Frequently Asked Questions

about Estate Planning

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FREQUENTLY ASKED QUESTIONS AND ANSWERS REGARDING ESTATE PLANNING

You've made a smart decision to begin researching the steps you should be taking to develop a solid estate plan. The truth is that most people put off establishing their estate plan and regret doing so. What follows are a series of Frequently Asked Questions and Answers that we've received from our clients and prospective clients. We've put this together to help clear up some of the misinformation regarding creating your estate plan and to provide you with some guidance in helping you make the very important decisions involving your estate plan.

You've made a great decision to begin gathering information, it is our hope that the following information helps you along the way in finalizing your estate plan.

Our circumstances in life can quickly and unexpectedly change. This is why it is important to have your affairs in order. We have received questions from individuals with no estate plans wondering what they should do to take care of their families, assets, or businesses. We have also received questions from former estate planning clients, wondering if the plan they have in place is still sufficient to carry out their wishes. Knowing that these questions are on many minds, we want to provide some general answers to some of the most common questions.

What is an estate plan?

Broadly speaking, estate planning is the process of establishing a set of procedures and mechanisms to manage an individual's assets, financial affairs, and personal matters during the person's life, as well as providing for the disposition of assets after death. While many estate plans may share similar features, each estate plan should be specific to the individual needs of a person. Complex gift, estate, and income tax planning may or may not be suitable for everyone. By the same token, some individuals, but not all, may require mechanisms to be in place to manage the assets of loved ones who are minors and/or incapacitated.

Do I need an estate plan?

Preparing an estate plan is not mandatory for anyone. Contrary to what many people believe, the government will not take your assets after you die if you do not have a will. Colorado has, by statute, dictated who will inherit, and in what shares and amounts, in the event someone dies without a will. Only in very rare circumstances will someone's estate "escheat" to the state. It is also true that some families can get by without ever having a power of attorney in place.

However, intentionally forgoing an estate plan leaves a great deal to chance and may very well cost yourself and your loved ones more in the long run. Many individuals, and more particularly, surviving family members, may not believe that the default rules of inheritance match what they believe a deceased person wanted, leading to strained family relationships, if not outright litigation. It is also very common for family members to disagree upon what properly honors a deceased loved one when arranging their burial and funeral.

Furthermore, if a person becomes incapacitated but has not prepared powers of attorney, it is very likely that concerned family members would have to apply to the Courts to become someone's judicially appointed guardian and/or conservator. Guardianships and Conservatorships are always a judicial proceeding, and will require a hearing. It can take upwards of a month or more for this hearing to take place, and is fertile grounds for interested persons to litigate over who is best qualified to serve as guardian and conservator.

These risks for strife and litigation are particularly high for blended families, such as where a parent has remarried later in life, but has children from a prior marriage. For instance, if a person remarries, and dies without a will, their surviving spouse will inherit more than ½ of their estate, regardless of what the decedent's wishes were with respect to dividing their estate between their spouse and children.

I don't have many assets. Do I still need an estate plan?

Yes. While protecting assets is one of the major goals of estate planning, it is not just for the ultra-wealthy. Whether you have a lot, or just the personal property in your home, an estate plan gives you the power to determine who actually inherits that property. Without one, the distribution of your assets will be determined by the state's default rules, which may result in distributions that you, and your family, would not want. Nominating a Personal Representative to administer your estate after your death, and dictating who will receive your property, can add much-needed clarity and certainty for your loved ones after your death. Unfortunately, that lack of certainty can easily lead to disagreements and litigation among family members, such as disputes over the division of personal property and the proper person to serve as personal representative.

Second, estate planning is much more than simply protecting and disposing of assets after death. There are important legal documents which can aid you in ensuring your wishes are carried out as you age. Durable financial powers of attorney allow you to select a trusted individual-- usually a family member or friend-- to manage your financial and legal affairs when you are unable to do so. Medical powers of attorney/advance directives allow you to select a trusted individual to make medical decisions for you when you lack that capacity give informed consent, and allow you to outline your medical care wishes. A "living will" is an example of an advance directive, in which you outline the conditions under which life sustaining procedures and artificial nutrition should be continued or withheld.

Finally, if you have minor children, or a dependent family member for whom you provide care, you must consider and plan for that person's continued care if you pass away or are unable to continue providing care. For example, who will be the legal guardian of your minor children, and who will manage any income or assets they are entitled to? Even if you do not have many assets, your minor children may be entitled to receive income after your death, such as survivor benefits from the Social Security Administration. Particularly for those with minor children, the feasibility of obtaining life insurance should be considered. If minors do inherit a substantial sum, such as life insurance, it is important to ensure that those funds are properly managed and available for their care. Revocable living trusts are one vehicle which can be used to manage a minor's inheritance until they are old enough to manage the funds themselves.

