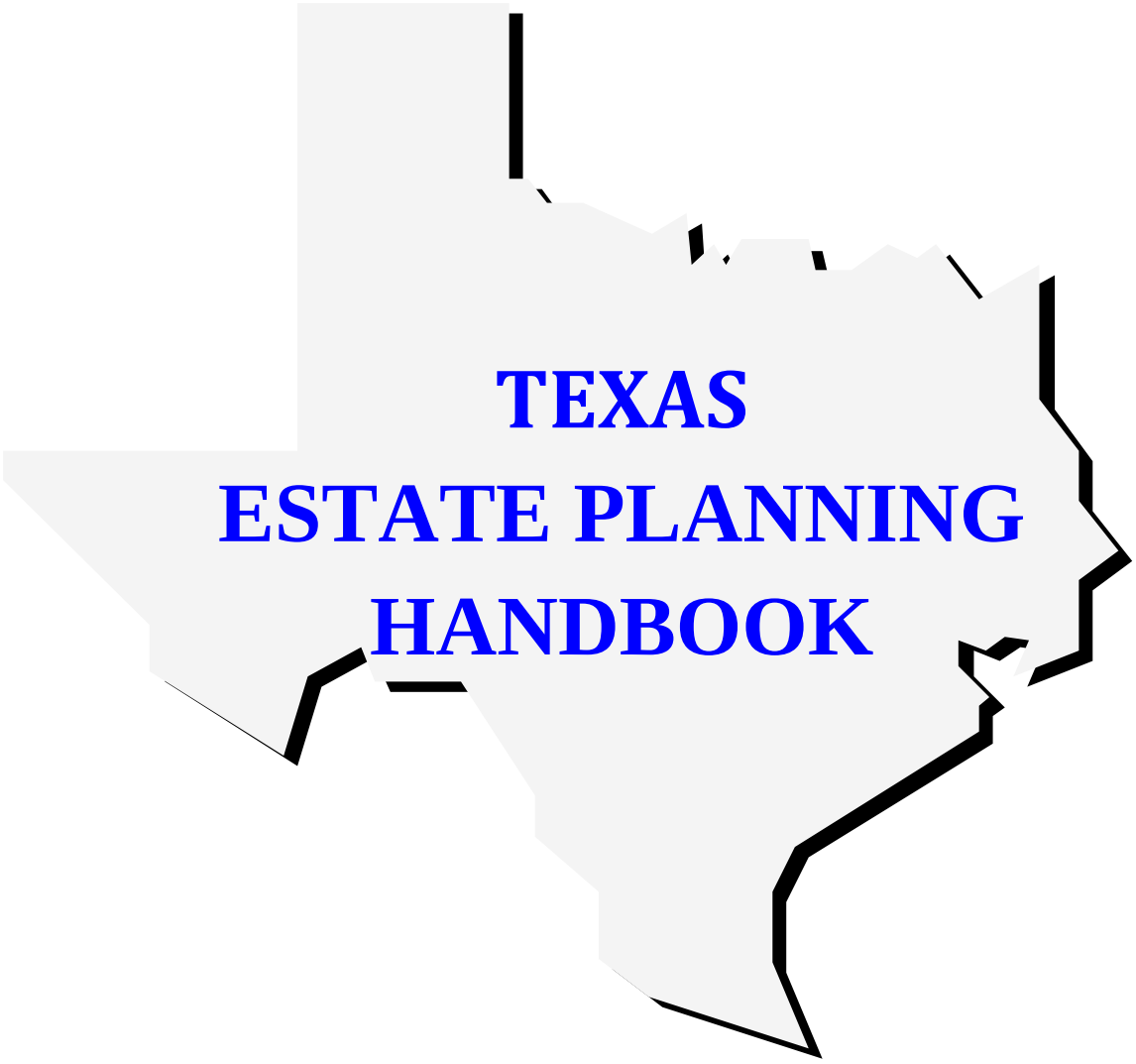

TEXAS ESTATE PLANNING HANDBOOK

By Brad Wiewel

The Wiewel Law Firm

Estate Planning * Asset Protection * Probate * Special Needs * Charitable

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Author's Note

The information contained in this booklet is for informational purposes only. It is not intended to give anyone specific legal advice. This author recommends that you consult with a qualified estate planning attorney for answers to your specific family situation. Data regarding the cost and expenses of probate was obtained from studies described in *The Living Trust Revolution* by Robert A. Esperti and Renno L. Peterson, and *Field Guide,* National Underwriter.

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Nothing contained in this publication is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This publication is intended for educational and informational purposes only.

ABOUT THE AUTHOR

Brad Wiewel is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization. He received his B.A. from the University of Illinois, and his Juris Doctorate, *with Distinction*, from St. Mary's University in San Antonio. He is licensed in Texas, and the United States Supreme Court, the United States Court of Appeals for the Fifth Circuit and the United States District Court, Western District of Texas. He is a former legal columnist for the *Austin American-Statesman.*

Brad is a Life Fellow of the Texas Bar Foundation, has been very active in a variety of public and private educational and charitable activities, and has acknowledged for his *Pro Bono* contributions.

Brad is a member of Wealth Counsel. Wealth Counsel is comprised of hundreds of estate planning attorneys throughout the United States. Its members provide state-of-the-art estate and business planning legal advice, counsel and documentation to their clients. These attorneys are committed to leadership in innovative estate planning techniques, and dedicated to assisting families, preserving wealth, and perpetuating philanthropy. He is also a graduate of the Advanced Studies in Wealth and Estate Strategies program sponsored by the Esperti-Peterson Institute in conjunction with Michigan State University.

Brad is a much sought-after speaker at estate planning training classes for CPAs, financial advisors and insurance professionals. In addition, he teaches continuing education classes in the CFP preparatory program at The University of Texas. He formerly hosted "Law Talk with Brad" on Talk Radio 1370 AM in Austin.

Brad and his wife, Cindy, are the parents of three sons: Sam, Andy and Zach, all of whom are, like Brad, Eagle Scouts.

Foreword

The Bridge Builder

An old man, going a lone highway,
Came at the evening, cold and gray,
To chasm, vast and wide and steep,
With waters rolling cold and deep.
The old man crossed in the twilight dim;
That sullen stream had no fears for him;
But he turned when safe on the other side
And built a bridge to span the tide.
“Old man,” said a fellow pilgrim near,
“You are wasting your strength with building here;
Your journey will end with the ending day;
You never again will pass this way;
You’ve crossed the chasm, deep and wide ---
Why build you this bridge at eventide?”
The builder lifted his old gray head:
“Good friend, in the path I have come,” he said
“There followeth after me today
A youth whose feet must pass this way.
This chasm that has been naught to me
To that fair-haired youth may a pit-fall be,
He, too, must cross in the twilight dim;
Good friend, I am building the bridge for him.”

Will Allen Dromgoole

PREFACE

Estate planning is a combination of the rational mind, which knows what to do with information, and the compassionate mind, which teaches and listens. An estate planning attorney should never lose sight of these principles. *How* we plan our estate will have a profound impact on our families and the ones we love.

Each family has different needs and different concerns. It is important that your estate plan is designed for your particular family situation.

As a client, you have the right to expect your estate planning counselor to always strive to help you identify your greatest hopes fears, dreams, and aspirations for both yourself and your family.

WILLS

Many people have felt uneasy, even guilty, for not preparing a will for their loved ones. They put it off for years, only to feel a surge of relief when they finally sign one in their lawyer's office. Unfortunately, their sense of relief may not be well founded.

Surprisingly, about the only aspect of your estate that wills actually control is property owned solely in your name or in your name with another person as "Tenants in Common." For most people, this is a relatively small portion of the estate. The list of what wills *do not* control usually includes the lion's share of an estate's value, including:

* Life insurance and annuity proceeds

* Retirement benefits (profit sharing plans, pensions, and IRAs)

* Joint Tenancy with Rights of Survivorship

Life insurance and annuity proceeds and retirement benefits are not controlled by wills. *They are controlled by beneficiary designations.*

People who are recently married or remarried may have quite a shock when discovering their actual beneficiaries may be their ex-spouse or their parents! This, of course, can have disastrous results.

Jointly held property has its own rules. The results of these rules may be very different from what you had intended in your will.

Most people who seek the will services of a lawyer look to him or her for guidance. When asked by a lawyer what they want to do in their wills, they often reply, "Leave everything to my spouse, and then to my children equally." The result is almost always a simple paragraph or two saying just that (with a little Latin thrown in) and nothing

more. The rest of the will document (and most trusts for that matter) is bare-bones boilerplate: a sterile legalese that does not have any loving instructions for the care of spouses, children, and grandchildren. Software wills are perhaps the worst choice because many are either invalid or grossly ineffective because people have no real idea as to the legal impact of the selections they make.

If you have property in your name and you do not have a valid will or other planning, your property automatically passes to beneficiaries named under your state's law *and* your property goes through probate. In that case, at least <u>two</u> lawyers are required to be employed. Later in this booklet you will find the "Last Will and Testament (According to the Texas Legislature)" which describes the disaster that may await your loved ones.

Probate has been said to be "a lawsuit you start against yourself with your own money for the benefit of your creditors." Not only can probate costs be substantial, but they are also the *first* to be paid. In many states the fees are often taken as a percentage of the gross value of the estate (that is, before creditors put a hand in). In Texas, however, attorney's fees for probate can be charged on a percentage or hourly basis; the Texas standard is "reasonable fees". In Texas, like most states, probate costs do not necessarily have a "cap".

