Basic Estate Planning: Single Person

Just the FAQs

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What is an *estate plan*?

An *estate plan* is a set of documents that provides for the orderly arrangement and management of your affairs in the event that you become incapacitated and sets forth the desired disposition of your estate after your death. A basic estate plan typically includes a Will, Financial Durable Power of Attorney, Health Care Power of Attorney, and a Health Care Directive. One of the primary goals of any estate plan is to minimize (or entirely eliminate) any and all taxes due at the time of death.

Do I need an estate plan?

Yes. Everyone needs an estate plan, although for a variety of reasons. Parents with young children need an estate plan in order to appoint someone to care for their minor children or to set up a trust for their benefit. Other people need an estate plan to minimize taxes. Everyone needs an estate plan to appoint a family member or trusted friend to act on their behalf in the event of incapacity.

What happens if I die without a will?

If you die without a will, the court will appoint an administrator to oversee the distribution of your assets. After payment of taxes, debts, funeral expenses and administrative costs, your assets will then be distributed according to state law, which represents the legislature's "best guess" as to how the average person would want his or her assets to be distributed. This law is quite rigid and does not take into account concerns such as tax minimization, family dynamics, and an array of other concerns unique to each individual. The law also does not make provisions for your minor children, leaving the court with ultimate authority to choose the person who will care for your children and their property. Finally, without a will, the administrator of your estate will generally be required to post bond and be obligated to ask permission of the court before taking any action on behalf of the estate.

If I already have an estate plan in place, do I need to update it?

The shelf life of your estate plan depends on a number of different factors, including changes over the years in (1) family circumstances; (2) tax and probate laws; and (3) financial circumstances. With the passage of time, any number of changes could potentially have a significant effect on your estate plan. Therefore, we recommend that you and your attorney review your estate plan every few years simply to ensure that it continues to properly represent your wishes, and that it complies with the current probate and tax laws.

What is a *revocable living trust*?

A *revocable living trust* is a substitute for a will that is designed to distribute your assets at death without having to go through probate. A trust agreement is drafted that sets forth how a person's assets are to be managed during his or her lifetime and how the assets will ultimately be distributed at death. Once this agreement is in place, the person then transfers all of his or her assets into the name of the trust, retaining complete control over the management and use of the assets as trustee. Upon the individual's death, there is no need for probate since the decedent didn't own anything (the trust does!). A successor trustee then distributes the trust assets according to the terms of the trust agreement. The trust agreement is completely revocable, meaning that during the individual's lifetime, he or she can amend or terminate the trust at any time. Finally, a revocable living trust is tax neutral, meaning that there are no tax benefits or detriments to using a revocable living trust in lieu of a will.

Should I use a revocable living trust instead of a will?

A revocable living trust may be more advantageous than a will because it: (1) avoids probate, (2) is a private document that is not filed with the court, and (3) provides for continuity of asset management after death or incapacity. However, a revocable living trust has certain disadvantages as well: (1) it is more complicated than a will, (2) all assets must be transferred into the name of the trust, and (3) it can be an inconvenience because persons dealing with the trustee (such as banks and title insurance companies) may want to review

the trust agreement to confirm the trustee's powers and duties. In Washington, a revocable living trust is often used by individuals who own out-of-state real estate, are contemplating moving out of Washington State, or have a history of long term disability. If an individual owns out-of-state real estate, the real estate is subject to probate in the state where it is located. Therefore, by using a revocable living trust, an individual can avoid probate in Washington as well as other states where his or her real estate is located. Additionally, many other states have onerous probate laws. For example, California probate attorneys' fees are based on a percentage of the value of the estate, regardless of the amount or quality of work performed by the attorney. For clients moving out of Washington, a revocable living trust may help them avoid such onerous laws.

What is probate?

The technical definition of "probate" is the legal process of settling a decedent's estate. In practice, probate involves the appointment of a personal representative to step into the deceased's shoes and wind up his or her affairs. This includes, among other responsibilities, filing the will with the court, creating an inventory of the assets, paying off all creditors, filing the decedent's final income and estate tax return (if required), and ultimately distributing the assets of the estate.

