• ESTATE PLANNING •

Reasons to Complete an Estate Plan

Keith Herman

Introduction

Completing a properly designed estate plan may be the most important task you accomplish during your lifetime. Your estate planning documents determine who takes care of you and your family after your death or disability and provides how every single item of property you own will be administered after your death.

Many individuals feel estate planning is only needed for the rich. However, it is often those with modest wealth that can benefit the most from estate planning. It is these people that suffer the greatest impact should an unforeseeable accident or death occur.

However, for individuals with an estate valued greater than $1,500,000, estate tax planning can often eliminate or significantly reduce the estate tax liability where the current top tax bracket is 48%.

Below I have listed some of the most important reasons to complete an estate plan.

Decide Who Receives Your Assets At Death

The state of Missouri has already written a Will for you. It is located at Missouri Revised Statute Section 474.010 (sometimes referred to as the "intestacy" statute). The distribution of assets contained in this statute is not how most people would want their property distributed upon death. You can override this statute in several ways: (i) by validly executing a Will (ii) by creating a revocable trust and transferring your assets to the trust during your life, (iii) by owning your assets jointly, or (iv) by providing for the disposition of your assets pursuant to a transfer on death (TOD) or beneficiary designation. Each of the options listed above has advantages and disadvantages, so it is best to have a comprehensive package of estate planning documents put in place and your assets thoroughly reviewed by an experienced estate planning attorney.

Avoid The Time And Costs of Probate

The term "probate" describes the court-controlled procedures for wrapping up a deceased individual's affairs at death and providing for the orderly distribution of those assets to the persons entitled to them, either under a Will, or the intestacy statute, after payment of debts, expenses and taxes. Any assets you own in your individual name at the time of your death are subject to probate. Probate can be time-consuming (usually takes a minimum of 6 months) and may involve significant costs. The Personal Representative (Executor) that is appointed by the probate court to administer your assets is entitled to a percentage of the value of your assets (roughly 5%) as an administrative fee and the attorney hired by the Personal Representative is entitled to this same percentage as a minimum attorney's fee.

There are several ways to avoid probate: (i) by creating a revocable trust and transferring your assets to the trust during your life, (ii) by owning your assets jointly with right of survivorship or (iii) by providing for the disposition of your assets pursuant to a transfer on death (TOD) or beneficiary designation. Merely, executing a simple Will does not avoid probate. Again, each of the options listed above has advantages and disadvantages, so it is best to have a comprehensive package of estate planning documents put in place and your assets thoroughly reviewed by an experienced estate planning attorney.

Name Guardians To Care For Minor Children

If you die without a surviving spouse to care for your minor children (i.e., under age 18), then a Guardian/Conservator will need to be appointed by the Probate Court to care for your minor children upon your death. The best way to indicate whom you would like to be the Guardian/Conservator of your minor children is by a provision in your Will. Keep in mind, however, that your nomination of a guardian is not binding on the court but will be given consideration.

Name Your Personal Representative (Executor)

As explained above, if you die with any assets owned in your individual name, these assets must be administered under the direction of the probate court ("probated") before they can pass to the beneficiaries. By executing a Will, you can specify whom you would like to serve as your "Personal Representative" to handle your probate estate. The Personal Representative has a significant amount of responsibility, from paying your debts and expenses, to deciding how your specific items of property will be allocated among your beneficiaries. The Personal Representative also has the discretion to liquidate your assets and distribute the cash proceeds or distribute your assets in-kind to the beneficiaries.

Avoid A Conservatorship Upon Incapacity

If you do not have a valid durable power of attorney for financial decisions and you become incapacitated (i.e. you do not have the legal or physical capacity to sign documents on your behalf) due to a physical accident or a mental illness (such as Alzheimer's disease), then no one (not even your spouse) has the legal authority to pay for your living expenses out of your assets or to execute documents on your behalf. If you became incapacitated without a durable power of attorney, then an extremely expensive and time-consuming court process must be undertaken to administer a conservatorship on your behalf.

Direct Your Family And Physicians How To Make Health Care Decisions

In the event you became incapacitated, a doctor will be responsible for making medical decisions on your behalf. If you execute a medical directive (similar to a living will) and a health care power of attorney while you still have capacity, then you can specify an "agent" (i.e. spouse, family member, or friend) to make these decisions for you, instead of relying on the doctor's judgment alone. A medical directive also allows you to tell your agent and doctor under what circumstances you would like life-sustaining procedures stopped (i.e. if you are in a terminal condition and will not be alive in 6 months or are in a coma or persistent vegetative state).

