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Legal Ease

Preparation is the most important component of an estate plan.

By [Sharon McBride](#) on August 31, 2015 online. September Issue of Magazine.

Many people mistakenly believe that estate planning is only necessary for the rich. In actuality, a basic estate plan is essential for everyone, regardless of income or net worth, because we all want to minimize misunderstanding, unnecessary costs and stress for loved ones after a death or incapacitation.

Without proper groundwork and documentation, assets like houses, retirement plans and savings accounts can end up in limbo for years, sometimes requiring expensive legal assistance to straighten out.

“Being prepared makes things a lot easier on surviving family members because they know they are implementing what you wanted,” says Sara Barry, a shareholder and attorney with GableGotwals law firm in Tulsa. “Having an estate plan can be very advantageous in practical terms, save time and expense and avoid uncertainty or unintended effects for your estate and family.”

Wills

So what goes into estate planning? An estate consists of everything a person owns when they die, including a home, personal property, investments, bank accounts, retirement plans and any interests in a family business or partnership. Beneficiary designation forms control who gets retirement accounts, along with life insurance proceeds. For most other assets, you need a will or living trust that says who receives your belongings.

So what exactly goes into a will? Or a living trust? What is the difference, and how does the average person know which one is appropriate for his or her situation?

“Simply put, a will is a document you sign that states how you want your assets to be transferred and estate to be managed after you die,” says Barry. “To be effective, a will must be signed in accordance with state statutes, following procedures for having other people witness you signing the document as your will and their signing it as well.

“After you die, the will has to be filed with the applicable district court, and the probate and estate administration procedures must be followed to settle the estate,” says Barry. “When a will is signed, it needs to be kept in a secure place because the original signed and witnessed document must be filed with the court and approved by it to give it effect.”

A will can be amended or revoked at any time during a lifetime and only has final binding effect after a death, when it is filed and approved by the court.

Wills are easy to create, but they require the distribution of assets to go through probate.

Probate

The probate process often requires a lot of technical paperwork and court appearances, and the resulting legal and court fees are paid from estate property, reducing the amount that is passed on to heirs.

Probate court is often a necessary part of the process of distributing a person’s assets after his or her death.

Whenever an individual passes away, probate court will typically get involved in order to make sure that everything in his or her estate is distributed properly, says David H. Herrold, an attorney with the Tulsa office of Doerner Saunders Daniel & Anderson.

Probate court will look at estate planning documents, such as a will, in order to determine where everything should go. They have to review the will and make sure that

it is legitimate and can be upheld. If the individual did not have a will, the probate court will then use their best judgment to distribute the assets.

“Probate court can be costly,” says Herrold.

Trusts

A trust can be more expensive to set up and requires professional assistance, but it provides benefits that a will cannot. First, when they're structured properly, trusts will help avoid guardianship or conservatorship if one becomes incapacitated. A will only works after you've died; a trust, by contrast, works all the time, including periods of incapacity before death, says Harry V. Rouse, an attorney with the Tulsa office of the Doerner Saunders law firm.

Trusts usually avoid probate, which helps beneficiaries gain access to assets more quickly as well as save time and court fees. Depending on how it's structured, a trust may also reduce estate taxes owed and can protect an estate from heirs' creditors.

“Many people mistakenly associate trusts with the rich and famous ... for example, a ‘trust fund baby.’ The term usually refers to a young person whose parents are wealthy and have set up a trust for their son or daughter,” says Herrold. “In actuality, any competent adult at any station in life can create a trust to protect assets and heirs.”

Powers of Attorney and Proxies

A power of attorney can also come in handy when planning for the unforeseen.

“Powers of attorney are used for a variety of reasons, not just for estate planning,” says Barry. “They can be limited in scope or broad. They can apply just to medical decisions, like a durable power of attorney for health care, or they can apply to decisions related to your assets.

