



ESTATE PLANNING  
&  
ELDER LAW SERVICES



ESTATE PLANNING 101

Estate Planning is the development of a plan for managing your assets and affairs during your lifetime, in case of incapacity, and upon your death. Your estate contains all assets you own, including real property, business interests, investments, retirement benefits, insurance and personal property.

Many people and, unfortunately, many attorneys focus only on planning for someone's death and neglect dealing with lifetime incapacity issues. However, those issues can be significantly more traumatic than what happens to someone's estate at death.



## What Should I Be Concerned About?

While everyone's goals are different, many of our clients are concerned about:

- Providing for minor, immature, or Special Needs beneficiaries
- Avoiding Lifetime Probate and Death Probate
- Minimizing taxation of their assets (estate taxes, income taxes, capital gains taxes, etc.)
- Maintaining control of their affairs during incapacity and their estates at death (i.e. health care wishes, blended families, etc.)
- Protecting their assets from long term care costs

## What Are Your Options?

The most basic estate planning methods include:

- Do Nothing
- Will Based Planning
- Joint Property & Beneficiary Designations
- Trust Based Planning
- Powers of Attorney

### Do Nothing

If you choose to forgo estate planning, you will lose the right to have any say in what happens to your assets, your minor children, and even to yourself when you die or if you become incapacitated. A probate judge will decide these matters. Your wishes will not be considered.

If you become incapacitated without an estate plan, Guardianship proceedings will need to be initiated with the probate court to appoint someone to make medical decisions for you and Conservatorship proceedings are necessary for someone to obtain authority to handle your finances. When you pass away, your assets will have to pass through Death Probate. These are often lengthy, stressful and expensive processes.

Lifetime Probate lasts as long as the incapacitated person is alive and remains incapacitated. The Death Probate process typically takes at least a year to complete and consumes 5 to 10 percent of a probate estate's value. These costs can be even higher if you own real estate in more than one state, since each piece of property must pass through probate in the state where it is located. These probate proceedings are a matter of public record, and your probate records can be acquired by solicitors selling services and products.

### Will Based Planning

A **Will** is a legal document that allows you to direct how your assets will be distributed, who will handle

your final affairs, and who will care for your minor children after your death. However, a Will cannot keep your assets out of the Probate Court or reduce your estate tax liability. Like the “Do Nothing” method, a Will subjects your estate to the attorney’s fees, costs, delays and lack of privacy associated with Death Probate.

A Will Based Plan may be advisable for younger individuals who are just starting out, with little net worth and perhaps with minor children, but who cannot afford a more comprehensive Trust Based Plan. In those situations, a Will Based Plan, accompanied by Powers of Attorney and a HIPAA Authorization, would be advisable.

## Joint Ownership & Beneficiary Designations

Because the use of Joint Ownership can sometimes avoid probate, people often use it as an estate planning method. Unfortunately, many times this does more harm than good.

Joint ownership (with rights of survivorship) arises where two or more people own an asset or real estate together. When one of the owners dies, the entire ownership passes automatically to the surviving joint owner without passing through probate. Unfortunately, in Michigan, there are several different types of “joint ownership” and they do not all prevent assets from having to pass through probate.

Joint Ownership results in loss of asset control because you are no longer the sole owner of your property. Jointly owned real estate cannot be transferred or sold without the permission and signatures of all joint owners, and sometimes their spouses.

Jointly owned bank accounts can be emptied by a joint owner, even though that owner has never contributed to the account. In addition, when someone is made a joint owner of your asset, their creditors can seek to



satisfy their claim with your asset.

Problems can arise even when you have total confidence in a joint owner. For example, if a joint owner becomes incapacitated, some joint assets cannot be transferred without initiating a Conservatorship probate proceeding to appoint someone to act on the joint owner’s behalf. Consequently, the probate court will have ultimate control over the property until the incapacity ceases or the joint owner dies.

Making someone a joint owner of your property can create needless gift taxes, income taxes, and especially capital gains taxes, which are far greater than the actual cost of probate. It may also disqualify the joint owners from receiving Medicaid and Supplemental Security Income benefits.

Finally, although owning assets jointly (with rights of survivorship) avoids probate at the death of the first joint owner, this probate avoidance is only temporary. When the last joint owner dies the asset must pass through the Probate Court.