Your will cannot take care of you if you are incapacitated. It only takes care of the people that you leave behind. Your will can do absolutely nothing to help you or your loved ones while you are mentally incompetent, because it is only effective at your death. Although a power of attorney can allow someone to take care of you if you are mentally incompetent, a power of attorney is often a "blank check" to handle your assets however someone chooses, though they are expected to operate with your best interests in mind. In fact, in many cases it is often difficult (and occasionally impossible) to get a financial institution to recognize a power of attorney.

Every will is a public document upon being filed for probate. When it is filed, it becomes *totally public*. A legal notice that the will has been admitted to probate is published in a local newspaper, and anyone can go to the courthouse, look at it and see exactly how your estate is divided. In addition, the probate inventory must be prepared which shows such things as many of your non-retirement financial relationships and the balances of those accounts, the value of your house and other property. If the estate of the deceased owed unsecured debts (other than for taxes or administrative expenses) on the date the probate inventory is due, then the probate inventory is also made public, exposing very private financial information. Most people do not want to make any part of their family's affairs public, especially at this very vulnerable time in their lives. In certain Texas counties, such as Travis County, everything required to be filed with the court is placed on the *Internet*, and made *available to anyone, anywhere in the world!*

Do you have minor children or grandchildren? If you do, and your will leaves your property directly to them, you have really left your financial affairs and the well-being of your children and/or grandchildren in the control of the probate court. Also, whether you have a will or a trust, by leaving your property outright to loved ones, regardless of their ages, you have not protected them from:

***** The claims of their own or their spouse's creditors,
***** Disability and the risk of a guardianship proceeding, or
* Their inexperience and/or inability to handle their inheritance wisely.

Wills do not cross state lines very well. If you make a will in one state and die a resident of another, the laws in your new state may be used to interpret your will. This can often lead to confusion, and confusion can lead to increased expenses. As it happens, each state's will laws

are different, which is why lawyers tell their clients "if you move out of state, be sure to have your will redone to meet the laws of your new state." Having to rewrite your will may be expensive, but not rewriting it is even more expensive! In Texas, a will that is valid and self-proved (which means that the witnesses to the will do not need to testify) in the state in which it was written, can be admitted to probate here as if it was written in Texas. Despite this, problems and additional expenses arise, however, because research into the original state's laws can be necessitated, and the other documents required for comprehensive estate planning (medical and financial powers of attorney, etc.) should be updated to comply with Texas laws. As an aside, one of the biggest problems with software wills is that the law of the state in which the *software developer lives* may be used instead of Texas law which can add to delay, confusion and expense.

In addition, if you own land or other real property in more than one state, it is possible that your estate may have to be probated in each state in which you own property. For example, the estate of a Texas married couple with a condominium in Colorado might face four probates – one on each death in Texas, and another on each death in Colorado. Think of paying administration expense, court costs, attorney fees, and related expenditures for each state!

Your natural reaction by this point might be to wonder why wills remain so popular. Why do so many lawyers continue to recommend them? The answer is quite simple: people - particularly lawyers - are conservative by nature. Wills have been and continue to be an institution in our society.

PROBATE

A deceased or a mentally incompetent person cannot sign deeds, write checks, pay bills, transact business, transfer assets, or care for children. Probate is the legal process of accomplishing these tasks. Death probate is the most familiar of the two types of probate. *Guardianship* is the process of obtaining a court order appointing a guardian to control your person, and/or a guardian to control your property. Your guardian (including your spouse) will be required to purchase a surety bond, and the court will retain jurisdiction over the guardians, and require regular reports and accountings to be filed for the rest of your life.

Dying with or without a will almost always results in probate.

Before probate can even begin, the probate court must first establish whether a will exists and, if so, whether it was signed correctly. (If the deceased did not leave a will, the probate court distributes the property as provided by the state's laws.) Please see "The Last Will and Testament (According to the Texas Legislature)" later in this booklet. The court must also determine whether the maker of the will was legally competent and that the maker was not forced to sign the will.

Anyone who disagrees with a will's provisions can bring a lawsuit in the probate court. This is called a *will contest*; it can be a way for unscrupulous potential heirs to attempt to collect what they were not directly left by the will.

If you have a will, you can designate the person you would like to manage your estate. If you die without a will, you give up that right. The agent for an estate is known as an executor, an administrator, or a personal representative depending on the state and the circumstances. In Texas, the Executor will need to hire a lawyer to file the necessary papers and to make all court appearances. Often the Executor has no experience in estate administration and is totally dependent on the lawyer. Both the Executor and the lawyer are legally entitled to be paid for their services.

One of the Executor's main responsibilities is to notify creditors and heirs of the estate. Creditors are notified either directly by the Executor or by legal notices that are published in newspapers.

Currently in Texas, the standard used to calculate attorney fees is "reasonable compensation". Reasonable compensation is usually determined by hourly rates, fixed fees, percentages, customary fees, or whatever the attorney can justify by the "difficulty of the case", the "level of experience required", and so on. Ordinarily, judges in typical Texas probate cases do not even know the amount of attorney's fees that are being charged because that information often is not required to be disclosed to the court.

The length of time it takes to complete probate averages sixteen months nationwide. Theoretically, in Texas an estate can be closed in 4-6 months, although it certainly can take longer, especially if it is a taxable estate. Those families not lucky enough to be "average" can spend years waiting for probate to end. The assets often will not be distributed until the probate process is completed. In fact, the

Executor could be sued if he or she distributed assets to heirs before creditors had been paid.

Probate is designed to give public access to previously very private information. Everything filed with the probate court is open to inspection by everyone, and can be scrutinized and copied at any time, for any reason, or for no reason whatsoever; to whom and how you leave your property is all made very public. As noted earlier, in some Texas counties, such as Travis County, this highly personal information is placed on the internet for anyone, anywhere in the world to see and access!

A living trust is designed to avoid probate. A living trust should have carefully structured instructions for the care and well-being of both you and your loved ones while you are alive but incapacitated and of your loved ones after you are gone.

A living trust avoids probate when title to your various assets is transferred to the name of your trust while you are alive. On your death your living trust remains *alive* - your property and the instructions that accompany it are immediately available for the benefit of your loved ones - without the intervention of the probate process. Although a trust administration is often necessary, if the trust is fully funded (which means your trust owns your assets – but you control the trust!) all of the deceased's property and the trust provisions remain private.

I'm a performance piece entitled,
"The Probate Experience".

LIVING TRUSTS

"Estate Planning" is a term frequently used but rarely understood. Proper estate planning should be centered-around the following mission statement:

I want to control my property while I am alive, take care of myself and my loved ones if I become disabled, and be able to give what I have to whom I want, in the manner I think appropriate, and if I can, I want to save every last tax dollar, attorney fee, and court cost possible.

Planning your estate with a fully funded living trust meets these estate planning goals and also does the following:

* Provides instructions for your care and that of your loved ones in the event of your disability, avoiding any possibility of a guardianship;

* Avoids probate;

* Keeps your planning affairs totally private;

* Prevents out-of-state probates if you own property in more than one state;

* Achieves federal estate, gift and income tax planning which can save your loved ones thousands of dollars;

* Provides loving instructions for the care of minor children and children with special needs;

* Allows you to determine what age and under what conditions you want your children and loved ones to inherit;

* Prevents the time, expense and humiliation of a guardianship - in the event you become mentally incompetent;

* Is difficult for disgruntled heirs to contest;

* Allows you to leave extensive instructions for the care and assistance of your loved ones after your death;

* Both Living Trusts and wills allow you to create protective trusts for your little ones, challenged children and/or grandchildren, which frees them from impersonal, expensive, and cumbersome supervision of the court, and can also protect your children's inheritance from the claims of their creditors or future ex-spouses.

"Well," you might ask, "if living trusts are so good, why does everyone seem to talk about estate planning in terms of wills?" The answer is simple: people - particularly lawyers - are conservative by nature. Wills are perceived as old and venerable and have been accepted as

the way to plan. Lawyers take courses about wills in law school, but they generally have not received much instruction about other planning alternatives.

Trusts have been in existence even longer than wills. Unfortunately, they are perceived as only for the very wealthy, or that they are too complicated or unmanageable for most people. Nothing could be further from the truth. Living trusts are for anyone who wants to achieve the goals discussed here.

People who learn about the problems associated with wills - and how they can be overcome with living trust planning - generally embrace the living trust concept.

People Centered Estate Planning Process. Estate planning attorneys who are dedicated to people-centered estate planning embrace the following philosophies:

* A living trust should contain your carefully crafted instructions for your own care and that of your loved ones. To meet this end, the estate planning attorney should conduct a detailed interview with you to identify your hopes, fears, dreams and aspirations for yourself and your family.

* Your estate plan should be custom drafted like a suit of fine clothing to meet your individual planning goals.

* Because you never know what might happen, your trust should plan for every contingency and should be on the cutting edge of the law.

* Your trust should be written in straightforward, understandable language, with a minimum amount of technical legal language.

Easy to Create. With the help of your advisors and your attorney, you can quickly and comfortably establish a living trust for yourself and your loved ones. In Texas if you are married, it is often recommended that you and your spouse have a joint living trust.