“In connection with their estate planning, many people execute an advance directive, a durable power of attorney for health care and a durable power of attorney (for management of assets),” explains Barry. “A power of attorney can give the person appointed to act for you significant powers and authority.”

The use of it, and who it is given to, should be carefully considered. Not all powers of attorney are created equal. For example, a power of attorney may give the person named in it the power to change investment of assets or to even change ownership of them, says Barry.

“There are many choices to be made when executing these documents, so it is important to consult your attorney and understand the options,” he continues.

Additional types of documents to consider when planning for the future include healthcare proxies and living wills.

“A living will, also known as an advance directive, is not a ‘will’ in the traditional meaning,” says Barry. “The living will allows a person to give advance directions about end-of-life medical care, such as the desire not to be kept alive artificially or by mechanical devices for a prolonged period of time after he or she becomes unable to tell health care providers what to do.”

In the living will, you can also appoint a “health care proxy” to act for you as to the medical decisions you make in a living will, says Barry.

You can also sign another document called a durable power of attorney for health care to appoint another person to give directions to doctors and health care providers about your care and treatment if you are unable to do so.

It is important to note that the durable power of attorney for health care does not authorize another person to make end-of-life decisions, such as ceasing to use life-sustaining procedures or devices, says Barry. In other words, this person will be your “attorney-in-fact” or “agent” to arrange for your care and give directions to doctors and hospitals if you are too ill or injured to do so for yourself.

“Many people choose to execute both an advance directive and a durable power of attorney for healthcare,” says Barry. “You should consult an estate planning attorney to be sure you understand the documents and execute them in accordance with state law.”

Stay up to Date

It is important to keep beneficiary designation forms updated.

Beneficiary designation forms on life insurance policies, 401(k) accounts and other assets will generally override any conflicting provisions within a will or trust. It’s essential to make sure all forms are checked and updated regularly, ideally on an annual basis.

“Inevitably, we all reach a point in life where we experience an inability to control what happens to us personally and how our property is managed or distributed,” says Herrold. “Whether it’s our health, our relationships or our assets, we each will reach a point we can no longer take care of those things or make adequate decisions about them.

“Thus, it’s critical that while we’re capable of caring for ourselves and our property and making meaningful and intentional decisions, that we put measures in place that will help us control our destiny,” says Herrold.

Even if you decide not to execute any documents, there are things you can do to make it easier on a surviving spouse if you die, for example, making sure certain assets are in both your names with right of survivorship.

“While many people may think of estate planning as just completing a ‘form,’ it is really much more than that,” says Barry. “It is deciding what you want done with your property and then preparing and signing the most appropriate and useful documents to accomplish it in the event of your illness or death.”

At a minimum, however, most should have a will and an advance directive for health care, says Herrold.

“I would also recommend you consider establishing a revocable trust. For many people, a durable power of attorney is the most important document, since it designates who will manage your affairs, if you are unable to do so, and it can avoid a costly, cumbersome and contentious guardianship proceeding that is supervised by a court. Regardless of one’s financial status, he or she can need someone to make everyday decisions for him or her.”

Plan For Less

Estate planning doesn’t have to cost a bundle. A will doesn’t have to be expensive. If cost is an issue, you may be able to get low-cost help through a legal aid group or student-run clinic. Remember when using online resources that state laws can vary widely, says Barry.

Whatever type of document you decide to implement for the future, it’s best to make that decision sooner than later.

“I find that many people put off estate planning because they have a hard time making these decisions, especially deciding who should be the guardian of their children, or if a trust should be put in place for children and who could be the trustee,” says Barry. “But, if you don’t decide, state law will govern, and not only may the result be something you did not want, it can be emotionally harder for your family.

“For many individuals, the process of naming persons to be their beneficiaries for life insurance and 401(k) plan accounts in the event of death is a regular occurrence,” she adds. “When that is done, it is usually a good time to also have a will or trust prepared in order to give effective directions for how to transfer assets that you individually own, such as your home, any other real estate and your bank and personal investment accounts.”

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