

**T**HE BASICS  
You  
SHOULD KNOW

**SPREADING THE WORD ABOUT ESTATE PLANNING**

The vast majority of Americans don't even have a will. Practically everyone needs to do some estate planning - not just the rich. Yet, confusion, ignorance, and misinformation rule the day. The "Baby Boomers" are reaching middle age, and during the next twenty years the United States will experience a transfer of wealth the likes of which has never been seen. Some \$6.8 trillion worth of assets will pass from parents to children, grandchildren, friends, charities, and others.

The "Baby Boomers" are beginning to feel mortal. They are at the age when people become very concerned about planning for their loved ones and themselves. Retirement planning, investments, insurance, and estate planning are subjects of great interest and frequently these needs are intertwined.

Our firm is prepared to speak to these concerns. We will gladly give presentations to groups about estate planning. We work with other professionals to create presentations that carry the appropriate message to meet the needs and concerns of their clients.

Topics include basic estate planning, family limited partnerships, irrevocable life insurance trusts, charitable remainder trusts, and foreign national's trusts.

**PROVIDING ESTATE PLANNING ANSWERS PEOPLE CAN USE**

*What is Estate Planning?* Estate Planning is the process of ascertaining the appropriate legal vehicle, such as a Will or Trust for your estate, and what pertinent provisions to insert in such vehicle that will provide the most tax and other benefits to enable you to efficiently manage in case of disability or incapacity and pass your property to whom you wish upon your death. In the course of assembling the various requested information, you should decide how you desire your estate to be distributed. Naturally, there are many factors that should be considered when arriving at a comprehensive estate plan, such as Federal Estate and Income Tax consequences; these will

differ with each situation. Estate Planning is a key ingredient in investment and retirement programs. Without effective estate planning, couples with estates over \$7,000,000\* may pay up to \$1,575,000 in unnecessary estate taxes. Poor planning means increased professional fees and court costs. Worse yet, poor planning can frustrate a person's intentions and deprive loved ones of the resources intended for them. On the other hand, people have the power to create a wonderful bounty for loved ones and provide for them while minimizing taxes, professional fees, and court costs. There may be no other action which will have such a profound, beneficial effect on a family as the decision to create or update a person's estate plan.

### *Disability and Guardianship:*

If a family member is no longer able to manage his or her affairs, estate planning with a general durable power of attorney or a living trust allows the healthy spouse or other family members to manage the family's property and affairs without the additional expense of a guardianship.

### *Instructions for Loved Ones:*

Is there a way that a person can leave instructions on how children or loved ones are to be cared for? Is there a way that one can say how his or her money will be invested or used if a person is no longer around? Simple wills, joint tenancy with right of survivorship, and life insurance beneficiary designations offer no way to leave instructions. But a will with trusts or a living trust gives a person a chance to leave instructions for loved ones and for the management of the estate. You can provide for the protection of property subject to a trust from your family's creditors and ex-spouses upon divorce.

### *Providing for Young Children:*

Children under 18 years of age cannot receive money or property outright. A windfall from insurance proceeds or inheritance means a trip to probate court to establish a guardianship and provide for the management of the money and property until the child reaches 18. These arrangements are very expensive and time consuming. If a person sets up a trust for the children, he or she can name the trustees and decide how the property will be managed and distributed while avoiding the expense of a guardianship.

*Divorced Parents:* Single parents want to provide for their children, but they frequently do not want the ex-spouse to have control of the proceeds. Divorced parents can achieve this goal easily by creating a living trust or will with a testamentary trust that appoints a responsible person, other than the ex-spouse, as the trustee to manage the money or property for the children.

*Children from Previous Marriages:* Couples are frequently concerned about how to provide for both the surviving spouse and their children by earlier marriages. With proper planning each spouse can control the ultimate distribution of one-half of the community estate to his or her children while providing the surviving spouse with income for life.