Easy to Change or Cancel. Your living trust can be changed or canceled at any time. You are not locked into a fixed position; after signing your name, you always have the option of "unsigning" it. In fact, it is recommended that you regularly review and update your living trust. Please see the chapter on "LifePlanning Legal Services™" later in this booklet.

Easy to Maintain Control. Your living trust receives its strength by becoming - for your benefit - the "owner" of your property. As the maker, trustee, and primary beneficiary, you control every aspect of how your property is to be used and enjoyed.

Easy to Appoint Trustees. Both you and your spouse can be the original trustees of your joint trust, or you can each be sole trustee for your own separate trust. You can specify different trustees to take care of your loved ones after your death. You can name as many or as few trustees as you like. You can determine how they may be terminated or replaced, and you can even name their replacements.

Can Be Set Up Quickly. Creating a living trust can usually be drafted in three to four weeks.

Funding Your Trust. In order for your trust to meet your planning goals and to avoid probate of your assets, it is critical that your assets be titled in the name of your trust. The process of transferring your assets into your trust is called "funding" your trust. An unfunded trust is like a car without gas; neither will get you very far! A good estate planning attorney should provide you with assistance in funding your trust. Unfortunately, many estate planning attorneys do

not have qualified funding coordinators or paralegals to help you during the funding process.

Tax Consequences. There are no adverse income or property tax consequences to establishing a living trust. You do not need any special tax identification numbers nor do you need to file any special tax returns. In fact, you continue to file your tax returns just as you always have. Also, your property taxes are unaffected by the trust.

Inexpensive in the Long Run. Settlement of a fully funded living trust can cost less than a probate or guardianship proceeding.

Disadvantages of a Living Trust. There are very few disadvantages of using a living trust to plan your estate. The most common criticism of a living trust is that you must fund it. But, think how much easier it is for *you* to do this than for someone less familiar with your affairs, such as a family member or a close friend. And you are the one who will have the satisfaction of knowing your affairs are *really* in order, not just put off for others to handle. Another concern about living trusts are their perceived complexity. Certainly your living trust should include the latest and most sophisticated tax planning; and everyone knows how complicated the tax laws are. So if you want to save your heirs every tax dollar possible, some detailed tax planning is needed.

As to the complexity of maintaining your business affairs through a living trust instead of personally, in actual practice there is very little difference. Often the only "complication" (if there is one at all) of handling an asset which has been transferred to your living trust may be occasionally writing "Trustee" after your signature when you sell real estate.

A Word of Caution. Proper estate planning revolves around your relationship with a qualified estate planning attorney. Unfortunately,

there are many businesses and *salespeople* masquerading as estate planning professionals. They are inundating the public with sales schemes that involve selling wills, living trusts, and other estate planning documents without the involvement of attorneys in the design and drafting of the documents. These people prey on well-intentioned families, the elderly and the uninformed. They sidestep practicing legal professionals and deceive the public. They are the opposite of what the People Centered Estate Planning Process stands for: professional thoroughness by the attorney and other advisors, and respect for the overall well-being of the client and the client's family. It aspires to the highest ethical and professional behavior that will lend dignity to the client and competence to the planning process. Software trusts usually have the same problem as software wills – they usually do not work right!

Three Misconceptions. While a Living Trust is an excellent tool for controlling assets during a disability and avoiding probate, there are three very popular and totally erroneous misconceptions about this tool. First, people hear the word "trust" and assume that by having a living trust they have *magically* protected their assets from their creditors. Unfortunately, Living Trusts add <u>NO ASSET PROTECTION</u> to your estate. While there are several tools available to shield your property if you are sued such as Limited Partnerships (LP) and Limited Liability Companies (LLC), a Living Trust, in and of itself, provides no additional protection. The second misconception is that when someone dies with a Living Trust no legal work is needed. This is also false. Although a properly implemented Living Trust may avoid the need for Court involvement, you will almost always need the help of a qualified estate lawyer to assist the successor trustee with the legal requirements imposed by the terms of the trust. Third, despite the superiority of a living trust over a durable power of attorney, you still need a durable power of attorney to manage retirement accounts (401(k), IRA, etc.). It's best to contact the firm

that has your retirement accounts and get their form for those accounts.

A Living Trust Prepared Through the People-Centered Estate Planning Process is the Essence of Estate Planning. It allows you to control your property while you are alive, to take care of yourself and your loved ones if you become disabled, and enables you to give what you have to whom you want in the manner you want, and saves every last tax dollar, attorney fee, and court cost possible.

TRUSTEES

Under the laws of our country, a trustee is a super-agent charged with the most important of duties: administering our property for the benefit of you (if you have created the trust) and your loved ones. Whether the trustee is a person or an institution, the responsibility of

the position remains the same: to follow the trustmaker's instructions.

The compensation of trustees in many states is defined as whatever is reasonable. "Reasonable" is frequently determined by what professional trustees - banks and trust companies - charge. Generally, their charges are 1.5% or less per year of the value of the funds they administer.

Trustees and guardians have different functions. A *guardian* raises your minor children and provides loving care. A *trustee* is your children's financial manager, handling money and property. The trustee and the guardian may be the same person as your guardian or the trustee and the guardian can be two different individuals. This establishes a checks-and-balances system for the benefit of your little ones.

You are trustee as long as you are alive and well. Your family, friends or any bank trust department, trust company, Certified Public Accountant or responsible adult can serve as a trustee for you and your loved ones after you are unable to serve as your own Trustee. They can serve alone or in combination with other trustees you name. When selecting your trustees, be mindful that you are not limited to naming a single trustee. You can name as many co-trustees as you like. You can change your trustees any time, and you can name different trustees for different circumstances. For example, you can have one set of trustees while you are alive and healthy, another set on your disability, and yet another set on your death. An important aspect in the selection of trustees is balance. You may want to augment the financial thoroughness of a bank with the understanding of a responsible adult when it comes to planning for your children.

In addition to selecting successor trustees, you can also specify in your living trust the conditions under which trustees should be either removed or replaced. In short, you have an open hand in the choice, manner, and number of trustees.

It is preferable to name yourself (and your spouse, if married) as your initial trustee. If single, you can name a child or another close loved one or advisor as your initial co-trustee, or you might want to function as the sole initial trustee of your trust.

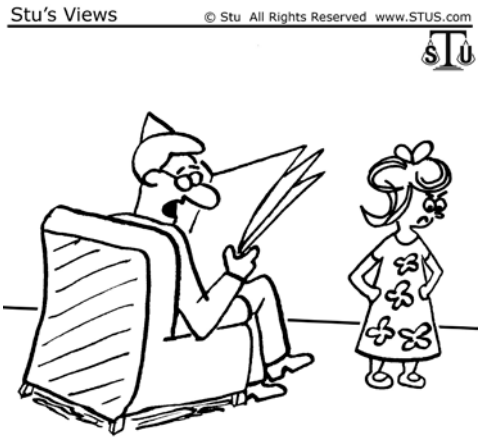
If you are married, you can name one or more replacement trustees to assist your spouse while you are disabled. This choice is recommended, because your spouse may appreciate having help with your financial affairs at a difficult and stressful time. Alternatively, however, you can rely only on your spouse to take care of you and manage the family finances as sole trustee. Professional advisors, close family members, institutional trustees, financial advisors and accountants are often named because they know so much about the family's finances; they can step right in and help a spouse who may not be well informed with respect to the family's finances.

People who do not have advisors or a particularly close relationship with their advisors usually select close family members or corporate fiduciaries as their successor trustees. Close family members are selected when they can offer moral support and some financial or administrative help to loved ones. Corporate trustees are usually named solely for their ability to manage one's financial affairs, from the investment of funds to record keeping and the preparation of tax returns. Generally, corporate trustees are used when either the family dynamics are complex or the assets in the trust require special talent. If a corporate trustee is utilized, a "Trust Protector", usually a close family friend, is named. The Trust Protector monitors the

performance of the corporate trustee and can replace the trustee if the circumstances call for it.

A spouse trustee has different needs after you are gone. This is still true even if your spouse is an expert in your finances. A period of intense grief follows the loss of a loved one, and during this time even the soundest of business minds does not function very well. It is important to ensure that your spouse has access to clear thinking and supportive help. This is especially true if any relatives or family acquaintances begin to propose dubious financial ventures on the basis of the newfound affluence. Blended family issues and the desirability for re-marriage protection should be factored into this critical decision.

Your loved ones need prudence, but they also need loving care. That is where the personal touch of a close family member or trusted advisor can make all the difference. Such persons can offer understanding when dealing with complex family relationships and unique personalities. Adding them to your trustee team is a real planning plus. Your estate planning attorney can assist you in selecting the proper combination of caring and competent trustees to ensure your own well-being and that of your loved ones.



No, you can't get a $5
"advance on your inheritance".

JOINT TENANCY WITH RIGHT OF SURVIVORSHIP

Joint Tenancy with Right of Survivorship (JTWROS). "JTWROS" may be a huge planning pitfall. Although JTWROS has been assailed for years by many estate planning experts, it remains - unfortunately - a very popular form of property ownership.

How Joint Tenancy With Right of Survivorship Works. In JTWROS, each person owns the *entire* asset, *not* a part of the asset. *"Right of survivorship" means that whoever dies last owns the property*. The deceased joint tenant merely had the use of property while he or she was alive.

