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Estate Planning Basics: Getting Started

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ESTATE PLANNING BASICS: GETTING STARTED

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What is Estate Planning?

Estate planning is nothing more than developing a process for identifying and transferring all of your property from one generation to the next or within a generation. Estate planning isn't only for the rich; there are no minimum property requirements. Anything that you care about–from an old rocking chair that belonged to your grandfather to a cabin where your family spends all its vacations–is important enough to justify at least basic estate planning.

Sometimes young families think they don't have enough property to justify estate planning. But if you have a child under age 18, you have estate planning concerns. Who will raise your child if you can't? Who will manage any cash or assets the child might inherit?

This publication is designed to help you begin the estate planning process. It is not intended to substitute for the assistance and advice of a lawyer. But it is intended to clarify some of the issues and language involved in estate planning so that you can figure out what you want to accomplish with your estate plan.

It's Easier To Put It Off

One reason that people put off estate planning is because it involves more than listing what you own and who you want to have it when you are gone. It involves attitudes and feelings about death, property ownership, business arrangements, marriage and family relationships. Sometimes adult children will put off talking with their parents about their estate because they don't want to appear greedy, or because they can't imagine a time when their parents won't be around. Sometimes parents avoid talking to their adult children about estate planning because they don't want to hurt feelings, or they truly aren't aware of all the options that are available to them. As uncomfortable as talking about death might be now, isn't it worth spending some time and money to avoid the confusion, delay, expense and quarreling that might occur if you died without a plan? If you don't make a plan, Utah law will decide what happens to your estate, and it might not be what you would want at all.

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Dying Without a Will or Trust

Most people don't intend to die without a will (or trust), but it does happen fairly often. If you die leaving no will, your property will be distributed according to Utah law. Under state laws, if you are married with no children, your property will pass to your surviving spouse. This is also true if all your children are the biological children of both of you. If you are married but have children who are the child of one but not the other spouse, the property is divided: one-half to the surviving spouse and the other half in equal shares to children of the deceased. If you are unmarried with no children, your property will pass to your parents. If you have no surviving parent, your property will pass to your brothers and sisters or to the children of deceased brothers or sisters. If you are unmarried with children, your property will pass in equal shares to your children. The court will appoint a conservator/guardian to handle the assets of any child under age 18.

Before You Visit an Attorney

Before visiting an attorney who will transform your wishes into a written legal document, take some time to organize what you will need. Inventory your assets and try to put a price tag on each one. Assets are things you own with an economic value–houses, cars, stocks, bonds, annuities, furniture and appliances. If you're not sure of the value of some items, there are information sources that can help.

1. If you are unsure of the current value of your house or other real property, consult a real estate agent, your municipal (or county) property assessor, or your last property tax bill. The principal owed on a mortgage is usually available on quarterly or annual statements from the mortgage holder.
2. Car values are published in the *Kelly Blue Book* (http:// www.kbb.com) and *Edmunds Automobile Buyers Guide* (http://www.edmunds.com). If you have Internet access, you can check Autosite (http://www.autosite.com) or CarPrices (http://www.carprices.com) for current list prices on used cars, vans, trucks, wagons and SUVs.
3. The cash value of whole life insurance policies can be found on a schedule in the policy. It is also available from your insurance agent. The cash value is the amount of money the insurance company would return to you if you terminated the policy today. Term life insurance has no cash surrender value.
4. The values of annuities are available in annual reports or quarterly statements, or from your broker or insurance agent. The daily values of mutual funds, corporate stocks, and bonds are quoted daily in many newspapers and the *Wall Street Journal*. Many brokerage firms keep the balances in your funds posted on their website and accessible with a personal identification number (PIN) assigned to you.
5. Any bank or vendor of U.S. Savings Bonds can tell you how much your bonds are worth now. If you have Internet access, you can price them online at http://www.savingsbonds.com.
6. The human resources officer at your place of employment should be able to tell you the amount you have contributed to your pension or 401(k) plan.

As you collect this information, be as accurate as you can, but don't get bogged down in being correct to the penny. Your goal is to put together a list of what and how much you own so you can make decisions about its disposition.

Who Are Your Beneficiaries?

In an estate plan, beneficiaries are the people and organizations to which you leave your property. Most people have a pretty good idea of who their direct beneficiaries will be. Couples in second, or subsequent marriages may face more complicated decisions if there are children from a prior marriage involved. The usual legal tool for handling this kind of issue is a particular type of trust. But in a simple beneficiary situation, the plan maker's choices are usually clear.

