

Consumer Legal Guide



Your Guide to Estate Planning



ILLINOIS STATE

BAR ASSOCIATION

ASK A LAWYER

ESTATE PLANNING

Estate planning involves a person creating a plan to indicate where his or her property will go upon death. Here are some estate planning issues to consider:

- Who should get my money and property when I die?
- How much property should I give to my spouse or my children?
- How do I treat my children from a prior marriage?
- How does my property settlement agreement with my former spouse impact my estate?
- Is there enough money to provide for my family?
- Who will manage my estate after I die?
- Who will manage the property given to my minor children?
- Who will manage the property if my child is disabled?
- Can I prevent my minor child from receiving the entire inheritance at age 18?
- Can my minor child's inheritance be paid out over time as the child matures?
- Will my estate be subject to a death tax?
- Can death taxes be reduced?
- How will the ownership and control transfer for the family business or farm?
- How will the taxes on my farm or business be paid?
- Should I have a buy-sell agreement with my business partner?
- Who will manage my assets and pay my bills while I'm living if I'm no longer able to do so?
- Who will make health care decisions for me if I am alive but I am unable to make those decisions for myself?

When objectives have been defined, documents are prepared and property transferred to put the plan into effect. A Will is almost always part of the plan. Other documents used may include trust agreements, beneficiary designations for life insurance and deferred compensation benefits, powers of attorney for health

care and for property, buy-sell agreements, living wills, and powers of attorney. Sometimes the basic structure of a business will be altered through corporate recapitalizations, the creation of partnerships, or the establishment of a pension or profit-sharing plan.

ESTATE PLANNING DOCUMENTS

Estate planning documents include Wills, trust agreements, beneficiary designations for life insurance, 401(K) plans and IRAs, powers of attorney for health care and property, buy-sell agreements, and living wills.

PROFESSIONAL HELP

People should seek legal help when creating their estate plan. An experienced attorney is skilled in drafting estate planning documents that are precise and clear.

In addition to an attorney, many other people can be involved in the estate planning process, including accountants, life insurance agents, trust officers, and financial planners. Your advisors should remain in contact with the family and review the estate plan from time to time.

Changes in your life can create a reason to change your estate plan.

Changes in the law can also create a need to update your estate plan.

The various fees and costs for an estate plan should be discussed with your attorney.

A WORD ABOUT TAXES

An Illinois resident who dies with property located in Illinois may be subject to income tax, the Federal Estate and Gift Tax, and the Illinois Estate Tax.

In 2015, the Federal Estate tax exemption amount was \$5,430,000. The Illinois Estate Tax exemption amount was \$4,000,000. A person whose estate exceeds these exemption levels may need do some additional estate planning to minimize or eliminate death taxes.

Generally, a gift of property from a person to his or her spouse is not subject to a gift tax or an estate tax. However, giving all of your property to your spouse might not be the best estate plan

depending on the value of your spouse's assets. The estate tax exemption amounts are determined in the year of the person's death. An estate tax may be due if the surviving spouse's estate exceeds the applicable exemption amount. The goal of estate tax planning for married couples is to take advantage of the applicable exemption of both spouses, which doubles the amount that can be left estate tax-free. The applicable federal exemption is now "portable," meaning that the amount of the exemption that is not used by the first spouse to die may be usable by the surviving spouse. However, the Illinois estate tax exemption is not portable.

GIFTS DURING LIFE

Some estate plans may include lifetime gifts. In 2015, a person could give up to \$14,000 a year to any person without a gift tax. In addition, under certain circumstances, a person could make gifts for medical expenses and tuition expenses above the \$14,000 a year limit if the medical payments and tuition payments weremade directly to the medical provider or the education provider.

WHAT INFORMATION DO I NEED TO PREPARE A WILL?

Many attorneys have forms for you to fill out that request basic information that helps the attorney draft your estate plan.

An estate plan should be reviewed every 2-3 years to make sure that it is still current based on the law and your life changes.

WILLS

With important exceptions, a Will is a document that controls the disposition of a person's property at death. In Illinois:

- The maker of a Will must be 18 years old and be of sound mind and memory.
- The Will must be in writing.
- The Will must be signed by the maker and must be witnessed by 2 witnesses in the special manner provided by law. Persons who are beneficiaries under the Will should not serve as witnesses.

