INSIGHT ON ESTATE PLANNING

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A living trust and a pour-over will

Two estate planning documents working in tandem

At the very least, your estate plan should include a legally valid will governing the disposition of assets upon your death. But comprehensive estate planning often goes much further. For instance, you may provide for transfers of assets to a living trust (also known as a revocable trust) to supplement your will. For many, the best part of this strategy is that the trust assets don't have to pass through probate.

You can take an additional step by creating a pour-over will. In a nutshell, a pour-over will specifies how assets you didn't transfer to a living trust during your life will be transferred at death.

Complementary documents

As its name implies, any property that isn't specifically mentioned in your will is "poured over" into your living trust after your death. The trustee then distributes the assets to the beneficiaries under the trust's terms.

The main purpose of a pour-over will is to maximize the benefits of a living trust. But many estate planning experts also tout the merits of using a single legal document — a living trust — as the sole guiding force for an estate plan.

To this end, a pour-over will serves as a conduit for any assets that aren't already in the name of the trust or otherwise distributed. The assets will be distributed to the trust.

This setup offers the following benefits:

Convenience. It's easier to have one document controlling the assets than it is to "mix and match." With a pour-over will, it's clear that everything goes to the trust, and then it's the trust document that's used to determine who gets what. That, ideally, makes it easier for the executor and trustee charged with wrapping up the estate.

Completeness. Generally, everyone maintains some assets outside of a living trust. A pour-over will addresses any items that have fallen through the cracks or that have been purposely omitted. It closes the door on your estate.

Privacy. In addition to the convenience of avoiding probate for the assets that are titled in the name of the trust, this type of setup helps to keep a measure of privacy that isn't available when assets are passed directly through a regular will.

There is, however, one disadvantage to consider. As with any will, your executor must handle specific bequests included in the will, as well as the assets being transferred to the trust through the pour-over provision before the trustee takes over. (Exceptions may apply in certain states for pour-over wills.) While this may take months to complete, property transferred directly to a living trust can be distributed within weeks of the testator's death.

Therefore, this technique doesn't avoid probate completely, but it's generally less costly and time consuming than usual. And, if you're thorough with the transfer of assets made directly to the living trust, the residue should be relatively small, and perhaps there won't be anything at all that will pass via the will.

Note that if you hold back only items of minor value for the pour-over part of the will, your family may benefit from an expedited process. In some states, your estate may qualify for "small estate" probate, often known as "summary probate." These procedures are easier, faster and less expensive than regular probate.

The role of trustee

After the executor transfers the assets to the trust, it's up to the trustee to do the heavy lifting. (The executor and trustee may be the same person and, in fact, they often are.) The responsibilities of a trustee are similar to those of an executor with one critical difference: they extend only to the trust assets. The trustee then adheres to the terms of the trust.

While one of the primary objectives may be that the trustee transfers the assets into the hands of beneficiaries as soon as possible, the trustee's role may be more complicated in certain circumstances. For instance, the trust document may include terms for handling assets of young children or those with special needs. Along these lines, a trustee may be directed to leave assets in the trust until a child reaches a specified age. Or the trustee may be authorized to make distributions at various intervals.

Account for all your assets

The benefits of using a living trust are many. Pairing it with a pour-over will can help wrangle any loose assets that you purposely (or inadvertently) didn't transfer to the living trust. Contact your estate planning advisor for additional details. •

Revocable trust vs. an irrevocable trust

Should you use a revocable or irrevocable trust? It depends on your needs.

A revocable trust provides more flexibility because you're able to make revisions such as changing beneficiaries. You effectively maintain control over the trust assets. With an irrevocable trust, you give up all rights to the assets after they're transferred to the trust.

The main advantage of an irrevocable trust is that the assets are removed from your taxable estate. But this may not be important to you if the estate is completely shielded from tax by the federal gift and estate tax exemption. The exemption for 2022 is $12.06 million. As a result, most people opt for a revocable trust.

