

ESTATE PLANNING FOR YOU (AND THOSE IMPORTANT TO YOU)

By

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What Is Estate Planning?

Estate planning is the legal area concerned with:

- **Planning for Your Property (or Assets)** (that is, the management of your assets during your life and the administration and distribution of your assets after your death); and
- **Planning for Your Person** (that is, your medical, health, and personal care decisions).

A Will alone isn't sufficient to plan for both your person and your property because it only takes effect at your death and deals only with your property. But it's usually a good start, and most everyone should at least have a Will.

Estate planning is essential for most people. It is a primary step in planning your personal affairs. In essence, estate planning is the process of getting your affairs in order for the convenience and benefit of your beneficiaries and you.

Remember, the primary purpose of an estate plan is to carry out your goals and wishes. Clients benefit from having a legal structure set up to carry out their wishes and from gaining the peace of mind that their affairs are in order.

What Questions Does Estate Planning Answer?

An estate planning attorney can help you answer important questions like these:

- "Do I need a Will? Or, do I need a Trust?"
- "How can I make things easier for my family and loved ones in the event of my death or incapacity?"
- "How can I guarantee that the people, charities, or other beneficiaries I want to receive my property at my death will actually receive it?"
- "What is probate? How can I avoid it?"
- "What are estate, gift, and generation-skipping transfer taxes? How can I avoid or minimize them?"
- "What plans do I need to make now for the care of my children in the event of my death or incapacity?"
- "Who will make personal and medical decisions for me if I become unable to do so?"
- "Who will take care of my property and affairs for me if I become unable to do so?"
- "What do I need to know about Wills, Living Trusts, Advance Directives (Living Wills), Powers of Attorney, and Joint Tenancy?"
- "Is the estate plan I have now the right one for me?"
- "What will happen to my business if I die or become disabled?"
- "If nursing home care is a possibility, can I become eligible for Medicaid to pay for it? If so, how? Should I plan for long-term care now?"

Do You Need Estate Planning?

You need estate planning if you want answers to questions like those above. My experience in counseling people about their estate planning has shown me that the greatest benefits of planning are often intangible: **Avoiding problems and simplifying matters for family and loved ones at emotionally difficult times.**

In this respect, it's important that someone you trust be ready to help you with your affairs, not only at your death but while you're living and unable to take care of those things yourself. Estate planning provides a practical, legal structure for this to happen. Children of aging parents or other loved ones are often in the best position to help encourage older parents to take care of their affairs.

If your own estate planning isn't done while you are living, the Oklahoma law of intestacy (that is, death without a Will) or descent and distribution will dictate what happens to your property. The law may not do anything you want; it often requires probate; and it won't address many of the questions noted above.

Many people question whether they have an "estate." You do if you have any assets you won't deplete during your lifetime. For example, your estate can include your home, any other real estate you own, cars, bank accounts, investments, mineral and royalty interests, retirement plans, and life insurance.

Although many people think of Wills and Probate when they hear the term "estate planning," estate planning also involves planning for assets that don't pass under a Will (for example, life insurance, retirement plans, IRA's, joint tenancy property, etc.).

*As we've said throughout the years, **“You can't take it with you, but you sure can leave a MESS!”***

Estate planning gives you the opportunity to take control, get “your house in order,” and make plans that will avoid or minimize potential problems.

What About Probate and Estate Taxes?

The costs of probate and estate and income taxes (both federal and Oklahoma) can reduce the value of your estate. An effective estate plan can avoid probate and reduce or even eliminate estate taxes in many cases.

Probate. Probate is the court proceeding that occurs after a person dies in order to carry out the terms of his or her Will. When a person dies having only a Will, a probate proceeding is usually required to administer his or her estate. Not having a Will can also require a probate proceeding.

