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Why do I need Estate Planning?

When you die, there are certain typical problems, which, if not planned for, create a burden on those you leave behind.

Financial Burdens:

- Estate settlement costs are high. These costs consist mainly of probate fees and death taxes.
  1. **Probate Fees**: Fees set by statute are generally paid to the executor of the estate and to the attorney who assists with the probate. Probate fees often consume about ten percent (10%) of the gross value of the estate. Usually, a Probate is required if the decedent leaves real property, or assets with a gross value of $100,000 or more.
  2. **Death Taxes**: Estates that exceed certain amounts may be subject to both state and federal estate taxes. The estate tax rate may be as high as 45%.
- Estate assets are improperly arranged.
  1. **Liquidity**: There are not enough LIQUID (cash type) ASSETS to pay estate settlement costs.
  2. **Cash Flow**: There is not enough INCOME to care for loved ones left behind such as a spouse and minor children.

Transfer of Assets:

- Distribution of estate assets may be subject to probate delays and expense.
- Assets transferred to minors may be in cumbersome guardianship accounts until they attain the age of 18 (21 in some states) and are then distributed outright to the children.
- Additional death taxes may have to be paid because there was no pre-death planning.

If you become incapacitated and unable to make thoughtful and informed decisions regarding your finances or your health care needs, planning for these possibilities will ease the emotional strain and financial burden on your family and care givers.

Conservatorship:

- Court orders and court supervision are required.
- A bond, attorney fees, and other expenses must be paid out of the Conservatee's assets.

Planned Giving:

- Giving through one's estate continues a lifetime legacy of good works.
- Significant tax benefits can be realized.
- The needs of your spouse and children can be provided for and a charity (or charities) benefited, creating a "win-win" result.

If you desire to give any portion of your assets to a church, a Christian school or college, or to another Section 501(c)(3) charitable organization, to receive an income tax deduction, planning is necessary. Contributing to good works does not happen by accident.

Do I need a Will?

A Last Will and Testament ("Will") is used to distribute property according to *your* wishes, and to appoint a guardian for your minor children. In addition, a Will can be used to use the marital tax deduction to its best advantage and to provide special procedures in case you and your spouse die simultaneously.

Specifically, a Will can be used to:

- **Avoid distribution of your estate under the law of Intestacy.**

The State Intestacy Law will pass property to certain relatives of the decedent. These laws have been drafted to be "fair" in the average situation, but most people like to choose who will receive their assets when they die.

- **Permits you to nominate a guardian for your minor children.**

Without a nomination in a Will, the court will appoint a guardian for minor children. Relatives are not always the best choice for a guardian, and consideration must be given to the financial situation of the potential guardian as well as his or her health, age, willingness and ability to care for your children.

- **Permit a waiver of the Probate Bond.**

Without a Will, the executor (administrator) will be required to post a fiduciary bond to guarantee the replacement of any funds misused or diverted by the executor. Since this additional cost must be borne by the estate, and you should be able to choose an executor you trust, you may waive the bond requirement in your Will and reduce the costs to your estate.

- **Choose your Executor.**

The duties of the executor of an estate can be very time consuming and frustrating, especially to a spouse who has just lost his or her mate. In your will, a qualified individual or a corporate trust company can be chosen to handle these duties.

- **Make specific bequests to individuals.**

You may bequeath (give) specific items of jewelry, heirlooms, furniture, or make cash bequests, and be certain that they will pass to the proper persons. Without a Will, written or oral instructions may not be followed.

- **Sale of assets during the probate administration.**

Additional expense to the estate can generally be avoided by specifying in your Will your executor may sell assets without the executor having to publish a notice of sale in the newspaper and obtain court approval of the sale. A sale of assets may be necessary in order to pay death taxes and probate expenses.

- **Authorize the continuation of your business.**

Unless the Will authorizes the continuation of a business, the executor must operate it at his or her own risk. Many executors may elect not to administer the estate unless this risk is borne by the estate.

