Estate Planning 101

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I. What is estate planning?

It simply means planning what will happen with your property at the time of your death. It includes wills, possibly trusts, and maybe family partnerships. It may include providing for guardians for disabled people or minors. It expands to include pre-death planning such as powers of attorney and living wills and possibly competency issues.

A. The first question for the client is "Do you have an estate plan?"

Everyone needs some plan.

Some common excuses for no plan are:

"I don't have an 'estate'. I only have a house and money in the bank."

"I need to wait to do an estate plan until all my children can be in town to talk to me about it."

"I did a will about 25 years ago and I am sure it is still ok."

"My spouse is not well, and I don't want to talk to him/her about it."

****Most Common:** "I don't have to do an estate planning since Louisiana doesn't have forced heirship anymore."

****Most Erroneous:** "My only child is disabled so I can't make a will."

"I don't have thousands of dollars to spend on legal fees."

"I can just get a form off the internet and fill in the blanks."

B. What sort of estate plan should I have?

What kind of estate plan do **you** want?

For instance -- a client comes in and wants to leave his property, which consists of 5 rental properties (two have mortgages on them) and a family home, along with some cash in the bank to his four children, three of whom live in other states, with his current wife having the income for life of all of the rental income, but one child who lives here to continue to live rent free in one of the homes with his grandchild.

Problems - one child living rent free---who is responsible for insurance, taxes, maintenance and upkeep? Is the child who doesn't work disabled or on any kind of government assistance? If so, for that child to inherit may jeopardize government assistance. The surviving spouse can't refinance without the agreement of all children. What if the spouse remarries? Out of state children are not happy with this arrangement.

Some options: spendthrift trust for one child who lives here with funding for house maintenance and house going into trust; family partnership for other rental properties; give family home outright to surviving spouse.

I. Everyone needs a Will

A. What happens without a will?

1. Community property (acquired during the marriage) is divided:

½ to spouse

½ to children, subject to spouse's right to use the property until remarriage.

*This is not forced heirship. This is an "intestate succession" or what happens without a Will.

If you don't want the above to happen, you must write a Will!

2. Separate property goes to children.

B. Types of Wills

1. There are several types of Wills. The most common are:

a. Olographic or handwritten. (It must be entirely written, dated and signed by the person making the Will. There must be no other signatures or writing on the Will. Don't let anyone else sign it!)

b. Statutory. A typewritten Will with a Notary and two witnesses. Has several other requirements.

C. How long does it take?

1. It usually takes about a week after our initial meeting to have the

Will drafted and a meeting to execute the Will. It may be shorter or longer, depending on the complexity of the Will and the business of the office.

D. Restrictions on Wills.

1. We still have forced heirship for children who are under 23 or disabled. These children will have a share in the estate whether you provide for them or not, unless they are disinherited.

2. You may not place certain types of restrictions on gifts in the Will, such as:

   a. "prohibited substitution" - for example: "I leave my gold ring to Jim, until he dies, then it is to go to John", etc.

   b. restrictions that are found to be "against public policy" - for example: "I leave my home to Alice, provided she never marries." You may say "provided she is not married at the time of my death".

3. Have your Will drafted by a person who is knowledgeable about them, or at least have your Will checked by an attorney.

E. Executors and Administrators

1. Executors. An executor is a person named in the Will to be responsible for having the Will probated and carrying out the wishes of the person who has died.

2. Administrators. An administrator may be named in the Will. This person is responsible for administering the estate while the legal work is pending.

3. Normally, an executor is all that is required. Most people name their spouse or child. It should be someone who knows where your Will and personal papers are, who is in your community or can be here, and who you trust. The attorney will tell the executor what he or she needs to do.

