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Estate Planning & Elder Law

Estate Planning Guide

COMPREHENSIVE ESTATE PLANNING

Most people believe that estate planning consists of nothing more than preparing a Will to specify how your assets are to be distributed upon your death. Proper estate planning, however, deals with protecting your family and assets both during and after your lifetime. A comprehensive estate plan involves: (i) preparing for your disability or incapacity; (ii) minimizing the risks associated with the administration of your estate at death; and (iii) protecting your family's inheritance after your death.

Effective estate planning allows you to avoid many difficulties and expenses that most people never consider, such as:

- The need to have a court-appointed guardian to manage your property if you become incapacitated;
- The costs incurred by your estate when a probate proceeding is necessary to manage and distribute your assets at death; and
- The risks posed to children's inheritance years after your death by their creditors and divorcing spouses.

As you can see, estate planning includes more than simply passing along your bank accounts at death. Comprehensive estate planning involves the establishment of a plan for managing your assets while you're alive, distributing those assets upon your death with a minimum of cost and delay, and protecting your family even after your death.

When establishing an estate plan there are many obstacles and challenges that need to be considered. Set forth below are some that you should be aware of.

PROBATE

Most people have heard that they should try to avoid probate, but do not understand why. When discussing estate planning, there are actually two forms of probate we should be concerned about: – death probate and living probate. Death probate involves the legal administration of your estate upon your death. Living probate deals with the appointment of a guardian to manage your affairs in the event you become incapacitated. Let's examine each form of probate in a little more detail.

DEATH PROBATE

Death probate is the process through which assets held in the name of a deceased person are legally transferred to his or her heirs. In addition, any debts of the decedent are paid, and any unfulfilled legal obligations must be resolved. The probate court supervises all of these activities.

The probate process is typically a long, complicated, and costly process for many families. Here are the basic steps to settling an estate:

STEP ONE: FILING PETITION AND GATHERING MATERIAL

A formal written application to the court along with a filing fee must be submitted to the court to start the probate process. One of the probate court's first jobs is to approve or appoint someone to handle the affairs of the estate. This person is called the executor or administrator depending upon the circumstances and whether the deceased person died with or without a Will. (To keep things simple, we'll call this agent of the estate a "personal representative.") Generally, the first thing the personal representative does is hire an experienced probate attorney. Although having an attorney is not a legal requirement, as a practical matter it is almost impossible to navigate the probate process without one.

STEP TWO: PUBLISHING NOTICE TO HEIRS

The second step is to ensure that all of the deceased person's heirs at law be notified. This means that certain relatives who are not named as beneficiaries under the Will are put on notice that a probate proceeding has commenced. This can lead to a Will contest lawsuit by an heir who is unhappy about being left out of the Will.

STEP THREE: INVENTORY AND APPRAISAL ASSETS

During probate, all assets in the estate are usually frozen so that an accurate inventory and appraisal can be made. As a result, during this period many of the assets cannot be distributed or sold without permission from the court. The court may often require formal written appraisals for many items, such as real estate, antiques, collectibles, automobiles, furniture, and other valuable assets. Appraisal fees can be expensive and, like all expenses, are paid for out of the estate.

STEP FOUR: FINAL DISTRIBUTION AND CLOSING OF ESTATE

Finally, after the court is satisfied that all notice requirements have been met, it will order all debts, claims, taxes, attorney's fees, the personal representative's compensation, and any other miscellaneous expenses to be paid. Only after all the bills are paid will the probate court permit the distribution of the estate to the beneficiaries named in the Will; or if there is no Will, to the designated heirs at law.

HOW MUCH DOES PROBATE COST?

Probate costs generally amount to between 5% and 7% of the gross value of the estate. Probate fees are often calculated on your estate's gross value without deductions for liens or encumbrances. If you have property worth $100,000 but you owe $90,000 to a bank or financial institution, your probate fees may be based on the full $100,000 value of the property, not your $10,000 in actual equity. As you can see, this valuation method unfairly increases the size of your estate and results in the payment of larger fees.

HOW LONG DOES PROBATE TAKE?

The slow progression of an estate through the probate process can be very frustrating for families. Although the process generally takes six to nine months to complete, some estates may take over a year. Most people assume that their estates are simple and will glide through the system. Regardless of how simple an estate appears, it's very difficult to close a full probate in less than six months because of all the steps that must be completed to the satisfaction of the court.

