Basic Estate Planning

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What is estate planning?

We all die. Before we do, many of us suffer some sort of disability.

The odds of your becoming disabled are subject to many risk factors, including your age, your occupation, your hobbies, and which insurance company you ask (different companies will provide you with different statistics of the odds of your becoming disabled).

While "estate planning" sounds like a fancy term for what rich people do, that is a misperception.

For many years, "estate planning" meant tax-avoidance planning at death. As of the writing of this paper, we each have an "exemption" from paying federal estate taxes if our estate is valued at $11.7 million or less. I don't usually run in those circles. This paper will not discuss taxes.

As I use the phrase, estate planning addresses two topics: (1) what happens to your stuff when you die, AND (2) what happens if you become disabled and need help managing your finances or taking care of your physical needs?

Planning for death

Let's talk about death first, since it is inevitable, and, because you never know when it is going to happen, that uncertainty creates a sense of urgency: best not to procrastinate!

This paper is not about cremations, crypts, plots, memorial services, wakes, open or closed coffins, or obituaries. It is just about the legal documents that people consider when they are planning for death.

If you don't own anything, you can skip this part.

If you own as much as a car, you probably need some estate planning.

What happens to your stuff when you die? Where does it go? If you have a will and/or a trust (or multiple trusts), that should answer the question. If you do not, your stuff will pass as prescribed by state "intestacy laws," which can be complex and may not reflect your wishes.

Almost everyone needs a will.

As explained below, many people need trusts.

Wills and probate

Probate is a legal process to pass property from someone who dies to a "beneficiary" of that property. If the deceased has a will (again, absent pesky problems like will contests), his or her property will pass according to the terms of his/her will.

At this point, it is important to point out the distinction between "probate property" and "non-probate property."

If you own property that has a *title* (e.g., a car, a boat, a house) or an account at a financial institution to which only you have access, that is considered "probate property" because it must pass through a legal process to go from you to your intended beneficiaries. If that applies to you, you need a will.

Non-probate property typically passes according to a beneficiary designation that you fill out before you die. This includes life insurance and retirement plans. If all you own is non-probate property, you do not need a will (although it is still a good idea because you may overlook some probate property you own like the title to your car).

If you have a will, when you die, a lawyer will file it with a court that deals with *probate cases*, and, unless there is a problem, the court will "admit your will to probate."

Probate administration involving properly prepared wills can be simple and inexpensive. Without a properly prepared will, it can be relatively expensive and an unnecessary pain of paperwork and court proceedings.

Can you write your own will? Yes, but don't. Most people who prepare "holographic wills" screw them up, leave something out, forget a "what if?" or two.

Can you use an online will form? Yes, but don't. Many of the ones that I have seen are a mishmash of generic clauses that may or may not apply to a client's specific situation, and they leave out provisions required by state law, which are designed to avoid unnecessary expense.

Texas has an abbreviated probate process, called an "independent administration." Unless you just like paying lawyers, that is what you want for your heirs. In order to assure that is what happens, your will needs some special language, which may not be on that will form you bought at Office Depot.

Wills can be relatively inexpensive. There is not that much to preparing one, but you want it done correctly. When it comes to paying lawyers, this is where you will get a lot of bang for your buck.

Trusts and Guardianship Avoidance

"Trust" is another one of those words that sounds like it should be reserved for people who spend their days playing golf and making travel plans. Not so.

A trust is a simple concept. Trusts can be relatively inexpensive. You simply have your lawyer prepare a document by which you entrust someone to manage your money or property for the benefit of someone else.

Minors cannot inherit in Texas. Many people do not know this and designate their minor children or grandchildren as beneficiaries of this that or the other – bad idea!

In those cases, the only way the minor can get access to the property is if someone goes to probate court and initiates a guardianship proceeding.

One of the primary objectives of all estate planners is to do all he can to see that your heirs avoid guardianship proceedings. They can be expensive to set up and more expensive to administer. If the minor beneficiary is, say, five-years old, the guardianship will go on for thirteen years (assuming that the

child does not have or develop and disabilities, in which case it could go on a lot longer).

All of that can be avoided with a simple trust.

If you leave your five-year old grandchild an inheritance, you can avoid the expense and hassles of guardianships by forming a trust for his or her benefit and leaving the inheritance to the trust instead of to the child.

Trusts are not just for children, however. They are a great vehicle for leaving property to a spouse.

Trusts come along with all sorts of extra-added benefits. Below is a brief summary of the advantages of leaving an inheritance in trust to a spouse or minor children or grandchildren.

Let's assume that we have two spouses who have two children. How can they benefit from forming a trust (or two) for their children or one another?

1. Control over disposition: If one spouse simply leaves everything to the other spouse, there is no assurance that the children will ever get anything. The surviving spouse may leave everything to his or her next spouse, and the children get zip.

2. Asset protection: Trust assets are exempt from collection efforts of a creditor of a beneficiary. If you leave property to your spouse and children in trust, and they have creditor problems, the trust assets are protected.

3. Protection from new spouse: If you leave your property in trust for your spouse, instead of outright, you pass first, and your surviving spouse remarries, the trust will shield her from pressures from a new spouse (who has the best idea for a new business and just needs some start-up money, and then a little more; you get the idea).

4. Avoids commingling: Leaving property to your spouse in trust also avoids the problem of the surviving spouse's commingling what s/he inherits with assets of his or her next marriage, which can lead to messy situations.

5. Professional assistance: If the beneficiaries need professional administration or advice, the trust can provide for that.

6. Flexibility – stand-by trusts: Revocable trusts also serve the purpose of being "stand-by trusts." In other words, if a spouse has a stand-by trust and later becomes disabled, someone can use a power of attorney to move his/her assets into the trust so that the trustee can manage them for the benefit of the disabled spouse. Once again – guardianship avoidance!

7. Probate avoidance: If both spouses want to avoid probate, they can transfer their assets into their trusts while they are living. You might think of this as a pre-death probate. It is typically much easier to transfer assets when the owner is living and can explain things to you than after s/he is deceased.

8. Guardianship avoidance for minors: As explained above, leaving an inheritance to a trust for your children avoids the expense of a guardianship proceeding.

Planning for disability

I typically prepare the following "disability documents" for my clients:

Durable Power of Attorney: This allows someone to deal with paying your bills and addressing other financial issues if you are unable to do so.

Medical Power of Attorney: This allows someone to make medical decisions for you if you are unable to do so.

Directive to Physicians: Some people call this a "living will" for reasons unknown to me. This is the document that directs your physician to "pull the plug" under certain conditions.

Declaration of Guardian (Self): As I have said, if your estate plan is done properly, the likelihood of a guardianship is minimal; but, if a guardianship proceeding becomes necessary for some reason, it is a good idea to sign a document stating who you would like your guardian to be. There are two types of guardians: one of the person and the other of the estate.

Declaration of Guardian (Minor Children): If you are married and have minor children, you and your spouse can designate who will take care of your children if die before they reach majority. If you are divorced and have minor children, your ex-spouse will be likely be their guardian if need be.

HIPAA Release: This document gives your doctor permission to talk to certain pre-approved people about your health care. Your doctor may have his own form for that, but I like the idea of doing it ahead of time when there is no question about your mental capacity.

Conclusion

It feels good knowing that your affairs are in order, and you are not leaving your heirs a mess. For a free consultation, call me at 214-663-0488, or send me an email to tom@tnoblelaw.com.