

Why Everyone Should Have an Estate Plan

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Christ the King Episcopal Church

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Why Plan?

- Control
- Explore options and choose preferences
- Avoid having to make decisions in a crisis
- Address issues for **You** for before you die
- Address issues for **Your Family** for after you die

Basic Concepts

- Community Property System
 - Community or Separate
- Two Types of Property
 - Probate or Nonprobate

CHARACTERIZATION OF MARITAL PROPERTY

Community Property States:

Texas, Washington, Idaho, California,
Arizona, Nevada, New Mexico,
Oklahoma, Louisiana

Common Law States:

The other 41

Why does it matter?

- The community property system is a way of dividing joint property upon divorce or death.
- In Texas, property is either separate or community.

Separate Property

- Property owned prior to marriage
- Property acquired by the spouse during marriage while domiciled in a common law state
- Property which the spouse acquired during marriage by gift, devise, or descent
- Property purchased with the spouse's separate funds or separate credit
- Personal injury recoveries during the marriage, except recovery for loss of earning capacity
- Property purchased with the proceeds from the sale of separate property
- Appreciation in the value of separate property
- Property received pursuant to a valid partition and exchange of community property

COMMUNITY PROPERTY

Everything else

- Includes wages, salaries, interest, dividends, other earnings, income from separate property

Probate vs. Non-Probate

- **Probate Property** (passes under Will)
 - Land
 - Automobiles
 - Stocks and bonds
- **Non-Probate Property** (does not pass under Will)
 - Life insurance
 - Pension plans
 - IRAs and 401(k)s
 - Bank accounts, JTWRROS

Where do I start?

Fact Gathering

- Assets:
 - Homes and furnishings
 - Other real estate
 - Autos and boats
 - Cash and savings
 - Stocks and bonds
 - Life insurance
 - Retirement benefits
- Liabilities:
 - Debts

Why do you need a Will?

Non-Tax Advantages

- You can control where your property goes
 - Avoid intestacy
 - Establish trusts
- Provide for disposition of estate in most economical manner
 - Independent administration
 - Appoint Fiduciaries
 - Select Guardian for children

Why do you need a Will?

Tax Advantages for larger estates

- \$10,000,000 + exemption from estate tax (indexed for inflation; \$11,200,000 in 2018, but this expires at the end of 2025 and reverts to \$5,000,000 indexed for inflation)
- Charitable deduction for charitable bequests

What if I die without a will?

- Texas laws of intestacy will decide who gets your property, with some surprising results!
- Don't assume everything will automatically go to your spouse. . .

Let's look at the Addams Family:

If Gomez dies without a Will or trust, because Pugsley and Wednesday are children of the marriage, Texas law provides that Morticia will receive:

- all of the community property
- homestead right to live in the spooky mansion for the rest of her life
- 1/3 of Gomez's separate personal property
- a 1/3 life estate in his separate real property