- **Defer distributions to minors.**

When parents die leaving minor children, each child's share of the estate must be held in a guardianship account until he or she turns 18 (21 in some states), at which time the entire remaining share is distributed outright. Provisions can be placed in the will to defer these distributions until children reach a more mature age.

- **Tax Savings.**

Certain substantial tax savings are possible by creating Trusts in the Will (known as Testamentary Credit Shelter Trusts). Similar tax savings, plus probate savings can be gained by using Living Credit Shelter Trusts.

- **Peace of mind**.

Although this advantage cannot be measured in dollars, when your estate is in order, an emotional load is lifted from the person who is concerned for his or her family's well being.

Types of Wills and Trusts

There are many varieties of Wills and Trusts to fit your needs. These documents should only be drafted by a qualified attorney at law. A few of the more common documents are listed below. Although additional trusts may be used for income tax savings or to remove life insurance benefits from the taxable estate, the following trusts and Wills are usually at the center of an estate plan.

- **Basic Will**

A basic or simple Will generally gives everything outright to a surviving spouse, children, charities, or other beneficiaries. Use of a simple Will, without a Living Trust, does not avoid probate if there is real property or total assets valued over $100,000.

- **Will with Contingent Trust**

Frequently married couples with minor children will pass everything to their spouse, if living, and if not, to a Trust for their minor children until they become more mature.

- **Pour-over Will**

The so-called "pour-over" Will is generally used in conjunction with a Living Trust. It picks up any assets which were not transferred to the Trust during the person's lifetime and "pours" them into the Trust upon death. Those assets will generally be subject to probate administration, however.

- **Tax-Saving Will**

A Will may be used to create a Testamentary Credit Shelter Trust. This Trust provides lifetime benefits to the surviving spouse, without including these benefits in the surviving spouse's estate upon their own death. This type of Will Trust permits a married couple to take full advantage of the unlimited marital deduction and help minimize Estate Tax. Probate is still required, however.

- **Living Trust without Tax Planning**

Generally, the surviving spouse has full control of the principal and income of this type of Trust. Its main purpose is to avoid probate and perhaps manage the assets for beneficiaries who are not yet ready to inherit the assets outright, because they still lack experience in financial and investment matters.

- **Revocable Living Credit Shelter Trust**

This type of Trust avoids probate, permits asset management for beneficiaries, and makes certain that both spouses can use their Unified Estate Tax Credit. Therefore, additional assets can be passed to children or other heirs, and eliminate or minimize the death/estate tax. This is the most common Trust in use.

- **Living Credit Shelter/QTIP Trust**

By adding another Trust to the Credit Shelter Trust (above), the first spouse to die can determine the beneficiaries of his or her estate after the surviving spouse dies. For example, the income earned on assets in the Qualified Terminable Interest Property (QTIP) Trust must be given to the surviving spouse for his or her lifetime, but can then pass to the children of a prior marriage of the first spouse to die. Even if there are no children of a prior marriage, some estate owners use this Trust to prevent a subsequent spouse of the survivor from diverting the assets to themselves. Additionally the QTIP permits deferral of death taxes on the assets until the surviving spouse dies.

- **Qualified Domestic Trust**

Asset-transfers at death to a non-citizen spouse do not qualify for the Marital Deduction unless the assets pass to a Qualified Domestic Trust (QDOT). The QDOT rules require that the trustee be a U.S. citizen, and have other measures which help insure that death taxes will be collected when the surviving spouse dies.

