The Truth About Estate Planning in Texas

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Table of Contents

Chapter 1: A Brief Overview of Estate Planning.......... 1

Take a Realistic Look at Your Situation........................ 3
Know What You Own 3
Determining Your Beneficiaries 4
Providing for Minor Children 5
Custody of Your Minor Children................................... 5
Property of Minor Children 7
Planning for Incapacity 7
Transferring Your Property At Death 7
Last Will & Testament 8
Living Trusts.. 8
Changing Your Estate Plan 8

Chapter 2: Naming Your Beneficiaries........................ 11

Direct Beneficiaries 11
Alternate Beneficiaries.. 12
Second Marriages.. 13
Shared Inheritances 13
Special Needs Children 14
Irresponsible Beneficiaries... 15
Placing Controls on Bequests 15
Disinheritance 16

Chapter 3 Providing for Minor Children 17

Name Someone to Care for Your Minor Children........ 17
Name Someone to Manage Your Minor Child's Property 18
Naming Children as Beneficiaries of Life Insurance.... 19

Chapter 4: Preparing for Incapacity.............................. 21

Financial Decisions 21
Medical Decisions... 24
HIPAA Authorization 25
Directive to Physicians 27

Chapter 5: Last Will & Testament................................. 29

Gifting Property to Beneficiaries 29
Dying Without a Will in Texas 30
A Word About Probate 33

Chapter 6: Living Trusts... 35

How a Living Trust Helps You Avoid Probate 36
Living Trusts and Taxes.. 37
Choosing Your Successor Trustee 37
You Still Need a Will.. 39

Conclusion 41

Chapter 1

A Brief Overview of Estate Planning

If you are like a lot of people, you have a nagging feeling that you need to create an estate plan. But, you may have avoided it because you think it is too difficult or too expensive to do. Perhaps, you do not know where to start or do not know whether you even need an estate plan. This book covers the essential information you need to know about estate planning in Texas. It gives you the truth about estate planning in Texas.

So, we will start at the beginning. Do you even need an estate plan? If you own property that is important to you, then yes, you need an estate plan. If you have minor children, then yes, you need an estate plan. If you have minor grandchildren, then yes, you need an estate plan.

Many people have the mistaken notion that estate planning is just for the wealthy. That is not true. There are no minimum property requirements before creating an estate plan. There is no requirement that you own a home or have a large bank account before you make an estate plan. Anything you own that you care about is significant enough

to warrant estate planning. If you have family photographs, works of art, gold jewelry, or family heirlooms, you may be concerned about passing those items down to future generations. The question, therefore, is not whether you need an estate plan but whether you own any property that you want to go to a specific person when you die. If you do, you need to create a plan to carry out your desires.

> Example: Bill and Joe are welders. They are in a general partnership. They each own their welding trucks and equipment. Bill estimates that his welding equipment is worth well over $50,000. Bill wants his welding equipment to go to his partner Joe at his death. Bill, however, fails to do any planning to make sure his equipment goes to Joe. At Bill's death, his welding equipment goes to his family members in accordance with state law. The only way Bill can guarantee his equipment will go to Joe is to prepare an estate plan.

If you have minor children, you have estate planning concerns. Who will care for your child if you and the other parent die before the child is an adult? If there is any money for your child after your death, who will manage it for the child's benefit?

Take a Realistic Look at Your Situation

You cannot create a proper estate plan without taking a realistic look at your situation. Everyone has different needs and different circumstances for which they need to plan. There is no "cooker cutter" approach to estate planning. As you look at your situation, consider the following questions.

- Are you single or married?
- Do you have children?
- Are you in a second marriage or a subsequent relationship?
- Do you have stepchildren?
- Do you have children from prior relationships?
- Do you have grandchildren?
- Do you have brothers and sisters?
- Do you have close family members you want to remember in your estate plan?
- Who else do you care about and want to leave property to other than your family or close relatives?
- Do you want to support any causes or charities in your plan?
- Do you want to leave a gift for an educational institution?

Know What You Own

Your estate plan will center around decisions about who gets your property when you die. Therefore, you need to know what you own to plan for its proper distribution at

your death. If you plan to leave all your property to just one or two people, it is not necessary to prepare an itemized list of the property to have a sound plan. If you plan to leave items to many different beneficiaries, it will be helpful to those settling your estate to have an itemized list.

