The Four Basics of Ohio Estate Planning

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THE FOUR BASICS OF ESTATE PLANNING

Careful estate planning should be a concern and priority for everyone. Not only should an appropriate estate plan be implemented, it should be reviewed on a regular basis to insure that it meets with your current needs and desires. Individuals with large estates should consider the use of trusts, gifting and charities to minimize estate taxes. Proper titling of assets, utilizing "payable on death" or "transfer of death" designations and ownership as "joint tenants with rights of survivorship" designations, while not providing estate tax savings, can maximize the ability to pass assets to beneficiaries outside of the probate process. Although each person's estate planning needs are unique, there are four basic estate planning documents that everyone should consider incorporating into his or her estate plan. These four documents are discussed in the following paragraphs.

Your Last Will and Testament:

Your last will and testament sets forth your intentions as to the distribution of those assets subject to probate at the time of your death. It does not control those assets in which "payable on death" or "transfer on death" beneficiaries have been named and those beneficiaries survive the decedent. It also doesn't control those assets held in joint ownership as "joint tenants with right of survivorship" with a surviving co-owner. Beneficiary designations and joint tenancy with rights of survivorship supercede the terms of a will. A will also does not control those assets held in a trust. Technically, assets in a trust are held in the name of the trustee in his or her fiduciary capacity on behalf of the trust beneficiaries. Assets in a trust are not held in an individual's name and thus are not dictated by the terms of a will, but by the terms of a trust.

A will is also subject to certain rights that a surviving spouse has, whether named in the will or not. A surviving spouse is entitled to any vehicles in the decedent's name not specifically bequeathed by the decedent and not to exceed a total value of $40,000. The surviving spouse is entitled, not only to live in the marital residence for 1 year rent free, but to purchase it at its appraised value. The surviving spouse can purchase any tangible personal property not specifically bequeathed. The surviving spouse also receives the first $40,000 of the net estate (if minor children are involved, the $40,000 is divided among the spouse and minor children) as the "family allowance." Finally, the surviving spouse may "take against the will", leaving him or her with 1/2 or 1/3 of the net estate, depending upon children involved. Thus, you can't completely disinherit a spouse.

If nothing else, a will provides a safety net. It provides a roadmap as to how distributions of assets are to be made upon the death of the testator. Intended beneficiaries previously designated on assets may be deceased. Forgotten assets that do not have a co-owner or beneficiary designations may exist. It may be impractical or impossible to cover the individual's intentions through death beneficiary designations. A will can divide assets among numerous beneficiaries in different amounts or percentages. A will can provide for contingent beneficiaries, in case the primary beneficiary or beneficiaries are deceased.

A will can provide for payment over time by creating a "testamentary trust", that is a trust created by and originating from the will. A testamentary trust can provide for payments or expenses to be made

on behalf of minor children or special needs individuals or for distributions to be stretched out over an extended period of time for adult beneficiaries. With a testamentary trust, versus an "intervivos trust" or trust created during one's life, there is the probate court overseeing the activities of the trustee on behalf of the beneficiaries. This may or may not be preferable, and may determine whether a revocable living trust or will is preferable. A testamentary trust can be just as creative or flexible as any other trust in terms of fulfilling the distribution requirements of the testator.

A will can also designate guardians for minor children. A guardian of the person and/or estate can be appointed for any child under age 18 to serve as guardian until age 18. As long as designated guardian is willing and able to serve and deemed appropriate by the probate court, they will be appointed.

Finally, certain legal and formal requirements must be met for a will to be valid. It must be executed by an individual 18 years of age or older. It must be executed by a competent adult, of sound mind and free from undue influence. It must be witnessed and acknowledged by 2 independent witnesses. A will does not need to be notarized. Failure to have a will results in assets of an estate being distributed according to Ohio's law of descent and distribution. This basically means your closest blood relatives; spouse, children, then parents, brothers and sisters, etc. This may not be your intent. Also, if minor children are involved, guardianships need to be established to manage the assets. Also, without a will, no executor exists, resulting in the court having to appoint an administrator to administer the estate. This may not only be not the person the decedent would have preferred, but also usually requires more complications and expenses for an administrator to liquidate and distribute the assets of an estate versus an executor.

Durable Power of Attorney:

Another basic estate planning document is a general durable power of attorney. "Durable" just means that it remains in full force and effect even if the principal becomes incapacitated. A general durable power of attorney is basically a financial and legal power of attorney. Due to legislative actions taken in 1991, a general power of attorney no longer covers medical decisions, which must be addressed in a durable power of attorney for health care. Thus, a general power of attorney covers basically everything other than health care decisions.