Avoiding Probate

The probating of a Will permits a court of law to supervise the transfer of assets from the decedent to his heirs. A typical probate lasts about one year, with six months being a minimum time if everything proceeds according to schedule. Because of the expense of attorney's fees, executor's commissions, probate bond, court costs and the time delay, many people attempt to avoid probate administration. Some of the methods used to avoid probate are described here:

- **Joint Tenancy and Community Property with Right of Survivorship**

These are forms of title arrangement, usually between spouses. The title of the property passes automatically to the surviving joint tenant. There may be income tax disadvantages to this arrangement and the joint tenancy must be dissolved after one joint tenant dies. Creditors of either joint tenant can attach the asset. It may also frustrate tax savings which are anticipated from carefully drafted Wills and Trusts.

- **Totten Trust**

This is a way to pass savings accounts to heirs. Passbook accounts are held in Trust for another. Typical wording would be: "Alice Jones, in Trust for Michael Jones, Jr."

- **Life Insurance**

The proceeds of life insurance are rarely subject to probate administration, unless the insured's estate is the beneficiary or all of the named beneficiaries pre-decease the insured.

- **Lifetime Gifts**

Gifts made before death will avoid probate. However, they may be brought back into the estate for estate tax purposes. Also, gifts carry the donor's tax basis to the donee, usually creating a capital gains tax issue, whereas assets received from the decedent's estate will generally get a new or stepped-up tax basis.

- **Revocable Living Trust**

In many situations, the Revocable Living Trust is an effective method of avoiding probate. It has the additional advantages of providing management of the funds for the heirs for some time after the decedent's demise. Also, in the event the person setting up the Living Trust (also called an Inter-Vivos Trust) becomes mentally incompetent or otherwise incapacitated, the Successor Trustee can take over management of the estate.

Revocable Living Trusts
(or Inter-Vivos Trusts)

A Trust is created when one person (the Trustor, Settlor, Grantor) transfers to another person or corporation (the Trustee) a property interest to be held for the benefit of himself or others (the beneficiaries). If the Trust is created during the Trustor's (the person creating the trust) lifetime, rather than in his Will, it is an Inter-Vivos or Living Trust. When the Trustor retains the right to dissolve the Trust arrangement, it is a Revocable Living Trust. NOTE: Assets in a Revocable Living Trust are included in your gross estate for Federal Estate Tax purposes.

What are some advantages?

- Assets in the Trust are NOT subject to probate administration. This saves executors' fees, bond fees, and attorneys' fees. It also grants more privacy as to the beneficiaries of the estate, when they receive it, and how much they receive.
- The Trust offers an opportunity to avoid possible *estate taxes* by allowing a husband and wife to allocate the family assets into two separate (A-B) Trusts.
- You may manage the Trust yourself and act as your own *trustee*. In a joint trust, your spouse may continue full management control after your death.
- Professional management is available if the Trustor becomes incompetent, disabled, or wants to be free of the worries of management.
- Should the Trustor (who is also usually the original Trustee) die, the Successor Trustee can step in and manage the estate without delay or red tape.
- Annual court accountings, with accompanying legal fees, which are required in Probate and Conservatorship proceedings, are not required.
- A Trustee can collect life insurance proceeds immediately after the Trustor dies and use the proceeds to care for family members, without obtaining court approval.
- A Successor Trustee can be located in another state without problems.
- Real property located in other states can be distributed without separate Probate proceedings in each state.
- Court intervention is still available if needed.

What are some disadvantages?

- Creditors may not be cut off as quickly as they are in probated estates.
- A little more effort is required to transfer assets into the Trust and the Trustee should keep records of transactions.
- There is no direct Court supervisions unless someone files a petition to ask the Court to intervene.
- Annual tax returns may be required if the Trustee is someone other than the Trustor. But, should the Trustor become incapacitated, the Successor Trustee can step in and manage the estate immediately, and often with little expense.

Other Planning Documents

Most estate plans also include a Power of Attorney and an Advance Health Care Directive. The **Power of Attorney** appoints the Agent to make financial decisions and sign financial documents on behalf of an incapacitated principal.

The **Advance Health Care Directive** allows a person to specify what medical treatment they want in the event of incapacity, and appoints the Agent to make medical decisions according to the directions given.