If you are married, you need to understand that Texas is a community property state. Texas community property laws *presume* that all property acquired during the marriage is community property. Each spouse owns one-half of the community property. There is no inheritance requirement for spouses in Texas. Each spouse can leave his or her share of the community property to anyone they desire. If you want your interest in your community property to go to your spouse when you die, you have to provide for that in writing. It does not happen automatically.

Determining Your Beneficiaries

Your beneficiaries are the people to whom you choose to leave your property. Most people know who their heirs are, and have no problem creating a plan for those beneficiaries. Distribution plans can be simple, like leaving everything to your spouse. Or, distribution plans can be elaborate, such as using trusts to pass property to family members over several generations.

Your particular distribution decisions may have complexities due to multiple marriages and children from various relationships. If you and your current spouse have children from prior marriages as well as children from your

current marriage, you may have conflicting desires in estate planning. You may, for example, feel conflicted over how to leave property to your children from a prior marriage while providing for your current spouse and the children of that marriage. There are many ways to plan for these conflicts. Do not let conflicting desires or apparent complexity prevent you from creating a proper estate plan. Chapter 2 covers the naming of your beneficiaries in greater detail.

Providing for Minor Children

Parents with minor children want to make sure they provide for the children if the parents die suddenly. Parents in this situation need to decide who will raise the children and who will manage any money the children may inherit. Another concern of parents with minor children is making sure there is enough money to leave the children. One way parents can make sure there is enough money for the guardians of the children to provide the level of care parents want for their children is by purchasing life insurance. Chapter 3 discusses these issues.

Custody of Your Minor Children

If one parent survives the other, the surviving parent usually takes care of minor children. But, if the other parent is not involved with the children or both parents die, provision must be made for a guardian to care for the children. Your estate plan should name the guardian for your children.

Example: Michael and Kim are divorced. They have a minor son, Heath. They have an amicable relationship and can cooperate in raising Heath. Both Michael and Kim understand that if one of them dies, the other will have sole custody of Heath. Michael dies, leaving Kim sole custody of Heath. Kim prepares a will in which she states her desire for her sister Rachel to take care of Heath should she die while he is still a minor.

Your nomination of a guardian, however, is not binding on a court. Children are not legal property you can give to someone else in a will. But, judges generally confirm a guardian nomination unless there is a challenge to it that presents sufficient evidence showing that the proposed appointment is not in the best interests of the children.

Example: Jill is a single mother with a five-year-old daughter named Samantha. Samantha's biological father has never had anything to do with her. He provides no parenting or financial support. If Jill were to die, she wants her sister to raise Samantha. Jill can name her sister and as Samantha's guardian in her will. She cannot, however, guarantee that it will happen because the law does favor biological parents having custody in this situation. However, if Jill includes in her will a detailed statement explaining why her sister would be a proper guardian for

Samantha, it may persuade the judge. The judge's primary concern, after all, is Samantha's best interest.

Property of Minor Children

Minors cannot legally own significant assets. Therefore, you need to nominate someone to supervise and manage the property you leave to your minor children. The person you name to manage the property can be the same person you name to have custody, but it does not have to be that person. You can designate any adult to manage your children's' property.

Planning for Incapacity

Deciding who gets your property is only part of what goes into creating a proper estate plan. You also need to make arrangements for the handling of your financial and medical affairs in case you become incapacitated and unable to handle these matters yourself. If you do not state your wishes before you become incapacitated, you are setting your family up for a tremendous amount of stress and conflict. Chapter 4 covers essential issues in preparing for incapacity.

Transferring Your Property At Death

Wills and living trusts can both transfer property after your death. Deciding which is best for you is the technical aspect of estate planning.

Last Will & Testament

A will is a document in which you state who you want to receive some or all of your property and when you want them to receive it. If you have minor children, you can also specify a guardian for them.

The biggest drawback of a will is that it must go through probate. Probate is the process of filing your will with a court. Once your will is in probate court, a judge oversees the distribution of your estate according to your will. Probate can be expensive and time-consuming. The process rarely provides any benefit to your beneficiaries. It does not benefit anyone except the lawyers involved in the process. Chapter 5 discusses wills and probate in more detail.

Living Trusts

A living trust is similar to a will in that it states how you want to distribute your property. The most significant difference between a will and a living trust is that a living trust does not go through the probate process. A living trust is, therefore, a probate-avoidance device. Chapter 6 discusses living trusts.

Changing Your Estate Plan

You should not think of your estate plan as a static thing. A good plan is revocable and changeable. You can change or modify an estate plan, whether it be a will or living trust, at any time. You can change it for any reason or no

reason at all. You should review your estate plan regularly to make sure it still accomplishes your desires.