*Controlling All Property:* Life insurance and retirement benefits are controlled by the beneficiary designation that a person makes when he or she takes out the policy or enrolls in the retirement plan. These beneficiary designations will not necessarily be controlled by the will or estate plan. A person must match those designations to the estate plan. Proper planning will ensure that all assets flow in a way that meets the family's needs.

*Avoiding Probate:* Property subject to a living trust will not go through the probate process. Estate planning with a living trust allows a person or family to avoid the expense, time, and public notice that probate brings.

*Joint Tenancy with Right of Survivorship (JTWROS):* Holding title to major assets using JTWROS can wreck the estate plan. Many families fail to realize until it's too late that the family will or trust has no control over property they hold in JTWROS. As a result, JTWROS can create unintended beneficiaries and defeat tax planning. Other problems can include increased income and estate taxes for loved ones.

*Estate Tax:* Will estate taxes reduce what loved ones receive? Married couples with estates between \$3,500,000\* and \$7,000,000\* including the value of life insurance proceeds and retirement plans could pay up to \$1,575,000 in unnecessary estate taxes. Proper planning can eliminate all estate taxes for married couples on estates up to \$7,000,000\*.

## *Family Limited Partnership:*

For individuals with estates larger than \$3,500,000 and couples with estates larger than \$7,000,000, family limited partnerships can offer tremendous estate tax savings. Such partnerships allow the older generation to maintain control of the assets while gifting limited partnership interests to the younger generation. They provide substantial protection from the creditors of the children. A family limited partnership can hold a business, real estate investment property, a ranch, or securities. The partnership can be a key part of a business succession plan that will ensure continuity and contribute to family harmony. For those who are uninsurable, these partnerships are one of the best ways to reduce estate taxes.

*Life Insurance Trusts:* For individuals with estates over \$3,500,000 and for couples with estates over \$7,000,000, estate tax rates are 45%\* at \$3.5 million. The sheer magnitude of the tax liability can cause great family hardship and threaten family business interests. One of the best ways to provide the funds to pay the estate taxes is to create a life insurance trust. The trust buys insurance on the life of the individual or couple. The proceeds of the policy are not included in the estate of the couple or individual. But those proceeds provide the funds necessary to pay the estate taxes. For those who are insurable, this is usually the most inexpensive way to solve estate tax problems.

## *Charitable Remainder Trusts:*

For those who own highly appreciated property and who are interested in making gifts to charitable causes, charitable remainder trusts can provide an amazing combination of benefits. In the right circumstances, a family can avoid capital gains taxes, avoid estate taxes, increase the income available to the donors, and leave the younger generation with the same estate that they were expecting.

*What About the Special Concerns of Non-Citizens?* Non-Citizens owning property in the United States need estate planning assistance. U.S. laws have special rules for Resident Non-Citizens and for Non-Resident Non-Citizens. Proper advice can reduce estate taxes.

## *What is the Best Way to*

### *Address Estate Planning Concerns?*

Individuals and couples who need to plan their estates should talk to an attorney who understands the issues and is willing to provide the needed information. The attorney should offer a free initial consultation to discuss estate planning and answer questions. The attorney should be able to create a plan that meets the needs of loved ones and minimizes taxes, professional fees, and court costs. This planning can give a person or couple tremendous peace of mind. It can save family and loved ones needless heartache and expense. Estate planning can have a profound effect on a family's future happiness and prosperity.

## **W**ILLS, TRUSTS and RELATED DOCUMENTS

### **WHAT IS A WILL?**

A Will is a legal document that allows you to direct the distribution of your property upon death in an economical and efficient manner. Bequests under the Will may pass either directly or in trust to a beneficiary.

### **WHAT IS A POWER OF ATTORNEY?**

A Power of Attorney is a document by which you can give legal authority to another person (the "agent" or "attorney in fact") to act on your behalf. You can give an agent very broad authority or it can be limited to one or more specific acts. A DURABLE Power of Attorney is not effected if you subsequently become disable or incapable of managing your affairs, but is terminated upon your death.

### **WHAT IS A TRUST?**

A Trust is a legal arrangement in which legal title and management of property are vested in a Trustee who administers the property for a designated beneficiary(s).

