

CHAPTER 1

Preparing Your Estate Plan

The Role of Your Will

Estate planning, in simple terms, may be defined as a plan to dispose of the property you have acquired throughout your lifetime by using the most appropriate method of transferring that property. At different times in life your estate, family, and plans for your property will be different. Estate planning can help accomplish a number of goals, including avoiding taxes and probate, and providing for continuing care of dependents, along with a variety of other individual purposes. Your valid will, no matter what other methods you use, remains one of the basic tools of estate planning. The role of your will is flexible and addresses your personal needs at various stages of life. In the early stages of your life your will may name guardians for dependents, dispose of family heirlooms, or give individual gifts to children, relatives, or charities. At later times in life, if your estate becomes extensive, your will may dispose of property that is not transferred by more sophisticated estate planning techniques. No matter what other estate planning methods you may use, a valid will always remains a necessary part of your plan.

Many methods allowing the immediate transfer of property outside the

probate process are in common use. Joint Titling with Right of Survivorship is one method of transferring ownership that most readers are familiar with. This common estate planning technique allows either of the co-titleholders to assume full ownership of the property upon the death of the other. Transfers of ownership by this method make the property immediately available and are usually exempt from tax liability and the probate process. A new method of transferring certain monetary assets, such as bank accounts and CDs, are Payable on Death accounts. This new method of direct transfer, which is not currently available in all 50 states, allows the transfer of certain accounts directly to a named beneficiary upon death of the owner. A number of methods, including gifts made during your lifetime, trusts, and other planning measures may be required to meet your individual needs. The trend in both federal and state legislative statutes is toward lowering taxes and simplifying the probate process. Always try to be aware of new methods of estate planning that can help accomplish your goals.

As shown by the sample in the Introduction, your will can be a very simple document, setting out your complete plan regarding distribution of your estate. Your will should always reflect your current goals, family needs, and personal decisions. Your will can be amended or revoked and replaced by a new one at any time.

Estate Concerns

You may reasonably expect to write several wills in a lifetime. The process of writing, executing, and maintaining a will should become a routine part of your overall estate plan. Updating your will as needed can help keep it simple, effective, and responsive to your current needs.

The passage of time can make significant changes in your personal, family, and estate situation. Your first will, often simple in content, may be supplemented, or supplanted, to take into account guardians, additional beneficiaries, charitable bequests, or other elements of your estate plan. Consider your estate, beneficiaries, and family needs, and plan accordingly when deciding on the content of your will. Bequests and provisions in your will may be as brief or extensive as needed to express your wishes and plans. A simple will is not necessarily brief.

YOUR PERSONAL SITUATION

Assessing your personal situation is a task you are best qualified to perform. Typical concerns include your health, marital situation, and dependents; the status of your beneficiaries; and the risks involved in your daily life. Your age and health, and that of your beneficiaries, are extremely important in shaping your estate plan. At the early stages of adult life, your as-

sets and responsibilities may be few, requiring only a simple will to transfer your estate to your beneficiaries. At such times, your primary concern may be to assure that your personal property is disposed of in the manner you decide. Automobiles, household goods, jewelry, and electronic, photographic, hobby, or sports equipment may be disposed of in a valid will with little extended planning required. In later years, after a lifetime of changes, the same concerns often apply. The estate planning cycle often begins, and ends, with a simple will.

Changes in your estate plan usually follow important events in your life, including:

- Moving.
- Marriage.
- Birth or adoption of children.
- Divorce.
- Remarriage.
- Death of grandparents and others of their generation.
- Maturity of children.
- Birth of grandchildren.
- Death of parents and others of their generation.
- Growth of estate, including inheritance(s).
- Need for estate tax planning.
- Continuing health care needs.
- Death of spouse.
- Death of beneficiaries.

These events can affect the nature of your estate and influence your choice of beneficiaries. Be sure to review your estate plan periodically and address important events that change your estate planning goals and methods.

Special Situations

At different times in life you may find that there are special situations that affect your estate plan. These situations can include marriage, divorce, birth of children, disinheritance, and a variety of others. Your will and common estate planning methods may be used to address a number of these situations. Other estate planning methods, such as trusts, should be considered if your will cannot adequately meet your goals. As changes occur in your life your will, along with other components of your estate plan, should be kept current.