- **Probate can be lengthy.** (It generally takes around 6 months and can last 2 years or longer.)
- **Probate can be costly and inconvenient.** (A probate proceeding in Oklahoma can be expensive from the perspective of legal fees and expenses, depending on the circumstances.)
- **Probate is public.** (Once filed in the probate action, your Will and any other information filed in the probate action generally become public records and can be viewed by anyone who wants to see to whom you left your assets, etc.)

Estate Taxes. Estate taxes are taxes that are payable after your death from your estate, depending on its size.

The Oklahoma estate tax was repealed for deaths occurring on or after January 1, 2010.

However, there is a federal estate tax that is payable on estates of a certain size. Basically, your estate will have to pay federal estate taxes if its net value when you die is more than the exempt amount in effect at that time. Federal gift and generation-skipping transfer taxes may also need to be considered during the planning process.

Please review www.danleylaw.com from time to time to learn more information about federal estate, gift, and generation-skipping transfer taxes.

"Where There's A Will There's A Way?" . . . Not Necessarily

Remember that a Will only takes effect at your death and must be probated before it becomes effective. It doesn't provide for the care of your property or your person while you're unable to take care of your own affairs. A Will doesn't eliminate the possibility of a guardianship in the event you become unable to take care of your own affairs. (**Guardianship** is the court process where you're declared incapacitated for some reason and your rights to take care of your own affairs are taken away and given to your "guardian" to make your decisions. Like probate, it's usually a costly and inconvenient process. There are annual reporting requirements to the court, and an attorney usually must be hired to handle the proceeding.)

Revocable "Living" Trusts. To avoid these results, many people use Revocable "Living" Trusts, which are convenient and have many benefits, such as the following when properly prepared and funded:

- Living Trusts completely avoid probate and its costs and inconvenience for the property put into the Trusts.
- When combined with documents like Durable Powers of Attorney for Health Care and Property, Living Trusts in most cases can avoid the need for a guardianship in the event of your incapacity.
- Living Trusts can contain beneficial tax planning.
- Living Trusts are private (you only show them to whom you want).
- Living Trusts can lead to a quicker distribution of assets at your death, as contrasted to a Will which is probated.
- Living Trusts essentially plan for life as well as death.

Of course, the decision between using a Will or a Trust as the primary estate planning document is the client's own personal choice to make, based on his or her own needs and circumstances. I believe the client should be informed about all of the options in making that decision and not be confined to using only a Will.

Is There a Typical Estate Plan?

Most everyone should, at a minimum, seriously consider these estate planning documents that, when combined, plan for your property decisions and your personal care decisions:

- **Will or Revocable "Living" Trust** (properly funded).
- **"Pour-Over" Will** if a Living Trust is used.
- **General Durable Power of Attorney.** This document allows you to name an agent to make decisions for you and sign on your behalf concerning your assets and property. If you become incapacitated, the agent can still do those things for you as long as the document is correctly drafted to be "durable."
- **Healthcare Power of Attorney.** This document allows you to name an agent to make your personal and medical care decisions for you if you become unable to make them yourself. If properly drafted, it is also "durable" to be effective after you may become incapacitated.
- **Advance Directive for Health Care.** Under Oklahoma law, this document contains a Living Will, a Health Care Proxy designation, and an Anatomical Gift designation.
- **HIPAA Authorization.** This document allows you to name someone to serve as you "personal representative" under the federal law known as "HIPAA" for the purpose of obtaining your medical information and records from health care providers on your behalf.

How Can You Plan For The Care Of Your Children?

Many people make plans for their cars, their home, their bank account, and other assets. However, they often fail to adequately plan for their children. Difficult problems can obviously arise if you don't plan for your minor children.

Example. As reported in *The Wall Street Journal*, an orphaned brother and sister, ages 9 and 12, whose parents died without a Will, were shuttled back and forth between a maternal aunt in Georgia and their paternal grandparents in Pennsylvania while state courts argued over both the merits of the case and which court had jurisdiction. Finally, their grandparents reluctantly opted to give up their attempts rather than subject the children to further dislocation.