JTWROS property cannot be controlled. Even if a joint tenant intends to have his or her share pass to loved ones, the property is *not controlled* by the provisions of the owner's will or trust. Property that is owned in JTWROS automatically passes to its surviving owners by *operation of law.* This means that no one - not even a court - has any effect on who receives the property.

Misconceptions. JTWROS can be a trap. The term itself has nice connotations because it implies "the two of us," a partnership, a marriage of title as well as love. On the surface, it appears to be the right way for people who care for each other to own property. It is psychologically pleasing, which too many people is the real advantage of joint ownership.

JTWROS is easy and convenient. Some advisors continue to recommend JTWROS, claiming that it bypasses the entire probate process; however, this is not entirely true. In addition, the tax consequences are often misunderstood.

The Truth. For most people, the disadvantages of JTWROS far exceed any advantages. Some of the more devastating pitfalls of JTWROS are:

* Property passes to unintended heirs.
* There are no planning opportunities.
* Unnecessary and increased death taxes may be paid
* Probate is at best delayed, not totally avoided.
* For nonspousal owners, unintentional gift taxes and death taxes can be generated.
* JTWROS offers no protection from creditors.

Unintended Heirs. JTWROS property passes to the surviving joint tenant and no one else, no matter what you do. If it is your intent to leave your property to your spouse and then to your children, JTWROS is *not* for you.

Joint tenancy with right of survivorship provides no means of ensuring that your property will pass to whom you want. For example, if your spouse remarries and puts part or all of the estate in JTWROS, your children may inadvertently be disinherited. Or, against your wishes, your spouse may create a new will to disinherit some or all of your children after your death. If you and your spouse die together in an accident, significant questions may arise as to who is going to inherit your property. JTWROS is a pitfall because you cannot control where such property passes after your death.

No Planning Opportunities. What if your spouse or your children need assistance in managing the property you left them? JTWROS cannot help. It has no provision for help. If you become disabled, your JTWROS property may be tied up in a guardianship proceeding while you desperately need it for your own or your loved ones' care. If your spouse is disabled when you die, the probate court will

"inherit" the JTWROS property and through a guardianship determine how and when it is to be used for your spouse's benefit.

Joint tenancy with right of survivorship includes no tax planning of any kind. Because of its one-dimensional aspect, JTWROS robs many people of their ability to reduce the estate tax burden imposed on their loved ones. For example, upon the death of the first spouse (assuming you and your spouse do not die together), JTWROS property passes to the surviving spouse without estate tax. However, when the surviving spouse dies, the resulting estate is usually larger, and may *all* be subject to estate tax. This wastes an opportunity to pass extra money to your heirs *estate tax free*.

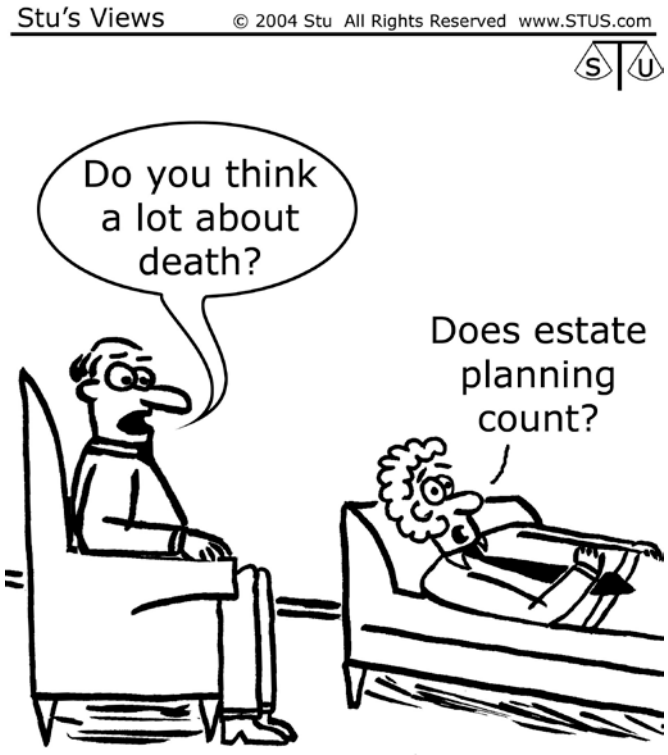
Probate Awaits. Joint tenancy with right of survivorship passes outside all your planning and avoids probate - *but only on the death of the first spouse*. When the second spouse dies, there will be a probate. In situations where both spouses die together, there will be at least one probate and maybe two. What is worse, if a joint owner becomes sick and is not able to take care of their financial affairs, it may be necessary for the probate court to conduct a guardianship proceeding so the joint asset can be sold. JTWROS does not avoid probate; at most, it only delays it.

Unintended Taxes. When nonspouses create JTWROS, they often create a gift tax as well. Frequently, an older parent designates a son or daughter as a joint tenant on securities accounts and other property. The moment this is done, the transfer of property may very well be a gift that might have to be reported to the IRS. In some cases, a gift tax may have to be paid.

When a nonspouse joint tenant with right of survivorship dies, the surviving tenant gets the property. A parent with three children may make one child a joint tenant so that child can "sign on the account". When the parent dies, the child inherits all of that property, no matter

what the parent's will or trust says – JTWROS *leap-frogs* over your will or trust. The primary consequences are 1) if the child is selfish, he or she may legally keep the entire property, or 2) if the child is generous and shares the inheritance, he or she may have gift tax consequences.

Excellent for Creditors. Property that is owned in JTWROS may be subject to being attached by the creditors of a joint owner. Often a parent will name a child as a joint owner of a bank account or other property, usually for convenience purposes and to avoid probate on the parent's death. Unfortunately, most people do not realize that the child's creditors may attempt to attach the part of the property or asset that the child owns jointly, if the child contributed to or was gifted any part of the joint property. Only some of the problems associated with JTWROS property have been mentioned here. They can all be avoided, however, through living trust planning.



ASSET PROTECTION

Although a detailed discussion of asset protection is beyond the scope of this booklet, being concerned about loss of assets in a lawsuit is smart. An inadvertent slip by a person in your home, or a sudden car wreck on the freeway can lead to a potentially devastating legal meltdown. Crafting a solid Asset Protection plan is wise. As noted earlier, while a revocable living trust does not in itself provide any additional safeguards in the event of a lawsuit, combining a living trust with one or more of the following tools can create a very potent shield:

Annuities

Life Insurance (and the Cash Value)

Family Limited Partnerships (FLP)

Limited Liability Companies (LLC)

Marital Property Agreements

Spousal Protection Trusts

Spendthrift Trusts

Domestic Asset Protection Trusts

Offshore Trusts

Unfortunately, we know that you cannot buy life insurance after you have just been diagnosed with cancer, in most cases you will not be able to construct an asset protection plan if a claim against you is already pending, expected or threatened. So, moving forward to protect your property, and build a secure fortress to guard your

family's wealth prior to a problem while the "coast is clear" is vital to your future financial stability.

SPECIAL NEEDS PLANNING

Special people need special planning. Many families struggle to find the best way to leave money to a child or loved one who, due to a mental or physical challenge, will never be in a position to effectively manage an inheritance. The creation of a proper plan to ensure that your special person has the money needed to provide for their care without jeopardizing the availability of certain governmental benefits and supplements is critical.

Some of this work may be contained in a properly drafted Will or Living Trust. Often, a "stand-alone" trust is created so that other members of the family can name that trust a beneficiary of assets that will be needed in later years for the care of the special person. In fact, naming the special person in a Will or Living Trust, or making that person the beneficiary of an insurance policy or retirement account can be the *absolute worse thing* to be done because the money coming to the special person will almost certainly be enough to disqualify him or her from most benefit programs! In other words, an inheritance that is not correctly structured in this setting can be a curse instead of a blessing. On the other hand, a properly constructed Special Needs Trust creates a fund that will allow a comfortable, fulfilling life for the special person and permit access to other resources that may be available.

Special attention is called for when a family is trying to navigate through these very complex issues. A properly crafted estate plan which incorporates Special Needs Planning can provide a lifetime of assistance for the special person, and ensure that all of the benefits provided by outside sources are fully accessible. Families enjoy a

substantially heightened sense of peace of mind after this planning is put into place.

MEDICAID and ELDER LAW

Planning for Medicaid is sometimes called "Elder Law" which refers to helping seniors and their families better plan for extended long-term in a nursing home. Obtaining Medicaid to help pay the sometimes enormous costs is usually a primary goal.

No legal area is more hazardous for families, and the rules and regulations change frequently. With very careful planning under the supervision of a qualified elder lawyer, many assets can be preserved for the family. Specialized trusts are often created along with a very specific "Medicaid" power of attorney. A Medicaid specific power of attorney is critical if additional Medicaid planning is anticipated after mental incapacity but prior to death.

There are *many, many myths and misconceptions* about Medicaid planning. Early planning can result is great savings for the family. Waiting too long can make Medicaid planning impractical and sometimes impossible. You cannot begin Medicaid planning too soon!