MARRIAGE

Marriage can affect your personal goals, the ownership of property, and your estate plan. Your will, and your spouse's, should address your shared and individual goals. The need for a will is especially critical if you intend your spouse to inherit the majority of your estate. In most states, if there is no will to direct otherwise, your spouse may inherit only a portion of your assets. Be aware that all states, except community property states, allow a surviving spouse to "elect" against the will. This means that the surviving spouse can elect to receive a portion of your estate as set out by state law, instead of the bequests made under your will. Because of the elective share statutes it is virtually impossible to disinherit your spouse. A summary of the elective share for your state can be found in Chapter 8, State Resources and Requirements. Spouses should consult with each other regarding estate planning so that they can prepare complementary, not conflicting, plans. Good estate planning requires that each spouse has an individual will that mirrors the other, and that it contains no conflicting bequests or instructions.

MARRIAGE AND PROPERTY

Marriage, of course, has a significant effect on property ownership. In community-property states, each spouse has a one-half interest in all property of the marriage. The property interest of each spouse is individual and, if no other plans are made, should be disposed of in the will. Property owned individually before the marriage remains separate and may also be distributed in a will. If you live in a community-property state, be sure your will specifies how you intend to dispose of the individual property that is a part of your estate. You and your spouse should coordinate your estate plans, and each of you should prepare wills accordingly.

DIVORCE / REMARRIAGE / OTHER RELATIONSHIPS. Divorce and remarriage can be of special concern to those preparing an estate plan. If you or your spouse have been married previously, be sure to check for accuracy all titles, deeds, and insurance policies acquired during the previous marriage. If either spouse has children by a previous marriage, choices must be made regarding their place, if any, in your estate plan. For those who are married, agreement and coordination are essential to effective estate planning.

Relationships other than marriage may also affect your estate planning decisions. In some states, those who live together continuously for a period of time may be considered legally married, even though no formal marriage ceremony has taken place. Common-law marriages of this type may have significant impact on the way an estate is divided. If you or one of your beneficiaries maintains a living relationship with someone who is not a legal spouse, you should consider the implications carefully. States that currently recognize common-law marriages are Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode

Island, South Carolina, and Texas. The District of Columbia also recognizes common-law marriages.

In summary, those who are currently married, considering marriage, or maintaining a relationship that could have the legal status of marriage should take special care when preparing an estate plan. Each spouse should have a will, and the major provisions should not conflict or disagree. Spouses who have named each other as sole or primary beneficiary should always name alternates to receive the estate if both die simultaneously.

CHILDREN AND DEPENDENTS

If you are responsible for the care of minor children, you should nominate a guardian for them in your will. While your wishes are not strictly binding, the probate court usually appoints your nominee as guardian when you express your intent in your will. Designating a person to serve as guardian of minor children in the case of the simultaneous death of both parents is important, and the wills of both parents should agree regarding the designation of the contingent guardian. Close family members, including the spouse and extended family, are usually relied on to provide care for minor children until they reach maturity. A healthy surviving spouse, provided with adequate financial resources through insurance or estate assets, is usually the best choice for dependent care. If you are single or lack family resources, the importance of this type of planning becomes more critical.

Plans for dependents, especially intentions regarding care, education, religious affiliation, and management of assets, should be outlined and discussed with your chosen guardian. The guardian you appoint must consent and be acceptable to the court. Financial support, especially over a long period of time, may require a trust or other arrangements.

• Example

If my wife, Jo Anne Stone Light, does not survive me by more than 180 days, then I give my entire estate to my daughter, Linda Lee Light, and my son, Paul Abraham Light, in equal shares, and I appoint Abraham Lee Light, my father, as guardian of my children until they attain their majority.

CHILDREN: UNEQUAL SHARES

If you have no will, your children—minor and/or adult, biological and/or adopted, legitimate and/or illegitimate—may have an equal claim on your estate. Most states also provide your unborn (pretermitted) children a share of your estate if you die intestate. Often, parents have children with unequal needs or have concerns about the ability of a particular child to manage assets. In later stages of estate planning, prior gifts made to children may affect the terms of your will. Providing for children requires special care as

you outline your estate plan. When children are minors or require continuing care, you may consider estate planning methods beyond your will that provide income and financial security over time. If you have minor or adult children that you intend to exclude from your estate or treat differently in your will, take special care to spell out your intentions.

