



BIBERAJ & SNOW, PC

Attorneys and Counsellors at Law
(A Professional Corporation)

Estate Planning: A Primer

Estate planning may seem complex and confusing to those who aren't familiar with its concepts. Although everyone should have a Will and a Durable Power of Attorney, not everyone needs an elaborate estate plan with trusts or tax avoiding documents. Thus, a little bit of education about estate planning can go a long way toward clearing the air and helping everyone understand the important parts of this process and the documents that help you get where you want to go.

This guide has been prepared to help our clients learn some of the basic concepts and terms used in estate planning. This guide is not intended to make you an expert, but rather share basic information in order to make you more knowledgeable and conversant as you think about you own estate planning needs and goals.

At anytime throughout this process, if you feel confused or have a question, please feel free to call our office to speak to one of the attorneys. Your comfort with and understanding of your own estate plan is important part of a successful estate planning process!

How to Get Started

- 1) Read this guide!
- 2) Using our Estate Planning Questionnaire, make a list of:
 - a) All the property you (or you and your spouse) own. Give approximate values for the assets, and also indicate how the assets are titled/owned (in your name, your spouse's name, jointly, etc.) Please make sure to include the face/cash value of any life insurance policies.
 - b) Any retirement/pension or deferred compensation benefits to which you and your spouse are entitled, and note the person named as the beneficiary of each.
 - c) Any liabilities such as mortgages, loans, and other debts.
- 3) Compile any existing estate planning documents: wills, trusts, powers of attorney, etc.
- 4) Contact our office to set up an appointment to discuss your information and mail/drop off with us a copy of your questionnaire and/or existing estate planning documents.

Estate Planning: A Primer

Terms & Concepts

The Process

ESTATE: Generally, all the property you own when you die. Specifically, your net assets (total assets minus debts) at death. This includes: *real property* such as homes, farms and land; *personal property* such as furniture, jewelry, collectibles and vehicles; *financial property* such as stocks, bond, bank accounts, insurance proceeds, value of pensions and deferred compensation plans; and *retirement plans* such as IRAs, 401ks, etc.

ESTATE PLANNING: The process of planning and preparing documents to control what happens upon your death or incapacity to your property, your family, and your personal wishes. Some examples include: planning and providing for the financial needs of those who survive you; setting up guardianships for minors or other dependants; setting up gifts to family or charities; communicating your priorities regarding life sustaining medical care; minimizing taxes; and possibly avoiding probate.

ESTATE SETTLEMENT: The process of taking care of your affairs upon your death. This may include probating a Will, determining assets and liabilities; paying debts; filing taxes (income & estate) and paying taxes, and distributing your property to your beneficiaries.

INTESTATE: Dying without a Will. The process by which state law directs your estate to be handled when you die without a Will.

DETERMINATION OF BENEFICIARIES: The form of ownership of the estate property determines how property will be distributed to heirs and other beneficiaries. In the absence of any estate documents, state law determines how a decedent's property shall be distributed. The provisions of a Will override state law. However, some types of property pass immediately to the beneficiary outside the Will, avoiding probate. For example, jointly-owned property (such as a jointly-titled bank account or a home) passes immediately to the survivor without any need for probate or other process. Similarly, property controlled by a trust agreement passes outside the Will. Insurance proceeds, pension death benefits, deferred compensation death benefits, and balances of Individual Retirement Accounts (IRAs) are paid directly upon death to the beneficiaries named in the document that governs each piece of financial property. If beneficiaries are not named in these documents, the assets go into the decedent's estate and their distribution is controlled by the Will, if one exists, or by state law.

PROBATE: The legal process of proving the validity of your Will following your death, transferring your property to your beneficiaries, and showing compliance with the terms of your Will. It is an established court process for transferring legal title to property

contained in your estate by creating a public record of the same consistent with the terms of your Will.

The Players and the Roles:

BENEFICIARY: A person or organization legally entitled to receive benefits through a legal device, such as a Will, Trust or life insurance policy.

HEIR: One who receives property from someone who has died. While the traditional meaning includes only those who had a legal right to the deceased person's property, modern usage includes anyone who receives property from the estate of a deceased person.