Who should you name as your children's guardian?

If you're like most parents of young children, you've probably put a lot of thought into raising your kids, ranging from their schools to their activities to their religious upbringing. But have you considered what would happen to them if you — and your spouse if you're married — should suddenly die? Will the children be forced to live with relatives they don't know or become entangled in a custody battle? Fortunately, you can avoid a worst-case scenario with some advance estate planning.

With a will, there's a way

The biggest step you can take to ensure your intentions are met is to specifically name the guardian in your will. If you have a will in place but haven't provided for a guardian for your minor children, amend it as soon as possible. This can be done easily enough by adding a clause or, if warranted, through drafting a new will.

Be sure to list all the names and birthdates of your children. In addition, you might include a provision for any future children in the event you pass away before your will is amended again. Rely on your attorney for the required language.

What happens if you don't name a guardian for minor children in your will? The choice will be left to the courts to decide based on the facts. In some cases, the court could choose a family member over a friend or vice versa. This could lead to subsequent legal disputes with the kids caught in limbo.

Factors that can influence your choice

There's no definitive "right" or "wrong" choice for a guardian. Every situation is different. But there are several factors that may sway your decision:

Location. It's often preferable to name a guardian who lives close to your current location as opposed to someone residing thousands of miles away. The transition will be easier for the kids if they aren't uprooted.

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Age. A guardian's age is often overlooked but can be a crucial factor. Your parents may have provided you with a great upbringing, but they may now be too old to raise young children. Plus, your parents may experience health issues that could adversely affect the family dynamic.

Environment. Do the guardian's views on child raising align with your own? If not, your intentions may be defeated. Consider such aspects as education, religion, politics and other lifestyle choices.

Living circumstances. No one can fully project into the future, but at least you can take current circumstances into account. For instance, if you're inclined to select a sibling as guardian, does he or she already have kids? Is he or she single, married or in a relationship? You don't want your child to be thrust into chaos when a safer choice may be available.

Choose the best person for the job and designate an alternate if that person can't fulfill the duties. Frequently, parents will name a married couple who are relatives or close friends. If you take this approach, ensure that both spouses have legal authority to act on the child's behalf.

Other special considerations

Depending on your situation, other issues may come into play. For example, if you're divorced, your will may control the designation if your spouse predeceases you.

It may be helpful to prepare a letter of explanation for the benefit of any judge presiding over a guardianship matter. The letter can provide valuable insights into your choice of guardian.

Coming to a final decision

Be sure to take time to review your choice of guardian in coordination with other aspects of your estate plan. This decision shouldn't be made in a vacuum. Contact your estate planning advisor with any questions. •

A spouse's inheritance rights vary state by state

If you're preparing to get remarried, your estate plan likely isn't top of mind. However, depending on the state you live in, your spouse has property rights that apply regardless of the terms of your estate plan. These rights are the same whether it's your first marriage or subsequent. Let's take a closer look at spousal rights and some strategies you may be able to use to limit them.

Understanding your state's laws

Spousal property rights are creatures of state law, so it's critical to familiarize yourself with the laws in your state to achieve your planning objectives. Most states provide a surviving spouse with an "elective share" of the deceased spouse's estate, regardless of the terms of his or her will or certain other documents. The remaining states (except Georgia) are community property states.

Generally, a surviving spouse's elective share ranges from 30% to 50%, though some states start lower and provide for progressively larger shares as the duration of the marriage increases. The most significant variable, with respect to planning, is the definition of assets subject to the surviving spouse's elective share rights.

In some states, the elective share applies only to the "probate estate" — generally, assets held in the deceased spouse's name alone that don't have a beneficiary designation. In other states, it applies to the "augmented estate," which is the probate estate plus certain nonprobate assets, such as revocable trusts, life insurance policies and retirement or financial accounts that pass according to a beneficiary designation or transfer-on-death designation.

By developing an understanding of how elective share laws apply in your state, you can identify potential strategies for bypassing them.