F. If I change my mind.

1. If you want to change your Will, have a new Will drafted and destroy the old one.

G. Probate or "Filing Wills"

1. What Probate Means.

a. Probate means the formal filing and recognition of the Will as the Last Will and Testament of the deceased person. There are several legal requirements and documents to be prepared. It is necessary to have an attorney do this. After the person dies, the executor or other interested person meets with an attorney and brings the original Will.

b. If there is no Will, there is no "probate", but a legal proceeding still needs to be done in order to transfer assets to the heirs.

2. Requirements.

a. Original Will;

b. Affidavit of Death and Heirship;

c. There is no need for a hearing, unless the Judge requests

one.

3. Before death, the Will is not "filed", but is kept with the personal papers of the person who made the Will.

III. Do I need a trust?

A. Method of taking property out of estate;

B. Method of giving money with restrictions;

C. Can be done now - funded part now, part later;

D. Trust becomes separate entity.

E. Some living trusts do not qualify for homestead exemption.

IV. How is the estate administered?

A. If necessary, after the Will is probated, there will be a period of "administration" when the debts of the succession are paid and a proposed distribution of the estate is done. Most of the time, no formal administration is necessary -- as long as the estate has more assets than debts. The attorney will advise the executor if an administration needs to be done. This is normally not necessary for a small succession.

B. One problem that has been common recently is how to administer an estate when there are forced heirs who refuse to accept or reject and perhaps the surviving spouse cannot continue to make the house payments, car payments, etc. As a part of an administrative procedure, we can obtain a Court order allowing the sale for not less than the

appraised price.

V. Succession or Placing the Heirs in Possession

A. Normally, after the Will is probated, the attorney will proceed to draft the documents placing the heirs in possession of the property. In order to do this, all property and debts of the deceased person must be listed. The succession information sheet is filled out by the survivor and brought in to the attorney. All property should be listed regardless of whose name it is in, unless:

1. The spouses had a separate property agreement. If so, list only property and debts in the name of the deceased person.

2. Property acquired by inheritance or before marriage by surviving spouse (surviving spouse's separate property).

3. Life insurance to a named beneficiary.

4. IRA's to named beneficiary.

5. Property in a trust may not be included.

VI. Costs

A. For “Succession”.

1. Filing costs depends on parish;

2. Attorney's fees --- set fee vs. percentage;

3. Executor's fee or administrator's fees (may be waived).

B. For Will

C. For Trust

D. For Power of Attorney

VII. Louisiana Estate and Inheritance Tax- no longer exists for persons dying after June 30, 2004.

VIII. Federal Estate Taxes

A. Current exemption is $5 million per person.

IX. "Living Wills"

A. This is simply a form directing your physician or hospital not to keep you alive on life support systems should two (2) physicians certify that you are in a persistent vegetative state with no chance for recovery and naming someone to make your decisions for you should you become unable to communicate with health care providers.

X. Powers of Attorney

A. Used only while person still alive;

B. Give only to one you trust;

C. Can be broad or limited;

D. Filed in courthouse of parish you live in when needed.

XI. Divorce Issues

A. Additional estate planning considerations in the event of divorce or remarriage:

1. Immediately:

a. Review will or write a will specifying how your property is to be divided after death.

b. Review all beneficiaries on insurance policies, retirement plans, etc. and change beneficiaries, if necessary.

c. If you have minor children, designate tutors to care for the child and/or to care for assets left to the child.

d. Consider the use of a “spendthrif” trust to have assets held for the child past age 18.

Common Questions on Estate Planning:

A. Do I need a Will?

You must have a will to leave your property to someone other than your children. For instance, if you have property that you want to leave to your spouse, you must have a will in order to leave your share of any property to your spouse or to anyone other than your children. You must have a will to designate an executor/executrix of your estate. You must have a will to leave any particular items or gifts to anyone other than your children in equal shares. You must have a will to disinherit someone. You must have a will to give a lifetime usufruct to your spouse or to another person.

B. If I have a will made several years ago, is it still valid?

A will does not expire by lapse of time unless it is not probated for five (5) years after a judicial opening of a succession. If you desire to make changes, you may want to update the will.

