

Estate Planning – An Introduction

What is an Estate Plan?

An estate plan consists of a will based or trust based plan, and takes into account other aspects of your planning, such as the form of your financial investments and insurance.

Functionally, an estate plan is designed to ensure that your assets pass:

- To whom you want
- When you want
- In the manner you want
- By the most efficient means, in terms of time, legal fees, court fees, and taxes.

What Happens if I Die Without a Will or Trust?

A person who dies without a will, is said to be “intestate” and title to his property passes to his heirs in accordance with the intestate laws of his state. The probate process directs the transfer of title.

What Happens if I Die With a Will?

A will directs the distribution of your assets upon your death without regard to intestate laws, with a few exceptions, such as Colorado’s prohibition against disinherit a spouse. The Probate Court will oversee the transfer of title in accordance with the terms of the will.

What is Probate?

Probate is the court-supervised process used to transfer title to assets in accordance with the terms of a will; or, in the absence of a will, in accordance with the intestate code. Assets held in trust do not require probate. Similarly, assets subject to beneficiary designations, such as insurance proceeds, do not require probate. The probate process involves:

- Filing a copy of the will with the court
- Filing a petition with the court to appoint a personal representative
- Managing estate assets while probate is pending
- Paying debts
- Collecting and valuing assets
- Distributing assets of the estate
- Filing an inventory of the estate and closing probate

What is a Will Based Estate Plan?

A will-based plan consists of a will along with a number of ancillary features or documents. Chief among these for a young family is the Appointment of a Guardian, usually included in the will itself. Other essentials include a Durable Health Care Power of Attorney, a Durable Financial Power of Attorney, and an Advance Medical Directive/Living Will. Additionally, a Personal Property Memorandum and a Final Arrangements Directive are highly useful adjuncts.

Naming a Guardian for Minor Children.

This should be the foremost concern of any parent. If both parents die without naming a guardian, the court will appoint a guardian to raise your children without knowledge of your wishes, your children's needs, or your extended family members' suitability. Worse, the court could place your children in state custody while this decision is pending.

Financial Power of Attorney

A Power of Attorney designates an person to handle your finances on your behalf. This is critical in the event you are injured or develop Alzheimer's or other forms of dementia. A power of attorney must be executed *before* you become mentally incapacitated.

Healthcare Power of Attorney.

A Healthcare Power of Attorney, also known as a Medical Power of Attorney, authorizes your agent to make medical decisions on your behalf. This is essential in the event you are injured or mentally incapacitated. In any given year, a person

is far more likely to become disabled or incapacitated than to die. Yet disability planning is often overlooked.

HIPAA Release.

The Health Insurance Portability and Accountability Act (HIPAA) prohibits healthcare providers from sharing healthcare information without a HIPAA release form. For example, the parents of a child over 18 generally cannot speak to a healthcare provider unless they are named on a HIPAA Release. Thus, including important family members is key.

Advance Medical Directive/Living Will.

An Advance Medical Directive, commonly referred to as a Living Will, expresses your intentions regarding life sustaining treatment in the event of a terminal illness. This is invaluable at lifting the burden of agonizing decisions from family and friends.

Personal Property Memorandum.

A Personal Property Memorandum is a wonderfully flexible adjunct to a will or trust, which can help avoid amending or rewriting your estate documents. As you acquire possessions after your estate planning has been finalized, you can identify who will receive these gifts in your personal property memorandum. Changes to the memorandum need not be witnessed, notarized or prepared by an attorney.

Final Arrangements Directive.

As part of your estate plan, you should consider making a nonbinding Final Arrangements Directive. You may specify your wishes regarding your final arrangements in broad terms or great detail. You may wish to address the following:

- Burial, cremation, embalming
- Caskets and urns
- Headstones or burial markers
- Ceremonies, including location, readings, music
- Cost and payment of final arrangements

While this document is not legally binding, it can come as a great relief to those who must arrange these details. This directive can put to rest questions about your final wishes and avoid family discord.

What is a Trust Based Estate Plan?

A trust is a legal document that, just like a will, contains your instructions for what you want to happen to your assets when you die. But, unlike a will, a trust can avoid probate at death and is a more seamless and private method of distribution. A trust can be designed to achieve a wide range of goals. A trust can control and distribute your assets during your life or during the life of your beneficiaries and can provide asset protection from financial predators. Trusts can ensure that individuals do not inherit before they are fiscally disciplined, and can prevent a beneficiary's spouse from receiving trust proceeds through a divorce. In some instances, trusts can result in significant tax savings. Regardless of its specific function, every trust shares four components:

- The Grantor (Trustor/Settlor) who creates and funds the trust
- The Beneficiary(ies)
- The Trust itself
- The Trustee who manages the trust

In choosing a trustee, the grantor can nominate a friend, a corporate trustee or – in many instances – himself. Increasingly, a Trust Protector is named as well.

A trust can assume many forms. A trust can be "revocable", meaning that it can be freely altered or dissolved during the life of the grantor, or "irrevocable", which cannot be dissolved and therefore provides greater asset protection. A trust can be "inter vivos", meaning that it is in effect during the life of the grantor, or "testamentary", which does not go into effect until the death of the grantor. A testamentary trust can be a feature of a will, however, like the will, it would be subject to the probate process. Trusts can also facilitate eligibility planning for Medicaid, SSI and other government services through Special Needs Trusts, and can be designed to take care of the needs of pets.

As in a will based plan, it is essential that a trust based plan appoint a guardian for minor children and include a number of supporting documents, such as powers of attorney and a living will.

Why You Need an Estate Plan

Estate Planning is essential for everyone, regardless of their wealth and age. Estate planning – or its absence - impacts events after your death and during your lifetime. Following your death, estate planning ensures that your assets pass to whom you want, when you want, in the way you want. This is critical. Equally important, however, is the effect estate planning has on events during your life. The downside to our increased life expectancy is the increased potential that we will become disabled or mentally incapacitated. This can be tremendously difficult on caretakers, but we can assist them now by appointing a medical and financial power of attorney, documenting our wishes regarding life sustaining measures, and engaging in elder care planning. Dictating these choices in advance allows your voice to be heard when you can no longer speak for yourself.

Estate planning can also offer creditor and financial predator protection, and in some cases tax savings. Estate planning can ensure that an inheritance is distributed in measured installments on a time table designed to foster fiscal responsibility, prudence, and security.

Should you become disabled or incapacitated, without the proper planning, your family must petition the Probate Court for the appointment of a guardian of your person to make medical decisions, and a financial conservator of your estate to make financial decisions. This is a draining process in terms of dollars, time and emotional energy. Should you die “intestate” without estate planning in place, the laws of Colorado and the Probate Court will determine to whom your assets pass, without regard to your wishes or the financial maturity or vulnerability of your beneficiaries. Worse still, is the possibility of your minor child being placed in the custody of a guardian you would not have chosen.

Damaging family conflict is far more likely to arise when there is no guidance as to end of life decisions, final arrangements, and the disposition of your estate. Estate planning will afford you exceptional peace of mind from the knowledge that you have made life for those you love a bit easier. You will feel justifiably proud and relieved by the gift of planning you have achieved. LeonardLaw would be honored to help guide you through this important step.