CHARITABLE GIVING

Charitable Planning may be the most rewarding undertaking of your life. Everyone is aware of the needs that go unaddressed in our society and the world daily. You may want to benefit your church, the homeless, support research into medical cures or create a scholarship fund at your alma mater. Regardless of what you want to do, *HOW* you do it can have a profound impact on your family and your taxes! Estate taxes are *voluntary* taxes –the more you are willing to give to charity, the less you have to pay to the IRS!

There are many ways to benefit charities. Charitable trusts are often recommended. Some charitable options have "*Give and Get*" qualities. A Charitable Remainder Trust, for instance, can allow you to avoid the immediate payment of capital gains taxes on the sale of stock, real estate or other property – *and* you will receive a current income tax deduction you can use to offset other taxes. A Charitable Lead Trust trusts can eliminate taxes on even the largest estate at the time of your death *and* allow your loved ones to inherit all of your property. The use of a private Family Foundation also is a popular choice to allow your charitable desires to continue far into the future, and provide a mechanism for your loved ones to manage that portion of your estate for the charitable purposes you have specified. Donor Advised Funds operate much like private foundations but with often better tax results and fewer administrative duties. There are a number of other approaches to accomplish whatever your goals may be.

Charitable planning can be exciting and rewarding for you and your family. By becoming a *Philanthropist*, you can change your life and the lives of your family and countless others. We will look forward to explaining the vast array of options, and helping you design what works best for you and the causes you care the most about.

ESTATE TAXES

We are all familiar with the Ben Franklin quote: "In this world nothing is certain but death and taxes." Unfortunately, taxes and death still go together. Everything you own, that has your name on it or that you can control is part of your estate.

Many people may not be aware of the true size of their estate. Your estate includes everything your own or control on planet Earth, including assets you may not have considered like retirement accounts and death benefit of your life insurance policies. The amount of your exemption is currently in flux and will remain subject to the whims of Congress for the foreseeable future. Married couples have a particular problem because historically, without undertaking advanced estate planning they receive only one estate tax exemption per couple, not two per couple. This "marriage penalty" often wreaked havoc on an estate that you spent a lifetime accumulating; this issue is in flux, however, so close attention to changes in the law is required. There is even a secret, but extraordinarily brutal tax called the "Generation-Skipping" tax that heavily taxes grandparents when they leave too much money to their grandchildren. These taxes fall especially hard on estates that have large retirement accounts that must also recognize income taxes.

Estate tax payments are generally due within nine (9) months of death. This deadline could force your family to borrow, liquidate or sell assets, such as a business interest, securities, or withdraw assets from retirement plans to pay estate taxes. Life insurance placed in a Family Annual Gifting Trust (sometimes called a Life Insurance Trust) can be a cost effective way of providing the necessary money for your family to pay estate taxes and other costs. If you do not plan properly, the IRS could take more of your estate than your loved ones would receive.

LIFE INSURANCE TRUSTS

Life insurance and estate planning go hand in hand. It represents a major building block in the estate planning process – the "fuel" that powers the estate planning car.

Many times the "fuel" is taxed at the pump before it finds its way into the estate planning vehicle. Because life insurance is not a *probate* asset (i.e. does not pass through probate, but via beneficiary designations), many people assume that it is not a *taxable* asset. While the death benefit is usually income tax free, life insurance proceeds are *not estate tax free*! Estate taxes are due only 9 months after the date of death (or the second death for most married couples), regardless of the status of any probate of the estate which may be pending.

Buying life insurance to add to your taxable estate makes little sense. The solution is to structure your life insurance to be totally free from federal income and estate taxes. This can be accomplished through a special type of trust called an Annual Gifting Trust, sometimes also called an Irrevocable Life Insurance Trust.

An **Annual Gifting Trust** is an extra trust that you can create as part of your total estate plan. Through the use of this special trust, three estate planning objectives can be achieved.

1) Insurance proceeds can be kept *both* federal income and estate tax free.

2) The terms provided in the trust document allow you to control how the insurance proceeds are used by the trust's beneficiaries.

3) The life insurance proceeds received after death by an Annual Gifting Trust can be used to pay the taxes at death so that the family can inherit the deceased's estate without the need to liquidate assets to pay the taxes. This is especially important in estates with large retirement accounts, a family business or real estate.

There are even policies for married couples that insure both spouses called "second-to-die." Because estate taxes normally are not due until the second death, this type policy may be more affordable, and can be available even if one spouse has health issues that might otherwise hinder the accessibility to life

insurance.

FINDING AN ESTATE PLANNING ATTORNEY

Selecting the right estate planning attorney can be difficult. However, there are some pointers you can follow to help you select the right one.

Qualifications. The attorney who assists you in preparing your estate plan should be on the cutting edge of knowledge in estate planning law. Be wary of attorneys who practice in a wide variety of areas of law. It is impossible for an attorney to be an expert in all areas. A good estate planning attorney will limit his or her practice to estate planning and related topics. To become board certified in Texas, an attorney must obtain recommendations from other attorneys and a judge who attest to the lawyer's competency and ethics. The attorney must then take another bar examine which focuses exclusively on estate planning issues. Because of this extraordinarily high bar, only about one percent of all Texas lawyers is board certified in estate planning and probate law.

Find out what type of professional organizations your attorney belongs to; this is often a good indication of whether he or she is well versed in estate planning. Keep in mind, however, that few organizations require that their members demonstrate a minimum level of professional competence. Investigate the membership requirements for the organizations to which your attorney belongs. It is fair to ask your attorney how he or she developed expertise in estate planning, and how many estate planning continuing education hours he or she has completed in the past year. You should also ask to review copies of any articles or publications on estate planning the attorney has written.

Attorney Fees. Cost is always an important factor. However, making your decision based solely on cost may not be wise. Attorneys set their fees in several ways, although almost all attorneys will consider the amount of time that they will need to invest, the complexity of the plan, and the location and type of assets. Also, remember that attorneys who do not supervise the funding of your trust may charge less, but an unfunded living trust will not achieve your goals. Having the attorney who handled your traffic ticket or divorce draft your estate plan is usually penny-wise and pound foolish.

An experienced estate planning attorney should be able to quote you a flat fee at the conclusion of the initial interview when the attorney knows what he or she will need to do to prepare your plan. Be aware that many attorneys charge an hourly rate for estate planning. This may be an indication that the attorney does not know how much time will be required. It also rewards the attorney for taking more time and being less efficient, by increasing his or her fees. On the other hand, though, be cautious of attorneys who quote flat fees over the phone. This is usually an indication that the attorney does not custom draft documents, but rather uses the same boilerplate document for every client.

Most qualified estate planning attorneys will charge in the range of $4,000 to $15,000 for individual living trusts for a husband and wife. Keep in mind that *you get what you pay for*. Most people do not shop for a doctor only on price - quality is the focus. The same principle should be applied in selecting an estate planning attorney. Think about it: in the long run, you have not saved any money when you skimp on your estate plan now, only to force your loved ones to spend much more money on probate and taxes after your disability or death.

What Should be Included? A properly drafted estate plan should probably contain the following documents:

* Revocable Living Trust or Will

* Pour Over Wills that place any assets in your trust which you may have forgotten to fund

* Durable Power of Attorney
* Special Power of Attorney for trust funding and managing retirement accounts

* Certificate of Trust to avoid disclosing the particulars of your living trust during funding

* Medical Power of Attorney to allow a loved one to make health care decisions for you should you not be able to communicate

* Living Will which directs your physician to discontinue life support procedures if you are terminally ill

* HIPAA Release which allows your physician to discuss your medical condition with your loved ones.

Each of these documents should be a part of every estate plan. You should also determine exactly which services your attorney provides and whether there is any additional cost for

* Trust Funding,
* Telephone conversations and answering questions,
* Reviewing the estate plan with your successor trustees,
* Reviewing the estate plan with your family in the event of your disability or death,
* Modifications to your estate plan, and
* Recording and filing fees

Custom Drafted Documents. A high quality estate plan should be custom drafted to fit your needs and the needs of your family. Your estate planning attorney will need to gather detailed information about yourself and your family. Be wary of attorneys who conduct initial interviews over the telephone or do not want to meet with you before preparing your estate plan - this is usually an indication that they do not custom draft their documents. Your attorney should also review your trust carefully with you and be willing to answer all your questions.

Deductibility of Fees. A qualified estate planning attorney should know exactly what percentages of their fees are deductible for federal income tax purposes. You should receive a detailed and itemized statement for verification of the fees.

Designing Your Plan. Your estate planning attorney should take two to three hours to discuss the design of your plan with you. Your attorney will need this time to develop a strong understanding of your family situation. Before your first meeting with an attorney, establish whether there is a charge for the consultation. Most attorneys do not charge for initial meetings, but some do.

Document Preparation Time. A good estate planning attorney should be able to have your documents prepared in 3-4 weeks.

A Long Term Commitment to You. You should consider whether your attorney is prepared to keep you informed of changes in the law, new tools in estate planning, and other information you need to keep your plan current. For your plan to work the way you want it to, you must be committed to keeping it up-to-date, and you should look for an attorney who shares that commitment, which is why we have created our **LifePlanning Legal Services™** program.

LIFEPLANNING LEGAL SERVICES™

Estate planning is not an event; it is a lifelong process. Ongoing maintenance is vital to the success of any estate plan. Many people are under the misconception that estate planning is a one-time event, a legal transaction that never needs revisiting or review. However, estate planning with a revocable living trust is a strategy designed to adapt to the client's changing family and financial circumstances. Flexibility is a hallmark of the living trust and one of the primary reasons why clients prefer to plan with it. Our clients are aware that changes in family and financial circumstances will likely arise and the law also continues to evolve. They want their planning to adjust to meet these changing needs.