EXECUTOR/ADMINISTRATOR: The person named to handle the property of someone who has died. If the person is named in a Will, they are called the Executor; if no one is named and instead must be appointed by the Court, then the person is called an Administrator. The executor/administrator must collect and manage the property, pay debts and taxes, and then distributes what's left as specified in the Will. In addition, the executor/administrator handles any probate court proceedings and takes care of day-to-day tasks--for example, terminating leases and credit cards, and notifying people and organizations of the death. Relatives are often named, however, the technical nature of complex estates may require the assistance of a professional. An unwilling executor of a person who is already deceased may petition a court to have another party named or can seek professional assistance. Executors are sometimes also called "personal representatives."

GUARDIAN: An adult who has been given the legal right to control and care for a minor or incapacitated adult or her property. A Guardian has legal authority to make personal decisions for the child, including responsibility for her physical, medical and educational needs, and is called a "guardian of the person." An individual appointed by a court to look after an incapacitated adult may also be known as a guardian, but is more frequently called a conservator. If a separate person is named to handle the minor's or incapacitated adult's property and money, such person is called a "guardian of the estate" or a "trustee."

ATTORNEY IN FACT: A person designated in a power of attorney to act on your behalf.

TRUSTEE: The person who manages assets owned by a trust under the terms of the trust document. A trustee's purpose is to safeguard the trust and distribute trust income or principal as directed in the trust document. With a simple probate-avoidance living trust, the person who creates the trust is often also the trustee.

GRANTOR: Someone who creates a trust. Also called a "trustor" or "settlor."

SUCCESSOR TRUSTEE: The person you appoint to handle the trust after you die.

The Documents:

WILL: A document in which you specify what is to be done with your property when you die and name your executor. You can also use your will to name a guardian for your young children.

POWER OF ATTORNEY: A document that gives another person legal authority to act on your behalf when you are unavailable or unable to do so. If you create such a document, you are called the “principal” and the person to whom you give this authority is called your “attorney-in-fact” or “agent.” A power of attorney may be “general,” which gives your attorney-in-fact broad powers over your affairs. Or it may be “limited” or “special,” giving your attorney-in-fact permission to handle a specifically defined task. If you make a “durable” power of attorney, the document will continue in effect even if you become incapacitated.

MEDICAL OR “HEALTH CARE” POWER OF ATTORNEY: A document in which you designate another person to make medical decisions on your behalf if you are unable to make those decisions for yourself. In Virginia, this is sometimes also referred to as an “advance medical directive.”

LIVING WILL: A legal document in which you state your wishes about certain kinds of medical treatments and life-prolonging procedures for when you are terminal or close to death. The document often specifies the conditions under which life support systems may be withdrawn and adequate pain medications be administered. The document takes effect if you can't communicate your own healthcare decisions. A living will may be incorporated into an *advance healthcare directive*.

TRUST: Any written contract or arrangement whereby one person (the grantor) delivers property to another person (the trustee), who exercises the ownership attributes of the property for the benefit of a third person (the beneficiary). In some circumstances, the grantor, trustee, and beneficiary can all be the same person, as when a person merely desires to have a trust in existence prior to his death so the trust assets will not become a matter of public record. In other cases, the three persons are different people, as when a husband sets up a trust in his Will to be administered by a bank trust department for the benefit of his wife. In any case, the trust becomes the owner of the property, but the provisions of the trust may allow or require that the income and even the principal of the trust may be expended to take care of the beneficiary. Trust terms can be extremely flexible, and trusts can be used for a number of purposes—providing professional management of investments, treating different heirs differently, maintaining confidentiality, and in some cases avoiding or reducing taxes, or protecting assets from creditors and predators.

IRREVOCABLE / REVOCABLE TRUST: If the transfer of property to a trust is not reversible and the grantor relinquishes all power to control the property, it is "irrevocable." An irrevocable trust is usually created to remove property permanently from one's estate in order to reduce income and estate taxes while making provision for a beneficiary. A trust is "revocable" if the grantor can amend, control, or terminate the trust. There are no tax savings to the grantor in a revocable trust.

