

LEGAL TOOLS FOR ESTATE PLANNING

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"No one can confidently say that he will still be living tomorrow. "

Euripides - Ancient Greek Poet

What is my "Estate" and what is an "Estate Plan"?

"Estate" = everything you own + "Plan" = decide on and arrange in advance.

An "Estate Plan," at its most simple, is what you want to happen to your Estate when you die. Everyone has some idea of what they want to happen to their "stuff" after they die. Remember it took your lifetime to accumulate your Estate and it will take some time and effort to distribute your Estate after you die. Your legal "Estate Plan" tells your survivors how you would like the distribution to be accomplished.

** A modern "Estate Plan" encompasses more than planning for a death. It also includes planning and documents to use in the case of a medical crises or disability.

A good "Estate Plan" is more than words on a page. Estate planning is a process based on trust, accurate information and clear communication. It is very important for the attorney or other professional you work with to understand your goals and objectives. It is equally important for you to understand your options for estate planning tools. Estate planning attorneys use our ability to listen in a supportive and non-judgmental manner to allow our clients to express their true wishes. Our knowledge of the law allows us to provide our clients with a variety of options to turn their intentions into reality.

Where do I start creating my estate plan?

First, gather information about your family. All estate plans are based on your family because the family members and dynamics impact the planning options. So the most important consideration is your family:

Marital status:	Single; Married; Divorced, Widowed
Children:	How many children. Are they adults or minors? All from the same marriage.
Health:	Are any my family members disabled
Relationships:	Do all family members get along

Second, gather information about your assets to determine what assets will be left behind for administration and distribution when you die.:

What kinds of assets:	Real property; cash; investments; retirement accounts
Value:	Total value of assets determines estate tax issues
Ownership:	Solely owned; Joint owner; Joint tenant

Third, consider specific issues for your estate and family. Each estate plan is different because each individual, family and set of assets is different. Also, the ultimate goal of the estate plan is successfully transferring your assets to the correct destination and take care of your family:

- ✚ Guardianship for minor/disabled children
- ✚ Financial support for disabled family members
- ✚ Where do I want my assets to go when I die?
- ✚ Lifetime gifting
- ✚ Gifts to Churches; Charities; Non-Profits
- ✚ Estate tax issues
- ✚ Probate or non-probate?
- ✚ I don't care!!

Fourth, decide which estate planning tools meet more of your goals and create less disadvantages.

Everybody has an Estate Plan: Intestate Succession

The State of Wisconsin has a set of Intestate laws to direct your assets upon your death. Intestate means "without a will." The only way to avoid intestate succession is to create your own estate plan.

"Intestate" = without a will. If you die without a will, your estate will be distributed based on the intestate laws at the time of your death.

Your legal heirs (by intestate succession) are:

1. surviving spouse;
2. children equally;
3. grandchildren;
4. parents, both equally and either if surviving;
5. siblings
6. nieces/nephews

It then continues on to grandparents and down the line.

Note of interest: Very few estates ever go to the state. If an estate goes to the State of Wisconsin, it is directed to the capital of the school fund.

** If you want to change the intestate distribution in any way, you must create some kind of estate plan!

Probate

"Probate" is a legal procedure. It is used to account for and distribute an individual's assets after death.

The objectives of probate are:

1. Identify the natural heirs and the desired beneficiaries of the deceased.
2. Identify all assets of the deceased.
3. Identify all debts of the decedent, including taxes, fees, and claims.
4. Use the assets to pay the debts.
5. Distribute remaining assets to family or other beneficiaries.

Many people believe if they do not have a will, their estate will not have to go through probate. Others believe if they have a will, their estate will not have to go through probate.

The need for probate has NOTHING to do with the presence of a will. The need for probate depends on the assets left behind by the deceased individual. Probate only administers "probate assets" which are assets owned in the sole name of the deceased, with no joint owners, and no named beneficiaries.

Probate may be expensive. The cost is dependent upon the type of assets, the cooperation of the family and heirs, the efficiency of the personal representative, the skill and experience of the attorney, and the complexity of the disposition.

Probate is complex and time consuming. Most probate administration takes at least 12 months to complete. Wisconsin courts require probate administration to be completed within one (1) year of appointment of the personal representative. This time frame can be expanded upon the show of good cause.

Classic Estate Planning Tool Alert!!

Wills - Where There's a "Will", There's a Way!

The most well-known document used in estate planning is a Will. A "Will" is a voluntary document directing how the individual's share of assets will be distributed upon her death. A Will cannot take effect until after the death of the individual and must be accepted by the appropriate local court for administration.