You also need to think about alternate beneficiaries–people or organizations that would receive your property should a direct beneficiary not outlive you. You can name one or two alternate beneficiaries for every one of your direct beneficiaries. Naming alternate beneficiaries eliminates the risk that you won't get around to amending your will or living trust if one of your direct beneficiaries predeceases you.

Do You Have Young Children?

Parents of children under the age of 18 have two estate planning concerns. The first is providing for the custody of their children should both of them die at the same time. Then, because minors cannot legally own any significant amount of property, nominating an adult to supervise and manage any assets the child would inherit. The same person may fulfill both roles, or one individual may be named as the children's guardian and another as financial manager or conservator.

The person you name as a child's personal guardian cannot actually serve as legal guardian until approved by a court. This is because children are not property and cannot be "left" to someone as you could a piece of property. You should always name a successor personal guardian in case your first choice is unable to serve or continue to serve.

"Blended" families can raise complex estate planning concerns. People who have been married more than once may have trouble reconciling their beneficiary desires for their present spouse (and family if the couple has children from their present relationship) with their wishes for children from prior marriages. Here a trust can be very useful, providing for a current spouse while still keeping some property intact for your children.

When there is a family member who will never be able to care for himself or herself, estate planning is more complicated. Providing care and support for these children often requires the help of experts, particularly to coordinate the parents' support with rules on government benefits. Parents must choose a personal guardian to be responsible for the disabled child until he or she becomes a legal adult at age 18, and a financial manager to supervise any money or property they leave for the care of the child for as long as the child lives.

What is Probate?

Once you know what money and property you have, you need to determine which is probate property and which is non-probate property. Probate is a legal process to determine who should receive a person's property at death, who should handle their business affairs, such as paying bills, and who should care for any minor children and their assets. Probate operates according to state law and because Utah is one of the states that has adopted the Uniform Probate Code (UPC), it is a relatively simple and inexpensive process.

Not all property a person owns is subject to probate. Property held in joint tenancy with right of survivorship; property held in a trust; life insurance or retirement funds payable to a named beneficiary; payable-on-death checking and savings accounts (POD), and registrations on securities and securities accounts are all examples of non-probate property.

Probate property is all that you own that does not, by the way it is titled, have survivorship rights. Examples of probate property are your share of property owned as tenants in common, your share of household goods, and property owned only by you. Probate property is distributed at death according to the directions in your will or under the laws of Utah if you do not have a will.

Methods for Transferring Your Property When You Die

Now that you know how much property you have and how title for the property is held, you can decide whether you need a will or a trust to dispose of your assets when you die.

Wills

A will is a written document that describes how its maker wants property distributed after his or her death. By making a will, an individual can decide who shall receive his or her property, how much each will receive, and when they shall own it.

A will has no effect during the testator's (the person making the will) lifetime. Only upon death does a will disposing of the testator's property become effective.

Anyone 18 years of age or older can make a written will. Although a person can make his or her own hand-written will, in most cases, it is best to consult with a lawyer to be sure your written document will accomplish your objectives. If you have an attorney for other purposes, consult that attorney about writing your will. If he or she does not do estate planning, they may suggest another attorney. If you do not have an attorney, a relative or friend may be able to suggest one. Failing this, check with people you know in any business or social organization with which you're involved, especially those with a large number of members over age 40. The Utah State Bar runs the Lawyer Referral Service (801) 531-9075 Mondays through Thursdays, 7:30 to 4:30 and Fridays, 7:30 to 12:30, but be sure to ask any attorney whose name you get from the Service about his or her credentials and experience. Before choosing your estate planning lawyer, try to interview at least three attorneys to find the one who is right for you and your estate planning needs and concerns.

Some financial and legal experts advise against a simple will citing the time and expense of probate, loss of privacy, and other concerns. If your estate planning involves complex arrangements, if you have substantial probate assets, or if you wish to make arrangements in the event of incompetency, a revocable living trust may be the best estate planning tool. However, if it appears from an inventory and appraisal that the value of the probate-able estate does not exceed $25,000, less reasonable funeral expenses and costs of any last illness, it can be settled quickly and inexpensively in a small estate probate procedure.