The only limitation on changing your estate plan is that you must be “competent” to make the changes. Competency means that you have the mental capacity to make decisions about your property and that you understand the consequences of those decisions.

Chapter 2

Naming Your Beneficiaries

The core of your estate planning revolves around deciding who gets your property when you die. Settling on your heirs does not have to be a painful or stressful part of the planning process. It can, in fact, be a satisfying part of the process because it allows you to contemplate the benefits your property will bring to the people you choose. You are free to make whatever decisions you want concerning your beneficiaries. There are two types of beneficiaries you need to keep in mind. You have "direct beneficiaries" and "alternate beneficiaries."

Direct Beneficiaries

Direct beneficiaries receive your property outright after your death. Suppose, for example, that you leave your truck to your son. Your son is a direct beneficiary. You can name as many direct beneficiaries as you want for specific gifts of your property.

There are two types of direct beneficiaries:

- Primary direct beneficiaries – these are the people you name to receive specific items of property

- Residuary direct beneficiaries – these are the people you designate to receive any property not explicitly left to primary direct beneficiaries

> Example: Charles leaves his truck to Kevin, a hunting buddy. He leaves his hunting rifle to another hunting buddy, James. Charles leaves $10,000 to the NRA. He leaves the rest of his property to his brother Jason. Kevin, James, and the NRA are direct primary beneficiaries. Jason is a residuary direct beneficiary.

Alternate Beneficiaries

Alternate beneficiaries receive property only if a direct beneficiary is not alive at your death. You can name one or more alternate beneficiaries for every direct beneficiary. The most common use of alternate beneficiaries occurs when spouses leave all property to each other and then designate the children as alternate beneficiaries when both spouses are deceased. You can, of course, make more complex alternative beneficiary designations.

> Example: Sam leaves his property equally to his brother, Allen, and his sister, Sue. Sam specifies that if Allen predeceases him, he wants to divide Allen's share of the property as follows: 25% to Allen's four children and 25% to specifically named charities. If Sue dies before Sam, the division of her share is

as follows: 50% to Sue's son, 25% to specially designated charities, and 25% to a specific political cause.

Second Marriages

Blended families often raise unique and sometimes tricky estate planning concerns. A common problem is how to provide for a current spouse while keeping the bulk of the estate intact for children from a previous marriage. Trusts are useful for planning in these situations.

Shared Inheritances

You can name more than one beneficiary for any gift you make. When you do this, they will share the inheritance. There are two questions to answer when considering shared inheritances. The first question is, how much does each beneficiary receive? The second question is whether you want the recipients to share ongoing ownership of the property or whether you want the property sold after your death with the proceeds going to the recipients.

You resolve the question of how much for each beneficiary using percentages of ownership, e.g., 25% to Allen, 75% to Jim. The second question is more difficult to answer. If you decide you want your beneficiaries to share ongoing ownership, how will they share management or control? What will happen if one of them wants to sell his or her interest? What if there are relationship problems between the beneficiaries you are forcing to share the inheritance? You need to give serious consideration to these

issues and questions before deciding to have recipients share inheritances. A shared gift is a good idea ***only if*** you are confident your beneficiaries can continue shared ownership without being in constant conflict.

> Example: Cheryl has three adult children. Her son Jimmy has problems handling money and holding a job. He lives with her in the family home. She does not charge him rent. She wants to leave the family home to her three adult children equally. But, Cheryl's other two children view their brother Jimmy as a freeloader who needs to grow up and be responsible. Cheryl recognizes that Jimmy cannot live in the home for free after her death because that is, in essence, depriving her other two children of their inheritance. Cheryl needs to decide whether leaving the house to all three with continued shared ownership is a good idea or whether it is better to specify that they sell the home and divide the proceeds. If she determines a sale is the best way to leave the gift, she can distribute a disproportionate share to Jimmy if that is her desire.

Special Needs Children

If you have children with mental or physical disabilities, you will need to provide for their care and support, whether they are minors or adults. The best way to

do this is with a special needs trust. The purpose of the trust is to provide for the unique needs of the child without jeopardizing his eligibility for government benefits. The trust owns the assets, not the child. The trust manages the assets for the benefit of the child. The assets in the trust do not count when determining the child's eligibility for benefits. You name an independent trustee who manages the assets and uses them for the child's needs that are not covered by government benefits.