- After death, the Will is presented in court and, after being proven valid, is put into effect and its provisions are carried out.

A Will may be revoked or changed at any time before death so long as the maker is legally competent. Changing a will also requires 2 witnesses.

WHAT ARE SOME IMPORTANT CONSIDERATIONS IN MAKING OR REVIEWING A WILL?

Who should receive your property, and, if children, at what age?

Who should be named as guardians of minor children, and what are their duties?

Should a trust be created for your spouse, children or others? If a trust is created, you must name a competent individual or trust company to manage the trust.

Should charitable gifts be made?

Should life insurance proceeds be payable to a trustee or executor named in your Will or to individuals directly? Who should be named executor?

Can taxes be saved?

Has your marital status changed since you made your last Will?

Have any beneficiaries of your estate died or have you had important changes in circumstances or assets?

Generally, a person can give his or her property to anyone. However, Illinois law does not allow one spouse to disinherit the other spouse without the consent of the disinherited spouse. If a Will disinherits a spouse, the surviving spouse can renounce the Will and receive a percentage of the deceased spouse's estate. A surviving spouse can receive one half (1/2) of the estate if there are no surviving descendants or one third (1/3) of the estate if there are surviving descendants.

In general, a person's right to renounce the Will of his or her spouse does not extend to a "living trust" created by the spouse prior to death.

WHAT PROPERTY DOES A WILL NOT GENERALLY CONTROL?

A Will generally does not control the disposition of the following properties:

- Property held in joint tenancy
- Property payable to a designated beneficiary
- Property held in trust

DOES A WILL MAKE FOR MORE COURT EXPENSE?

No. In fact, a Will can save expense by eliminating the need for sureties on bonds, expediting the sale of property, avoiding guardianship for minors where not really necessary, and otherwise providing the executor of the Will with clear directions on handling of the estate.

If there is no Will the court appoints an administrator to settle the estate and make distributions as provided by law, after all debts and expenses have been paid.

An individual without a Will has no voice in the selection of the administrator. If there is a Will, the executor nominated by the maker of the Will takes the place of an administrator and is the one who handles the estate. A person making the Will may nominate as executor any individual in whom he or she has confidence provided the executor meets statutory requirements. A bank or trust company also may be named as executor.

Illinois has adopted Independent Administration for estates of all sizes. This is a relatively simple process that allows for increased family privacy and less court appearances.

WHY WRITE A WILL?

A Will allows a person to state to whom his or her property will be transferred after his or her death. But if there is no Will, the property is transferred to one's heirs pursuant to the state statute. For example, if there is a surviving spouse and one or more children, the surviving spouse gets half and the children share equally in the other half. A Will lets you give your property to the people whom you chose. Without a Will, the state statute gives your property to your heirs at law even if that is not what you would have wanted.

A Will allows you to choose how to distribute your estate. A Will can help you reach your estate planning goals. In some instances, a Will can help reduce or eliminate estate tax.

A Will lets you name your executor. The executor is the court appointed person to be in charge of your estate.

A Will also allows you the opportunity to nominate the individual or individuals whom you would like the court to appoint as guardian of your children.

DOES A GOOD LIFE INSURANCE PROGRAM TAKE THE PLACE OF A WILL?

No. Life insurance is one kind of property you can own. Life insurance trusts are popular devices to provide money at your death without adding to your taxable estate. Another way of planning for use of insurance proceeds is by creating a trust in your Will. The insurance is then made payable to the trustee named in the Will. The designation of life insurance beneficiaries may affect the creditors of a decedent as well as the decedent's taxes, all of which should be considered when making an estate plan.

PUTTING OFF MAKING A WILL

A Will should be prepared while a person is in good health and in a position to carefully consider its provisions. Putting off making a Will can have disastrous results when you do not want your property distributed to your heirs as set out in the state statute.

PROBATE ADMINISTRATION

In most cases, the estate of someone who dies owning property must be "probated." This is the Court supervised process by which a decedent's property is transferred to those who are to receive it. The process typically begins with the Court naming a "personal representative" who takes charge and reports to the Court as the decedent's wishes are fulfilled.

WHAT IS A PERSONAL REPRESENTATIVE?

