ESTATE PLANNING
FOR WOMEN

Strategies and Solutions for

Modern Women

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Chapter 1, Estate Plans and Why You Need One

Do you have an estate plan? If you are like many women, your answer is probably “No.” And, if we were to ask you why not, we expect you might tell us:

- I am young and healthy, so I don’t need a plan yet.
- I am nowhere close to my “golden years!”
- I don’t have much property.
- I am not rich.
- My husband has a will. There’s no reason for me to have one, too.
- I’m married so my husband will get everything I own automatically if I die first, and I will get everything my husband owns if he dies first.
- I don’t have a family so I have no one to leave my property to.

If any of these answers apply to you, then you have bought into some of the most common misconceptions women (and men too!) have about estate planning. However, once you read this introductory chapter and start to understand what estate planning is really all about, we think that your perception of the subject will start to change. For additional estate planning misconceptions and what the truth *really* is, see Figure 1.1.

We begin this chapter by defining the terms *estate* and *estate plan* and by explaining many of the things you can do with your plan. Later, we introduce you to the basic tools of estate planning (You’ll learn more about those throughout this book.) and we also tell you what can happen if you do not have a plan. Finally, we explain why it’s always best to prepare your plan with the help of an estate-planning attorney.

Do You Have an Estate?

When you read the word “estate,” the image of a very large home with beautiful gardens set behind a big stone wall may come to mind. That’s certainly one kind of estate, but from a legal perspective, your estate is something quite different. It’s everything you own – all of your assets. So whether you own a little or a lot, you have an estate.

The following list is by no means exhaustive, but it illustrates the kinds of assets that may be in your estate:

- Bank accounts
- Checking accounts
- Vehicle
- Boat
- CDs (Certificates of Deposit)
- Stocks, bonds and mutual funds
- Retirement plans, such as a 401(k), SEP, and an IRA.
- Life insurance
- Annuities
- Real estate
- Collectibles like an art, stamp or coin collection
- Fine jewelry
- Antiques
- Closely held business interests

You may own 100% of the assets in your estate or just a portion of them.

Legal Details: Your home, rental property, farm, ranch and undeveloped land are referred to as *real property*. Other kinds of assets are referred to as *personal property*, which can be *tangible* or *intangible*. Tangible property includes things affected by gravity, such as vehicles, furniture, artwork, household goods, and the like. Intangible assets on the other hand have value, but you cannot touch them. They include cash, stocks, bonds, CDs and mutual funds, and intellectual property such as trademarks, copyrights, patents, and goodwill.

Figure 1.1, Common Estate Planning Misconceptions

True or false! Here is the *real* story behind some of the most commonly held estate planning misconceptions.

Misconception #1. Estate plans are only for the rich.

Truth. There are many reasons to have an estate plan even if you are nowhere near as wealthy as Oprah, *The Donald* or Facebook's Mark Zuckerberg. Here are a few: You need an estate plan to control who will own your assets and personal belongings when you die; to determine who will raise your young children if you and their other parent both die while they are still minors – younger than age 18, depending on your state; and to identify who you want to manage your finances and your medical care if you become incapacitated.

Misconception #2. I don't own any assets, so I don't need an estate plan.

Truth. You probably own more than you realize. For example, do you have a bank account, a house, and/or a car? They are all assets, and we assume you have opinions about who you want to own with them when you die. Besides, giving your assets away is not the only purpose of an estate plan. Another reason is to control who will make health care decisions for you and manage your finances if you are unable to make them yourself because of a serious accident or health crisis. And, if you care about who will raise your children or manage their finances should they be left parentless as minors, then you've got two other very important reasons for having an estate plan.

Misconception #3. I can't afford an estate plan.

Truth. Not having an estate plan can create a lot of problems in your life and the lives of your loved ones regardless of how much or how little you own, so you really can't afford *not* to have one. And, in the long run, not having a plan means that it will cost more to settle your estate after you die than it would cost you to prepare the plan. Furthermore, preparing an estate plan does not have to cost you *an arm and a leg*. For example, you can expect to pay between $500 and $2,500 for a will depending on its complexity. Setting up a living trust will cost somewhere between $4,000 and $15,000 depending on such things as the nature of your assets, the complexity of your family situation, and where you live. Residents of urban areas, especially areas located on either coast, can expect to pay more than those who live in rural communities.

Misconception #4. I am young and healthy, so I don't need to think about estate planning right now.

Truth. Age is no protection from the possibility that a bad accident or a serious illness could kill you or leave you unable to manage your own health care and finances. In fact, if you become incapacitated, the court might have to set up a guardianship or conservatorship for you in order to manage your money and medical care. For more about the guardianship (conservatorship in some states) process and why it's something to avoid, see Chapter 3 in this book.

Accidents and illnesses incapacitate people of all ages, but if you prepare the right estate planning documents, *you* can choose who will make health care decisions on your behalf -- maybe even take you off life support – and control your financial assests under such circumstances. The tragic story of Terry Shiavo, the young woman who ended up in a "persistent vegetative state" after a heart attack that caused massive damage to her brain, is a cautionary tale of what can happen when you don't prepare for such an eventuality. After she became brain dead, Shiavo's husband and her parents were involved in a five-year-long, emotionally difficult and ultimately very public dispute about whether Terry's husband should be allowed to take his wife off life support. President George W. Bush even signed legislation to keep Terry alive after Florida's 6th Circuit Court gave her husband permission to remove her feeding tube. Ultimately, after countless lawsuits, appeals and court hearings, Terry’s feeding tube was disconnected and she died sometime later. Unfortunately, we will never know what Terry herself would have wanted because she never put her wishes in writing.

Misconception #5. I have a will, so I am set.

Truth. Preparing a will is a great start, but it can only do so much. For example, your will won’t provide for the management of your money and your health care if you become incapacitated nor will it control the kinds of life-sustaining medical care and treatment you will receive if you are near death without hope of recovery. Also, wills do not control who receives your retirement accounts and life insurance; those go to the beneficiary designated on the account or policy.

Misconception #6. I have no family, so I have no one to leave my assets to.

Truth. You may not have a family, but you can leave your assets to your close friends and/or to the charities you support. Your generosity could make a big difference to them. Plus, if you don’t decide what will happen to your assets when you die your state’s *intestate* or inheritance law will say who is entitled to inherit from you if you die without a will – ultimately, the government could end up with what you own. Do you really want that to happen?

Misconception #7. My spouse will inherit everything when I die and I will inherit everything if he dies first so I don’t need an estate plan.

Truth. This may or may not be true. What will happen to your assets depends on how they are titled, who you named as the beneficiary of your life insurance and retirement accounts, the inheritance law of the state where you live at the time of your death and on the inheritance laws of any other states where you may own real estate. Inadvertently disinheriting spouses is not unusual, especially in blended families! For example, in some states your husband may not inherit your assets unless you leave them to him in your will or title them as *joint assets with the right of survivorship.* Furthermore, even if he does inherit everything you own, your husband may have to go to court to obtain an order stating that he does indeed own all of your assets, which will involve more time and cost than if you had prepared an estate plan.

Misconception #8. My spouse can handle everything for me if I become incapacitated or if I die first.

Truth. Maybe, but maybe not. At the very least, your failure to plan could create expensive legal and financial hassles for him. Also, if your spouse is not a good money manager and/or not good at taking care of life's practical details now, there is no reason to think he will change if you become incapacitated or die. Furthermore, if your spouse has a substance abuse problem, is gullible and easily swayed by others, suffers from bi-polar disease or depression, etc. you may want to protect him by doing appropriate estate planning. An example would be a trust that ensures that if you die first, someone else will manage the assets you transfer to it on his behalf.

Estate Plans and What You Can Do With Yours

At its simplest, an estate plan is a set of legally enforceable instructions that detail to whom you want your assets transferred when you die and who you want to direct your financial affairs and make medical decisions on your behalf if you become mentally or physically incapacitated and cannot manage those things for yourself.

You can also use your estate plan to:

• **Control** when your beneficiaries can have full or partial control over the assets you leave to them.

• **Limit** what your beneficiaries can do with those assets.

• **Ensure** that the assets in your estate avoid probate after your death. All assets that you transfer to others through your will must go through probate, which is a court-supervised, public process that can be both time-consuming and expensive. Also, during probate the details of your will and possibly a list of your assets, will become available to anyone who wants to take the time to access the records of the court where the probate process takes place. Many of these sensitive documents are sometimes posted on the internet!

• **Designate** a personal guardian for your minor children. This is the person who will raise them should you and their other parent both die while they are minors – under age 18 in most states, but 21 in some. If you don't designate a personal guardian for your children and the worst happens, a judge will decide who will raise them. Read Chapter 5, Being a Parent for detailed information on the subject.

• **Name** who you want to manage your young children's property. This person will manage the assets you leave to them should you die while they are still minors. If you don't designate someone, their father will manage their inheritance, and if your young children are left parentless, the probate court will decide who will manage their inheritance until they become adults. Chapter 5, Being a Parent tells you more about property guardians. A far better alternative is to set up a trust for them and have a Trustee manage assets.

• **Minimize** the amount of taxes your estate may owe after your death. Presently, federal estate taxes are an issue only for those of you with estates that are worth multi-millions. Congress can change the estate tax law whenever it wants however. We discuss estate taxes in more detail in the next chapter.

• **Designate** who you want to manage your financial affairs in the event you become mentally or physically incapacitated and can't manage them for yourself. We discuss this subject in detail in Chapter 3.

• **Spell** out the kinds of life-prolonging medical care and treatment you do and don't want if you are near death and cannot speak for yourself. Not only does having control over your care at this stage of life allow you to "die with dignity," but it also ensures that your assets don't get spent on care and treatment you do not want. Turn to Chapter 3 for more information on this subject.

• **Provide** for the care of your pets after your death or incapacity.

Warning! If you are in an unmarried relationship and you do not prepare an estate plan, you will create a lot of problems for your partner if you become incapacitated or are the first to die. For example, unless you provide for your partner in your plan, he will not be legally entitled to any of your assets when you die because the inheritance laws in every state do not recognize unmarried partners. Also, in some states, unless you specifically designate your partner as your *health care agent* – the person entitled to make medical decisions on your behalf – the doctors who are caring for you may be unable to consult with him if you are comatose, brain dead and/or near death, and your partner may not be allowed to visit you if you are in intensive care. In addition, unless you prepare a *HIPAA Release*, the doctors caring for you cannot share any information about your medical condition with him, and if you do not properly designate an agent to handle your funeral arrangements, your partner won't be able to arrange for your funeral. You will learn more about both of these issues later on in this book.

Some people also include a personal statement in their estate plan. This is a highly personal, non-legal, written document that you can prepare for your loved ones. You can use it to share your values, beliefs, accomplishments, challenges, family history, hopes for your children, life lessons, and so on. Preparing it can be an emotionally rewarding experience, and your loved ones may treasure what you've written more than any of the assets you leave them.

The Documents That Should Be in Every Estate Plan

Certain documents belong in your estate plan regardless of your wealth, health, or age. They are a:

• **Will.** Among other things, this document spells out who you want to inherit your assets when you die and who you want to serve as your *executor* -- the person who will be responsible for ensuring that the terms of your will are carried out.

• **Durable (Financial) Power of Attorney** for your finances. This document gives someone else the right to make financial decisions for you should you become incapacitated and can't make them yourself. If you choose, you can name someone to act on your behalf even if you are not incapacitated. Doing so might be a good idea if you are leaving the country and need to transact business while you are gone – such as signing a contract, or selling stock

• **Medical (Healthcare) Power of Attorney.** This document gives someone else the right to make medical decisions for you if you become incapacitated.

• **Living Will.** In this document you state the kinds of medical care and treatment you do and don't want when you are near death.

Legal Details: In some states, a medical power of attorney and living will are combined into a single document and called "Advanced Directives."

• **Declaration of Guardian.** This document indicates who you want to act as your guardian – the *guardian of your person* and the *guardian of your estate* if the guardianships become necessary. More importantly perhaps, you maybe be able to use the document to state whom you do NOT want in those roles. Your choice for a guardian of the person will make decisions related to your personal well-being and the person you choose to be your guardian of the estate or conservator manages your assets. However, some states do not recognize this kind of document.

• **HIPAA Release.** This form is used to let your doctors know with whom they can share information about your medical condition and course of treatment. Read Chapter 3 for more information about the HIPAA Release.

Depending on a variety of factors, you may also want to include one or more trusts in your estate plan. You can use your will to create a trust after your death or you can set up a living trust while you are still alive. Although this chapter introduces you to both of these estate-planning tools, you'll learn more about them in Chapter 2 and throughout this book. Chapter 3 provides more information about a financial durable power of attorney and about health care directives.

Tip. Some of you may want to make a prenuptial or a postnuptial agreement a part of your estate plan. For information about these agreements, see Chapter 4.

What May Happen if You Don't Have an Estate Plan

If you die *intestate* (without an estate plan) your assets will be distributed to your legal heirs according to the intestacy or inheritance law of your state (except the ones discussed in the *Other Ways to Transfer Assets to Your Beneficiaries* section of this chapter). This means that your spouse may not inherit most if not all of your assets if he survives you. In other words, it's possible that if you die without a plan your surviving spouse could end up with only some of what you own, and your children or other blood relatives would end up with the rest.

There are any number of potential problems with letting your state laws decide who will inherit your assets rather than preparing an estate plan:

- The assets may go to people you don't want to have them.

- The way your assets are apportioned among your legal heirs may not reflect your wishes.

- Even if your assets are distributed as you would wish, it will likely take much longer for your legal heirs to receive them and the process of settling your estate will be more expensive than if you had prepared an estate plan.

- Your close friends and favorite charities will get nothing.

• If you are in an unmarried relationship, regardless of whether it is an opposite sex or same sex or relationship, your partner won't end up with any of your assets because state inheritance laws don't recognize unmarried relationships. The exception would be if you made your partner the beneficiary of your life insurance policy, retirement account, or some other beneficiary asset, or if the two of you owned any assets jointly. In some states, however, jointly-owned assets will not go to your partner unless they are specifically titled as "joint assets with the right of survivorship."

• Your loved ones will have to decide how your personal belongings, like photo albums, jewelry, clothing, furniture, knick-knacks, and so on are divided up. This process can be highly emotional and extremely contentious in some families.

• If you have minor children, a judge will determine who will raise them. It's possible that the judge involved in the process will choose someone you dislike and/or who does not share your values, religion and/or attitudes toward child rearing.

• A judge will also appoint a guardian or conservator to manage the assets your minor children inherit from you because minor children cannot own assets. The guardianship will continue until your children become legal adults. Also, if you do not prepare an estate plan, you will forfeit the opportunity to prepare instructions explaining what you want done with your children's assets.

• Whenever one of your children becomes a legal adult – age 18 or 21 -- that child will get full control over whatever he or she inherits from you. Inheriting money with *no strings attached* at such a relatively young age could create problems for the child, especially if the value of his or her inheritance is substantial. For example, the child may spend the inheritance on frivolous things or use it to feed an addiction or scam artists; friends and/or family members may take advantage of the child and his or her money. If you had written a will, you could have specified in it at exactly what age you want each of your children to get control over the assets you leave to them -- at 21, 25, 30, and so on.

Warning! Sometimes a poorly-constructed estate plan can be as dangerous as no plan at all. For example, it may not "cover all of the bases" you need covered or may not do what you want it to do. Homemade and computer generated plans are the most vulnerable to this.

Why You Need to Keep Your Estate Plan Up-to-Date

Far too many people prepare their wills and other estate planning documents, file them in a safe deposit box, and never look at them again. So, although their lives and the law continue to change, their estate plans don't, and when they become incapacitated or die, what is in those plans may not reflect their current wishes, their family composition, or their asset mix, all of which can create a multitude of problems -- even conflict -- for their loved ones.

<u>Here are examples of times in your life when you should update your plan:</u>

- You get married for the first time or you marry again
- You begin a family
- You get divorced
- You and your significant other decide to live together in a committed relationship
- You acquire new assets
- You sell or lose assets
- You retire
- Your children become adults

• Your spouse dies

• You have grandchildren

• You move to another state

Even if none of these milestones apply to your life, it’s a good idea to review your plan every two or three years to make sure that it continues to reflect your wishes and that there are not other things you would like to do with the plan. For example, if your current plan is based on a will, you may decide that you would like to set up a living trust and transfer the assets that you own to it so you can avoid probate; since you wrote your plan you may have become very involved with a charity and want to include it in your plan; or you may have changed your mind about who you want as the executor of your will, the trustee of your trust, or as your financial and health care agents. For all of these reasons and others, never treat your estate planning documents as though they are set-in-stone -- always view them as works in progress.

Get an Attorney’s Help With Your Plan

It’s always best to hire an attorney to help you prepare your estate plan. Now, you may assume that we say this because we are attorneys and so are biased. But really, we are not! Our advice is based on the fact that we have seen far too many instances where do-it-yourself (DIY) estate planning produced disastrous results. We understand you may be tempted to cut corners and prepare your own estate plan using online forms or legal software, but going the DIY route is fraught with peril.

Yes, the legal documents you create on your own may look impressive and cost less, but they are apt to do an inadequate job of addressing your needs and may even create expensive and complicated legal and financial problems for you and your loved ones down the road. In other words, DIY estate planning tends to be *penny-wise and pound-foolish*. Preparing your own plan is an especially bad idea if your family situation is complicated. For example, if you have remarried and are in a blended marriage; your assets are complicated; you own a closely-held business; your assets are worth so much that estate taxes are a concern; and/or you are living with another person but not married.

There are many benefits to working with an estate planning attorney, but the biggest one is that you are more likely to end up with a plan that truly meets your needs than if you do it yourself. The attorney will help you think through your estate planning goals and he or she will recommend building your plan on a will or on a living trust based on those goals and your financial and family situation. The attorney will also help ensure that your plan is complete – that it includes all of the documents you need, that everything is legally enforceable, and that it all works together to achieve your goals.

To reinforce the value of working with an estate-planning attorney, here are some of the potential problems associated with DIY estate planning:

- The estate planning template you use may be wrong for your state, or at the very least not allow you to take advantage of the favorable laws in your state. For example, in some states you can use your will to provide for an informal probate of your estate when you die. That would mean that during the administration of your estate, your executor would not have to get the court's permission for the actions he or she wants to take, saving time and money and making the executor's life a lot easier.
- You may make mistakes when you are completing your plan documents. Just an incorrect word or selection can create big problems!

