

ESTATE PLANNING GUIDE

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BASIC ESTATE PLANNING

I. POSSIBLE GOALS OF AN ESTATE PLAN

- A. To provide for yourself during the balance of your lifetime, especially during your retirement years.
- B. To provide for the support and security of your surviving spouse.
- C. To provide for the support and security of minor children, as well as protect them and incapacitated adult children.
- D. Education of children, grandchildren.
- E. To protect a family business.
- F. To assure that assets are distributed as you desire.
- G. To make final charitable gifts.
- H. To minimize death taxes, federal estate taxes and state inheritance and estate taxes. Death taxes are governmental assessments on your right to pass ownership of your assets at death.
- I. To minimize or avoid administration ("probate") expenses.
- J. Creditor protection.

II. DETERRENTS TO ESTABLISHING AN EFFECTIVE ESTATE PLAN

- A. Costs, principally legal fees, vary widely by nature of an individual's estate, goals, geographic area and specialized experience of attorney.
- B. The results are intangible. There is no immediate advantage to you, except possibly peace of mind.
- C. Emotional impact of confronting death now.
- D. Personal time expenditure.
- E. Proper estate planning is detailed and sometimes complex.

III. WHAT HAPPENS WITHOUT AN ESTATE PLAN?

- A. Statutory Will.
 - 1. If an individual owning property in his/her own name (including an interest in a tenancy in common) dies without a will, state statutes

provide a will. For example, in Nebraska, if Harold dies without a will and is survived by a wife and two children, his wife gets \$50,000 plus one-half of the assets above \$50,000 and the children divide the remaining balance.

2. Statutory wills allow the court system, instead of you, to take care of such important functions as designating a personal representative for the estate, designating a guardian for minor children, protecting a family business, etc.
 3. Having a portion of the estate pass to the children when a spouse is surviving can be extremely detrimental to that spouse, especially if the estate is not large. What if the surviving spouse needs the children's share to support him or her?
 4. A statutory will passes assets outright to minor children. A cumbersome and expensive conservatorship must be established to hold such assets. Sale of assets of the conservatorship, especially real estate, can be expensive and difficult. Children receive the assets outright at the age of 19.
- B. Lack of proper planning can result in death taxes being payable at the first spouse's death in large estates because of failure to take advantage of the unlimited marital deduction.
- C. Improper or lack of planning can cost a lot of tax dollars by failure to use the various tax deductions and credits available.
- D. Estate settlement costs may eat up a significant portion of the estate.

IV. **WHEN TO REVIEW YOUR ESTATE PLAN**

- A. A move to another state.
- B. A significant change in assets (including an inheritance).
- C. A change in family situation.
- D. Retirement.
- E. Law changes.
- F. At least every five years.

V. **FORMS OF PROPERTY OWNERSHIP**

- A. Sole Ownership. Title to an asset is held in an individual's name only. Ownership is passed at death by will or statute through a probate proceeding.

- B. Joint Ownership. Title to an asset is held in the names of two or more persons as joint tenants with rights of survivorship (JTWROS). Each joint tenant, normally, owns an undivided interest in the whole asset. At the death of a joint tenant, ownership of the whole asset passes outright to the survivor(s).
- C. Tenancy-In-Common. Title to an asset is held in names of two or more persons who each hold an undivided interest without right of survivorship. When a co-owner dies, his or her interest in the asset must be passed by will or statute through a probate proceeding.
- D. Contractual Designations. Economic benefits of an asset pass at death by virtue of owner's contractual rights to designate a beneficiary. Examples are: life insurance, annuities and retirement plan accounts. These assets will pass to the beneficiary of record. When you name your estate as the beneficiary of these assets, the asset will be subject to probate.
- E. Custodian for a Minor (UGMA or UTMA). An adult holds property in a restricted account for the benefit of a minor. When the minor reaches the age of majority, he or she is entitled to the assets that have been held for his or her benefit.
- F. Trust. A trustee of a trust holds legal title for the beneficiaries, who have equitable title. Assets held in trust are passed outside of probate.
- G. Most Common Ownership Error. The most common error is the titling of assets in a manner that results in a tenancy in common rather than in a joint tenancy with rights of survivorship. This is common in home titling but also happens with other assets. Often, the owners are unaware of the error.

