ESTATE PLANNING

WILLS, TRUSTS AND PROBATE

IN PLAIN ENGLISH

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(Profile on Last Page)

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Estate Planning - What Is It?

It sounds difficult, but estate planning is really just a process for organizing your affairs. It can help everyone, no matter what their financial status. Estate planning can do this for you:

- Let you control who receives your property at your death.
- Allow you to name the people who will, if you die, (1) act as guardian for your children, (2) act as personal representative to make sure your will is followed, and (3) act as trustee to control your assets for your beneficiaries.
- Reduce your estate and gift taxes.
- Make sure assets are not wasted (one way to do this is through the use of trusts).
- Reduce probate costs.
- Maximize automatic, non-probate transfers to your loved ones at your death.
- Control whether you receive extraordinary life support if you are terminally ill.
- Avoid court involvement in your personal and financial affairs if you become incompetent.
- Name your own guardian and conservator in case they are needed.
- Name the person who will be in charge of your body and ceremony after your death and state what you want to happen.
- Ensure if you have a blended family that your plan works as you intend.

These and other goals can be easily accomplished through "Estate Planning."

How Does Estate Planning Work?

The law allows, and even encourages, people to set and reach these goals. It is done by carefully saying in written documents what your wishes are. These documents can include:

- Wills.
- Personal Property Memoranda.
- Trusts (Testamentary, Living, and Irrevocable, for example).
- Living Wills (Right to Die Declarations).
- Financial Durable Powers of Attorney.
- Medical Durable Powers of Attorney.
- Declarations as to Burial and Funeral Preferences
- Business Purchase and Sale Agreements.
- Marital Agreements.
- Cohabitation Agreement.
- Beneficiary Designation Agreements

In order to properly prepare these documents, an estate planning lawyer needs to get information from you about your family, your needs and goals, and your financial background. We use a written form to do this, to save time during our visits and make an accurate record of the important facts concerning your estate planning.

What Does Estate Planning Cost?

In my office, there is no charge for an initial visit to discuss your estate planning. Fees charged for estate planning work can be based on hourly rates, or on a fixed fee basis, depending on what documents you need, how complex your documents need to be and the size of your estate. Fixed fees are typically paid one-half when the plan to prepare your documents is agreed upon, and one-half when the work is complete.

What Do I Need To Know About Estate And Gift Taxes?

First, you need to know what you don't need to worry about. The good news:

Good News

There is now no Colorado estate tax. Other states have estate or inheritance taxes, so if your client has real or tangible personal property outside Colorado, always check the tax laws of the states where the property is located.

Also, there are no taxes on gifts to a spouse, so long as they are outright gifts, without conditions (except conditions in certain narrowly defined situations).

There is federal estate and gift tax, but only for large estates.

Federal Estate Tax; How Much Can You Own?

In 2012, Congress passed the "American Taxpayer Relief Act of 2012" (TRA). Under the TRA, as of 2015 each person can each give away at death up to $5,430,000 worth of assets without paying estate tax. That estate tax applicable exclusion amount ("Exclusion Amount") is indexed for inflation, so it will go up. The maximum tax rate on taxable estates under the TRA is 40%.

Porting by Surviving Spouse

In addition, the second spouse to die can use both his or her Exclusion Amount plus any unused Exclusion Amount of his or her deceased spouse. The unused amount is the "deceased spousal unused exclusion" (DSUE). The surviving spouse can "port" or carry with them the DSUE of a deceased spouse, so a surviving spouse who ports would have up to $10,860,000 in assets they could give away tax free in 2015. A tax return must be filed in able for the surviving spouse to port the DSUE. The DSUE amount is **not** indexed for inflation so the ported exemption will remain the same at the surviving spouse's death.

Annual Giving: No Tax Up to $14,000

Gift tax rules also allow everyone to make gifts each year up to a certain amount to an unlimited number of persons. The 2014 annual exclusion amount is $14,000, so for example, spouses can give up to $28,000 to each beneficiary with no gift tax. These annual gifts do not reduce the estate tax Exclusion Amount. Like the rule for exempt gifts to spouses, annual gifts must generally be outright gifts, without conditions, to be gift-tax free. Again, there are some exceptions, and these are particularly important for gifts to minors.