Over time, it is inevitable that changes in the law, family, and financial situations may require revision in estate planning documents or may provide new planning opportunities that benefit our clients. A client's estate may outgrow some of the original tax planning contained in their documents. Clients may acquire new assets that are not titled in their trusts or are titled incorrectly. With all of the hazards that could adversely affect a plan's ability to attain the client's goals, regular review and updating of estate plans becomes essential.

Many people are justifiably concerned about the legal fees associated with estate planning. There are really three types of costs involved in this process:

* The cost of the initial counseling and drafting the documents

* The cost of updating the plan (or failing to do so, which is more expensive)

* The cost of settling the estate after disability or death

When an attorney quotes fees for estate planning work, do those fees cover *all* of the costs of the plan? We want to help reduce the total *overall* cost of your planning while improving its quality.

We believe that part of improving its quality means creating a team approach. The team consists of the client (the expert on their family), the attorney (the expert on the law), the client's financial advisors and CPA. When clients have enough education and ongoing counseling, they can be in control of their planning, and together, the team can make their goals and hopes for their family a reality, even when circumstances change. And when successor trustees step in, they should be familiar with their roles, and have the support of the team to help them. Under this strategy, planning becomes proactive, fewer settlement problems occur, the estate plan does what it is supposed to do, and the *overall* cost is less than the national average for trust settlement or probate alone.

For these reasons, we have developed the LIFEPLANNING Legal Services™ program, a structured maintenance strategy that will help ensure that your planning works over the long haul. To our knowledge, few other estate planning firms in the country have made a commitment of this nature to their clients' planning. We have designed the LIFEPLANNING Legal Services™ program to be the most efficient method of receiving ongoing counseling while at the same time reducing the total overall cost of estate planning.

LIFEPLANNING Legal Services™ includes a number of elements, all intended to accomplish the goal of more successful, cost-effective planning:

* To counsel clients frequently on planning opportunities provided by changes in the law;

* To keep abreast of changes in family and financial circumstances and how those changes may affect your planning;

* To regularly update documents to incorporate improved planning strategies;

* To help clients fund their trusts correctly and completely;

* To give successor trustees the tools and information they need to carry out their roles;

* To educate clients on issues which are vital to their estate planning.

We recognize the magnitude of our responsibility to our clients. In order to carry out our obligations, we ask our clients to make a similar commitment to the success of their planning. We urge our clients to devote the energy necessary to ensure that their estate plan succeeds. We insist that our clients fund their trust completely and correctly. We ask our clients to keep us informed of changes in their family or financial circumstances. We expect that our clients participate in periodic reviews essential to effective planning.

We are committed to the success of every client's estate plan. We pledge ourselves to the highest standard of service and to doing the job right. And we believe that LIFEPLANNING Legal Services™ is the best way to achieve that end.

Epilogue

DO NOT GO GENTLE INTO THAT GOOD NIGHT

By Dylan Thomas

Do not go gentle into that good night,
Old age should burn and rave at close of day;
Rage, rage against the dying of the light.

Though wise men at their end know dark is right,
Because their words had forked no lightning they
Do not go gentle into that good night.

Good men, the last wave by, crying how bright
Their frail deeds might have danced in a green bay,
Rage, rage against the dying of the light.

Wild men who caught and sang the sun in flight,
And learn, too late, they grieved it on its way,
Do not go gentle into that good night.

Grave men, near death, who see with blinding sight
Blind eyes could blaze like meteors and be gay,
Rage, rage against the dying of the light.

And you, my father, there on the sad height,
Curse, bless me now with your fierce tears, I pray.
Do not go gentle into that good night.
Rage, rage against the dying of the light.

If you have not created a valid Will, the Texas legislature has drafted one for you. It certainly may *NOT* be what you want, but here it is:

Last Will and Testament
(According to the Texas Legislature)

Being of sound mind and memory, **I Waited Too Long,** make this, my last Will and Testament:

I.

Separate Property*: If I am married and have children, I will, bequeath and devise unto my children in equal shares two-thirds of all of **my separate real estate**. My spouse shall have a life estate only in the remaining one-third, and at my spouse's death that, too, shall be given equally to my children. **My separate personal property** shall be given two-thirds to my children and the remaining one-third outright to my spouse. **If I do not have children**, I give half of my separate property real estate to my spouse and half **to my parents**. My spouse will inherit all of my separate personal property. If I do not have children, living parents, siblings, nieces or nephews, I give my spouse all of my community and separate property.

If I am *not* married and have children, I will, bequeath and devise unto my children all of my property. **If I am *not* married and do *not* have children**, then I give all of my separate property to my parents. If I do not have children or living parents, then I give my extended family (siblings, nieces, nephews, cousins) all of my property even if I do not like them, and even if I have never met them or know them. If my extended family cannot be located, I give all of my property to the **Government.** Furthermore, even if my property goes where I want it to, I desire to spend extra money getting it to them, I want them to have to

hire at least one extra lawyer, and I wish for it to take longer than it would if I had not **waited too long.**

****Separate Property*** is all of your property if you are not married. If you are married, separate property generally consists of property you owned before you were married, received by gift, inheritance or a personal injury settlement or for post-death purposes, assets acquired while residing in a non-community property state.

II.

Community Property: If I am married and I have children**, I will, bequeath, and devise unto all **my children** equally, my entire one-half of all of the community property, including my half of our home, furnishings, cars, savings accounts, checking accounts, stocks and **all** of my other **community property** if I have at least one child by a **prior relationship**. In other words, I give my children my entire half of everything that my spouse and I have acquired since we were married. ***Only* if all of my children are by my current spouse**, then my spouse shall inherit all of my community property.

*****Community Property*** for post death purposes is generally property acquired by a married person while residing in a community property state, except assets that are inherited, received by gift or as a result of a personal injury recovery. Texas, Louisiana, New Mexico, Arizona, Nevada, California, Washington, Idaho and Wisconsin are the only Community Property states.

III.

Financial Guardians for Minors: If I am married with minor children, my current spouse may be appointed guardian of our **minor children's** assets until they are eighteen years old, but only with the approval of the court. If I am divorced, **my ex-spouse may be appointed as guardian** of the portion of my home, furnishings, cars, savings accounts, checking accounts, stocks, and all other of my community and separate **property that I leave my children by my ex-spouse. My current spouse** may be appointed **guardian only** of the portion of my property that I leave *our* children. As a further safeguard, I direct my spouse, my ex-spouse, or whoever the court has appointed guardian of my children, to purchase for the probate court a **performance bond** to guarantee that proper judgment is exercised in the handling, investing and spending of the children's money. If I have minor children, the guardians of my children's assets must file a **complete accounting** with the **probate court yearly**. The accounting must show, in detail, how, where, and why every dollar necessary for their proper care was spent during the previous year.

IV.

Custody of Minors: If my spouse predeceases me while any of **my children are minors**, I do not wish to exercise my right to name a guardian for my children, even though I recognize the **probate court** may act on very limited information and may appoint someone whom I consider **totally undesirable** to care for my beloved children. I direct the court, if it considers it in their best interest, to appoint even a **complete stranger** as their guardian.

V.

Money and Property to Children: If I have **minor children,** then when my children reach the **age of 18**, they shall have full rights to withdraw and **spend** their entire share of my estate; this includes any life insurance and retirement accounts, if they are named as the beneficiary. **No one shall have any right to question my children's action** on how they decide to spend or give away their respective shares regardless of the maturity of my children. I have decided not to provide any direction for my children about who should get any particular property; instead, **I prefer that my children fight-it-out** over my property regardless of whether this **destroys** their **relationship** and **devastates** any of my **business interests or investments**.

VI.

Bonding: As a further safeguard, I direct my **spouse,** or whoever the court has appointed **administrator** of my estate, to purchase for the probate court a **performance bond** to guarantee that proper judgment is exercised in the handling, investing and spending of the estate's money. I want the probate court to feel free to appoint a **corporate trust company** as the administrator, even if the **fees** charged by the company may be **very high**.

VII.

Incapacity: I do not wish to exercise my right to select someone I love and trust to make medical and financial decisions for me if I become **mentally incapacitated**. I direct the probate court to appoint two guardians for me, one for managing my **medical care** and the other for **managing my money**. I understand that this could result in the employment of perhaps **three** or more **attorneys** and that I will have no control over who the judge appoints. I direct the court, if it considers it

in my best interest, to appoint even **complete strangers** as my guardians, knowing full well that the medical guardian has the power to put me in any nursing home that he or she may decide is appropriate, and that the financial guardian, with supervision by the court and the lawyers, will control how my money is invested and spent.

VIII.

Medicaid: Because I *did not buy* Long Term Care insurance and *failed to plan* for my disability, if I ever receive **Medicaid** then **I give my house to the State of Texas**.

IX.

Taxes and Attorneys Fees: Under existing law, there are certain legitimate legal avenues open to me to lower the death tax rates, ensure privacy, reduce court costs, legal fees, and other expenses related to the administration of my estate and the care of my children. I do not want to take advantage of any of these avenues. **I prefer to pay the maximum death taxes and attorney's fees possible**, rather than give it to either my family or my favorite charity. I have signed and set my hand **this one day after my last day to plan - the day after my death**.

