

ESTATE PLANNING OVERVIEW

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WILL-BASED PLANS

The Basic Will:

A basic will, sometimes referred to as an "I Love You Will," typically gives everything to the surviving spouse, or in the event there is no surviving spouse, to children or other beneficiaries. If there are minor children (under 18 years old), it may also name someone to be the guardian for the minor children.

A basic will does not provide any protections for the surviving spouse, children or other beneficiaries against claims that others may have against them. Such claims may arise from creditors, lawsuits, divorce, remarriage or other situations. A basic will does not include tax, Medicaid or long term care planning.

To have legal effect, a will must be probated after the death of the maker of the will. A will based estate plan necessarily includes planning to probate. When probated, wills and the related filings are public documents open to public view.

The Basic Will with a Testamentary Trust for Children:

Basic wills may include a testamentary trust for minor or young adult beneficiaries. The will maker designates someone to manage and control the assets for the children until they reach a certain age. Upon reaching the designated age, the remaining trust assets

are transferred to the children outright and the trust terminates. Children's trusts sometimes stagger the distributions to the children over a period of time (e.g. 1/3 at 25 years of age, 1/3 at 30 years of age, and the remaining assets at 35).

The Basic Will with Ancillary Documents:

Because a will controls only the probate estate at death, other documents are usually prepared to address health issues, disability and incompetency. These documents usually include a durable power of attorney, durable power of attorney for healthcare, and living will.

The **durable power of attorney** is used to appoint someone to make financial and property transactions for you if you are unable to do so because of disability, incompetency or other reason. If there is no power of attorney, or if a financial institution will not honor the power of attorney, or if for some other reason the power of attorney is ineffective, a conservatorship (living probate) proceeding in court may be necessary. Conservatorship proceedings can be expensive, time consuming and stressful. Conservatorships involve court oversight and usually require that periodic financial accountings be submitted to the court for review and approval.

A **durable power of attorney for healthcare** is used to appoint someone to make healthcare decisions for you if you are unable to do so because of disability or incompetency.

A **living will** is your advanced directive indicating what medical care you want to receive or discontinue in the event that your quality of life has become unacceptable to you because of a serious, irreversible health condition. You may direct that in the event you have such a condition, and it will not improve with treatment, that you be permitted to die naturally with only the administration of medication or medical procedures necessary to keep you comfortable and to relieve pain. Health conditions may include permanent unconsciousness, permanent confusion, dependency in all activities of daily living and end-stage illnesses.

Will with Trust Provisions to Save Estate Taxes:

Estate tax planning can be incorporated into a will-based estate plan. Basic estate tax planning for married couples usually involves the creation of trust provisions in the will to take advantage of the estate tax exemptions available to both spouses. Without these tax planning provisions, the estate tax exemption of the first spouse to die is wasted and estate tax is more likely to be owed upon the death of the surviving spouse.

Revocable Living Trust-Based Plans

When properly drafted and funded, revocable living trusts are a superb means not only for probate avoidance, but also disability planning, estate tax planning, protection and management of assets, and protection of privacy.

To fully utilize the benefits of a revocable living trust-based plan, it is important that the revocable trust be funded. In other words, you transfer your assets to your living trust. A fully funded revocable living trust provides disability planning that cannot be achieved merely with a will and a durable power of attorney. A fully funded revocable living trust titles the trust maker's property in the name of the trust. The trust instrument designates what circumstances will constitute a disability, the person or persons that will decide if the trust maker is disabled, and the guidelines and instructions for management of the trust during the period of disability. Because the assets are titled in the trust, the trustee has the power to manage the assets without need to resort to a power of attorney or a court supervised living probate (conservatorship).

A durable power of attorney presents several problems when used as the cornerstone of disability planning. Banks and other institutions may not honor the power of attorney. A disgruntled family member who does not like the person appointed may petition a court to revoke the power of attorney and to appoint a court supervised conservator. Additionally, a durable power of attorney grants power to the appointee but does not provide guidelines and instructions to the appointee. Consequently, there is always a risk that the appointee may use a power in a manner contrary to what the maker would have wanted him or her to do. For these reasons, a properly prepared and funded revocable living trust is likely to be preferable to relying solely on a durable power of attorney as the cornerstone of disability planning.

An unfunded or partially funded revocable living trust may necessitate an otherwise unnecessary probate proceeding to administer the unfunded assets at the death of the trustmaker. A "pour over" will is used to transfer any unfunded property into the trust after the death of the trustmaker. After the assets are transferred to the trust, the trust terms control the disposition of the assets.

A revocable living trust plan should include standard ancillary documents such as the "pour-over" will, durable power of attorney, living will and health care power of attorney. A durable power of attorney can be drafted to grant the appointee the power to transfer unfunded property into the trust.

Protection of Assets/Risk Management

Traditional will-based and traditional revocable living trust-based plans typically do not address protection of assets from lawsuits and claims against the beneficiaries. Traditional plans usually focus upon tax and management issues, but not asset protection. Trusts can be created within your estate plan to protect your beneficiaries'

shares from lawsuits, judgments, creditors, divorce or other unpleasant events that may happen in their lives. They can also be designed to protect your bloodline beneficiaries in the event your spouse remarries after you die.

The revocable living trust does not protect the trustmaker's assets from his or her creditors during his or her lifetime. The asset protection features apply after the trustmaker's death in trusts created in the plan for the beneficiaries. Planning to protect the trustmaker's assets from lawsuits or other creditor claims during the trustmaker's lifetime generally involves additional planning that may include limited liability companies, limited partnerships and irrevocable trusts.

Asset protection is also referred to as risk management. As with any risk management strategy, there is no 100% "bullet proof" plan that is guaranteed to protect assets from all potential creditors. Promoters that market such "bullet proof" plans should be avoided. More likely than not they are selling "snake oil" or are promoting strategies that are illegal or of little or no real protective benefit. There are numerous lawful means to protect assets and manage risk, but no plan can be said to be completely "bullet proof."

Irrevocable Life Insurance Trusts

Irrevocable life insurance trusts (ILITs) are irrevocable trusts funded with life insurance. ILITs are commonly used if the value of the assets in the estate exceed the total of the maximum allowed estate tax exemption amounts. In those circumstances, additional planning is needed because the tax planning in the will or revocable living trust will not zero out the estate tax.

The ILIT is irrevocable, meaning trust maker cannot terminate the trust as he or she could do with a revocable trust. The trust maker does not exercise sufficient control over the ILIT to have the insurance proceeds included in his or her estate. Therefore, when the proceeds are paid, the proceeds will not be included in the trust maker's estate. Therefore, the proceeds of the life insurance pass to the beneficiaries free of estate tax.

Care must be taken in both the formation and operation of the ILIT. If not properly formed or managed, tax advantages can be lost. For this reason, the trustee should be a professional, such as a CPA.

Disability, Long Term Care and Nursing Homes

How will you and your dependents survive financially in the event you become disabled? How will you pay for nursing home or other long term care? These are a few of the basic questions that you must ask yourself when planning your estate. Do you have sufficient wealth to pay these expenses out of pocket? Should you purchase

insurance to cover these expenses? Disability insurance provides an income stream in the event you become disabled. Long term care insurance can provide a means to pay for nursing home care and alternative forms of long term care, including at home care, in the event such care is needed. You should consult a qualified insurance representative to determine if insurance products may fulfill your planning goals.

If any beneficiary of your estate is, or is likely to become, disabled, you must take care to ensure that your estate plan will not unintentionally disqualify the beneficiary from necessary government assistance. Special Needs Trusts are commonly created for bequests or gifts to such individuals.