VI. USE OF JOINT OWNERSHIP IN LIEU OF A WILL

- A. Passing assets by joint tenancy results in a probate free transfer to the surviving joint tenant(s).
- B. Disadvantages.
 1. What happens when the surviving joint tenant dies? If he or she has no will, you're back to a statutory will situation. You have no control as to what ultimately happens to the asset.
 2. What happens if there is a simultaneous death? By statute, ½ of the joint assets will be probated and distributed through the husband's estate as if the wife died first. The other ½ will be probated and distributed through the wife's estate as if the husband died first. We then have the cost and inconvenience of two simultaneous probate proceedings.

C. Joint Ownership with Children and Non-spouses.

1. With limited exceptions, joint tenancies can be severed at any time by any joint tenant, or his or her creditors. This means each joint tenant gets his or her proportionate share of the asset, or a forced sale must occur.
2. Joint tenancy with your children can result in assets going to the joint tenant now, or being subject to the child's debts and liabilities.
3. Joint tenancy with children or others creates a question as to who is legally responsible for reporting the income from such property.

VII. SIMPLE WILL

A. "Simple will" is a term for a will when no trusts are created or utilized in the estate plan.

B. Simple wills suffice in small estates with no minor children or complications. (Estates under \$25,000 can be passed by affidavit.)

C. Basic Elements of a Will.

1. Identification of your heirs and beneficiaries.
2. Designation of a personal representative.
3. Designation of a guardian, and successors, for minor children.
4. Disposition of your solely owned assets to spouse, children, grandchildren, other relatives and friends and/or charity.
5. Special provisions regarding personal effects and home.

D. Legal Requirements for Execution of a Will.

1. Maker must be at least 18 years of age (if married can be younger than 18) and of sound mind.
2. Must be in writing and signed by maker (another individual may sign maker's name if in maker's presence and by maker's direction).
3. Must be signed by at least two witnesses who either see the maker sign or are told by the maker that the signature is his or hers. Witnesses should be independent.
4. Can have a self-proving affidavit.

5. The above are requirements of the Nebraska statutes. Normally, if you comply with the requirements of the state in which the will is signed, it will be recognized by other states.
6. Holographic (handwritten wills) are legal in Nebraska. A handwritten will complying with the holographic wills is likely to be more effective than poor use of a computer form.

E. Other Elements Involved In Making a Will.

1. Survivorship provisions. You may condition a bequest or devise on that person surviving you for a specific period of time - say six months. These clauses will delay the availability of assets to the heir. You can provide who shall be presumed the survivor in the event of a joint death, if you want something other than the presumption provided by statute.
2. You can specify who bears the burden of death taxes.
3. If liquidity is a problem, you can specify the method you desire for your estate to raise funds to pay death taxes, claims and administration expenses.
4. You can specify administrative provisions for personal representatives.
5. You can eliminate the necessity of a bond for fiduciaries, including personal representatives, guardians and trustees.
6. Funeral and burial arrangements do not belong in your will. The will has no legal status until approved by your local county court and the appointment of a personal representative is completed. You will normally be buried before that is accomplished. Make your wishes known to your family.

F. Selecting a Personal Representative.

1. A personal representative takes possession of your solely-owned assets, administers them, collects income, pays legal creditors and claims, pays taxes and administration expenses and distributes the balance of the estate as you specify in your will to your heirs and beneficiaries.
2. You should provide for successors in the event your first choice dies, declines or is refused by the court.

3. Possible Choices.

- a. A spouse. Do you want to designate a spouse?
- b. One or more of your children. Does the child have the time or experience? Will it cause friction with the surviving spouse or between your children?
- c. Another individual, especially one experienced in business.
- d. Your attorney or accountant. Naming your attorney or accountant is generally a poor choice. There are inherent conflicts of interest and an absence of cross-checks.
- e. A bank trust department or other corporate trustee. A corporate trustee is a conservative choice.