Pay-on-Death and Beneficiary Designations result in assets paying to a beneficiary after you die, but do not give anyone legal access to the asset to help you in the event of incapacity. They do not allow you to control when that asset is distributed to an immature or minor beneficiary as you can with a Living Trust. If a beneficiary is receiving Medicaid, SSI, or other governmental

benefits, they may be disqualified by receipt of those assets, unlike if the assets had been held in or paid to a Special Needs Trust, which would not disrupt such benefits.

## Trust Based Planning

Over the last several decades Living Trusts (a/k/a Revocable Living Trusts) have increased in popularity and usage as an estate planning method, primarily because of the many benefits that can be realized by using them, including:

- Avoiding Lifetime Probate
- Avoiding Death Probate
- Minimizing or even eliminating federal estate taxes
- Maximizing Medicaid Planning opportunities

A Living Trust is a document that enables you to: 1) direct who will handle your financial affairs if you become incapacitated; and 2) control when and to whom your property will be distributed after your death – without passing through probate. In it, you name a Trustee, usually yourself, to manage assets you place in trust (stocks, bonds, real estate, personal effects, etc.). You can still buy, sell, trade, spend or do anything with these assets you choose. You can modify or revoke a Trust at any time if you are still competent.

If you become incapacitated, the Trust provides for the automatic appointment of a Successor Trustee you have chosen – without going through Probate. Your Successor Trustee is required to use and manage the Trust assets as you direct in the Trust.

Trust based planning enables you to control your assets after your death. Unlike a Will, you can direct not only who receives your assets, but when and under what conditions they will receive them (upon reaching a certain age, completing school, etc.). Trust assets do not have to go through Death Probate, no matter where they are located. As a result, your loved ones

avoid the attorney's fees, costs, delays, and loss of privacy associated with the probate process.

For an individual or a married couple having estates exceeding \$11,700,000, additional tax planning methods can be utilized to reduce, if not eliminate, estate tax liability. In addition, if you have a substantial amount of funds held within an IRA then you may wish to consider using a Stand Alone Retirement Trust to receive those funds.



A Living Trust, in combination with a properly drafted Financial Power of Attorney, can be utilized to assist you become eligible for Medicaid and other governmental programs, without losing all your assets to long term care and nursing home costs. In the case of a married couple, for instance, this could mean being able to keep up to an additional \$130,380 and still qualify for Medicaid benefits!

## Powers of Attorney

Every estate plan should also include a Financial Power of Attorney, a Medical Power of Attorney, and a HIPAA Authorization.

A **Financial Power of Attorney ("FPOA")** (a/k/a a Durable Power of Attorney) is a document in which you empower someone to handle your financial affairs during your lifetime, but that does not specify how the affairs are to be handled like a Living Trust does. It can

be drafted to become effective upon your incapacity or upon signing, whichever you choose. You can modify or revoke a FPOA if you are still competent.

The FPOA can help avoid the need to initiate Conservatorship probate proceedings. It should be tailored to address your needs. For instance, an FPOA drafted for a senior may need to include trust creation powers, as well as gifting and transfer provisions necessary to facilitate Medicaid eligibility.

**A Patient Advocate Designation (“PAD”)** (a/k/a a Durable Power of Attorney for Health Care or a Medical Power of Attorney) is Michigan’s version of an “advanced medical directive.” The PAD permits you to designate a person, called your “advocate”, to make medical decisions on your behalf, if you no longer can, without seeking a Guardianship through the probate court.

The PAD allows you to direct what types of medical treatment you will receive, including whether to withdraw life support, in case of incurable illness or injury. You can modify or revoke a PAD if you are still competent. It should also indicate whether you also want your advocate to have authority to handle mental health decisions, and because of changes in Michigan’s organ donation law in 2003, should express your wishes regarding organ donation.

Although living wills have been recognized by medical providers in the past, there is no statutory authority requiring a living will to be recognized and their legality has been highly questionable since enactment of the Durable Power of Attorney for Health Care (“Patient Advocate”) Statute in December 1990. Therefore, we highly recommend that you do not rely upon a living will or powers of attorney drafted before December 1990 as the means to ensure that your wishes regarding medical care will be followed.

The Health Insurance Portability and Accountability Act of 2003 (“HIPAA”) prohibits health care providers from releasing your private medical information to anyone but you or your “personal representative.” Consequently, we recommend that every estate plan include a **HIPAA Authorization** that appoints, as the very least, your designated decision makers (e.g. Trustee, Patient Advocate, etc.) as your HIPAA “personal representative” and authorize your health care providers to release your medical information to these persons. You should also consider appointing trusted family members (e.g. – children) in that authorization if you want them to be able to talk to your medical personnel if necessary.



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