Revocable Living Trusts

A revocable living trust is a legal arrangement by which an individual shifts ownership of property (such as a home, real estate, bank accounts, certificates of deposit, stocks, bonds, or life insurance) from personal ownership into the legal ownership of the trust. A revocable living trust is just what the name implies–one that is created during an individual's life, but that can be changed or terminated at any time.

The person whose assets are placed in the trust is called the trustor or grantor. The grantor must actually change the title of ownership of each asset that will be placed in the trust from his or her name to ownership by the trust. Merely setting up a trust agreement does not place any property into the trust–a separate transaction is needed to transfer ownership of each asset. For example, you have to go to the bank and fill out a form to change the name on your checking and savings accounts and to the County Recorder's office to change the title on your home from "Michael D. Kelly" to the "Michael D. Kelly Living Trust." The cost to transfer property is usually minimal, but it takes time to organize your papers and make the transfers. As you acquire new property, you must also take care to place it in the trust's name and not your own. About 49% of all people who have living trusts never complete this second step, which pretty much negates the advantages of setting up a trust. Some attorneys, as part of setting up the trust document, will "fund" the trust for you, meaning he or she will change the title of your assets from your name to the trust name.

A revocable living trust has advantages and disadvantages. One of the advantages of a trust is in the event of incompetency. Advanced age, a serious illness, or even an accident may cause a person to be incapable of either supervising his or her assets or making necessary payments for his or her well-being. A living trust is an effective tool for handling your financial affairs if you become incompetent. The trust agreement tells how and who is to determine you are incompetent, and directs how your financial affairs are to be managed by the successor trustee.

If you have substantial probate assets, a living trust allows your estate to avoid the time and expense of probate. Assets owned by a revocable living trust are non-probate assets. The trustee (the person who manages the assets in the trust) already has legal title to the trust assets and can transfer title, without probate, to the beneficiaries named in the trust agreement.

A living trust will cost more and take more time to set up than would preparing a will. Having all your property in a trust may make it more difficult to deal with stockbrokers, bankers, and insurance companies. They need to know who has what powers under the trust agreement. Many financial institutions will not loan money to a trust. For example, if you wanted to refinance your home mortgage and your home is owned by the trust, you might have to transfer the house out of the trust, complete the refinancing, and then transfer the house back into the trust. Insurance companies may be unwilling to insure vehicles owned by a trust, maintaining that they can't determine who the authorized drivers are.

Trusts do not provide any income tax savings. Income earned in a revocable living trust is taxed to the grantor (trustor), and must be reported on his or her personal state and federal income tax returns. State and federal law requires the value of all property and assets be incorporated into the grantor's estate upon death and so they must be included when federal estate taxes are determined (in 2002, estates under $1 million were exempt from federal estate taxes, with the amount gradually increasing to $3.5 million in 2009). Trusts also do not protect assets from nursing home costs. Since the revocable living trust can be changed at any time by the person who formed it, the income and assets in the trust are considered available to cover nursing home costs under current Medicaid rules.

Even though you have a trust, you will still need what is called a "pour-over" will. You can't use any other device except a will to name a personal guardian for your minor children. Also you can use your will to appoint a financial manager for any assets your children may inherit. You may also acquire property that you don't have time to transfer into your trust before you die. A pour-over will says anything you own at death passes to the trust. A pour-over will also acts as a backup in order to pass on items such as jewelry and furniture that don't have a legal title.

Other Ways of Transferring Property

People sometimes use different forms of property ownership to accomplish their estate planning goals. For example, a simple pay-on-death (POD) bank registration is usually a better way to handle your checking account than a living trust. All you do to set up a POD account is name, on a form provided by the bank, one or more persons you want to receive any money in the account when you die. You can do this with any kind of bank account, including savings, checking or certificate of deposit accounts. Banks don't charge more for keeping your money this way. During your life, the beneficiary has absolutely no right to the money in the account. You can withdraw some or all of the money, close the account or change the beneficiary at any time. When you die, the beneficiary claims the money simply by showing the bank the death certificate and personal identification.

Utah is one of the states that has adopted the Uniform Transfers-on-Death Security Registration Act, where you can add a transfer-on-death designation to individual securities (stocks and bonds) or securities accounts. Securities accounts are broker-held accounts for your stocks, bonds, mutual funds or similar investments. With a Transfer-on-Death registration on file, no probate is necessary. After your death your beneficiary or beneficiaries will receive these securities promptly.

Some property owners will hold their real and personal property in joint tenancy with rights of survivorship. This property does not go through probate. However, common ownership in and of itself does not create a right of survivorship. Property held as tenants in common or in corporate or partnership arrangements would still have to go through probate.