Is probate as bad as I've heard?

Not in most cases. While we've all heard "probate horror stories" over the years, the truth is that Washington State has one of the simplest probate systems in the nation. Assuming your will gives your personal representative all of the necessary powers, our system allows the personal representative to act with complete power and without court intervention on nearly all matters, saving a significant amount of time. Furthermore, unlike some other states, attorneys' fees are not determined by the value of the estate. This makes the probate procedure significantly less expensive than many other states, such as California, Hawaii, Montana, and Wyoming. Of course, there are instances where assets are difficult to locate, family members simply don't trust each other, or heirs contest the validity of the will. In those instances, yes, probate can be a long and costly endeavor. However, that is a function of particular circumstances surrounding the family, and not an inefficiency of the probate process itself.

Has the estate tax been repealed?

No. While there has been a significant amount of coverage in the media about the possible repeal of the estate tax, the fact is that the federal estate tax is very much in effect. In fact, not only does the federal estate tax still exist, but in May of 2005, Washington State enacted its own estate tax independent of the federal tax.

Will I have to pay estate taxes?

Whether or not you have to pay estate tax depends solely on the value of your estate at the time of your death. The IRS and Washington State give each person an exemption against the estate tax. This is referred to as the *exemption amount* (see Estate Planning insert for the current exemption). If the aggregate value of all of the assets of your estate (including life insurance proceeds payable on your death) exceeds the federal or state estate exemption amount, your estate may be subject to the federal and/or state estate tax. The chart in the Estate Planning insert outlines the recent past and the current federal and state exemptions and tax rates.

Will I be subject to estate taxes if I am not a U.S. citizen?

If you are not a U.S. citizen, but you reside in the U.S. (i.e. a resident alien), you will be subject to estate taxes in the same manner as a U.S. citizen. In other words, a resident alien domiciled in Washington can transfer the same amount as a U.S. citizen free of estate tax (see Estate Planning insert for the current exemption).

What are my options for leaving money to my young children?

Children under the age of 18 can inherit money, although an adult must be appointed by the court to manage the funds until the child turns 18. Rather than involve the court, there are two simple ways to structure a bequest to children: (1) establish a custodial account under the Uniform Transfers to Minors Act (UTMA) or (2) establish a trust for the child. Under the UTMA option, you choose a trusted friend or family member (a custodian) to manage property you are leaving to a child. The custodian will then manage the property until the child reaches age 21, at which time the funds are turned over to your child. While the

custodial arrangement is simple, it may place too much money into a child's hands at a very young age. For that reason, you may want to consider the second option and establish a trust at the time of your death to hold the funds for your children. In your will, you name a trustee to manage and invest the trust property and make distributions to your child for his or her health, maintenance, support, and educational needs. Unlike the custodial arrangement, a trust allows you to distribute the entire trust remainder at any age you desire or to stagger distributions (i.e. one-third of the trust principal at age 25, another portion at age 30 and the balance at age 35). While the funds remain in trust, the trustee will continue to make distributions for health, support, maintenance, and education. Because the trust may be held until children are out of college and heading in the right direction, the trust is generally the more popular option.

What happens to my estate if my children and I die together?

A well drafted will should cover the possibility that you and your immediate family dies together, leaving no living descendants. Many people choose to leave their estate to their extended family, friends, or charity.

Who is the personal representative?

In your will, you appoint a personal representative who will be responsible for stepping into your shoes and winding up your affairs. Generally, a personal representative doesn't need special financial or legal knowledge, and many individuals feel comfortable naming a friend or family member. When the time comes, the person you appointed can accept or decline this responsibility. Many personal representatives work closely with attorneys throughout the entire probate process, while others prefer to keep costs low and handle much of the work themselves. The personal representative is entitled to reasonable compensation, which is paid from the estate.

Who is the trustee?

