Liability Disclaimer

The information on this web site does not constitute legal advice. The law is constantly changing, and we make no warranty of the accuracy of information on this site or any site to which we link.

Estate Planning

Estate planning is a process whereby a person's objectives for management and disposition of his property are analyzed and action is taken to accomplish those objectives. Here are some of the areas that estate planning addresses:

Who should get my money and property when I'm gone? The needs of one's spouse, children and others must be weighed against one another. This can be particularly difficult if there are children by prior marriages or a property settlement agreement with a current or former spouse.

Is there enough money to provide for my family? Particularly the young people, the adequacy of one's life insurance program should be reviewed.

Who will manage the estate? This is a critical problem if there are handicapped or minor beneficiaries. Who should be guardian of minors or handicapped beneficiaries?

Are there tax-saving opportunities?

Is there a problem of succession to ownership and control of a family business or farm? Do I need a buy-sell agreement with my partner? Do I have enough liquid assets to pay the taxes on my farm or business?

When the objectives have been defined, documents are prepared and property transferred to put the plan into effect. A Will is almost always part of the plan. Other documents used may include trust agreements, beneficiary designations for life insurance and deferred compensation benefits, powers of attorney for health care and for property, buy-sell agreements and living wills. Sometimes the basic structure of a business will be altered through corporate recapitalizations, the creation of partnerships or the establishment of a pension or profit-sharing plan.

Professional Help

In most cases, lay people shouldn't do their own estate planning without legal help. Few persons are experienced in solving the problems outlined above. Even fewer are skilled in drafting with precision and clarity the documents needed to put the plan into effect. One's attorney should certainly be involved in preparation of the estate plan. Many other people -- accountants, life insurance underwriters, trust officers and financial planners -- may also assist in this planning. For certain estates, bankers, business consultants and farm managers may be consulted as well.

There should be close coordination among the advisors. If a trust company is named as executor or trustee, your attorney will work closely with it. Coordination of life insurance with your overall estate plan may involve your insurance agent. Finally, all advisors should remain in contact with the family and review the estate plan from time to time, because many events can occur that call for changes in the plan. In addition, changes in the laws may necessitate a change.

It's beyond the scope of this pamphlet to discuss the fees and costs of professional help to estate planning and probate work -- there are too many factors to make it generalized. Your attorney should be willing to discuss with you (in advance, if you wish) the basis on which the fees will be calculated.

A Word About Taxes

A discussion of the specifics of the income and estate tax obligations imposed on decedents and their assets and the various planning techniques to minimize taxes is beyond the scope of this pamphlet. However, in general, other than income taxes, there is in effect only one tax now applicable to decedents who were resident of Illinois and whose property was located in Illinois (property located in other states and countries may be subject to additional taxes.) This tax is the Federal Estate Tax.

In effect, every person may give away during life and upon death a certain amount without incurring any tax obligation (see schedule below for the exemption level in effect for a given year or set of years). Any person whose estate exceeds the amount listed below may need to use special estate planning techniques to take advantage of tax saving opportunities available through careful planning with the advice of your attorney.

YEAR	EXEMPTION LEVEL
2002/2003	$1 million
2004/2005	$1.5 million
2006/2008	$2 million
2009	$3.5 million
2010	estate tax repealed
2011	$1 million

As you can see, the schedule reverts in 2011 to $1 million exemption unless the repeal is made permanent between now and then.

What Information Do I Need To Prepare A Will?

It will be helpful to your attorney if you fill out information sheets, which most attorneys have available, in advance of the visit. This will not only assist the attorney in properly advising you with the type of estate plan that will best suit your needs but will also assist in helping to keep the expense at a minimum.

Finally, you are urged to review your estate plan periodically so that it is kept current. You should contact your attorney for a complete checkup at least every five years, and more frequently if there are changes in the family (birth, death, marriage, divorce), changes in assets, or changes in tax laws.

Wills

A Will is a document that controls the disposition of a person's property at death. Each state has formal requirements for a Will. In Illinois:

The maker of a Will must be 18 years old and be of sound mind and memory.

The Will must be in writing.

The Will must be signed by the maker and must be witnessed in the special manner provided by law. Two witnesses are required in Illinois. (Persons who are beneficiaries under the Will should not serve as witnesses.)