### **WHAT IS A LIVING TRUST?**

A Living Trust is a trust created during your lifetime under which you retain the power to revoke the trust and take back the assets from the trust free and clear of the trust. A Living Trust is established for the purposes but generally it will provide for the management of your affairs if you become disabled or incapacitated during your life and then provide for the deposition of your estate upon your death. Normally, the Living Trust will provide for you to receive the trust income and allow you to make changes to the terms of the trust at any time during your life. The Living Trust has advantages over the power of attorney for the management of your affairs during any period in which you may be disabled or incapacitated. The property subject to the Living Trust also avoids the probate process. However, a Living Trust can be inconvenient and can cost more to prepare than a Will.

### **WHY SHOULD YOU HAVE A WILL OR A TRUST?**

If you die without a Will, the rules of intestate distribution dictate how your property will be passed. In Texas, your estate may be encumbered with significant additional legal expenses and delays in probate court if you do not have a Will or Living Trust. A properly prepared will can provide for an Independent Executor.

There are many tax and non-tax advantages for creating a Trust in your Will (Testamentary Trust). For example, a person with a substantial estate may wish to leave a large portion of the estate in trust for his or her beneficiaries to prevent the taxation of such property upon the death of the beneficiary. Additionally, if a minor child is a beneficiary of the estate, it is advisable to create a Trust for the benefit of the child until attaining 18 years of age or any other appropriate age as you may determine.

### **WHAT IS PROBATE?**

Probate is the legal process of submitting your Will to the Probate Court, administering your estate, and distributing your property.

### **WHAT IS AN INDEPENDENT EXECUTOR?**

An Independent Executor is free to administer your estate with a minimum of court supervision and legal expense. It is a streamlined and simplified probate proceeding. Essentially, an Independent Executor has the duty to settle your estate and distribute your property as designated in your Will. If the maker of the Will (testator) is married, the testator often designates his or her spouse as an Independent Executor. However, if the estate is expected to be substantial, or burdensome for the spouse to manage (for example, when a business or a farm will be an asset of the estate), the testator may wish to designate a bank or someone other than the spouse as Co-Independent Executor to assist, or as an Independent Executor, instead of the spouse.

If you decide to provide for a Trust in your Will, you will designate a Trustee who will manage the trust for your beneficiaries. If you are married, you may want to designate your spouse as the Sole Trustee or a Co-Trustee. You will also designate a Trustee who

will manage any Trusts created for the benefit of your children.

An Independent Executor or Trustee (who is not a parent of your children) is not authorized to personally take custody of your minor children; you may, therefore, wish to consider naming a Guardian of your minor children who will be in the position to assume responsibility for the care of your children upon the death of the survivor of you and your spouse.

A Guardian may be designated either in your Will or in a separate written instrument. Sometimes a separate instrument is advisable if you have difficulty deciding upon a Guardian.

You should also designate one or more alternative Independent Executors, Trustees and Guardians who will act in the event your first choice predeceases you or is otherwise unable or unwilling to serve.

**WHAT IS A LIVING WILL (DIRECTIVE TO PHYSICIANS) ?**

If you do not wish to prolong your life by artificial means, you may choose to make a Living Will, or a Directive to Physicians as it is called in Texas. Texas law allows any competent adult to instruct his or her physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition or irreversible condition. The form and contents of the directive are prescribed by Texas law. The directive takes effect only after the patient's attending physician determines that the patient is suffering with a terminal condition from which the patient is expected to die within six months even with the application of available life-sustaining procedures or the patient is suffering with an irreversible condition so that the patient cannot care for his or her self and is expected to die without life-sustaining procedures.

**WHAT IS A MEDICAL POWER OF ATTORNEY?**

A Medical Power of Attorney is an instrument, which allows you to appoint someone else to make a wide array of health care decisions, not just those directed toward death, on your behalf in the event you are incapable of making them.

**EXPLANATION OF TERMS :**

Some of the terms which are particularly relevant to Estate Planning are listed below:

*Will :* A legal instrument, executed in accordance with state laws pertaining to testamentary transfers which pass title of your property pursuant to the terms of the Will to your beneficiaries upon your death.