The trustee is the person who is responsible for all aspects of the administration of a trust. The primary duties of any trustee are twofold: (1) to prudently invest and protect the assets of the trust, and (2) to make distributions to the trust beneficiaries according to the terms of the trust. If desirable, more than one individual may be named to serve as co-trustee. Some individuals will name a family member or friend as the primary or alternate trustee. However, other individuals do not have family members or friends that they feel could (or should) take on this role. In such event, it may make sense to name a qualified bank or trust company to undertake this responsibility. The trustee is required to act in the best interest of the trust beneficiaries. This duty of loyalty is known as *fiduciary duty*, and it places a very high (and legally enforceable) standard of care and expectations upon the trustee.

What happens to my pet?

We understand that pets are part of the family, and it is often important to plan for their future as well. Because pets are considered property in the eyes of the law, you can make a provision in your will to give your pet to a trusted friend or family member that has the ability to care for your pet. In addition, you may choose to set up a trust for your pet in order to provide for future costs associated with owning a pet.

How should my assets be titled?

An individual's assets generally pass pursuant to the terms of his or her will. However, if an asset is held jointly with another person (such as a bank or brokerage account held as *"joint tenants with right of survivorship"*), the asset simply becomes the property of the surviving owner. Therefore, it is very important to review the titling of all of your assets to ensure that they will be distributed by the terms of your will rather than by operation of law. Unless there is a compelling reason to hold the asset in joint tenancy, we recommend that your assets be titled in your name alone.

What about my life insurance policies and retirement plans?

While your will controls the disposition of your assets upon your death, certain assets (cleverly named *nonprobate assets*) are not subject to the terms of your will. Life insurance policies and retirement plans (i.e. 401(k)s, IRAs, 403(b)s) are nonprobate assets and are distributed to the people that you have named on your beneficiary designation form. Part of estate planning includes coordinating the distribution of your nonprobate assets with the distribution plan set forth in your will. Because distributions from retirement plans are subject to income tax, there are a number of tax pitfalls that must be negotiated when designating a retirement plan beneficiary. Needless to say, improperly coordinated beneficiary designations can result in a significant tax loss.

Do I need a financial durable power of attorney?

Yes. Regardless of the size of your estate or your family circumstances, you should have a financial durable power of attorney. This is a legal document signed by you that appoints an *attorney-in-fact* to handle all financial transactions on your behalf in the event that you become incapacitated. Your attorney-in-fact will handle mundane tasks such as sorting through your mail and depositing your checks, as well as more complex jobs like handling your investment accounts or filing your tax returns. Without such a document in place, a court supervised guardianship proceeding is necessary to appoint someone who will act on your behalf. This proceeding can be very expensive and cause a rift between family members. This potential problem is easily avoided by having a financial durable power of attorney in place.

Do I need a health care power of attorney?

Yes. You should have a health care power of attorney to appoint a trusted friend or family member to make medical decisions on your behalf in the event you are unable to make such decisions yourself. Your health care attorney-in-fact will work with your doctors and other health care providers to make sure that you get the kind of medical care you wish to receive. When arranging your care, your attorney-in-fact is legally bound to follow your treatment preferences to the extent that he or she knows them.

Do I need a health care directive?

Yes. A *health care directive* (often referred to as a living will) allows individuals to express their desires regarding medical treatment under certain circumstances. You are strongly encouraged to let others know your wishes regarding the termination of life support by executing a health care directive. Washington allows you to state that you want life support procedures continued or terminated if (1) you are terminally ill, unconscious, and on life support; or (2) you are in a persistent vegetative state and on life support.
A health care directive should not be confused with a request made under the *Washington State Death with Dignity Act*. Such a request allows you to receive medication to terminate your own life. This request can be made only by a person who is already terminally ill, and who is still competent to make decisions.

Allowing others to make a life support termination decision for you is a very large burden to place on your loved ones. Every individual is encouraged to make his or her own decision and execute a health care directive to provide guidance to family members.

How do I get started setting up my estate plan?

The first step is to contact one of the attorneys in our Estate Planning & Probate Group. We will send you some background information and an initial questionnaire to get you started with the process. We will then set up a time to meet to discuss your family circumstances, specific estate planning goals, and tax issues.

To learn more, contact our

Estate Planning & Probate Group

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