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A Quick Guide to

ESTATE PLANNING

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Considering one's legacy can be discomforting. Estate planning, after all, is primarily about what will happen to your physical and financial assets when you are no longer around. But if your last act is to ensure the security and well- being of those you care about, then you're going to need an estate plan. Seen in this light, estate planning can actually be empowering.

Estate planning includes the creation of wills, trusts, and guardianship and other legal vehicles and documents. This short guide covers the basics of estate planning. As every person's goals are different, this is not meant to be exhaustive. It will, however, help you to start thinking about what you need to do.

Whether you're married, single, partnered, with or without children, you need an estate plan and this guide will explain why you do.

Having an estate plan means that your loved ones are exactly the ones who will inherit your hard-earned wealth. It can also ensure that the taxation of your estate can be minimized. Done strategically, your estate plan could provide for your heirs to inherit the maximum that the law permits. Also, as you age, you may become less able to care for yourself, or perhaps become entirely unable to do so. An estate plan that includes health directives and powers of attorney can help ensure that your wishes regarding your own well-being are respected. You retain independence and free your loved ones from having to make deeply decisions for you. And if you have children with special needs, your estate planning should include setting up a special needs trust if appropriate.

As the father of two young people, my appeal to you is to do the right thing for your loved ones. If you commit to one thing this year, let it be your estate plan.

Sincerely,
Robert

WHAT IS ESTATE PLANNING?

Estate planning is the process by which you create legal documents that set out your wishes as regards your financial assets, your minor children, and your own well-being when you are no longer around (or no longer able when still living) to implement them. A typical estate plan should include:

- a **will** that is the primary document regulating your wishes as regards inheritance and permanent **legal guardianship** of your minor children (if you have any)
- a **trust** that relates to protecting assets for the benefit of yourself and/or specific persons
- a **healthcare directive and proxy** that specifies your intent as regards decisions on your physical well-being and end-of-life arrangements respectively
- a **power of attorney** that enables a trusted Agent to make financial decisions for you in the event that you are incapacitated and can't do so for yourself

You don't need to have all of the above – it all depends on your assets and your specific situation and wishes. But even single people should have a will and advance directives because all of us want to make sure the fruits of our life's labor go to the people and organizations we care about. And also, that we always retain our independence as regards our own well-being.

INTESTACY & ITS NEGATIVE CONSEQUENCES

When you die without a will, you die "intestate". Which means that your family and heirs have to endure a prolonged probate process. Probate is the process whereby the legal courts distribute all estates – with or without a will. When the situation of intestacy arises, it almost

always means a delay in the distribution of the estate because the court – in the absence of a will – has to become your estate planner. Judges need more time to consider the facts and then apply the law**.**

In short, when you lack a will someone else (i.e. the state through the courts) decides who gets what and how much. The statutes rarely accomplish results that truly match your own wishes. In New York, your spouse receives $50,000 and one-half of the remainder of your estate. Your children receive the other half, even as minors. But even as this is clear under the law, your family needs the courts to rule that it is so if you pass on without a will.

The other key thing to consider is this: if your family is entirely reliant on your assets for income, the absence of a will can be a traumatic experience for them if **they do not have have immediately accessible and sufficient funds to live on**. In New York, it can take several months to probate a will, and certainly more time is needed to distribute an estate that does not have a will.

In intestacy, the lack of a will can be complicated by claims to some or all of your assets. While this may be unlikely in most cases, it can prolong the process and **added litigation** (if there are competing claimants) can further muddy the waters.

When the court decides on distribution, it will appoint someone to be the **"administrator"** (aka "Personal Representative") of your estate. It can be someone you know (such as a relative or friend) who could agree to take up the responsibilities. In the absence of this, the court will appoint someone (likely a professional like a lawyer). Administrators are also entitled to a free, which comes out of the estate assets. (note: where you do have a will, your administrator is called an "Executor").

Having a will is likely to ensure that your assets get to the people you love quickly and without incident or stress. Probating a will is generally an inexpensive and smooth process, provided you've got it properly drafted and executed.

GUARDIANSHIP OF MINOR CHILDREN

This is perhaps the most sensitive topic for most of my clients: the issue of who will take care of their kids should they pass on prematurely i.e. before the kids are of legal age. For some people, it's an easy choice: their own parents and/or siblings will be guardians for their kids, or even very close friends or other relatives.