Do I need an attorney to help me with my estate plan?

There is no legal requirement that you hire an attorney to assist you in your estate plan. Just as a person can act as their own attorney (*pro se*), you are legally allowed to prepare your own estate plan. However, doing so is a calculated risk. The underlying documents that make up an estate plan, and the functions they serve, are governed by numerous state laws and precedents which must be adhered to. The consequences of running afoul of these laws may be either innocuous or severe, depending on the law in question. For example, while it is possible to disinherit children, specific language should appear in a will in order to successfully do so. Otherwise, the child in question may still inherit a portion of your estate. Similarly, if two people are legally married, even if they are separated, you cannot disinherit a spouse in Colorado just by excluding them from your will, because spouses are entitled to an "elective share" of a decedent's estate.

In addition to specific state statutes, proper estate planning must also consider the method and timing of distributions to successors, which can have tremendous impacts on taxes and the ultimate owners of assets. Many people, eager to make the distribution of their assets swift and simple after their death, unknowingly commit severe errors which end up costing their families in the long run. For instance, rather than prepare a financial power of attorney or a will, many people have simply added one of their children to all of their accounts and assets as a joint owner, thinking that this would allow them access to money to help care for them during life, and give them immediate access upon death so they can then divide the assets among siblings. However, upon the death of a joint owner, the asset in question becomes the sole property of the remaining joint owner. As such, the child who was named on those accounts becomes the sole owner, and has no duty or obligation to share the asset with siblings, even despite what may have been in the decedent's will, if any.

Overall, there are many pitfalls in estate planning which the uninformed can unknowingly fall into, with potentially devastating effects to themselves and their families.

Should I use a trust or a will to transfer my assets?

Both a trust and a will are effective estate planning vehicles that can serve similar purposes, but with many differences. Generally speaking, the sole purpose of a will is to outline who will inherit your property after your death, and who will be in charge of administering your estate. Unlike a trust, a will comes into effect only after you die. When someone who utilized a will passes away, the estate is said to go through "probate," a judicial process in which a Court appoints a personal representative to administer your estate pursuant to the terms of your will. This process is usually informal and unsupervised by the court.

A revocable living trust is the most common trust used as a "will substitute." Practically speaking, when using a trust to dispose of your estate, you would also have a will in place which "pours" any assets owned in your own name into the trust upon your death. One of the differences between a will and trust is that, unlike a will, a trust is effective immediately upon creation. You would select a trusted individual to serve as trustee, who then has the responsibility of administering the trust and disposing of assets as dictated by the trust agreement. Typically, the creator (the "grantor") would serve as the initial trustee until their death or incapacity, at which point a successor trustee steps in to manage the trust. In this way, the trust serves a similar function to a will in that it ultimately transfers your assets to your successors at death. However, a trust can serve several additional functions other than simply distributing assets, which a will cannot.

First and foremost, a properly funded living trust is a very effective tool for managing your assets if and when you cannot, such as if you become mentally incapacitated. While you have capacity, you could continue acting as trustee yourself, largely managing your own assets in the same fashion as you do now. However, upon your incapacity, your nominated successor trustee can quickly step in to manage your finances and property, including the payment of your expenses.

Second, many people have historically used a living trust to avoid probate. However, due to the streamlined and speedy nature of probate in Colorado, we do not typically recommend using a trust solely to avoid probate. While probate may still be a burdensome and costly enterprise in other states, Colorado has taken great strides to simplify and promote speedy and efficient administration of estates. Likewise, the potential for abuses of discretion and delay on the part of fiduciaries (such as trustees and personal representatives) exists whether or not an estate must pass through probate. Nevertheless, if avoiding probate is a genuine goal, it is important that the vast majority of your assets either (i) be transferred to the living trust during your life, or (ii) have beneficiary designations in place such that they are transferred directly to the intended recipients immediately upon your death. Otherwise, your probate estate would likely need to be opened in order for your will to first pour your assets into the trust, which defeats the purpose.

