

Estate Planning

For Parents of Minor Children

SMITH RAYL
LAW OFFICE, LLC

Questions answered by an estate plan

- If you cannot make your own decisions and take care of yourself, who will do it for you?
- If your children are left with no parents, who will raise them?
- Who gets your property when you die?

Everyone has a estate plan

- The one you create for yourself
- The one created for you by the Indiana General Assembly

Goals of a Good Estate Plan

Goals of a good estate plan

- Designate someone you trust to take care of you and to make decisions if you cannot do it for yourself
- Designate someone you trust to raise your children if they are let without a parent
- Ensure that your property goes to the people you want it to go to
 - Blended families make decisions more difficult and more important

Goals of a good estate plan

- Minimize the burden imposed on your family
 - Avoid the need for an adult guardianship while you are alive
 - Tell your family what you want to happen if you are terminally ill and unable to make your own decisions
 - Transfer money and other property to your heirs outside of the probate process
 - ✓ Title transfers immediately upon your death
 - ✓ Title transfers without court involvement
- Preserve the value of your estate by minimizing taxes
 - For most people, estate taxes are now irrelevant
 - Start thinking about estate tax planning if your estate will approach \$5 million (including life insurance and qualified savings)
 - Don't overlook income tax on qualified savings (IRAs, 401(k)'s, etc.), deferred compensation
 - May require tradeoffs with some other goals

Understanding Estate Planning Tools

Dealing with your own incapacitation

Dealing with your own incapacitation

- General Durable Power of Attorney
 - Power of Attorney = An instrument empowering one person (the attorney-in-fact) to take action on behalf of another person (the principal)
 - A power of attorney never deprives the principal of the authority or power to take action personally, as long as the principal is legally competent to do so
 - Attorney-in-fact must act in the best interest of the principal
 - “General” power of attorney is one granting broad authority, rather than narrow, limited authority
 - “Durable” power of attorney survives the incapacity of the principal
 - Attorney-in-fact can be empowered immediately or upon some future event such as the principal’s incapacity (a “springing” power)
 - Can avoid the need for an adult guardianship if you become incapacitated

Dealing with your own incapacitation

- Health care power of attorney and appointment of health care representative
 - Health care power of attorney is an example of a limited POA
 - Powers include contracting for health care services (e.g., admission to a hospital) and dealing with insurance claims
 - A health care representative is a person with the authority to give consent to health care
 - A health care representative who is also an attorney-in-fact with power over health care decisions has the authority to consent to health care being discontinued or withheld
 - Health care powers can be included in a general POA, but usually done as a separate document, usually combined with the appointment of a health care representative

Dealing with your own incapacitation

- Living Will
 - Expresses your desire to have medical care withheld or withdrawn if you are in a persistent vegetative state
 - Includes instructions with respect to nutrition and hydration
 - Not the same thing as a “do not resuscitate” order
- Life Prolonging Procedures Declaration
 - Expresses your desire to have medical care continued if you are in a persistent vegetative state

Understanding Estate Planning Tools

Naming a guardian for your children

“Who gets the kids?”

- Death or incapacity of one parent
 - Ordinarily, both parents have equal rights and authority with respect to children, uninterrupted by the death or incapacity of the other parent
 - If there is an order granting sole custody to one parent and the custodial parent dies, the noncustodial parent (not a step-parent) usually receives custody unless the noncustodial parent’s parenting time privilege:
 - Has been suspended or
 - Is subject to supervision
- Death or incapacity of both parents (or of custodial parent with noncustodial parent’s parenting time suspended or restricted):
 - A court may appoint a guardian and custodian
 - A court may appoint a temporary guardian, pending appointment of a permanent guardian
 - Child Protective Services may take custody until there’s a court order establishing custodial rights and a guardianship

Using your will to nominate a guardian

- Nominating a guardian in your will
 - Nominate the person(s) you wish to have appointed as guardians of your children, preferably with an alternate if the first person(s) cannot or will not serve
 - An intensely personal decision, probably with conflicting considerations, but one you need to make
 - Does not automatically create a guardianship or give a right of custody -- has no legal effect until there's a court order appointing a guardian, either temporary or permanent
 - Does not guarantee the court will ultimately follow your wishes, but courts give deference to the nomination
 - Discuss the decision with the person(s) you nominate – and provide a copy of your executed will