_____

I Waited Too Long

GLOSSARY OF ESTATE PLANNING TERMS

ADMINISTRATION
The process by which assets in the name of a **Decedent** are legally transferred to the decedent's rightful heirs or beneficiaries. Administration can either be through a trust or by will.

ADMINSTRATOR
An administrator is appointed by the probate court to administer an estate where the deceased died without a Will. An administrator's role is very similar to that of an **Executor**.

ADVANCE DIRECTIVE
In Texas, this term refers to a **Medical Power of Attorney** and/or a **Living Will**.

ANNUAL EXCLUSION
An exclusion from gift taxes for gifts by each donor to each donee which is available on an annual basis. The annual exclusion has been indexed for inflation, and has grown over the years. The annual exclusion is the amount that can be given gift tax free per donor, per donee, per calendar year. In order to qualify for the annual exclusion, the gift must be a "present interest" i.e., a gift available immediately to the donee as opposed to one not available until the future or one requiring the consent of some other person.

APPLICABLE EXCLUSION AMOUNT
The amount "sheltered" from federal tax by the taxpayer's **Unified Credit**, which increases as the Unified Credit increases. If the value of the estate is less than the Applicable Exclusion Amount for the year of death, no federal estate tax will be due.

ASSIGNMENT
Transfer of title of an asset from one owner to another, such as from a person to a **Trust**.

ATTORNEY-IN-FACT
A person named as an agent in a **Power Of Attorney**.

BENEFICIARY
A person who is (or will be in the future) a recipient of benefits from a **Will**, insurance policy, annuity, retirement account, an **Estate** or a **Trus**t.

BEQUEST
A gift of property made in a **Will** or **Trust**.

BYPASS TRUST
Please see **Family/Bypass Trust**, below.

BOND
An insurance policy that insures that a **Fiduciary** will faithfully perform his or her duties. In **Probate**, the principal on the bond is the **Personal Representative**, the **Surety** is the insurance company and the insured is the **Estate.**

COMMUNITY PROPERTY
Most of the property acquired by a couple during their marriage while they resided in a community property state. Inheritances, gifts, money paid as a result of personal injuries and property owned prior to marriage is typically **Separate Property**. Under Texas law, most property acquired during marriage in a non-community property state is Separate Property at death, but is considered Community Property on divorce. The Community Property states are: Texas, Louisiana, New Mexico, Arizona, Nevada, California, Washington, Idaho, Wisconsin, and in limited situations, Alaska.

COUNSELING-ORIENTED
A collaborative interaction between clients and their estate planning lawyer that begins with teaching the basics of the process and the options available to clients, and then listening to clients describe the unique dynamics of their family. This exchange defines the clients' goals and objectives, fears and concerns, and the standard of success.

CREDIT SHELTER TRUST
Please see **Family/Bypass Trust**, below.

DECEDENT
A person who has died.

DISABILITY
A condition of helplessness preventing the person from conducting normal business, financial and personal functions, whether caused by mental or physical conditions.

DOD
A common abbreviation for **D**ate **O**f **D**eath.

ESTATE
An entity consisting of a person's property and all the rights and responsibilities relating to it usually used in the context of a **guardianship** or **probate**. A **trustee agent under a power of attorney** or **guardian** administers an estate when a person is incompetent or disabled. A personal representative (an **Executor** or Administrator in probate - **Trustee** if probate is avoided through a **Living Trust**) administers the property of a person after death. For **Estate Tax** purposes, the estate consists of everything a person owns or controls of at the time of death anywhere on Earth. This includes life insurance payable by reason of the person's death.

ESTATE TAX
Sometimes used synonymously with the federal estate tax or death tax. Generically, any tax which is levied upon the estate as a whole which exceeds the **Credit Shelter/Trust Amount**. For married couples, the tax usually is not levied until the second death because of the **Marital Deduction**.

EXECUTOR
An executor is someone named by the deceased in a Will and appointed by the probate court to administer that estate. The executor is under the ultimate authority of the probate court and can be removed if necessary. It is important to understand that an executor named in the will is NOT the executor of the estate until the probate court makes a formal appointment. Until then, the named executor has no power or control of the estate or its assets. An **Administrator** serves in a similar role as an **Executor** when the deceased died without a Will.

FAMILY / BYPASS TRUST
A **Trust** which contains property on which federal taxes are avoided at the death of the first spouse to die and which typically is not subject to the estate tax at the second death. Family/Bypass Trusts have historically been used by married couples to obtain two **Unified Credits** per couple, not just one per couple. The trust is sometimes called the Credit Shelter Trust. Because of changes in the law, the trust is no longer required in order to save estate taxes, but using this type of planning can also result in a large degree of protection for the family in the event the surviving spouse remarries. These type trusts can be used in either a **Living Trust** or a **Will**.

FAMILY LIMITED PARTNERSHIP
Family Limited Partnerships (FLPs) and Limited Liability Companies (LLCs) are entities or companies which are typically created to shelter assets from creditors' claims that result from lawsuits. If *very carefully*

crafted, these may also provide some reduction in both gift and estate taxes.

FIDUCIARY
A person or corporation that occupies a position of trust and accountability. The word characterizes a relationship such as **Trustee-Beneficiary**, Attorney-Client, Doctor-Patient, Bank-Depositor, Principal-Agent, etc.

FUNDING
The process of transferring ownership or title of a **Trustmaker's** assets into a trust estate by signing a new real estate deed, changing beneficiary designations, assigning personal property, leases, corporations or partnerships, changing ownership of financial accounts, etc. Properly funding a **Living Trust** is the *only way* to insure that your family will avoid a **Guardianship** of the estate on incapacity and **Probate** on death. Failing to "fund" an asset may result in a probate. Please see **Pour-Over Will**, below.

GIFT
A gratuitous transfer of property to someone else without receiving adequate consideration in return.

GIFT PROGRAM
Usually a planned program of making annual gifts to beneficiaries within the amount of the annual exclusion.

GIFT TAXES
Taxes imposed by the federal government (and some states) on a person giving money or property to a non-charitable person or entity. The giver (donor) usually owes tax.

GRANTOR
In trust usage, the person who creates a trust (also known as Trustor, **Settlor** or **Trustmaker**).

GROSSED-UP GIFT TAXES
If gifts have been made within three years of death on which **Gift Taxes** were actually paid out of pocket, those gift taxes will be added back to the value of the estate for purposes of computing federal estate taxes. This is called the gift tax gross up.

GUARDIANSHIP
A **Probate** court proceeding in which the judge considers whether a person has become so disabled that he/she needs someone else to make decisions about the person's care. Generally, the Court appoints a relative as guardian, with a bond. There are two types of guardian: the "guardian of the estate" manages money, and the "guardian of the person" manages medical and personal care.

HEIR
A person who inherits something from a **Decedent** under the **Law of Descent and Distribution**, where the **Decedent** had no **Will**, which means that someone has died **intestate.** Heirs receive notice of **Probate** court actions even if the decedent had a will. See also **Beneficiary**.

ILIT
A trust designed to hold life insurance so it will not be taxed as part of the insured's estate. It is *irrevocable*.

INCOME BENEFICIARY
The person who will receive the income from a trust for a specified period of time (e.g., the beneficiary's life). See also, **Remaindermen**.

INHERITANCE TAX
Any death tax levied by a non-federal government (e.g. a state) upon the takers of the property as opposed to the estate as a whole (see estate tax). Texas does not have a state inheritance tax at this time.

INTER VIVOS TRUST
"During lifetime." A term used to describe a **Trust** created during the lifetime of the **Trustmaker**, distinguished from a testamentary trust created by a **Will**, which only becomes effective at death. Please see **Living Trust,** below.

INTESTATE
When one dies without a valid **Will**, or where a will does not dispose of all the **Decedent's** property. Someone dying intestate gives up all control of their estate, and is at the mercy of the **Law of Descent and Distribution.** In addition, the **Decedent's** family will almost always pay substantially higher attorney's fees, and perhaps increased taxes.

INVENTORY
In a **Probate** court case, a list of the assets of the **Decedent** or disabled person, prepared and signed by the **Fiduciary (Personal Representative** or guardian). This is very personal information. Often this does not have to be filed with the probate court. If the estate has unsecured debts (except for taxes and administrative expenses) on the date the Inventory is due, however, then it, along with the **Will**, becomes a public record which is available for inspection and copying by anyone, and is sometimes available on the internet.

JOINT AND SURVIVOR ANNUITY
This is an annuity payable to two people (e.g. a husband and wife) through the lifetime of the survivor of the two of them. For qualified plans, this is the type of distribution mandated by law, unless both spouses consent to a different form of payment.

JOINT TENANCY WITH RIGHT OF SURVIVORSHIP
A form of ownership of property among natural persons, characterized by equality of ownership share and created by the same ownership document. When an owner dies that person's interest automatically transfers to the survivor, who then owns the entire asset.

LAW OF DESCENT AND DISTRIBUTION
A state statute that prescribes the distribution of the property of a **Decedent** who died without a valid **Will (Intestate)** to the decedent's heirs.