Your will may include special instructions regarding property left to minors. You may specify a person to hold and care for gifts of property to those who are immature or, by law, unable to take possession.

● **Example**

I direct my son, Frederick Roger Hale, who is my appointed Executor, to keep the Browning shotgun, SN 67890, that I have given to my grandson, Charles James Hale, until he has reached maturity and is able to safely assume possession, or reaches the age of 18 years.

If you plan to exclude a particular child from your estate, be sure to state that intention in your will. If you fail to mention one child while leaving gifts to others, the court may rule that you simply overlooked that child and may award him or her a share proportionate to those of your other children. Be sure provisions regarding children are clear, complete, and direct.

● **Example**

I have purposely made no provision for my son, William Samuel Stull, because I have neither seen him nor heard from him in the past 30 years.

Be sure to list the reasons for unequal treatment of your children in your will. Unequal division of your estate can often result from prior gifts or loans made to your children.

● **Example**

I give my entire estate to my son, James Carl Stull. I have intentionally made no provision for my other son, Howard Charles Stull, since I previously purchased an 80-acre farm in Pasco County, Florida, for him in accordance with his expressed wishes.

Making unequal provisions in your will should always be planned carefully. Children who are treated unequally, or who are excluded from your will, are likely to contest the will.

DISINHERITANCE

Disinheritance usually applies to immediate family members (an only child, for example) who would have a claim on your estate if you had no will or if your will were declared invalid. Note that Louisiana is the only state in which you cannot disinherit your children. If you disinherit an immediate family member, it is always wise to state your reasons for doing so in your will. In most other cases, you may effectively disinherit anyone other than your named beneficiaries by simply not including them in your will. If you wish, you may also include a statement in your will specifically omitting all others.

● **Example**

I hereby specifically exclude from my estate any and all other persons not named previously in this, my Last Will and Testament.

CAUTION: Completely disinheriting your legal spouse is virtually impossible. In any case, your spouse will be able to take an elective forced share of the estate. Remember, disinheriting a close family member can cause controversy in your family. Family members who feel that they have been unfairly disinherited are the source of most will challenges. If you have reason to believe that someone will contest your will, recognize that he or she will probably engage an attorney, and take special care when preparing your will. A properly executed (signed and witnessed) will is very difficult to challenge successfully.

Many of the special situations encountered at different stages of estate planning may be addressed with simple provisions in your will. Evaluating your personal situation and your goals is necessary to determine if additional estate planning measures are needed. If continuing care of dependents, conservation of assets for future generations, or estate taxes are a concern, you should consider a trust or other arrangement. Health and medical expenses are also concerns that can affect estate planning decisions.

Common Estate Planning Methods

The Living Will and Power of Attorney, which can be used as methods to address concerns related to continuing care and conservation of assets, are discussed in more detail in Chapter 7. In the following section, estate planning methods including Payable on Death accounts and Joint Titling with Right of Survivorship are summarized. A detailed overview of Trusts is also presented.

PAYABLE ON DEATH ACCOUNTS

The Payable on Death (POD) account is a simple estate planning tool that has recently become available in many states. Checking and savings accounts, along with certificates of deposit, may be designated as Payable on Death accounts. The owner of a Payable on Death account simply designates a beneficiary to receive the account upon the owner's death. These accounts are transferred outside the probate process and are immediately available to the named beneficiary.

To establish a Payable on Death account, simply ask your banker to open or designate the account as a POD account. Your banker will ask for the name of the beneficiary who is to receive the account upon your death. The name of the beneficiary you designate, along with the letters P.O.D., are then typed on the account documents. Once this is completed, the account will go directly to your designated beneficiary upon your death.

This simple method of designating a beneficiary has some advantages over the traditional method of joint titling (with right of survivorship) such accounts. A major advantage is that your ownership interest in the account is not compromised while you are living, as it is with a jointly titled account. Your bank or financial institution can tell you if your state has Payable on Death accounts or a similar statute. POD accounts allow the named beneficiary to claim the balance of any accounts immediately upon the death of the account owner. POD accounts are, by law, exempt from the probate process. The states having Payable on Death accounts are listed in Chapter 8, State Resources and Requirements.