Third, a trust is an excellent vehicle in which to pass your assets to minor children. Children can still inherit property even if they are minors; however they would not have the legal capacity to control or manage those assets until they reach the age of majority (21 in Colorado). Establishing a trust for the benefit of minors allows for the trust to receive the property until your children have reached a designated age. Until they reach the required age, the trustee would manage their inheritance, including prudent

investment and taxes, and make disbursements to them or on their behalf. Importantly, the trust can be set up in a variety of ways to meet the wishes of the grantor in terms of how the assets are spent and distributed. For instance, a pure discretionary trust, in which the trustee has complete control over the timing and frequency of distributions, may be desired by some (and may be recommended for the purposes of preserving public benefits for the disabled). On the other hand, others may want to dictate the exact timing and frequency of distributions.

Fourth, a trust provides significantly more privacy than a will. Once submitted to a court for probate, a will becomes a matter of public record and is available for inspection. On the contrary, a trust does not need to be recorded or otherwise submitted to a court. Additionally, in Colorado, the beneficiaries of a trust are only entitled to a copy of the portions of a trust which are pertinent to their interest in it, making it possible to keep the inheritances beneficiaries will receive private, even from one another. Furthermore, in funding a trust, title to assets, including homes, are transferred to the trust itself. This makes it possible to protect your own privacy by removing your name from title to real estate while maintaining your ownership interest in the asset itself.

The foregoing are just some of the benefits of a trust. There are many other potential uses for a trust, which are tailored to more specific goals, such as Medicaid and public assistance planning, or complex tax planning.

What other alternatives are there to using a will or a trust?

The two biggest alternatives are (i) to title assets as "Joint Tenants with Rights of Survivorship" and (ii) designating beneficiaries on financial accounts. In many cases, particularly between spouses, an entire estate can be transferred to the other just by utilizing these two methods. However, as they may not be appropriate in all circumstances, it is still a good idea to have a will in place.

Joint Tenancy with Rights of Survivorship is a form of ownership of property between two or more people. When one joint tenant dies, title to the property vests automatically in the surviving joint tenants. This form of ownership is most common between two spouses as it relates to the ownership of their home. However, it can be used for other beneficiaries as well, such as children. However, the potential tax ramifications of transferring property to children should be considered. Likewise, the relationships between potential beneficiaries, as well as with the current owner, should be considered as well. If you have more than one child, and you add all of them to the title to your home, you are making them joint owners of the property. They will all need to agree on if and when to sell the property, if ever, and at what price. Also bear in mind that, during your life, whoever you add to title to the property is a joint owner, and will have rights to control the sale and disposition of that property, as well as rights to the proceeds of sale. Disputes between co-owners of property can be expensive if they end up in court.

Utilizing beneficiary designations is also a critical practice. If you ever purchased life insurance, then you are probably familiar with the concept. With life insurance, when you die, the proceeds from that policy are paid to the beneficiaries you designated with your life insurance provider. In a similar manner, you

can designate beneficiaries for a wide array of other financial accounts, including bank and checking accounts, annuities, IRAs, 401Ks, and brokerage accounts. Bear in mind, however, that your beneficiary designations will control the ultimate distribution of that asset, regardless of what your will says, so be sure that you include all the intended individuals as beneficiaries.

What is a durable power of attorney vs a non-durable power of attorney?

A durable power of attorney allows an agent to continue acting on behalf of a principal—the person creating the power of attorney—following the principal's incapacity. By contrast, an agent's powers under a non-durable power of attorney will expire upon the principal's incapacity. In Colorado, powers of attorney are considered by default to be durable, and would require specific language to make them non-durable.

What is the estate tax, and does it apply to me?

The estate tax, sometimes referred to as "death taxes" is a levy imposed on estates whose value exceeds an exclusion limit set by law. There is a federal estate tax, and some states have a separate estate tax as well. For all intents and purposes, Colorado does not have an estate tax. An in-depth discussion of the mechanics of the estate tax would take volumes to complete. However, for these purposes, when determining whether an estate tax will be imposed, the most important number to look at is the lifetime exemption. The 2017 "Tax Cuts and Jobs Act" significantly raised the federal estate tax exemption. For 2020, the exemption for an individual is set at $11,580,000.00 ($23,160,000.00 for married couples). Only if an estate, and all lifetime taxable gifts, exceed 11.58 Million Dollars will the federal estate tax be imposed. Even then, the tax is only imposed on the amounts that exceed the exclusion. This increase is currently set to expire in 2025, after which it will drop down to the prior exemption levels, of roughly $5.5 Million, adjusted for inflation.

Will the state get all of my assets if I don't have an estate plan?