C. Is it okay to have a handwritten will?

You may have a handwritten will but it must be **entirely** written, dated and signed by the person making the will. It must not be notarized, witnessed or typed. If you intend to do this type of will it might be a good idea to have an attorney review it to make sure it is valid.

WILLS PRINTED OFF THE INTERNET ARE USUALLY NOT VALID IN LOUISIANA.

D. Do I have to list personal items, such as personal belongings or

household items that may have little value in my will?

You can list these in your will or you can direct your executor to dispose of your personal effects in accordance with a letter attached to the will.

E. If I want to change my will, can I simply write on a piece of paper what my changes are or mark out on the will what I want to change?

No. Any changes on the will have to be done by a codicil, which must be in the same form as a will and witnessed and notarized, or you must make a new will. Most of the time, it is just as easy to make a new will.

F. Where should I keep the will?

The original will is given to you when it is signed. I keep a copy in my office. You should keep the original in a fire-proof place or in a place where it will not get lost or misplaced. You may put it in a safety deposit box, but make sure that someone other than yourself has access to the safety deposit box so that it can be retrieved in case of death.

G. Who should have a copy of the will?

Anyone that you want to have a copy. If you want your children to have a copy, that is fine. If you do not want anyone else to have a copy that is entirely up to you.

H. What if the will is lost?

If the will is lost, we can probate a copy of the will. We just have to make a search for the original and insure that there

has not been a new will made.

I. Is my will valid?

It is not valid if it is not in acceptable Louisiana form or a form recognized by the state where the will was executed. Common problems: husband and wife have a “joint” will. Louisiana does not recognize “joint” wills, therefore, making a “joint” will invalid; a will is drafted but not signed; a will is signed but not drafted correctly; a will does not dispose of all of a person's assets; a person attempts to make a will at home but types it or gets it witnessed and notarized; a person has a prohibited substitution; the will does not name anyone as executor or it names too many as executor; or an attorney you do not want to use is named.

Questions on Inheritance Laws:

A. What is forced heirship?

Forced heirship means that regardless of what you say in a will, your children must inherit a share of your estate (¼ if you leave one child; ½ if you leave two or more children). That inheritance may be subject to a lifetime usufruct in favor of the other spouse. Other restrictions may be placed on that forced inheritance, such as placing it in trust. We no longer have forced heirship for non-disabled children over age 23.

B. How can I protect myself in the event of changes if I have children under 23?

What I would suggest is having a will that takes care of both situations. In other words, if you desire to leave everything to your spouse, go ahead and write the will that way, but then put a provision for what will occur if forced heirship applies. If you do not have a will, forced heirship is not an issue for you because your children are going to inherit your estate subject to your spouse's right to use community property until remarriage. This is not forced heirship, this is what happens without a will.

For minors or disabled children, property may be left in trust.

C. If I have a will leaving everything to my spouse, not making any provision for forced heirship, but I have forced heirs, is my will invalid?

No. If your will leaves everything to your spouse, the will is simply considered "reformed" to leave the maximum amount you could leave to your spouse with a legal (or until remarriage) right to use.

D. My children (under 23 or disabled) have been unkind to me -- Do I still have to leave them a share of my estate?

If you wish to delete them from your estate they must be specifically disinherited -- that means you must say in your will that you disinherit them and you must state why.

If you simply make a will and don't mention anything about a particular child who qualifies as a forced heir, that child will be considered a forced heir and will receive his or her share of the estate. You will have to specifically disinherit them and state the reasons.

E. If my children are forced heirs and I wish to sell my home do I have to obtain their consent?

Yes.

F. Do I have to pay them their share of the estate?

Not if they agree for the usufruct to attach to the proceeds. As a practical matter, most children will not agree to sell unless they receive their share at the time of the sale. Article 615 of the Louisiana Civil Code says that when property is sold by agreement, the usufruct attaches to the proceeds of the sale unless the parties provide otherwise.