A personal representative manages the decedent's estate. Executors and administrators are personal representatives.

If the decedent left a Will (referred to as dying “testate”), the person who manages the estate is called the executor. If the decedent had no Will (referred to as dying “intestate”), the person managing the estate is called the administrator.

WHO SERVES AS PERSONAL REPRESENTATIVE?

An executor is nominated by the decedent in the Will. If there is no Will, an administrator is nominated, generally by the decedent’s family. Individuals, banks, and trust companies can serve as executors or administrators. An administrator must be a resident of Illinois. An executor must be a resident of the United States but does not have to be an Illinois resident. Each executor or administrator must be approved and appointed by the court.

WHAT ARE THE RESPONSIBILITIES OF A PERSONAL REPRESENTATIVE?

The duties and responsibilities of a personal representative, either an executor or administrator, can be generally described as gathering and protecting the assets, paying the legitimate creditors, and distributing the remaining assets pursuant to the terms of the Will, or if there is no Will, to the heirs pursuant to the state statute.

Opening the Estate

Once a person dies, the person in possession of the Will is required by law to file the Will with the circuit clerk within 30 days of the date of death. Then the person nominated as executor is responsible for asking the court to probate the Will.

Not all Wills need to be probated. For example, in 2015, if the assets subject to probate are less than \$100,000, under certain circumstances, a small estate affidavit can be used to avoid probate.

Duties with the Court

Executors and administrators have certain duties to the court:

- To send out legal notices.
- To inventory the estate’s assets.
- To resolve the claims of creditors.

- To petition the court as necessary in the management of the estate's assets.
- To provide accountings and receipts as needed.
- To make disbursements and distributions.

Duties as to Property

Executors and administrators have certain duties as to estate property:

- Collect and inventory all assets of the estate (including assets in a safe deposit box).
- Preserve, manage, and insure assets during the probate administration.
- Manage the decedent's business as needed.
- Obtain valuations and appraisals of assets.
- Sell property that is not distributed in kind.
- Collect life insurance benefits as needed.
- Pursue claims in favor of the estate.
- Defend claims against the estate.
- Transfer assets as needed (like stocks, bonds, and bank accounts).
- Distribute the estate in accordance with the terms of the Will or, if there is no Will, distribute to the heirs pursuant to the state statute.

Financial Duties

- Keep records of money coming in and all money going out.
- File the decedent's final income tax return.
- File the necessary income tax returns as fiduciary for income and expenses generated during the course of administration.
- File gift tax returns as needed.
- File an Illinois estate tax return if required.
- File a federal estate tax return if required.
- Provide for the payment of all taxes.
- Provide beneficiaries with appropriate tax information.

JOINT TENANCY

WHAT IS JOINT TENANCY?

Joint tenancy is a common form of ownership for property. Husbands and wives often have residences and bank accounts in joint tenancy. It is used less frequently with non-spouses for a variety of reasons.

Each joint tenant, regardless of which one purchased or originally owned the property, has the right to use the jointly owned property. When two people own property in joint tenancy and one of them dies, the survivor becomes the 100% owner of that property and the deceased joint tenant's interest terminates. The surviving joint tenant then owns the property free of any claims by the heirs of the joint tenant who died, unless certain limited exceptions apply.

Joint tenancy shouldn't be relied on as a substitute for a Will. It doesn't cover unanticipated contingencies nor does it provide a comprehensive plan for the disposition of one's entire estate as does a Will.

IS JOINT TENANCY THE ONLY WAY TO HOLD TITLE TO PROPERTY WITH ANOTHER PERSON?

No. Two or more persons may also own property as tenants-in-common or tenants by the entirety. Tenants-in-common, like joint tenants, each have the right to use and share in the income from the property. But there is no right of survivorship with tenants-in-common. When a tenant-in-common dies, his or her interest passes to his or her estate and not to the surviving co-tenant. The property passes, instead, as part of the estate to the heirs, or the beneficiaries under a Will.

Tenancy by the entirety allows a husband and wife to hold their primary residence free of claims against only one spouse. As with joint tenancy with the right of survivorship, in the case of tenancy by the entirety, at the death of the first spouse/owner, the surviving spouse/owner automatically becomes the sole owner.