Irresponsible Beneficiaries

If you have concerns that some of your beneficiaries will squander your money and property, you can leave it to them in a trust. You name an independent trustee to manage the trust property and distribute it to your beneficiaries as they have a need. This type of trust is known as a Spendthrift Trust.

Placing Controls on Bequests

A lot of people want to impose controls on gifts rather than leaving them outright to beneficiaries. You may, for example, want a particular piece of property to stay in the family. Or, you may want to allow a recipient to receive a gift only under certain conditions. We call these types of controls, "dead-hand" controls because they are attempts to control property after you die. Most attempts at "dead-hand" control are not feasible and can cause problems with settling your estate. Additionally, the law does not favor this kind of

power, so it is generally not legally possible to control your property for many generations.

Disinheritance

The most common question clients ask our initial consultation is, “How much do I have to leave my children?” The answer is nothing. You have no legal duty to leave your children anything. You have no legal obligation to leave anyone anything.

You do have the legal right to disinherit your children. If you plan to disinherit a child, I suggest that you openly express that intention in your estate planning documents. Do not merely leave a child out of your estate plan. Explicitly state your intention to disinherit them. Failure to expressly state your intention to disinherit may leave open the possibility of your child challenging the omission as a simple oversight on your part.

Chapter 3

Providing for Minor Children

If you have minor children, you probably have concerns about what will happen to them if you die. For two-parent homes, the concern is usually about the simultaneous death of the parents. For single-parent households where the other parent is deceased, has abandoned the child, or is unavailable for different reasons, the concern is for what will happen to your children if you die before they reach adulthood.

Name Someone to Care for Your Minor Children

When a minor child has two capable parents, and one dies, the other parent has the legal right to take sole custody. But, the question of care for minor children is an issue when both parents die, a single parent dies, or a parent with custody believes the other parent is not qualified to ever have custody, even at the death of the sole custody parent. What do you do in those situations?

If there are no parents capable of raising your children, the court will appoint a "personal guardian" for them. You can avoid the need for the court to get involved by naming someone to be your child's guardian before you die. You should appoint a guardian and a backup guardian

to ensure that it is never necessary for the court to get involved in the custody and care of your children. If you have minor children, this is the ***most compelling*** reason to make sure you have an estate plan in place.

The person you name as the guardian of your children will still need court approval. The court does have the authority to go against your nomination if the judge believes it is not in the best interests of your children to be in the care of the person you name. The judge has this authority because children are not property you can "leave" to just anyone. But, if no one contests your nomination of a guardian, the judge will almost certainly confirm your choice. As a practical matter, a judge will reject your appointment of a guardian only if there are serious and provable reasons to do so. If, for example, the person you name as a guardian has a serious criminal background, a history of child abuse or neglect, or has a drug addiction problem, the judge will reject that appointment. Otherwise, the judge will likely confirm your appointment.

Name Someone to Manage Your Minor Child's Property

If you leave money or property to your minor children, either as a direct or alternate beneficiary, you should do so through a trust. A trust is a legal entity that owns the property on behalf of your children. You then name someone to manage and handle the trust property for the benefit of your children. The person you name to maintain the trust is called the "trustee." Your children are

the "beneficiaries" of the trust. The trust documents set out the trustee's duties and responsibilities, along with the rights of the beneficiaries. You also set an age at which your children are to receive the trust property outright, free of the trust.

Until your children reach the age you specify, the trustee manages the money and property in the trust for the best interest of your children. Looking out for your children's best interests means the trustee can use the trust money to pay for their regular living expenses, health needs, and educational needs.

You want to choose a person with integrity and common sense to serve as a trustee. As a general rule, I suggest naming the same person you choose as your child's guardian unless there are compelling reasons to pick someone else. If, for example, the guardian you select does not have sufficient financial or practical experience to manage the trust adequately, you may want to name someone else as trustee.

Naming Children as Beneficiaries of Life Insurance

Many parents with minor children have not acquired substantial assets, so they use life insurance to provide financial security for the children in case one or both parents die. If you name your minor children as beneficiaries and they are minors when you die, the insurance company cannot legally pay the life insurance proceeds directly to them. In this scenario, it will be necessary to ask a court to appoint an

adult to manage the money for the children until they reach adulthood. You can avoid this situation by establishing a trust for the children and naming the trust as the beneficiary of your life insurance.