A Will only impacts "Probate Assets." "Probate Assets" are those without a joint tenant or owner, a beneficiary designation, or a POD (payable on death) or TOD (transfer on death) designation.

What can a Will do?

- ✚ Distribute tangible personal property
- ✚ Distribute real estate and cash assets
- ✚ Make gifts to churches, charities, friends
- ✚ Nominate a guardian for your minor children
- ✚ Nominate a personal representative to take administer of your Estate
- ✚ Eliminate somebody from receiving assets from your estate

What can a Will NOT do?

- ✚ Cannot direct Non-Probate assets
- ✚ Cannot change the beneficiary designation on an asset
- ✚ Cannot guarantee nominated person will serve as guardian of minor children
- ✚ Cannot guarantee nominated person will administer of your estate
- ✚ Cannot control disposition of your deceased body or your funeral

Your Forgotten Estate Plan - Beneficiary Designations Avoid Probate

Just like the rest of the world, the ways in which we hold our wealth are changing. Rather than individually held stock certificates, we now own shares of mutual funds. Rather than a pension, we now own IRA's, 401(k)'s and other qualified funds. New financial assets have created opportunities for different methods of distribution.

Beneficiary designations are required on life insurance policies and retirement assets. Beneficiary designations, including transfer on death designations and payable on death designations, may also be available for bank accounts, investment accounts, and stock ownership. Real property located in Wisconsin can be transferred by recording a Designation of TOD Beneficiary with the county Register of Deeds (see below).

Payable on Death (POD) - Often used on bank accounts, including certificates of deposit. A POD designation requires liquidation of an account or asset and payment to POD beneficiary.

Transfer on Death (TOD) - Used on non-retirement investment accounts and real property in certain states. A TOD designation allows transfer of an account or asset directly to the TOD beneficiary without first liquidating the account. This allows the beneficiary to take the asset with the original interest rate and terms.

Life Insurance - Life insurance is a classic non-probate asset because it requires the owner to designate a beneficiary. Each policy has its own provisions directing the policy benefits if the named beneficiary is deceased. It is important to review and update life insurance beneficiaries every few years.

IRA's and Retirement Plans - Individual Retirement Accounts and all other retirement plans are held by a sole owner and cannot be held jointly. The owner is required to name a beneficiary to receive the asset upon the owner's death. The beneficiary of an IRA has the opportunity to continue to own the IRA for use in his or her own retirement.

IMPORTANT!!!! Under current federal retirement laws (ERISA) and state case law, the beneficiary designation on retirement assets ALWAYS CONTROLS over any other document. An important part of estate planning is to review each beneficiary designation to be sure they are correct and up to date.

Designation of TOD Beneficiary (also known as Transfer on Death Deed) - Since 2005, Wisconsin has allowed owners of real property to transfer ownership upon their death using a Transfer On Death deed (TOD Deed).

Advantages of using a TOD Deed:

- ✚ Does not transfer ownership of the real property until the original owner dies
- ✚ Owner retains 100% ownership and control during life
- ✚ Owner can sell the property without involvement of the TOD beneficiaries.

- ✚ Owner may revoke or change the TOD designation at any time before death.
- ✚ After owner die, process to vest title in beneficiaries is very simple
- ✚ Beneficiaries get a full basis step-up to the fair market value as of the date of death

Til' Death Do Us Part - Marital Property Agreements

Wisconsin is a "Marital Property State" (often called a "community property state"). "Marital Property" is a type of ownership. When a married couple, or either one of them, buys or creates property of any kind, the law now presumes it is owned by the couple as Marital Property. Each spouse automatically owns an undivided one-half interest in Marital Property.

Marital Property law went into effect on January 1, 1986. After that date, there are two additional requirements to create Marital Property: (1) The couple must reside in the State of Wisconsin; and (2) the property must be bought or created after that time.

All other property is "undetermined" and can be individual property, joint property, marital property, or a little of each.

The best way to clarify how assets are owned in a marriage is by signing a "Marital Property Agreement." A husband and wife, either before marriage or during marriage, can state in writing how property is held. All parties, including the US Government, are bound by classification of property in the Marital Property Agreement.

** Important to Note: If a married couple was married and lived in the State of Wisconsin prior to 1986 and they now own highly appreciated property which was bought before 1986, they should determine if a Marital Property Agreement can give them a tax advantage on the death of the first spouse.