In short, no. When a person dies without a will, they are said to have died "intestate." Colorado, and all other states, have enacted statutes which control the disposition of an intestate estate. Those statutes lay out who inherits the intestate estate, in in what portions. In Colorado, a decedent's surviving spouse will inherit the entire estate if each spouse's surviving descendants are also the surviving descendants of the other spouse. In cases where one or both spouses have descendants who are not descendants of the other, the amount the surviving spouse would inherit is reduced, but still represents a sizable portion of most estates. If a decedent does not have a surviving spouse, or the surviving spouse is not entitled to the entire intestate estate, the decedent's descendants will inherit the remainder. Furthermore, even if a person dies without a spouse and descendants, the law will look next to parents of the deceased and

their descendants, as well as to the grandparents of the deceased and their descendants. Only if there are no survivors in any of those classes would the intestate estate pass to the state of Colorado as unclaimed property. In Colorado in particular, if after 21 years no one has claimed that property, it will become the property of the state and transferred to the public school fund.

If I don't have a will, who is in charge when I pass away?

When someone dies, Colorado law sets out who is entitled to serve as your personal representative, and in what order (the order of priority). The order of priority applies equally to both testate estates (with a will) and intestate estates (without a will). Currently, the following persons are entitled to serve as your personal representative, in descending order:

-The person with priority as determined by a probated will including a person nominated by a power conferred in a will;
-The surviving spouse of the decedent who is a devisee of the decedent;
-The surviving party to a civil union entered into in accordance with article 15 of title 14, C.R.S., who is a devisee of the decedent;
-A person given priority to be a personal representative in a designated beneficiary agreement;
-Other devisees of the decedent;
-The surviving spouse of the decedent;
-The surviving party to a civil union entered into in accordance with article 15 of title 14, C.R.S.;
-Other heirs of the decedent;
-Forty-five days after the death of the decedent, any creditor.

What estate planning documents should I have in place in the event something happens to me?

While the specific needs of individuals, couples, and businessowners may vary, we recommend that most estate plans be comprised of at least the following documents:

- **Medical Power of Attorney and Advance Directive** to designate someone you trust to make medical decisions if you cannot and to express your wishes regarding those decisions.

- **General Durable Power of Attorney** to designate someone you trust to handle your financial affairs on your behalf during your life if you are unable to do so.

- **Will and/or Trust** to express your wishes for who will manage your estate after your death and how your assets will be distributed.

- **Living Will** to state your wishes for end-of-life medical care.

- **Instructions for Disposition of Last Remains** to clearly express your wishes for how your remains are disposed of, and any memorial or funeral events are handled.

- **Appointment of Guardian for Minors** to express your wishes for who will care for your minor children in the event you are unable to do so.

Is my current estate plan sufficient?

We recommend that you review the list above to make sure you have all of the applicable recommended documents. We also recommend having your estate plan reviewed approximately every three to five years, or if any major life events have occurred, such as the following:

- New family members (births, adoptions, etc.)
- Deaths in the family
- Purchase or sale of a house or other real estate
- Marriages or divorces
- A move to a new house
- Acquisition or sale of any significant assets
- Start of a new business

My spouse and I jointly own all our accounts. Do we still need an estate plan?

Yes. While your spouse may be protected in the event of your death in the sense that they will be able to access and use your joint assets, you should still plan for what happens after both you and your spouse pass away. More importantly, while joint ownership may give your spouse the ability to access joint accounts, that does not necessary mean that have full control over them. Consider for example joint ownership of your home. If your spouse becomes incapacitated for any reason (such as permanent disability, Alzheimer', etc.) and they no longer have contractual capacity, they would no longer have the power to sell or transfer any interest in the home. This then inhibits your ability to sell and move your home, as well as refinance it (such as a reverse mortgage). Without a financial power of attorney in place, your only recourse may be to seek judicial appointment of a conservator for your spouse. Appointment of a conservator is a judicial process which can take a month or longer, and must involve an in-person hearing. Furthermore, a conservatorship is an ongoing proceeding, requiring yearly reports and accountings to the Court. This adds much unwanted time and complexity to a process which a power of attorney could have streamlined.

Why do I need a will if I already have a power of attorney?

Many people, including agents, mistakenly believe that they have power of a principal's estate once the principal dies. Rather, all powers of attorney, including medical and financial powers of attorney, automatically terminate upon the death of the principal. Once someone dies, legal authority to administer that person's estate and handle their final affairs will pass to their court appointed personal representative. Your will gives you the ability to select who that person is.

What other measures should I take to ensure my estate is in order?