Making children or others joint owners of your property while you are alive is considered a taxable gift of their share of the value at the time the transfer is made, and should be done only after careful consideration.

Gifts to grandchildren or others more than a generation below the client can result in additional “generation skipping tax” of 40%. There is an exclusion from tax for generation skipping gifts equivalent to the estate tax Exclusion Amount (and so in 2015 it is $5,430,000).

Lifetime Taxable Gifts

You can’t avoid estate tax by giving assets away during your lifetime over the $14,000 amount. We have a “unified” gift and estate tax system so either gifts at death or during lifetime are subject to tax. Lifetime taxable gifts should be reported on a Form 709 U.S. Gift Tax Return. The client does not pay the gift tax; the gifts just reduce what the client can give away at death. Therefore, only gifts over your lifetime that exceed the Exclusion Amount ($5,430,000 in 2015) would result in gift tax at the 40% rate. Annual exclusion gifts up to $14,000 per person do not reduce the available Exclusion Amount.

Laws relating to Medicaid benefits need to be considered before making gifts. If the client applies for Medicaid within five years of the gift there will be a penalty period to wait out before the client becomes eligible for benefits.

What Property Is Included?

What property is included in determining if estate tax is owed at death? Basically, everything the client owns or controls, with some exceptions. The gross taxable estate also includes all death benefits from life insurance policies, annuities and retirement plan assets. Clients often misunderstand this, particularly as to life insurance death benefits. The law says that the entire proceeds payable at death are subject to estate tax if the policy was owned by the decedent, or even if the decedent transferred the policy to another person within 3 years of death.

Planning for the Second Death

Spouses who plan to benefit each other also need to understand that in analyzing their plans for estate tax issues, tax will be imposed at the second spouse's death on all of the property they both own, since the survivor will own it all, if the property exceeds the surviving spouse's Exclusion Amount. This is when the unplanned, large estate bears the hardship of estate tax: at the second spouse's death, since there is no tax on the gift to the spouse at the first death. As discussed above, one way to reduce this risk is for the surviving spouse to port the unused Exclusion Amount of the deceased spouse.

How Can Estate Planning Help Me With These Taxes?

Using Your Exclusion Amount: Family Trusts

Usually, the first step for you who are at risk for estate tax is to make sure you use, and not lose, your Exclusion Amount. Spouses can double the amount they can leave to others tax-free (from $5,430,000 to $10,860,000 in 2015). With the exception of porting, the first spouse to die fails to use, and thereby loses, his or her Exclusion Amount by giving their assets to the survivor. The Exclusion Amount is used by changing this typical plan to give everything to the surviving spouse. The new plan usually includes the creation of a “Family” Trust (or “Bypass” or “Credit Shelter” or “Exempt” or “B” Trust) to which the first client to die transfers an amount not exceeding his or her Exclusion Amount. The surviving spouse can be the beneficiary and can also be the trust, so long as the rights of the spouse to distributions are limited, typically to income and principal for “health, education, maintenance and support”. At the survivor’s death, the assets in this trust are not subject to estate tax. The same estate tax savings result can be accomplished by giving the Exclusion Amount to persons other than the spouse, in trust or not. But spouses are often uncomfortable completely omitting the survivor as beneficiary.

As discussed above American Taxpayer Relief Act of 2012 allows a spouse to “port” or use the Exclusion Amount not used by the deceased spouse. But the survivor must file an estate tax return to protect this right and it will be lost if the survivor remarries and the new spouse dies first.

Disclaimer Wills

Sometimes, to provide more comfort to you that the survivor will have the option to control all assets after the first death, and to make the wills more flexible in case estate tax laws change, or both, wills are written to give everything to the surviving spouse but name the Family Trust as the recipient of anything the spouse decides to give up or “disclaim”. That allows the survivor to put off until the first death the decision about whether to fund the Family Trust with the deceased spouse’s assets, or to receive them free of trust. However, surviving spouses are often reluctant to give up their rights, and to be effective such disclaimers must be made in writing within 9 months of death, delivered properly to interested parties and done before the survivor takes possession of or receives any benefit from the asset to be disclaimed (such as income).