- You may leave property to someone who can't own it. For example, a minor cannot own property. If you leave real estate to a minor and you die while the child is still young, a costly guardianship of the estate may have to be set up for him or her so that the property can be sold, invested or spent, if necessary. As we've already explained, guardianships are problematic for many reasons and a much better way to transfer assets to a child is through a trust.

• Like many people, you may not realize that some assets, like life insurance and retirement benefits, transfer according to whom you designate as the beneficiary and not according to what your will may say about them. In other words, those designations “trump” the terms of your will. Your lack of understanding about this fact could lead to disappointment and anger among some of your beneficiaries if your will says that you are leaving your life insurance proceeds and/or retirement benefits to X, Y and Z persons, but you named X as the beneficiary of the policy or account. X will end up with the proceeds from those assets, not Y and Z despite being named in your will.

• You may not calculate the total value of your estate accurately. As a result, you may die without having taken appropriate steps to minimize your death taxes, which would mean that there would be less of your estate for your beneficiaries. (and more for the IRS!)

• You may not plan for important contingencies. What will happen if the executor of your will dies before you do and what might happen if one of your beneficiaries develops serious money problems or gets divorced after your death? Estate planning attorneys are trained to anticipate all of the “what ifs” in your life and to help you plan for them.

• You may overlook issues in your financial or family life that require “special handling” in your plan.

• You may not understand some of the terms you encounter when you are making your selections or filling out your own forms. As a result, your plan may not do what you intended.

• You may want to disinherit people who have been abusive or problematic; this is very explosive unless handled carefully and correctly.

• The documents you prepare may not be legally enforceable in the state you are living. For example, you may use a form that your state does not recognize or you may not get certain documents properly executed according to your state’s requirements – witnessed by the right number of adults and notarized, if necessary. If your documents are not completed correctly, it will be as if you never prepared them.

• You may unintentionally create serious problems for your loved ones because generic fill-in-the-blank forms and computer created plans cannot address complex situations. For example, let's assume you have children from a previous marriage and you leave all of your assets to your spouse in your will with the assumption that your spouse will make sure that when he or she dies, whatever remains of those assets will go to your children. Without the right planning, however, your spouse would be free to leave the assets to whomever he wants. It's entirely possible that your children could get nothing, if your spouse remarries and leaves everything to his new spouse or if he decides to leave everything to his own kids from an earlier marriage.

• You may never get around to preparing your plan. If you are like a lot of people you may promise yourself that you'll get it done, but estate planning always seems to end up at the bottom of your *To Do* list.

• You Accidently disqualified a disabled person from receiving public benefits because you left assists directly to them, instead of in a special needs trust.

Tip: Depending on the complexity of your estate, preparing your plan may require the assistance of your CPA, financial planner, and/or insurance broker/agent in addition to your estate-planning attorney.

Joan Murphy is a penny pincher and extremely self-reliant. She paints her own home with the help of her husband; clips coupons, carefully shops for clothes; and sees no reason why she and her husband should work with a financial planner. She has that same attitude about estate planning and firmly believes that with the right books and a software program, she can prepare a perfectly adequate will. Sadly, Joan is very wrong and what she does not know about estate planning has come back to haunt her husband and their children when she has died.

Here are just a few of the mistakes Joan made when she prepared her plan:

- *First and foremost, Joan did not arrange to have the correct number of adults as witnesses when she signed her will, as her state requires. Therefore, her will is completely invalid -- it's as if she never wrote one.*

- *She assumed that because they were married, her husband would automatically become the executor of her will if she died first. Therefore, she did not formally designate him as her executor and named an alternate executor only.*

- *She did not understand that her will did not control all of the property she owned, such as her insurance policy's death benefit and the funds in her retirement plan and only tried to address them in the will. However, because she did not review her policy or accounts and did not coordinate the person to receive these with the beneficiary named in her will, these assets went to someone she did not want. Her will did not properly give away all of her property and a lawsuit had to be filed to determine what would happen to the property she did not designate.*

- *She inadvertently left all of her assets to her children, who were still minors when she died. Therefore, her husband does not have access to Joan's money and he cannot sell the couple's home or operate their family business without court approval.*

Chapter 2, Estate Planning Basics

In the first chapter of this book, we defined the word *estate* from a legal perspective, explained why having an estate plan is important and why you need one regardless of your age or your wealth, and described the basic documents that belong in every plan. In this chapter, we discuss the basics of creating an estate plan in greater detail, tell you about the probate process, and discuss estate taxes.

Distributing Your Assets After Your Death

There are several ways to distribute your property on your death. Those options are through a will or by using a living trust. We discuss these options in this chapter starting with a will.

Writing a Will

A will is a document that among other things, identifies your *beneficiaries* – the people and/or charities you want to inherit your assets when you die; it identifies what property you want them to inherit, and names your *executor*. In many states, an *executor* is referred to as a "Personal Representative." This is the person who will be responsible for ensuring that after your death, the terms of your will are carried out during the probate process. You'll learn more about what an executor does later in this chapter.

Legal Detail. The legal term for someone who prepares a will is the *testator* or *testatrix*.

Legal Detail. Some states, under certain circumstances, recognize hand-written wills.

You must sign your will, and (except with a handwritten holographic will) witnesses must sign your will for it to be legally valid. (Most states require at least two witnesses, but some require three.) The signing of your will should be treated as a solemn occasion. Having your witnesses in the same room with you gives them the opportunity to see that that you are of *sound mind* – understand what you are doing, and appreciate its significance. All of these things could be important if the validity of your will is contested after your death.

If it is contested, a judge (and in some cases, a jury) will decide whether or not your will is legally valid. If the court rules that it's not, your will is thrown-out and you are considered to have died *intestate* -- without a will. Sometimes, however, when a will is contested, only certain provisions of the document are ruled legally invalid.

A will is also a legal document you *may* use to designate a personal guardian for your children. This is the person who will raise them if you and their other parent both die before they are legal adults -- age 18 in most states.

Warning! Since a will only goes into effect when you die, you should complete a separate document to designate a personal guardian for your minor children in case you and their other parent become incapacitated while they are still young, assuming your state provides for such a document.

Warning! It's never a good idea to create a joint will with your husband or your unmarried partner. (A joint will is one that you both sign.) Each of you needs your own separate will although you may want to coordinate some of the provisions in the two wills. A joint will is a bad idea because your state may view it as a legally binding contract, which means that when one of you dies, the survivor won't be able to amend the will or cancel it and write a new one.

Here are some other things you can do with a will:

- Provide for the creation of a testamentary trust.

- Forgive debts that may be owed to you. If you don't, your executor will be required to try to collect the debts during the probate process.

- Say that a beneficiary's access to the assets is contingent on doing or not doing something (graduate from college, get married, etc.).

• Disinheriting someone. Leaving a relative out of your will is a serious step and may be contested after your death. To minimize the likelihood of that happening an estate planning attorney should help you craft the right language for your will. We discuss disinheriting someone in Chapter 5 of this book.

What You *Can't* Do With Your Will

There are limits to what you can do with a simple will – which is a will that does not include a trust. For example:

- You cannot limit the amount of access your beneficiaries will have to the assets you leave to them after your death and/or prohibit them from doing certain things with the property. If you want to do this you must either add a testamentary trust to your will or transfer the assets to those beneficiaries through a living trust.

- You cannot discourage a beneficiary from doing something illegal with the assets you leave to him or her. For example, your will cannot limit distributions to someone with a longtime drug problem without adding a testamentary trust.

- You cannot transfer the money in your 401(k), IRA, annuity, or the proceeds from your life insurance policy because those funds will go to whomever you designated as the beneficiary of the account or the policy.

- You cannot keep the details of your will private. This is because once your will is filed with the probate court after your death, it becomes a public document**.** As a result, anyone can go to the courthouse to look at it at that point**.** Some counties also make wills available online!

Legal Details. Assets that are not transferred through your will are said to pass *outside* your will. Examples of such assets include accounts held in POD (Payable on Death), TOD (Transfer on Death), joint tenancy with right of survivorship, the funds in your retirement account, and the proceeds from your life insurance and annuities.

Tip: You cannot leave any of your assets to your pet because pets cannot own property. If you want to ensure that your cat, dog or some other pet is taken care of financially after you die, you are better off leaving the assets to a trusted, pet-loving friend or relative together with instructions for how you want him or her to spend the money on your pet's behalf. Another more expensive alternative is to set up a trust for your pet's benefit.

Making Your Will Legally Valid

Your will must meet specific requirements established by your state to be legally binding, or enforceable. Although the requirements can vary somewhat from state to state, generally:

- You must be at least age 18 when you write your will

- Your will must be witnessed, although in very limited situations a handful of states recognize hand-written (*holographic*) wills, which are wills that are entirely in the handwriting of the testator. A holographic will does not need to be signed in front of witnesses.

- You must be mentally competent -- of *sound mind* -- when you sign your will. It's assumed that if you are of sound mind, you understand the significance of what you are doing, i.e., you know what your property is, and understand who will receive it on your death.

- The provisions of your will must represent *your* wishes, not someone else's.

- You must date and sign your will.

Warning! Do not ask one of the beneficiaries of your will to witness your will because acting as a witness could limit the amount of property that person will be able to receive from you when you die.

Tip. Your will may not have to be notarized to be legally valid. However, if your state allows wills to be *self proving*, then you and your witnesses might want to go before a notary and sign an affidavit attesting to the fact that you were of sound mind, a legal adult, and so on when you signed your will. The witnesses would attest to this under oath. The advantage of using a *self proving* affidavit is that it relieves the witnesses from having to go to the probate court to testify to those things.

As we have said before, if your will does not meet all of your state's requirements for a legally valid will it will be like you never wrote a will, or died *intestate*.

Suzanne is not married, and lives in a small condo that she bought a few years after her children, Craig and Stephen, had both married and set up their own households. She has an IRA worth about $80,000.00, a brokerage account worth $25,000.00, a small checking account, and a few certificates of deposit worth a total of $15,000.00. A will is appropriate for her non-complicated estate.

Things to Consider When You are Preparing Your Will

Writing a will may seem easy, but actually you will have a lot of decisions to make when you prepare the document, especially if you want to make sure that the assets you give to your beneficiaries will make a positive difference in their lives and that those assets won't create any problems for them down the road.

Here are some of the decisions you will need to make:

- Who will be your beneficiaries. This decision may be a no-brainer if you are happily married, have an unmarried partner, and/or children. If you don't, this decision may be more of a challenge.

- Exactly what you will leave to each beneficiary.

- Who you will name as the executor of your will. The next section discusses the role of your executor.

- Whether you will include a trust in your will, and if you do, who will be the trust beneficiaries, what assets will be transferred to the trust, how you want the assets managed, and who the Trustee of the trust will be (the individual or institution responsible for carrying out your instructions, among other things).

Your Executor and the Probate Process

Your executor or personal representative will serve as the legal representative of your estate during the probate process. In that capacity, your executor will have a lot of responsibilities, some of which could be quite time consuming. Here are some of them:

- Ask the probate court to accept your will. In some states, the executor must post a legal notice about your death in your local newspaper, giving people an opportunity to formally contest the validity of your will or the appointment of your executor before a hearing is held to admit the will to probate. In other states, the executor must place a notice at a prominent location in the county courthouse and keep it there for approximately ten days to two weeks before the hearing. Unless there are objections, at the hearing, the court will normally accept your will and formally appoint your executor. At this point, the probate process will officially begin.

- Prepare a written inventory of all of your assets that include the fair market value on the date of your death of each asset. To determine the value of your assets, your executor may need to hire a realtor and/or an appraiser. Your estate will pay their fees.
- Formally notify creditors of your death and of their right to file claims against your estate so that they can get paid. In most jurisdictions, secured creditors must be notified by certified or registered mail; but publishing a notice in a local paper may suffice for unsecured creditors.

• Try to collect any money your estate may be owed.

• File state and/or federal tax returns and pay any taxes your estate may owe. Your executor should enlist the help of a probate attorney or an accountant to do this. Again your estate will pay that person's fee. Your executor will not be able to complete the transfer of all of your assets to your beneficiaries until all taxes have been paid, of course!

• Pay any other financial obligations your estate may owe, including the cost of your burial or cremation, assuming you did not do "pre-need" planning – all legitimate debts, the fees of any professionals your executor hires, and so on. These obligations will also include paying your executor a fee unless your executor has waived the right to receive one. If there are not enough liquid assets in your estate to pay the taxes, debts, and expenses, your executor will have to sell some of your assets, which means that there will be less of your estate for your beneficiaries.

• Help defend your will against any contests. Luckily, most wills are not contested. However if yours is, your executor will have to defend your will, which will involve more legal fees and expenses all of which your estate will have to pay.

• Transfer the appropriate assets to your testamentary trust, if your will includes one.

• Some states require that the executor submit a written report or "accounting" to the probate court. The report details all of your assets, all of the income they may have earned since your death, all of the expenses the executor paid out of your estate and how he or she intends to distribute what is left in your estate to your beneficiaries. If your estate is eligible to go through a less formal process than the traditional probate process, this report may not be required.

• Transfer your assets to your beneficiaries. Once this has been done, the probate process will be over and your executor's work will be done.

While the probate process is going on, your executor must manage the assets in your probate estate. For example, if it includes rental property, the executor will be responsible for collecting rents and making necessary repairs, among other things, and if you own a closely held business, your executor will have to ensure that your business is well run. It's likely that your executor will hire professionals to help handle these responsibilities.

Tip. During the traditional probate process, a hearing and court order may be required for many of the steps that an executor may have to take, like paying any bills owed by your estate, selling property and distributing your assets to your beneficiaries. However, if you request an informal or independent administration in your will (assuming your state provides this option), your executor will be able to take most of these same steps without first having multiple court hearings. The executor must still follow all of the rules that apply to each of the actions he or she must take on behalf of your estate, but this type of administration is much less expensive and time consuming.

Your executor's job will be over when he or she has paid the last expenses associated with your estate, any and all taxes of your estate have been paid, and transferred all of your assets to your beneficiaries.

Who Should You Name as Your Executor?

The person you choose as your executor needs to be comfortable dealing with the court and filling out forms, have good organizational skills and be able to juggle lots of details at the same time. Ideally, your executor should also live close to where you live or can at least travel there as needed.

Your choice for executor must also meet your state's requirements for executors. Those requirements generally include being an American citizen and of legal age, and most states bar convicted felons from being executors. Your estate-planning attorney can tell you if your state has any other requirements.

Most people name a close relative as their executor – their spouse or an adult child, for example -- or a good friend. However, if your estate is large and/or complicated, or if you don't believe that any of your relatives or friends are right for the job, a professional fiduciary, such as a bank or trust company are all good choices. You may also opt for a professional executor if you are concerned that your children or other relatives will make your executor's life difficult by second guessing his or her decisions or if you anticipate that there may be a will contest. This can happen when one or more of your potential heirs are unhappy with its provisions. Not only could dealing with a will contest be very time consuming, but if your executor has a personal relationship with the contestant, it could be quite awkward.

Warning! An executor is entitled to be paid a fee. Although a family or friend might waive the fee, a professional executor will not. The professional's fee could be a percentage of the value of your gross estate, which is the value of all of your assets before taxes, debts, fees and other expenses are paid, or a percentage of the value of the assets and expenses the executor handled

Do not name someone as your executor without confirming first that he or she is willing to do the job. When you talk with your choice for executor, be clear about exactly what is involved. If your first choice does not want to take on the responsibility, find someone else. Also, be sure to designate an alternate executor in case your first choice is unable (or unwilling) to be your executor when the time comes.

What You Can Do Now to Make Your Executor's Job Easier Later

Your executor will have a myriad of details to take care of after you die. Here are some things you can do now to make life easier for that person:

- Prepare a list of all your assets, including their locations. The list should also note the username and password for each of your online accounts.

- Ensure that your executor knows exactly where your will and other important documents, like insurance policies, the titles to your home and car, and business ownership paperwork are located. If your executor needs a key or password to access this information, be sure that he or she has that too.

• Provide your executor with written information about where you keep all of your asset ownership paperwork.

• Keep an up-to-date a list of all of your outstanding debts, including the amount of each debt, to whom you owe each debt, the applicable account number and contact information for each creditor. (Also keep a list of money owed to you).
• Make a list of all of the legal and financial professionals you work with, like your CPA, financial planner, broker, estate planning attorney and so on.

• Provide him or her a list of any business partners you may have and their contact information, and be sure the executor knows where the business' organizational papers and bylaws are.

• Review your will with your executor.

Setting Up a Trust

Another way to pass your assets on to your beneficiaries is by setting up a trust. A trust can hold the assets you own and can be used to either transfer the assets to your trust beneficiaries (much like your will) or benefit those beneficiaries in some other way. For example, the trust could periodically transfer money to the beneficiary, or the trust could pay some or all of their living expenses.

There are two basic types of trusts: Trusts that don't go into effect until after your death -- *testamentary trusts* – and trusts that go into effect while you are alive – *living trusts*. Testamentary trusts are *always* irrevocable after your death but until then, you can always change their provisions by revising your will. A non-testamentary or living trust is almost always revocable and flexible.

A testamentary trust is created inside your will; it’s a part of that document. A living trust or *intervivos* trust, on the other hand, is always created *outside* your will through the preparation of a separate trust agreement. You’ll find out more information about testamentary and living trusts in the next two sections of this chapter.
An executor’s job is temporary; it’s done when the last expenses, taxes, and debts have been paid and all final distributions to beneficiates have been made. The job of a trustee, however, may be ongoing.

Testamentary Trusts

You can provide for the creation of a testamentary trust in your will. However, as we explained earlier in this chapter, the trust won’t go into effect until after your death and your will is probated. Prior to that, it will exist on paper only.

To create this type of trust you must spell out the terms of the trust in your will, including the:

- **Trust beneficiary.** You can designate multiple beneficiaries as well. Always designate an alternate for each beneficiary in case the first beneficiary dies before you do, or in case the first beneficiary decides not to accept (disclaims) the asset you’ve left to him or her.

- **Trustee of the trust.** This may be an individual or a financial institution. Be sure to designate a substitute or alternate trustee too in case your first choice is unable or unwilling to serve in that capacity once the trust has been set up. After your death, the trustee will be responsible for managing the trust assets for the benefit of your beneficiaries according to your instructions. Those instructions may give the trustee full control over the trust assets, which would mean that the trustee could decide how the assets will be spent, whether to sell, invest or borrow against any of the assets. Or, you may give the trustee very specific instructions regarding how you want the assets managed.

