

**THE NUTS AND BOLTS  
OF  
ESTATE AND  
DISABILITY PLANNING**

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## I. ESTATE PLANNING

### 1. What is Estate Planning?

Generally speaking, estate planning is the overall process which an individual may undertake during his or her lifetime to prepare for retirement, to plan for the distribution of property to the surviving spouse, children, or others, and in the event of a premature death, to provide for a surviving spouse, children or others. In the event of the death of both parents, the needs of surviving minor children can be provided for, both in terms of economic care and the nurturing and parenting process.

Everyone needs to do some estate planning in order to carry out his/her wishes and desires in the event of death. It is not necessary to have a large estate in order to need an estate plan. If an individual neglects to make an estate plan and provide for the distribution of his or her property, the state provides a plan through statute. This plan is referred to as "Intestate Succession," and it may not conform closely to the wishes of the individual.

The estate planning process takes into account the needs, desires and goals of the individual. It provides the necessary financial planning to create an estate and provides for the disposition of that estate in order to satisfy the goals set by the individual. Retirement should also be part of an estate plan. The plan should consider the need for care in the event of an individual's incapacity or disability and provide for those events. The plan may also take into account any special problems that a family may have and deal with those problems in a reasonable fashion.

### 2. Tools of Estate Planning.

The tools of estate planning include the individual's professional advisors and the elements of estate planning that each of those advisors brings to the estate planning process. A complete estate plan may include advice from attorneys, accountants, financial planners,

insurance advisors, and pension plan professionals. These individuals bring to the estate planning process the tools of their trade which include wills, trusts, tax planning advice, asset valuation advice, life insurance planning to create an estate where none may presently exist, health insurance planning to provide for the healthcare needs of an individual and his or her family, insurance for nursing care if an individual becomes disabled and unable to care for himself or herself, financial and investment advice during the acquisition phase of a person's lifetime, and advice from pension planners and the people responsible for company pension plans and their distribution.

### 3. How is Estate Planning Done?

In planning an estate, it is necessary to:

- (a) Determine the goals of the individual in providing for loved ones upon disability or death;
- (b) Determine the assets available or necessary to meet those goals, including life insurance, pension plans and other assets that an individual has accumulated during lifetime;
- (c) Consider how the various tools of estate planning, such as wills, trusts, ownership of property, guardianships and conservatorships would operate in that individual's specific situation;
- (d) Decide which tools can best be used to accomplish the individual's objectives with the assets available or to create the necessary assets in order to achieve these goals; and
- (e) Implement the plan by actually preparing the necessary documents, obtaining the necessary insurance or pension plan information, making the necessary changes in title to property, and reaching agreements with those people whose help may be needed.

A good estate plan will provide for an individual's disability, retirement, untimely demise, unexpected events, as well as the simultaneous death of the proposed recipients of the assets. The plan will also provide the necessary directions to those who are to carry out the estate plan.

#### 4. Do I Need a Will?

To a large extent, the answer to this question depends on what other estate planning tools have been used and whether any unexpected events have occurred. Generally speaking, a will is one of the most valuable tools in estate planning. Among other things, a will can:

- (a) Designate who should receive various items of a decedent's property and provide for alternative beneficiaries in the event that the primary beneficiary predeceases the individual;
- (b) Prescribe whether the property should be transferred outright or in trust, and if in trust, whether income should be paid or accumulated; when the corpus may be invaded and when outright distributions of part or all of the trust corpus should occur;
- (c) Coordinate the amount transferred to a spouse under the will with property passing outside the will in order to avoid unnecessary estate taxes. Designate distributions in the event that both spouses die simultaneously and the funds from which estate taxes will be paid; and
- (d) Appoint guardians for the children, executors, personal representatives and/or trustees and provide these fiduciaries with the powers to carry out and administer the estate assets.

#### 5. If there is No Will: Intestate Succession.

If you die without a will and owning any property which is not distributed by an estate planning tool, that property will be given to your relatives or to the state in accordance with the Intestate Succession plan adopted by the state where you are a legal resident when you die, regardless of where the death actually occurs. The one major exception to this rule is real property, which passes according to the rules of the state where the real property is located.

In Utah, the "Intestate Succession" statute (§§ 75-2-102 and 75-2-103) provides that if you die with a spouse only or a spouse and children of that marriage, 100% of the estate goes to the surviving spouse. If you die with a spouse and children who are not children of that marriage, then the first \$50,000 plus one half (1/2) of any balance goes to the surviving spouse and the other one half (1/2) goes to the children of the prior marriage. In the event that your

spouse has predeceased you, then the entire estate will go to the children, sharing equally. In the event that you die with no children and no spouse, then the entire estate will be distributed to your parents. If your parents have predeceased you, the estate will then be distributed to your surviving brothers and sisters or their children. In the event that these individuals cannot be located or do not exist, then the property will go to the state of Utah.

If you die without a will, Utah law provides a list of those individuals who will have priority to be appointed as your personal representative beginning with your spouse and children and ending with creditors. If you die without a will and there are minor children, the court will appoint a guardian to determine what will happen to those minor children. Those children will be entitled to receive their share of your estate at age 18 without any restriction or other guidance.

For some people, Intestate Succession may do a reasonable job of distributing their estate. However, for others the state's plan can unnecessarily increase total estate taxes, can result in unwanted (and expensive) accountings to the court, can distribute the assets of the estate in undesirable proportions, and can totally leave out intended beneficiaries. For example, the state plan does not provide for contributions to charity or for non-relatives such as step-children.

Although the government plan is far from perfect (and in many cases far from desirable) it does provide for the orderly disposition of your property after your death if you have failed to make provisions yourself. Unfortunately, this practical workability does not extend to providing for young children. Intestate Succession makes virtually no provisions for the orderly transfer of custody and guardianship of minors. As a result, court proceedings may be required to establish legal guardianships so that your children can be admitted to school, receive non-emergency

medical care, participate in activities requiring parental consent, etc. Court proceedings may also be necessary where relatives disagree over who should have custody.

#### 6. Minor Children

Since children are not property, you do not have the uncontrolled right or power over what happens to your children after your death. However, the law does recognize the importance of a quick, simple and inexpensive method of establishing custody and guardianship for your children. The law also assumes that parents are normally the most qualified to decide what is best for their children.

Utah law, therefore, provides that you may appoint a guardian for your children, in your will, to serve in the event that both you and your spouse die before your children reach age 18. When the first parent dies, custody and guardianship of the children automatically pass to the surviving parent. When the surviving parent dies, the custody and guardianship of the children pass without the need for any action of the court to the persons named in the surviving parent's will if the named guardians accept the guardianship. Although the courts have the power to remove the guardian appointed in the surviving parent's will, it is unlikely that any court would actually change guardians unless such a change is clearly required for the best interests of your children.

#### 7. What a Will Does

A will is an easy means by which you can appoint a guardian for your children; specify who will receive your property; provide for non-relatives, such as charities and friends; appoint the personal representative of your choice; waive requirements for a bond; make any final statements of love and comfort; give instructions and advice; and in many cases save taxes. Since wills have no effect until the time of death, they allow you the full use of your property while you are living, and yet can provide for complete disposition of all of your property upon

your death. Wills can also provide great flexibility to handle a situation where something unexpected happens, or where something expected fails to happen.

At the same time, there are no disadvantages in having a will (except possibly the cost of having the will prepared), since wills can be used with all other estate planning tools.

The advantages of a will are so substantial, that virtually every well-planned estate has at least a simple will. Indeed, a simple will generally is all that is needed, unless one or more of the following circumstances are present:

- (a) You have a large estate (do not forget to include life insurance and pension plan proceeds);
- (b) Your assets cannot be easily divided or easily sold and the money divided;
- (c) Your objectives after death cannot be met by merely dividing your estate assets;  
or
- (d) There are special problems, such as minor children or dependents that may need special help or protection.

If your circumstances fall within one or more of the above categories, you may need a more complex will or you may need to use one of the other estate planning tools, such as a Trust, in order to achieve your goals.

## 8. Probate Considerations

To have full effect and provide the protection of the court, a will must be probated. The term “probate” refers to the legal process by which a court determines that a writing is, or is not, a valid will. Although there are limited circumstances where a will can be used to pass title to certain assets prior to actual probate, it is almost always best to probate a will if it creates a guardianship or if there is any property not transferred by other estate planning devices. Generally, your will cannot be probated in Utah unless it is presented for probate within three years after your death.

Some people believe that non-will methods of transferring property, particularly joint tenancy, are preferable because they avoid probate. Although it is possible to reduce or avoid probate in many cases, it is still wise to have a will to insure against errors and the unexpected. A joint tenancy between husband and wife, for example, will avoid probate of the property upon the first death, but will not help upon the second death. Therefore, a joint tenancy is inadequate when a couple both die at or about the same time, as in a car crash. Although additional joint tenants may be added to property, doing so may require the original couple to pay gift taxes. In addition, the addition of other joint tenants may subject the property to creditors of the additional joint tenants; require approval of all current joint tenants; fail to provide for after-born or after-adopted children; and disinherit non-joint tenants.

Other estate planning vehicles, such as trusts, can be used very effectively with wills. For example, a trust, in conjunction with a will, can be used by an individual during his or her lifetime to manage estate assets and to avoid probate on the assets held in trust. Making outright gifts during a lifetime can result in loss of control of your property and may result in a gift tax.

#### 9. Is Probate Costly or Complicated?

That question cannot be answered directly because there are so many variables. However, under the Utah Uniform Probate Code, Title 75, both the costs and complications of probate have been reduced substantially.

For example, a simple uncontested estate with a valid will can be probated informally for less than the cost of a funeral, yet it provides marketable title for all of the estate property, and provides security from future claims of creditors. The unknown variables usually result from family problems, rather than legal problems. If family members disagree over the terms of the will, the cost of the probate will reflect that problem.

Where the estate is larger or more complicated, i.e., in excess of \$3,500,000, real estate in several states, multiple marriages and children from multiple marriages, or where a formal probate is desired, the fees will be higher. In these cases a judge must approve the fee. There may be additional fees where income or estate tax returns must be filed on estates subject to federal estate tax, although these returns must be made regardless of whether there is a probate, and therefore the fee for tax return preparation is not caused by the probate itself.

10. What Should a Will Contain?

Your will should identify itself as a will, expressly revoke all previous wills and codicils (even if there are none), appoint a personal representative, appoint a guardian where minor children are (or may be) involved, and provide a formula or method for distributing your property. In addition, your will may have provisions leaving specific items to specific people, waiving any requirement of a bond for the personal representative (which is almost always a good idea) and various other provisions which allow your will to work with other estate planning tools or deal with particular problems. Of course, the complexity of your estate plan will vary with the complexity of your individual circumstances and the size of your estate. You must be at least 18 to make a will.

Any document, which is entirely in your own handwriting, which clearly indicates that it is your will (or is to take effect at your death) and, which is signed by you can be recognized as a valid will in the state of Utah. Such a document (called a holographic will) should also be dated. However, you should be aware that holographic wills are not recognized in all states, and therefore a holographic will may be inadequate if you own property located outside Utah or move outside the state.

Any will that is not entirely in your own handwriting and signed by you must be executed with certain formalities in order to be valid. These formalities are required by the state in order