

BASIC ESTATE PLANNING

Estate planning involves the determination of who will inherit your property upon your death. Estate planning also should include actions intended to minimize taxes and address issues related to the care and custody of minor children and individuals with special needs.

The estate planning which you need depends on many factors. In general, most people should have a will and should consider having a durable power of attorney and a medical power of attorney. If you have young children, you will want to consider a trust in order to provide for the management of your property during the time they are minors and perhaps for a longer period. If you have assets in excess of \$600,000, you may want to consider a trust designed to minimize estate taxes upon your death. Most important, your estate planning should be designed to accomplish your goals and wishes.

It is important to remember that if you do not set forth your estate planning goals and wishes, the state will do so for you. The West Virginia Code sets forth who will inherit your property upon your death if you fail to dispose of your property in a will. How the state has determined the way your property will pass may be different than how you may want your property to pass. The State also has adopted procedures for the appointment of a guardian and/or conservator for you if you become disabled or incapacitated. State law also sets forth with whom your doctors and other medical providers should consult if you are unable to make decisions regarding your health care. Again, the decisions made by the state in these areas may not be the decisions you would have made yourself.

The only way to be sure that your goals and wishes are followed is to document them in a legally binding manner. This usually means signing a document that states these goals and that has been signed, witnessed, and notarized as required by law. Specific documents are intended to carry out specific goals. These are as follows:

- **WILL.** A will sets forth how and to whom your property will pass upon your death. It is important to remember, however, that a will only transfers property which you own in your name alone (or in which you have a divisible interest). Property owned as a joint tenant with right of survivorship or for which a beneficiary has been designated (such as proceeds of a life insurance policy) will not be transferred by a will. A will generally names a personal representative of your estate (executor or executrix), may include bequests of specific sums or property to named individuals and/or charities, should name a guardian of any minor children, and generally disposes of all of your property. A will is only effective upon death and can be changed as your goals and wishes change.
- **LIVING WILL.** A living will sets forth your wishes regarding medical intervention if you are terminally ill or if you are in a persistent vegetative state. Many people think of a living will as a declaration that, if they are terminally ill or in a persistent vegetative state, they wish to die naturally without undue medical intervention designed to prolong their life.
- **MEDICAL POWER OF ATTORNEY.** In a medical power of attorney, you authorize a person or persons to make health care decisions for you if you are unable to do so. A medical power of attorney can include specific directions for your health care representative to follow, including but not limited to, a living will-type provision. A medical power of attorney does not supersede your ability to make your own health care decisions. Rather, the person named as your health care representative has the authority to act only if you are unable to do so as determined by your physicians.
- **DURABLE POWER OF ATTORNEY.** In a durable power of attorney, you authorize a person to

take care of your financial transactions. A durable power of attorney can be conditioned upon your inability to take care of your financial transactions yourself but more often is not so limited.

- **TRUST.** A trust is a document created during your lifetime by a separate agreement (an inter vivos or living trust) or under your will (a testamentary trust). In a trust, you transfer property to a person or bank as trustee to be used for the benefit of another (the beneficiary). A trust can be used for a number of purposes, including to minimize taxes or to provide for the orderly management of your assets when the beneficiary may be incapable (because of age, illness, or other reasons) of managing the assets himself.

People often are reluctant to engage in estate planning because they are uncomfortable talking about death and illness and because such issues invoke difficult emotions. When you plan your estate, however, you provide your loved ones with directions to follow upon your incapacity or death, thus helping to minimize the emotional turmoil they will experience at such a difficult time.

Once you decide to plan your estate, contact a professional, such as a lawyer, to assist you. You should be prepared to discuss your assets with the lawyer and the goals you wish to accomplish. It is recommended that you prepare a list of your assets with their current market value and, most importantly, how the assets are titled. Your lawyer can then review the list with you, and together you can decide the best way to accomplish your goals.

It is important to remember that planning your estate is a continuing process. Changes in your financial affairs and changes in your family may make it desirable or necessary to change and update your estate planning documents. You should review your will and other documents at least once every two or three years to determine if they still accurately reflect your situation and goals. In addition, if you experience a major change in your finances or family (e.g., the birth of a child, the death of a spouse, the inheritance of property) you should also review your will and other documents.

In summary, estate planning is your opportunity to make decisions regarding your property, finances, and health care decisions. It involves, but is not limited to, making a will for the transfer of your property upon death. It may also involve deciding who will manage your financial and/or personal affairs if you become incapacitated and can no longer do so yourself. By planning your estate and communicating your decisions with your loved ones, you will be lessening the conflicts and difficulties that they may encounter later.

PREPARED AUGUST 1996 BY:

Lynn A. Smith
Robinson & McElwee
Charleston, W. Va.