- The specific assets you want transferred to the trust after you die.

- The purpose for which the trust funds should be distributed to the beneficiary. Typical purposes include for the "health, education, maintenance and support" of the beneficiary. You can also indicate in the trust document that the trustee has the discretion to determine when to make a distribution.

- Any restrictions and conditions you want placed on your beneficiary's access to and use of the trust assets. For example, you can indicate the age at which you want your children to have full control of the assets you've earmarked for them and what they can and can't do with them; or if your spouse is a bad money manager, you can direct that the trustee pay all of his bills and give your husband a monthly allowance rather than letting him have direct control over his share of the trust assets.

- When and under what conditions the trust must terminate, and what should happen to any property that is still in the trust at that point. For example, you may decide that you want the trust you set up for your child to end when he turns age 25 and for any assets that remain in the trust to go to him outright then. Another option is to direct that the trust terminate on the death of that child and that the remaining assets go directly to your grandchildren or remain in the trust for their benefit.

You can also use a highly specialized testamentary trust to:

- Provide for your seriously disabled child without jeopardizing his or her eligibility for government benefits, like Medicaid or Supplemental Security Income (special needs trusts).

John and Mary Smith have been married for 5 years, and have a modest estate. They have twin daughters, age 3. Their estate consists of a home with a mortgage, a small retirement account, and some modest investments. They did purchase life insurance on both of their lives in the amount of $500,000.00.

They met with an estate planning attorney who advised them to create wills because their current assets are modest. He strongly advised them to include a testamentary trust for the girls' benefit because the girls are minors. They name Mary's sister, Beth, as Trustee to *manage the funds in the trust for their daughters. They also advised them to name the trust as the beneficiary of the proceeds of life insurance and retirement accounts.*

Now, if something happens to John and Mary, Beth can sell the house if necessary, can use the proceeds along with the life insurance proceeds to pay for the girls' care, their education, and extras. Plus, John and Mary can provide that the girls don't receive all of the funds until they are 30 years old. Without the trust, the girls would inherit the money and the house, the court would monitor everything – nothing could be spent without the judge's approval, and the girls could get the money when they turned 18.

Living Trusts

Rather than using a will or a will combined with a testamentary trust to take care of your beneficiaries after your death, you may prefer to use a revocable living trust. As we already explained, a living trust is a legal entity that is totally separate from your will. You create this kind of trust while you are still alive by preparing a trust agreement. You can also transfer your assets to the trust while you are living, at which point the trust becomes their owner, not you. However, if you word your living trust document correctly by naming yourself (or yourself and your spouse), as Trustee and beneficiary, then that you can continue to manage, control and benefit from the assets just like you did before they were placed in the trust.

There are many reasons why you might want to set up a revocable living trust. For example:

• The assets in the trust won't have to go through the probate process before they can be transferred to your beneficiaries which reduces costs and keeps your affairs private.

• You can place limits on when (or if) your trust beneficiaries can have control over the trust assets and what the assets can be used for, just as you can with a testamentary trust.

• If you become incapacitated, the successor trustee you named in the trust can manage your finances. An expensive court guardianship for you would thus not be required.

• Provide for the care of your mentally or physically-challenged child without jeopardizing his or her eligibility for government benefits like SSI (Supplemental Security Income) and Medicaid. This kind of trust is referred to as a Special Needs trust and must meet specific requirements to qualify as such. As noted earlier, you can also do this with a testamentary trust.

Warning! It's not enough to state which assets you want transferred to your living trust. The assets must also be retitled in the name of the trust (this is called "trust funding"). Otherwise, they will still belong to you, not to the trust.
It's important to note that setting up a living trust does *not* eliminate the need for a will. You'll still need a will to:

• Ensure that any assets you may have forgotten to put in your living trust get transferred to it after your death. A will that serves this function is referred to as a *pour-over will*.

• Legally designate a personal guardian for your young children.

Other Ways to Transfer Your Assets

There are other ways to transfer your assets besides using a will or a trust. For example, some kinds of assets are transferred to someone else when you die through the use of beneficiary designations or because of the way you titled them.

When assets are transferred these other ways, they are said to pass *outside* your will because their transfer is not controlled by your will. And therefore, the assets do not go through probate.

It's always best to coordinate your use of the estate planning options described in this section of the chapter with the rest of your estate plan, especially if the total value of your estate is significant. Otherwise, you may unintentionally create problems for your beneficiaries.

Use Beneficiary Designations

When you set up certain types of accounts, you must fill out a form that asks you, among other things, to designate a beneficiary for the accounts. The beneficiary will receive the account proceeds when you die. Common examples of beneficiary accounts are:

• **Retirement accounts.** This kind of account includes employer-funded pensions, 401(k) plans, regular and Roth IRAs (Individual Retirement Accounts), and Simplified Employer Pensions, also referred to as SEPs. These accounts may hold mutual funds, individual stocks and/or bonds.

Warning! If you are married and make your spouse the beneficiary of your retirement account and your marriage ends in divorce, you and your spouse can divide up the funds in the account without having to pay penalties and free of any tax consequences.

Warning! You can designate a trust as the beneficiary of your retirement account. If you do, however, you may create a tax problem for the beneficiary if the trust is not structured correctly. Therefore, always consult with your estate planning attorney before designating a trust as your retirement account beneficiary.

• **Payable-on-death (POD) account.** This is a special kind of account that you can set up at a bank or credit union to hold money, savings bonds or U. S. Treasury Securities. You can also turn an existing bank account or CD into a POD account and you generally can make a brokerage account a POD account too. (This is known as a Transfer on Death (TOD) account.) When you set it up you specify who will receive the account assets when you die. Parents sometimes establish this kind of account for an adult child, but you can also set one up for another adult or for a charity.

It’s easy to set up a POD account -- just fill out the right paperwork and name an account beneficiary – the person who will receive the account assets when you die. If the beneficiary is a minor, you must also designate an adult to act as account custodian on behalf of the child.

Once you've set up a POD account, you can continue to manage and use the account assets. You can also close the account. When you die, your beneficiary will receive whatever assets remain in the account.

Warning! Some banks won't allow you to name multiple beneficiaries for the same POD account.

Warning! POD and TOD accounts go directly to the person named and cannot be managed the why your will may say. This is especially a problem for minors and people with special needs.

• **Custodial Account.** Like a POD account, this kind of account is easy to establish. However it differs from a POD account in a couple of important ways. First, only minors can be the beneficiaries of a custodial account. Second, once you transfer assets to a custodial account they belong to the child, not to you, so you cannot take them back. The child will get access to the assets when he or she becomes a legal adult **–** age 18 or 21 depending on the state. Depending on whether your state has adopted the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act (the law in most states) those assets may include cash, stocks and bonds, life insurance, annuities, patents, fine art, royalties, and real estate. We will provide more information about custodial accounts and your kids in Chapter 5.

• Life insurance. You may purchase life insurance to help ensure that your children, surviving spouse or partner has sufficient money to live on once you are no longer around to provide for him, to ensure that your children receive an inheritance, to benefit your favorite charity, or to pay your debts, the cost of probate, the estate taxes you may owe, the cost of your burial or cremation, and so on. Whatever the reason, when you die, the policy beneficiary will receive the policy death benefit.

Rather than having the death benefits go directly to your designated beneficiary when you die, you can name your trust as the beneficiary and spell out in the trust agreement who should receive the funds, how you want the funds used, and so on.

Be sure to designate a substitute for each beneficiary just in case your first choice dies before you do.

• **Annuities.** Annuities are generally purchased to provide for retirement. Again, these are transferred at your death to the named beneficiary.

Warning! It's a bad idea to designate your estate as the beneficiary of your life insurance policy. If you do, the policy proceeds could get bogged down in the probate process after your death, which would mean that they would not be distributed on a timely basis. Also, they could become available to satisfy your creditors' claims, whereas in at least some states they would not be. You may risk the same things happening if you die without having named a beneficiary for your policy or if your beneficiary dies before you do and you never named a substitute.

Warning! It's a bad idea to designate your estate as the beneficiary of your retirement account. That could create a tax problem for your beneficiaries. The same thing is true if you die without having named a beneficiary, or if the beneficiary dies before you do and you have not named a contingent beneficiary.

Make Lifetime Gifts

You can also transfer your assets without using your will or a living trust by giving them away while you are still alive. When you do, you are making *intervivos* or lifetime gifts.

Lifetime gift giving is a great way to reduce the value of your taxable estate. Another advantage is that you get the pleasure of being able to watch your beneficiaries use and benefit from your gifts while you are alive. For example, you may decide to give your son and daughter-in-law the money they need to purchase their first home or to give your daughter, a single Mom, the money she needs to provide your grandchildren with the kinds of extras she cannot afford to buy such as, music lessons, summer camp, a tutor, etc.

Not just any gift qualifies as a true gift however. Federal law says that to be considered a gift you <u>cannot</u>:

- Retain any control over the asset once you give it away.
- Continue to benefit from the asset.
- Take back the asset.

So for example, if you give your son rental property, you must transfer title to the property to him; you cannot receive any rental income from the property; and you cannot have a say in how your son manages the property or whether or not he sells it.

You should also be aware that for estate tax purposes there are other limits on lifetime gifts. For example, current federal law says that every year, you can give an unlimited number of people up to a certain set amount in gifts. This is referred to as your *annual gift tax exclusion*. (This amount is adjusted periodically to account for inflation.) If you give someone more than the amount of your annual gift tax exclusion in any given year, you must file a federal gift tax return for the excess amount, which will be subtracted dollar for dollar from your *lifetime gift tax exemption*, although it's also subject to change. Once you use up that exemption, you will have to pay gift tax on any other gifts above the annual exclusion. If you have used up that exemption and still own property when you die, your estate will have to pay a federal estate tax on all of the property you have left.

Title Your Assets Correctly

If you own an asset with someone else as *joint tenants with right of survivorship*, when the first owner dies, his or her share of the asset transfers to the co-owner. Many spouses own assets as *joint tenants with right of survivorship*, but you can do the same with your unmarried partner, an adult child, or someone else. Note that not all assets owned in another person's will be titled or held this way.

Another way to share ownership of your home and ensure that the share of the person who dies first will automatically transfer to the other owner is to title the asset as *tenants by the entirety*. However, this form of ownership is not available in most states and when it is, it can only be used by married couples.

Warning! Be sure you do not sabotage your entire estate plan by titling assets to pass outside your will (or trust). For example, you leave all of your assets equally to your two children in your will and later you make one of them a joint signer on a large bank account. By doing so, you may inadvertently make that child a joint tenant with right of survivorship, which means that when you die all of the money in that account goes to her even though your intention when you wrote your will was that your two children would split everything evenly.

Legal Details. In some states, **titling** property in your name as well as your spouse's is sufficient to create a right of survivorship, even when it comes to real estate. In other states, special language must be used to create a right of survivorship.

Death and Taxes

As we have already explained, if your estate is worth more than the estate tax exemption you have another very important reason for preparing an estate plan -- to minimize the amount of federal estate taxes it will owe after your death. Unless you take specific steps while you are alive to lower the taxable value of your estate, the taxes will take a big bite out of it, which means there will be less of your estate to go to your beneficiaries.

Warning! Congress can change the estate tax exemption whenever it wants. Therefore, if you have a sizeable estate it's a good idea to check with an estate-planning attorney to find out what the current amount is. That value could have been decreased or increased.

The "taxable value of your estate" means the total current value of all your assets less the total amount of debts that you owe. Over time, this amount is likely to change for any number or reasons: you acquire new assets; sell, lose or give away assets; your assets gain or lose value;

you take on new debt or pay off debt, for example. Therefore, if estate taxes are not a concern for you now, they could be in the future.

Warning! Your estate must pay any death taxes it owes to the IRS in cash no later than nine months after your death. Prior to your death if you have not arranged a means of paying any taxes you may owe when you die by purchasing a life insurance policy for example – your executor may have to sell some of your assets quickly to pay the taxes.

There are a variety of things you can do while you are alive to reduce the size of your taxable estate. For example, you can:

- Give your assets away as lifetime gifts. However, avoid giving any one beneficiary more than your federal annual gift tax exclusion amount. That amount changes periodically. If you give someone more than the exclusion, the amount of the gift that exceeds it will be applied against your lifetime gift tax exemption and you will need to file a gift tax return. The benefit of gifting is that it gets the future appreciation of those assets out of your estate.

- Transfer as many of your assets as you want to IRS-approved charities. Unlike lifetime gift giving, the annual gift limit does not apply.

- Transfer your assets to one of several irrevocable trusts. Some examples of this kind of trust include a *Charitable Remainder Trust*, a *Charitable Lead Trust*, an irrevocable *Life Insurance Trust*, and a *Qualified Personal Residence Trust*. Remember however, you cannot change or terminate an irrevocable trust once you have set it up.

- Transfer assets like real estate or a family business to a Limited Liability Company (LLC) or to a Family Limited Partnership (FLP). When you do this you may be able to get a reduced value on the assets in the entity for estate tax purposes.

If you are married, you and your spouse can take advantage of the federal *Unlimited Marital Deduction*, which allows all property in the gross estate of the spouse who dies first to pass tax-free to the surviving spouse. Sounds good, doesn’t it? Well, there is a catch. The problem is that the surviving spouse could end up with an estate tax problem as a result. If this is a concern, consult with an estate-planning attorney; the attorney can help you avoid the problem. In addition, your attorney may advise you on “portability” which allows the deceased spouse to “give” his unused exemption to you!

Chapter 3, Protecting Yourself In Case You Can't Manage Your Own Affairs

Estate planning isn't just about planning for what will happen when you die. It's also about creating legally binding documents that will help you ensure that your finances and your medical care will be managed properly if you become temporarily or permanently incapacitated because of an accident or serious illness. Those documents include:

- Durable Financial Power of Attorney
- Medical (Health Care) Power of Attorney
- Living Will
- HIPAA Release
- Revocable Living Trust

Not only will these five documents help you remain "in charge" of your financial and medical affairs when you cannot speak for yourself, they will also make things easier for your loved ones. For example, without a medical power of attorney and a living will, your loved ones will be left to guess who you want to make medical decisions and whether or not you want to be on life support. Without these documents, this is often emotionally difficult and extremely stressful. Furthermore, when some families are in that situation, a court may have to get involved. Is that *really* what you want for yourself and the people you care most about? In this chapter, you will learn a lot about the importance and value, as well as the limitations, of the documents discussed in this chapter.

Warning! If you are unmarried, unless you prepare the appropriate documents and give your partner, fiancé or friend the right to control your finances and medical care if you cannot, one or more of your family members may be appointed to make those decisions instead.

Tip. If you spend a lot of time in another state, prepare a medical power of attorney and living will that can be legally valid in that state as well as one for your primary state of residence.

Options to Control Your Finances When You Can't

You must prepare documents to designate how you want your financial affairs managed if you can't. One option is to set up a Revocable Living Trust. Another option is to create a durable financial power of attorney. A Durable Power of Attorney is a legal document that gives someone else -- your financial agent, also referred to as a *financial surrogate* or *attorney-in-fact* in some states -- the right to manage your money. The document can be set up to be effective immediately or only when you become incapacitated. It will remain in effect for a designated period of time of can be effective until you die or revoke it.

Legal Detail. A durable power of attorney that does not go into effect until you become incapacitated is referred to as a *springing power of attorney*.

Warning! These days, people live far longer than they used to. It's increasingly likely therefore that at some point during your lifetime, you will become incapacitated.

When you prepare your financial power of attorney, you can expand or limit the powers you give to your agent. Most people give broad authority to manage their financial affairs, including the right to pay bills, work with a financial advisor, CPA and other professionals, buy and sell property, manage investments, transfer assets to your living trust if you have one, prepare and file tax returns, and so on. If you own a closely-held business, you can give your agent broad discretion to manage your business affairs as well.

Warning! In some states, no financial institution ever has to honor your durable power of attorney. If you want to give your financial agent the right to make real estate transactions on your behalf, find out if your state requires that you file your durable power of attorney at your county courthouse. Your financial agent will not be able to handle those kinds of transactions until it is filed. Although you have the right to specify your financial agent's rights and responsibilities, most states set some limits on those things. For example, your agent probably won't be able to write a will on your behalf. Also, some powers you can only give to your financial agent by specifically referring to them in your durable power of attorney. Those powers include making lifetime gifts on your behalf and managing your retirement benefits.

In addition, you cannot give your financial agent the right to carry out any responsibilities on your behalf *after* you die because at that point your power of attorney becomes invalid. Instead, after your death, the executor of your will or the trustee of your trust will be responsible for your financial affairs.

As noted above, some financial institutions and real estate title companies may refuse to honor your durable power of attorney, and your state may not require them to do so. Therefore, it's a good idea to check with the institutions with whom you do business with to see if they will accept yours. If any of them will not, find out if they have their own durable power of attorney form that you can fill out. If they do, ask your lawyer to review the forms before you sign them.

Most financial institutions do not have their own forms; in that case, you have a couple of options:

• Move your funds to a financial institution that will honor your own power of attorney or that has a form of its own you can use.

• Set up a living trust, name yourself as trustee of the trust, and designate someone else as your successor. The successor trustee will manage the trust assets according to the instructions you set out in the trust agreement should you become incapacitated and after your death. The benefit of this option is that the successor trustee has a legally enforceable right to act on your behalf so there won't be an issue if one of your financial institutions refuses to recognize your financial power of attorney. Later in this chapter we discuss in more detail the benefits of having the trustee of a living trust manage your assets in the event of your incapacity rather than using a durable financial power of attorney.

Tip. If you set up revocable living trust and name yourself trustee of the trust, it's a good idea to have a durable power of attorney for your finances as well. Even though your successor trustee will be able to take care of many things on your behalf if you become incapacitated, there are assets the successor won't be entitled to manage such as your retirement accounts, accessing the information in your safe deposit box, and dealing with the IRS. For these reasons, you need a durable power of attorney for your finances plus a trust.

Legal Details. In addition to a durable financial power of attorney, there is a document called a nondurable financial power of attorney. Don't confuse the two! A nondurable power of attorney is *only* good for a specific purpose and is valid for just a limited period of time. For example, you are leaving the country for a month and want to give someone else the right to handle your banking, pay your bills, or sell some of your real estate while you are gone. Those responsibilities will end once the period of the power of attorney expires or if you become incapacitated before that date.