Marital Trusts

You may also create another trust to supplement the Family Trust. This "Marital Trust" (or "A" Trust) receives the overflow from the Family Trust that exceeds the Exclusion Amount ($5,430,000 in 2015). Otherwise, this overflow needs to be paid directly to the spouse to avoid estate tax at the first spouse's death. There are no estate tax savings that result directly from the use of the Marital Trust to hold this overflow. It is usually intended to restrict the surviving spouse's use of these overflow assets, often to ensure that at the surviving spouse's death the remaining assets go to their descendants. It may also be intended to assist the survivor in managing assets or protecting him or her from possible creditors, future spouses and "predators". The survivor must have the right to all of the income unless he or she is given either the unlimited right to principal during his or her lifetime or to say who received the trust assets in the survivor's will. If these terms are omitted, the gift into the Marital Trust has conditions that disqualify it for the marital deduction, meaning the client pays estate tax in this scenario. Marital Trusts can be written to allow the spouse to receive only income from the trust, so long as the spouse can convert all property in the trust so that it earns income. That is a Qualified Terminable Interest Property ("QTIP") Marital Trust.

Retitling Assets

It is critical that you understand you usually need to retitle assets and change death beneficiaries in order to make these estate tax plans with Family and Marital Trusts work. You may need to change property from joint tenancy to tenancy in common, make your "estate" the beneficiary of life insurance policies, or make one trust or the other the beneficiary of retirement plan assets. Signing the documents without making sure that you know what you need to do regarding your assets and beneficiaries will often defeat the plan.

Using Annual Giving Rights

Assets that would otherwise be subject to estate tax at death can be removed from the client's taxable estate. Gifting plans to maximize the annual $14,000 exclusion amount can be used effectively, through the use of trusts or by direct gifts. Gifts of business assets may exceed this $14,000 annual amount if they can be discounted in value for tax purposes because the gifted business interest is a minority interest or may not be freely transferred.

Irrevocable Trusts

You can create a living, "irrevocable" trust to which you transfer assets during your lifetimes that are not taxed at death. Life insurance is often used to fund such an irrevocable trust. For example, you can leverage up to $14,000 ($28,000 with a spouse) in annual, tax-free gifting to purchase insurance that will provide nontaxable death benefits available to your beneficiaries at death. These insurance benefits can be used to assist the estate in paying any estate taxes still owing. The client needs to give up any interest in the trust, and may not be the trustee, but if set up properly the trust can benefit the surviving spouse.

Businesses and Farms/Ranches

If you own a business, farm or ranch, you may with proper planning qualify your estate to obtain an extension to pay estate taxes over a 10-year period beginning 5 years from the date the tax was due (tax payment deferral under IRC §6166), with low interest payments. You may be able to have agricultural property valued for tax purposes as a farm or ranch (a "special use valuation"), not at its "highest and best use", such as the value if developed for sale. These elections restrict the use and sale of the property for 10 years after death.

Generation-skipping tax can be avoided by careful planning for very large estates. One example would be to set up a trust for grandchildren with assets to which the client properly allocates his or her Exclusion Amount (now $5,430,000). The trust can then grow above that amount and never be subject to this tax.

Charitable Giving

For those who wish to benefit charities, there are ways to reduce estate tax, obtain charitable tax deductions, and benefit you and also the charity. A charitable remainder trust, for example, can allow the client to put appreciated property into the trust, sell it, and avoid capital gains on the sale at the time of sale. You can reserve the right to receive income from the trust based on its value at the time of creation, or from year to year (measured at the end of each year). It can allow you to make up for any years when the income was less than whatever percentage of the trust you chose to receive at its creation (within limits). It removes the assets from the estate for estate tax purposes. It gives you a current income tax deduction for 30% to 50% of your adjusted gross income based on the present value of the charitable gift. This deduction can be taken over 5 years if you can't use it all at once. And it allows the client to make a gift to a charity or charities that you select, with the right to change the charity later. You can if you wish be the trustees of this trust. You can also use a donor advised fund with a local Community Foundation or with some institutions to easily make charitable gifts that are then outside your estate, for which you receive a current income tax deduction, and which you and your family or others can control in making charitable distributions.

