

## Estate Planning

# Basic estate planning considerations and documentation.

By Eva Stark, JD, LL.M.



A significant number of Americans have no estate plan in place in the event of premature death. However, failing to plan can have consequences that could be very costly both financially and in terms of undesirable distributions, delay, and family disharmony.

### Issues and considerations

Many considerations go into developing an effective estate plan:

- Type of assets owned.
- Overall net worth.
- Family structure and dynamics.
- Wishes and goals.

These issues, described below, should be thoroughly discussed with attorneys and financial professionals.

**AVOIDING INTESTACY.** A basic will can be used to ensure that assets will be distributed as desired. If an individual dies without a will—i.e., dies “intestate”—assets will be distributed as state law specifies. State law default distributions may come as a surprise to many individuals and may provide for drastically fewer or drastically more assets to certain beneficiaries than what may have been desired or anticipated.

**SELECTING A GUARDIAN FOR MINOR CHILDREN.** A will also can be used to nominate a guardian for minor children or their property. If a minor child has no other living parent or legal guardian at a parent’s death, the court will consider and frequently appoint the person the

parent nominated in the will. In the absence of a will, the court will select a guardian based on what it deems is in the child’s best interest which may be different from the parent’s wishes.

**AVOIDING INADVISABLE DISTRIBUTIONS.** A will may additionally be used to keep assets in trust for beneficiaries if outright distributions are inadvisable. It may be unwise to distribute assets to a beneficiary who: is too young or immature; is a spendthrift; has outstanding creditors; may undergo a divorce; is disabled and eligible for government benefits; or for other reasons. Keeping assets in a properly structured trust can help protect assets from third parties and help ensure that assets remain available for the benefit of the intended

beneficiary and other family members.

**CONSIDERING ESTATE TAXES.** For most individuals, neither federal nor state estate taxes will be a concern. However, where federal or state estate taxes may be an issue, planning opportunities for lowering or eliminating taxes may be permanently lost in the event of intestacy.

While the federal estate tax lifetime exemption amount is currently \$12.06 million, many states have a much lower state-level estate tax exemption amount. Massachusetts and Oregon—currently the states with the lowest exemption amounts—each have a state-level estate tax exemption amount of only \$1 million.

**REMEMBERING NON-PROBATE ASSETS.** Many individuals own a substantial amount of “non-probate” assets that pass outside a will. These typically include retirement accounts and life insurance that pass by beneficiary designation, certain jointly-owned property, pay-on-death accounts and similar assets. These should be reviewed with an individual’s attorney to ensure that they are coordinated with overall objectives and planning.

**UTILIZING LIFE INSURANCE.** Life insurance can play a critical role in estate planning. It can protect a family’s financial security in the event of the death of a breadwinner or stay-at-home parent. It can help equalize children’s inheritances where a significant portion of the estate is tied up in a business or farmland that may be designated to pass to a child actively involved in running the business or farm operations. Life insurance can also add much-needed



liquidity to an estate for the payment of various obligations, including estate taxes.

## Estate plan documents

Once an estate plan is developed, the individual’s attorney will draft documentation that is in accordance with the plan. Documentation in a typical estate plan may include:

**WILL.** A will may be used to avoid intestacy, name a personal representative and guardian for minor children and to keep assets in trust for children and later descendants if immediate distributions are inadvisable.

**REVOCABLE TRUST.** For many individuals, a revocable trust (established in addition to a will), can offer additional advantages. A revocable trust can provide for privacy in the disposition of assets. While a will can become public record in certain circumstances, the terms of a revocable trust typically remain private. A revocable trust

can also help avoid the need for ancillary probate in every additional state where the decedent may have owned real property. The trustee also holds and manages assets as soon as the assets are transferred to the revocable trust—not just after death. As a result, the trustee can effectively manage the assets in case of the settlor’s incapacity.

Just like a will, a revocable trust also can include provisions to keep assets in trust for beneficiaries in the event that outright distributions are inadvisable.