Questions regarding Trusts:

1. What is a living trust?

   Trusts are simply a measure of transferring property out of your estate. Trusts are of two (2) main types: a living trust, which transfers property out of your estate while you are still alive, and a trust which is in connection with your will which comes into effect upon your death. You transfer property to a trust with a trustee or manager of the property. You can place restrictions on property held in trust, such as grandchildren cannot receive their share until they reach the age of majority, etc.

2. Does a living trust "avoid probate"?

   Living trusts have been recently touted as a way to "avoid probate." This is basically a fallacy because you still need what is called a "pour-over will" which will have to be probated for a succession proceeding.

3. Does a living trust save money?

   Probate does not have to be expensive or time consuming. Many times the amounts that are charged for setting up living trusts (as well as the appropriate filing costs at the time they are set up or the time of death) exceed what would be charged for a normal succession procedure which would include probating a will.

4. Does a living trust save taxes?

   A living trust does not necessarily save on inheritance taxes. As mentioned earlier, there is no longer any Louisiana Inheritance Tax. In order to be subject to federal inheritance taxes, your estate must exceed $5 million. If you are not in that tax bracket you basically

have no need to set up a living trust for tax reasons. Also if you are transferring the property pursuant to a living trust to avoid inheritance taxes, it must be an irrevocable transfer of assets. If you do not wish to make it irrevocable (that means you cannot change your mind and get your money back from the trust if you decide you don't like it or don't want to keep the trust going) then you have not accomplished anything because a living trust must be irrevocable to actually take the property out of your estate for tax purposes. Many things already do not pass under a will such as an IRA or life insurance which is often the bulk of the assets. So, I would caution people to make sure to first ask themselves: Why am I setting up a living trust? What am I trying to accomplish? Is this actually going to accomplish what I wish it to? Is it going to save me money by "avoiding probate"? Is it going to save me or actually be more time consuming and costly?

5. I am using a "living trust" company -- is this valid?

There are a lot of companies that contact senior citizens and tout these living trusts as some sort of an answer to everything --- an answer to forced heirship, an answer to the costs of probate and succession. I would make sure that whatever you are given, you have it reviewed by an attorney so that you can insure that it is accomplishing what you wish to accomplish.

6. Are there other reasons to have a living trust?

One common reason for a trust is setting up a living trust for the benefit of an elderly parent or relative or for minors or disabled children to have another person manage assets.

7. Can I put all of my property in a living trust and thus get around forced heirship?

No, but the forced portion can be placed in trust if certain conditions

are met. You cannot get around forced heirship entirely by placing the forced portion in trust, but you can make it subject to restrictions similar to a usufruct.

Common questions regarding probate:

1. What do I need to give the attorney?

   Fill out a probate worksheet.

2. Do I only list property that is in the deceased person's name?

   No. List all property in either name unless it is your separate property (something you inherited or was given to you only).

3. Can I sell a car before this is finished?

   No. Normally you will need a Judgment of Possession or other court order.

4. How long does it take?

   It normally takes approximately two (2) months to complete succession. This two (2) months is from the time that I get all of the information that I need from you.

5. How much does it cost?

   The average succession fees, which include probate, state inheritance tax filing, and completion of the succession are $800-$1,000.00. This does not include court costs which usually are between $250.00 and $400.00.

6. Will I have to pay inheritance taxes and if so, how much?

Not likely.

7. Do you need a copy of the death certificate?

No.

8. My children live out-of-town. Do they need to sign anything?

In the event your children need to sign anything, it will be mailed to them.

9. Has the bank frozen our assets?

No. A spouse may use up to $10,000.00 in any joint account without authority.

10. Can I leave town while this is pending?

Yes. Any necessary documents may be mailed.

ATTACHMENT:

1) Probate Worksheet

2) Power of Attorney Worksheet

3) Will Worksheet