There are of course many other estate and gift tax techniques to consider if appropriate for you.

What About Avoiding Probate?

Probate is the legal process for transferring property when you die. This process applies only to the property that passes through the probate process (the "probate" property), and not to the property that passes directly to your beneficiaries, or as a surviving joint owner of property (the "nonprobate" property). Colorado has a modern probate code and there is little to be feared in our probate procedures. Probate can be "avoided" - but the question should always be: Is the cost worth the return? For Colorado residents with Colorado property, it usually is not. Why? No percentage fees allowed for attorneys or personal representatives (called "executors" in some other states). Only reasonable, usually hourly, charges are allowed. Probate costs are typically minimal. $2,500 - $5,000 would be a typical attorney's fee for a small estate in Colorado without complex assets. In our state most probate matters are handled informally, by a clerk (the "Probate Registrar"), not a judge; and they are usually unsupervised - no court hearings. It is primarily a matter of filing papers. For couples, the spouse is typically the personal representative. This assumes there is a need for probate at the first death. In fact, couples often have their property titled jointly with rights of survivorship, which means that there is an automatic transfer (outside of probate) at the first death. If the “probate” property is less than $64,000 in value (the 2014 amount which will change based on inflation) and does not include real estate, then no probate is necessary at all. A simple affidavit can be used to transfer this property to the rightful beneficiaries.

How Does Jointly Held Property Fit Into My Estate Planning?

When two people own property jointly (with rights of survivorship), then that property will be easily transferred to the other owner at the first owner's death. The will of the first to die will not control this jointly held property. This is also true of all property where a beneficiary who survives is named to receive the property at your death - like life insurance, annuities, IRA's and death benefits in retirement plans. (This does not apply if your estate is the named beneficiary; that makes the asset “probate” property.) So, when your lawyer makes a will for you, your estate plan will still not be complete until the transfer of all jointly held property, or property where a surviving beneficiary is named, is also considered. Again, that is your “nonprobate” property.

In fact, for non-taxable estates the simple but effective plan is often for a husband and wife to title all property jointly and name each other as death beneficiaries. Then, the will of the second to die, which will control all of this property, says who will receive it - children, for example.

For taxable estates over the Exclusion Amount it may not be a good idea for all property to be jointly held. This can result in more estate tax. For example, with jointly held property the first to die may not be able to use up any of his or her right to give away up to the amount of the Exclusion Amount tax free to a non-spouse. In other words, a couple can't easily give more than the Exclusion Amount tax free to others if all of their property is jointly held. So there are some estate plans which require that property not be held jointly, even by spouses who would like to give everything to each other, if saving estate tax is also a goal. The exception would be for couples with estates over the Exclusion Amount who plan to rely on the survivor porting the unused Exclusion Amount of the first spouse to die.

I generally advise that, except for spouses, you should not to keep accounts in joint tenancy, or name people as death beneficiaries, so they can pay your bills at your death. Your personal representative can do this with the assets that pass through your will, if any. If you set up joint tenancy or death beneficiary arrangements, these will be gifts that pass to the joint owner or death beneficiary in addition to those in your will. It creates confusion when you ask those who receive these gifts to use these assets to pay estate bills.

I also usually suggest that, except for spouses, you avoid joint tenancy arrangements during your lifetime to allow others to write checks, or otherwise have access to your funds, for your benefit. That is what your general power of attorney is for (discussed below). Agency accounts are used by the agent for you; joint tenancy accounts create gifts to the joint owner and the use is not limited to what is for your benefit. Joint tenancy can also allow a creditor of the joint tenant to claim the assets. Use an agency account for this purpose, not a joint tenancy account.

How Do Trusts Work In Estate Planning?

A trust is just an agreement in which you use your property to benefit someone (even yourself) and name a person to handle the property as trustee (who could be you), on the condition that the trustee gives it to the people whom you name - the beneficiaries. A trust can take effect during your lifetime - an "inter vivos" or "living" trust - or at death through your will - a "testamentary trust."

