IMPORTANCE OF ESTATE PLANNING

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Many people put more effort into planning for a vacation than they do for the disposition of their assets upon their death. As an attorney, who focuses her practice solely in the areas of the law relating to estate planning and probate, people often tell me that their loved one who died without a last will and testament meant to have a will, but just did not have the time or did not want to think about dying. I understand. Yet, did you know that if you die without a last will and testament, the state of your primary residence has written a last will and testament on your behalf? That state controlled disposition may not be a reflection of how you intended your assets to be distributed. In fact, it is most likely *not* how you would dispose of your assets.

In Kentucky, dying without a last will and testament is called dying "intestate" and sets into motion a complicated procession of legal maneuvers that must be complied with in order to produce the distribution of assets to the rightful heirs (as determined by the state, and not you). Rather than discuss the intestate probate process, this article describes the most basic reasons for estate planning, the most common documents, and the general purpose of estate planning.

REASONS FOR ESTATE PLANNING

Tax Planning: As a general rule, in 2006, if you die with more than $2,000,000 in assets (*including* your retirement, death amount of life insurance, home, and all other assets to which you have an ownership interest), your representatives are required to file a complex tax return with the federal government, which tells them the identity and value of everything you had an interest in at the date of your death. Also, depending upon your marital situation, your estate may be subject to Federal Estate Tax, which, can be a tax of as much as 46% of your assets. One key element of utilizing a qualified estate planning attorney is to maximize the ability to legally avoid Federal Estate Taxes. In essence, if your estate planning documents are structured properly, it is possible in many situations for a husband and wife to double the amount that is available tax-free and avoid estate tax.

As an example, assume that Husband and Wife are married and each has $1,500,000 in assets in his and her own name. Husband died in early 2006 and his last will and testament from 1972 gave all of his assets to Wife. Since under law there is no federal estate tax for property transferred between spouses, Wife then has $3,000,000 in total assets. Wife dies in late 2006. Since the tax-free exclusion from Federal Estate Tax is $2,000,000 for 2006, the Wife has $1,000,000 in assets subject to Federal Estate Tax. Under this common scenario, the Wife's estate will pay $460,000 to the government. This is $460,000 that will not go to the children of the Husband and Wife. Had the Husband and Wife in the above scenario been advised by a qualified estate planning attorney, and utilized basic estate planning principals, the amount payable in Federal Estate Taxes would have been zero (yes, zero).

Children: Probably the single best reason for parents to have a last will and testament is to plan in the event of death prior to children attaining the age of 18.

Guardian. Within a Last Will and Testament, parents can name a person who will have legal custody of children under age 18 in the event of the death of both parents. This avoids family uncertainly and disputes in the event both parents die and had not made this designation. Also, parents can name alternates.

Trusts. Trusts allow parents to implement a plan for distribution of assets following their death. For example, many parents have provisions in their estate planning documents which place their assets in trust for the benefit of children with incremental distribution to take place upon reaching certain ages such as 25, 30, and 35. Prior to the distribution periods, the designated trustee (often a trusted family member or bank) is required to distribute trust funds for the benefit of a child's education, support, and medical care.

Many parents have substantial life insurance on their own lives and name their children as the beneficiary if their spouse does not survive. By naming the trust within the estate planning documents, the life insurance proceeds become subject to the terms of the trust and utilization of the funds for education, support, and medical needs is monitored by the trustee. Designating the children as the beneficiary without mandating that the proceeds be placed into trust, means that the children will receive those funds outright at age 18 or 21 depending upon the law of the state.

Understanding of Property Title: Many people do not have a firm grasp on the meaning of property title for the purpose of death distribution. Title such as joint tenancy with right of survivorship, pay on death, and co-ownership have meaning under law. If an account, car, home, or other asset is titled in a specific way, it may mean that it passes outside of probate which means that it is not controlled by a last will and testament or by the laws of intestate distribution. Rather, it is controlled by its own title.

For example, often, I encounter a situation where an elderly mom puts one child as co-owner of her checking account so that the child can write checks for mom. Under Kentucky law, upon mom's death, that co-owner child can become 100% owner and the other children are excluded. Not such a big deal when there was $19.00 in the checking account, but if there was $300,000, the other children will most certainly have issues. No problem, you may say, just have the co-owner child equally distribute the $300,000 among all the children. Not so simple, since: (1) the co-owner child may take the position that mom wanted him or her to have that account and does not have to share; and (2) there are gift tax consequences to the co-owner child for making a gift.

One of the first things that a qualified estate planning attorney will do is look at your assets and determine how they will pass upon your death. This is particularly important if you have assets in excess of the Federal Estate tax free amount (currently $2,000,000). The most sophisticated of estate plans will be useless if all assets pass outside of the estate planning documents.

Avoiding Intestate Laws: Under Kentucky law, if a person dies without a last will and testament, the Commonwealth has written a last will on their behalf. Assuming there is not a prenuptial agreement, after payment of funeral, costs of administration, and creditors, assets will be distributed as follows: The first $15,000 in personal property to spouse; with the remaining assets divided equally, one-half to spouse and one-half among all of the deceased's children. In essence, this could create a potentially complicated situation where the children are sharing assets with the surviving spouse.

COMMON DOCUMENTS

Revocable Trust: A revocable trust is basically a last will and testament with "extras." Like a last will and testament, it contains the "who gets what" language and possibility the tax planning language needed to avoid taxes. Unlike a last will and testament, it can actually hold title to assets during the lifetime of its owner.

Generally speaking, there are three good reasons to have a revocable trust rather than just a last will. First, if you own real estate outside of your state of primary residence, your revocable trust, if used correctly, could avoid the out-of-state probate of that real estate upon your death. Second, your revocable trust, unlike a last will document, is private and not recorded after death. Third, assets that are titled in a revocable trust during the owner's lifetime are not subject to probate and therefore the identity and value are kept private from the public.

Last Will and Testament: Controls the disposition of assets upon death which are not otherwise designated. Within a last will and testament, an executor is nominated, that person or persons is in charge of legally wrapping up the affairs of the deceased's lifetime.

Living Will Directives: This is a document which controls health care decisions in the event that you do not have the capacity to make the decisions on your own behalf. In addition, within this document, you may make certain decisions about: being placed on machinery to sustain life; removal or non-removal of food and hydration to sustain life; and organ donation.

Power of Attorney Documents: This document allows the person or persons you designate to handle your finances. This document can be contingent upon incapacity or can be active immediately.

In short, planning for the disposition of your assets not only means that your assets pass in accordance with your wishes, it could also mean significant tax and administrative savings.

IMPORTANT NOTICE: This article is intended only to provide a basic summary of issues relating to estate planning, it does not provide guidance specific to any individual situation. Consult a qualified estates and trusts attorney for aid with regard to your situation.