** Also Important to Note: A Marital Property Agreement can be signed BEFORE a marriage to make sure the owning spouse continues to have full ownership and control of any assets. This may be called an "Antenuptial Agreement", but it is really a form of Marital Property Agreement.

Classic Estate Planning Tool Alert!!

Trusts

What is a "Trust"?

A Trust is a legal document creating an artificial entity. A trust separates the benefits of owning property from the responsibility of managing the property. It creates a way for one person to own and manage property for the benefit of another.

Parties to a Trust

- Grantor: The Grantor is the person who specifies the terms of the trust; signs the written agreement which creates the trust; and transfers property to the trust.
- Trustee: The Trustee is the person or organization who accepts ownership of the property and the responsibility of managing the property. The Trustee agrees to serve by signing the written trust agreement.
- Beneficiary: The Beneficiary is the person or organization who receives the benefits of the trust property. The Beneficiary may receive income earned by the trust property or even the trust property itself. The Beneficiary does not sign the written trust agreement.

"Primary Beneficiary" The initial recipient of trust benefits.

"Contingent Beneficiary" The next recipient of trust benefits. Commonly begins receiving benefits of a trust after the death of the Primary Beneficiary.

** The Parties to some Trusts may all be the same person. But the parties to an Irrevocable Trust to be used for MA purposes must be different people.

The "Basket"

It may be helpful to imagine a trust as a basket with a handle on top, much like an Easter basket. The terms of the trust are determined by the agreement between the Grantor and Trustee. The Grantor places the assets into the basket. The Trustee holds the handle of the basket and controls what happens to the assets in the basket. The Trustee also pays out the income or assets from the basket to the Beneficiary. The Beneficiary receives the benefit of the trust. If the trust is an Easter basket... the Beneficiary gets to eat the chocolate bunnies!

Types of Trusts

Revocable Trust: A trust which can be revoked or amended. A Revocable Trust becomes an Irrevocable Trust upon the death of the Grantors because they are no longer alive to revoke the trust or make amendments.

vs.

Irrevocable Trust: A trust which cannot be revoked or amended.

* * *

Living Trust: A trust which is created and funded while the Grantor is alive.

vs.

Testamentary Trust: A trust which is created or drafted during the life of the Grantor, but not funded until the death of the Grantor. A Testamentary Trust is always irrevocable by nature.

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Trusts Used for Beneficiaries with a Disability

Special Needs Trust - A trust for the benefit of an individual with a disability which is funded with assets owned by the disabled beneficiary. Often called a "First Party Trust" because it is funded with assets owned by beneficiary. Social Security rules require a Special Needs Trust be "established" by the parent, grandparent or guardian of the disabled beneficiary, or ordered to be established by the Court.

The purpose of a Special Needs Trust is often to preserve government benefits for the beneficiary and also improve the standard of living beyond the level provided by government benefits.

Upon the death of the primary beneficiary, assets remaining in a Special Needs Trust must first be used to "pay back" the state for all benefits provided. This is called a "Pay Back clause."

A Special Needs Trust must be irrevocable.

Supplemental Needs Trust - A trust for the benefit of an individual with a disability which is funded with assets owned by someone other than the disabled beneficiary. Often called a "Third Party Trust" because it is funded with assets owned by a third party.

The purpose of a Supplemental Needs Trust is often to "supplement" the beneficiary's standard of living or improve the standard of living beyond the level provided by government benefits.

Upon the death of the primary beneficiary, assets remaining in a Supplemental Needs Trust can be directed to other parties. No pay back clause is necessary.

A Supplemental Needs Trust can be revocable or irrevocable.

Pooled Trust - A trust created and operated by a non-profit entity to hold the assets of many individuals with disabilities. Each beneficiary has a "sub-account" which is controlled the "master trust" of the entity.

A pooled trust can provide professional management and administration for individuals who do not have a family member or relative who is willing or able to serve as trustee.

A pooled trust can manage smaller sub-accounts because all accounts are pooled for investment and management purposes.

The benefit of a pooled trust is each beneficiary receives professional investment of the assets in their sub-account and also professional administration and distribution of income and assets to ensure the benefits of the trust do not interfere with government benefits.

Because the pooled assets are large enough to provide income to pay fees, the fees paid by each individual sub-account holder are affordable.

Pooled trusts may only manage assets of a resident of the state where the pooled trust is sited.

Wisconsin's most widely used pooled trust is WisPACT, Inc. (Wisconsin Pooled and Community Trusts, Inc.) Find more information at : www.wispact.org.