Either way (with wills or living trusts), estate tax can be saved by using trusts, as discussed above. For example, by setting up a trust designed to capture a person's Exclusion Amount (the tax-free giving right) at the first death, a couple can make sure that they can give away twice the amount of the Exclusion Amount tax-free to their children. This is often called a "B trust" and is also known as a Residuary, Family or Credit Shelter Trust. A complementary trust is often set up to take in the rest of the estate for the surviving spouse, often called an "A" trust or a Marital Trust. It can be used to make sure the assets in the A trust go to the children at the second death, as long as it "qualifies" by giving the surviving spouse all of the income for life. This is known as a "QTIP" marital trust.

Another use of trusts is for property that you want to remove from your estate during your lifetime, so it is not taxed at your death. As discussed above, life insurance on your life is often used in this type of trust because it can leverage current dollars by paying premiums to fund a larger death benefit, which is not taxed at your death. The catch is that once you set up this trust, you can't change it; you can't be the trustee; you can't be the income beneficiary during your lifetime; and you can't control the use of the assets. These are called "irrevocable trusts." Their creation is very technical, as is the process of putting property into them without triggering gift tax. A warning: if you fund an irrevocable trust with a life insurance policy you now own, and die within three years afterwards, all of the death benefits from that policy will be taxed at your death.

When Are Revocable Living Trusts Useful?

There are many uses of revocable living trusts which are appropriate for estate planning. The most obvious is to have your property pass to your beneficiaries without passing through probate. As discussed above, for Colorado residents with only Colorado property, the goal of avoiding probate may not be worth the costs involved in setting up and maintaining such a trust.

However, if out-of-state real estate is owned, avoiding probate in that state can be an important goal—especially in the many states (such as California, Wyoming, Florida and most East Coast states), where percentage fees can be charged and probate procedures are complex and time consuming.

Also, where help with management of your assets during your lifetime is an important goal, for example for an elderly person who needs help with finances, a living trust is very useful. You can put your assets into a trust, with you as the initial trustee if you wish, so that if you are ever unable to manage the assets yourself, the "successor" trustee you name to take your place can do so for you. You can name a co-trustee to help you when the trust is created, and be in place to take over when needed.

These trusts can be changed, and property can be added or taken out by you, at any time as long as you are still competent. The downside is that living trusts can be more expensive than wills to set up and maintain. They cannot be set up and then ignored. For most living trusts to be useful, your property must be properly and legally transferred into them, and that includes both the property you now own and the property which you acquire later on.

Do I Need To List My Property In My Will? What About Personal Items?

No, don’t list what you own unless you have a specific asset you want to give someone. Your property will change from time to time, so there is no point in listing in your will all the property you now own. Wills typically have a "residuary" clause which says all of your property not otherwise mentioned is to be given to the persons you named. Any gifts of specific property can be placed in the will before the residuary clause. Usually personal, tangible property (things like furniture, cars, collections, equipment and household belongings) is handled separately in the will. The will should say that a memorandum may be used to designate specific gifts of this kind of property to individuals - this triggers a Colorado statute which allows you to "amend your will" without a lawyer, simply by filling out and signing such a memorandum.

What If I Have Retirement Benefits?

Benefits received under retirement plans are generally fully includable both in the income of the recipient (as the assets are withdrawn) and in the estate of the deceased employee. Retirement plans are subject to detailed rules as to when the benefits must be paid out, and how, after the death of the employee. Again, there are traps for the unwary. For example, a 50% excise tax can be imposed on certain distributions which are too small or too late.

However, if the original IRA was a Roth IRA and the assets were in the account for five years or more before the death of the owner, distributions may be tax free.