JOINT OWNERSHIP / RIGHT OF SURVIVORSHIP. Joint ownership, with right of survivorship, is a common estate planning technique used by married couples, as well as by others who own property together. Property held in joint ownership transfers title to the survivor upon the death of one of the owners. This type of transfer is automatic and avoids probate of the property. Real estate, bank accounts, and other property are often jointly titled by couples as an estate planning measure. Be sure to review deeds, titles, and account agreements that are titled jointly to ensure that "right of survivorship" is included. Joint owners may plan for the remote possibility of simultaneous death by naming an alternate beneficiary in their wills. If both partners die together and their wills agree on an alternate beneficiary, that person will receive the property once held jointly by both. For this reason, it is extremely important that spouses' wills agree on major provisions, especially the choice of alternate beneficiaries and Executor. In some states, a form of real property ownership, "tenants by the entirety," is available to married couples only. This type of ownership also transfers title automatically to the remaining spouse.

Trusts

Many techniques of estate planning can be set up with little or no outside help. For example, tax-deductible gifts of up to \$10,000 each may be made to children and grandchildren each year by each parent. The preparation of a will; joint titling of real estate and accounts, with a specified right of survivorship; and payment of life insurance policy proceeds to a named beneficiary can all be arranged easily, without ongoing outside assistance being required. A trust, however, requires the services of a trustee, who is empowered to oversee the operation of the trust, in accordance with the guidance contained in the basic trust agreement. Since a trust cannot be effectively used for estate planning purposes without outside assistance, the following material is intended to provide a general overview of trusts so that the type of trust needed can be identified. After review of this material, it is suggested that the components of the trust desired be listed in outline form to provide an informed basis for proceeding with outside assistance. The Trust Checklist at the end of this chapter is provided for this purpose.

A trust is simply defined as giving assets or property to one party (a trustee) to hold, use, or manage for another party (the trust beneficiary). A trust is legally established by the witnessed and notarized execution of a declaration of trust by the creator of the trust (also called the settlor, grantor, trustor, or donor). The trust agreement empowers the trustee to administer the trust and sets out its terms and conditions.

TRUSTS AND LIFE ESTATES. Trusts and life estates are options that can offer many advantages and may be considered as part of your estate plan. Trusts are often used to provide income to a surviving spouse or other beneficiaries while the assets of the trust are conserved for future distribution. There are several types of trusts and methods of establishing them to achieve different purposes. You and your spouse should discuss your goals, tax position, and anticipated income needs when considering trusts. A life estate can guarantee your spouse or other beneficiary the right to occupy real property, such as a house or farm, while allowing the title to be transferred to another beneficiary. Title transfers prior to death avoid probate and, because a life estate is a liability against real property, may lower the value of the taxable estate.

PURPOSES OF TRUSTS

Reasons for establishing a trust include:

- Providing for continuing care and education of minor children (or grandchildren).
- Providing income for a surviving spouse.

- Providing for continuing care of a dependent or incompetent adult.
- Providing the assistance and the security of professional management of assets.
- Minimizing federal estate taxes if the combined estate (of husband and wife) will exceed \$675,000 upon the death of the surviving spouse.
- Minimizing state inheritance taxes.
- Avoiding the expense, delay, and public record involved in the probate process.

THE TRUST ENTITY

The establishment of a trust creates a separate legal entity, the trust, which has ownership and/or title of property transferred to it. As a separate legal entity, the trust must be given a Federal Employer Identification Number (FEIN), and separate state and federal income tax returns must be filed if the trust's income exceeds \$600 annually. Generally, the trust holds title to all its assets, is managed by a trustee, and is owned by the beneficiary(ies). Functionally, a trust is very similar to a private investment corporation. The trustee should keep accurate accounts and report on the trust's status to the beneficiaries (owners) on a regular basis.

THE TIMING OF TRUST DISTRIBUTION

The reasons for establishing a trust affect its terms. An arrangement suitable for one stage of family life, addressing care of minor children in the event of the death of one or both parents, becomes functionally obsolete when the children reach adulthood and are presumed capable of managing their own affairs. A trust to pass on family real estate to the next generation may be established whenever circumstances warrant it. Establishing a trust to provide a source of funds for the continuing care of a spouse or relative who has, or may have, medical problems is often a concern in later life. Tax planning reasons for establishing a trust are directly related to the present and anticipated value of your estate.