Minnesota has several pooled trusts, including a trust created by The ARC of Minnesota (www.mnarc.nonprofitoffice.com) and also Guardian and Protective Services, Inc. (www.gapsinc.org).

Death and Taxes

Much of estate planning involves different tax implications. There are three (3) different types of taxes to consider during estate planning: income tax; capital gains tax; and gift/estate tax.

Income Tax - When a person dies, their individual income tax responsibility ends, and their estate becomes a new taxable entity. Estates must file an income tax return upon earning \$600 or more. Estates commonly pay taxes at a higher rate than an individual because the tax brackets for estates are higher.

Tax Basis - The amount invested in an investment asset, such as the purchase price of real property. The tax basis of an asset is the amount paid for the asset, plus any additional investment or improvement, less depreciation.

Capital Gains Tax - Capital gains tax is payable when an investment asset is sold for more than its tax basis. When the owner of an investment asset dies, his or her heirs receive a new tax basis equal to the fair market value of the asset as of the owner's date of death. If the asset is worth more on the date of death than the owner paid, the heirs receive a "stepped-up basis." Estate planning often includes provisions to ensure a stepped-up basis.

Gift Tax - The tax due on an asset transferred by an individual during his or her life. Gift tax is payable by the donor, which is the person making the gift.

Estate Tax - The tax due on all assets owned by an individual as of the date of death. The estate tax is payable by the estate prior to distributing assets to the heirs. Note: Inheritance tax is payable by the recipient upon inheriting an asset. Inheritance tax has generally been replaced by estate tax.

Annual Exclusion - The federal government allows each living person to make an unlimited number of gifts of a limited amount each calendar year. The 2023 annual exclusion amount is \$17,000.00. To qualify for the annual exclusion, a gift must be a completed gift of a present interest.

Unified Credit - The tax credit allowed by the federal government to be used against gift tax and estate tax. The 2023 unified credit is \$12.9 million. Note: the annual exclusion does not reduce the amount of the unified credit.

Estate Planning Documents for the Living

Powers of Attorney are invaluable documents for every adult. They help us retain some power and control over our personal business and our healthcare, in spite of our inability to take care of these things by ourselves.

Durable Power of Attorney for Finance and Property: A voluntary document signed by a competent individual giving another person the authority to handle the individual's personal business matters such as banking; filing tax returns; and managing real estate. A Durable Power of Attorney usually takes effect as soon as it is signed. "Durable" means that it remains in effect even if the individual becomes incompetent. The power and authority to handle personal business lasts until the death of the individual, unless revoked beforehand.

Durable Power of Attorney for Healthcare (aka "Advance Directive"): A voluntary document signed by a competent individual giving another person the authority to make health care decisions which may include admission to a nursing home and removal of feeding tubes. It is similar to a living will because it takes the individual's wishes into account. The document does not take effect until the individual is unable to make and/or communicate his or her own healthcare decisions. The power lasts until the individual recovers; until death; or until revocation. This is different than a "Living Will."

What is a Living Will? A voluntary document authorizing the withholding or withdrawing of tube feeding and/or life sustaining procedures if the individual is in a terminal condition or in a persistent vegetative state. Living Wills predate Powers of Attorney for Healthcare, and many attorneys and practitioners no longer encourage people to execute a living will. If you want to execute a living will in addition to a Power of Attorney for Healthcare, make sure all of the provisions are consistent.

Resource Note: The Wisconsin Department of Health Services has the statutory version of each power of attorney, plus a Living Will and an Authorization for Disposition available for free on its website. (<http://www.dhs.wisconsin.gov/forms/AdvDirectives/index.htm>) Another great Wisconsin form is available from Honoring Choices at <https://www.wismed.org/wisconsin/wismed/about-us/honoring-choices/wismed/about-us/honoring-choices.aspx>.

Final Thoughts

A Good Estate Plan Provides Peace of Mind!

If you have concerns or questions about your estate and what will happen to your legacy upon your death, consult an estate planning attorney. Be sure to write down a list of questions beforehand to make good use of your time and money. The peace of mind you receive will be worth the expense.

How Can I Help My Survivors?

The best way to help your survivors (and save money) is to PLAN & ORGANIZE!!!!

- Prepare a set of instructions about your assets
- Assemble all asset information in one place
- Discard or separate paperwork/information for assets you no longer own
- Talk to your family about your estate plan and your wishes
- Plan your funeral and pay for the arrangements

THE END – THANK YOU!