Joint tenancy can be desirable for people who buy property and want to share ownership, including inheritance rights. But transferring property from sole ownership to joint tenancy with someone else simply to avoid probate creates several problems that wouldn't occur if a living trust was used instead. For example, if you make someone else a joint owner of property that you now own yourself, you give up half-ownership of the property. The new owner can sell or mortgage his or her share, or it could be lost to their creditors in a severe debt situation. Also, if one of the joint tenants became incapacitated and could not make decisions about the property, the other owner would have to go to court to get the authority to sell it or obtain a mortgage. In addition, if you make another person a co-owner by creating a joint tenancy, and exceed federal gift tax limitations, a gift tax may be assessed.

Transferring Retirement and Pension Assets

In addition to Social Security, savings and investments, many people contribute to one or more retirement programs that will assure them an income when they get older. At your death, whatever funds are left in accounts that are self-funded will be transferred to a named beneficiary without probate. These include traditional IRAs (Individual Retirement Accounts), Roth IRAs, SEP-IRAs (IRAs for the self employed) and Keogh plans. In addition, many employers now offer what are called 401(k) or 403(b) plans. The 401(k) plans are for businesses, 403(b) plans for employees of non-profit corporations or educational institutions. Pensions, on the other hand, are set up by your employer, who determines what benefits you receive. Unless your spouse signs a form that waives their "joint and survivor" rights to your pension, they will be entitled to a portion of your benefits after you die. Very few pension plans extend benefits to anyone beyond your surviving spouse.

Naming an Executor or Personal Representative

A personal representative, sometimes called an executor, handles the business affairs of your estate after your death. This could be a friend, a family member, a corporate entity or bank. A personal representative locates the will if there is one; publishes notices in newspapers to inform potential heirs and creditors about the probate hearing; files an inventory and appraisal of the property; manages the property during the probate process; pays any creditors, taxes, and fees; distributes the assets to the correct people; and prepares a final accounting. When you write a will, you may nominate a personal representative. Before committing your wishes to paper, discuss the nomination with the individual to see if they are willing and able to perform these duties. You should also name a successor executor in case, for any reason, your first choice can't serve. If you plan to prepare a living trust, it's generally best that your executor be the same person you chose to be the successor trustee of your trust to avoid problems coordinating trust management tasks and possible conflicts.

Death and Taxes

Each time property transfers to a new owner there is a potential tax. When property is sold there may be an income tax on the gain from the sale. When property passes to a new owner because of the death of the former owner, state and federal estate taxes may be assessed. When property is transferred by gift, there may be a federal gift tax. *Whenever you are planning to transfer property — by sale, gift, or planning a transfer that will take place at the time of your death — get legal and financial advice before you make the transfer***.**

State Inheritance Taxes

Utah imposes a state inheritance tax on property owned by a person at death. Although it is separate from the federal inheritance tax it does not require the payment of additional taxes. If the value of the estate is less than the federal unified credit, no state inheritance tax is due. Furthermore, federal inheritance tax law allows for a credit for state inheritance taxes paid, up to a certain amount. The amount of state inheritance tax due under Utah law is equivalent to the maximum credit allowed under federal law. The net result is that the heirs pay part of the tax to the federal government and part to the state government but the total tax paid is not increased.

Federal Estate Tax

Federal tax law, gives each of us a "Unified Gift and Estate Tax Credit." This credit allows a certain amount of property to be exempt from Federal gift estate taxes. In 2002 and 2003, the exemption amount is $1 million, gradually increasing to $1.5 million in 2004-2005 and $2 million in 2006. At the same time, the top estate tax rate, which was 50% in 2002, will gradually decline to 45% by 2007.

At death your gross estate includes everything that you own at your death. If the potential value of your estate at death, or if you are married, the potential value of you and your spouse's combined estates, is close to or exceeds the exemption amount, estate planning is a concern.

Gift Tax

If you make substantial gifts of property and money to family members and friends during your life you may have to pay a federal gift tax. Under present tax law, each year you can give an individual gifts valued at no more than $11,000 free of Federal gift tax (gift taxes are paid by the giver). You can make gifts to as many individuals as you want. For example, if you had four children you could give each of them $11,000 and there would be no federal gift tax. Both members of a couple have separate $11,000 exemptions, so they can give a combined total of $22,000 per person per year tax free. You could do this every year, and as long as no individual received more than $11,000 there would be no federal gift tax. Married persons can make gifts of any amount to each other without incurring a gift tax.