PAYABLE ON DEATH

If an asset is registered to "A payable on death (POD) to B," the asset is not owned in joint tenancy. Rather, the asset is payable to B on A's death, but B has no rights during A's lifetime.

Illinois has adopted a statute that allows financial accounts, such as with a brokerage firm, to be registered as transfer on death ("TOD"). These are similar to a payable on death account. At the death of the owner, the assets in the account are transferred to the designated beneficiary.

TRANSFER ON DEATH INSTRUMENT

Illinois has recently adopted a statute that allows certain real estate to be transferred on death through a "Transfer on Death Instrument." It is similar to a "POD" designation described above. The beneficiary of the transfer on death instrument has no interest in the real estate until the death of the owner.

WHAT ARE SOME OTHER FEATURES OF JOINT TENANCY TO BE CONSIDERED?

- All joint tenants must agree to the sale or mortgage of the property.
- Any one joint tenant may withdraw all or a part of the funds in a joint bank account.
- The creation of a joint tenancy has important legal consequences. Estate, gift or income taxes may be affected.

Joint tenancy may have other consequences. For example: (1) if property of any kind is held in joint tenancy with a relative who receives welfare or other benefits (such as social security benefits) the relative's entitlement to these benefits may be jeopardized; (2) if you place your residence in joint tenancy, you may lose your right to advantageous senior citizen real estate tax treatment; and (3) if you create a joint tenancy with a child (or anyone else) the child's creditors may seek to collect your child's debt from the property or from the proceeds of a judicial sale.

IS JOINT TENANCY A GOOD OR BAD IDEA?

Joint tenancy is useful in the right cases. However, joint tenancies are not a simple solution to estate problems but can, in fact, create problems where none existed. The costs of preparing a Will, tax planning, and probate may be of little significance compared with the unintended problems that can arise from using joint tenancies indiscriminately. For a full explanation of the advantages and disadvantages of joint tenancy in your particular situation, you should consult a lawyer. With his or her advice, you will be able to make an informed choice of the best way to accomplish your objectives.

TRUSTS

LIVING TRUSTS

A trust, generally, is an agreement in which one person (the trustee) holds and manages property for another (the beneficiary). If you create a trust under your Will, it's called a testamentary trust. If you create a trust while you're alive, it's called a "living" or "intervivos" trust.

The living trust is a vehicle for managing your property during your lifetime and passing it on to your beneficiaries at death without probate.

The usual living trust works in this way. First you have your lawyer prepare a trust agreement that names the trustee and the beneficiaries and defines everyone's rights and duties. The agreement usually says that you retain power to amend or revoke it whenever you want. The trustee (or trustees) may be one or more responsible individuals (including yourself) or a bank or trust company. You transfer property (real estate, securities, cash, etc.) into the trust by placing it in the trustee's name. The trustee has management responsibility for the trust property.

The trust agreement usually provides that you are to receive all of the income of the trust and as much of the principal as you request, but if you are disabled, the trustee may use the income and principal to pay your bills. Upon your death the trust property is transferred to your beneficiaries without probate. A trustee might also continue to manage the trust property for the beneficiaries if they are minors, disabled, or have other special needs.

The main advantages of a living trust are these:

- If you want or need to have someone else manage your property and pay your bills in case of illness, the living trust may be the best arrangement. One alternative is a probate court guardianship proceeding, which is public, costly and inconvenient.
- Trust assets avoid probate. Avoiding probate at death may save time and money. However, Illinois probate procedures are very simple especially when Independent

Administration is used, and the importance of avoiding probate can be exaggerated. Virtually all of the steps outlined in the Probate Administration section above under “Duties as to Property” and “Financial Duties” need to be satisfied by the trustee.

- Because a trust is not filed in court, its provisions are private, unlike a Will, which must be filed in court at death. However, copies of the trust may be required by persons dealing with the trustee such as banks, stock brokers, etc.

The main disadvantages are these:

- If you use a bank or professional trustee, there are fees to pay during your lifetime that will probably be much more than the potential probate cost savings.
- Even if there are no trustee’s fees to pay, there will be costs and inconveniences during your life – the initial cost of setting up the trust and transferring your property into trust, inconvenience of maintaining a separate bank account and books and records for the trust, annual filing of tax returns may be required under certain circumstances.
- A trust only disposes of assets transferred to the trust.