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Refer A Friend

Herman

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Avoid The Public Nature Of A Will

After you die and your Will is submitted to the probate court, it is public record and anyone can gain access to it. If you would like to keep your financial and personal decisions private, it is best to execute a revocable trust and transfer all of your assets to the trust while you are living. A revocable trust will avoid making your personal financial situation and intended beneficiaries public record.

Restrict Your Children's Access To Their Inheritance

If you have young children, or children who have a poor sense of judgment when it comes to making financial decisions, you may want to leave your assets to them in trust rather than outright. You can specify another family member to act as trustee, to ensure the assets will be used for the child's best interests and will not be wasted on frivolous expenditures. You can also specify that the child will take over as trustee upon reaching a certain age, such as 25 or 30.

Protect Your Family's Inheritance From Creditors, Divorce and Estate Taxes

Most individuals leave their inheritance to their spouse and children outright (i.e. not in trust). There are several advantages if you leave your assets to your family members in a special Lifetime Trust. The assets are protected from the beneficiary's creditors. The assets are not subject to division in the event the beneficiary gets a divorce. The income tax liability generated by the assets can be deferred or taxed at lower levels. The assets will be exempt from future estate taxes. Even if you do not have a taxable estate (over $1,500,000 for 2004 and 2005), it is quite possible that your spouse or one of your children could have a taxable estate at the time of his or her death. Under current law, for 2004 and 2005, you can leave up to $1,500,000 of your assets to your family members in a trust in which the assets, and all of the income and future appreciation on those assets, will be exempt from future estate taxes forever.

The Lifetime Trusts mentioned above can allow each beneficiary (i.e. a spouse or child) to serve as his or her sole Trustee, giving the beneficiary complete access to the trust assets to be used as the beneficiary finds appropriate. Leaving your inheritance to your family in Lifetime Trusts is a win-win situation.

Double the Assets You Can Give Away At Death Without Estate Taxes

Under current law, you can give away $1,500,000 of assets at death without imposition of estate taxes. However, married couples can give away double this amount ($3,000,000) if you provide the appropriate language in your revocable trust (often called an A/B trust). If a married couple does not use an A/B trust mechanism in their revo-

cable trusts, then the first spouse's $1,500,000 exemption will be wasted, and assets valued greater than $1,500,000 will be subject to estate taxes at the surviving spouse's death.

Ensure Your Assets Will Stay In Your Family Even If Your Spouse Remarries

By leaving your assets to your spouse in trust, instead of outright, you can be certain they will eventually pass to your children and grandchildren, as opposed to being used for your spouse's new husband or wife.

Protect Your Assets From Future Creditors

If you have potential creditor problems or work in an industry that is often subject to litigation (such as the medical profession or owners of commercial or residential real estate), then there are several vehicles (such as a partnership or trust) available to isolate your assets from future creditors. These techniques involve giving up some control over the assets in favor of your family members while maintaining the right to use the assets when needed (subject to agreement by one of your family members).

Shield Life Insurance Proceeds From Estate Taxes

Many people are unaware that the death benefit, not just the cash value, of life insurance policies you own are subject to estate taxes. If you have a taxable estate (over $1,500,000 of assets, including the combined death benefit under all of your insurance policies), then you should create an irrevocable life insurance trust ("ILIT") and transfer your insurance policies to the trust. A properly designed ILIT can avoid estate taxes.

Avoid Bitter Family Fights and Make Difficult Times Easier

Specifying in writing (preferably in a revocable trust) how you want your assets distributed upon your death can avoid costly and time-consuming family fights over the disposition of your assets.

Conclusion

Estate planning is not a topic most clients enjoy discussing. Therefore, attorneys should take a proactive approach to educating their clients on the value of an estate plan.

About The Author

Keith Herman is an Associate in Greensfelder's Trust and Estates Practice Group. Mr. Herman has a wide range of experience in estate planning and drafting, including the more sophisticated aspects of wealth preservation and transfer tax planning. He has also worked extensively in charitable tax planning, has assisted in developing succession plans for business owners and has performed extensive work assisting clients in respect to family owned business entities and wealth preservation strategies.

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