

# INTRODUCTION TO ESTATE PLANNING

The essence of estate planning is providing for your own disability and ensuring through your love, wisdom and resources that your loved ones will be cared for after you are gone in the same way you cared for them in life. All of us will ultimately face death, and many of us will face disability at some time in our lives. Estate planning engages us in confronting the financial and emotional consequences of death and disability, and allows us to take control of our futures.

We will discuss **why** you should plan ahead, **what** legal instruments can help you create a plan for managing your wealth while you are alive and for distributing it after your death, and **how** to get started.

Before we begin, a caveat: This material has been developed for a general audience. But everyone's families and finances are different, and may significantly impact on the overall plan that is right for you. For advice about your specific situation, you should always seek professional guidance from a qualified elder law attorney and your other financial advisors (CPA, financial planner and/or insurance agent).

## WHY SHOULD YOU PLAN AHEAD?

### 1. Control

If you become incapacitated or disabled, and are unable to act or speak for yourself, your family will have to go to court to seek appointment of a guardian to authorize care for you, and/or a conservator to manage your assets.

If you die, the law of "intestate succession" dictates how your estate is to be distributed without concern for your wishes or the special needs of your family. A probate judge will determine who will care for your children and who will manage their money until they reach the age of 18.

If you plan ahead, **you can let your wishes be known** – and your wishes *will* govern when you are not able (or here) to speak:

- a. You can appoint the person(s) whom you would want to step into your shoes in medical and financial matters, whom you would want to manage your affairs after your death, and whom you would want to take care of your children.
- b. You can make sure that your property is managed as you would manage it.
- c. You can give guidance about how you want to be cared for if you are disabled.
- d. You can stipulate the circumstances under which distributions of your property are to be made.
- e. You can make sure that your property passes to whomever *you* wish, including friends, distant relative, charities.
- f. You can make sure that your family is able to avoid the delays involved with the probate process.

## 2. **Privacy**

Court proceedings are public proceedings. Anyone can go to court to look at guardianship and probate filings. By planning ahead, and keeping your legal affairs out of court, you can keep your personal business private.

## 3. **Preserve Assets**

You don't have to be "rich" to save money by planning ahead. By creating an asset preservation plan, you can:

- a. Avoid the court costs and attorneys fees (and personal representative fees) involved in guardianship, conservatorship, and probate proceedings;
- b. Potentially save tens (and even hundreds) of thousands of dollars by avoiding, or at least minimizing, estate taxes, thereby leaving more of your assets for your family and loved ones.

# **THE BASIC 5 ESTATE PLANNING LEGAL INSTRUMENTS**

## 1. **Durable Power of Attorney**

A Durable Power of Attorney is a legal document in which you appoint another person (your "attorney in fact") to act for you in financial matters when you are unable to act for yourself due to mental or physical incapacity. All persons, regardless of age, should execute a Durable Power of Attorney to facilitate the ongoing management of their affairs, even if you own all of your assets jointly with your spouse. Your attorney-in-fact can manage your money and your real estate, pay your bills and your taxes, hire and fire professionals for you, sue someone on your behalf, apply for benefits for you, make gifts, sign legal documents, and transfer your assets into your trust. The person you appoint must always act in your best interest and try to make choices you would make if you were able to do so. A Durable Power of Attorney can be a very powerful and versatile tool and should be carefully crafted to reflect the needs and concerns of each individual. This may be the most important document of all.

## 2. **Health Care Proxy**

Similar to a Power of Attorney, a Health Care Proxy is a legal document in which you appoint another person (your "agent") to make medical decisions for you in the event you are incapacitated (for example, unconscious or too ill to communicate). Your agent is required to consult with your doctor, and is entitled to access to your medical information necessary to make informed decisions, may seek a second opinion, may consent, refuse, or withdraw consent to treatment, can hire/fire providers, and can transfer you to another facility. Unlike a power of attorney, the Health Care Proxy does *not* take effect until your doctor determines that you are incapable of making or communicating health care decisions yourself. Before then, your agent may make no decisions on your behalf. As with the Power of Attorney, your agent must act in your best interest and make choices that you would make if you were able.

