

Ohio Basic Estate Planning

Continuing Legal Education Seminar

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[Pre-Substantive Law Comments]

-Is Estate Planning a good area of the law to get into?
(Pro's and Con's)

-Why you Should or Should NOT get into this area.

-Clients, Clients, Clients !

-Establish yourself among friends/relatives

-Get paid, and get paid THERE AND THEN !
Compare to other areas of the law PI, W/C

-Other areas of the law follow ("Oh yes, they did my will, great job, maybe you can have your divorce done by them")

-Compare to other areas (like w/c, PI, Tax): is this easier, or harder?

-Ticking Time Bombs ? You want to live with this?
What does this even mean?

-Clients for life (literally !) TYPES OF CLIENTS ?

-Frequent Changes in the Law (yes or no?)

A. Introduction: What IS Estate Planning and Probate Law?

1. Kind of a definition: Taking the appropriate proactive action and drafting of documents to ensure that your financial affairs and health care preferences will be taken care of as you wish in the event of death or disability. Nobody can tell what will happen in the future, and since we work hard to acquire assets and interests (which comprise an “estate”) it is wise to have a plan in place to prepare for the future (retirement, disability or death). Having a plan (like a retirement plan, or a will) is one of the wisest ways to spend a minimal amount of time to protect those assets and ensure they are passed down to those people or entities that you want, and in the manner that you want it. Many of us DO NOT have such a plan. We all should. Tell your clients, ALL OF THEM, take a little bit of time to do some planning, AND to get a will made up. It’s not that expensive, it’s not a big deal time-wise, do it. Now.

2. Will or no will? Without such estate planning mechanisms in place, if a person dies they are intestate. The law then kicks-in, and the law (not you, not your family, not ANYONE) determines who gets what, how much and when. This could lead to disastrous consequences, including losing money, your car, getting kicked out of your house etc.

GOVERNING LAW on wills: Chapter 2107 of the Ohio Revised Code. Bottom line suggestion here to you, and for you to suggest to your clients, always, and everywhere, even if you aren’t the one doing the paperwork for them: **HAVE A WILL** !! Gee didn’t I just say that ? And if you’re into that sort of thing have the other “just in case” stuff done (or not done) as well. (POA,DNR, etc.)

B. Basic Estate Planning Tools

1. BASIC ESTATE PLANNING TOOL # 1: The Will ("Last Will and Testament")

- a. Kind of a Definition: a declaration of what is to be done with one's property (assets AND liabilities) at death. It must be in writing, signed at the end, and witnessed.
- b. Nature: The main feature of the nature and crucial characteristics of a will are ambulatory and revocable. That is, it travels with you from county to county (and even state to state in many respects) and you can change it from time to time as events in life dictate (death/divorce, etc.).
- c. Some types of Wills
 - i. The Simple Will (executor and bequests)
 - Very easy to do, and a great way to make easy money if you're out on your own, or "on the side"
 - Still must meet statutory requirements or the person is "intestate"
 - ii. Other, more complicated wills (conditions, etc.)
 - iii. The holographic will-handwritten by the testator, still valid in Ohio if all of the statutory requirements are met.
- d. Requirements of a will:

i. Testamentary Capacity (you gotta be “able” to make a will). The Ohio Revised Code permits any "person of the age of eighteen years, or over, **sound mind and memory, and not under restraint**" to make a will (sec. 2107.02). {¶26} Niemes v. Niemes 97 Ohio St. 145, 119 N.E. 503 (1917) elaborates on the ‘capacity’ element by noting that a testator has capacity to make a will when he has sufficient mind and memory (1) to understand the nature of the business in which he is engaged (2) to comprehend generally the nature and extent of his property, (3) to hold in his mind the names and identities of those who had natural claims upon his bounty, and (4) to be able to appreciate his relation to members of his family. Age & capacity ! are 2 separate things !! Make sure BOTH are satisfied. The case of West v. Henry 173 Ohio St. 498 (1962) addresses the undue influence element. The Court held that In a will contest, the essential elements of undue influence are (1) a susceptible testator, (2) another's opportunity to exert it, (3) the fact of improper influence exerted or attempted and (4) the result showing the effect of such influence. Moreover, The mere existence of undue influence or an opportunity to exercise it, although coupled with an interest or motive to do so, is **not** sufficient to invalidate a will, but such influence must be actually exerted on the mind of the testator with respect to the execution of the will in question; and, in order to invalidate the will, it must be shown that the undue influence resulted in the making of testamentary dispositions which the testator would not otherwise have made. If you have a gun pointed at your head, but you are of sound mind and body, does the will count?