G. Guardianship/Conservatorship for Minors.

1. Applies to unmarried persons under age 19 (in Nebraska).
2. Can separate guardian of person and guardian of property (commonly referred to as “conservator”).
3. A guardianship/conservatorship provision in your will is really only a nomination and it must be accepted and approved by the county court, which normally complies with the nomination. A minor who is age 14 or over does have a significant say in the selection process.
4. Guardianships should take into account geographic location, the child's religious upbringing, emotional needs and preferences and the guardian's willingness to act. Successors should be specified in the event of guardian's death, unwillingness to accept appointment, etc.
5. Conservatorships are far less preferable to trust arrangements because:
 - a. They terminate at age 19 and all remaining assets are then distributed to the child. A trust allows holding the assets to a more mature age.
 - b. The conservator is usually inexperienced at managing property.
 - c. Assets are sometimes abused by financially pressed

conservators. Always consider the possibility of life changes for a potential conservator. For example, consider the possibility of a drinking or gambling problem.

- d. Investment and usage of assets are regulated and restricted by statute and court.
- e. Conservatorship funds may be used for the minors "support". What does this mean? Can funds be used for college expenses?

VIII. USING TRUSTS IN ESTATE PLANNING

A. Trusts Generally.

- 1. A trust is an arrangement whereby a party called a trustee holds, invests, administers and distributes property for the benefit of or to the creator of the trust (settlor), his or her spouse, his or her children and descendants, or other beneficiaries. The trustee can be a bank trust department, an individual, more than one individual or a combination.
- 2. Two Broad Types of Trusts:
 - a. A Testamentary Trust is one set up in your will. Your will specifies all the terms of the trust. It cannot come into existence until after your death. If your will fails, the Testamentary Trust fails. This type of trust requires supervision and approval by the county court and can be expensive.
 - b. An Inter Vivos Trust (between living persons) is established through a separate trust document. The trust comes into existence immediately.

B. Some Applications of Living Trusts:

- 1. Trusts are the best way to minimize federal estate taxes.
- 2. A trust can be used to hold your assets during your lifetime to help protect your assets should you become disabled or mentally incompetent. It is highly preferable to a legal conservatorship. Normally, a trust will not protect the settlor from his or her creditors.
- 3. A trust is the best way to protect and conserve the estate for a surviving spouse, if one, and ultimately, for children or other heirs.

A trust provides the spouse and/or children/other heirs with investment guidance and administrative assistance. The ultimate heirs are protected from mismanagement of the estate assets, from a new spouse for your surviving spouse, from creditors' claims (including personal injury type claimants), disability or incompetence, relatives, salesmen, additional marriages, etc.

4. Trusts are the best way of holding property for minor children. You can control the age or ages at which they receive the property outright. You can specify how the property is to be invested and how it is to be used for the minor. There is no expensive and restricted control by the courts and reports are available only to beneficiaries and their guardians. Trusts may establish criteria that children must meet to receive distributions.
5. Trusts can be used to protect other relatives or friends. For example, if you want to protect your mother, you can set up a trust for her support, to the extent needed. Then when she dies, any assets remaining go to the persons you designate. If you give the assets outright to your mother, she will then control where they go at her death.
6. Trusts (revocable) are the best way to avoid probate.
7. Trusts are usually coupled with what is called a "pour over will". Such a will specifies that at your death a part or all of your assets pass to a trust set up by you during your lifetime.

C. Avoiding Probate.

1. Probate is a legal procedure conducted through the county court (in Nebraska). One purpose of probate is to assure the orderly passage of title to solely owned assets. A frequently cited reason for probate is that of assuring creditors' claims and death taxes get paid. Often, the cited purposes of probate can usually be accomplished without probate.
2. Disadvantages of Probate.
 - a. Cost.
 - b. Delay.
 - c. Public proceeding.
3. Methods to Avoid Probate.
 - a. Joint tenancy.

- b. Trusts.
- c. Beneficiary designations.