LIFE INSURANCE GIFT VALUE
The value of a life insurance policy which is given to someone else normally is its "interpolated terminal reserve value", which is generally very close to the cash surrender value. In most cases, this gift value will be less than the face value of the policy. Where the insured is in bad health and cannot obtain new insurance within normal cost limits, the gift value of the policy may be greater.

LIMITED LIABILITY COMPANY (LLC)
Please see **Family Limited Partnership**, above.

LIVING TRUST
A trust created by agreement currently, as opposed to a testamentary trust created by a Will. A Living Trust6 can be used to hold assets during a person's lifetime and thereby remove those assets from probate at the person's death. Also sometimes called a "revocable living trust" because the terms of the trust can be changed by the creators of it. It is also known as an **Inter Vivos Trust** which means that it is created while someone is alive, as opposed to a "testamentary trust" which is a trust created by a Will.

LIVING WILL
A document telling friends, relatives, and health care providers how you want your process of dying managed by using or not using artificial means such as machines or even food and water to speed-up or delay the natural course of a terminal illness. In some states, the **Living Will** and a **Medical Power of Attorney** taken together are called the **Advance Directives**.

LUMP SUM GIFT
Typically a gift which is made on a one-time basis only, as opposed to a **Gift Program** which is designed to use the **Annual Exclusion** on a yearly basis.

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

MEDICAL POWER OF ATTORNEY
A grant of power to a person to make or carry out the decision of the signor of the document, under terms of a state law, to withdraw food and water during the final stages of a fatal illness. In some states, the **Living Will** and a **Medical Power of Attorney** taken together are called the **Advance Directives**.

NET TAX
Generally the actual amount of tax which is payable in a given situation, after all deductions, credits and other adjustments have been made.

PER STIRPES
Whenever a distribution is to be made to a person's descendants *per stirpes*, the distribution shall be divided into as many shares as there are then living children of such person and deceased children of such person who left then living descendants. Each then living child shall receive one

share and the share of each deceased child shall be divided among such child's then living descendants in the same manner

PICK-UP STATE
A state which does not impose an estate tax or an inheritance tax, but does "pick up" an amount equal to the federal state death tax credit. This has now been *repealed.*

PERSONAL PROPERTY
"Tangible" personal property means anything moveable that you can touch. "Intangible" personal property refers to financial assets such as cash, stocks, bonds, bank accounts, insurance, etc. Please see **Real Property**, below.

PERSONAL REPRESENTATIVE
A person or institution appointed by the probate court (nominated in a **will**, if any) to administer the **Decedent's Estate**. Also known as the **Executor** (for a will), or the Administrator (without a will). The term may also refer to a **Trustee**.

PETITION
A formal request to a court to make a finding of fact and enter an order or judgment based upon the facts and the law.

P.O.D.
An instruction to a depository institution such as a bank to pay the funds in the account to the **beneficiary** named in the document signed by the account owner.

POUR-OVER WILL
A **Will** which names an existing **Trust** as the principal **Beneficiary**. Thus, the **Probate Estate** "pours over" into the **Living Trust**. It is usually used when someone who has created a Living Trust failed in

Funding an asset into the trust. After death, the executor places that into the trust at the conclusion of probate.

PORTABILITY
The ability to transfer the unused **Unified Credit** of the first spouse to die to the surviving spouse, who can then use it for his or her gift or estate tax purposes; thus allowing a couple to receive two exemptions.

POWER OF ATTORNEY
A grant of power to a person (agent) to make or carry out the decision of the signer of the document, under terms of a state law, which expires upon the death or **Disability** of the signer. A *Durable* power document continues in effect during the signer's disability if and only if it contains specific language required by state law. A general power document contains no limitations on the grant of power. A *springing* power takes effect only upon the happening of an ascertainable event such as the declaration of disability of the signer. In Texas it is often difficult to get a financial institution to recognize a power of attorney. Recent changes in the law have limited the ability of institutions to reject powers of attorney, but it can still be a difficult and time consuming process. If it is not honored, a **Guardianship** may result. This has increased the popularity of **Living Trusts**.

PROBATE
The process of **Administration** of a **Decedent's Estate** under the authority of the probate court. At the conclusion of the process, the decedent's **Beneficiaries** or **Heirs** are identified, the debts and taxes are paid, and the remaining property is distributed to the persons or charities entitled to it.

QUALIFIED PLAN ASSETS

Property held in an IRA, 401(k), 403(b) or other pension/retirement plan on which the owner has not yet paid federal income tax; sometimes called "tax-deferred."

QTIP TRUST
Please see **Marital Deduction**, above.

REAL PROPERTY
Land, and anything permanently attached to it. Please see **Personal Property**, above.

REMAINDERMEN
The persons who will receive the benefit from a trust after the death of the **Income Beneficiary**.

REQUIRED BEGINNING DATE (RBD)
This is the date on which a retirement plan participant is required to begin making **Required Minimum Distributions** from his or her retirement plan(s), and is April 1st of the year following the year the participant reaches age 70-1/2.

REQUIRED MINIMUM DISTRIBUTIONS (RMD)
In retirement planning, a participant is required to begin making withdrawals from his or her retirement plans in the year after the **Required Beginning Date**. These withdrawals must meet certain minimum distribution requirements, based on the payout election the participant makes at that time. In general, the participant must withdraw the funds over his or her life expectancy (but may do so more rapidly).

RESIDUARY
The clause in a **Will** or a **Living Trust** that disposed of all of the **Decedent's** property not previously mentioned. This clause usually begins, "All the rest, residue and remainder of my property, of whatsoever kind and nature, and wherever situated, I give to . . . "

REVOCABLE LIVING TRUST
Please see **Living Trust**, above

ROLLOVER
Please see **Spousal Rollover**, below.

SEPARATE PROPERTY
A person's earnings while residing in a separate property state or property owned prior to marriage in a **Community Property** state, and the assets acquired with those funds. Also, in separate property jurisdictions and most community property jurisdictions, property received by inheritance, gift or personal injury settlement or award is separate property. In Texas, the income generated from separate property is Community Property.

SETTLOR
Same as **Grantor** or **Trustmaker**.

SPOUSAL ROLLOVER
Where retirement plans and IRAs are payable to a surviving spouse, the survivor will have an option to "roll over" the funds into his or her own IRA, thereby deferring the income tax on the plan funds.

SURETY
The guarantor of the principal's performance on a surety bond.

SURVIVOR
Usually referring to the surviving spouse in a husband and wife couple.

TENANTS IN COMMON
A form of ownership in which two or more persons own undivided interests in property. Each owner has rights to use the property. On the death of an owner, that owner's share goes to his or her heirs.

TENTATIVE TAX
The gross value of the federal estate tax prior to application of the **Applicable Exclusion Amount** and the credit for gift taxes paid after 1976 (and any other applicable credits).

TESTAMENT
Same as a **Will**.

TESTATOR
The person who signs the **Will** or testament.

T.O.D.
Transfer on death. A legal instrument attached to an ownership document of non-cash personal property, such as a car title or stock certificate, signed by the owner which changes title of the property to the **Beneficiary** named in the document at the death of the owner.

TRUST
An agreement between the **Trustmaker** and the **Trustee**, naming the **trustee** to control the **trustmaker's** property, or some of it, for the benefit of a **Beneficiary**. The trust agreement defines the trustee's powers and duties. See also **Living Trust**, above

TRUSTEE
A person or corporation appointed by a **Trustmaker** to take control of **Trust** property and administer it for the benefit of a **Beneficiary** named by the Trustmaker in the trust document. The Trustmaker may also designate himself or herself as the trustee and beneficiary. The trustee has a strict duty of accountability (F**iduciary**) to the beneficiary.

TRUSTMAKER
The person who creates a trust (also known as a **Grantor**, **Trustor** or **Settlor**).

UNIFIED CREDIT
A credit applicable against federal gift and/or estate taxes. In essence, it is the amount that you can pass tax free to your loved ones other than you spouse (if your spouse is a US citizen). The amount is always in flux. Whether Congress will increase it or decrease it has become nothing more than a guessing game. It is now referred to as the **Applicable Exclusion Amount**.

WARD
A person who is the subject of a **Guardianship**.

WILL
A document (sometimes also called a testament) executed by a T**estator**, which sets out the testator's instructions for winding up his or her affairs after death. The Will has no effect until the testator dies, and, therefore does not allow anyone named in the Will to manage the Decedent's assets in the event of his or her **Disability**. Please see **Power of Attorney** and **Living Trust**, above.

Why Work With The Wiewel Law Firm

We often get asked what sets The Wiewel Law Firm apart from other attorneys. Here are a few reasons:

- **Complimentary Initial Consultation**
- **Austin, Georgetown and Highland Lakes Offices**
- **Prompt Preparation of Plans**
- **Fixed Planning Fees**
- **Education Focused Website: www.TexasTrustLaw.com**
- **Complete, Exclusive Estate Plans**
  - **Wills**
  - **Trusts**
  - **Powers of Attorney**
  - **Living Wills**
  - **Probate**
  - **Asset Protection**
  - **Special Needs Planning**
  - **Elder Law/Medicaid Planning**
- **Optional LifePlanning™ Updates**
- **Small and Large Referrals Welcome**
- **Brad Wiewel is *Board Certified in Estate Planning and Probate* by the Texas Board of Legal Specialization. Less than 1% of Texas attorneys are Board Certified in Estate Planning and Probate Law.**

Notes