Passing Heirlooms to the Next Generation

If you have family heirlooms that you would like to see remain in the family, you need to make decisions about them. There are two ways to pass items to family members: give them away during your lifetime or arrange for them to pass at your death to the individuals you choose. Talk with family members and find out what they would or would not want. The twelve place settings of hand-cut crystal may not fit into your child's cupboards or lifestyle. On the other hand, you may discover some items you never realized had very special memories for a particular family member.

If you give items away during your lifetime you experience the joy of the person receiving the item. On the other hand, you have to relinquish all of your rights in the item. You can't give something away and continue using it.

The most common way to make gifts of family heirlooms is to arrange for them to be transferred to your trust or mentioned in your will. You don't need to include an itemization of your personal property and who you wish to have it in your will, you can write a letter of intent that specifically identifies certain items and the persons you want to receive those items. (For example, "To my daughter Alice, I leave grandma's garnet pendant.") Attach a copy of this separate listing to your copy of your will and give one to your attorney. To be sure your wishes are carried out, the will must refer to a "personal property letter." If there is no will or no reference to a separate listing in the will, the personal property letter is not binding. This letter needs to be signed and dated each time a change is made.

Planning for Incapacity

Though it may be difficult to think of a time when we will need help in managing our affairs or taking care of ourselves, a thorough estate plan should take this possibility into account. You can plan ahead by preparing a few simple legal documents to ensure that your medical and financial wishes are carried out if you are unable to speak and act for yourself. These legal documents are a health care power of attorney and a living will.

Health Care Power of Attorney

A health care power of attorney is a document that allows someone else to make medical decisions for you if you cannot make them for yourself. You may appoint any competent person who is at least 18 years old and not providing paid health care to you. The person you appoint is called your health care agent. You can give your health care agent the same power and authority as you have yourself to make your medical decisions. This includes the power to consent to your doctor giving, withholding, or stopping any medical treatment, including life-sustaining procedures.

You may limit your health care agent's power. To be sure that your agent understands how you want everything handled, you may provide directions or guidelines in your health care power of attorney. Your health care power of attorney becomes effective when you are unable to communicate your wishes due to any illness or injury. You may withdraw your health care power of attorney at any time. Give a copy of your health care power of attorney to your appointed health care agent and to your physician. Also, carry a card in your wallet or purse identifying who has your health care power of attorney as well as where your living will is located.

A Living Will

A living will is a written statement of your wishes concerning the use of extraordinary medical treatment or artificial nutrition and fluids to keep you alive if there is no reasonable hope of recovery from a terminal illness or accident. A living will gives medical personnel permission to withhold or withdraw life support systems that will merely delay death.

Your decision to write a living will and a health care power of attorney depends on your moral and ethical belief system. If your belief system guides you to choose life at any cost, a living will can also make these feelings known to your family members and physicians. If you do not have a living will, your family is left with the decision and they may not be able to agree on what action to take. A living will removes the decision from your family's shoulders and makes the decision yours.

Keep your living will in a place where you and your family members can find it easily. Some lawyers suggest that you sign several copies and have each one witnessed and certified (this makes revoking your living will a little more complicated as you have to destroy each of the originals). Carry a card in your wallet stating that you have a living will, where the original is located and who to contact to get the original. If you put the original in your safe deposit box, make sure someone knows where it is and has access to it. Otherwise, your living will may be found too late.

It is your responsibility to inform your physician that you have signed a living will; it is your physician's responsibility to make your living will a part of your medical record. However, patients admitted for emergency care often don't have complete medical records with them. For that reason, you can buy a bracelet engraved LIVING WILL/DO NOT RESUSCITATE.

You may get copies of Utah's living will and health care power of attorney forms from Utah Legal Services/ 254 West 400 South/ Salt Lake City, UT 84101 (801-328-8891) or the Utah Medical Association/ 540 East 500 South/ Salt Lake City, UT 84102 (801-355-7477).

Don't Let It Rust

Once you draft a will or trust, you may need to change it. A change in marital status, a move to a new state, the birth of a child, or a change in tax laws can all prompt a review and rewrite of your estate planning documents. Be sure to sign any new will or trust and have it witnessed before destroying the old one. Improper changes may not be effective and may inadvertently invalidate other parts of your plan. So take the time to do it right.

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