You can cancel your durable financial power of attorney whenever you want, assuming you are not mentally incapacitated. Put the revocation in writing and deliver a copy to your financial agent and to anyone with whom he or she may have done business on your behalf – your financial planner, CPA, and/or attorney, for example.

Warning! If your state requires that you make your revocation a part of the public record by filing it at your county court house, and if you do not, the revocation will not be effective. Also, your power of attorney may include specific revocation requirements of its own, so read it carefully.

Choosing Your Financial Agent

Who should you choose to be your financial agent? It is an important decision because if your agent mismanages your finances, it could be devastating to your estate and to anyone who is financially dependent on you. Here are some questions that will help you pick the right person.

- Who do I trust to take care of my money?

- Who do I know that does a good job of managing his or her own affairs?

• Are my assets worth a lot and/or are they complicated to manage? You own rental property or a closely held business, for example.

• Do I know anyone with the time to manage my financial affairs and their own too?

Most people choose a family member or close friend as their financial agent or trustee, but you may decide that your attorney, financial advisor, CPA, or someone else is a better choice. A professional, however, will charge you a fee for his or her services -- probably either an hourly fee or a flat rate that is based on the total value of the assets you need managed, while a friend or family member may waive the right to receive a fee. Even so, whether or not your financial agent will charge a fee should *not* be a deciding factor for you. Your decision should be based solely on who is the best person for the job.

Warning! Don't assume that if you are married, your spouse can automatically handle all of your financial affairs for you if you become incapacitated. You will still need at least a durable power of attorney for your finances. Although your spouse can manage your joint bank account without being named your financial agent, in most states if he wants to sell any of the real estate you may own together, either your signature or the signature of your financial agent will be required,

No matter whom you select as your financial agent, choose at least one alternate agent too. That way there will be someone to step in if your first choice is unable or unwilling to act on your behalf if and when the time comes. (We are all getting older!) Also, never designate someone for either position without first confirming that he or she is willing to assume the responsibility. They can decline to serve whenever they want to do so.

It's possible even if you have a durable power of attorney for your finances and become incapacitated that someone will petition the court to establish a *guardianship of your estate* (or *conservatorship* in some states). This might happen for example, because the person who files the petition does not approve of whom you named as your financial agent and would prefer that he, she, or someone else be in charge of your finances instead. If the court agrees to establish the guardianship/conservatorship, the person it names will assume your financial agent's responsibilities. The court will supervise this person and limit what he or she can do on your behalf. The next section of this chapter provides more information about the drawbacks of a guardianship/conservatorship.

Finalizing Your Durable Financial Power of Attorney

Review your durable financial power of attorney with your financial agent and alternate agent so you can be 100% sure that both of them understand exactly what you expect of them. Encourage them to ask you questions and to express any concerns they may have about what is in the document. It is important that they totally understand your wishes and feel certain that they can carry them out. If one of them does not, choose someone else; then sign it in accordance with the law of your state so that it will be legally valid. Your attorney will let you know if you need to get the document notarized and/or witnessed.

Store the original executed document and a copy with the rest of your estate planning documents. Give your financial agent, alternate and each of the financial professionals you work with a copy.

Tip. It's a good idea to let your financial agent and alternate agent know where to locate the following: The names of your banks and your bank account numbers along with the corresponding User IDs and passwords, and the names and contact information for your estate planning attorney, and any other attorney you may work with, your financial advisor, stock broker, CPA, etc.

If You Do Nothing and You are Disabled

What will happen if you become incapacitated without having either a living trust or a durable power of attorney? Sooner or later, a document related to your finances will probably need to be signed; one of your assets will need to sold; one of your bank accounts will have to be opened or closed; checks will have to be written; real estate you own may need to be sold, and so on. If there is no one with the legal right to do these things on your behalf, someone in your life -- your spouse, an adult child, or a close friend for example -- will have to ask a probate court judge in your area to declare you incompetent so that the judge can name someone as the guardian conservator of your estate.

Before the court can appoint someone, a public hearing will be scheduled and the judge will appoint a special attorney to represent your interests at the hearing. Your estate will be obligated to pay the attorney’s fees and expenses, which could be considerable. Also, members of your family will be notified of the hearing so they can attend if they want, and if any of them believe that they have something to gain or lose from the court’s decision, they may hire attorneys to represent them. In other words, the hearing could be contentious! Furthermore, some of the people who know you best may be called to testify at the hearing, and other people, like your doctor, friends, and/or business associates may have to testify, too. Meanwhile, if any of your family members disagree about who should be appointed, they might air their disagreements in court. Bottom-line, at the very time that your loved ones are having to cope with the fact that you are incapacitated, they could also be subjected to an emotionally-upsetting and expensive court process – a process that might never have happened if you had prepared the documents we recommended.

And there’s more! The person the judge appoints, assuming the judge decides that you cannot manage your own affairs, may not be someone you would ever have chosen to be in charge of your finances. It’s also possible that this individual will be someone your loved ones dislike or don’t get along with, or the judge may appoint a professional or bank which may be insensitive to their needs and concerns and does not understand their interpersonal dynamics.

And there is still more! All of the details about your mental state are presented in court, many of these are extremely private and embarrassing!

Tip: In some states you can use a declaration of guardian form to name your first choice for a guardian, and more importantly, to state who you do NOT want to serve in that capacity.

Warning! Your guardian or conservator may have to get the court's permission to spend and invest money and to take certain actions, like sell any real estate you own. Although there are good reasons for this, there is a downside as well because the courts work slowly and your finances could be hurt by delays as well as the expense of court involvement, attorney's fees, preparing required accountings, etc.

Jennifer Kline and Ed Flaherty were a young married couple. They knew about estate planning, but figured that they had plenty of time to worry about putting a plan together because they were only in their twenties and both of them were healthy. However, after Ed suffered a serious head injury while bicycling that left him in a coma for many months, they learned a painful and expensive lesson.
Because Ed could not manage his own affairs while he was in the coma and because he had not made any plans regarding his possible incapacity, Jennifer had no choice but to go to court to ask that she be named the guardian of his person and of his estate. The guardianship of the estate became necessary when Jennifer was unable to access some funds she needed to help pay the couples' expenses. With the help of an attorney and after a lot of time and money, Jennifer obtained that guardianship. She hated having the court involved in the couple's lives, but Jennifer had no choice. She needed the funds!

After about a year, Ed was well enough to ask that both guardianships end so a hearing was scheduled. On the hearing date, he went to court and answered a lot of questions; his doctor testified as well. In the end, the judge declared that Ed was competent. The very next week, Jennifer and Ed made an appointment with an estate planning attorney. After going through the hassle and expense of the guardianship process, both of them recognized that life is unpredictable and that youth and good health are no protection from unexpected accidents that can affect their ability to manage their own lives.

Another Option: Giving the Trustee of Your Living Trust the Right to Be in Charge if You Become Incapacitated

It is very common for people to use a durable financial power of attorney to give someone else the right to manage their finances if they become incapacitated. However, given the problems and limitations associated with doing so, we recommend that you consider establishing a living trust and giving the trustee of the trust the right to manage your financial affairs upon your incapacitation. Here's why:

- The court will stay out of your financial life and the trustee will not have to answer to the court.

- Your financial institutions must honor the terms of your trust.

- It will be much more difficult for someone to challenge the rights of the trustee to make decisions about your finances.

Warning! Even with a trust you will need a durable power of attorney to manage retirement accounts; those cannot be transferred to a trust while you are alive.

Directing Your Health Care When You Cannot Speak For Yourself

You may be young and healthy now, but you never know when you might be badly injured in an accident, fall into a coma, have a stroke, suffer a heart attack, or develop some other serious medical problem and no longer be able to make your own health care decisions. Let's be honest, none of us know what the future holds and we have all heard of people – sometimes young adults -- who become incapacitated for one reason or another. It's essential, no matter what your age or health status, that you prepare for the worst by creating what are commonly referred to as *health care directives*. These include a *medical power of attorney,* sometimes referred to as a *health care power of attorney,* and a *living will, also known as a directive to physicians. (*Some states combine both kinds of documents into one often called an Advanced Healthcare Representative.) The documents spell out the kinds of care and treatment you want and do not want if you are too ill or injured to direct your own health care and state whether or not you want life support to end when you are close to death.

The most important reason to prepare a medical power of attorney and a living will is that they let *you* control who is in charge of your medical care if you become incapacitated, but there are other reasons to prepare them:

- They will save your loved ones from having to make potentially difficult decisions about the kinds of care and treatment you should and should not receive and if and when life support should end if you are so ill that there is no hope of your recovery. They can also prevent a family fight.

- Your estate may be depleted by the cost of medical care and treatment you would not want.

- You will receive the care and treatment you *do* want.

- If you are in an unmarried relationship, your partner could be shut out of the decision-making process if you become incapacitated and/or are near death unless you name him as your health care agent.

Warning! Preparing a health care power of attorney and a living will is an extremely personal process so those documents should reflect *your* beliefs and values, not anyone else's. Never allow someone else to try to influence you when you are preparing them, especially someone with a financial stake in your decisions.

Your Medical Power of Attorney

You prepare a medical power of attorney to formally name someone as your *health care agent* and to give that person the right to make medical decisions on your behalf in consultation with your doctors when you can't make them for yourself. Those decisions usually include the right to admit you into the hospital, arrange for you to move to a nursing home or receive in-home care, and the right to get your living will enforced if there are problems getting that done, maybe because someone in your immediate family objects to terminating life support. Be sure to name an alternate health care agent too. We will discuss living wills later in this chapter.

The Qualities You Need in a Health Care Agent

When you choose someone as your health care agent, you entrust that person with something very important -- your health and well-being -- and you ask that person to be prepared to make very difficult decisions on your behalf, possibly even life and death decisions. Therefore, the person you designate should:

- Be someone you totally trust.
- Have good judgment.
- Share your values.
- Be comfortable talking with doctors and nurses.
- Be willing to speak his or her mind.
- Do well in stressful situations.
- Be someone who will not allow his or her personal feelings for you to get in the way of respecting your wishes.
- Live close to you or be able to quickly travel to your location.

Before you draft your health care power of attorney, ask the person you want to be your agent as well as your alternate choice if they are willing to take on the responsibility should the need arise. If either one expresses discomfort with any of the wishes you express or tells you that he or she would not be able to comply with some of your wishes for moral or religious reasons, you should probably name someone else as your health care agent.

Warning! As with a durable financial power of attorney, one of your family members may contest your health care power of attorney maybe because they do not approve of your choice of an agent or for some other reason, and try to get a "guardianship of the person" set up instead.

Your Living Will

When you prepare a living will you spell out the life-sustaining medical care you want and don't want when death is near. For example:

- If want to be kept alive through a feeding tube.
- If you want to be hydrated.
- Whether you want to receive antibiotics.
- Whether you want pain medication.
- If you want blood transfusions.
- Whether you want surgery.
- Whether you want chemo or radiation treatment, kidney dialysis, etc.

You can also use your living will to establish terms and conditions for each type of care or treatment you receive. For example, "I only want to be kept alive via a feeding tube under X, Y, and Z circumstances." And, your living will can state whether you want your tissue and/or organs donated.

Tip: If you are terminally ill, you may want to ask your doctor to prepare a Do-Not Resuscitate order (DNR), which would apply if your heart stops or if you stop breathing. Alternatively, you can ask your doctor to include a DNR order in your medical records.

We realize that preparing a living will is probably not at the top of your To Do list. After all, who wants to contemplate the end of their life? Inevitably, however, that time will come for everyone. And when it does, although your death may be very sudden, it could also be a relatively slow process, maybe because you are terminally ill, in a permanent coma, or in a persistent vegetative state. When it does not happen quickly, unless you've prepared a living will, your family in close consultation with the doctors in charge of your care, will have to decide what should happen to you (and they might not all agree). This is a big burden. By signing a Living Will, they know your wishes, and that is a relief to them. Preparing a living will is a loving and compassionate thing to do for the people who love you. If you are concerned about your finances, it can also be helpful in reducing the cost of extensive medical care because the miracles of modern medicine and technology can keep you alive long after you've fallen into a persistent vegetative state or become terminally ill or injured, and life-sustaining measures can be very expensive.

Warning! If you do not prepare a living will, your loved ones may decide to keep you alive at all cost even if you would have preferred something different or they may decide to "pull the plug" when you would have preferred to keep on living. Their decision may be influenced by a variety of factors, including their religious values; denial about the seriousness of your condition; fear of losing you; or even greed if they know that they will inherit your assets when you die.

Tip. It's a good idea to register your healthcare document, including your living will with a registry like DocuBank (www.docubank.com) or Living Will Registry (http://www.uslivingwillregistry.com). Then, if you are in a hospital far from home -- the doctors who are caring for you can contact the service to access healthcare documents within minutes.

Preparing Your Health Care Directives

Working with your estate-planning attorney, you will decide on the specific powers to give your health care agent. You can give him or her very sweeping decision making powers with regard to your medical care or you may prefer to spell out care options in detail. You will also decide on the provisions you want to include in your living will.

Your estate-planning attorney will make sure that the documents are legally valid in your state with appropriate witnesses and/or notarization. If you spend a lot of time in another state, you should prepare a second set of directives that complies with the requirements of that other state.

Warning! In most states your witnesses cannot be beneficiaries of your estate plan, your legal heirs, one of your medical providers, or anyone to whom you owe money.

Warning! Although you can use standardized forms to create your health care directives, they are very generic and won't allow you to put conditions on when you want or don't want certain kinds of care or treatment.

Once you have completed your medical power of attorney and your living will make copies and store the originals with the rest of your estate planning documents. Give a copy of each document to your health care agent and alternate as well as to your primary care physician. It's also a good idea to give copies to the people to whom you are closest. Spend time reviewing the documents with everyone that has copies so they understand your wishes. Ideally, even if they would not make the same choices for themselves, they will accept your decisions.

Tip. If your doctor expresses any reservations about the wishes you express in your medical power of attorney and living will, you might want to find a more supportive physician.

Whenever you review your will and trust documents to determine if they need to be changed in any way, make it a habit to review your health care directives, too. If you decide that they should be changed, destroy the originals and all copies and prepare a new directive. Never make handwritten changes.

If the Court Gets Involved

If you don’t prepare a health care power of attorney, someone may have to petition the court to set up a guardianship of the person on your behalf. Also, as we have already mentioned, even if you do prepare a medical power of attorney, someone may contest them and ask the court to establish a guardianship for you instead.

One Other Document You Should Complete

There is one other document you should complete: A HIPAA Release

- The federal Health Insurance Portability and Accountability Act (HIPAA) was enacted in 1996. Among other things, this law sets standards for the use and disclosure of information related to your health and prohibits your health care providers from sharing that information with most third parties without first getting your written permission. If you don’t have a HIPAA Release, it’s probable that if you are hospitalized, the hospital will refuse to let your loved one know anything about your condition! Completing a “universal” HIPAA Release will allow your care provider to discuss your condition with your family.

Chapter #4, Marrying For the First Time or Marrying Again

When you are in love and about to be married, it's easy to focus all of your thoughts and energies on your romantic hopes and dreams, but there are a myriad of practical financial and legal matters that you should tend to as well. For example, depending on your circumstances and goals, it may be a good idea for you and your fiancé to negotiate a prenuptial agreement with one another. Also, both of you should prepare your own estate plans, and if you already have plans, you should review your plan documents and update them as necessary.

We begin this chapter by discussing prenuptial agreements as they relate to estate planning and explain what makes such an agreement legally enforceable. Then we will go on to review the many ways that you can include your spouse in your estate plan and identify some of the strengths and weaknesses of each of those options. After you have read this chapter, however, meet with an estate planning attorney to get a clear understanding of the best way to plan your estate with your spouse in mind.

Prenuptial Agreements

You probably associate a prenuptial agreement, often referred to as a *pre-nup*, with ending a marriage, because many soon-to-be-spouses use them to spell out the terms of their divorce ahead of time. The hope is that negotiating things when a relationship is still all *hearts and roses* will help minimize the potential for acrimony, conflict, court hearings and expense later if the marriage fails. Increasingly, however, spouses-to-be, especially when at least one of them is coming into the marriage with a substantial amount of wealth, has a large earnings capacity compared to the other spouse, and/or has children from a prior relationship, are using prenuptial agreements to help protect their assets and ensure that all or some of what they own goes to their heirs; not their new spouse's heirs.

You see, in most states, the surviving spouse by virtue of marriage, has a legal right to a certain share of the estate of the deceased spouse regardless of what that spouse's estate plan may say.

In some states, the share is referred to as the *elective* or *forced share* and it guarantees that one spouse won't disinherit the other. In some states, the elective share is between one-third and one-half of the value of the deceased's estate, and the definition of estate for the purposes of determining the amount a surviving spouse is legally entitled to varies from state to state. In other states, the community property laws determine who owns what share of the property.
If you leave your spouse less than his "legal" share, he can ask the court to receive that amount after you die. By doing so, he will effectively undo your estate plan. You can use a prenuptial agreement how to ensure that that will not happen.

Legal Details. In some states, prenuptial agreements are referred to *ante nuptial* agreements or *premarital agreements*.

Assuming your future spouse agrees, you can use a prenuptial agreement to modify or waive any of his rights so that you will not have to share any of it with your husband to be when you die.

There are a number of reasons why your future spouse might be amenable to such provisions. For example, he is coming into the marriage financially secure and does not need any of your assets or you are willing to agree in the pre-nup to give him certain assets, maybe you may agree to retitle certain assets as *joint property with the right of survivorship*, and/or leave your fiancé with a specific amount in your estate plan.

Warning! If you and your husband prepare your estate plans or update your existing plans after your marriage – by writing wills and/or establishing a joint revocable living trust – and you forget to let your estate planning attorney know that you have a prenuptial agreement, you run the risk of negating the value of those documents, you may create the basis for a lawsuit by your family or your spouse's family, or you may unintentionally change your separate property into joint property. You also face these same risks if you prepare your own estate plan.

Make Sure Your Pre-nup is Legally Valid

Your prenuptial agreement must meet certain state-established requirements to be enforceable. Although the requirements tend to vary a bit from state to state, they are generally as follows:

- During the negotiation process, you and your future spouse must each be represented by separate attorneys. This arrangement helps ensure that both of your interests are fairly represented.

- Both of you must enter into the agreement because you want to, not because you feel pressured or coerced.

- You and your future spouse must be totally forthcoming with one another about the assets owned and the debts owed during your negotiations.