After death, the Will is presented in court and, after being proven valid, is put into effect and its provisions are carried out.

A Will may be revoked or changed at any time before the death of the maker. To be effective, changes must be made strictly in accordance with legal requirements. A change in a Will is often made by an addition called a "codicil."

What Are Some Important Considerations In Making Or Reviewing A Will?

Who should receive your property, and, if children, at what age?

Who should be named as guardians of minor children, and what are their duties?

Should a trust be created for your spouse, children or others?

If a trust is created you must name a competent individual or trust company to manage the trust.

Should charitable gifts be made?

Should life insurance proceeds be payable to a trustee or executor named in your Will or to individuals directly?

Who should be named executor?

Can taxes be saved?

Has your marital status changed since you made your last Will?

Have any beneficiaries of your estate died or have you had important changes in circumstances or assets?

Generally, a person may give away his or her money in any way in a Will. However, Illinois law does not allow one spouse to disinherit the other without the consent of the one who is disinherited. A surviving spouse, whether or not named in the Will, may renounce the Will and receive a third of the deceased spouse's estate if there are surviving descendants of the deceased or one half if there are no surviving descendants. A spouse may renounce a Will for any reason.

Does A Will Make For More Court Expense?

No. If a person dies leaving an estate, a court determines who is to receive the estate, and makes sure that all debts and expenses are paid. This must be done whether or not there is a Will. However, a Will can save expense by eliminating the need for sureties on bonds, expediting the sale of property, avoiding guardianship for minors where not really necessary and otherwise providing the executor of the Will with clear directions on the handling of the estate.

If there is no Will the court appoints an administrator to settle the estate and make distribution as provided by law, after all debts and expenses have been paid.

An individual without a Will has no voice in the selection of the administrator. If there is a Will, the executor named by the maker of the Will takes the place of an administrator, and is the one who handles the estate. A person making the Will may name as executor any individual in whom he has confidence provided the execution meets statutory requirements. A bank or trust company also may be named as executor.

Illinois has adopted independent Administration for estates of all sizes. This process increases family privacy; for example, no inventory or accounting is usually filed. Independent Administration also reduces the time required in the courts because unless there are disputes between the beneficiaries or with third parties, the court is involved only for opening and closing the estate.

Why Write A Will?

Illinois law establishes the right to make a Will, but it is not compulsory. If there is no Will, the court distributes the property to the legal heirs of the deceased according to law.

Just how the property will be distributed depends on the circumstances of each situation. For example, if there is a widow and one or more children, the widow gets half and the children get half. In all cases the law is rigid and makes no exception for those in unusual need or to other circumstances.

The value of a Will lies in the difference between a planned distribution of your estate as you have chosen OR having your property distributed (arbitrarily) under a fixed statutory distribution.

A Will gives you the choice of distributing your estate to take care of your particular needs and goals.

Does A Good Life Insurance Program Take The Place Of A Will?

No. Life insurance is simply one of the kinds of property you can own. Life insurance trusts are popular devices to assure proper use of insurance proceeds. Another way of bringing insurance proceeds into a trust is by creating a trust in your Will. The insurance is then made payable to the trustee named in the Will. The designation of life insurance beneficiaries may affect the creditors of a decedent as well as the decedent's taxes, all of which should be considered and integrated into estate plan.

"Death Bed" Wills

It's human nature to procrastinate -- to put off until tomorrow what should be done today. In the case of a Will, this tendency can be disastrous. A Will should be prepared while a person is in good health and in a position to carefully consider its provisions.

Too often, the hastily-contrived "Death-bed" Will fails to carry out accurately the wishes of the maker or is found to be invalid for some technical reason that could have been avoided.

Probate Administration

What Is A Personal Representative?

A personal representative is the person or entity who manages the decedent's estate. Executors and administrators are types of personal representatives.

If the decedent left a Will (referred to as dying "testate"), the person who administers the estate is called an executor if the decedent left no Will (referred to as dying "intestate"), the person is called an administrator.

Who Serves As Personal Representative?

An executor is nominated by the decedent in his or her Will. An administrator is nominated, generally by the decedent's family. One or more individuals or a bank or trust company, or a combination may be named. An administrator must be a resident of Illinois. An executor must be a resident of the United States of America, but need not be a resident of Illinois. Each executor or administrator must be approved and appointed by the court.