Retirement plans assets (except such Roth IRA’s) have in them accumulated, untaxed income which must be paid as funds are withdrawn. Delaying withdrawal as long as possible is usually a good financial plan as it allows the asset to accumulate without paying income taxes currently. At the death of a spouse, the survivor can continue to wait until his or her retirement age (now 70&½) to take distributions and thus defer payment of income tax by “rolling over” the asset into the survivor's own IRA. Any other individual who is the beneficiary must start taking out the asset, and paying income tax, but may do so over the beneficiary's life expectancy or by using the deceased IRA owner's age in his or her year of death. This option may be better for you if the deceased IRA owner was younger than you.

If the beneficiary is the estate of the deceased person, or a trust that could be paid to an estate or charity or other non-individual, the assets must be paid out, and taxes paid, in 5 years or less. An individual beneficiary may elect to this 5-year payout option if the deceased died before reaching age 70&½, but that should be done only after weighing the consequences of the earlier taxation of the assets.

You must be careful naming the Marital Trust or the Family Trust as the beneficiary of retirement plan assets. This will not allow the spouse to roll over the account to his or her own IRA. Often the desire to allow the spousal rollover conflicts with one of the purposes of these trusts: to make sure the trust goes to certain heirs (usually children and other descendants) at the spouse's death.

In addition, if the Marital Trust or Family Trust is the beneficiary of retirement plan assets, specific language should be in the trust, and in the beneficiary designation for the plan or IRA, in order to coordinate these documents with the distribution requirements imposed by law (to make sure mandatory minimum amounts are withdrawn) and in some cases to require withdrawn amounts to be distributed to beneficiaries.

Naming a trust instead of an individual can affect the minimum amounts which have to be taken out of the retirement plan account. Only trusts which are valid under state law, clearly name the beneficiaries, and become irrevocable on the death of the owner, and where the terms are communicated to the plan administrator, can be "designated beneficiaries" so that the lives of the trust's beneficiaries are used to calculate (and thus reduce) the minimum required distributions.

Paying the benefits directly to the surviving spouse is the simpler plan and usually best for income tax savings; but this can conflict with other estate planning objectives, such as control of the use of these assets by beneficiaries. It is important to have complete and unambiguous beneficiary designations, including naming of secondary beneficiaries - those who you want to receive the benefits if the first beneficiary dies before all of the funds have been distributed.

How Is Stepped-Up Tax Basis Important To Me?

There is more good news here if you take advantage of this opportunity. Simply put, giving away appreciated property at your death means the capital gain goes away! So, a parcel of real estate bought for $1,000 and given to your beneficiaries at your death when it is worth $10,000 receives a so-called "stepped-up" tax basis. If your beneficiaries then sell the property for $10,000, they have no capital gains tax to pay. They can even (for taxable estates) elect to value the property 6 months after your death if that is better for calculating gain.

Here is the warning: you lose this opportunity by giving the property to your beneficiaries before you die. In fact, if you do this, they receive it at *your tax basis* ($1,000 in the example above), not even at the value of the property when you gave it to them, despite the fact that gift tax is calculated on that current value. So, in general, wait to give away appreciated property until you die unless there are other, overriding reasons not to do so. But on the other hand, make gifts before death if your property has depreciated in value; otherwise the potential tax deduction may be lost forever.

Why Are Medical Directives Important?

A "living will" or right to die declaration is important to have for two reasons. First, it gives you control of life support decisions if you become incompetent and are also terminally ill. Your wishes regarding artificial life support are to be carried out even if you are not able to express them, because you put them in writing. Second, you relieve your loved ones of the anxiety of not knowing what you would have decided in such a difficult time. This document tells your doctor whether you want to be kept artificially supported by machines or nutrients if you are terminally ill and comatose or are in a persistent vegetative state. If you don't want to be kept alive under these circumstances, 2 physicians must sign your medical chart saying that you meet these conditions, and your family must be notified, before life support can be disconnected.

A medical power of attorney is another "medical directive" in Colorado and is discussed below.

Another document which allows you to direct your medical care is a CPR directive, which tells your doctor not to resuscitate you if your heart stops. This specific form can only be obtained by a medical provider and must be signed in advance by you and your doctor. It is designed to be used by a terminally ill patient who does not wish to be resuscitated when their quality of life does not justify the cost and effort: that is, when they are at peace with the reality of their pending death. You would not sign this form if you wanted your heart and breathing started if they stopped. If you do decide to have a C.P.R. directive, you may wish to wear a CPR Directive Bracelet or Necklace to advise emergency personnel who may otherwise try to resuscitate you, and keep a signed copy in a visible place in your home.