- Your pre-nup must be in writing and both of you must sign it.

- You must be given adequate time to thoroughly read and understand the agreement. Generally therefore, it’s best for you work out the terms of your prenuptial agreement well before the date of your marriage.

- The agreement cannot contain anything illegal. For example, it cannot alter your child support obligation or your visitation rights.

If your pre-nup does not comply with all of your state’s requirements and your spouse decides to contest it later, the court may declare the entire agreement legally invalid and toss it out. Alternatively, it may cite a specific provision in the agreement as unenforceable.

John Jones and Janet Klein are getting married in nine months. Both of them are successful professionals with assets of their own and both have children from previous marriages. Although they are deeply in love, they both know from personal experience that marriage does not always work out and that divorce can be devastating financially. They want to protect themselves from the financial impact of divorce in the event their marriage ends. They also want to do everything they can to ensure that the children from their prior marriages inherit from their respective relatives.

At the suggestion of another married couple they know, Janet schedule an appointment with a family law attorney to discuss getting a prenuptial agreement. The attorney explains the benefits of that kind of agreement and tells Janet that they can each protect their respective children's inheritance by agreeing that certain property is Janet's and certain property is John's. John retains another attorney to help him. They can each make a list, state which property is whose, and that all the income from their own separate property will belong to that spouse. They can also agree that each of their salaries will belong to the earner. That way, on Janet's death, her own children will inherit from her (assuming she creates estate planning documents leaving property to them), and it should be fairly easy to determine what property that is.

Postnuptial Agreements

If you do not prepare a pre-nup before your marriage, you and your spouse may want to negotiate a postnuptial agreement. You can accomplish the same things with a postnuptial agreement that you can with a prenuptial agreement and the requirements for a legally valid post-nup mirror those of a pre-nup.

Including Your Spouse in Your Estate Plan

If you are married, you probably want your spouse to be the primary beneficiary of your estate plan to ensure that if you die first, he will be financially comfortable. There are many ways that you can achieve this goal, and some of them may be better than others depending on the value and nature of your finances, your husband's own finances, his financial savvy, and other considerations. Broadly speaking however, you can leave your assets to him with "no strings attached" or you can place limits and control on those assets.

Leaving Your Assets to Your Husband Without Any "Strings Attached"

If you decide to leave all or most of your estate to your husband with *no strings attached* and you are the first to die, there will be no limits on what your spouse can do with the assets he inherits from you. Therefore, he will be free to spend everything, invest the assets, gamble them away, give them away as lifetime gifts, and transfer them to whomever he wants through his own estate plan.

Warning! There can be unintentional consequences of leaving all of your assets to your husband with *no strings attached*. For example, let's assume that the two of you have children, that each of you leave all of your assets in your wills to the other and that you name your children as your secondary beneficiaries. Let's also assume that you are the first to die and that after your death, your husband makes no changes to his will and later remarries. If he retitles everything with his new spouse as joint tenancy with the right of survivorship assets and dies before her, she will own 100% of all the retitled assets. It won't matter that your husband's will says that when he dies those assets should go to your children. Lesson? Always consult with an estate planning attorney before you title all of your assets as *joint tenants with the right of survivorship* (or as *tenants in the entirety)*. If you don't, you may unintentionally sabotage your entire estate plan.

Warning! You can leave an unlimited amount of your assets to your husband through your estate plan and your estate will not have to pay a dime in estate taxes because of the Unlimited Marital Deduction. If you do, however, you may create future estate tax problems for your children when he dies. However, an estate-planning attorney can help you minimize the potential for that problem.

If you decide to leave everything to your husband without any restrictions, you can:

- Bequeath all of your property to your spouse in your will

- Own all of your assets with your spouse either as *joint tenants with the right of survivorship* or as *tenants in the entirety* although most states do not have tenants by the entirety. If you do, each of you will own 50% of the assets while you are both alive, but when the first spouse dies, the surviving spouse will automatically own 100% of them. And, the assets will not go through probate. Spouses commonly title assets like real estate, bank accounts, brokerage accounts, and vehicles this way.

Warning! There are states where it is not common to own real estate this way.

- Designate your husband as the beneficiary of your life insurance policy. You may purchase the policy so that your spouse will have the funds he needs to pay for your burial or cremation, for the cost of probate, or so you can be sure that he and your children will have plenty of money to live on after your death.

- Make your husband the beneficiary of your retirement funds. You may have one or more of the following kinds of retirement accounts: regular or Roth IRA, 401K, employer-provided pension, SEP, or Keogh. When you die, whatever is left in those account's will automatically belong to your husband, at which point he can *roll over* the account assets into his own IRA and delay taking anything out of the account until he reaches age 70 1/2 or roll it into an inherited IRA and then begin receiving distributions from the account starting in the year after your death. Whenever your husband begins receiving money from the account, he must pay income taxes on it, however, unless the account is a Roth IRA because Roths are funded with pre-tax dollars.

Tip: It's a good idea for you both to talk with your financial advisor or CPA about whether if you die first, it would be better for your husband to roll over the retirement account or to take it as an "inherited IRA," which would mean that he would have to take distributions the year after your death rather than delay taking distributions until he turns 70 1/2.

Tip: You and your husband should both include a *simultaneous death clause* in your wills. The clause ensures that that if the two of you die within a certain amount of time, say 60 days, your respective assets won't pass to the other's estate, but will go to your designated alternate beneficiaries instead.

Warning! A will becomes a public document once it's been filed with the probate court and anyone who wants to can read it. An i*nventory* or list of all of the assets owned by your estate may also become part of the public record depending on the law of the state you live in, and the particular facts of your probate estate. If you are concerned about preserving your spouse's privacy, rather than using a will to transfer your assets to your spouse, you might consider making him the beneficiary of a living trust instead because living trust agreements are not public documents.

Take Care of Your Spouse, But Maintain Control Too

If your goal is to take care of your husband financially after your death *and* maintain some control over the assets you want him to benefit from, then making him the beneficiary of a trust is the answer. You may want this control because:

• You are afraid that your spouse will squander the assets you leave to him, because he is a poor or inexperienced money manager, has addiction problems, or has a hard time saying "No" to people when they ask for money.

• You have children from a prior marriage and you want to be sure that when your husband dies, they will end up with all or some of the assets, but you also want your husband to benefit from those assets while he is alive. Without the right controls in place, it's possible that your husband could deplete all of those assets after your death, or leave them to his own children, a new spouse, or someone else.

Why a Trust for Your Spouse

There are many different types of trusts. However, the ones we describe in this section of the chapter are the kinds of trusts spouses most commonly set up to benefit one another. If you are interested in one of them, schedule an appointment with an estate-planning attorney. Do not try to set up your own trust!

The attorney you meet with will help you decide if a trust is right for you, and help you plan its terms. Remember that you can create this type of trust in your will (a "Testamentary Trust") or in your Living Trust.

A trust for your spouse is a good option if you want to protect (remarriage or lawsuit proof) the money you are leaving your husband from lawsuits and future remarriage, or he is not a good money manager. If you pick someone other than your husband as Trustee of the trust, he will not have unlimited access to the assets in the trust or to the income the assets may generate. Instead, the trustee of the trust will dole out money from the trust to him, according to your trust instructions. You can even provide for the trustee to pay his living expenses and/or other expenses. If he is good with money, he can be the trustee and the trust assets would still be protected.

• **Special needs trust.** You should consider setting up a "Special Needs" or "Supplemental Needs" trust if your husband has a chronic illness or is mentally or physically incapacitated and you want to be sure that he can benefit from your assets without affecting his or her eligibility for government benefits like Medicaid and Supplemental Security Income (SSI), both of which are only available to people with very low incomes and few if any assets. However, the trust must meet very specific criteria to be considered a special needs trust. For example, your spouse must have absolutely no control over the trust assets and none of the income generated by those assets can be distributed directly to your spouse. Also, you must set up the trust before your spouse turns 65. The terms allowed in these trust vary from state-to-state and you must consult a qualified attorney.

Warning! Some strict special needs trusts allow the trust assets to be used only to pay for things that Medicaid and SSI won't cover. In some states, more discretion is allowed.

Blended Families Estate Planning Issues

Today, many people who get divorced marry again, and often at least one spouse has children from a previous marriage or even from multiple prior marriages. In fact, according to the U.S. Census Bureau, blended families now outnumber traditional families.

Blended families present parents with a whole host of unique challenges, including those related to estate-planning. Some of the estate planning issues can be quite complicated, and if you do not handle them correctly, your planning could have unfortunate unintended consequences. For example, if you die first and you leave all of your assets to your husband outright in your will with instructions that he should pass those same assets to your children from a previous marriage on his death, he may decide to leave the assets to someone else – his children, or a new spouse or partner for example -- which would mean that your kids would get nothing. On the other hand, if you leave all of your assets to your children and ask them to take care of their stepparent if you die first, he has no assurance that they will continue to care for him after your death. To resolve the potential for future problems with your estate as well as within your family, you and your husband (or future spouse) should spend time honestly talking with one another about how you want to deal with your blended family in your respective estate plans. Some of the issues you should address include:

• Do each of you want to leave your own assets to your children by blood only or do you each want to include your stepchildren in your plans as well?

• Are there assets that you want to ensure go to your children from your previous marriage? As you've already learned, if you leave them directly to your husband and you are the first to die, you have no guarantee that they will end up with your kids.

• Is there furniture, family heirlooms, art, knickknacks and so on that you brought into your new marriage that have a special significance to the children from your previous marriage? If there is, to avoid hurt, disappointment and the potential for hard feelings, state in your will or living trust which child gets what when you die. Otherwise, those children may not get them.

• If one of you inherits money or other assets from a parent or another relative, what will you do with it? Although marital property law says that your spouse may not be entitled to your inheritance, you may feel subtle or not so subtle pressure to use it to help your stepchildren go to college, to pay off bills your spouse owes from a previous marriage, pay his child support and so on, when what you really want to do is leave the inheritance to your kids.

• Should you set up a revocable living trust to benefit your spouse and children? Should it be your own trust or a joint trust with your spouse? Should your stepchildren be beneficiaries too?

Once you’ve talked through these issues together, you should both meet with an estate-planning attorney to discuss your concerns, decisions, and anything you’ve not been able to agree on. The attorney will answer your questions, suggest alternative approaches to the things you’ve already decided on, address other issues you should think about, and offer solutions to the matters you cannot resolve. For example, the lawyer may recommend negotiating a prenuptial agreement (or a postnuptial if you have this discussion after your marriage), that you purchase life insurance and/or set up a trust.

Chapter 5, Protecting Your Children

You face a multitude of choices when you are planning your estate with your children in mind, especially if they are minors – under age 18 in most states, but age 21 in some. The fact that you have so many choices is one of the reasons it's important to work with an estate-planning attorney. After all, you don't want to make any mistakes when it comes to the well-being of your kids should you die or become incapacitated while they are still young! Furthermore, what's right for your children when you prepare your plan initially may change over the years, so you need a professional to consult with over time about possible plan revisions.

In this chapter, we explain your options for ensuring that your kids will be taken care of if you die or become incapacitated while they are still minors. Later in the chapter, we discuss estate planning for adult children and highlight some special issues you may need face as a parent and how to address them.

Taking Financial Care of Your Minor Children at Death and Disability

You have several options for ensuring that your children's financial needs will be taken care of if you die while they are still young. Some of those include:

- Leave them property in your will.

- Make your children the beneficiaries of your life insurance policy or retirement account.

- Open a custodial account for each child.

- Make your children the beneficiaries of a trust.

Warning! Naming a minor as the beneficiary of an estate plan or an account is a bad idea. The money will be under court control until they receive it in a lumps sum on their eighteen birthday.

Which options are best depends on a variety of factors, including your estate planning goals, the value of your assets, and the needs of your children.

Use Your Will to Take Care of Your Children's Financial Needs

Most parents who have children together leave their assets to their spouse in their wills with the assumption that he will use those assets to provide for their kids and in turn, will leave those assets to those children when he dies. Although this is a relatively easy way to provide for your husband, as well as for your children; it can be problematic because there is no guarantee that things will happen that way after your death. For example, here are some examples of what might happen:

- Your surviving spouse may remarry or enter into an unmarried relationship and leave everything to his new wife or partner.

- He may leave everything to his children from a previous relationship.

- He may squander the assets or lose them in a bankruptcy, divorce, or lawsuit.

- He may prepare a new will and leave all of the assets you left to him to your children. But later, he may decide to retitle all of those assets as joint assets with the right of survivorship so that he then owns them with his new spouse or partner. The problem? If they own assets this way, if he dies first, his new wife will get 100% of those assets, which means that your children will get none of them.

You can also leave assets directly to your children in your will. You can leave each of them exactly the same amount of assets or different amounts. For example, if you have three children, you could direct that one child receive two-thirds of your assets and that the other two split the remaining third. If your children are very young, however, it probably makes the most sense to leave each of them exactly the same amount in your will with the understanding that as they grow older and their health or other status changes, you may want to amend the will or prepare a new one to change how you distribute your assets among them. For instance, if one of your children develops a chronic illness you may know that he or she will have a tougher time in life and so you may want to leave that child a greater share of your estate than your other children. This is a good example of why it's important to review your estate plan periodically and to revise it as needed.

You can also use your will to spell out which items of your personal property you want each child to get when you die. For example, you want your son to inherit all of your wood working tools and your daughter to inherit your great grandmother's ruby ring.

Advantages and Disadvantages of Transferring Your Assets Directly to Your Kids in Your Will

Transferring your assets directly to your minor children on your death has some significant disadvantages, however:

- A property guardian or conservator may have to be appointed by the court for your children in case you die before they have become legal adults because minors cannot manage their own property. In most states you must designate this person in your will, but some states let you do so by completing a special form. There are many problems with a guardianship, however. There will be a public hearing after your death and the judge who presides over the hearing may not agree with your choice of a property guardian, in which case he or she will designate someone else. That "someone else" may not be anyone you want managing your young children's property, and if you are divorced, may be your ex-husband. Once the guardianship has been established, the court will be involved in your children's lives until they become legal adults – age 18 or 21 depending on your state – and will limit what the guardian can and cannot do with the assets. We tell you more about property guardianships in the "A Property Guardianship: What Is It and Why You Should Avoid One If You Can" section later in this chapter.

- As soon as your kids become legal adults, they will get full control over whatever assets you left to them in your will. This could be a problem if they have substantial value or are complicated to manage such as real estate. After all, how many young adults do you know that have the maturity and financial management skills to manage more than a small amount of money? And how many young adults who inherit substantial assets are likely to hire a CPA, financial planner, and/or property manager to help them manage what they've inherited?

- Directly inheriting a significant amount of assets may affect your children's initiative and drive for success in life.

- One or more of your children may have other issues like drug addiction and getting full control of their inheritance at age 18 or 21 might fuel the problem.

- Some of your children may be victimized by predictors who use them for their money.

- If one of your children has a serious disability, having direct control over the assets you've left to him could negatively affect his (or her) eligibility to receive important benefits from the government.

In other words, you may do a great disservice to your minor children by transfering your assets to them with *no strings attached*. If this is a concern for you, a better estate planning choice would be to make them the beneficiaries of a trust. We discuss trusts and your minor children in the *Exercise Control with a Trust* section later in this chapter.

Purchase Life Insurance

Another way to provide for your minor children is to make them the beneficiaries of a life insurance policy. However, as with a will, once each of your children becomes a legal adult, that child will get full control over his or her share of the policy proceeds. Now, if the value of each child's share is just a few thousand dollars, this may not be an issue for you; but if it's worth much more, giving your children unrestricted access to their money is probably not something you want to do.

A good alternative in that case is to name a trust as the policy beneficiary, not your kids. You can do that either by providing for a testamentary trust in your will or by setting up a living trust while you are alive. Either way, at your death the policy proceeds will be paid to the trust and managed by the trustee for the benefit of your children according to the instructions set out in the trust agreement. For example, you can state in that agreement how you want the trustee to use the money on your children's behalf and when (if ever) the proceeds should be distributed to your children.

Tip! Many new insurance policies have "restrictive" beneficiary designations that let you tell the insurance company to slowly distribute that money to your children.

Open Custodial Accounts

As we explained in Chapter 2, you can open a custodial account to benefit your minor children at a bank or brokerage firm. If your state has adopted the Uniform Gifts to Minors Act, you can transfer cash, mutual funds, stocks, bonds, life insurance, and annuities to the account. If it has adopted the Uniform Transfers to Minors Act, which is the law in most states, you can also transfer real estate to the account.

You can make transfers to a custodial account while you are alive, or you can provide instructions in your will or living trust to have specific assets transferred to the account after your death. If you transfer assets while you are alive, the transfers will be irrevocable, which means that once the assets are in the account, you won't be able to take them back. However, assuming you are not the account custodian, those transfers will be treated as lifetime gifts so that they will reduce the overall value of your estate, which would be a good thing if you are concerned about having to pay estate taxes after your death. Whenever one of your children becomes a legal adult, his or her custodial account will end and the child will get full control over whatever assets remain in it.

Warning! Only one child can benefit from a custodial account, so if you have multiple children, you'll need to set up a separate account for each child.

As we already mentioned, when you establish a custodial account, you must name an adult to serve as its *custodian.* (Be sure to name a successor, too.) This person will be responsible for managing the account assets and for using them to help pay for your child's basic needs, which include food, shelter, healthcare, clothing and education, for reinvesting any income the assets may generate, and for collecting income from any real estate that may be in the account.

As we mentioned, while you are alive, you can serve as the account custodian. However, there are drawbacks to doing so:

- You won't be able to use the account assets to pay for your children's basic needs because as long as you are alive it is your legal obligation as a parent to provide to pay for those needs using your own resources. You can, however, use the assets to pay for any extras you want your children to have, or you can do nothing with the assets and just let them increase in value.

- When you transfer your assets to the accounts, the transfers won't be treated as lifetime gifts because you will still be in control of them. Therefore, if you die while the accounts are still open, any assets that remain in them will be included in your taxable estate and could mean that your estate will owe taxes.

Warning! You will be taxed on any income the assets in their custodial accounts may earn. Also, the value of the account assets could jeopardize their eligibility for federal college aid.

Exercise Control With a Trust

You'll avoid the drawbacks associated with a very simple will and with the other estate planning options we've discussed so far if you take care of your children's financial needs using a testamentary trust in your will or a living trust. Although it costs more to set up a trust, when you do, *you* get to determine when (if ever) your children will get control over the trust assets, when the assets will be distributed to them, and for what purpose. You can also control what the trustee of the trust can do with the assets – what the trust income and/or principal can be spent on. You can also prevent an ex-husband from getting control of this part of your estate!