Chapter 4

Preparing for Incapacity

The aging process confronts each of us with the reality of becoming physically or mentally incapacitated. Wise estate planning prepares for this possibility. With just a few legal documents, you can create a plan that ensures your financial and medical wishes are carried out if you become physically or mentally incapacitated. These legal documents should be part of any well-drafted estate plan. They are your protection against future incapacitation issues, and they become operational only if you do become unable to manage your affairs.

Financial Decisions

A Statutory Durable Power of Attorney allows you to appoint another person to make financial and other non-medical decisions on your behalf. The fact that it is "durable" means it does not terminate if you become incapacitated. Without a Durable Power of Attorney, your spouse, adult children, or close relatives will have to ask a court to give them authority over your financial affairs if you become incapacitated and unable to manage them yourself. The legal process necessary to acquire authorization to act on your behalf is called a "Guardianship" proceeding. Guardianship proceedings can be costly and time-

consuming. Preparing a Durable Power of Attorney is inexpensive and straightforward.

You Determine How Much Authority to Give Your Agent

The person you appoint to act for you is called your "agent" or "attorney-in-fact." You choose how much authority to give that person. You can, for example, give your agent the power to act for you in any or all of the following ways:

- Pay for your support and care
- Borrow money in your name
- Conduct bank transactions on your behalf
- Handle your real property
- Handle legal claims on your behalf
- Access your safety deposit box
- Deal with your insurance and retirement benefits
- Prepare and file your tax returns
- Exercise your stockholder rights
- Contract for services
- Make gifts to others
- Collect your Social Security benefits
- Perform unspecified, non-medical tasks

Your agent under a Durable Power of Attorney has broad authority to act for you. It is, therefore, vital that you select someone you completely trust to work in your best interest.

When Your Durable Power of Attorney Takes Effect

A Durable Power of Attorney can take effect immediately when you sign it, or it can "spring" into effect when you become incapacitated. In the case of a "springing" Durable Power of Attorney, you can explicitly state the type of disability that triggers it. If you do not define the disability trigger, you are disabled only if a physician certifies in writing that you are incapable of managing your financial affairs.

If you want someone to take over some or all of your financial tasks now, you should make your Durable Power of Attorney effective as soon as you sign it. If it is effective upon signing, your agent can begin helping with your finances right away and can continue to do so even if you become incapacitated.

If, on the other hand, you believe your agent should not take over unless and until you are incapacitated, you have two options. First, if you trust your agent to use his authority only when necessary, you can make your Durable Power of Attorney effective immediately. You can then express your wishes that your agent should not act for you unless it becomes evident to him that you cannot handle your affairs yourself. Second, if you are uncomfortable with giving agency authority immediately, you can make a "springing" power of attorney that does not take effect until your physician certifies in writing that you cannot manage your affairs.

Medical Decisions

For many people, the increasing use of life-sustaining medical technology raises fears of artificially prolonging their lives against their wishes. Writing down your desires for medical care and appointing someone you trust to make sure medical professionals follow those wishes can help alleviate fears of unwanted medical treatment and life-sustaining procedures. Knowing your desires in advance can also help family members who might otherwise agonize over making medical decisions on your behalf.

Medical Power of Attorney

A Medical Power of Attorney allows you to designate another person to make medical decisions for you should you be incapable of making those decisions for yourself because of unconsciousness or mental incapacity. Your designated agent has broad authority to make any health care decisions you could have made if you were not incapacitated unless you explicitly restrict that authority. Many people have the mistaken notion idea that a Medical Power of Attorney is just for the elderly. But, unexpected illnesses or injuries can happen at any age, so all adults should have a Medical Power of Attorney.

The Agent's Authority to Act Depends on Your Doctor

A Medical Power of Attorney authorizes an agent to act on your behalf only after your attending physician certifies in writing that, based on his reasonable medical judgment, you are incompetent. The physician must file the

certification in your medical records. Regardless of the existence of a Medical Power of Attorney or the declaration of incompetence, Texas law states that treatment cannot be given to or withheld from you if you object.

HIPAA Authorization

The Health Insurance Portability and Accountability Act (HIPAA) is a Federal law that requires the establishment of national standards to protect the privacy of patients' healthcare information. The law regulates the disclosure of "Protected Health Information," which is defined very broadly as:

"Individually identifiable health information transmitted or maintained in any form which:

- is held by a covered entity or its business associate;
- identifies the individual or offers a reasonable basis for identification;
- is created or received by a covered entity or an employer; or
- relates to a past, present or future physical or mental condition, provision of health care or payment for health care."