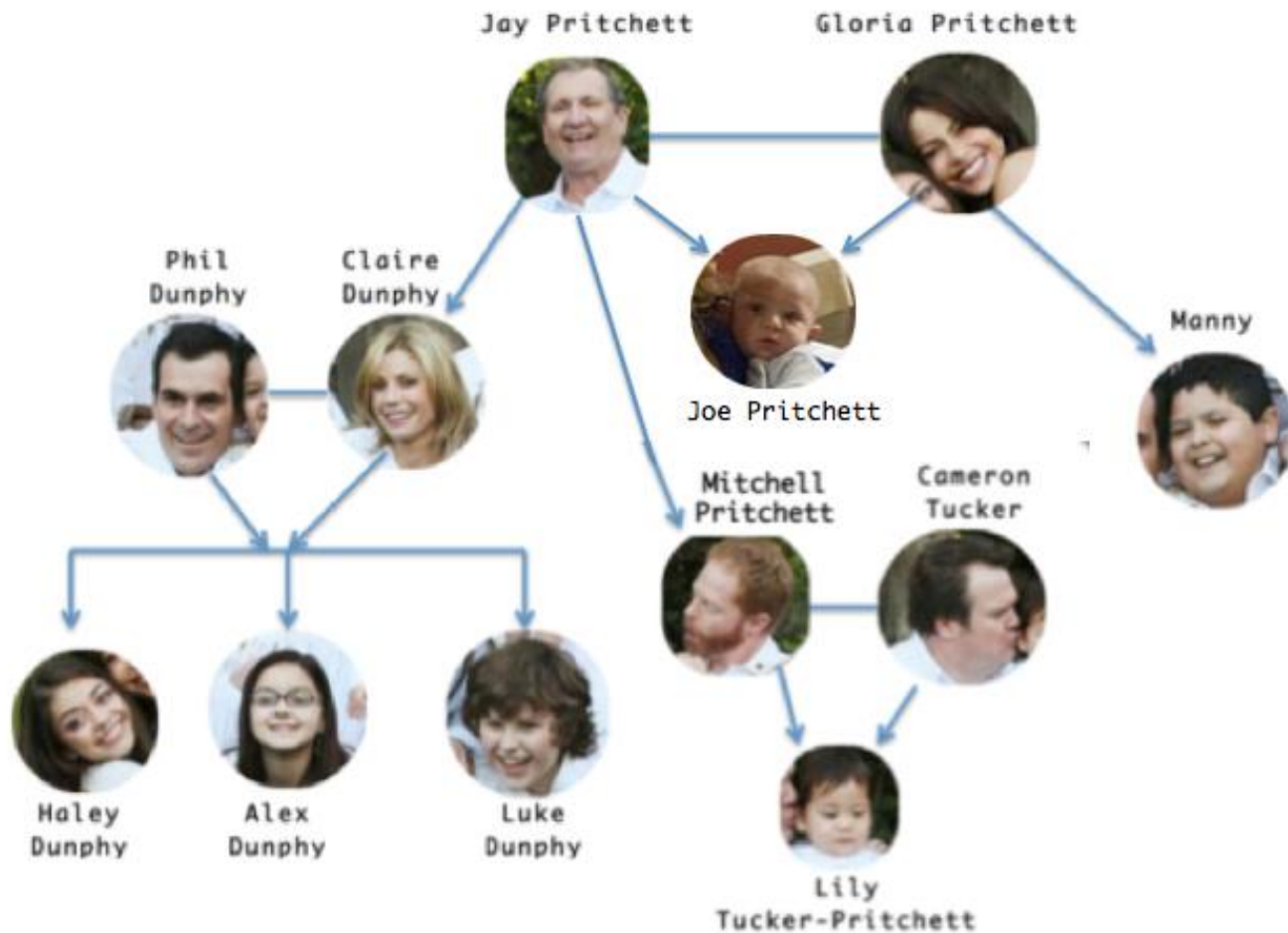




Pugsley and Wednesday would receive:

- $\frac{2}{3}$ of Gomez's separate personal property
- Gomez's separate real property, subject to Morticia's $\frac{1}{3}$ life estate

But what about a more Modern Family? What happens if Jay dies without a Will?



What does Gloria get if Jay dies without a Will?

Since Jay has two children from a prior marriage, Texas law provides that Gloria would receive:

- $\frac{1}{2}$ (her half) of the community property
- Homestead right to live in the house for the rest of her life
- $\frac{1}{3}$ life estate in Jay's separate real property
- $\frac{1}{3}$ of Jay's separate personal property



Claire, Mitchell, and toddler Joe get:

- **Jay's share of the community property**
- **2/3 of Jay's separate personal property**
- **Jay's separate real property, subject to Gloria's 1/3 life estate**



This is
probably
NOT what
Gloria
was
expecting.



IF YOU ARE MARRIED AND DIE INTESTATE:

Survived by Spouse and No Descendants, like
Leonard and Penny

Separate Personal Property

All to surviving spouse

Separate Real Property

$\frac{1}{2}$ to surviving spouse

$\frac{1}{2}$ to Decedent's parents
and/or siblings

Community Property

All to surviving spouse



So, how can I avoid all this intestacy stuff?

- Will -or-
- Revocable Living Trust

What's the difference?