If you are like most parents who set up a trust for their children, the trust agreement will include one or more of the following provisions:

- Your children will receive unrestricted access to their share of the trust assets reach a specific age (21, 25, 30, etc).

- You can prevent your children from getting unrestricted access to their share of the trust assets. Instead, you can direct the trustee to use the assets to pay their day-to-day expenses or to provide them with an allowance, maybe because you are worried that your children will not do a good job of managing the assets or because you want the trust assets to be available to benefit your grandchildren or other beneficiaries at some point.

- You can also give your children control over their share of the trust assets in stages. For example, they might receive one-third of the assets at age 25; another third at age 30; and a final third at age 35. The advantage of doing this is that they will not have the opportunity to mismanage their entire inheritance all at once. Instead, by receiving their assets over time, they will have the chance to learn (hopefully) how to manage them responsibly, which should increase the likelihood that they will truly benefit from what they receive from you.

- You can tie an inheritance to the meeting of specific milestones – going to college, graduating from college, getting married, starting a family, buying a home, and so on. Of course, this scheme would penalize those children who do not achieve these goals.

- Your children will get control of some portion of the trust assets or of specific assets at a certain age, but they will never control certain other trust assets, although they can receive income from them. This approach makes sense if you want to ensure that a certain amount of the trust assets or specific assets will be available to benefit future generations of your family.

Tip: One reason to create a trust for your children is to maintain control over their share of the trust assets, thereby protecting these assets from their possible divorce or lawsuit. If a trust is set up as a "spend-thrift" and it owns the assets, your child can not lose their inheritance in a divorce or lawsuit, and in many states, they can server as their own trustee and still have the divorce and lawsuit protection.

Legal Details. In most states, a trust cannot last for an indefinite period of time.

Set Up a Testamentary Trust for Your Kids

A testamentary trust is a type of trust that does not come into existence until after your death because it's created through your will. You spell out in your will the specific assets you want transferred to the trust at your death, who you want to serve as Trustee of the trust, what you want the trustee to do with the assets, what you want to happen to each child's share of the trust assets once the child becomes a legal adult, and so on. We discussed these options in the previous section of this chapter.

After your death, the will has to go through probate, but the assets earmarked for the trust will be transferred directly to the trust. Once that happens, the trustee will be responsible for managing them according to the terms set out in your will.

Taking Care of Your Children With a Living Trust

Unlike a testamentary trust, a living trust is created and funded (assets are transferred into the trust) while you are alive. There are a couple ways to use this kind of trust to benefit your minor children. One popular option is for you (and your spouse if you are married) to set up a living trust, transfer all of your assets to it, and name yourself as Trustee so that while you are alive, you can manage the assets for the benefit of your family like you do now. At your death, the trust assets can either be transferred into a remarriage protected trust that we discussed in the previous chapters, or transferred to a single trust for all your children (a common trust), or they can be transferred to separate trusts for each child.

If you are like most people who set up a family trust, your trust agreement will provide that when the first spouse or partner dies, the trust must be divided into two shares -- the deceased's share, which will be irrevocable, and the survivor's share. Both shares can be used to provide for your family.

The agreement will also state that when the surviving spouse or partner dies, his or her share of the assets will be combined with the assets in the deceased's trust and the successor Trustee will manage them for the benefit of your children. Eventually, depending on the terms of the trust agreement, those assets will either be divided up and transferred to a separate trust for each of your children or distributed to them outright.

Regardless of whether you create a Living Trust or a Testamentary Trust in your will, you must decide when your children receive their assets from the trust, if ever, or what happens to those assets when the children die. We reviewed most of those options earlier in this chapter.

Tip: If you set up either type of trust and make your children its beneficiaries, it's a good idea to name the trust as the designated beneficiary for assets like life insurance and retirement accounts rather than the children themselves.
Warning! Making one of your adult children the trustee of his or her sibling's trust is a good way to turn them into enemies!

Tip. An important advantage of using a living trust to provide for your young children is that you can give the Trustee the right to manage the trust assets according to your instructions if you become incapacitated before they become legal adults. You cannot do the same thing with a testamentary trust because it is part of your will and so it does not come into existence until your death.

Who will Raise Your Children?

A personal guardian is the adult who will raise your children if you die or become incapacitated while they are minors, assuming their other parent is also deceased or unable to care for them. If you are like most parents, you will designate this person in your will but in some states you can do it by completing a separate document.

Picking someone to raise your young children, may not be an easy decision for you.
After all, who can *really* “fill your shoes?” In the end, however, you will have to decide which of your relatives or friends would do the best job given what you know about each of them.

Your answers to the following questions should help you make that decision:

- Who do I know that is healthy enough (and young enough) to raise my children? As you well know, raising kids can require a lot of physical stamina, especially if they are very young. Therefore, you probably don’t want to choose someone with chronic health problems or who may die before your youngest turns 18.

- Who has the time to raise my children? Raising kids is time-consuming, so you may not want to choose someone who has young kids of their own or who has a demanding career.
- Who has the right mindset? You know many wonderful people, but they don’t necessarily have the patience, understanding or loving nature required to raise happy, well-adjusted kids.

- Who shares my personal values as well as my attitudes toward child rearing?

- Who appears to be doing a good job raising their own children?

- Is it important to me that my children’s personal guardian share my religion?

- Who has a happy, stable home life? You don’t want your children living in a home where there is a lot of conflict, substance abuse, emotional turmoil, etc.

• Who has room in their family, or in their home, to raise my children? Are there already too many children or not enough physical space so that they might be stressed adding more children to the family?

• Who can afford to raise my children? Ideally, you will leave your children sufficient assets so that the cost of raising them will not be an issue for their personal guardian; but if not, it would be best for all involved if you did not choose someone to raise your kids for whom doing so would be a financial burden.

• Which adults do my children know and like?

Warning! You should choose someone in your community so that your children, once they are teenagers, will not be dislocated!

Raising your children may require that their personal guardian purchase a larger vehicle, add on to his or her home, or even buy a larger home. Therefore, it is a good idea to specify in your will or trust that your executor or the Trustee of a trust you may have set up to benefit your children has authority to use some of the assets you are leaving to your children to help pay for those things. You may also want to spell out how much the executor or Trustee can spend on them.

Once you’ve decided whom you would like to serve as your children’s personal guardian, sit down with that person to find out whether he or she is willing to assume such a big responsibility, if it becomes necessary. Explain that during the guardianship period, he or she will have all of the legal rights and responsibilities that you have now as a parent, but that he or she will be supervised by the court, which means that he or she will have to get its permission to take certain actions on behalf of your children and may also have to attend court hearings and prepare reports for the court. Also, be clear about your children’s needs and the challenges you may have encountered raising some of them, and be 100% honest about the financial resources that will be available to raise them. In addition, be clear about how you want your kids raised. Finally, encourage your choice for guardian to ask you questions and to express any reservations he or she may have about being your children's personal guardian and let that person know that you won't be upset if he or she decides against it. Have this same conversation with your choice for your children's alternate personal guardian.

Tip: If you and your unmarried partner are raising young children together and you want to be sure that if one of you dies while they are still minors the other will have the legal right to continue raising them, meet with a family law attorney in your area to find out the adoption process works.

Tip. If you have a long-term illness, your state may allow you to designate a *standby guardian*, without giving up your parental rights. This person would raise your children whenever you are incapacitated by the illness or if it progresses to the point that you can no longer care for them at all. This arrangement assumes that your children's other parent is not alive or is also unable to raise your kids. Typically, your children's standby guardian would also raise them after you die. The process for designating a standby guardian varies by state.

Who Will Care For Your Children's Property

Warning! If you are divorced, your ex-spouse may automatically become the personal guardian of your children and your choice may be ineffective to stop that.

As we explained earlier, minors cannot own and manage their own assets, so if you leave property to your young kids in your will (and have not included a trust to manage those assets), you should also indicate who you want to manage those assets on their behalf until they become legal adults. Your designee is referred to as their *property or estate guardian*. If you don't name one, the court will do it for you, assuming you die while your children are still young. The court's choice may be someone you would rather not have responsible for your children's financial well-being or involved in their lives in any way.

Warning! If you are divorced, your ex-husband will become your children's property guardian unless you specify someone else.

Tip: In some states, you can designate your children's property guardian using a special form rather than in your will.
Before you decide to allow a property guardian to be in charge of your minor children's assets however, it's important for you to understand that property guardianships are *very* problematic and should be avoided if possible. A far better alternative is to put the assets you want your children to benefit from after your death in a trust so that a Trustee will manage them.

Here are some of the key disadvantages associated with having your children's assets managed by a property guardian:

- A court hearing will be held before the guardianship can be established and anyone who wants to can attend it. In other words, people you know as well as curious strangers will be able to find out about the assets your children will benefit from, observe any conflict within your family about who the guardian should be assuming they air their differences in court, and gain personal information about your kids. All of this will be part of the public record.

- The judge presiding over the hearing will make the final decision regarding who the property guardian will be. Yes, the judge will consider your designee, but in the end, his or her decision will be based on what the judge believes is best for your children. Therefore, if one of your surviving family members makes a good argument to the court for why someone other than your pick would be a better choice for property guardian, the judge may put that individual in charge of your children's assets.

- Once the guardianship has been set up, the court will be involved in your children's lives until they become legal adults.

- A guardianship tends to be expensive and its cost will be paid out of the assets you've left to your children.

• You will have no control over what the property guardian can and cannot do with the assets you've left to your children in your will; the court will control that based on the laws and rules of your state.

• While the property guardian is in charge of your children's assets, he or she will be under the supervision of the probate court and will have to get its permission to spend the assets. Getting that permission will require court hearings, which can be expensive, cumbersome and time consuming.

• The property guardian will have to prepare detailed reports for the court outlining what he or she did with the assets during the reporting period. Having to prepare these reports can take a lot of time.

• The property guardian will be entitled to receive a fee throughout the duration of the guardianship, which will come out of the assets you've left your children. The cost of all guardianship-related court hearings will also be paid from those assets.

• The guardian will have to purchase a bond and post it with the court. The amount of the bond will depend on the value of the assets the guardian is managing. The purpose of the bond is to protect your children should their property guardian mismanage their assets in some way or even steal them.

Warning! The person you pick may not be eligible to serve if they have a criminal record. The person you pick may not be able to get a bond because they have a poor credit score.

Despite these drawbacks, if you want a property guardian to be in charge of your children's assets when you die while they are still minors, here are a few things you should consider when you are choosing one:

• You can name the same person as your children's personal and property guardians or you can choose a different person for each role. If you do the latter, it's best if the two guardians will be able to get along and cooperate with one another.

• Your state may have some specific requirements for property guardians. For example, it may require that if your choice for a guardian does not live in the same state as your children, the guardian must work with someone in your state. Having to do so would put an additional burden on the guardian. Your estate-planning attorney can tell you about any requirements in your state.

• It goes without saying that your children's property guardian should be comfortable managing the kinds of assets you're leaving to your children in your will and do a good job managing his or her own property.

A Far Better Alternative

As we mentioned earlier, a far better option for the management of your children's assets after your death is to entrust them to either a testamentary or living trust so that a Trustee, not a property guardian, will manage them. In large part this is because the Trustee will be free to manage the assets according to the instructions you've set out in the trust agreement, without court involvement.

Of the two types of trusts, a living trust has an important advantage over a testamentary trust – you can give the Trustee of a living trust the right to manage the trust assets for you and the kids if you become incapacitated while your children are still minors and even when they are young adults. For instance, the Trustee can then pay for college or schooling. You can't do that with a testamentary trust because it won't get set up until after your death.

The main drawback of adding a trust to your will or creating a living trust is that it's more expensive up front. If the value of the assets you are leaving to your children is not enough to merit the expense, another way to avoid a property guardianship is to include language in your will directing the executor of your estate to transfer the assets to custodial accounts – one for each child. In that case, an account custodian would manage them until they turn 21 and the court would not be involved.

Tip: If you are divorced, leaving your assets to your minor children in a trust will prevent your ex-husband from getting control of your property.

Tip. It may not be a good idea to designate as your children's Trustee the same person you've named as their property guardian; sometimes checks and balances are good.

Warning! Although you can avoid having a property guardian manage all or most of your minor children's assets with the right estate planning, when it comes to who actually raises your children, you have no other option than to designate a personal guardian for them.

Who To Choose As Trustee

If you are like most parents, you will designate your spouse, a close friend or a relative to be the Trustee of the trust that will benefit your children. However, if no one you know is right for that role, you can name a professional, like your financial planner, CPA or attorney instead. However, as we have mentioned in earlier discussions about professional trustees, this person will charge a fee for his or her services during the period of the trust, while a friend or relative may waive the right to receive a fee. Also, the fee will be paid out of the trust assets. Even so, you may decide that paying the fee is worth the peace of mind you will gain from knowing that if you die or become incapacitated while your children are still minors, the assets will be well managed.

Designate an alternate or substitute Trustee as well. This person will step in should your first choice die, be unable to serve for some other reason, or be unwilling to be Trustee when the time comes.

Estate Planning for Your Adult Children

When your children have all grown up, estate planning for them is not that much different from the estate planning you may do for any other adult, although you may have some specific concerns about some or all of your children that you want to address through your plan. Here is a brief rundown on your options:

• Make your adult children the beneficiaries of your life insurance policy, brokerage account, retirement account, and the like. If you do, they will receive the funds they are entitled to when you die.

• Give them your assets while you are alive. If you are like some parents, you may want to give your children a jump-start on life by letting them have some of their inheritance sooner rather than later, maybe so they go to graduate school, buy a home, start their own business, and so on, or you may want to reduce the size of your taxable estate by giving your assets away. When you give your assets away during your lifetime, you are said to be making lifetime gifts and doing so achieves both goals. However, as we explained in Chapter 2, to qualify as lifetime gifts, the assets you give away must meet specific criteria.

• Include them in your will. You can use your will to transfer specific assets to your children or you can designate your spouse as the primary beneficiary of your will and your children as alternates. If they are alternate beneficiaries, they will only inherit the assets if your spouse dies before you do and what they inherit in the end could be a lot, a little, or nothing at all depending on what your spouse does with the assets. However, if you leave property to your spouse in a trust, your children could be *remainder beneficiaries*, which means that they would end up with whatever is left when he dies**.**

• Make your children the beneficiaries of a trust **–** a testamentary trust or a living trust. For more information about this alternative, turn back to our discussion in this chapter about minor children and trusts and the discussion about what will happen to the trust and its assets once they become legal adults.

Should You Treat All of Your Adult Children the Same or Differently in Your Estate Plan?

Most parents believe that it's fairest to treat all of their children exactly the same in their estate plans and doing so can make a lot of sense. However, there are times when you may want to do things differently. For example:

- One of your children has been very successful financially and has all of the resources he or she needs, but your other children have not been so fortunate.

- One of your children has a chronic illness or disability that will limit how much he or she can earn and will cause that child to have higher medical and insurance expenses.

- You don't have a good relationship with one of your children or maybe no relationship at all.

- After your health began to fail, one of your children has consistently been there for you making sure that you have what you need.

If you decide to leave some of your children more than others, be up-front with all of them about what you are doing and why. Your honesty can help minimize the potential for problems after you die – anger, jealousy, hurt, and even legal action if any of your children decide to contest the terms of your estate plan.

Warning! It is always dangerous to do an unequal distribution to children regardless of the reason. Parents see fair is fair, but kids only see fair is equal!

When You Have Special Concerns About Your Children

Most families are complicated and don't resemble the ones we've seen on TV shows like *The Brady Bunch*. Some of your children may have emotional problems for example, others may have addictions or serious disabilities; and some may have a history of trouble with the law. Although you probably love your "problem child" just as much as you love your other ones, out of care and concern for their wellbeing, you may realize that it would be better to treat them differently in your estate plan.

Tip: Share your concerns regarding any of your children with your estate-planning attorney. The attorney can advise you about your options for addressing them.

It's also possible that you are estranged from one of your children and don't want to include that child in your plan at all. However, since the law presumes that you want all of your children to inherit from you, it's important that you be very explicit that you are not leaving any of your assets to the child you are disinheriting. Otherwise after you die, it may be assumed that you simply forgot to include him or her due to mental feebleness on your part, and later, if that child contests your will and wins, the child may receive whatever share of your estate he or she would be entitled to if you had died without a will.

If you want to disinherit a child, it's always best to work with an estate-planning attorney. The attorney will help you ensure that you use exactly the right language in your will.

Warning! In a few states, you cannot disinherit a child. These states have laws that entitle a child to a limited amount of your estate.

Tip: Before you disinherit a child, we recommend that you think long and hard about whether doing so is really a good idea because your action could create considerable pain and turmoil in your family after your death. For example, your children may become estranged from one another because of what you've done and may even end up involved in protracted and expensive legal battles related to the disinheritance. A better option might be to leave the child you want to disinherit less of your estate than the rest of your children or to put more restrictions on what that child can do with his or her inheritance; when you do this, include a no contest clause which would "cut out" any child who challenges your plan.

Chapter Six, Estate Planning After a Divorce or Death

Ending your marriage and losing a spouse are two profoundly life-changing events, especially when they are unexpected. In fact, both are at the top of virtually every *most-stressful-events-in-life* list.

Yet, despite all the emotional upheaval in your life at such times, you will have to make important and difficult decisions – decisions that could affect your happiness and financial well-being for years to come. Complicating matters, you may have to make some of those decisions fairly quickly. For all of these reasons, when you are caught up in a divorce or dealing with the loss of your spouse, it can be easy to overlook your estate plan and the changes you may need to make to it. Yet, if you do not, the consequences could be disastrous.

This chapter sets out general guidance and advice about estate planning when you are divorced or have become a widow. However, this information is no substitute for the advice of your divorce attorney and an estate-planning attorney. They can tell you exactly what you should and should not do based on their understanding of your finances, goals, family situation, and the laws of your state.