What Are The Responsibilities Of A Personal Representative?

The duties and responsibilities of a personal representative, either an executor or administrator, are defined primarily by the Illinois Probate Act and the Internal Revenue Code. Here are some highlights:

Opening The Estate

If the decedent left a Will it is responsibility of the person in possession of the Will to file it with the circuit clerk within 30 days. It is then the responsibility of the person nominated as executor to ask the court to probate the Will. A Will need not be probated in every instance.

Duties With The Court

Publish or provide required legal notices.

Prepare an inventory listing real estate and both tangible and intangible personal property.

Approve or contest claims filed against the estate. Petition the court as necessary in the management of the estate's assets.

File periodic and final accountings reporting receipts, disbursements and distribution.

Note: Many of the obligations for obtaining court approval before and after transacting business on behalf of the estate may be reduced or eliminated under independent Administration.

Duties As To Property

Collect and inventory all assets of the estate including any that may be held in dependent's safe deposit box.

Preserve, manage and insure assets during administration.

Take action to manage the decedent's business.

Secure valuation and appraisal of assets.

Sell property as required to meet the objectives of the estate.

Review the decedent's life insurance policies and help the beneficiaries collect them.

Consider Social Security and other claims.

Determine whether the decedent had any unfulfilled contractual obligations or was the recipient of such obligations by other parties.

Determine the nature of joint tenancy assets, if any, and consider their inclusion or taxability within the estate.

Arrange for transfer of stocks, bonds, bank accounts and other assets.

Distribute the estate in accordance with the Will or, if none, to the heirs, as determined by law.

Financial Duties

Keep records of all transactions.

File or assist in the filing of the decedent's final income tax return.

File the necessary income tax returns as fiduciary for income and expenses generated during the course of administration.

Review decedent's records to determine whether any gift tax returns were or should have been filed.

File federal estate tax return where necessary, making such elections as are appropriate.

File necessary state estate tax returns. Provide for payment of all taxes.

Provide beneficiaries with appropriate tax information.

Joint Tenancy

Joint tenancy with right of survivorship is a useful tool for holding title to property and for planning the transfer of that property after one's death. Joint tenancy is probably the most common form of ownership for residences and bank accounts between husband and wife. It is used less frequently with other family members. The fact that joint tenancy is widely used doesn't mean that everyone fully understands it. This pamphlet highlights the legal and tax implications of joint tenancy.

What Is Joint Tenancy?

Joint tenancy has significant legal effect not only during the lifetimes of joint tenants, but also when one of them dies. Each joint tenant, regardless of which one purchased or originally owned the property, has the right to use and to share in the income from the jointly owned property. A joint tenant's interest in the property terminates upon his or her death, and the surviving joint tenant or joint tenants then own the property free of any claim by the heirs of the joint tenant who died. This may not be the intent of the original joint tenants, because it bars descendants, heirs or beneficiaries and all but the surviving joint tenants from receiving any interest in the property.

Joint tenancy shouldn't be relied on as a substitute for a Will. It doesn't cover unanticipated contingencies. While it provides for a successor for a particular piece of property, joint tenancy doesn't provide a comprehensive plan for the disposition of one's entire estate as a Will does. Property held in joint tenancy does not pass under a Will.

Is Joint Tenancy The Only Way To Hold Title To Property With Another Person?

No. Two or more persons may also own property as tenants-in-common or tenants by entireties. Tenants-in-common, like joint tenants, each have the right to use and share in the income from the property. However, when a tenant-in-common dies, his or her interest does not pass automatically to the surviving co-tenant. It passes, instead, as part of the estate to the heirs, or the beneficiaries under a Will. Tenants by the entireties allows a husband and wife to hold their residence free of claims against only one spouse.

How Is A Joint Tenancy Established?

When the ownership is in real estate, the deed normally includes the words "as joint tenants and not as tenants-in-common."

For registered securities (stocks and bonds) the names of the owners are stated followed by the words "as joint tenants with right of survivorship, and not as tenants-in-common."

For bank accounts (both checking and savings) all of the joint tenants sign a signature card. The agreement on the back of the card creates a joint tenancy in the depositors.