### 3. Living Will

In your Health Care Proxy, you appoint a person to speak for you. Through a Living Will, you give that person the words you want them to say on your behalf regarding your “end-of-life” wishes. These may include directions to refuse or remove life support in the event you are in a coma, persistent vegetative state, or suffering from a terminal illness or injury which your doctors have determined will result in your death within a short period of time. On the other hand, your instructions may be to use all efforts to keep you alive, no matter the consequences.

### 4. Last Will & Testament

A will is a legally binding statement of who will receive your property at your death. It also appoints a legal representative (“personal representative”) to carry out your wishes, and appoints a guardian for your minor children. The will only covers “probate property” and does not govern jointly held property, trust property, or life insurance proceeds. If you have established a trust during your life, your Will typically “pours over” into your trust after your death any assets you did not put in trust while you were living. A Last Will & Testament can be an important tool in long term care planning.

### 5. Trust

Although not appropriate or necessary for everyone, a trust can accomplish many goals, including probate avoidance, estate tax avoidance, preservation of privacy and control, asset management, and long term care asset preservation. A trust is a legal entity in which you (as the “grantor”) place property in trust for the benefit of one or more individuals (“beneficiaries”). A trust is established by a “declaration of trust”, a legal document, in which you name someone to manage the assets placed in trust (the “trustee”) and give instructions on how and when distributions of income and principal are to be made. The trustee must follow the rules provided in the trust instrument. Assets of all kinds can be placed in trust, including bank accounts, real estate, securities, mutual funds, and personal property. An *irrevocable* trust is one that cannot be changed after it has been created. A *revocable* trust may be changed or rescinded by the person creating it at any time.

## WHAT ABOUT THE ALTERNATIVES?

There are alternatives to these Basic 5. The one many people choose is “do nothing.” We’ve already talked about the consequences of that choice. Other alternatives include holding property as joint tenants, creating trusts in a will (“testamentary trust”), and designating beneficiaries of life insurance and other benefits.

## HOW OFTEN SHOULD YOU REVIEW YOUR PLAN?

Many of us created estate plans when our first children were born and haven’t revised them since! In some cases, those children now have children of their own and an update is definitely overdue. Generally speaking, you **should review your plan at a minimum of every 5 years.**

You should also review your plan **each and every time there is any change in your family structure** (new children, new marriage, divorce, death) **or your finances** (new job, new home, inheritance, change in income, change in health). You should be particularly aware if yours and your spouse's combined assets are at or approaching \$1 million (including real estate, IRAs, 401(k)s, life insurance, investment accounts, bank accounts, etc.). Once you exceed that level, you are subject to estate tax unless you plan ahead.

### **WHAT ABOUT LONG TERM CARE PLANNING?**

As we (or our parents, grandparents, aunts and uncles) get older, a huge concern is how we will be able to afford the kinds of long term care we may need without having to lose a lifetime's accumulation of assets. Most of us want to be able to remain in our homes as long as possible, with nursing home care being a choice of last resort. For seniors facing these issues, the planning strategies may be different than some of the Basic 5 we have discussed.

For seniors, certain financial and/or estate planning choices, made with the best of intentions, can inadvertently jeopardize their ability to receive government assistance (SSI, Medicaid) if they need it. We *urge* you to plan ahead and to seek professional guidance from attorneys and financial advisors who concentrate their practices in knowing the ins and outs of "elder law."

### **OK, YOU ARE CONVINCED. WHAT DO YOU DO NEXT?**

If you already have a plan in place, pull all the documents out and look at them carefully. Is your plan less than 5 years old? Are you still satisfied with your choices for guardian, attorney-in-fact, health care agent, trustee, and personal representative? Is your family structure the same? Have you made your end-of-life wishes known? Do you have the essentially the same amount of assets now that you had when you executed your plan? Is your health essentially the same too? If you can answer "yes" to all of these questions, put your documents away, pat yourself on the back, and pick a date a year from now to look at them again.

If you answered "no" to any of those questions, or you do not have a comprehensive plan in place, it is time to pick up the phone to contact an attorney who concentrates her practice in estate and long term care planning. Together with the other financial professionals, we will work with you to create a plan that is best suited to your individual needs and goals and will help you reap the full benefit of the many options available to you.

We welcome the opportunity to work with you and your family and look forward to meeting with you soon.