- A Will is a document in which you specify exactly how you want your property to pass
- No property is actually transferred until you die and your Will is probated
- Your Will can name who you would like to serve as independent executor and/or trustee of any trusts created under your Will
- Your Will can name who you would like to serve as guardian of any minor children

Revocable Living Trust

- Created during your lifetime
- Your assets are transferred into the trust during your lifetime
- You can be named as Trustee, and specify who you would like to be Trustee upon your death or incapacity
- Trust property can be designated to pass as you wish
- If properly administered, may avoid probate

-BUT-

- If not properly administered, a living trust can end up creating a big mess, with part of the property being in the trust, and part never getting into the trust and having to go through probate, and fights about what was in the trust or not in the trust, so this option is **not** for everybody; also, even if it does avoid probate, it does not avoid work

You might consider a living trust if:

- You own property in states outside of Texas
- You expect to move around to other states
- Privacy is a big concern
- You want more sophisticated planning in place in the event you become incapacitated
- You expect family members to attack your estate plan

For many people in Texas:

- A regular Will is sufficient
- Probate in Texas is less burdensome than in most (or all?) other states
- It usually costs less to have a Will prepared than a living trust
- There are no “extra” tax benefits to having a living trust as opposed to a Will—the same tax planning can be done in either one

Estate Tax Basics

- Imposed on every asset that you own or have control over when you die
 - Includes insurance proceeds
- Exemptions from estate tax
 - \$11,200,000 exemption for 2018 (but this higher amount expires in 2025)
 - Unlimited marital deduction for gifts to spouse who is a U.S. citizen
 - Charitable deduction for gifts to charity

Can I use my spouse's exemption as well as my own?

- You may be able to rely on a relatively new feature in the law referred to as “Portability of the Unused Exemption Amount”
- To take advantage of this law, the surviving spouse must file a federal estate tax return (Form 706) when the first spouse dies, even if there was no taxable estate
- Surviving spouse can lose this benefit if he or she remarries and outlives the next spouse

Gift Tax Basics

(outright or in trust)

- Gifts to U. S. citizen spouse
 - Qualify for gift tax marital deduction
- \$15,000 annual exclusion gifts
- Larger gifts to use up your exemption amount while you are alive
- Gifts for medical or tuition expenses (Watch out—these must be made directly to the provider!)

Planning for You Before You Die

- Statutory Durable Power of Attorney
- Medical documents
- Declaration of Guardian in the event of incapacity (also naming those who are disqualified from serving)
- Appointment of Agent for Disposition of Remains

Statutory Durable Power of Attorney

- This document names an agent who can handle your business affairs
- It can be made effective immediately or only upon your incapacity
- It is a very powerful document, so be careful who you name as your agent
- Your agent can take all your money while you are alive so there is nothing left to pass under your Will! (It would be a breach of the agent's fiduciary duty, but the bank who gave all the money to the agent will not be liable.)

Important note for the charitably inclined

- If you want your agent to be able to fulfill existing pledges or make gifts to charities you have supported in the past, you must specifically authorize these activities in the power of attorney itself
- (Same rule applies if you want your agent to be able to make gifts to family members)

Medical Documents: Advance Directives

- Medical Power of Attorney
- Directive to Physicians / Living Will
- Out-of-Hospital Do Not Resuscitate Order

Medical Power of Attorney

- Names an agent to make medical decisions for you in the event you are not able to make them for yourself.
- You can have this in addition to a Directive to Physicians or by itself

Directive to Physicians / Living Will

- Does not designate an agent but gives direction on whether to administer, withhold, or withdraw life support if you have:
 - Terminal Condition (likely to produce death within 6 months)
 - Irreversible Condition (patient is unable to make decisions and would die without life-sustaining treatment)

HIPAA RELEASE FORM

- The medical privacy law has had some unintended consequences
- You want to be sure that the people you want involved in your healthcare decisions, and in particular the person you have named as your agent under a Medical Power of Attorney, have access to your medical records
- Power is effective immediately

Declaration of Guardian

- Names who you will like to be in control of your person and/or estate in the event you become incapacitated and in need of a guardian
- A court hearing an application for appointment of guardian **shall appoint** the person designated in the Declaration of Guardian unless the court finds that the person designated is **disqualified** or **would not serve the best interests** of the incapacitated person

Tex. Estates Code § 1104.202(a)

Don't let Uncle Fester be my guardian!



- If you specify who is disqualified from serving as guardian, a court **MAY NOT UNDER ANY CIRCUMSTANCES** appoint such person(s) as guardian. Tex. Estates Code § 1104.202(b)

What about organ donation?

- There is a statewide registry
- www.donatelifetexas.org

Can't I just do this myself?

- Hand-written Will on the back of a napkin
- “Found this form on the internet”

Do it yourself = More work for my colleagues and me later!

- Unintended consequences
- Often more heartache and expense in the long run