Parents should, at the very least, name trustworthy guardians for their children in their Wills. Parents should also, either through their Wills or through their Living Trusts, have a children's trust in place which is ready to receive assets at the parents' deaths to provide for their children's care and education. (This also applies to grandparents with minor grandchildren.)

Example. Many parents rely on proceeds from life insurance policies to provide for their children in the event of their deaths. It's important that the parents have a children's trust ready to receive the insurance proceeds.

What About the Use of Joint Tenancy?

Many people have bank accounts or their homes in joint tenancy with another person. With a few exceptions, joint tenancy is not a good way to plan for the distribution of assets. Effective estate planning can take care of the problems with joint tenancy, including the problems illustrated in these two examples.

Example 1. Joe and Mary have \$75,000 in C.D.'s. They place their son John on the C.D.'s with them as joint tenant with right of survivorship ("JTWROS") so that John can help them handle the C.D.'s if needed. One problem with this is that John's creditors might be able to make a claim against the C.D.'s for debts John owes. This is because John, by becoming a joint tenant, is also an owner of the C.D.'s. Another problem is a potential family dispute. Assume that Joe and Mary's Will says that all their property is to be divided equally between John and his two sisters. At Joe and Mary's death, their daughters want their share of the C.D.'s. However, John can claim he is entitled to all of the \$75,000 because JTWROS property isn't normally subject to the Will or probate. The children could end up in a lawsuit if they can't work it out.

Example 2. Joe and Mary own their house in JTWROS. They did this to avoid probate. However, at the death of the first of them, the survivor will still need to have an Affidavit of Termination of Joint Tenancy prepared and filed in the county clerk's records to remove the deceased spouse's name from the property. And, probate will be required at the second death if the survivor doesn't plan to avoid probate. If one of them becomes incapacitated while both are living, and the home needs to be sold, they have to go through a court procedure similar to guardianship to allow the home to be sold.

Do Any Special Concerns Exist in Your Case?

Effective estate planning can also help with special concerns like these:

- Second marriage situations.
- Children from prior marriages.
- Charitable giving.
- Life insurance trusts.
- Special needs of disabled children or adult relatives.
- Children or relatives who have difficulty handling money.
- Business interests that need to be planned for in the event of death or disability.
- Providing for grandchildren.
- Long-term care, such as nursing home care, and eligibility for Medicaid to pay for such care.
- Large estates and tax avoidance.

When Should You Have Your Estate Planning Reviewed?

If you have already done your estate planning, you should have it reviewed at least in these situations:

- When you get married.
- When you become a parent.
- When you reach mid-life.
- When you move to another state.
- At the death, birth, or divorce of children, guardians, or trustees.
- After a divorce.
- Before you remarry (for example, a *pre-marital agreement* is often essential.)
- When you retire (especially if you move to another state.)
- When you need to make a change in beneficiaries on any retirement benefits or life insurance.
- When you must make elections on retirement benefits and plans.
- When a spouse dies.

Estate Planning Consultation?

It's very important that you consider all your options so you can make informed decisions with respect to your estate planning needs. We don't limit those options to Wills and Probate but address what benefits a client under the client's particular goals and circumstances. Since each person's estate plan is unique, we work with our clients in a very individualized way.

Please contact us if you are interested in learning about our initial Estate Planning Consultation. The Consultation is designed to help potential clients learn about their estate planning options and decide whether they would like us to do their estate planning.

Conclusion

I have the privilege of helping clients from across the state take care of their estate planning. My primary goals include providing competent legal services in an understandable and cost-effective manner and performing services the way I would like them done for me if I were the client.

I hope you will contact my staff or me if we may be of service.

Thank you,

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Please note: This paper is provided as a courtesy in order to provide educational information about estate planning. This paper does not constitute legal or professional advice or services. If you have questions about your estate planning, you should consult with an attorney of your choice who is experienced with estate planning.

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NOTES/QUESTIONS: