ELG
Estate Planning

YOUR GUIDE TO ESTATE PLANNING

DO I EVEN NEED AN ESTATE PLAN?

You may be asking yourself if you even need an Estate Plan. Maybe you don't think you have an "Estate". You might be surprised to learn that just about everyone has an Estate. If you own a home, you have an Estate. If you have a retirement account, you have an Estate. If you have just one bank account, you have an Estate.

Estate Planning is not just for wealthy people. Those with wealth know they need an Estate Plan. But everyone needs to protect themselves and their loved ones with an Estate Plan that fits their specific needs. The fact is, you already have an Estate Plan, but it might not be one that you would choose for yourself. The State chooses for you if you have no valid, written Estate Plan.

Most people are familiar with the term "Will" or "Last Will and Testament", and understand that a Will directs where your assets go when you are gone. A Will is a part of an Estate Plan. If you pass away with a validly executed Will, you are considered "testate" and your personal Estate Plan controls who gets your assets. On the other hand, if you pass away without a validly executed Will, you are considered "intestate" and Washington intestacy law controls who gets your assets. Essentially, your assets will be distributed to your closest living relatives, known as your heirs-at-law, in predetermined percentages. While intestacy law aims to make an equitable disposition of assets to your family, it makes no allowances for personal circumstances. Intestacy law does not discriminate between the sister who spent years by your bedside and the sister you hadn't spoken with in thirty years. Your estranged brother will inherit your Estate before your cousin who was your closest friend. Your unmarried partner of many years may receive nothing from your Estate. Or your new spouse may get half of your Estate and your children would split among themselves the other half.

If you have minor children, a Will is especially important as it is through your Will that you name who would be the Guardian of your children; meaning who would raise them and be responsible if you're not there to raise your children. Avoiding family conflicts over who will be the Guardian of the children is accomplished through a Will.

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- If any of your beneficiaries receive government benefits, you can protect their eligibility for benefits and provide money for them by appointing a Trustee in your Will to manage that beneficiary's inheritance on their behalf.

- If any of your beneficiaries are incapacitated, or otherwise unable to manage money, you can appoint a Trustee in your Will to manage that beneficiary's inheritance on their behalf.

- If the intended disposition of your assets is straightforward, advance planning can set up your Estate to make its eventual administration simple and fast.

- And as mentioned previously, if you have young children, your Will is the Estate Planning document through which you should nominate a Guardian to care for them, as well as a Trustee to manage their inheritance until they come of age.

Now that we know we all have an Estate and an Estate Plan, be sure the Estate Plan is one that you choose for yourself.

ESTATE PLANNING DOCUMENTS THAT EVERYONE NEEDS

A comprehensive Estate Plan is more than just a Will. A comprehensive Estate Plan is a plan for both the management of your assets during your lifetime, as well as the disposition of your assets upon your death. Sophisticated Estate Plans can also include provisions to protect, not merely distribute, your assets for the benefit of your loved ones. Such protections are especially important if any of your beneficiaries has problems managing money or lifestyle issues, receives government benefits, or is anticipated to need expensive long-term care.

Estate Planning documents can be divided into two categories: the "living documents" are documents that you use during your lifetime and the "dispositive documents" are the documents that direct the disposition of your assets upon your death. The living documents consist of your Powers of Attorney for finances and health care and your Advance Health Care Directive. The dispositive documents are centered around your Will, but depending on your individual circumstances, may also include Revocable Living Trusts, Asset Protection Trusts, Beneficiary Designations, Transfer on Death Deeds, and Property Status Agreements

POWERS OF ATTORNEY

A Power of Attorney is a document in which one person – the Principal – grants authority to another person – the Attorney-in-Fact or Agent – so that the Attorney-in-Fact can take actions on behalf of the Principal. An Attorney-in-Fact is a fiduciary, meaning that he or she must act in the Principal's best interests.

The two most common types of Powers of Attorney are the General Durable Power of Attorney and the Health Care Power of Attorney.

General Durable Power of Attorney

The General Durable Power of Attorney authorizes the Attorney-in-Fact to manage the property and finances of the Principal. This Power of Attorney is "general" because it grants broad authority to conduct many different types of transactions. It is "durable" because the Attorney-in-Fact's authority endures even after the Principal becomes incapacitated.

The Attorney-in-Fact under the General Durable Power of Attorney is authorized to:

- Access the Principal's bank and investment accounts
- Manage and pay the Principal's bills
- Buy and sell real property on behalf of the Principal
- Buy and sell personal property, such as cars, on behalf of the Principal
- Make gifts of the Principal's property
- Apply for government benefits on behalf of the Principal
- Keep an accounting of transactions conducted on behalf of the Principal

Unless the Principal is incapacitated, the Attorney-in-Fact should obtain permission from the Principal before taking actions on the Principal's behalf.

Health Care Power of Attorney

The Health Care Power of Attorney authorizes the Health Care Agent to make medical decisions on behalf of the Principal. The primary responsibility of the Health Care Agent is to consult with the Principal's physicians to determine the course of the Principal's care when the Principal is incapacitated unable to speak for himself or herself. The Health Care Agent may need to act because the Principal is permanently incapacitated – for example, due to dementia, or because the Principal is temporarily incapacitated – for example, due to the effects of anesthesia.

The Health Care Agent is authorized to:

- Access the Principal's medical records
- Authorize a recommended medical procedure
- Request that treatment be withheld if the Health Care Agent believes that the risks of treatment outweigh the likely benefits
- Select a facility in which the Principal will receive treatment or care
- Terminate life support

The Health Care Agent must follow the instructions of the Principal as set out in the Principal's Health Care Directive. Furthermore, the Health Care Agent should make every effort to try to make the same decision that the Principal would have made if the Principal were not incapacitated. Therefore, before the Principal becomes incapacitated it is important for both parties to have a discussion about the Principal's wishes and values regarding health care.

WHO SHOULD YOU APPOINT? You should designate as your Attorney-in-Fact or Health Care Agent someone you trust – with your money and your life. That someone must be capable and an effective advocate for you if you should become no longer able to manage your own affairs. And the person you appoint must have the requisite time, energy, and skill set to take on these important roles. Talk with the person you are thinking about nominating as your Attorney-in-Fact or Health Care Agent. It is an important responsibility to take on, so make sure who you name is up to the task.

ADVANCE LIVING WILL

And POLST: Physician's Order on Life-Sustaining Treatment

Your Advance Health Care Directive, sometimes referred to as a Living Will, spells out your instructions to your health care agents and medical providers regarding the type and extent of treatment you want to receive at the end of your life. By putting your wishes in writing, you can ensure that you get the care you want, avoid confusion about your wishes, minimize the potential for disputes among your family members, and alleviate the burden on your loved ones who would otherwise be charged with making a difficult decision on your behalf in a moment of crisis.

Executing an Advance Health Care Directive will not prevent you from receiving emergency and other treatment to save your life. An Advance Health Care Directive only comes into play after the emergency is over and your doctors have already determined and put in writing that, within a reasonable degree of medical certainty, you are not going to recover no matter what treatment is offered; in other words, the treatment prolongs the process of your dying.

If you do not want to receive emergency treatment, you will need to execute a Physician's Order for Life Sustaining Treatment ("POLST") with your doctor. It is the bright green form that emergency responders look for, and is often kept on the refrigerator door.

WILL WITH ASSET PROTECTION

Your Will is the centerpiece of your Estate Plan. Your Will is the document through which you direct the distribution of your assets upon your death. Very simple Wills generally direct that your assets be distributed to your named beneficiaries. More sophisticated Wills, however, function to not only distribute assets to your loved ones, but to distribute those assets in such a way that those assets are protected. Common reasons that asset protection may be beneficial is the current or anticipated receipt of needs-based government benefits, financial or creditor problems, lifestyle issues, divorcing spouses of your children, or incapacity or inability of your beneficiary to manage money. If a beneficiary requires or desires asset protection, that beneficiary's inheritance can be directed to a specialized trust, called an Asset Protection Supplemental Needs Trust, or simply a Supplemental Needs Trust.

One of the most common reasons that Supplemental Needs Trusts are beneficial is that these trusts can help the trust beneficiary qualify for Medicaid long-term care benefits. As you can imagine, long-term care is expensive! In the State of Washington, it is not uncommon for long-term care to cost upwards of $10,000 to $12,000 per month. Medicare does not cover long-term care; neither do most private health insurance plans. Long-term care insurance must be purchased years in advance of anticipated need.

This leaves most people with two options: pay for long-term care costs out of pocket until they have depleted all of their money or qualify for Medicaid benefits and do so in a smart way without losing all their assets.

Medicaid long-term care coverage is a needs-based government benefit and single Medicaid recipients can keep only $2,000 in cash. However, money that is held in a Supplemental Needs Trust for the benefit of a Medicaid recipient does not count towards that $2,000 limit. If your spouse or other loved ones have current or anticipated long-term care needs, consider incorporating a Supplemental Needs Trust into your Estate Plan. This trust may be able to help your loved ones get the care they need without impoverishing themselves.

REVOCABLE LIVING TRUST

While a Revocable Living Trust is not for everyone, it may be appropriate in certain situations. A Revocable Living Trust is an instrument in which a "Trustor" transfers his or her assets into the name of the trust so that those assets are managed by a "Trustee" for the benefit of a "Beneficiary". In Revocable Living Trusts, it is common for the Trustor, Trustee, and Beneficiary to all be the same person – at least initially. The Trustor provides for successor Trustees to take over in the event of death or incapacity and directs the disposition of assets upon his or her death.

A Revocable Living Trust is attractive to some people because it may be effective to avoid the probate process if the trust is set up and managed correctly, which often is not the case. For many people for whom probate avoidance is appropriate, there are simpler ways to avoid probate, such as Transfer on Death beneficiary designations and Transfer on Death Deeds. However, for individuals with significant wealth and extensive real Estate holdings in multiple states, a Revocable Living Trust may be worth considering.

A common and costly misconception is that holding property in a Revocable Living Trust protects assets. That is, many people mistakenly believe that transferring assets into a Revocable Living Trust means that those assets will be protected from their creditors. Not so! They also may have been told that the assets in the trust are not "countable" by Medicaid or other needs-based benefits programs. Again, this simply isn't so and people are often confused about Revocable Living Trusts.

In the State of Washington, Revocable Living Trusts provide no asset protection. It is critically important to understand that an Estate Plan based on a Revocable Living Trust could result in the loss of the couple's entire Estate. For Washington Medicaid purposes, assets held in a Revocable Living Trust are indistinguishable from assets held in an individual's own name. In fact, the only way a spouse upon his or her passing may protect assets for his or her surviving spouse against long-term care costs is through a Will with an Asset Protection Supplemental Trust. This is the best Estate Planning tool for those who want to make sure their entire Estate isn't lost to devastating long-term care costs.

DECIDING WHETHER TO USE PROBATE TO BENEFIT YOUR ESTATE

A key component of a comprehensive Asset Protection Estate Plan™ is the testamentary Asset Protection Supplemental Needs Trust. As discussed above, if your loved ones need asset protection, particularly due to long-term care needs or other reasons, you can direct their inheritance to an Asset Protection Supplemental Needs Trust for their benefit. Probate is the process by which the Supplemental Needs Trust is established and funded.

Probate is the legal process to administer your Estate. After your Will is filed with the court, your Personal Representative is appointed and is granted the legal authority to act on behalf of the Estate through issuance of Letters Testamentary. Probate is a well-defined procedure for the orderly administration of an Estate to ensure that your debts are paid and your assets distributed according to your wishes.

If none of the beneficiaries of an Estate is expected to need asset protection, an Estate Plan may be set up to avoid probate, using tools such as Transfer on Death Beneficiary Designations for financial accounts and Transfer on Death Deeds for real property. Even if your Estate is set up to avoid probate, it is still important to have a Will to ensure that all of your assets go to your intended beneficiaries.

PROVIDING FOR MINOR CHILDREN

If you have minor children, the most important Estate Planning decision that you will make has nothing to do with your assets. Rather, you need to decide the person you trust to finish raising your children if something happens to you while your children are still young. Guardianship is the legal answer to parental absence or neglect. If both parents are deceased or otherwise unavailable, the court will appoint a Guardian for any minor child(ren). If the parents had nominated a Guardian or Guardians in their Wills, the court will generally defer to the parents' choice. Failure to nominate a Guardian means that the court will have to select a Guardian without your input. As you can imagine, this opens the door to family conflict and disputes in a moment of crisis. Don't let this happen: you decide who you want to raise your kids and put that decision in writing.

It is typical for parents of young children to leave the bulk of their Estate to their children. Because young beneficiaries should not receive an inheritance outright, parents also need to decide on a Trustee to manage their children's assets until they come of age. The Trustee can be the same person as your Guardian, or you can choose to divide these roles between different individuals. Your Estate Planning Attorney can discuss with you the pros and cons of each option.

HOW OFTEN DO I NEED TO REVISE MY ESTATE PLAN?

It is too easy to think that once your Estate Plan is signed it can be placed in a safe place and be forgotten. However, changes in your personal situation or changes in the law may cause your plan to become outdated. Some specific events which may affect your Estate Plan include:

- Marriage in the family
- Birth or adoption in the family
- Death, disability, or serious decline in health in the family
- Marriage dissolution or legal separation in the family
- Determination of paternity
- Appointment of a legal guardian
- Significant change in family income and resources
- Relocation to a different State or country
- Purchase of real property
- Purchase of life insurance
- Receipt of an inheritance or significant gift
- Commencement of long-term care
- A change in the laws governing your Estate Plan

This is not a comprehensive list; there are many reasons why Estate Plans become outdated, including the fact that you may simply have changed your mind about certain aspects of your Estate Plan.

We recommend you review your Estate Planning documents at least every five years and whenever there is any change in your personal circumstances. Often, no changes will be needed. Well thought-out Estate Plans are designed to anticipate changing circumstances and include provisions for alternate decision makers and beneficiaries

DON'T WAIT UNTIL IT'S TOO LATE

People tend to fall into two categories with respect to Estate Planning. Some people are excited to come up with a plan to provide for their family after they have gone. They may enjoy designing a trust to provide for the education of grandchildren or the care of beloved pets. Some people may even be excited to donate their body to science to further medical research!

Most people, however, have at least some degree of apprehension about preparing their Estate Plan. This apprehension is understandable. Fundamentally, Estate Planning is about planning for the loss of control, both during your lifetime due to incapacity and then upon your passing. It is important not to let this reasonable apprehension keep you from planning for the future. Failure to put a plan in place rarely works out well. For example, if you put off executing your Powers of Attorney, if and when you become incapacitated, a Guardian will be appointed by the court. The court will decide who manages your affairs – not you. Similarly, if you put off executing your Will, the laws of the State of Washington will determine who gets your assets – not you.

A qualified Elder Law and Estate Planning Attorney can work with you to create the Estate Plan that's right for you - tailored to your unique situation to accomplish the results you want.

Don't wait until it's too late. Contact ELG Estate Planning to get started on your Asset Protection Estate Plan™ today.

ELG
Estate Planning

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