LIVING TRUST: Also called an *inter vivos* trust, this is a trust that exists during your lifetime. Living trusts are a method of avoiding the cost and hassle of probate because the property you transfer into the trust during your life belongs to the trust, not you, and this passes directly to the trust beneficiaries after you die, without court involvement. The successor trustee--the person you appoint to handle the trust after your death--simply transfers ownership to the beneficiaries you named in the trust. Tax benefits depend on whether the trust is revocable or irrevocable and whether a trust is properly funded.

TESTAMENTARY TRUST: A trust established by the terms of a will. It comes into existence and is funded only upon the settlement of the deceased's estate. Unlike a grantor's living trust, which always remains confidential, the testamentary trust, as it arises from a will, is required to make annual accountings to the local court and these become public records.

FUNDING: The act of transferring property, money or other assets into a trust. One may fund a trust during lifetime or by use of a will leaving all assets to a trust, commonly called a "pourover" will. Generally, if a trust is not funded, it is unable to accomplish the goal for which it was created.

Other Estate Planning Concepts:

AVOIDING PROBATE: Some individuals place a priority on avoiding the time and procedures associated with the probate process. Techniques exist for transferring most or all of one's assets outside of probate to avoid delay and preserve confidentiality. This can be accomplished by setting up the ownership of property in joint form or in trusts and ensuring that beneficiaries are named for insurance policies, pensions, and similar assets.

ESTATE TAXES: Taxes imposed by the state or federal government on property as it passes from the dead to the living. All property you own, whatever the form of ownership, and whether or not it goes through probate after your death, is subject to federal estate tax. Currently, however, federal estate tax is due only if your property is currently worth at least \$2 million when you die. This threshold rises to \$3.5 million in 2009. The estate tax is scheduled to be repealed for one year, in 2010. After that, the tax will return, with a threshold of \$1 million, unless Congress extends the repeal. Any property left to a surviving spouse (if he or she is a U.S. citizen) or a tax-exempt charity is exempt from federal estate taxes. A handful of states also impose estate taxes; these are usually called inheritance taxes.

MARITAL DEDUCTION: Federal estate tax law permits all the assets of a decedent, regardless of value, to pass to a surviving spouse without being taxed. Such assets are then included in that spouse's estate and taxed on his or her later death. Estate taxes may be deferred, but not necessarily reduced, by use of the marital deduction. Careful estate planning can avoid or reduce such taxes by splitting the ownership of property between spouses (rather than having it jointly owned) or by transferring the property to a trust for the surviving spouse's benefit.

JOINT PROPERTY: An asset owned by two (2) or more people. For example, a house, car, bank account, or the right of access to a safe deposit box may be jointly owned. Joint ownership is convenient for spouses where the value of their combined estate does not exceed the amount of the federal estate tax exemption. Otherwise, it may be better not to own some property jointly as it may result in substantial taxes that might have been avoided. Estate planning can deal with this issue.

PER STIRPES / PER CAPITA: As used in a Will or Trust, *per stirpes* means that an estate will be divided in equal shares among one's named beneficiaries and that, if one of those beneficiaries is not alive at the time of the distribution, then that person's own heirs will split his or her share equally among themselves. (For example, two heirs A and B each get 50%, and if B is deceased, B's children split B's share among themselves.) The alternative form of equal distribution is *per capita*, which means that an estate will be split equally only among the beneficiaries who are alive when the testator dies, hence the descendants of a non-surviving beneficiary would be cut out. (For example, originally there were going to be two heirs, A and B, but B died before you. Thus A gets 100%.)

SAFE DEPOSIT BOX: In Virginia, the person named as executor may open the safe deposit box for the limited purpose of retrieving the Will for probate. However, some other states require that when a bank learns that its safe deposit box customer has died, the box must be sealed until the tax authority has had an opportunity to examine the contents of the box. Regardless of whether you use a safe deposit box or a fire proof safe at home, be sure you designated executor knows where your estate planning documents are located.

A final note: This primer was developed to convey basic information and concepts associated with estate planning. However, laws related to trust and estates vary from state to state and change over time. So always consult with your legal and tax advisors before making decisions!