U.S. savings bonds and other Treasury obligations, when the owners are listed as "A or B," either one may cash in the bond at any time. When one has died, the survivor is the sole owner.

If an asset is registered to "A payable on death (p.o.d.) to B," the asset is not owned in joint tenancy. Rather, the asset is payable to B on A's death, but B has no rights during A's lifetime.

What Are Some Other Features Of Joint Tenancy To Be Considered?

All joint tenants must agree to the sale or mortgage of real estate and to the sale of registered stocks and bonds.

Any one joint tenant may withdraw all or a part of the funds in a joint bank account.

Any co-owner may redeem U.S. Treasury bonds.

The creation of a joint tenancy has important legal consequences. Estate, gift or income taxes may be affected.

Joint tenancy may have other consequences. For example, 1) if property of any kind is put in joint tenancy with a relative who receives welfare or other benefits (such as social security benefits) the relative's entitlement to these benefits may be jeopardized; 2) if you place your residence in joint tenancy, you may lose your right to advantageous senior citizen real estate tax treatment, and 3) if you create a joint tenancy with a child (or anyone else) the child's creditors may seek to collect your child's debt from the property or from the proceeds of a judicial sale.

Is Joint Tenancy A Good Or Bad Idea?

Joint tenancy is useful in the right case. However, joint tenancies are not a simple solution to estate problems but can, in fact, create problems where none existed. The costs of preparing a Will, tax planning and probate may be of little significance compared with the unintended problems that can arise from using joint tenancies indiscriminately. For a full explanation of the advantages and disadvantages of joint tenancy in your particular situation, you should consult a lawyer. With his or her advice, you will be able to make an informed choice of the best way to accomplish your objectives.

Trusts

Living Trusts

A trust generally, is an agreement where one person (the trustee) holds and manages property for another (the beneficiary). If you create a trust under your Will, it's called a testamentary trust. If you create a trust while you're alive, it's called a living trust, sometimes called an inter vivos trust.

The living trust is a vehicle for managing your property during your lifetime and passing it on to your beneficiaries at death without probate.

The usual living trust works in this way. First you have your lawyer prepare a trust agreement that names the trustee and the beneficiaries, and defines everyone's rights and duties. The agreement usually says that you retain power to amend or revoke it whenever you want. (Because of this feature, these trusts are sometimes called "revocable trusts," or "revocable living trusts.") The trustee (or trustees) may be one or more responsible individuals or a bank or trust company. You transfer property (real estate, securities, cash, etc.) into the trust by placing it in the trustee's name. (You can begin by putting in a small amount, and then add to the trust later.) The trustee has management responsibility for the trust property.

The trust agreement usually provides that you are to receive all of the income of the trust and as much of the principal as you request, but if you are disabled, the trustee may use the income and principal to pay your bills. Upon your death the trust property is transferred to your beneficiaries without probate. A trustee might also continue to manage the trust property for the beneficiaries if they are minors, disabled, or have other special needs.

The main **advantages** of a living trust are these:

If you want or need to have someone else manage your property and pay your bills in case of illness, the living trust is by far the best arrangement. One alternative is a probate court guardianship proceeding, which is public, costly and inconvenient. Another alternative is the power of attorney for property which is discussed in the next section of this pamphlet.

Avoiding probate at death may save time and money. However, Illinois probate procedures are very simple especially when independent Administration is used, and the importance of avoiding probate can be exaggerated. Virtually all of the steps outlined in the Public Administration section above under "Duties as to Property" and "Financial Duties" need to be satisfied by the trustee.

Because a trust is not filed in court, its provisions are private, unlike a Will, which must be filed in court at death. However, copies of the trust may be required by persons dealing with the trustee such as, for example, banks, stock brokers, etc.

The main **disadvantages** are these:

If you use a bank or professional trustee, there are fees to pay during your lifetime that will probably be much more than the potential probate cost savings.

Even if there are no trustee's fees to pay, there will be costs and inconveniences during your life -- the initial cost of setting up the trust and transferring your property into trust, inconvenience of maintaining a separate bank account and books and records for the trust, and the annual filing of fiduciary income tax returns may be required.

A trust only disposes of assets transferred to the trust.