D. Reducing Estate Taxes.

1. Federal estate taxes are only a factor in estates larger than the exemption equivalent to the applicable credit (increasing gradually to \$3,500,000 in 2009).
2. Nebraska Estate Tax.
 - a. Nebraska taxable estate means federal taxable estate minus \$1,000,000. Under present Nebraska law, an estate that is not subject to federal estate tax may be subject to state estate tax.
 - b. Graduated tax rate 5.6% to 16.8% at \$9,000,000.
3. Determining Your Gross Estate for Federal Estate Tax Purposes.
 - a. Gross estate includes the fair market value of all assets owned by you as of the date of your death including the face value of life insurance.
 - b. Includes property you transferred during your life but in which you retained an interest. Exercise care in lifetime gifting to avoid assets being “brought back” into your estate.
 - c. Retirement benefits.
 - d. Jointly held property.
 - e. Use fair market value.
 - f. Most people underestimate the size of their estate. Be complete and realistic.
4. Federal Estate Tax Deductions.
 - a. 100% unlimited marital deduction for property passing outright to the spouse or in a specific type of trust.

- b. Applicable credit results in exemption of property. A married couple has two exemptions, one for each spouse. Effective estate planning can currently pass \$3,000,000 (in 2004) of assets from a husband and wife to their children or other heirs, estate tax free. An unmarried person can pass \$1,500,000 estate tax free to his or her heirs.
 - c. Charitable Deduction for gifts to charities, including public charities, private foundations or charitable remainder trusts.
 - d. Claims, mortgages, and administrative expenses.
- 5. An improperly planned estate can result in unnecessary estate tax.
 - 6. A properly planned estate protects from any sequence of deaths. Those with spouses should consider an asset structure and estate plan that uses the applicable credit of each spouse.

IX. DISCLAIMER PLANNING

- A. Disclaimer Planning is an estate planning method that has gained popularity in recent years due to the uncertainty of the estate tax structure.
- B. A Disclaimer Plan is one that leaves much of the decision making to survivors after your death.
- C. One example of disclaimer planning is a plan whereby you designate a spouse or other as beneficiary of all your assets. A trust is named contingent beneficiary. After your death, if it makes sense, your spouse or other beneficiary can disclaim all or part of his or her inheritance, in which your trust is the beneficiary of your assets. The trust might provide for children, nieces and nephews, charity, etc.
- D. Unique considerations:
 - 1. Remarriage of a surviving spouse. Assets may become available to new spouse.
 - 2. Inherited Assets.
 - 3. Family Business.

X. TYPES OF TRUSTS

- A. Irrevocable Life Insurance Trust.
- B. Special Needs Trust.
- C. QTIP.
- D. Conduit Trust for Retirement Plan Benefits.
- E. Grantor Retained Annuity Trust – “GRAT”.
- F. Incentive Trusts.
- G. Dynasty Trusts.
- H. Asset Protect Trusts.
- I. Defective Grantor Trusts.

XI. RETIREMENT PLANS

- A. An estate plan should include a review of your retirement funds.
- B. Taxes on retirement plans include:
 - 1. Income taxes.
 - 2. Estate taxes.
 - 3. Penalty taxes - early withdrawal and failure to take minimum required distributions.
- C. Minimum distributions are required at age 70½. Distributions should be planned carefully.
- D. Beneficiaries of retirement funds are best directed to:
 - 1. Spouse and/or adult children.
 - 2. Charity.
 - 3. Conduit or QTIP Trust.
- E. A spouse beneficiary may roll over account and treat as his/her own.

XII. LIFE INSURANCE IN YOUR ESTATE PLAN

- A. Face value of policies owned by decedent is included in estate for federal estate tax purposes.
- B. Life Insurance serves a variety of purposes.
 - 1. Pay taxes and expenses.
 - 2. Fund Buy-Sell Agreements.
 - 3. Estate liquidity.
- C. Irrevocable Life Insurance Trusts move insurance proceeds outside of your estate.
- D. Life insurance *transferred* within 3 years of death is included in estate.

XIII. LIFETIME GIFTING

- A. You can make gifts to any donee of up to \$12,000 per year in 2006.
- B. There is an unlimited exclusion for certain tuition and medical payments.
- C. 529 Plans. Nebraska has tax deduction.
- D. UGMA/UTMA accounts for minors. Kiddie tax to age 14.
- E. In asset selection, consider reduction of estate now vs. step-up in basis of assets held at death.
- F. There are a wide variety of gifting strategies. Appropriate strategy depends on your asset structure and desires.
- G. “Leveraged” gifting can significantly reduce estate and resulting taxes.
- H. One technique to gifting is the use of trusts.
- I. Another approach to gifting is to set up a business entity to own property and transfer business interests to heirs. Valuation discounts are applied.
- J. Entities used for discounting are “C” Corps, “S” Corps, Family Limited Partnerships (FLPs) and Limited Liability Companies (LLCs). Each arrangement has its pros and cons. The correct tool for a particular situation is fact-dependent.
- K. Is gifting land in the path of development a good idea? No step-up in basis vs. estate tax cost of inclusion. Don’t assume. Do the math.