LIVING PROBATE

When an individual becomes mentally incompetent and unable to manage his or her personal and financial affairs, it is necessary to undergo living probate. Living probate refers to the guardianship process. An individual, generally a family member, applies to the probate court to be appointed guardian of the incompetent person. The applicant has the burden of demonstrating the person's incompetence by clear and convincing evidence. Once appointed, the guardian must present the court with a full inventory of the incompetent person's assets and provide detailed accountings on annual or bi-annual basis showing the court how the incompetent person's assets have been managed. The guardian must seek the court's approval for any expenditure of the incapacitated person's funds. The entire procedure is expensive, time-consuming, and burdensome.

WHAT ARE YOUR ESTATE PLANNING OPTIONS?

As a practical matter, estate planning can be accomplished by one or more of the following strategies:

1. Doing nothing
2. Relying on probate avoidance techniques for transferring title to your assets at death
3. Using a Will
4. Using a well drafted, comprehensive Living Trust

WHAT HAPPENS IF YOU DO NOTHING?

Believe it or not, a majority of Americans choose to do nothing. According to the American Bar Association, 55% of Americans have no estate planning documents in place. Unfortunately, for those who have no plan, state law will dictate how their estate is to be distributed at death. As you might imagine, the government's plan of distribution has no particular concern for what may be in the best interest of your family.

In addition, doing nothing will require your estate to be administered through the probate process, which will result in court costs and attorney's fees. Moreover, the estate will be administered by someone - usually a family member -appointed by the court. This person may not be the one you would have chosen to manage your estate.

RELYING ON PROBATE AVOIDANCE TECHNIQUES

Many assets can be transferred to one or more beneficiaries at death without the need for probate. These assets transfer immediately at death by operation of law and do not become part of the deceased persons probate estate. Bank accounts can name "Payable on Death" beneficiaries. Investment accounts can be titled as "Transfer on Death." The beneficiaries of your life insurance policies will receive their funds directly from the insurance company. Real estate can be transferred outside of probate through the use of "Joint and Survivor" deeds or "Transfer on Death" affidavits.

One of the most common probate avoidance techniques is the use of "Joint and Survivor" bank accounts. At the death of one of the joint owners, the funds in the bank account pass to the surviving owner immediately at death outside of the probate process. The deceased owner's Will does not determine how the account is distributed. However, the use of "Joint and Survivor" accounts can often lead to unintended consequences.

Let's consider a common scenario. Mary is getting up in years and has trouble leaving her home. She adds her daughter Susan as a joint owner on all of her bank accounts so that Susan can handle Mary's banking transactions. Mary has a Will that states all of her assets are to be divided equally among her three children. At Mary's death, Susan is legally entitled to keep all the money in the bank accounts, even though Mary wanted the funds allocated equally among all the children.

In addition, placing assets in a joint account can place them at risk during your lifetime. For example, if Mary makes Susan a joint owner of her bank accounts and a legal judgment is entered against Susan, Mary's funds may be at risk because Susan's name is on the accounts. For these reasons, most estate planning professionals advise against using joint tenancy as the primary estate planning tool for anyone other than married couples.

Another issue with relying solely on probate avoidance techniques is that they provide no protection in the event of a person's incapacity. Consider a situation in which a husband and wife own their home as joint owners. If the husband becomes incapacitated, it may be necessary to sell the home. However, joint ownership does not provide the wife with legal authority to sign a deed on behalf of her husband. Consequently, the wife must apply to the probate court to be appointed guardian of her husband in order to transfer his interest in their home.

IS RELYING ON A WILL A GOOD ESTATE PLAN?

For most people estate planning is accomplished by drafting a Last Will and Testament. A Will is simply a document that specifies how you would like your assets to be distributed at death.

As we've already seen, a Will does not control the distribution of all your assets. Jointly owned property, life insurance proceeds, and transfer on death accounts pass outside your Will. A Will only determines the distribution of the assets you own at the time of your death that do not have beneficiary designations.

Relying on a Will guarantees that your estate will be administered through the probate process. As stated previously, probate can be an expensive and time-consuming process. In addition, the probate process is a matter of public record. Anyone can go to the probate court and review your file to see what assets you owned and the persons to whom they are being distributed.