Self-Declaration Trusts

The self-declaration trust is a variation of the living trust discussed above. Its unique feature is that the creator of the trust is also the trustee. The trust document usually includes a procedure for removing the creator of the trust as trustee without going to court -- typically, one or more physicians or family members or a combination have removal power; and then a successor trustee named in the agreement takes over.

Many people of retirement age are concerned about the possibility of a disabling illness, even if they are currently in good health. They don't want to set up a living trust because they want to handle their own business as long as they are able to do so.

The self-declaration trust provides for this contingency -- the creator of the trust has full control until a disability or death occurs, and then the trust becomes fully active.

Taxes

The living trust has essentially no tax significance. While you live, the trust income is reported on your 1040 just as if the trust did not exist. (Unless you are trustee, the trustee must file an annual fiduciary return on form 1041, but this is only an information return.) At death, the trust property is included in your estate for tax purposes as if you owned it outright. Any tax plan that is built into the trust agreement (e.g., the marital deduction gift) also could be achieved through a Will.

Life Insurance Trusts

A word about life insurance trusts is in order. A life insurance trust is technically a living trust (sometimes revocable and sometimes irrevocable) but its function is quite different from the living trust vehicle discussed above. When a life insurance trust is created, the maker doesn't transfer any property to the trustee -- he merely names the trustee as beneficiary of his life insurance policies. The trust is dormant until the maker dies. At that time, the trustee collects insurance proceeds, and thereafter the administration of the trust is like that of a testamentary trust, indeed, the life insurance trust is something like a Will of your insurance proceeds -- it's a way to unify the disposition of your life insurance and the rest of your property without subjecting the insurance to probate or to claims of creditors.

Powers Of Attorney

The living trust is usually the best way to provide for someone to manage a person's property and the payment of his bills during disability. The power of attorney is a simple device that may serve that same purpose.

In concept, the power of attorney creates a form of agency -- the person named as "attorney-in-fact" has power to act as your agent for whatever purposes are specified in the document that appoints the attorney-in-fact. (The attorney-in-fact need not be a lawyer -- the word "attorney" in this sense means "agent.")

Some powers of attorney are limited in scope. Examples of limited powers of attorney are the deputy cards that you can sign to authorize someone to write checks on your bank account or to authorize access to your safe deposit box. A general power of attorney, on the other hand, gives the agent broad power to manage your property and pay your bills. It may even empower the agent to make gifts on your behalf, to transfer your property to a living trust or to consent to medical or surgical procedures on your behalf, if these powers are specified in the instrument. Even if you have signed a general power of attorney, it may also be advisable to sign one or more special powers, because most financial institutions prefer to work with their own printed forms. A power of attorney that deals with real estate must be acknowledged before a notary public like a deed.

In a long illness, a general power of attorney doesn't work as smoothly as a living trust. For this reason, many lawyers recommend living trusts for clients who are ill or elderly, and use the power of attorney for clients who are younger and healthy, as "insurance" against an unexpected contingency. The power of attorney may also be used to supplement a living trust.

Illinois has adopted a Durable Power of Attorney Law. This Act allows the appointment of an agent and successor agent who can act for you. The power can be conditioned upon the principal's incapacity. These powers survive the disability of the principal.

There are two types of statutory powers: **PROPERTY** and **HEALTH CARE**. Both must be executed by the principal. The property power must be witnessed by a notary public and the health care power by one witness.

A property owner allows a principal to appoint an agent who can act for him or her in whatever matters are delegated. It can be as broad or narrow as the principal requires. Also matters such as successor agents, guardianship, and compensation can be specified.

A health care power allows the appointment of an agent to make health care decisions on your behalf. Illinois law allows adults the right to accept or refuse medical treatment as they see fit. A health care power allows the delegation of this right to an agent. The health care power allows specification of medical treatment desired, appointment of successor agents, nomination of guardians of your person. The powers survive disability of the principal. Your health care power of attorney should be consistent with any preferences you may express on a living will (see below).

A WORD OF CAUTION. A power of attorney allows the agent to do anything that a principal could do. You should not provide anyone with a power of attorney unless you place the utmost trust and confidence in that person.

Death automatically cancels a power of attorney, so this device is no substitute for a Will.

For information about living wills, powers of attorney for health care and related subjects, see **Living Wills and Health Care Directives**.