*Testator :* A male person who executes a Will.

*Testatrix:* A female person who executes a Will.

*Laws of Descent and Distribution:* Statutory provisions which set out the manner in which an estate distributed when a person dies without leaving a Will. (Intestate)

*Executor:* The person named in your Will to administer your estate. The Executor is responsible for paying all of the debts, collecting the debts owed by and owed to the deceased, paying any estate taxes which are owed, representing the estate before the probate court, seeing that all property is distributed to the proper beneficiary as dictated by the Will, including the transfer of title so that ownership will finally vest. The process which serves to give your Executor the greatest freedom is the insertion in your Will providing that he or she will be an "Independent Executor without bond."

*Administrator:* A party chosen by the court to administer the estate whenever a person dies without a valid Will, or when for some reason the Executor appointed cannot serve. The Administrator customarily receives a fee for his services, is bonded, and must make application to the court and receive the court's ratification at each step in the process of disbursement of your assets. Naturally, all fees are deducted from the estate.

*Guardian:* A person appointed to stand in your stead with regard to the raising of your children to their legal majority (presently 18 years) in the event of the death of both spouses. There are two basic kinds of guardianship. Guardianship of the person means that a guardian is appointed to look after the physical needs of the ward. The ward retains control of his money and property. Guardianship of the estate means that the guardian has control over the ward's assets. Guardianship of the person and the estate combines the basic kinds of guardianship to give the guardian total control over the ward's physical needs and assets.

*Trustee:* The Trustee is the person who will manage the trust fund, customarily for the benefit of your children. The Trustee will take your place regarding expenditures for your children. He or she should, therefore, be a person whose financial theories most closely approximate your own. For purposes of

permanency, several banks and trust companies are available for this capacity and can bring advanced financial knowledge to bear upon the estate.

**OTHER CONSIDERATIONS :**

In the event that you move to a different state or country, have your Will reviewed by an attorney licensed in that jurisdiction to determine if the Will is valid in such state or country and whether or not probate of the Will may be complicated by the use of an out-of-state Will.

We advise our clients to place the original Will in a safe place such as a safe deposit box and keep a copy of their Will at home. It is also a good idea to give a copy of the Will to the Executor named in the Will.

The Will or Living Trust (Estate Plan) should be reviewed periodically so that it may be kept current. You should revise your Will or Living Trust (Estate Plan) whenever your personal circumstances change significantly such as with a birth, death, remarriage or divorce, or if your assets change substantially.

Since the Will is a legal document, it cannot be changed unless formal procedures are complied with. Accordingly, please do not attempt to alter, write on your Will or change your Will yourself. You should call an attorney.

# **E**STATE PLANNING INFORMATION

---

*\*Amounts represent equivalent value of assets that would be excluded from estate tax by the Unified Credit available in 2009. The Unified Credit Equivalent increases in future years as follows (Note: Gift tax equivalent remains \$1,000,000 and is not repealed):*

<u>YEAR</u>	<u>EXCLUSIVE AMOUNT</u>	<u>TOP RATE</u>
2009	\$3,500,000	45%
2010	Repealed	
2011	\$1,000,000	55%

---

This information was provided as a courtesy by:

KEVIN P. SHAY

ATTORNEY & COUNSELOR AT LAW

**BOARD CERTIFIED – ESTATE PLANNING & PROBATE LAW BY THE TEXAS BOARD OF LEGAL  
SPECIALIZATION**

INDEPENDENCE PLAZA II, 14350 NORTHBROOK DRIVE, SUITE 220, SAN ANTONIO, TEXAS 78232-  
5011

EMAIL [KSHAY@KPSHAY.COM](mailto:KSHAY@KPSHAY.COM) W TELEPHONE (210) 497-6300 W FACSIMILE (210) 497-6333

WEBSITE [WWW.KPSHAY.COM](http://WWW.KPSHAY.COM)

(12/2009)