Applying limits

Elective shares are designed to protect surviving spouses from being disinherited. But there may be good reasons for limiting the amount of property that goes to your spouse when you die. For example, your spouse may possess substantial wealth in his or her own name. Strategies for minimizing the impact of your spouse's elective share on your estate plan include:

Making lifetime gifts. By transferring property to your children or other loved ones during life (either outright or through an irrevocable trust), you remove those assets from your probate estate and place them beyond the reach of your surviving spouse's elective share. If your state uses an augmented estate to determine a spouse's elective share, lifetime gifts will be protected so long as they're made before the lookback period or, if permitted, your spouse waives the lookback period.

Transferring assets to a revocable trust. In most (but not all) probate-only states, transferring assets to a revocable trust is sufficient to shield them from your spouse's elective share. In augmented estate jurisdictions, the elective share generally applies to revocable trusts.

Purchasing life insurance. Life insurance can be a great way to create wealth and liquidity for your children or other family members, and in probate-only states it's generally shielded from your spouse's elective share. Augmented estates usually include life insurance, but in some states, it may be possible to exclude it by holding it in an irrevocable life insurance trust.

Retitling assets. In probate-only states, you may be able to protect assets by holding them jointly with a child or other family member with right of survivorship.

Having your spouse sign a waiver. One thing most elective share states agree on is that your spouse can waive his or her elective share in writing, either through a standalone waiver or as part of a broader prenuptial or postnuptial agreement.

Check beneficiary designations on retirement plans and other accounts and be sure that they name your children or other intended beneficiaries. Keep in mind that changing certain beneficiary designations requires your spouse's consent.

Elective share laws are complex

If you're remarrying, consult with your estate planning advisor to evaluate your state's elective share laws. He or she can explain how they may affect your estate plan and what strategies you can use to protect your assets. •

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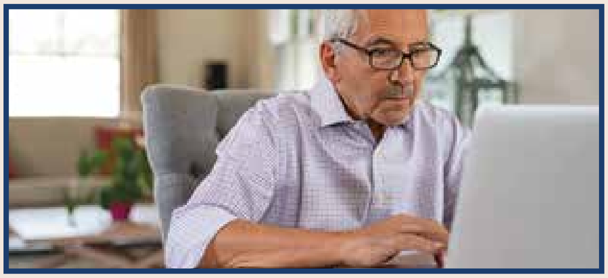
Your estate is tied too closely to specific gifts

Your will is designed to provide for the disposition of your possessions and tie up any loose ends in your estate. To accomplish these goals, you may include specific bequests to named beneficiaries. For example, you might want your daughter to inherit jewelry or artwork that's been in the family for generations.



But be wary of making bequests that could eventually result in unintended outcomes. A frequent problem under this scenario is that the deceased no longer owns the asset on the date of death. For example, let's say that Jim bequeaths one of his three children 100 shares of a stock that was worth $100,000 decades ago when his original will was drafted. But, between then and the time of Jim's death, he had sold the stock. As a result, that bequest fails, and that child could be left with less than Jim had intended.

In a similar scenario, let's say Debbie bequeaths real estate to her son and life insurance proceeds to her daughter. But from the time Debbie includes the bequests in her will to the time of her death, she sells the home and invests the money, while eventually allowing the life insurance policy to lapse.

In this situation, one potential outcome is for her children to split the investment account, which may be exactly as Debbie intended. Potentially, though, Debbie may have intended that her son would receive the investment account — after all, she reasoned, it was created with the proceeds from the sale of the house. Debbie may have intentionally let the life insurance policy lapse because other assets had already been transferred to her daughter. Rather than create the uncertainty, Debbie could have left clear instructions so that her intentions were known.

As you can see, doling out specific bequests to beneficiaries can lead to unintended results. Consider that you may not still own the same assets at your death as you do now. To avoid this situation, review your will and revise as needed on a regular basis.

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