

Do I Need a Will?

An Introduction to Estate Planning

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Do I need a will?

As an attorney, I am often asked, "Do I need a Will?" My answer to this question is that you should have a plan and a Will may be part of the plan. The term "estate planning" refers to planning for what happens to your property and other concerns upon your death. Estate planning may also include planning for your finances and medical care if you are seriously ill and unable to communicate your wishes.

Is estate planning difficult?

Thinking about your own death is usually the only difficult thing about estate planning. Estate planning can help you feel prepared and more comfortable with the prospect of your inevitable death.

Procrastination is the enemy of estate planning. To avoid procrastination, I suggest you commit to completing your planning by a specific date. For example, you might commit to completing your planning before your next vacation, your birthday or the end of the year. Completing your planning will give you a sense of accomplishment.

Why should I do estate planning?

When you die, your family and friends will mourn your loss. Estate planning will ease their burden. It can save them from unnecessary stress, conflict, hassle, delay and financial loss. It is one of the most thoughtful gifts you can leave.

Estate planning assures that your property is distributed the way you intend and avoids distribution to unintentional, unwanted or undeserving beneficiaries.

Estate planning can protect hard-earned assets. It can prevent payment of unnecessary taxes. It can also help prevent the sale or fragmentation of family businesses, ranches, farms, recreational properties or similar assets.

Estate planning can protect privacy and provide for the care of minor children.

Estate planning will assure your wishes are carried out if you become incapacitated and are unable to communicate your intentions or manage your own affairs.

What does estate planning involve?

Estate planning requires a number of steps including:

- (1) understanding the issues and the process,
- (2) inventorying your Estate,
- (3) identifying goals,
- (4) choosing your planning tools, and
- (5) formulating and implementing your plan.

Taken one step at a time, the process usually is not difficult. The following sections explain each of these steps.

Steps in Planning: 1. Understanding Issues and the Process

Much of estate planning deals with the transfer of a person's property upon their death. The property is called the "Estate" and generally falls into one of two categories: (1) probate and (2) non-probate. Thorough estate planning also plans for periods of incapacity late in life, when you may not be able to manage your own affairs or communicate your wishes.

Probate assets can only be transferred by a court authorized Personal Representative of the Estate. Personal Representatives are also known as Executors. The Personal Representative must first pay all of the debts of the Estate. Often these will include things like final medical and burial expenses, taxes and consumer debts. After the debts are paid, the Personal Representative distributes the remaining Estate assets. If a Will exists, the assets are distributed according to the Will. If a Will does not exist, the distribution of assets is controlled by state intestacy statutes which predict what you would have wanted had you left a Will. Under the statutes, the Estate will typically be distributed to a surviving spouse or children. The statutes can provide unexpected and undesired results. You should NOT rely on the statutes unless their application in your particular situation is thoroughly understood.

Non-probate assets are not controlled by a Personal Representative, a Will or the intestacy statutes. Transfer of a non-probate asset is typically controlled by some form of joint ownership or by a beneficiary designation on an account or insurance policy. For example, married couples often own their home as joint tenants with right of survivorship. When one of the joint owners dies, the other is automatically the sole remaining owner. Simple paperwork is filed with the clerk and recorder to document the survivor's sole ownership. Most investment and bank accounts allow for designation of a pay on death (POD) beneficiary. In these circumstances, the account can typically be transferred to the beneficiary simply by providing proof of death.

A common mistake in estate planning is to confuse probate assets and non-probate assets. This can lead to unintended and unfortunate results. For example, people often attempt to gift non-probate assets through their Wills. This is not effective because the asset is transferred some other way and is never controlled by the Will.

Planning for incapacity involves leaving instructions about your wishes and appointing someone to act on your behalf in the event you are seriously ill and cannot manage your own affairs. Planning for incapacity should be part of your estate planning. You can designate a power of attorney for both financial and medical matters. Financial powers of attorney authorize someone to handle your financial affairs and can be tailored to your particular situation. Medical powers of attorney authorize someone to direct your medical care. Medical powers of attorney are typically combined with advanced directives (living wills) that provide your specific instructions for medical care if you are unlikely to recover from a serious illness or accident.

Steps in Planning: 2. Inventorying your estate

After you understand the process, the next step is to inventory your Estate, including all of your significant assets and liabilities. Your inventory should include both what you own and how you own it. Your inventory should include copies of deeds, account statements, contracts, vehicle titles, insurance policies, and anything else in which ownership is documented in writing. Use a three-ring binder or file folder to compile copies of all your important records in one place. For each asset you should verify how it is owned, including whether it is owned individually, as a joint owner or with a beneficiary designation. If you are unsure how an asset is owned, it is important that you find out as part of your planning process. Let your chosen Personal Representative know where and how you keep your estate planning inventory.

Steps in Planning: 3. Identifying your goals - who gets what and how

Once you have inventoried your estate, the next step is to determine who you want to receive your various assets upon your death. Good planning deals with all reasonable possibilities, including the possibility that you may live longer than one or more of your intended beneficiaries. To address this possibility, you should identify alternative beneficiaries. For example, if you wish to leave your grandmother's wedding ring to your daughter, you may wish to designate a granddaughter as an alternative beneficiary in the unlikely, but possible, event you live longer than your daughter. Also remember that your debts must be paid before distributions from your Estate to any heir. Your planning should take into account the effect that mortgages and other large debts will have on your Estate.