XIV. FAMILY LIMITED PARTNERSHIPS – FLP

- A. Settlor transfers asset to FLP in exchange for general partnership and limited partnership interests. Limited partnership interests are gifted.
- B. An uncertain area under current case law. The IRS has been successfully challenging FLP's.
- C. Discounting.
 - 1. Minority Interests.
 - 2. Lack of Marketability.
- D. Advantages.
 - 1. Control of assets.
 - 2. Valuation discount opportunities.
 - 3. Reduction of transfer taxes.
 - 4. Ease of transfers.
 - 5. Creditor protection.
- E. Disadvantages.
 - 1. Set up costs.
 - 2. IRS requirement of legitimate business purpose.
 - 3. Current target area for IRS.
 - 4. No step-up in basis of the partnership interest itself.
- F. Use FLP's effectively.
 - 1. Don't overfund the FLP.
 - 2. Keep your FLP formal.
 - 3. Give up control.
 - 4. Do it now versus on death bed.

XV. IRREVOCABLE LIFE INSURANCE TRUST

- A. Irrevocable Trust.
- B. Owns insurance policy on settlor of trust.
- C. Premiums paid by trust from gifts made to trustee by settlor.
- D. Insurance proceeds are not included in settlor's estate.
- E. Funds may be held in trust as long as settlor specifies.

XVI. DEFECTIVE GRANTOR TRUST

Increases leverage of a gift because settlor pays income tax but is out of settlor's estate for estate tax purposes.

XVII. GENERATION SKIPPING TRANSFER TAX

- A. Transfers to 3rd generation are subject to second, separate level of transfer tax.
- B. There is an exclusion from this tax (presently equal to the applicable credit), although regular gift or estate tax will continue to apply.
- C. Great flexibility concerning distributions from a GST trust.

XVIII. SPECIAL NEEDS TRUST

- A. This is a type of trust used to provide for a disabled individual eligible for governmental assistance.
- B. Such trusts are designed to avoid disqualifying the disabled individual from governmental assistance.

XIX. CHARITABLE GIVING

- A. During Life.
 - 1. A direct donation is the simplest and least expensive charitable gift.
 - 2. There are a wide variety of trust arrangements that can be used for charitable gifting. Assets can be transferred in a way that allows the donor or donor's relatives to receive income for a specified period of time with the remainder to charity. There are many alternatives to this type of planning.

3. Charitable giving can save capital gains taxes by the transfer of appreciated property, which allows the donor a deduction for fair market value.
- B. At Death.
1. A charitable gift may be made by a specific bequest in a will or trust.
 2. A charitable gift may be made by a beneficiary designation.
 3. A charitable gift taking effect at death is fully deductible from the decedent's estate.
- C. Consider current play between ordinary income tax rates and capital gains rates.

XX. AGRICULTURAL ISSUES

- A. Initiative 300.
- B. Greenbelt.
1. Recapture concerns. Challenge valuations that are too high even if you are paying taxes based on greenbelt.
 2. A new owner needs to re-apply for greenbelt.
 3. Be aware of when property will no longer be eligible for greenbelt. For example, property annexed is no longer eligible once it is within city limits.
- C. Development potential – Gift now or own at death?
- D. Special Use Valuation.
1. Decedent was a U.S. Resident.
 2. Property passes to a qualified heir.
 3. Property used for a qualified use.
 4. Decedent materially participated in use for required period.
 5. Adjusted value of property is at least 50% of gross estate.
 6. At least 25% of the adjusted value of gross estate must be qualified real property.

E. Special Use Valuation Farm Method.

Average annual gross cash rental for comparable land used for farming purposes less average annual real estate taxes for comparable land divided by average annual effective interest rate for all new farm credit loans.

F. Special Use Valuation Recapture.

1. Tax benefits are recaptured if sold or use discontinued within 10 years.
2. If recapture applies, seller likely has the cash.