The living trust is usually the best way to provide for someone to manage a person’s property and the payment of his bills during disability.

TAXES

The living trust has essentially no tax significance. While you live, the trust income is reported on your 1040 just as if the trust did not exist. (Unless you are trustee, the trustee must file an annual fiduciary return on form 1041, but this is only an information return.) At death, the trust property is included in your estate for tax purposes as if you owned it outright. Any tax plan that is built into the trust agreement (e.g., the marital deduction gift) also could be achieved through a Will.

LIFE INSURANCE TRUSTS

A life insurance trust is a living trust that can

be either revocable or irrevocable. A revocable life insurance trust can be created to receive and distribute life insurance proceeds after the death of the trust maker. Typically, the trustee is named as a beneficiary of life insurance policies and then after the trust maker dies, the trustee collects the insurance proceeds and distributes the proceeds pursuant to the terms of the trust. A revocable life insurance trust can unify the disposition of your life insurance without subjecting the insurance proceeds to probate or to the claims of your creditors. An irrevocable life insurance trust owns the insurance policy and collects the proceeds at death which, if properly structured and managed, will exclude those proceeds from estate tax.

POWERS OF ATTORNEY

A power of attorney can also provide for someone to manage a person's property and the payment of his bills during disability.

In a power of attorney, you name an agent (an "attorney-in-fact") and you give that agent certain powers to act on your behalf.

Some powers of attorney are limited in scope. A general power of attorney gives the agent broad power to manage your property and pay your bills. It may even empower the agent to make gifts on your behalf, to transfer your property to a living trust or to consent to medical or surgical procedures on your behalf, if these powers are specified in the instrument. A power of attorney that deals with real estate must be acknowledged before a notary public.

In a long illness, a general power of attorney doesn't work as smoothly as a living trust. For this reason, many lawyers recommend living trusts for clients who are ill or elderly, and use the power of attorney for clients who are younger and healthy, as "insurance" against an unexpected contingency. The power of attorney may also be used to supplement a living trust.

Illinois has adopted a durable power of attorney law. This Act allows the appointment of an agent and successor agent who can act for you. The power can be conditioned upon the principal's incapacity. These powers survive the disability of the principal.

There are two types of statutory powers: PROPERTY and HEALTH CARE.

A property power allows a principal to appoint an agent who can act for him or her in whatever matters are delegated. It can be as broad or narrow as the principal requires. Also matters such as successor agents, guardianship, and compensation can be specified.

A health care power allows the appointment of an agent to make health care decisions on your behalf. Illinois law allows adults the right to accept or refuse medical treatment as they see fit. A health care power allows the delegation of this right to an agent. The health care power allows specification of medical treatment desired, appointment of successor agents, and nomination of a guardian of your person. The powers survive the disability of the principal. Your health care power of attorney should be consistent with any preferences you may express in a living will (see below).

A WORD OF CAUTION. A power of attorney may allow the agent to do anything that a principal could do. You should not provide anyone with a power of attorney unless you place the utmost trust and confidence in that person.

Death automatically cancels powers of attorney, so this device is no substitute for a Will.

Many people also execute a Living Will Declaration. This is a statement given directly to your doctor that makes clear one's wishes as to how he or she would want to be treated when death is imminent. Unlike the health care power of attorney that also may discuss end of life decisions, the Living Will Declaration does not involve a 3rd party decision maker. The statement is given directly to the doctor, as if the patient were able to communicate his or her wishes. The Living Will Declaration is not followed unless agents named in the health care power of attorney are not available. Because the language of these two documents may not be identical, it is important that care be taken to make sure that one's wishes are accurately described in both documents.

For information about living wills, power of attorney for health care, and related subjects, see the pamphlet entitled Your Health Care.

This pamphlet is prepared and published by the Illinois State Bar Association as a public service.

Every effort has been made to provide accurate information at the time of publication.

For the most current information, please consult your lawyer. If you need a lawyer and do not have one, call Illinois Lawyer Finder at (800) 922-8757 or online **www.IllinoisLawyerFinder.com**

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For more information on legal issues or to obtain single copies of each of the pamphlets listed above (free to individuals), please visit

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