ii. In writing. Statute of Frauds, anyone ? And if you

have to SIGN IT, (see below) then it has to be in writing, doesn't it? Well, duh !

iii. Signature (it HAS to be signed, and it has to be signed at the end of the document !!! Strange but true). And there must be witnesses to the person signing it, watching the actual act of pen to paper.

iv. Beneficiaries. You got get rid of your stuff, and you gotta say who gets it.

v. Executor. You need to name a person, or entity to do all this, take care of everything, close bank accounts, distribute assets, etc. Surviving spouse, parents, best friend, significant other, it can be anyone.

e. What happens if a will is declared invalid, for whatever reason? (Trick Question, as some issues are forgiven)

i. Answer: intestacy.

ii. Administrator vs. Executor

iii. More court involvement

iv. The government decides (not you) who gets your stuff and what happens

v. One last thing: your will can't stab your spouse. (What does this even mean?). Suppose you are married and you die with a will, and it directs all your stuff to go to the Humane Society, every dime. Will this actually happen?? Probably not. The spouse can "Elect Against the Will"

f. The Process (wills): What do you do when someone

wants you to do their will?

i. Gather information. Initial consult/interview.

What the attorney needs to know:

-Marital Status !!!!!!! (Kids)

-Prior will ?

-Assets

-Liabilities

-Bequests (who is gonna get what?)

-Anybody getting specifically excluded ?

-Client Identification

-Being of Sound mind? Due diligence

ii. What you should tell the client

-Spousal issues

-be straight with me, man !

-Other items (DNR, Living Will, etc.)

-Protecting the creditors !

-Keep a copy of the will in a safe place, keep one in YOUR office too.

-What happens after the client dies (the process, see below)

iii Drafting the document, things to know.

-Preliminary considerations
(as you look at the blank screen)

-“Per Stirpes”

-“fee simple absolute”

-“To serve without bond”

-other considerations

g. Probating and the creation of “the estate”

i. Estate Property (what goes in, what doesn't: KNOW!)

ii. Life Insurance: DOES NOT. Not part of an estate in Ohio. It's a contract, pure and simple. Nor does the 401K. Nor do a lot of things !!

iii. Taxes? First \$100,000.00 is tax-free.

iv. The process ('probating a will')

-forms, forms and more forms !

-accountants? An accounting ?

-status reports?

-gathering assets/filing lawsuits

-addressing liabilities/paying bills

-negotiating with creditors (fun fact: they still want their money, even though the credit-card holder is now dead)

-Suggestion: Get in good with the Magistrates if your county uses them, and the clerks (tough to do in the age of e-filing)

-The final Accounting and Distribution

-Suppose a family member or someone has a problem with the way you're doing it for the decedent? Any relief?

-Suppose something comes up after everything's been wrapped-up?

-Problem? (Real Property issues? Money? Ownership of something?)

-New property/assets/money discovered

-The long-lost relative surfaces (finally)

2. BASIC ESTATE PLANNING TOOL # 2: Trusts (Revocable or Living Trusts)

a. Kind of a definition: when one person gives property to another person to hold and manage for one or more other persons. The one giving the property is the grantor, or settlor, the person getting the property (in charge of it now) is the trustee and the

other person for which all of this benefits is (get this now) the beneficiary. Think of the Kennedy's.

b. Reason for a Trust? Unless you're a billionaire why would you EVER want this? Good question. Can you think of any?