Also, the M.O.S.T. form, which stands for Medical Orders for Scope of Treatment, is a relatively new (2010 in Colorado) form often used at nursing homes, rehabilitation facilities, hospice care facilities, hospitals and other care facilities. A physician, advanced practice nurse (APN), or physician assistant (PA) may sign the form after consultation with the patient. It covers CPR, life support, antibiotics and tube feeding. The patient or his or her agent (or guardian or proxy, all known as a "surrogate") also signs the form. If this form is ever used, it is important that it be consistent with other medical planning documents like a medical power of attorney, living will or CPR directive. Information about this form and its uses can be obtained at www.coloradoadvancedirectives.com. As stated there, the M.O.S.T. is "primarily intended to be used by the chronically or seriously ill person in frequent contact with healthcare providers or already residing in a nursing facility."

What Can Powers Of Attorney Do For My Estate Planning?

You have the right to name people you want to be in control of your affairs if you can no longer handle them yourself. These documents are called powers of attorney and are "durable" if they say you want them to be effective even after you become incompetent. That makes sense, since you usually make a power of attorney exactly for this purpose. Having a power of attorney allows you to pick the person (for example a spouse or a responsible child) whom you wish to control things for you when you are unable to yourself. Powers of attorney can avoid costly and difficult court procedures to name a conservator for your property or a guardian for your person. A "general" power of attorney is used to name an agent for your property and financial affairs. A "medical" power of attorney is the document which names an agent for any of your health-related decisions. Both documents are important and desirable to have as part of an estate plan. They allow your agent to control your property and personal affairs during your lifetime after you become incompetent.

Where Can I Get These Forms?

Of course, an attorney can provide these forms for you. You can also obtain versions of all of these forms on the Internet. You can obtain the living will and medical power of attorney forms from the Aspen Club at Poudre Valley Hospital, the Larimer County Hospice office and the Larimer County Office on Aging. An estate planning attorney will likely include language going beyond the forms you obtain elsewhere, and address issues that simpler forms don't cover. You have to decide whether it is worth the cost for an estate planning attorney to prepare these forms for you.

How Do Declarations About Burial And Funeral Preferences Work?

A new Colorado law allows you to declare in writing how your remains are to be disposed of, what ceremonies will take place after your death, and who is to be in charge of both. This is called a "declaration instrument". A will may still contain such instructions, but it is often not referred to in a timely manner after one's death. Even if you have this form, it will still be important for you to communicate your wishes to others.

What Do I Need to Know About Common Law Marriage Issues?

Colorado recognizes common law marriages. They are created where a man and woman intend to be married and have the reputation of being married in the community. You can see that this is not a black and white definition, and that can lead to disputes in court. To avoid common law marriage, you should not tell others, verbally or in writing, that you are married, and you should avoid giving others the impression you are married. It is best to avoid joint ownership of assets and the joint filing of tax returns. You can say in your will that you do not intend to be common law married, but that does not keep it from happening if you otherwise act in such a manner that you have such a marriage. You can sign a cohabitation agreement saying you are not married, and that adds some weight to support to your position.

What If I Have A Blended Family?

When your planning involves children from prior marriages, your new "blended family" raises unique estate planning issues. Your estate plan, which may involve gifts at the first or second death to the children from prior marriages, could be changed by the surviving spouse. The surviving spouse could choose not to do follow this plan. For example, either of you could change your will at the death of the first spouse. And a spouse can always elect to ignore the other spouse's will at death and take his or her "elective share" allowed by law. The current law in Colorado essentially allows a spouse to receive one-half of the "augmented estate" after 10 years of marriage (5% per year until then). The definition of the augmented estate is complicated, but generally it means all of what both spouses own. So, the spouse, with some exceptions, has the right to end up with at least 50% of the total assets of both spouses. The only sure way to keep spouses from changing their will, or taking the "elective share" in spite of the deceased spouse's will, is to have a marital agreement where you freely give up those rights, either before or after marriage. Spouses using a marital agreement should each be represented by their own attorneys, who are not in the same law firm. Another approach would be to create a trust at the first death where property belonging just to that spouse is put in the trust so you know it will go where you want it to at the spouse's death. But that would not necessarily keep the surviving spouse from claiming their "elective share" if they did not receive what the law allows them. You can see that such a trust should be created with an attorney's advice, as there may be limitations on the effectiveness of such a trust to avoid spousal rights.