But the truth is few of us have actually thought deeply about this issue. If you (as a single-parent) or you and your spouse were to die before your kids were grown, who would raise them with the best care, love and wisdom? And even when you've settled on one or a few people, you have to ask them whether they would take on this responsibility. It may not always be the answer you think it already is. A conversation with your preferred guardians should start as soon as you have kids. And if you are a single parent, arranging for proper legal guardianship is all the more urgent.

In the absence of clear stipulations that are legally binding, should you and your spouse be unable to care for your children, their care and custody typically falls to the state (e.g. Social/Child Services). These state departments or agencies could allow for temporary custody of your children to be held by your closest relatives, but that is not a given. What is necessary is this: all parties (including your family members) must petition to the courts for full custody of your children until they are of age. Even ex-spouses who did not have joint custody may be able to petition. In short, you don't get to decide who raises your kids should you no longer be around if you haven't set up proper legal guardianship documentation.

The issue of guardianship can be addressed through the use of the following:

- A Guardianship Clause in a Will
- A Standby Guardianship
- A Designation of Person in Parental Relation

In a **Guardianship Clause of a Will**, a parent names a guardian and an alternative to raise his or her child or children in case of the parent's death. Naming a guardian is a major step in assuring that a child is raised by a close and trusted friend or family member whom the parent believes will best raise your child or children Naming a guardian also has the effect of limiting conflict over that very question because guardianship clauses are given great weight by courts in guardianship proceedings.

Parents who aren't ready to appoint a permanent Legal Guardian can create temporary safeguards with a **Standby Guardianship** document. This type of guardianship document is useful if a parent will be away on travel and becomes stranded because of war or natural disaster, or if the parent becomes incapacitated. The Standby Guardianship gives the named guardian the right to act as a child's "parent" in the absence or incapacity of the legal parent or guardian (for example, taking the child to school and home, or to doctor's appointments, or living with the child). It does not take away the rights of a parent, rather it provides the standby guardian the same rights as the parent as regards caring for the child until the parent is ready to resume full duties. This temporary guardianship generally lasts for sixty days before permission of a court is required to continue the guardianship (for example, at the death of the parent).

Finally, if a parent will be out of the country or away on an extended trip, he or she might utilize a **Designation of Person in Parental Relation** as a method of ensuring that a competent adult has the authority to make decisions related to a child's school or health while the parent is away. The use of HIPPA authorization in conjunction with the Designation may be considered for most effective use.

WILLS

A will is what we lawyers call a "testamentary" document. "Testamentary" because it is a declaration of and testimonial to your free-willed wishes that governs the document. A will is

the most common type of estate planning document. A properly drafted will can accomplish the following for you:

- The people who receive your assets are the ones you intend as recipients
- Your Executor or Personal Representative is a person you trust for his/her honesty AND expertise to carry out the disposition/transfer/preservation of your estate per your specific intentions
- Your children have a Legal Guardian of your choice

Of course, it sounds very simple and for most people, will-making is indeed a straightforward process. Sometimes, the simplest and shortest paragraphs of legalese suffice. The Internet has many templates that give an idea what your will could look like. But remember that not everything you intend can **be operational in law** so it's always good to have a lawyer look over the final version. Remember too that there is a process of **witnessing** (attestation) that makes the will valid. Make sure you do that correctly too as requirements may vary from state to state (note: estate law is entirely within the purview of state law; there is no "federal" estate law even as there are federal taxes to be paid on inheritance assets).

One important thing to note as a spouse: marriage operates to some extent outside the law of wills. If you own real estate or any other property with your spouse in a joint tenancy, that operates by law to confer full ownership of assets to your surviving spouse. You cannot terminate this **"law of survivorship"** by providing for someone else to inherit your share of the joint tenancy via your will. As most couples own their family home jointly, this is one area that must be clearly understood by married people who may agree to leave some of their real estate to children from former marriages, for example. Talk to your spouse about this. Even if you are not married to your partner, you can set up a Joint Tenancy as well.

TRUSTS – ILITs & SPECIAL NEEDS TRUST

Trusts are highly complex legal instruments and there are quite a few types of trusts. For most families, trusts are used primarily to hold assets outside the probate process (i.e. assets that are not distributed via your will and are therefore not part of the estate taxes your heirs have to pay). Other trusts are set up to ensure that minor children have a trustee to manage the financial assets you leave them so that they will have enough for a quality standard-of-living and a good education.