Using a Declaration of Standby Guardian to provide an immediate guardian

- Declaration of Standby Guardian
 - A written designation of person(s) to serve as guardian to your children immediately upon your death, preferably with alternate(s)
 - Guardianship created immediately without court order
 - Does not automatically guarantee custody, but CPS is required to give preference to a standby guardian
 - Guardianship lasts only 90 days, unless a permanent guardianship proceeding is initiated, which leaves the standby guardianship in place until there's an order appointing a permanent guardian
- Other benefits
 - Guardianship takes effect upon parent's death or incapacity
 - Provide for temporary care by one person, long term care by another:
 - Nominate your sister in Idaho as permanent guardian
 - Designate a local close friend as standby guardian

Understanding Estate Planning Tools

Transferring your property through the probate process

Transferring your money and property through probate

- Probate is a court proceeding for changing the title to property of a decedent
- Streamlined probate process for estates with less than \$50,000, but still involves the court
- Assets that you own at the time of your death transfer in accordance with either
 - Your will, if you have one
 - The statutory rules of intestate succession, if you don't
- UNLESS title is transferred by another legal mechanism that removes the property from your estate

Testamentary trusts

- A trust is a form of property ownership in which a person (the trustee) holds title to property for the benefit of one or more other persons (the beneficiaries)
- A testamentary trust is a trust established by a will
- If you have minor children, and your property is being transferred to them through the probate process, your will should create one or more trusts to hold the property; to use it for their health, education, maintenance, and support in accordance with your instructions; and to disburse it to them when they reach a certain age.
- The trustee can be the person you nominate as guardian or another individual. An alternative is to name a bank or other institution as the trustee.
- Your will should specify at what age or under what circumstances the trust assets should be distributed to your children.

Disadvantages of probate

- Probate can be expensive
- Your assets will not be immediately available for your heirs to use – and may not be for weeks or months
- Probate increases the burden and stress on your family at a time when they are already burdened and stressed
- Probate is a public process – everything about your estate becomes a matter of public record

Understanding Estate Planning Tools

Transferring your property outside probate

Probate estate versus taxable estate

- Your probate estate and your taxable estate are different
- Property transferred outside probate can still be subject to estate tax
- Again, not a consideration for most people

Assets that have beneficiaries

- Examples:
 - Life insurance policies
 - 401(k) plans
 - IRA's: traditional, Roth, SEP
- Title transfers immediately upon death outside probate
- If no beneficiary is named, or if the beneficiary predeceases you, asset goes into probate estate
 - Name secondary beneficiaries
 - Beneficiary can be a living trust (more on that later)
 - Consider income tax consequences to beneficiaries of qualified savings plans

Jointly owned property -- sometimes

- Property held as joint tenants with right of survivorship (JTWROS)
 - Decedent's share of the property transfers immediately upon death to other joint tenant(s)
 - Surviving tenant(s) sign an affidavit of survivorship and record it in the county recorder's office – preferable soon after death but at least before the property is sold or conveyed
- Special form of JTWROS for married couples: Tenancy by the entirety (TE)
 - Property cannot be reached by creditors of either owner
 - But can be reached by joint creditor of spouses
 - Applies to real property in Indiana (and some other states) acquired by a married couple
 - Does not apply to property acquired before marriage
 - Convert to TE after marriage with a quitclaim deed
- Tenants in Common – Decedent's share is part of probate estate

Payable on death and transfer on death property

- Bank accounts designated as Payable on Death or POD accounts
- Other forms of real or personal property designated as Transfer on Death or TOD property
 - Can be a great way to deal with businesses organized as LLCs or corporations
- Transfers immediately upon death to the named beneficiary
- If all beneficiaries predecease the owner, account or property becomes part of probate estate
 - Secondary beneficiaries permitted
 - Trusts permitted as beneficiaries

Avoiding probate with Living Trusts

- A “living trust” is one that you create to hold your property while you are alive and then to provide for your children (or others) after you die.
- Most people serve as their own trustees while they are alive with the appointment of someone else to take over after they die.
- A living trust avoids probate simply because you don’t own the property when you die – the trust owns it.
- A document called a declaration of trust or a trust agreement controls everything about the trust.
- By placing all your property in the trust – or at least all of your property that is not transferred upon your death outside of probate – you can avoid probate altogether.

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