A trust can be structured to pay all, or a portion of, the trust principal to the trust beneficiary(ies) at various times, either on specific dates, such as birthdays, or over multiyear periods.

Examples of timing trust principal distribution include:

- All of the principal to beneficiary(ies) on January 1, 2000.
- Each beneficiary's principal to be paid in full upon his or her twenty-fifth birthday.

- Beneficiary to receive one-third of the principal 10 years from the date of the trust agreement, one-half of the remaining principal 5 years later, and the balance of the principal 20 years from the date of the trust agreement.

10 years	$\frac{1}{3}$
15 years ($\frac{1}{2} \times \frac{2}{3}$)	$\frac{1}{3}$
20 years (balance)	$\frac{1}{3}$

- All to beneficiaries upon sale of trust assets, per trust agreement.

When the principal balance of the trust is fully paid to the trust beneficiary(ies), the trust is terminated.

Trusts can be established on either a revocable or an irrevocable basis. An irrevocable trust cannot be changed, whereas a revocable trust can be terminated at the trustee's discretion. At present, there are no federal income or estate tax advantages to a revocable trust.

THE TRUSTEE

Clearly, the person or organization chosen as trustee has a significant bearing on how the trust is structured. If a third-party trustee, either an individual or an organization, is appointed, the trustee should be bonded in the amount of the trust to protect the interests of the beneficiary(ies). Compensation of the trustee for investment, management, disbursement, and state and federal tax filings should be established and agreed on before a trust is set up. Third-party trustee fees vary with the size, term, and complexity of the trust, and it is wise to obtain several quotes. If the trust has a relatively long term, it is also desirable to select an alternate trustee to serve in case the first trustee becomes incapacitated or is otherwise unable to serve.

Trusts can be organized either as "living" trusts (*inter vivos* trusts) or as "testamentary" trusts (established upon death). If you set up a living trust, you can also be the trustee. Generally, a revocable trust is preferable if you plan to act as the trustee or wish to assess the performance of a third-party trustee.

THE FUNDING OF TRUSTS

Living trusts are funded with wholly owned assets such as cash, stocks, bonds, and real estate. A testamentary trust can be funded with wholly owned assets or life insurance policy proceeds. The initial funding of a trust is its principal. Funds earned from the trust principal, such as interest, dividends, and rents, are considered as trust income. Many trusts are designed to preserve the principal until termination, with the trust income being distributed to the trust beneficiaries in a timely manner for

their benefit. In other cases, the trust may be structured to reinvest all income, thereby creating a larger principal balance to be paid out when the trust is terminated.

If the trust is funded with real estate, you may also grant a lifetime-use provision for a spouse or others, particularly if they are not to be beneficiaries of the trust upon its termination. This is accomplished by adding a life estate interest clause to the deed of the property involved before its transfer to the trust. A beneficiary of a trust has vested ownership in all, or part of, the trust principal and income. Unless otherwise specified, ownership of a trust interest is an asset to the owner and, as such, can become a part of the owner's estate.

Trust Checklist

PURPOSE(S) OF TRUST

- _____ Continuing care/income.
- _____ Maintenance of ownership.
- _____ Timed distribution of assets.
- _____ Privacy/avoiding probate.
- _____ Tax considerations.

TYPE OF TRUST

- _____ Testamentary trust.
- _____ Living trust (*inter vivos*).

NATURE OF TRUST

- _____ Irrevocable.
- _____ Revocable.

TRUSTEE

- _____ Third party.
- _____ Self/owner(s).

TRUST ASSET(S)

- _____ Real estate.
- _____ Stocks/bonds.
- _____ Cash.
- _____ Income-producing asset(s).

(continued)

Trust Checklist (continued)

SOURCE OF TRUST ASSETS

- _____ Lifetime transfer(s).
- _____ Estate.
- _____ Life insurance proceeds.

TERM OF TRUST

_____ Years.

TRUST OWNERS/INCOME BENEFICIARY(IES)

_____.

_____.

_____.

_____.

TIMING OF TRUST DISTRIBUTION

Income _____.

_____.

_____.

Principal/Asset(s) _____.

_____.

_____.

Date _____