Covered Entities Cannot Share Your Health Information

HIPAA limits "covered entities" from sharing your protected health information. Covered entities include health care providers that conduct transactions in electronic form, health care clearinghouses, and health plans. Essentially, any

health care provider or insurance company that uses computers in the ordinary course of its business is subject to HIPAA.

Violations of HIPAA can result in civil fines and criminal punishment. Civil penalties range from $100 per violation up to an annual maximum of $25,000 for general violations and $50,000 per violation up to a yearly maximum of $1.5 million for willful violations. Criminal punishment includes fines of up to $50,000 and imprisonment for up to one year. If a covered entity violates HIPAA with the intent to sell or use individual health information for commercial advantage, personal gain, or malicious harm, criminal punishment includes fines of $250,000 and imprisonment for up to ten years.

How HIPAA Affects You

There is no question that health care providers and insurance companies should protect your medical information. The penalties associated with violating HIPAA, however, creates an environment in which covered entities are overly cautious about sharing medical information with anyone but the patient. It is even difficult for close family members, such as spouses and children, to get your medical information when they need to help you.

A well-drafted Medical Power of Attorney arguably should be legally sufficient to authorize your health care provider to share your protected medical information with your health care agent. But, if the Medical Power of Attorney does not explicitly allow the sharing of your health

information as required under HIPAA, your medical provider may err on the side of caution and refuse to share the information with your agent. This refusal can lead to severe problems if your agent needs the information to make an informed medical decision on your behalf.

Additionally, your agent does not have the authority to act under your Medical Power of Attorney until your attending physician certifies that you are incompetent. You may need someone to have access to your records before that time. You may, for instance, want your agent to contact your doctor's office with a question on a bill, or to discuss your medical condition with your doctor. A HIPAA authorization allows your agent to do that. It is, therefore, a good idea for you to sign a separate document authorizing the disclosure of protected health information.

Directive to Physicians

A Directive to Physicians is popularly known as a "living will." It is a document instructing your physician about your wishes for life-sustaining treatment when you have a terminal or irreversible condition. Clearly stating your intentions before a diagnosis reduces the possibility of family conflict and spares your loved ones these difficult end-of-life choices.

A Directive is Effective for a Qualified Patient

A Directive to Physicians is active when you become a "qualified patient." You are a "qualified patient" when you are diagnosed with a terminal or irreversible condition by

your attending physician. Your physician must certify the diagnosis in writing. If you sign a directive, tell your doctor about it and have the directive made part of your medical records.

Chapter 5

Last Will & Testament

Having a will is what most people associate with estate planning. Everyone should, at a minimum, have a will. Using a will, you state who you want to inherit your property. You can also use your will to name a guardian for any minor children. If you do not have a will, state law dictates who inherits your property and cares for your minor children. Dying without a will can delay the distribution of your property to loved ones and cause them to spend thousands of dollars in court costs and legal fees. A good estate plan always begins with either a will or a living trust. Chapter 6 covers living trusts in detail.

Gifting Property to Beneficiaries

Wills can contain specific gifts and general gifts. Specific gifts distribute a particular item at a specific person. An example of a specific gift is: “I leave my engagement ring to my daughter, Cindy.” General gifts, on the other hand, are usually percentage gifts that are distributed after all the specific gifts have been handed out.

Dying Without a Will in Texas

If you die without a will, Texas law has a formula that determines the distribution of your assets. That formula does not consider your wishes or unique circumstances. The following summary explains how Texas law distributes your assets if you die without a will.

Rules for a Single Person with No Children

If you are single and have no children, your property distribution will be as follows:

1. If both of your parents are alive, your assets pass to them in equal shares. If only one parent is living and you do not have any siblings, your property goes to your living parent.

2. If you have siblings, or descendants of your siblings, i.e., nieces and nephews, your surviving parent receives one-half of your estate. The other half splits between your siblings or their surviving children.

3. If neither of your parents survives you, your entire estate passes to your siblings or their descendants.

4. If you have no parents alive at your death, no surviving siblings and no surviving descendants of your siblings, your estate is divided in half, with one-half passing to your mother's side of the family and one-half passing to your father's side of the family.

5. If one side of your family has wholly died out, the entire estate passes to the surviving side.

6. If you die without any surviving heir, a rare occurrence, your estate passes to the State of Texas.

Rules for a Single Person with Children

If you are single and have children, all your property passes to your children equally. If some of your children predecease you and leave children or grandchildren of their own, the younger generation is entitled to the portion of your estate that the older generation would have received had they survived.

Rules for a Married Person

Most people assume that if you are married and die without a will, your surviving spouse inherits your entire estate. But that is not always true. The question of property distribution for marriage persons depends on whether the estate is composed primarily of community property or separate property.

Community Property

In Texas, the presumption is that all property acquired during the marriage is community property. If your spouse and children survive you, the distribution of your community property is as follows:

1. If all your children are also the children of your surviving spouse, your surviving spouse inherits all your community property.

2. If all your children are not also children of your surviving spouse, your one-half interest in the community estate passes to your children, with your spouse keeping only one-half interest.

Your surviving spouse inherits all of your community property if you do not have any children.

Separate Property

If you have any separate property at your death, the distribution of that property is as follows:

1. If you have a surviving spouse and children, your spouse gets one-third of your separate personal property and a life estate interest to one-third of your separate real property. A life estate entitles your spouse to use the property until his or her death. The rest of your separate property is inherited outright by your surviving children.

2. If you are married and have no children or other descendants, your surviving spouse is entitled to all your separate personal property. If, however, you have surviving parents and siblings, your surviving spouse is entitled to only half of your separate real estate with the other going to your parents, siblings or descendants of siblings.

The distribution of assets, as outlined above, only applies if you die without a will. If you leave a will, the probate court follows the distribution you specify in the will. The key is to make sure you have, at a minimum, a will that expresses your desires.

I want to repeat this point for emphasis because I see so many people who do nothing to plan for their death. If you want to make sure your assets go to the people you choose, ***you need a will***.

A Word About Probate

All property left by a will must go through probate. Probate is the legal process by which a will is "proved" and accepted in court as a valid last testament of the deceased. Once the will is proven to be valid, the legal process of administering the estate of the deceased begins. The administering process involves distributing property according to the will. Probate can be a tedious and expensive proceeding.

The critical thing to know about probate is that it is unnecessary. You can plan your estate in such a way that you avoid probate altogether. The probate process is costly, time-consuming and provides no benefits to your beneficiaries. The process is nothing more than a clerical and administrative process. In the vast majority of probate cases, there are no contests and no conflicts. Without contests and conflicts, there is no need for lawyers or courts to be involved.

Probate does not require a lawyer to conduct extensive research, draft complex pleadings, or even use adversarial skills. Most probates are entirely uneventful. The process involves the executor of the will providing a copy to the lawyer who then initiates the court proceedings. The process then drags on for months, or even years as lawyers are filing papers and court hearings are taking place. Finally, a judge allows the distribution of your property to the beneficiaries.

People who defend the probate system, mostly lawyers (are you surprised?), claim that probate prevents fraud in the transfer of a deceased person's assets. They also assert that it protects beneficiaries by promptly resolving the creditor's claims against the estate. The truth is that very few estates need these "benefits" because very few estates face allegations of fraud or complicated debt issues. The wiser course of action in estate planning is to create a plan with probate avoidance as a top priority.

Chapter 6

Living Trusts

The living trust does the same essential job as a will in that it allows you to leave your property to the beneficiaries of your choosing. The advantage of a living trust over a will is that the living trust avoids probate. Living trusts are one of the best tools for transferring property outside of probate. Another advantage of a living trust is that it is not made public after your death. A will becomes public record during the probate process. The settlement of a living trust is entirely private. With a living trust, your beneficiaries can settle your estate sitting around the kitchen table with a cup of coffee.

Living trusts are "living" because you create and maintain them while you are alive. A living trust is "revocable" so you can change it or revoke it any time before you die. A living trust becomes irrevocable only at your death. As the creator of the living trust, you are called the "Trustor" or "Settlor." The property you transfer to the trust is called the "trust estate." You also serve as the "trustee," which means you manage the trust property for the benefit of the beneficiary. Who is the beneficiary? You are.

In a living trust, you serve in all three significant capacities. You create the trust ("Trustor"), you manage the

trust ("Trustee"), and you do so for your own best interest ("Beneficiary"). As a trustee, you can do what you want with the property in the trust. You can sell it, spend it, invest it, or give it away. There are no serious drawbacks or risks in creating or maintaining a living trust. And, unlike other types of trusts, you do not need a taxpayer ID number for the living trust, nor do you need to keep separate trust tax records. You report all transactions of the living trust on your personal income tax return.