There are two types of trusts which are often considered by families:

- ILIT (Irrevocable Life Insurance Trust)
- Special Needs Trust

The difference between "irrevocable" and "revocable" is that in the latter case, you can change your instructions that pertain to the trust. You can't make any changes to an irrevocable trust – it's "set in stone". Irrevocable trusts are usually used for life insurance – an ILIT (**Irrevocable Life Insurance Trust**) ensures that your family not only receives the full monetary benefit of your life insurance, but they also pay no *estate* taxes on such benefits. Without an ILIT, they will get less money from your life policies as they will have to pay taxes on the amount received from your insurance carriers. Which is why some families use ILITs to minimize estate taxes, ensuring that their loved ones net out with more inheritable money.

When you set up an ILT, you relinquish ownership of your insurance policy to the trust. You can't change the beneficiaries under the trust (hence the word "irrevocable). And you can't be trustee of your own ILIT. The trust acts like a third-party entity, and the person who manages it is the trustee. This is important, especially where you have minor children who cannot manage money themselves, or adult children who aren't capable of managing money properly. When the benefits of the life insurance are paid out, they go into the ILIT, whereby the trustee then decides how much and how the money is used for your children or other beneficiaries. Again, this afford another layer of protection for your loved ones.

One type of trust that is all-important for parents with special needs children is the **Special Needs Trust**. The tricky thing about this area of trust law is that you may land up depriving your child of government benefits if you set up such a trust without in-depth planning. So if you are going to do so, work with an attorney who is specifically experienced in Special Needs Trusts.

All trusts require grantors (you), beneficiaries (your loved ones) and a trustee (a person legally empowered to administer the trust). Your choice of trustee should be based on someone who has the expertise to carry out the workings of the trust, and the integrity to meet his/her **fiduciary responsibilities**. Most people choose their trusted legal or tax advisors to be trustees. It's not an easy job for the lay person. One solution is to appoint co-trustees e.g. one family member and one professional trustee.

There is also something called the **Living Trust.** This is essentially an alternative to a Will that achieves the same effect, but does not need to be probated. Living trusts are revocable, and are therefore sometimes referred to as revocable living trusts. Essentially, you transfer your assets to the trust while you are alive, and upon your passing, the trust distributes your assets to your designated beneficiaries. To ensure that all your assets are given to your intended beneficiaries, you have to diligently transfer them to the trust; any asset not covered by the trust will fall to distribution under intestate rules of your state of residence. This means that it is possible that the people who inherit such assets not under the trust may not be the ones who you intended to give those particular assets to. One way around this is to use a simple will as a "catch-all" legal device by which any of your assets not moved over to the trust while you're alive are distributed to your named beneficiaries under this will upon your demise. Note: living trusts do not cater for guardianship of children.

HEALTHCARE DIRECTIVES & LIVING WILLS

Having a will and/or a trust isn't a complete estate plan. You should also plan for **incapacity**. I always include this topic in my discussions for clients. It's just as much about doing what's right for your well- being as it is about doing what's good for your loved ones. Imagine being in the position of having to decide for your spouse whether to terminate life-saving medical

efforts. For your children, it's just as hard if you are a single or sole surviving parent and they have to make that decision for you.

You can free yourself and your loved ones from deep anxiety and stress by setting up legal documents that address the situation where you can no longer make decisions pertaining to your physical and financial well- being. Even if your spouse or family member knows you very well, it's always good to talk about your wishes as an individual before you start working on the legalities.

To plan for incapacity, you should consider the following:

- A Power of Attorney
- A Health Care Proxy
- Other Health Care Directives: e.g. Living Will

A **Power of Attorney** can have very deep and wide influence on your financial life: the person who has POA will have authority to make decisions on business transactions, including banking, real estate and investments. Would your spouse be best placed to have POA in the event of your incapacity? Remember that POA is less about your physical well-being than your financial security so having the right person hold it is important.

There's also the **Durable** Power of Attorney. This one is even more powerful: it is for the chosen person to make all decisions for you when you are in need of guardianship due to **incapacity** (i.e. you are mentally incapable of making decisions for yourself). For this, make doubly sure that the chances of abuse of power are realistically absent and that the person who has your durable POA has deep knowledge and understanding of your values, and your wishes.

A **Health Care Proxy** is really a Durable POA for just Health Care decisions. The New York state government has made this legal document available online (see **www.health.ny.gov**).

Make sure you get it witnessed, but the real question is who you want to make the decisions for you.