Steps in Planning: 4. Choosing planning tools

You may be able to choose from several different mechanisms for distributing your Estate assets. Some mechanisms work better than others for particular assets. Here is a brief summary of the major estate planning tools:

a. Joint ownership: Real estate, vehicles, bank accounts and other assets with written documentation of ownership can usually be owned jointly with a right of survivorship. When one owner dies, their interest terminates automatically and the surviving owner(s) receive their interest. Ownership records should be updated and may require proof of death.

b. Beneficiary designations: Life insurance policies and most bank or investment accounts can have pay on death (POD) or transfer on death (TOD) beneficiary designations. Typically, the insurance or account is paid to the beneficiary upon providing proof of death.

c. Wills: Wills direct the distribution of probate assets which may include individually owned real estate, vehicles or personal property and bank or investment accounts with no pay on death beneficiary. Probate assets do NOT include property that is owned jointly, transfers by a pay on death designation or is held in trust. If a person owns significant probate assets, they should have a Will unless they are absolutely certain how their property will be distributed under state intestacy statutes. In a Will, you appoint a Personal Representative to administer your estate and an alternative in case your first choice is unable to serve. You then set out your gifts by starting with specific gifts and ending with the "residue" of the Estate which is everything that is left after the specific gifts are made and debts are paid. Items of tangible personal property, such as antiques, jewelry, tools, guns, family heirlooms and other mementos can be gifted by leaving a distribution list with the Will. The distribution list simply names who gets what. A Will should be signed in front of two witnesses and all signatures should be notarized. However, some less formal Wills may be valid. The distribution list accompanying a Will does not require witnesses or other formalities, but should be easy to understand, signed and dated.

d. Trusts: A trust is a legal arrangement in which property is held by one party for the benefit of another. The basic elements of a trust are:

- (1) a trustor who creates the trust,
- (2) a trustee who has the duty to protect and controls the trust assets,
- (3) a beneficiary for whom the trust is created, and
- (4) a purpose that benefits the beneficiary.

There are many reasons for forming a trust including:

- (1) protecting assets for young, handicapped or irresponsible beneficiaries,
- (2) avoiding probate to protect privacy and prevent delay,
- (3) eliminating the need for multiple probates if real estate is owned individually in multiple states, or
- (4) limiting or avoiding estate or inheritance tax.

There are many additional reasons for creating trusts and trusts can be tailored to meet many different needs.

e. Lifetime gifts: If you do not want to retain control of an asset until your death, it may make sense to simply give it as a gift during your life. An accountant or attorney should be consulted before gifting an asset with highly appreciated value.

Steps in Planning: 5. Formulating and implementing your plan

By reading this pamphlet you will have gained a basic understanding of estate planning and completed the first step in the process. After you have inventoried your estate, identified your goals and selected the estate planning tools that may be right for you, you will need to formulate and implement your plan. The plan will include the use of one or more estate planning tools to achieve your goals. Depending on your circumstances, your plan may be simple or complex. In either case, you should have a clear understanding of how each significant asset will transfer upon your death. A good way to check your understanding is to make a diagram or chart showing each asset, to whom it will transfer and how it will transfer.

Do I need the help of an attorney?

Not everyone needs an attorney to assist them in their estate planning. You probably need the assistance of an attorney if one or more of the following apply to you:

- (1) your estate, family situation or planning goals are unusual or complex,
- (2) you want to disinherit one of your children or another close family member,
- (3) you wish to leave assets to someone who is now a minor or has a disability or special needs,
- (4) you suspect a family member or someone else will try to interfere with the distribution of your estate,
- (5) you wish to avoid probate,
- (6) your estate is large and may be subject to estate tax,
- (7) you own real estate in more than one state or country, or
- (8) you are uncertain and concerned about how your estate will be distributed.

There are numerous other reasons why you might need the assistance of an attorney.

If you are in doubt, err on the side of caution and seek help.

Does estate planning need to periodically be updated?

If you have done estate planning, it is a good idea to periodically update your estate inventory and review your plan. As a rule of thumb, your plan should be reviewed whenever there is a substantial change in circumstances. Regardless of significant changes, your inventory should be updated and your plan reviewed about every five years. If changes are needed, make them carefully and make sure you understand the affect of any change on the entire plan. Avoid making handwritten changes on an existing Will; the changes may create confusion and raise questions about the validity of the Will. When changes to your Will are necessary, it is best to carefully create a new Will that revokes the prior Will. In an emergency only, a new Will or codicil (amendment to an existing Will) can be executed if entirely handwritten, signed and dated by you.

If you have not done so, you should consider executing at least a medical power of attorney prior to any major medical procedure. Many hospitals may ask you to execute a medical power of attorney upon admission. It is better to take a carefully prepared document with you than to execute one during the chaotic and stressful hospital admission process.

About this Pamphlet:

This pamphlet is general in nature and is NOT intended to create an attorney-client relationship or to be a substitute for you seeking legal advice from an attorney. It is simply general information and a place to start.

Although much of the information in this pamphlet applies to most states, it is intended primarily for Montana residents. Additional information for Montana residents can be obtained on the internet at <http://www.nextgeneration.montana.edu/>. The information at this internet site is also not a substitute for legal advice from an attorney.

I am always happy to answer questions over the telephone (Scott at (406) 721-9700) or via e-mail (manning@montanalawyer.com). Brief initial confidential consultations are available at no charge.

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