## DURABLE POWER OF ATTORNEY.

An individual may become unable to manage financial affairs well before death due to old age, disease or injury. A durable power of attorney may be used to appoint a trusted individual (an “agent”) to handle financial affairs under such circumstances. This can avoid a potentially costly guardianship proceeding where a court appoints a guardian it deems will act in the

individual's best interest. Where the estate includes a business, a separate document may be executed to appoint an agent for making business decisions. The document may be made effective immediately upon execution or only in the event of incapacity.

#### **NOMINATION OF PRE-NEED**

**GUARDIAN.** In many states, it is customary for an individual to nominate a guardian for his or her person or property "pre-need" as part of his or her estate planning documents. If the individual does become incapacitated, and a guardianship proceeding is commenced, the court will consider the nominated agent. Without such a document, the court will likely appoint a close relative it deems can act in the individual's best interest.

**HEALTH CARE PROXY.** A health care proxy may be used to nominate a trusted family member or friend to make health care decisions if an individual is unable to make or communicate his or her own health care decisions. The document can typically be structured to take effect immediately or upon the individual's incapacity.

**ADVANCE DIRECTIVE.** An advance directive may be used to express a person's wishes with respect to

various types of life-sustaining treatment in the event he or she becomes terminally ill or permanently unconscious and unable to communicate such wishes to his or her doctor.

**HIPAA AUTHORIZATION.** The Health Insurance Portability and Accountability Act of 1996 (HIPAA) protects certain health care information. An authorization may be needed to permit medical personnel to discuss such protected health information with agents named under powers of attorney.

#### **RE-EVALUATING PERIODICALLY.**

Even if an individual established an effective estate plan and executed proper documentation, changed circumstances or laws may necessitate revisions. Family circumstances may change (a marriage, the death of a spouse, birth of a child, divorce, etc.). Guardians, executors or trustees named in documents may no longer be living

or capable of handling duties. Tax laws may have changed. Financial circumstances and insurance needs may have changed. As a result, estate plans should periodically be re-evaluated with an individual's attorneys, financial advisor and other professionals to determine whether updates may be necessary.

**OVERCOMING EXCUSES.** Many individuals fail to create an estate plan. This may be due to not making time to address a seemingly far-off problem, avoiding potentially difficult conversations and decisions, not wanting to think of one's mortality and the perceived high cost of working with attorneys and other professionals.

However, the lack of a plan can lead to drastic consequences that may easily be addressed with an appropriate estate plan and the help of competent attorneys and financial professionals.



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As a result of the Tax Cuts and Jobs Act of 2017 (TCJA) the estate, gift and generation skipping transfer (GST) tax exemption amounts increased to approximately \$11.18 million per person (approximately \$22.36 million for a married couple). For assets transfers in excess of the applicable exemption amount and otherwise subject to such taxes, the highest applicable federal tax rate remains at 40 percent. While the exemption amounts are indexed for inflation, current law provides for an automatic sunset of these increased exemption amounts after 2025. As a result, the exemption amounts available in 2026 and beyond could be reduced to a level provided under prior law (\$5.49 million/single and \$10.98 million/couple in 2017, indexed for inflation) absent further action by Congress. In addition, under different rates, rules and exemption amounts (if any), there may be state and local estate, inheritance or gift taxes that apply in your circumstances. Please consult your own tax or legal advisor for advice pertaining to your specific situation. This material includes a discussion of one or more tax related topics. This tax related discussion was prepared to assist in the promotion or marketing of the transactions or matters addressed in this material. It is not intended (and cannot be used by any taxpayer) for the purposes of avoiding any IRS penalties that may be imposed upon the taxpayer. The Nautilus Group® is a service of New York Life Insurance Company. Nautilus, New York Life Insurance Company, its employees or agents are not in the business of providing tax, legal or accounting advice. Individuals should consult with their own tax, legal or accounting advisors before implementing any planning strategies. SMRU 1842293 Exp. 2/28/2024