How a Living Trust Helps You Avoid Probate

Remember, the legal process the courts use to carry out the terms of your will is called probate. The probate process can vary in the length of time it takes to complete from as little as three months or as long as two or more years. During the probate process, your beneficiaries do not have access to their inheritance. They must wait until probate is complete to receive the property you want them to have. They must also pay court costs and attorney's fees for the probate process.

With a living trust, you name your beneficiaries and specify the property you are transferring to the trust. The trust assumes legal ownership of the property. You appoint yourself as the initial trustee and manage the trust property. As a trustee, you retain control of your assets even though on paper you no longer "own" them, the trust does. When you die, control of trust assets passes to your designated successor trustee. The successor trustee distributes the assets to your named beneficiaries. The whole process allows your

assets to go to your heirs without the delays and expenses of the probate court.

Living Trusts and Taxes

A living trust does not affect your income taxes while you are alive or your estate tax at death. If you need a tool to lower your taxes or protect your assets from creditors, you need to look for something other than a living trust.

Income Tax

During your lifetime, the living trust does not have a separate existence for income tax purposes. The IRS treats living trust property as your property. The trust is not functionally distinct from you while you are alive, so you cannot use it to lower your income tax.

Estate Tax

Living trusts do not save on estate taxes. A living trust serves to avoid probate for your estate, thus making the succession process easier for your beneficiaries. Of course, avoiding probate is a significant benefit to your heirs. But all property that passes through a living trust may subject to estate tax if the value of the estate is over the federal exemption limit.

Choosing Your Successor Trustee

When setting up a living trust, you and your spouse are the initial trustees. When one of you dies, the other

continues as the sole trustee. Serving as a trustee is how you maintain control of the property in the trust.

You must name at least one successor trustee. The successor trustee is the one who makes the trust work after your death. The successor trustee's primary job is to turn trust property over to your beneficiaries. The successor trustee's task is not a difficult one, and it does not take much time. Remember, with a living trust there is no court filing and no requirement for a court to approve the transfers. As long as you identify your beneficiaries in the trust, the successor trustee merely makes the transfers.

Do not think, however, that the successor trustee has nothing to do. The work of the successor trustee does require effort. And, the successor trustee must know the location of the trust property. If there are bank accounts or stock accounts, the trustee must work with those institutions to get funds turned over to the trust for distribution to beneficiaries. The trustee should not encounter any problems or issues because most financial institutions are familiar with the workings of a living trust and will accept the authority of the successor trustee.

For property requiring a title, the trustee prepares the documents necessary to transfer title to the beneficiaries. Any property without formal title documents, such as jewelry, household furnishings, heirlooms, collectibles, etc., is quickly moved to the intended recipients. The trust ends when all beneficiaries receive the money or property left to them. Upon termination of the trust, there is no need to file

any formal legal document at any governmental office declaring the end of the trust. Upon completion of the work, the trust vanishes.

You Still Need a Will

Even if you put everything you own into a living trust, you still need a will. But, the will you use in conjunction with a living trust has only one function. It pours over into the trust any assets acquired after the creation of the trust that you intentionally or unintentionally failed to put into the trust. Not surprisingly, this will is called a "pour-over" will. You can also use the pour-over will to name guardians for minor children. While a pour-over will must go through probate, it is a much more straightforward and less expensive process because the majority of your property is already in the living trust ready for distribution to your heirs. And, if you are careful to put all property you currently own or acquire after creating the living trust into the trust, your family will not need to probate the pour-over will.

Conclusion

Without a proper estate plan, you forfeit the opportunity to make many important decisions for you and your family. These include:

1. Deciding who will receive your assets when you die.

Without a will or a living trust, the statutory distribution plan enacted by the Texas legislature controls the distribution of your assets. That plan will very likely conflict with your wishes.

2. Deciding how your assets will be distributed to your loved ones when you die.

3. Deciding who will manage the assets you leave behind.

If you have not named someone to manage the assets you leave behind, a judge who does not know anything about your financial values will make that decision in your place.

4. Deciding whether to authorize a trusted friend or family member to engage in a specific business, financial or legal transaction on your behalf if you are unable to manage your affairs, such as if you become incapacitated.

5. Deciding whether to authorize a friend or family member to make medical decisions for you if you are

incapacitated and unable to make those decisions for yourself.

6. Deciding whether to authorize a trusted friend or family member to receive access to protected healthcare information.

7. Deciding whether you would like your physician to use artificial methods to extend your life upon diagnosis with a terminal or irreversible condition.

If you want control over these critical issues, you need an estate plan.

Contact my office to schedule an appointment to discuss the estate plan that is best for you and your family.

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