January 9, 2019 **"There are levels to Estate Planning. Find a specialist"**

Often when someone decides it is time to "get their affairs in order", they should seek out an attorney. Using legal software to "do it yourself" often leads to more legal problems later. Sometimes they do not know whether they need any attorney or one who focuses on wills. My personal recommendation is to always seek out an attorney that makes estate planning (broader than just wills) a large dedicated portion of his or her own practice. While some attorneys that have more general practices can produce documents that would technically be accurate, often if an attorney does not practice in this area, there will be many subtleties or even major technical points that are missed or not fully addressed.

In addition to non-specialist attorneys, some people look to non-attorneys for their estate planning advice. Attorneys operate in the same estate planning area as other professionals (such as CPAs, Financial Advisors and Insurance agents) and work as a planning team in the "best case" scenarios. However knowledgeable the non-attorney professional is, there is still a need for an estate planning attorney, because non-attorneys are not allowed to draft the documents to execute the plan. If you are provided with documents by a non-attorney, you should not sign them. Estate planning documents must be specialized to work properly. The precise language needed is solely the domain of the attorney.

As a result, often the process with an estate planning attorney will involve a questionnaire asking about family members. In addition, there will be question about the full scope of assets and how those assets are owned. A large part of the inquiry process for the estate planning attorney is focused on discovering three things: 1) what does the person own; 2) how does the person own it; and 3) what does the person want to happen to it?

<u>What does the person own</u>?

Often discovering this information is a process that is more difficult than it would initially appear to be. Sometimes, people give answers based upon their own practical perceptions rather than the legal reality. For example, someone may say "my house", because they are paying the mortgage every month. However, the property is titled in their parent's name. Or, if they are beneficiaries of a trust, the property may be under the true ownership of the trust itself with a trustee that pays the bills.

There may also be issues in a marriage, for example, where one spouse handles the finances and the other one does not. That spouse may not truly have an idea of the "big picture" of what is owned.

Sometimes people are not sure exactly what they own resulting from their age, whether just faulty memory or actual impairment from a condition like Alzheimer's. In addition, they may have appointed an agent under a durable power of attorney, and that agent may have bought or sold property, retitled assets, created trusts, etc.

There are two general classifications of property: real property and personal property. Real Property is real estate (i.e., land, houses, buildings, trees, etc.). "Personal Property" is everything else that is not real property.

Further there are two types of personal property: tangible and intangible. Tangible personal property is what you can interact with, see and touch. It could be your automobiles, boats, items around your home like furniture, expensive rugs, artwork, etc. Intangible personal property is more associated with ownership-oriented rights like your bank accounts, investment accounts, IRA, 401(k), 403(b), pensions, life insurance policies, patents, copyrights, shares in corporations, membership interests in LLCs and partnership interests in partnerships, etc. Intangible personal property could also be interests in trusts or powers of appointment (whether general or special). Those concepts would have to be explained more thoroughly in later editions but believe me they are important!

In addition, adding to the level of complexity, is the convenience of technology allowing for the ownership of digital assets. Online options for tracking bank accounts, investment accounts, retirement plans (IRAs, 401(k)s, 403(b)s), life insurance policies, pensions etc. often also provide for the opportunity for paperless statements. Someone forgetting about an account or two is a real possibility.

Even if they remember, there is a great concern around access to them. Even with a durable power of attorney, if an agent wants to take money out of a bank account, he or she at least must go to a bank branch and speak to a bank branch representative. However, now in 2019, whether someone has a durable power of attorney or not, if they get access to digital assets, they can move money out of bank accounts electronically, "update" beneficiaries of investment plans, life insurance policies and retirements plans without any oversight.

How does the person own it?

Even if someone is sure about all that they own, the next step for the attorney is discovering how they own it. How someone owns something will affect whether the disposition of it can be

controlled by a will. Often property will pass automatically without consideration to how they desire.

When it comes to real property that is owned by more than one person, the deed to the property must be consulted. A deed is a written document that describes the individuals and/or entities (i.e. LLCs, Trustees of Trusts, etc.), the amount of the money paid for the property (if any) and the physical location and boundaries of the property. This deed is recorded (i.e. stored) in the court of the county of the state wherever that property is located. This allows for the chain of ownership to be verified.

If there is more than one owner (i.e. two spouses) that are special forms of ownership to provide for rules of how the property passes in case of death of one of the owners. One of them is joint tenancy with right of survivorship ("JTROS"). That means that whenever the first person passes away the property will automatically be titled in the remaining person or persons by operation of law. No other steps need to be taken after the first death.

If a married couple owns a house as JTROS and the husband (or spouse in a same sex marriage) dies, then the wife (or other spouse in a same sex marriage) owns 100% of the property by operation of law. No probate would be necessary at the death of the husband for that particular property. Since no probate is necessary at that time for the property to vest fully in the wife, the husband's will has no effect on the transfer of that property even if it specifically mentions that property being left to someone. However, since the wife now owns 100%, her will affects the transfer of that property completely unless she executes another deed and 1) creates a new joint ownership with someone else or 2) transfers the ownership to a business entity or trust. If the wife did either of those steps, then her will also would not control the disposition of the property at her death.

What does the person want to happen to it?

Most people have intended recipients for their property. However, it may not be who others may assume it would be. That is part of what the estate planning attorney is trying to discover through his or her conversations in the consultation. Often the assumption is that the surviving spouse and/or children would be the most likely people. However, depending on the relationships and history, that individual may desire to have property targeted to other individuals or even no individual at all. Sometimes individuals have friends outside of the family

or organizations such as churches, universities and non-profit organizations that they would prefer to target.

Often if the person desires to do something "out of the ordinary", the estate planning attorney will try to get a written note to protect him or her from later liability from those think they should have been left something.

Going back to the married couple with the joint ownership of real estate, often married couples may want that result of the property automatically passing to the other where they are the first marriage. However, if it is a second marriage or "blended" family, that may not be their desire. That husband (or same sex spouse) who passed away first, may have had children from his first marriage or before getting married that were not the children of the wife (or other same sex spouse). If the property passes completely to the other spouse, then those children could have no interest in the property. Instead the husband (or same sex spouse) may want a different form of joint ownership called "tenants in common".

In that form of ownership, each person keeps their ownership through death and passes that along by will. The first spouse to die would be able to pass along their 50% interest in the property either according to their will or, if they died without a will, according to their state's laws for intestate administration. That would allow the first spouse the opportunity to provide for children or other loved ones in their own will and/or trust in their own estate planning documents rather than their surviving spouse.

Bank accounts often have Payable-On-Death ("P.O.D.") designations on them, so they will pass directly to the named beneficiaries after death. This also would avoid a will or trust, so just knowing about the bank account and planning for it to be available without knowing the status of any POD designation could be disastrous.

With beneficiary designations for things like life insurance, IRAs, 401(k)s, 403(b)s and pensions, the form generally will control who gets the property. However, unlike life insurance policies and IRAs, any retirement plans under ERISA like 401(k), 403(b) and pension plans, the spouse generally must be the primary beneficiary. The only way to avoid this is where is a written waiver following the guidelines is executed by that spouse. Often people are not aware of this rule and think that the actual form always controls as written, so reviewing all beneficiary designations, especially older forms executed many years ago, is critical for second marriage/blended families where the surviving spouse would replace the children as beneficiaries.

"WILL WEDNESDAYS"
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MAIN TAKEAWAYS:

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