent’s children may have conflicting interests and objectives, and it is crucial to put a plan in place that accounts for this.

Creating a Trust in a Will

Often, one or more trusts are created in a person’s will. There are many reasons to create a trust in a will, such as:

- To protect assets from creditors, lawsuits, and failed marriages of a beneficiary
- To allow beneficiaries to receive an inheritance while still maintaining eligibility for certain public assistance or benefits
- To provide flexibility and control over who will manage assets on behalf of a minor child
- To provide for the well-being of a surviving spouse while ensuring that any remaining assets ultimately pass to the first spouse’s chosen beneficiaries

An estate plan is critical in planning for your children’s future.
What is Probate?
Once you have determined what assets you have, you need to determine which assets are probate property and which are non-probate property. Probate is simply a legal process to determine who should receive a person’s property at death, who should handle the tasks involved in administering the estate, such as paying bills, and who should care for any minor children and any assets which they inherit. In Texas, the probate process is governed by the Texas Estates Code, and generally is a relatively simple and inexpensive process. Not all property a person owns is subject to probate. For instance, property held in joint tenancy with right of survivorship; property held in a trust; life insurance or retirement funds payable to a named beneficiary; and payable-on-death checking and savings accounts (POD) are all examples of non-probate property. In these instances, the property goes to the named beneficiary and is not included in the probate estate, unless the estate is the named beneficiary or is the default beneficiary in the case where no other beneficiary is named.

Any assets that are probate assets will be administered under the terms of your will, or if you have no will, under the rules provided in the Texas Estates Code. If you have a will that provides for independent administration, the probate process will have minimal court involvement and your executor will have broad powers in dealing with the assets in your probate estate, which usually will save time and money in the administration of your estate.

In some cases, a formal administration may not be necessary. There are several alternatives to probate administration depending on the circumstances. Two of the most common alternatives are: (1) probating of the will as a “Muniment of Title” and (2) an Affidavit of Heirship. Both of these procedures involve less time and expense than a full administration, but they are only available in certain circumstances and can only be used to pass title to certain types of property. You should speak with an attorney to determine which probate procedure is most appropriate in your specific case.

Planning for Your Children

Minor Children
If you have minor children, a properly designed estate plan is critical to ensure that your children are taken care of if you die or become incapacitated. For instance, who will be responsible for caring for your children if you are unable to do so? Your estate planning documents can appoint guardians to manage the personal and financial affairs of your children as well as create trusts to hold any assets to be inherited by them. Absent such a plan, a court will appoint a guardian to care for your children and may have to create one or more special trusts and appoint a trustee to manage any assets that your children might inherit. The trusts created by the courts are less flexible and may not take into account your wishes and desires in providing for your children. In addition, the court will most likely appoint a bank trust department to manage the assets, which could result in greater administration costs than if you had appointed a family member or trusted friend to serve as trustee of the trust.

Children with Special Needs
Planning is particularly important for children with special needs in order to preserve the child’s current or future access to government benefits, such as Medicaid and supplemental security income. If you have a child that has a disability or other special needs which qualify the child for government benefits, your will should include a special needs trust for that child. If a child with special needs inherits property outright or in a trust that does not qualify as a special needs trust, the assets owned by the child or the trust could result in the child being disqualified from receiving certain benefits. However, a special needs trust can be created in order to limit the distributions of trust property to the child in such a manner to ensure that he or she remains eligible for public assistance.
What is a Power of Attorney?

Hopefully, you will never be in a position where you are unable to manage your own affairs. However, should this happen to you, it is important that someone else be able to make financial decisions on your behalf. Using a power of attorney, you will be able to name the person (referred to as an “agent”) who will be responsible for making financial decisions for you if you are unable to do so. Usually, the person you name as an agent will be a family member or a trusted friend. In addition, you may name one or more alternate agents in case the first person named is unable or unwilling to serve as an agent under the power of attorney.

Durable vs. Non-Durable Power of Attorney

If a power of attorney is “durable”, this means that it will remain in effect if the person executing the power of attorney (referred to as the “principal”) becomes incapacitated, as opposed to a non-durable power of attorney, which terminates upon the revocation or incapacity of the principal.

Regardless of whether a power of attorney is durable or non-durable, the principal can revoke the power of attorney at any time. However, if any third parties are relying on the power of attorney at the time of revocation, it may be necessary to record the revocation in the public records in order to provide the third parties with notice that the power of attorney has been revoked.

Medical Power of Attorney and Directive to Physicians

A medical power of attorney is a document in which you appoint one or more persons to make healthcare decisions if you are unable to make these decisions. The person you appoint will have the ability to obtain medical records, discuss medical concerns with your doctor, and make decisions on your behalf regarding what types of treatment you will receive. If you have a medical power of attorney, your physician has an obligation to comply with your agent’s instructions or allow your care to be transferred to another physician.

A directive to physicians, often referred to as a “living will”, lets you specify your wishes in advance regarding artificial life support and other life sustaining treatments and procedures if you become incapacitated and have a terminal or irreversible illness. It not only ensures your wishes are known, but also protects your loved ones from having to make these difficult decisions for you. The directive to physicians also allows you to choose specific treatments or procedures that you may wish to have, and also to list treatments and procedures that you do not wish to have.

Retirement Plans and Life Insurance

Frequently, the largest asset a person has is some sort of retirement plan, such as a 401(k) or IRA, or a life insurance policy with a large death benefit. Unlike most other assets, retirement plan proceeds and life insurance death proceeds generally do not pass under your will. Instead, these assets pass to the beneficiaries named on the plan’s or policy’s beneficiary designation form. For this reason, it is extremely important to make sure you have the proper beneficiaries named on any retirement plans and life insurance policies. If you are married, your spouse will usually be named as the beneficiary of your retirement plan or life insurance policy. With some retirement plans, such as 401(k) plans, your spouse must be named as the beneficiary unless he or she consents in writing to another beneficiary designation. Additionally, if your spouse is the named beneficiary, he or she may be able to roll the plan proceeds over to another tax-deferred plan, potentially resulting in significant income tax savings. Often times, a trust, such as a testamentary trust created in your will, may be named as an alternate beneficiary of a retirement plan or life insurance policy. You should never name minor children as the beneficiaries of a retirement plan or life insurance policy. Because improper beneficiary designations can cause unexpected problems with the administration of an estate, you should consult with your attorney in making beneficiary designations, and you should make sure to regularly check your beneficiary designations to make sure they are up to date, particularly if your life circumstances change, such as a divorce or the death of a beneficiary.