

ESTATE PLANNING

This article is offered for informational purposes only. It is not to be construed as legal advice or to take the place of a consultation with a lawyer of your choosing.

Attached to this article is a Confidential Estate Planning Information Data Sheet. The data sheet is important in helping you and your attorney determine your needs and wishes. It also serves as a “road map” to your assets.

My now-deceased father-in-law is an example of the need for a road map. Tom always told the family he had the “mortgage taken care of” in the event of his death. We, his family, assumed he had mortgage insurance. Upon his death we did not find any evidence of a mortgage insurance policy. Needless to say, my mother-in-law was disappointed and had to continue making mortgage payments. We were never sure what he meant by “taken care of.”

I keep the Data Sheet with my notes and copies of your Estate Planning documents. It can assist the heirs in finding the buried family treasures. The form has notations for the location of safe deposit boxes, which banks you are using, what credit cards you may have, your life insurance policies, etc. It assists your heirs in doing an efficient round up of your assets.

WILL

Do I Need a Will?

When we talk of your passing and your subsequent estate, we refer to either testate (with a Will) or intestate (without a Will).

Without a Will, as the commercials on television so loudly proclaim, your estate distribution will be decided by the state. This isn't quite as bad as it seems. The governor doesn't come down and decide that Aunt Bessie gets your house and Uncle Merle gets your gun collection. It is done by statute.

I have found for the most part that the intestate succession (the manner of which the statutes decide the division of assets) makes sense.

Intestate Succession:

In the event a young husband were to die leaving no children, but a surviving wife, his individual property* would be divided one-half to the surviving spouse and the one-half to the decedent's surviving parent(s). The legislature's intent is that the parent of the decedent probably had something to do with the decedent's acquiring individual assets and the parents should take half.

*Individual property is the property owned by the decedent in his or her name alone. Most married couples have very little personal individual property. Homes and cars typically are titled in both spouses names.

Another example would be a young couple with children. Upon the husband's death one-half would go to the wife and the remaining one-half would be divided among the children.

Testate Succession:

Most of us have done a certain amount of Estate Planning not realizing we have. For example, we have titled the house in both names, titled the cars in both names, titled the household furniture in both names. The 401(k) already has a named beneficiary designee such as our spouse. Life insurance has a named a beneficiary designee by contract. All of these items pass outside your estate.

In a Will we are dealing only with your individual assets. Using myself as an example, the only assets I own in my name are probably my hunting dogs, my shotguns, my fishing rods, and my interest in my law firm. The bulk of mine and my wife's assets are jointly held. Our house is jointly held, our cars are jointly held, my 401(k) pays to my wife, my life insurance pays to my wife, our household furniture is jointly held, and our bank accounts are jointly held.

Aside from issues with children/grandchildren (discussed below), the reason you would want a Will would be to provide that your individual assets pass down in the fashion you want vs. the intestate succession statute. A will provides for specific bequests such as: I hereby give my eldest son this shotgun, that shotgun and this fishing rod and I give my other son this fishing rod and this shotgun. Finally, you may wish to divide your assets in an unequal manner among your heirs. This can only be accomplished through the use of a will.

Testate Trust/Family Trust.

When my children were underage, my wife and I provided that upon my death everything would have transferred to her. (Albeit almost everything would have transferred to her by the operation of law since it was jointly owned.) Upon my wife's death, anything that was left, assuming the children were still under age, this property was to go into a trust for the benefit of the children. This is commonly called a Testate Trust or Family Trust.

I provided that a family member would be appointed the Guardian of the children. Another family member would be named the Trustee to manage the funds. The terms of the trust then dictates how the money is to be spent on the children and their education. It is important to remember that most of us, via our life insurance, are worth considerable sums of money.

In choosing a trustee this person/institution does not necessarily have to be a stock broker or CPA but rather someone you trust, who is smart enough to listen to a financial advisor and invest the Trust in a prudent manner.

Another example for the use of a trust would be an older couple that wants to provide for their grandchildren. A couple in their 50s or 60s typically wants to give each other all that they have and upon the surviving spouse's death, the property gets divided between the children. It gets complicated when the children have children (grandchildren of the couple). If that child is divorced from the grandchild's other parent the grandparents might want to protect the grandchild's inheritance in the event their parent was deceased.

Many times a grandparent becomes concerned that if their divorced child were to die that the deceased-divorced child's share would pass to the grandchild and would ultimately be controlled by the former daughter/son-in-law. In this instance, we can set up a Trust to avoid the

problem. For example - Mom gives to dad, dad gives to mom, upon the last to die, the assets go to the children, divided in such and so manner. In the event one of the children becomes deceased, than that deceased child's share would pass to their child (the grandchild) in a Trust typically controlled by one of the surviving children (aunt or uncle of the grandchild). This keeps the former in-law from getting their hands on the money.

Versatility of a Trust.

Testate/Family Trusts allow you to control your bequests in the manner which most would not have the courage to do if they were alive. When we are alive and little Johnny goes off to IU and comes back the first semester with a 1.5 grade point average he cries, you cry, and before long Johnny is back up at IU for that second semester of beer and pizza. With the Trust, you have named a Trustee and told the Trustee that there is a certain grade point requirement that Johnny must make. In the event Johnny does not get the grade point you set forth (typically somewhere between 2.0 and 3.5) then Johnny does not get money for that next semester. Johnny can cry, the Trustee can cry, but the Trust controls. You can control your children/grandchildren from the grave.

POWER OF ATTORNEY

When I prepare Wills, I also suggest the preparation of a Power of Attorney. This document typically names the surviving spouse as the attorney-in-fact in the event you become mentally or physically incompetent, as so certified by a doctor familiar with their medical condition. This is called a Durable Power of Attorney.

The Power of Attorney, for the most part, lays dormant. It is used only in the event you or your spouse was to be afflicted by Alzheimer's, some other type of debilitating disease, etc. The Power of Attorney is then exercised by the spouse.

For example, assuming a Durable Power of Attorney is executed at the time the couple is 45 and the husband is diagnosed with Alzheimer's at 65. Even though the couple has been married for 40-50 years, the nursing home and the state will require the spouse start a Guardianship for the spouse. Without a Power of Attorney giving authority to this spouse to make medical and financial decisions for the incapacitated person, a Guardianship is needed. A guardianship is rather expensive, time consuming, and plodding in nature, Your spouse would need to be appointed in order to make both medical and financial decisions for you.

LIVING WILL

Another document I suggest be executed at the time of the Will is a Living Will. In Indiana, our statutes provide that in the event you are being kept alive artificially that you may request that the machines be turned off (unplugged) and you have a choice as to whether you want the IVs supplying hydration to be discontinued as well.

An item of note is Powers of Attorney for 18, 19, and 20 years old. In my instance, I have had my children execute Powers of Attorney in the unlikely event that they were to become disabled and need my wife or myself to make medical decisions for them. Most of us simply do not think that a 18, 19 or 20 year old can find themselves in a medical situation needing a power of attorney.

Unfortunately many people are scared of dying and hold off estate planning until it is too late. Planning is important and should not be viewed as scary but rather simply something that we as responsible people need to do.