-Money

-Firearms

-Asset Protection

-Minor Children

-anything else?

3. BASIC ESTATE PLANNING TOOL # 3: Power of Attorney (Ohio Revised Code Chapter 1337)

a. General "all-encompassing" POA (Financial POA) It allows a designated person to cash checks, sign documents and do things in someone's absence.

b. Durable Power of Attorney for Health Care (O.R.C. Section 1337.11. Takes effect immediately

c. Living Wills Ohio Revised Code Chapter 2133: "An adult who is of sound mind voluntarily may execute at any time a declaration governing the use or continuation, or the withholding or withdrawal, of life-sustaining treatment." O.R.C. 2133.02. It provides instructions should you become incapacitated and incapable of making decisions regarding your medical

care. Take effect only when you become incapacitated.

d. The DNR Order. Do not resuscitate. Tells the nursing home or hospital to let you die, literally.

-Different requirements from Living Will:

KNOW THEM !

e. Practice Tip: the OSBA has a good deal of information on this subject on its website including forms.

f. Resources:

-CLE's and seminars like this

-fellow practitioners/mentors

-the folks at the front counter (in the clerk's office)?

4. BASIC ESTATE PLANNING TOOL # 4: Investment Strategies

a. Asset Protection

b. Wealth Preservation

5. BASIC ESTATE PLANNING TOOL # 5: Long-term Planning

a. Medical decisions

b. Medicaid "spend-down" plan

c. "End of Life" Planning

d. Retirement

- investments
- annuities
- life insurance cash-in
- your in-laws

C. Other Issues

1. The Definition of "Marriage"

- LGBTQ Issues

2. The Definition of child/issue

- Adoption
- Step Children
- Grandparents Rights

-Questions/Discussion

-I am always available (during today's seminar, and afterwards) if you should have any questions or concerns.

Best of luck to all of you !

-Thank you !

/jeg

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Celebrating 25 years (1994-2019)

Joseph Gibson is an attorney with a private practice focusing on Workers' Compensation law (representing both employers and injured workers) litigation, and firearms law. He is the owner of Gibson Law Offices, a solo-practitioner law firm with locations in Fairborn, Tipp City, and Middletown. Born and raised in Southwest Ohio, in 1987 he graduated from the University of Dayton with Bachelor of Arts in Political Science. He went on to attend the University of Dayton School of Law, and where he earned his Juris Doctor degree in 1990. In the late 1980's and early 1990's, he worked for the Department of Defense at Wright-Patterson Air Force Base Air Force Logistics Command. His time there was mainly in the Air Force Contract Law Center where he reviewed Contracting Officer's Decisions for legal sufficiency. He was then appointed by the Ohio Bureau of Workers Compensation to be the local district attorney for Dayton and Springfield service offices where he represented the BWC at all levels of administrative hearing. He advised claim and risk staff on claim questions, premium issues, and agency policy. He has instructed at Sinclair Community College and Edison State Community College in the Political Science and Business Law Fields. In 2009 he was elected to County Council in his hometown of Tipp City, Ohio earning the highest number of votes a candidate has ever won up to that time. He was re-elected 4 years later and again in 2017. In 2014 he was selected to be Council President. Currently he serves as the City's Mayor. Her served on the City's Land Use Revision Committee, and the property maintenance code review committee. He also serves on the Tipp City-Monroe Township Cable Access Commission and the Miami County Council. He has advised gun shop owners and private citizens on firearms law issues for several years, and has spoken on the subject to trade groups, recreational organizations and local civic groups. He is a Lifetime/Benefactor Member of the National Rifle Association of America. He has lectured for various groups and professional organizations including National Business Institute, Lorman Seminars, Rotary International, and local chapters of the Chamber of Commerce.