G. Children Farming? Special Provisions.

H. Installment payments of Estate Tax.

1. If more than 35% of adjusted gross estate is a farm, then election may be deferred for five years (paying interest only) and then in equal installments over 10 years.
2. Disposition of the farm accelerates the payments.

I. Anti-corporate Farming – Initiative 300.

1. South Dakota version ruled unconstitutional in 2003.
2. Nebraska law exempts family farm corporations and land that will be used for another purpose within five years.
3. General partnerships are excluded from prohibition.
4. Use of an FLP or LLC requires special considerations.

J. Agricultural – Miscellaneous.

1. Conveyance of development rights to property to city considered in valuation.
2. Maintenance of five beehives is not considered farm use.

XXI. POWERS OF ATTORNEY

A. Generally.

1. A power of attorney is a written document whereby the principal empowers another person to act as his or her attorney-in-fact.

2. A power of attorney can grant authority to the attorney-in-fact to do anything the principal can do except execute or revoke a will and execute a right to die will.
 3. A general power of attorney gives the attorney-in-fact all of the powers possessed by the principal.
 4. A special power of attorney limits the powers to those powers specifically set forth in the document.
- B. A durable power of attorney survives the principal's incompetency.
- C. A springing power of attorney becomes effective only upon principal becoming incompetent.
- D. Powers of attorney executed more than five years old may be invalid due to "staleness doctrine".

XXII. ADVANCE DIRECTIVES

A. Durable Power of Attorney for Health Care.

1. You can appoint an attorney-in-fact to make health care decisions for you when you are "incapable" of making your own health care decisions.
 - a. "Health care decision" includes consent or refusal to consent to medical treatments and procedures to treat disease, injury or degenerative conditions.
 - b. You are incapable of making your health care decisions when you cannot understand the nature and consequences of such decisions. Your attending physician must make this determination in writing. You may require confirmation by a second physician.
2. Your attorney-in-fact will have the authority to consent to the withholding or withdrawing of a life-sustaining procedure or artificial nutrition and hydration only if:
 - a. Your power of attorney specifically grants that authority; AND
 - b. You are in a terminal condition or persistent vegetative state.

3. Your attorney-in-fact has the duty to act consistently with your desires as you state them in your power of attorney or otherwise make them known.
 4. You may revoke a power of attorney for health care at any time as long as you are competent and are able to communicate in any manner your intent to revoke.
- B. Declaration or "Right to Die Will".
1. A declaration allows you to express your desires with regard to life support should you become terminally ill or in a persistent vegetative state and can no longer speak for yourself.
 2. You can specify your desires concerning life sustaining treatment, artificial nutrition and hydration and relief from pain.
 3. You may revoke your declaration at any time as long as you are competent and are able to communicate in any manner your intent to revoke.
- C. Your declaration may be incorporated into a power of attorney for health care, combining and consolidating the features of both documents.

XXIII. MISCELLANEOUS

- A. Coordinate your asset ownership and beneficiary arrangements with your will and trust. The most perfect wills and trusts can be defeated by failure to coordinate your assets with them. This is a frequently overlooked or ignored procedure.

Examples:

1. Al provides in his will that son A is to get an 80 acre parcel of farmland at Al's death, even if his wife survives him. However, Al and his wife own the 80 acres jointly. How will son A get the 80 acres? When?
 2. Stan sets up an estate tax avoidance trust for his wife. However, all assets are owned jointly and life insurance is payable to the wife. The trust is left dry.
- B. Consider preparing funeral instructions. These instructions can include where you would like your services held, who you would like to perform the services, what songs and scriptures you would like to have read. You can also state your wishes regarding burial and cremation.
- C. Consider using a laundry list to dispose of personal effects, such as jewelry, furniture, clothing, antiques, china, tools and hunting and fishing equipment. Nebraska statutes

provides that a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will. Such a list, to be valid and binding, must be dated, be in the handwriting of the maker of the will or signed by him or her and must describe the items and who is to get them with reasonable certainty. The writing may be prepared before or after the execution of the will and the maker may alter it as often as he desires. Using a laundry list can save you annual trips to your lawyer to amend your will and the accompanying expense.