The purpose of a general power of attorney is to appoint an agent to conduct your financial or legal affairs if you become incapacitated or incompetent or for convenience purposes. A general power of attorney usually grants broad powers to include signing checks, managing accounts, executing deeds or contracts and so forth. Some people execute a limited power of attorney for a specific purpose, such as if a person cannot attend a real estate closing, he or she might execute a limited power of attorney to allow an agent to execute the closing documents. Most individuals who execute a power of attorney continue to manage their affairs as long as they are able, and the power of attorney is not placed into effect until or if the grantor becomes unable to do so. One can choose to have what is known as a "springing power of attorney" which, on its face, states that it is not to become effective until certain events occur in the future. However, as a practical matter, springing power of attorney documents may be problematic. Proving that certain events, such as incompetence or incapacity, to a financial institution or recorder's office may be difficult, making the document ineffective. That is why we do not usually recommend springing powers of attorney.

While it is also always advisable to have alternate agents named, we suggest having a separate power of attorney document for each agent, with an instruction letter indicating the order of priority. Although it is perfectly legal to have a power of attorney with multiple agents listed, once again it can create practical problems. It may be difficult for an agent listed as an alternate on a power of attorney to provide the necessary proof to the entity requesting it that the primary power of attorney or attorneys are unable to serve or are deceased or unwilling to serve.

One significant purpose of a general durable power of attorney is to avoid the necessity of a guardianship. Many spouses do not realize that by virtue of being married does not allow them to sign for the other. If they own real estate, regardless of how the deed is titled, both a husband and wife have to sign the deed to transfer title. If one is not competent or is otherwise incapacitated, it is probably too late to execute a power of attorney, and, unless one is already in place, a guardianship becomes necessary. This involves significant additional time and expense for the competent spouse. Children or other trusted family members or friends should be named as alternates.

Health Care Documents:

Up until 1990, only a general power of attorney was necessary for appointing an agent to handle one's affairs. In 1991, statutory law became effective in Ohio specifically addressing health care issues. Up until that time, Ohio did not technically have a power of attorney for health care or a living will. These issues are now specifically addressed under Ohio statutory law, and forms for both health care powers of attorney and living wills have been recommended and approved by both the leading legal and medical associations in the state.

Power of Attorney for Health Care:

A power of attorney for health care is exactly what it sounds like. It appoints an agent to make medical decisions if you are unable to do so. Both a general power of attorney and a health care power of attorney should be durable. All this means is that the power of attorney shall remain valid even if the grantor becomes incapacitated or incompetent. A health care power of attorney should also have alternates listed with addresses and phone numbers so that agents and alternate agents can be reached on short notice to make medical decisions. A health care power of attorney in Ohio must either be witnessed by 2 uninterested individuals (cannot be the agent or the attending physician) or notarized by a notary public to be valid. With a health care power of attorney, a copy is just as legally valid as an original. A health care provider or institution will never need to see the original. Also, since a health care power of attorney, on its face, does not become effective until medical decisions have been made, there are no worries or concerns about giving copies in advance to one's primary physician, the agents named in the document, etc.

A health care power of attorney covers all medical decisions with one possible exception. The exception occurs when an individual executes a "living will" or "advanced directive." A living will only addresses end of life issues, but, when it comes to those issues, it supersedes the durable power of attorney for health care.

Living Will:

The living will originates from statutory law in Ohio. The definitions of the medical conditions described in the document are very specific, and the situations addressed in the document are very specific. By executing a living will in Ohio, the individual states that should he or she every be "terminally ill" or "permanently unconscious" (as defined by Ohio statutory law) by his or her attending physician and at least one other physician, he or she does not wish to be kept alive by artificial means, if it will not provide comfort or care or alleviate suffering and does nothing more than prolonging life. Should one not have a living will, the life support decision falls into the hands of the agent named in the power of attorney for health care. With no living will or health care power of attorney, no one has the legal authority to have one taken off of life support, even if the family believes it is best. As with the durable power of attorney for health care, a living will must either be witnessed by 2 disinterested individuals or notarized by a notary public. Also, a copy of a living will is as legally binding as the original.

With respect to health care documents, namely the durable power of attorney for health care and living will, the laws may vary greatly from state to state. While a last will and testament and general power of attorney should be universally accepted in most, if not all states, health care planning documents will probably need to be revised should one move his or her residence to a new state. Also, any documents intending to be health care planning documents executed prior to 1991 should be revised, in that they will be outdated and probably not recognized.

Conclusion:

Each estate plan should be tailored to an individual's particular needs and wishes. Some may be more complex than others and require additional estate planning documents. However, for many individuals, the execution of those 4 basic estate planning documents, namely, a will, a general durable power of attorney, a living will and a durable power of attorney for health care will serve as adequate planning for the events and situations that may arise during your lifetime and at the time of your decease.

Edited August 14, 2023