
## Q: What is estate planning?

When someone passes away, his or her property must somehow pass to another person. In the United States, any competent adult has the right to choose the manner in which his or her assets are distributed after his or her passing. A proper estate plan also involves strategies to minimize potential estate taxes and settlement costs as well as to coordinate what would happen with your home, your investments, your business, your life insurance, your employee benefits (such as a 401K plan), and other property in the event of death or disability. On the personal side, a good estate plan should include directions to carry out your wishes regarding health care matters, so that if you ever are unable to give the directions yourself, someone you know and trust would do that for you, and know when you would want them to authorize extraordinary measures and when you would prefer they pull the plug.

## Q: Why is it important to establish an estate plan?

Sadly, many families don't do proper estate planning because they don't believe that they have "a lot of assets" or otherwise believe that their kids can just come in and divide their assets by themselves. If you don't make proper legal arrangements for the management of your assets and affairs after your passing, the state's intestacy laws will take over upon your death or incapacity. This often results in the wrong people getting your assets as well as higher estate taxes. If you pass away without establishing an estate plan, your estate would undergo probate, a public, court-supervised proceeding. Probate can be expensive and tie up the assets of the deceased for a prolonged period before beneficiaries can receive them. Even worse, your

failure to outline your intentions through proper estate planning can tear apart your family as each person maneuvers to be appointed with the authority to manage your affairs.  Further, it is not unusual for bitter family feuds to ensue over modest sums of money or a family heirloom.

## Q: What does my estate include?

Your estate is simply everything that you own, anywhere in the world, including:

- Your home or any other real estate that you own
- Any interests you may have in any business
- Your share of any joint accounts
- The full value of your retirement accounts
- Any life insurance policies that you own
- Any property owned by a trust, over which you have a significant control

## Q: What estate planning documents should I have?

A comprehensive estate plan should include the following documents, prepared by an attorney based on in-depth counseling which takes into account your particular family and financial situation:
A Living Trust can be used to hold legal title to and provide a mechanism to manage your property. You (and your spouse) are the Trustee(s) and beneficiaries of your trust during your lifetime.  You also designate successor Trustees to carry out your instructions as you have provided in case of death or incapacity. Unlike a Will, a Trust usually becomes effective immediately after incapacity or death. Your Living Trust is "revocable" which allows you to make changes and even to terminate it.  One of the great benefits of a properly funded Living Trust is

the fact that it will avoid or minimize the expense, delays and publicity associated with probate.

If you have a Living Trust-based estate plan, you also need a Pour-Over Will. For those with minor children, the nomination of a guardian must be set forth in a Will. The other major function of a Pour-Over Will is that it allows the executor to transfer any assets owned by the decedent into the decedent's trust so that they are distributed according to its terms.
A Will, also referred to as a "Last Will and Testament", is primarily designed to transfer your assets according to your wishes. A Will also typically names someone you select to be your Executor, who is the person you designate to carry out your instructions. If you have minor children, you should also name a Guardian as well as alternate Guardians in case your first choice is unable or unwilling to serve. A Will only becomes effective upon your death, and after it is admitted by a probate court.

A “Durable Power of Attorney for Property” allows you to carry on your financial affairs in the event that you become disabled. Unless you have a properly drafted power of attorney, it may be necessary to apply to a court to have a guardian or conservator appointed to make decisions for you when you are disabled. This guardianship process is time-consuming, expensive, emotionally draining and often costs thousands of dollars.

There are generally two types of durable powers of attorney: a "present" durable power of attorney in which the power is immediately transferred to your attorney in fact; and a "springing" or future durable power of attorney that only comes into effect upon your subsequent disability as determined by your doctor. When you appoint another individual to make financial decisions on your behalf, that individual is called an "attorney in fact". Anyone can be designated, most commonly your spouse or domestic partner, a trusted family member, or friend. Appointing a power of attorney assures that your wishes are carried out exactly as you want them, allows you to decide who will make decisions for you, and is effective immediately upon subsequent disability.

The law allows you to appoint someone you trust - for example, a family member or close friend to decide about medical treatment options if you lose the ability to decide for yourself. You can do this by using a "Durable Power of Attorney for Health Care" or Health Care Proxy where you designate the person or persons to make such decisions on your behalf. You can allow your health care agent to decide about all health care or only about certain treatments. You may also

give your agent instructions that he or she has to follow. Your agent can then ensure that health care professionals follow your wishes.  Hospitals, doctors and other health care providers must follow your agent's decisions as if they were your own.

A Living Will informs others of your preferred medical treatment should you become permanently unconscious, terminally ill, or otherwise unable to make or communicate decisions regarding treatment. Almost all states have instituted living will laws to protect a patient's right to refuse medical treatment.  Even if you receive medical care in a state without living will laws this document is useful to a court trying to decide what an unconscious patient would want. In conjunction with other estate planning tools, it can bring peace of mind and security while avoiding unnecessary expense and delay in the event of future incapacity.

Some medical providers have refused to release information, even to spouses and adult children authorized by durable medical powers of attorney, on the grounds that the 1996 Health Insurance Portability and Accountability Act, or HIPAA, prohibits such releases.  In addition to the above documents, you should also sign a HIPAA Authorization Form that allows the release of medical information to your Agents, your Successor Trustees, your family and other people whom you designate.

## Q: What is the purpose of a Special Needs Trust?

While you can certainly bequest money and assets to those with special needs, such a bequest may prevent them from qualifying for essential benefits under the Supplemental Security Income (SSI) and Medicaid programs.  However, public monetary benefits provide only for the bare necessities such as food, housing and clothing.  As you can imagine, these limited benefits will not provide those loved ones with the resources that would allow them to enjoy a richer quality of life.  But if parents leave any assets to their child who is receiving public benefits, they run the risk of disqualifying the child from receiving them. Fortunately, the government has established rules allowing assets to be held in trust, called a “Special Needs” or “Supplemental Needs”  Trust  for the benefit of a recipient of SSI and Medi-Cal, as long as certain requirements are met.

## Q: Who can establish a Special Needs Trust?

While Special Needs Trusts are typically established by parents for their disabled children, any third party can establish a Special Needs Trust for the benefit of a disabled beneficiary. It is important to seek the assistance of competent counsel when creating a Special Needs Trust. Indeed, a poorly drafted Trust can easily be subject to “invasion” by the government agencies who provide benefits. Our law firm has the experience and the expertise to establish effective Special Needs Trusts for anyone who wishes to provide for a disabled beneficiary

## Q: Our family is wealthy. Do we still need to create a Special Needs Trust?

Yes, you should still establish a Special Needs Trust to protect your disabled beneficiaries from potential creditors. For example, if your disabled beneficiaries are ever sued in a personal injury action, the assets in the trust would not be available to the plaintiffs. Furthermore, because the funds in the Special Needs Trust are not countable as available assets for purposes of determining government benefit eligibility, more of your money can be used for those supplemental expenditures that will allow your disabled beneficiary to enjoy a higher quality of life. Otherwise, much of your assets will be used to pay for private care benefits that are extremely expensive and can drain even significant sums of money over a period of years.

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