What Should I Do To Get Started?

If you think there is some estate planning that you need to do, or if you simply have questions about what to do, you should contact an attorney for an appointment. If you choose to call me, I will send you a form to fill out and bring with you, along with copies of any estate planning documents you currently have, to our first meeting. Again, there is no charge for this first visit with me. If you are searching for an attorney, you should ask for references from trusted friends and advisors. You can obtain the ratings on lawyers by their peers, and information about their practices, from Martindale Hubbell at www.martindale.com, which reports how lawyers are rated by their fellow lawyers in the community: from C - Good to High, to B - High to Very High, to A - Very High to Preeminent in their field. Attorneys are only rated if they meet one of these levels and are considered to meet high ethical standards by their peers. My profile at Martindale Hubbell is at http://www.martindale.com/Peter-W-Bullard/308761-lawyer.htm. I have the highest possible rating (AV® Preeminent™) by my fellow attorneys who know me according to Martindale-Hubbell. AV® Preeminent ™ and BV® Distinguished™ are certification marks of Reed Elsevier Properties Inc., used in accordance with the Martindale-Hubbell certification procedures, standards and policies. Martindale-Hubbell is the facilitator of a peer review rating process. Ratings reflect the anonymous opinions of members of the Bar and the Judiciary. Martindale-Hubbell Peer Review Ratings fall into two categories - legal ability and general ethical standards. You can read more about this at my website: www.estate-planning-help.com.

PROFILE OF PETER W. BULLARD

Peter W. Bullard is a lawyer in Fort Collins with the Law Offices of Peter W. Bullard, P.C., and has practiced law for 41 years, 10 in Indiana and 31 in Colorado. He limits his practice to wills, trusts, estate planning, probate and related litigation and administration.

He has been married to his wife, Judy, for 45 years. They have two children, Emily and Sarah, both Colorado State University graduates, and five grandchildren.

Mr. Bullard attended Indiana University School of Law (Juris Doctor, 1973) and Indiana University (B.S. Business Management, 1970). He has been active in bar association matters, having served as Larimer County Bar Association President (2000-2001) and as a member of the Colorado Bar Association Board of Governors, 2001-2004. He is chair of the Larimer County Trust & Estate Bar Committee (2001 to present). He has been a member of the CBA Trust & Estate Section for many years, a member of its Council (2004-2006) and co-chair of its Statutory Revisions Committee (2006-2008), and served on the subcommittees whose work resulted in the Colorado Uniform Guardianship & Protective Proceedings Act and the Colorado Uniform Powers of Appointment Act. He authored "Navigating Colorado's Trust Registration Statutes," published in the Colorado Lawyer, March, 2002. He has been a member of the Northern Colorado Estate Planning Council for over 26 years.

Mr. Bullard lectures on estate planning, trust and probate topics. He has been active locally in many community activities, including the Planned Giving Committee of Plymouth Congregational Church, the Board of OpenStage Theatre, the Board of the Poudre Valley Hospital District, the Board of Poudre Valley Hospital Board of Retirement, the Poudre R-1 District Advisory Board, Rocky Mountain High School Accountability Committee, the Board of Fort Collins-Foothills Rotary Club, the Leadership Class of the Chamber of Commerce, the Fort Collins Building Board of Appeals, the Fort Collins Liquor Licensing Authority, and as Chair of the Larimer County Bicentennial Committee.

Mr. Bullard has for over 12 years held an A+ rating from his peers, through the Martindale-Hubbell rating system. He also holds an A+ rating through the Better Business Bureau.

Dated: January 2015