Divorce and Your Estate Plan

The divorce negotiation process can be incredibly time-consuming and emotionally difficult, especially if you and your spouse do not see eye-to-eye on the issues you are trying to resolve. As a result, you may find yourself spending far more time than you would like in your divorce attorney's office reviewing legal documents and considering your post-divorce finances given different settlement scenarios. You are probably spending more money on legal help than you would prefer as well. Therefore, you may not want to hear what we are about to tell you because it means even more time with attorneys, reviewing more legal documents, and spending more money. The message: Meet with an estate-planning attorney before and during your divorce and then once it is final. You will be glad you did. Otherwise, you may:

• Unintentionally make changes to your plan that you are not allowed to make before your divorce is final.

• Create problems for yourself down the road because you don't fully understand the implications of the changes you would like to make.

• Not execute correctly the changes you make to your plan, which could mean that they won't be effective or will not accomplish what you want them to.

• Violate the terms of the prenuptial or postnuptial agreement you signed.

• Make changes to your plan that violate your divorce agreement or court rules.

Before Your Divorce Begins

Review your estate plan with your attorney as soon as you know that you are going to get divorced to identify any changes you want to make to it. This is especially important if you anticipate that your divorce will be contentious. For example, you may want to:

• Revoke your power of attorney documents if they designate your spouse as your financial and/or health care agent. When you are headed for a divorce, it's really not a good idea to let someone who may not feel kindly toward you and who may even have a desire for revenge, have the legal right to make financial and medical decisions on your behalf should you become incapacitated. If you revoke the documents, prepare new ones immediately.

• Revoke your will and write a new one if your spouse is the beneficiary. Even if he is not, it's a good idea to write a new one if your current will names your spouse as your executor, the Trustee of your testamentary trust, or property guardian for your minor children. The same advice applies if you designated one of his relatives, or close friends, for any of these roles.

Warning! You and your spouse will be considered legally married until your divorce is official. Therefore, until that happens your spouse will continue to be entitled to all of his or her marital rights as established by your state unless your spouse waived them in the pre-nup or post-nup you may have negotiated.

- Revoke your living trust if it benefits your spouse. If you do, decide what to do with the assets you had intended for your spouse and then transfer the assets to a new living trust, include them in your will, or provide that they be transferred to a testamentary trust when you die.

- Name someone else as the Trustee of the living trust you may have set up to benefit your children, if your spouse is currently designated the Trustee.

- Choose someone else to be the beneficiary of your life insurance policy if your spouse is the beneficiary, or cancel the policy. If your spouse is the beneficiary of your retirement account, change that designation too; however, work-related benefits such as a 401k and group life insurance cannot be changed, and if you designated him as the beneficiary on a bank or brokerage account as a POD or TOD, either close the account and decide what to do with the account assets or remove your spouse as the beneficiary and name a new one.

Warning! It can be easy to overlook non-probate assets for which your spouse is a beneficiary, especially if you acquired them some time ago. To help ensure that you don't overlook any, go through your files and safe deposit boxes to create an inventory of every asset you own before your divorce begins.

Warning! If you plan on initiating the divorce, speak with your divorce attorney and/or your estate planning attorney before you do to find out whether the law in your state as well as the rules in the court limit what you can and cannot do to your estate plan once your divorce has begun.

Warning! If you die during your divorce without an estate plan, it's likely that the intestate law of your state will entitle your spouse to at least some, if not all, of your assets.

When Your Divorce Begins

In most cases while your divorce is going on, neither you nor your spouse will be able to take any of the actions on the following list without giving the other advance notice, and usually you may even have to get the other's permission**.**

- Revoke the living trust you established together.
- Change the title on assets that you own together as *joint tenants with the right of survivorship*.
- Remove your spouse as the beneficiary of your life insurance policy, retirement plan, IRA, or other non-probate assets you may own.
- Fund a new revocable living trust you may have set up.

In some states, if your spouse is still your financial agent and/or your health care agent, as soon as your divorce begins his or her rights as your agent will be cancelled automatically and the person you named as your alternate agent will become your financial and/or health care agent. If you live in one of these states, designate new alternates right away.

Tip. Talk with your divorce attorney about what your spouse can do with his or her estate plan while your divorce is going on.

Once Your Divorce is Over

As soon as your divorce is over, you will be free to do whatever you want with your estate plan, as long as none of your actions violate the terms of your divorce decree. With that caveat in mind, here is a list of the things we recommend you do right away, assuming you have not already done so:

- Immediately name new beneficiaries for your IRA, 401k, life insurance, annuities and health savings accounts if your ex is still the beneficiary.

- Take all necessary steps to remove your spouse from any federally-regulated benefits and retirement plans you are participating in through your employer. Speak with your divorce attorney or with your employer’s human resource department about how to do this. Be sure to name new beneficiaries right away.

Warning! Under federal law if you do not remove your ex as the beneficiary on your 401k, 403b and group life insurance your ex-spouse will receive those assets at your death even if you divorced him years ago.

- Close any POD or TOD accounts for which your former spouse is the beneficiary and decide what you will do with these assets. Another alternative is to remove your former spouse as beneficiary of the accounts and name new ones.

- Revoke your will and write a new one. In some states, the official end of a marriage automatically voids all provisions in a will pertaining to a former spouse and his relatives, including his or her status as a beneficiary and appointment as your executor and/or trustee.

- Revoke your living trust and create a new one which removes all provisions relating to your ex –spouse. If your state automatically revoked those provisions when your divorce became official, review what was revoked and add appropriate new language as necessary.

- Revoke your current financial and medical powers of attorney if they name your former husband as your designated agent and prepare new ones. Depending on your state, however, your ex’s powers may have been revoked automatically as a consequence of the divorce.

• If you have minor children and you want to ensure that any assets you had previously left to your former spouse will benefit them instead of him, you should name them as the beneficiaries of your will and designate a property guardian for them; make them the beneficiaries of a testamentary trust that you include in your will and designate a trustee for the trust; or transfer those assets to a living trust and name a trustee for it. The latter two options are your best options if you want to control how the assets will be used after your death and set limits on what your children can do with the trust assets once they have become legal adults. The latter two are also the ways to avoid a costly guardianship for your children. Read Chapter 5 for more information about using a will or a trust to benefit your minor children.

Warning! Your revocations won't be legally valid unless they are done in accordance with the law in your state, so talk with your estate-planning attorney about how to make them. If your state does not automatically remove your former spouse as the beneficiary of your will, living trust and non-probate assets on divorce and assuming you don't remove him or her yourself, your ex will still be their beneficiary if you die first.

Warning! Amending an irrevocable trust like a life insurance trust, qualified personal residence trust or a charitable trust can be extremely difficult to do. If you and your former spouse established one and he is the beneficiary, consult with your estate-planning attorney about your options.

Estate Planning When You Lose Your Spouse

When your spouse dies, you will have many plans to make and lots of details to deal with right away in the midst of your grief. And, if you are the executor of his estate and/or the Trustee of your spouse's testamentary or living trust, handling everything may feel totally overwhelming, especially if he managed your family's finances and you know little or nothing about those. Therefore, it's essential that you schedule an appointment with an estate-planning attorney immediately to review the details of his plan and to discuss any immediate actions you need to take. The list below details some of the most important deadlines you should be aware of; some of these may apply to you even if you are not the executor or Trustee.

•The estate of your spouse may have to be probated by a specific date depending on your state of residence. If there is a deadline and assuming the estate must be probated (not all estates have to be) and the deadline is missed, the will may not be accepted for probate. As a result, the property of the deceased will be distributed as if he had died *intestate*, regardless of what his will may say. Depending on the details of your state's *intestate* law, the distribution could be financially devastating to you.

• If you want to turn down or *disclaim* any of the assets your spouse left to you, you must do so within specified time limits too.

There are a number of reasons why you may want to disclaim assets. For example:

• You would like the assets to go directly to your children, or to another family member.

• You want the assets transferred to a trust, not to you.

• You want to get the assets to your children without having to be concerned about gift tax returns.

Warning! If you disclaim assets, you cannot choose who will receive them instead of you. They will go to whomever they would have gone to if you had died before your spouse. Also, if you use the assets, you cannot disclaim those assets later.

• If your spouse's estate owes estate taxes, an estate tax return must be filed no later than nine months after his death. If the estate owes any taxes, those must be paid by that deadline too. A six-month extension to file is available, but there is no extension from the IRS to pay the taxes.

• Even if your spouse’s estate does not owe any estate taxes, an estate tax return must be filed during the nine-month window if you want to add any unused portion of your spouse’s lifetime federal estate tax exemption to your own. By doing so, you will increase the total value of the assets you can transfer estate tax-free when you die.

What to Do With Your Estate Plan After the Death of Your Spouse or Partner

Review your estate plan with your estate planning attorney to identify anything that should be changed now that your spouse is no longer alive. Here are some of the most important things to take into account:

• Have your estate planning goals and/or financial needs changed?

• If your husband is the primary beneficiary of your estate plan, you may need to name new primary and secondary beneficiaries, and make appropriate changes to any trusts for which your spouse was a beneficiary.

• How are your assets titled and how *should* they be titled now that your spouse is deceased? One option is to transfer them to a living trust so it will own them.
• Now that your spouse is deceased you will need to name an executor, Trustee, and guardian. Also, be sure to designate new alternates.

• Did you give your spouse power of attorney for your health care and/or for your finances? If you did, are you comfortable with the alternates you named? If you are, fine. Otherwise, be sure to prepare new healthcare and financial power of attorneys right away. If you become incapacitated without having done this, your state will decide who will manage your finances and your health care.

Finally, if you have no estate plan, it’s time to prepare one! If you are not convinced that you need a plan, re-read Chapter 1 in this book.

Figure 6.1, An After-Death Checklist

The list below provides an overview of the various actions that need to be taken after the death of a spouse, although not every activity on the list may apply to you. If you are not the executor of your spouse's estate then whoever is will be responsible for some of the actions on this list. The same is true if your spouse set up a trust and named someone other than you as its Trustee. Be sure to speak with your estate planning attorney and your financial advisor to find out if there are other things that need to be done. Also, turn to Chapter 2 for a detailed discussion of an executor's responsibilities and how the probate process works.

- Meet with a probate attorney. Find out if his estate must go through probate. The process may be necessary to get the house in your name, for you to have access to certain accounts, for you to receive certain benefits, to claim a debt he or she was owed, and/or to file a lawsuit if your husband died accidentally as a result of someone else's negligence.
- Find out what must be done to administer the trust your husband may have set up. For example, certain assets may need to be transferred to the trust; it may need to be divided into sub-trusts; and/or assets may need to be transferred to some of the trust beneficiaries. As the Trustee, you are legally obligated to follow everything set out in the trust agreement.

- Meet with your estate planning attorney to review your own plan. Discuss all necessary aspects to your plan as well as any changes you may want to make. Get clear about exactly how each adjustment should be made so that whatever you do is legally binding. If you do not have an estate plan, prepare one right away with the help of estate planning attorney.
- Meet with your financial planner to discuss revisions to your financial plan in light of any assets you have inherited from your spouse, how to make up for any shortfall of income you may experience because of his death, and the steps you may need to take to secure your financial future.

• Order 10-20 copies of your husband's death certificate. Many of the companies you may have to contact after his death will require that you provide them with a copy before they will agree to do what you want done.

• If you are the beneficiary of your husband's life insurance policy, get in touch with the insurance company to arrange to receive the benefits. They will not be paid to you automatically.

• Get in touch with your husband's retirement plan administrator if you are its beneficiary. Consult with your financial planner and CPA about the best way to have the plan benefits paid to you. There may be several options that could have very different tax consequences. Do the same if your husband was self-employed and designated you as the beneficiary of his or her SEP IRA, Simple IRA or solo 401K.

• If you are the beneficiary of your husband's investment account, contact the company where the account is located to find out how to get the funds in the account transferred to you. If the two of you shared a joint investment account, find out how to get it transferred into your name only.

• File for any employer-sponsored benefits you may be entitled to, such as income from your husband's pension and deferred compensation account. The human resource department where he was employed can help you. Find out about your options for receiving the income -- in a lump sum or over time, for example – and consult with your financial advisor and CPA about which one is best for you.

• If your husband received health insurance through his employer and you were on the plan and assuming that the employer employs at least 20 employees, COBRA entitles you to remain on the plan for up to 18 months. If you have dependent children, you can stay on for as long as three years.

• Notify the Social Security Administration about your husband's death and find out about any benefits you may be entitled to. For example, you may be eligible to receive survivor's benefits or a one-time payment of $255. You will have a limited amount of time to apply for survivor's benefits after his death.

Tip: Read "*Surviving Probate*", another book we wrote that completely covers the details of probate and living trust administration.

To learn more about the survivor's benefits you may be entitled to and how to apply for them, visit the local office of your Social Security Administration, go to the agency's website, http://www.ssa.gov call 800-772-1213, or read https://www.wiserwomen.org/images/imagefiles/Social Security Survivor Benefits.pdf.

• If your husband ever served in the military, contact the Department of Veteran's Affairs to find out if you qualify for survivor's benefits, http://www.va.gov.

• Contact the government Employees Retirement System if your husband ever worked for a local, state or federal office because you may be entitled to benefits, http://www.opm.gov/retire/pre/fers/index.asp.

• Transfer the title to your car into your name if it was in both of your names. If your husband had his own car, contact your state's Department of Motor Vehicles to find out how to change the car registration into your name unless it is earmarked for someone else in your husband's estate plan.

• Make a list of all of your husband's credit accounts, debit cards, and other accounts so you can close them. Make sure that you have at least one credit card account in your own name.

• Find out if the utility accounts for your home are in your both of your names, or in his name only. If they are in both of your names, ask to have them transferred into your name, and if they are in your spouse's name, find out if they can be transferred into your name. If you have never had utility service in your own name however, the accounts may have to be closed and you may need to apply for new service.

• Create a household budget for yourself. If you need help preparing one, talk to your financial advisor.

Chapter 7, Estate Planning When You Are Living With Someone Without Being Married

The number of unmarried (both same sex and opposite sex) couples living together in the US is on the rise. For example, between 2000 and 2010 alone, the percentage of unmarried households in this country increased by 24% according to the U.S. Census Bureau. And the couples in most of these households told the Census Bureau that they had no plans to marry even if they already had children together or intended to begin families at some point.

Estate planning can be a challenge regardless of your marital status, but it can be especially complicated if you are part of this growing population, mainly because unmarried couples don't have the same legal rights that spouses do. Your unmarried status has estate-planning ramifications for your children as well.

None of the estate planning issues you may face is insurmountable, assuming you address each of them appropriately. This chapter helps you do that by reviewing the most common challenges unmarried couples face and by highlighting your basic options for addressing them. However, and we cannot stress this enough, the information in this chapter is no substitute for consulting with an estate-planning attorney who has experience working with unmarried couples.

Warning! The estate laws in this country are all geared to benefit married couples only, so despite the fact that you do not want to marry, very serious consideration must be given to that alternative.

Estate Planning Issues You Should Know About

If you are part of an unmarried couple, you face many potential estate-planning challenges. They include:

- Your partner is not legally entitled to any of your assets if you die without an estate plan. This is because state intestate laws – the laws that determine who gets what when someone dies without a plan – only recognize surviving spouses and the deceased's blood and legal relatives. Although these laws vary somewhat from state to state, in most states if you are unmarried and you die without a plan, your children will inherit what you own; and if you are childless, your assets will go to your parents, assuming they are still alive, or to your siblings if your parents are deceased. In other words, your partner will be left out in the cold.

Warning! If you are divorced and you did not revise your estate plan to eliminate all provisions related to your ex, then your ex-- not your partner -- may be legally entitled to some of your estate when you die.

• If your partner survives you, unlike a surviving spouse, he won't be entitled to receive Social Security survivors' benefits based on your earnings, which could create a financial hardship for him if you are the major breadwinner or if your partner has contributed little or nothing into the Social Security System because of the nature of his employment. Also, if you were receiving Social Security disability benefits before your death, your partner won't be eligible to receive survivors' disability benefits either, nor will he be entitled to survivors' veterans' retirement benefits if you served in the military.

• Without the appropriate planning, your partner will have no right to manage your finances if you become incapacitated, even if decisions about your finances may affect him. Furthermore he won't have the right to determine the kinds of medical care you will receive even if he knows better than anyone what your wishes are. Instead, the court will probably put a family member in charge who will not be required to consult with your partner about those things.

• He will not have any control over your burial or cremation.

Warning! If you become incapacitated, your partner *may or may not* be able to manage your joint bank accounts and any joint credit accounts you may share. In most states, however, unless you have done the proper planning, he *won't* be able to sell or refinance the real estate, vehicles or other assets the two of you may own together.

• If you and your unmarried partner begin a family together, there will be no presumption of paternity on his part as there would be if the two of you were married. Therefore, if he dies without an estate plan and without having established his paternity, the children you had together will have to go through a long and expensive process in order to be entitled to a share of your partner's estate. Also, if you die while the children are still minors, he will have to initiate a long and expensive process to prove his right to continue raising them.

• If you are divorced and you die while you and your partner are raising the children from your former marriage, he may have no legal right to continue doing so.

• He will be evicted from the home you purchased without him.
Henry Thomas and Sarah Smith lived together without being married. She earned a high income as the owner of a high tech startup and had a high net worth, while Henry earned a modest living as a teacher. Sarah owned the couple's home and the two of them kept separate bank accounts, with the exception of one joint checking account that they held with the right of survivorship. They each deposited money into that account to pay their household bills.

Three years into their relationship, Sarah was killed in a car crash on her way to an out-of-state business meeting. She had no estate plan. As a result, all of her property, including the home she and Harry had lived in as well as her business – a business that Harry had helped her build -- went to Sarah's mother and brother, neither of whom had ever liked Henry.

The two of them sold Sarah's home and Harry moved into an apartment. They also sold Sarah's business and did not reward Harry for his role in making it a financial success. They also kept the money in all of Sarah's bank accounts with the exception of the $763.00 in the account she had shared with Harry. That money was Harry's.

Harry knew that if Sarah had prepared an estate plan things would have worked out very differently for him when she died. Instead, in a "blink of an eye" he not only lost the woman he loved, but also the comfortable life he used to enjoy with her.

Planning With Your Partner in Mind

This section of the chapter reviews some of the options you have for addressing the problems just described. Those options include:

- Title your assets correctly. How you title your assets determines what will happen to them when you die. For example, if you want your partner to automatically end up with your assets when you die, you can retitle them as *joint tenants with right of survivorship* so that you and your partner will own them together. That way, when the first partner dies -- let's assume it's you -- your share of the assets will automatically transfer to him. There are downsides to owning assets this way however. For example, it will make it more difficult to preserve the assets for your children. Also, he can withdraw all the money without your knowledge or consent!