It's important to note that a **Living Will** is not the same as a Health Care Proxy. The former provides specific instructions about health care decisions. You may put such instructions on your New York Health Care Proxy form – it will help your "proxy" to make decisions for you ("proxy" refers to both the person, and to the legal document). The Health Care Proxy allows you to choose someone you trust to make health care decisions on your behalf. Unlike a Living Will, a Health Care Proxy does not require that you know in advance all the decisions that may arise. Instead, your health care agent can interpret your wishes as medical circumstances change and can make decisions you could not have known would have to be made.

What are these decisions? The most common example is if you wish to have artificial life support terminated in the event that you are unconscious and there's no reasonable hope of your recovery, your agent can direct your doctors to discontinue any treatments that unnecessarily prolong your life. I would recommend that your spouse or most trusted relative or friend be your agent in your health care proxy. They may already know your wishes, but having it in writing makes a painful situation a little easier to bear for all involved.

GETTING STARTED – BENFICIARY DESIGNATIONS

In the above sections, I talked a bit about probate – the distribution of assets when you have a will and when you die without one (i.e. intestate). There's also something called **non-probate assets** i.e. assets that fall outside the legal requirements of needing a will or other estate planning documents to ensure proper inheritance. For most families, the typical non-probate assets include:

- Proceeds (aka "death benefit") of a **life insurance** policy (or policies) where the beneficiaries are direclty your spouse and/or children

- Balances (funds) in your **retirement** accounts and other investments – such as IRA (Individual Retirement Account) and 401(k), tax-deferred annuities and brokerage accounts

If you make clear beneficiary designations for such assets, they pass to your beneficiaries **without the need for probate, which can sometimes take months to complete**. So if you have life insurance, your spouse and kids need only provide your insurance carrier with your policy details and the insurance benefit will be paid out to them directly. This kind of cash flow can prove to be a crucial buffer for your family as they will require liquidity to meet mortgage payments to remain in your family home, school fees, living expenses, healthcare insurance etc..

Note: your heirs will have to pay estate taxes on inheritance, including the above. Talk to your tax planner and estate planning attorney about estate tax minimization (e.g. using an ILIT as detailed in previous pages in this Guide).

Once you get your non-probate assets attended to, then the more detailed thinking must follow: **make a list of all your probate-able assets (inventory), and who you want to leave them to and why (intentions).** I have one client who is a single mother but also the sole caregiver for an aged friend. That aged friend was provided for too. And if you have a business, that is an asset as well. In fact, as a business owner, that's an additional aspect of your estate planning (talk to your business partners about succession planning and exit strategies with the guidance of a law firm).

WORKING WITH A LAWYER

I like to joke with people I meet that we sometimes spend dozens of hours planning for a family vacation, but hardly or no time at all on estate planning that protects our loved ones. The irony is that I am also deeply serious: if anything were to happen to you during a family vacation (or to your spouse as well), it could be a real crisis for your family. One that could negatively impact the course of their lives.

It's natural to be uncomfortable talking about death and the dwindling of one's life. Work with attorneys who can take you to that comfort level where you start feeling that the estate planning process is empowering and not something to be fearful or squeamish about. It's a serious matter, but we don't have to lose our good cheer even as we are hard-headed about it.

That said, you should ask these questions when deciding whether to work with a law firm:

- Is estate planning their main area of practice, and if so, for how many years? Five years is a good benchmark.
- Can he/she provide a proposal that lists pricing, work to be delivered and timeline for completion?

- What do client testimonials say about them? Are they willing for you to talk to their clients about the latter's experience with you?

- Are they flexible i.e. they won't "nickel and dime" you? You should respect and pay professionals for their time and good work, but avoid those who are not willing to be flexible.

I have no problems with people who prefer the *Do-It-Yourself* approach. The Internet has many good websites offering standard forms and basic explanations. So the question is this: is your own situation just a "standard" one? If all you have is non-probate assets, then you may not even need a will. But if you have assets that need to go through the probate process, and you have minor children, things could get tricky. And there's also the issue of planning for incapacity as you enter your later years.

You could, of course, do your own state planning and then **get an attorney to review** the documents, but to get it right could mean spending as much as if you had used the attorney in the first place. My advice is this: **if your situation is in any way uncommon, you'll need the drafting expertise of an experienced attorney.**

In law, "the devil is in the details". Lawyers are trained to not miss the woods for the trees, and vice versa. For lay persons, that which is often seemingly harmless and ordinary can throw

the entire situation in disarray when overlooked or done wrongly. Plus, developments take place in the courts all the time and even in legislation, so you should make sure to stay on top of that as well if you prefer to work independently.

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