A Will can also present problems for individuals who are involved in second marriages. For example, a woman who has children from a previous marriage may desire to leave all of her assets to the children of the prior marriage. Even if her Will provides that all of her assets are to be distributed to the children of her first marriage, if she dies before her new husband her children's inheritance will be at risk. Ohio law allows a surviving spouse to elect to take against the Will. In most cases, this means that the surviving spouse can take up to one-third of their deceased spouse's assets even if no provision has been made for them in the Will.

A Will becomes legally effective only at death. Accordingly, it offers no protection if the person who drafted the Will becomes legally incompetent during his or her lifetime. Often someone who has been named as Executor in a person's Will believes that they have the authority to manage that person's assets if they become incompetent. This is simply not the case. Their only legal recourse is to go to probate court and seek to be appointed guardian of the incompetent person.

WHAT ARE THE BENEFITS OF LIVING TRUST?

A well-drafted Revocable Living Trust can provide for the efficient management of your assets both during your life and after your death. The document is called a "Living Trust" because it is created during your lifetime.

A trust is basically a legal agreement between three parties:

1. Grantor - the person who creates the trust;
2. Trustee - the person who holds legal title to the trust assets; and
3. Beneficiary - the person who receives the benefits of the trust property.

When you (either an individual or a married couple) establish a Living Trust for estate planning purposes, you will initially occupy all three positions as Grantor, Trustee, and Beneficiary. You, as Grantor, create the Trust Agreement and transfer your assets to yourself as Trustee. As Trustee, you hold title to the assets for your own benefit as Beneficiary. From a practical standpoint, you will not experience much difference in the management of your assets. You can buy, sell, trade, do whatever you choose with your assets—just like you do now. However, from a legal perspective, you own title to your assets as Trustee, which has significant consequences. A person holding title to assets as Trustee owns them in a fiduciary capacity—meaning he or she must hold the assets for the best interest of the Beneficiary

according to the terms of the Trust Agreement. The Trustee does not own the property in their individual capacity. That is, they cannot treat the Trust property as their own, and must keep it separate from their own property. In addition, if the person who occupies the position of Trustee changes, there is no need to transfer title to the Trust property. The position of Trustee is a legal status defined by the Trust Agreement, and whoever occupies that position is the owner of the Trust property. Accordingly, when you die, there will be no need for probate because legal title to your assets will remain in the name of the Trustee, even though it is a Successor Trustee that you specified when you originally created the Trust. The Successor Trustee will distribute your assets according to your instructions outside of the probate process.

In addition to avoiding probate at your death, a properly drafted Trust will avoid living probate in the event of your incapacity. For example, if you suffer a major stroke and are unable to manage your financial affairs, your Successor Trustee will have complete authority to handle all of your financial affairs without the involvement of the probate court.

Moreover, a Trust can be written to protect your family from problems that can occur even after you've died. A well-drafted Trust can:

- protect your children's inheritance if your spouse remarries;
- protect the money you left to a child if they are involved in a divorce;
- protect the money you left to your child from claims of their creditors; and
- protect the government benefits of a special needs child who inherits money from you.

PREPARING YOUR ESTATE PLAN

As you can see, there are many factors to be considered when preparing your estate plan. Your plan should be designed to meet the specific needs of your family. A carefully prepared estate plan will ensure that your affairs are managed appropriately and efficiently in the event of your incapacity or death.

To learn more about how you can protect your family, please call Joseph L. Motta Co., LPA at (440) 930-2826. Or visit our website at www.josephlmotta.com

Leave a legacy, not a predicament

Joseph L. Motta co LPA

Helping Individuals Protect Their Families During and After Life

Joseph L. Motta Co., LPA is devoted to protecting families from life's most challenging situations. Our goal is to provide you with the peace of mind that comes from knowing that you have planned your affairs so as to avoid the financial disruptions that often accompany death or incapacity. Each client receives our personal attention because we want you to feel comfortable discussing issues that can be emotionally difficult to address. We strive to use our knowledge and expertise to provide you with the best advice on how to protect the ones you love.

Our primary office is located at 32730 Walker Road, Suite J-1, Avon Lake, Ohio 44012. We also have office spaces at 25550 Chagrin Blvd., Suite 100, Beachwood, Ohio 44122; and 38027 Euclid Avenue, Willoughby, Ohio 44094. Please call us at (440) 930-2826 to schedule a free, no obligation, personal consultation.