Tip. In some states, you may want to include the words *with right of survivorship* in the ownership paperwork if you and your partner own assets together. Otherwise, the two of you will own them as *tenants in common.* This is important because (and again, our explanation assumes that you die before your partner) when you die in some states your share of the assets you and your partner own together as *tenants in common* will pass according to the terms of your estate plan, assuming you have one. If you don't, they will transfer according to the intestacy law of your state, which means that none of them will go to your partner. Be sure to check with an estate planning lawyer to advise you in the titling of your assets.

- Make your partner the beneficiary of assets like your retirement account, PoD and ToD accounts, for example. He will receive the funds in those accounts when you die.

Warning! If your partner is the beneficiary of your employer's retirement plan, after your death, he will have the option of rolling over the plan funds into an "inherited IRA," which would allow him to benefit from them over his lifetime. However, your partner will have to start withdrawing money from the IRA no later than one year after your death. If you were married, he would be able to delay taking the money until he turned 70 ½. Having to start taking money out the IRA before then could cause him to owe more in income taxes.

- Designate your partner as the beneficiary of your life insurance policy. This is an affordable way to help ensure that he will be financially comfortable after your death. It's also a good way to make certain that there will be enough money to pay for any taxes your estate may owe after your death and/or to pay the costs of your funeral.

Warning! Some insurance companies may refuse to let you name your partner as your policy beneficiary. Work with your insurance broker to find one that will.

Warning! The value of your life insurance policy will be included in the total value of your estate when you die, which could mean that your estate will owe estate taxes. If this is an issue for you, one way to avoid the problem is to set up an irrevocable life insurance trust and let the trust, not you, own the policy. That way, the policy won't be included in your estate. For this strategy to work, however, the trust must be structured correctly.

- Include your partner in your will. This is an obvious way to ensure that your partner will end up with your assets if you die first. However, it may not be an attractive option for you because your partner will have total control over those assets after your death and he will be able to do whatever he wants with them, including spending them, giving them away and transferring them to whomever he wants through his own estate plan.

- Make your partner the beneficiary of a testamentary trust. This is a good option if you would like to put limits and controls on your partner's access to and use of the assets you want him to benefit from. To set up this kind of trust, you provide in your will that when you die, the trust is set up, the assets you designated for it are transferred to it and whomever you named as trustee for the trust manages those assets on your partner's behalf according to your instructions. You can also designate who the trust beneficiary will be when your partner dies -- your children, for example. For a complete discussion of testamentary trusts, turn back to Chapter Two.

• Entrust your partner's financial future to a living trust. You can establish a living trust to benefit you and your partner while you are both living and you can provide in the trust that when you die, the trust assets will continue to benefit your partner. Although this is a more expensive option than leaving your assets to your partner in your will or making him the beneficiary of a testamentary trust in your Will, you may decide that the benefits of a living trust outweigh its costs. Those benefits include:

-- While you are alive, you can be both the Trustee and the beneficiary of the trust, which means that you can control and benefit from the trust assets just like you do now. You can designate your partner or someone else as your successor Trustee. This person would manage the trust assets when you die or should you become incapacitated.

-- The trust assets will not go through probate; therefore your partner will be able to benefit from them immediately after your death.

-- You can set limits and controls on what your partner can do with the trust assets after you die or if you become incapacitated and he becomes the Trustee.

-- You can structure the trust so that when you die, certain assets in the trust will benefit your partner while others will benefit your children, your relatives, charities or any other beneficiaries you may designate. Alternatively, you can let your partner benefit from everything in the trust and control what will happen to the assets when he dies.

-- Compared to a will, a living trust is more difficult to contest. Therefore, it's a better option if your family members do not approve of your unmarried relationship or of your partner in particular.

Tip. A trust (either a testamentary or a living trust) is best if you have children from a prior relationship and you want to be sure that when your partner dies they will inherit some or all of the assets you want him to benefit from while he is alive. That may not happen if you leave everything to your partner in your will because he will be legally entitled to do whatever he wants with the assets you've transferred to him. Also, he may die or become mentally incapacitated before he prepares an estate plan or before revises his existing plan to put your or your children in it.

- Do the appropriate estate tax planning, assuming your estate is worth so much that estate taxes will be due when you die. As we explained at the start of this chapter, tax minimization planning is important when you have a substantial estate because you will not be entitled to pass on to your partner an unlimited amount of your assets free of estate taxes as you would be able to if you were married. Although you can transfer tax-free assets valued at or below the amount of your individual tax exemption, anything over that exemption will be taxed, leaving less of your estate for your partner and for other beneficiaries of your estate plan. An estate-planning attorney can help you minimize or even eliminate the taxes your estate will owe at your death.

- Make your partner your financial agent and health care agent by preparing a durable power of attorney for your finances and a medical power of attorney. If you do and you become incapacitated at some point, he will be legally entitled to manage your finances.

Warning! If your partner becomes your financial agent, his right to control your finances is likely to be superseded by a guardian of your estate if one of your family members initiates a guardianship or conservatorship process and is named as your guardian or conservator. You may be able to prevent this from occurring by setting up and funding a living trust because typically, the assets in a trust are controlled by the Trustee of the trust and not by a guardian of the estate.

If you do not make your partner or anyone else your financial and health care agent, your partner can ask the court to be named guardian of your estate and your person. It's possible that one or more of your family members may also make the same request. A judge will decide who will be named as your guardians and given that the law gives preference to family members, it is likely that if your partner and a family member both want to become your guardian, the family member will be designated, not your partner.

Tip: Make sure your partner has an estate plan that names you as his heir and as beneficiary on his retirement account and life insurance, as well as his financial medical agent, executor and/or trustee.

Tip: Be sure to list your partner on any HIPAA Release forms you fill out if you want to ensure that he will be able to visit you in the hospital if you are extremely ill and/or close to death and that the doctors caring for you will share information about your medical care and condition with him. As an extra safeguard in the event you are hospitalized in a medical facility that limits visitors to a patient's biological or legal family members, fill out a Hospital Visitation Authorization form. You can download the form here, http://community.compassionandchoices.org/document.doc. Store the original in your safe deposit box and give a copy of it to your partner.

Tom and Becky are an unmarried couple with three children. When they prepared their estate plans, they each set up a living trust. Both of their trust agreements provided that when one of them died, the survivor would become Trustee of the trust for his or her own benefit. The couple also owned a house together.

When Tom died unexpectedly from a sudden illness, Becky decided to move back to her hometown so her family members could help her raise their young children. As Trustee of her trust as well as Tom's, she was able to sell their home quickly and use part of the sale proceeds to buy a new one near where her parents lived. Also, using the rest of the money from the sale of the house and the considerable funds in Tom's trust, Becky could afford to work part time. Given all of the changes her kids had been through, she felt it was important to spend as much time as possible with them. Becky was happy that she and Tom had prepared estate plans. She recognized that things would be quite different if they had not.

Define Your Rights and Responsibilities with a Co-Habitation Agreement

Although it's not directly related to estate planning, you and your partner can use a cohabitation agreement to establish your individual legal rights and responsibilities in your relationship as they relate to your shared and joint assets, your commingled funds, and your debts, among other things. You can also spell out the terms of your possible breakup as a couple in the agreement. As with any important legal document, you should hire a family law attorney in your area to draft your cohabitation agreement so that you can be sure that it complies with the laws of your state, does what you want, covers all the bases, is free of any ambiguities that might pose problems later, and so on.

Tip: Even when a co-habitation agreement spells out how an unmarried couple will end their relationship, the partners may end up in litigation over the terms of their breakup. Usually however, the courts in most states will enforce the agreement, assuming it is legally binding.

Protecting Your Children's Right to Inherit From You and Your Partner

If you and your partner have children together, they will be considered illegitimate because the two of you are not married. Therefore, you must take specific steps to protect their inheritance rights. First, establish your partner's paternity by putting both of your names on each child's birth certificate and second, sign a *statement of paternity* or *parenthood statement* for each child. (In some states, your partner will not be able to have his name added to a birth certificate without signing this statement first.)

Warning! In some states, after an out-of-wedlock child is born, the child's father has a limited amount of time to sign a paternity statement.

Tip: See a Family lawyer in your state before the child is born to know the exact steps to take to cement your partner's paternity. This is critical if you later decide to seek child support.

After your children are born, you and your partner should include them in your individual estate plans as soon as possible. Otherwise, if one of you dies without having done this, it will take longer and be more expensive to prove that your children have the right to inherit from that parent than if they had been included in the deceased's plan, or if you and your partner had been married.

If you had children with someone else, but you and your partner are raising them together and your partner wants them to be automatically entitled to inherit from him, he may want to adopt the children in a *second-parent adoption* even if their biological father is still living. However, this kind of adoption is not an option in all states and when it is, the adoption cannot happen however unless one of the following occurs:

• You and the children's biological father both consent to the adoption.

• The court declares their biological father to be an unfit father.

• The court finds that he has abandoned the children.

Tip: If your partner cannot adopt your children and he wants to ensure that they will inherit his assets when he dies, he should include them in his estate plan.

Glossary

A/B trust. A trust plan that married couples can set up to maximize their individual estate tax exclusions. Also called a Bypass trust.

Administrator. The individual appointed by the probate court to take an estate through the probate process when someone dies *intestate.*

Annual gift tax exclusion. The total value of gifts you can transfer to someone else each year while you are alive without having to file a federal gift tax return. Presently, this amount is $14,000.

Assets. The property that you own. It may include real property (raw land, developed land and buildings) and/or personal property (everything you own that is not real property). Your personal property may include vehicles, fine jewelry, furniture, fine art, household goods, collectibles, and jewelry, stocks, bonds, CD's, and so on.

Automatic Temporary Restraining Orders (ATROS). An order automatically issued by the court in most states after a married person formally files for divorce. The order, which applies to both spouses involved in the divorce, limits the kinds of changes each of them can make to their respective estate plans while their divorce is going on.

Beneficiary. The individual or charity that receives property benefits from your will, your trust, your life insurance policy, retirement account, and so on.

Bypass trust. See A/B trust.

Civil union. A legally recognized relationship between a same sex couple that provides both partners some of the same rights as married couples. Not all states allow civil unions.

Co-habitation agreement. An agreement between two unmarried people that spells out the terms of their relationship. Many co-habitation agreements also set out what will happen if the couple breaks up and establish the couple's individual estate planning rights and responsibilities.

Common law marriage. A marriage that is the result of a couple living together for a certain period of time and meeting specific criteria. A common law marriage confers on a couple all of the rights and responsibilities of marriages that are the result of ceremony. Only a few states as well as the District of Columbia recognize common law marriages however.

Community property. Assets and income acquired during a marriage in a community property state, with the exception of gifts and inheritances. Each spouse legally owns a 50% undivided interest in the assets and income. Only nine states are community property states. They are:, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. Alaska is an opt-in state, meaning you can own your property as community property by signing paperwork to that effect.

Complex will. A will that includes a testamentary trust.

Custodial account. An account that is set up for a minor at a financial institution or brokerage firm. The minor will gain control of the assets you transfer to the account when he or she becomes a legal adult, which is 18 in most states and 21 in the rest.

Declaration of Guardian. A document that you use to legally designate who you want to make decisions about your personal well-being and your finances if the court is asked to designate a guardian for you. This individual would have responsibility for all aspects of your life. This form is not available in all states.

Designation of Agent for Remains. A document used to state (what you want for your funeral) how you want your body disposed of **–** burial or cremation -- and who you want to make all decisions related to these matters.

Domestic partnership. When two people live together in a committed relationship. The couple can be in a same sex or heterosexual relationship although domestic partnerships are most often associated with same sex couples. Typically, couples enter into this form of relationship in order to get some of the benefits of marriage. Although not all states recognize domestic partnerships, those that do require couples to register their relationship with a specific government office. Some municipalities have their own domestic partner registration process.

Durable power of attorney for finances. A document that gives someone else the right to manage your finances even if you become incapacitated. That person is called your *financial agent*. You can give him or her very broad powers or specific powers.

Elective share. Also referred to as a *forced share*, this is the portion of a deceased spouse's estate to which the surviving spouse is entitled no matter what the deceased spouse's estate plan may say. The elective share ensures that one spouse cannot disinherit the other. States define "estate" differently for the purpose of defining a surviving spouse's elective share.

Estate plan. A plan that controls what will happen to your assets when you die.

Executor. The person or institution you designate in your will who will be responsible for filing it with the probate court after you die and taking your estate through the probate process.

Family Limited Partnership (FLP). A general partnership controlled by family members that includes general and limited partners like other partnerships do. Typically, the older members of a family – mother and father usually – act as the general partners, contribute assets to the FLP and manage and invest them. They, their children, and maybe their grandchildren too, are limited partners, so they do not participate in FLP decision making and have limited liability for it. All income from the assets is reported on the returns of the partners in proportion to their ownership interests.

Federal estate taxes. The taxes your estate must pay to the IRS after your death if the value of the assets in your estate is worth more than a certain amount.

Financial agent. The individual you designate in your durable financial power of attorney document to manage your finances should you become incapacitated.

Gift tax. A federal tax imposed on transfers of property that you make as gifts during your lifetime if you exceed the amount of your gift tax exemption.

Guardian. A person named by the court to manage your finances and/or your health care if you become incapacitated and you have not prepared the appropriate power of attorney document/s. In some states, a guardian is referred to as a *conservator*.

Health care agent. The person who will make health care decisions on your behalf if you become incapacitated and are no longer able to make the decisions yourself. You must formally name in this person in a power of attorney for health care document. The document is also referred to as a durable power of attorney for medical care.

Health care directives. Legal documents that give you control over your medical care if you become incapacitated. They include a medical power of attorney and a living will. Some states combine both documents into a single document.

HIPA release. A form that tells your health care providers with whom they can share information about your medical status and prognosis. It's important to name spouses, family members and non-family members. Otherwise they may not be privy to this information if you are too ill to share it with them yourself.

Hospital visitation directive. A form that allows you to spell out who you do (and don't) want to visit you in the hospital when you are seriously ill.

***Intervivos* gift**. A gift that you give to someone else while you are still alive.

Intestate. Dying without a will.

Irrevocable trust. A kind of trust that cannot be changed or terminated once it's been set up. It can be a living trust or a testamentary trust.

Joint property. Property that you own with someone else.

Joint tenants with the right of survivorship. A way of titling an asset such that when one owner dies, the surviving owner is automatically entitled to the deceased's share.

Lifetime gift tax exemption. The maximum value of assets that you can transfer to others during your lifetime without triggering the federal gift tax. At the time this book was written the amount was $5,250,000.

Limited liability company (LLC). A popular form of business ownership that combines the tax advantages of a sole proprietorship or partnership with the personal liability protection of a corporation.

Living trust. A trust that you establish while you are still alive. It can be revocable or irrevocable.

Living will. A legal document that states the kinds of medical care and treatment you do and do not want when you are close to death and there is no hope of your recovery. AKA Directive to Physician.

Minor. A child, or someone younger than age 18 in most states; in some states, a minor is someone younger than age 21.

Nondurable power of attorney. A power of attorney that lasts for a limited period of time. Its duration is spelled out in the document.

Payable-on-death account. A bank account that holds funds for the benefit of whomever you designate as its beneficiary. The beneficiary will receive the funds when you die. Also called a Totten Trust.

Personal guardian. The adult you designate in your will as the person you want to raise your minor child if the child is still a minor when you die. It is also the person named by the court as the one who makes decisions regarding an incapacitated adult's health care, living arrangements, etc.

Postnuptial agreement. Similar to a prenuptial agreement (See next definition), but negotiated by spouses during their marriage.

Power of attorney for health care. A document that gives someone else the right to make health care decisions on your behalf should you become incapacitated. This person is referred to as your *health care agent*, *health care proxy* or *health care surrogate*. You can give this person very broad powers or specific powers, including the right to have your living will enforced.

Prenuptial agreement. An agreement between two future spouses that spells out the financial arrangements of their marriage and possible separation or divorce. In some states, prenuptial agreements are referred to *ante nuptial* agreements or *premarital agreements*.

Probate. The process that validates a will, get as many legitimate claims against the deceased's estate paid, and that distributes all remaining assets to the deceased's beneficiaries according to the terms of the will. The process begins when the executor of the deceased's estate files the will with the probate court, and it is accepted as valid.

Property guardian. The adult or institution you want to manage the property you leave to your child in your will after you die if the child is a minor at that time. You designate this person in your will. Also, the adult or institution to handle the financial affairs of an incapacitated adult.

Qualified terminable interest property trust (QTIP). A type of trust that allows you to provide for your surviving spouse, but also lets you determine what will happen to the assets that are still in the trust when your spouse dies. Many spouses with children from a prior marriage use this kind of trust to ensure that those children will benefit from their estates eventually. This trust is typically used for the deceased's property in excess of the federal unified credit exemption. ($5,250,000.00 in 2012)

Residuary clause. A clause in a will that leaves all of the will maker's assets that not already designated for specific beneficiaries to one or more individuals or charities.

Retirement account. A regular or Roth IRA, 401K, employer-provided pension, SEP, or Keogh.

Revocable trust. A trust that you can change. Only living trusts can be revocable, although some living trusts are irrevocable.

Separate property. Your individual property, or the property you own by yourself and not with someone else.

Simple will. A will that does not include a testamentary trust.

Special needs trust. A trust that you can set for an adult or minor with a mental or physical disability that will not jeopardize his or her eligibility for benefits from such government programs as Medicaid and Supplemental Security Income (SSI).

Spendthrift trust. A trust that generally prevents the creditors of the beneficiaries from reaching the assets in the trust.

Tenants by the entirety. A legal form ownership that allows spouses to share ownership or real property. Allows each surviving spouse to fully own real property when the other spouse dies. Not all states recognize this form of ownership.

Testamentary trust. An irrevocable trust that is set up through your will.

Trust. A legal entity created to hold assets for the benefits of the trust beneficiary/ies. It can be a testamentary trust or a living trust.

Trustee. The individual or financial institution named in a trust agreement who is responsible for managing the trust assets according to the instructions spelled out in the agreement.

Unlimited marital deduction. A federal deduction that allows a spouse to transfer all of his or her assets to the other spouse free of estate taxes.

Will. A written document stating to whom you are leaving your assets and naming the executor of your estate. If you have minor children, you can also use your will to designate their personal and property guardian/s. Some wills include provisions for the establishment of a testamentary trust after the death of the writer of the will.