Besides making sure that you have the above documents in place and up to date, there are other things you can do to make things as clear and easy as possible for anyone trying to step in and manage your affairs:

- Check your beneficiary designations on all bank accounts, retirement accounts, stocks, life insurance policies, etc. Naming beneficiaries ensures that these assets pass directly to the person named, avoiding the probate process, so make sure that you take advantage of this option and that your designations are up to date.
- Make a complete list of accounts, assets, insurance policies, and other information to make things easier for whoever you place in charge of your estate. A worksheet can be found on our website under the Resources tab in the Downloadable Materials section.

- In addition to the list above, make sure you have a record of important login information and passwords for bank accounts or other assets you access electronically. In the digital age, many people do not receive paper statements, so logging in may be the only way for your agent or personal representative to access account numbers and other important information.

- Inform the people who you have designated to serve as your fiduciaries (powers of attorney, personal representative, trustees) that you have made such designation, and inform them as to where the governing documents are located. At your discretion, you may also share copies of those documents with them as well.

- We routinely recommend that advance medical directives be given to your primary care physician, so they can note your wishes and the identity of your agents in your personal medical records. This can ease the transition for a medical agent to step in and assist in your medical care, and save them the time and stress of trying to locate your advance directives in emergency situations.

- Consider purchasing a pre-paid burial plan. The costs of burial and funerals can be staggering, and many family members will be unprepared to cover those costs. Having a pre-paid plan in place saves a significant amount of financial and emotional stress on family members.

What estate planning mistakes should I avoid?

If you do decide to take action to make or update an estate plan, keep the following cautions in mind:

- Don't panic or rush! In the current climate, many people have a tendency to make rash decisions. In addition, mistakes get made and shortcuts get taken when people attempt to prepare and file documents in a hurry.

- Don't try to DIY without proper research. In an emergency, any will is usually better than no will. However, we caution against preparing wills, deeds, or other documents without professional assistance, review, or at least thorough research. For example, we have seen numerous cases where self-made wills are contested or disputed (leading to thousands of dollars in legal fees and unnecessary family strife) because they lack clarity or are not properly executed.

- Don't make large transfers of assets or real estate without looking into the financial implications. For example, large financial gifts could have an impact on Medicare eligibility, and adding individuals to property deeds could have significant tax and liability implications.

Who should I choose as my fiduciaries?

This is always an important decision, and one that you are the most qualified to answer. Many people will name their spouses and/or their children to be their agents under powers of attorney, and personal representatives. However, each family is different. You may not be married, or you may not have children. There is no requirement that your fiduciary be related to you. Most importantly, it should be a person you trust implicitly, and who will perform their job with integrity, diligence, and fairness. When making your selections, you should also look to the qualities that different people may have and how those qualities would lend themselves to different roles. Perhaps one of your children is a nurse or doctor, and so they might make an excellent agent under a medical power of attorney. However, they may not be very good with their own finances, in which case you could select someone else as your financial power of attorney. You do not need to choose the same person to serve in each role, though you certainly can if you wish. In certain situations, it also might make sense for a professional fiduciary to be named, especially if the assets of the estate are complex (for example, if the assets include operation of a business rather than merely passive investment in stocks), or if there isn't a qualified family member to serve in this capacity.

What if I move to another state?

Generally, your estate planning documents should be valid in another state so long as they are valid in the state they were created. This applies to powers of attorney, as well as wills. However, to be

cautious, it would be wise to have a meeting with a local attorney in the state you move to in order to confirm that there are no conflicts with that state's laws.

Do I need to record my will with the Court after I sign it?

No. During your life, none of your estate planning documents need to be recorded or placed with a governmental body, though your agents under your powers of attorney will need to prove their authority when acting on your behalf. Only after you pass away is your will delivered to a court to be "lodged" and offered for probate. That being said, some jurisdictions do still permit the filing of wills during one's lifetime, and this option should be considered.

Where should I keep my will?

If a will which was known to be in your possession cannot be found after your death, there is a rebuttable presumption that you destroyed the will with the intent to revoke it. As such, storing your will in your home exposes it to risk of being stolen or destroyed by natural disaster. If you store it in your home, ensure that it is in a place that is safe and will not be lost, such as a large home safe or fireproof lockbox. However, your nominated personal representative should have access to it (key or code). You can also consider storing your original will with the person you have nominated to serve as your personal representative, who should then store it in a safe place of their own. In this way, they will always know where it is.

Storing a will in a safe deposit box is not recommended. Once the bank is aware of your death, it will likely secure the box, and would require a court order to deliver the contents. In Colorado, there are methods for interested persons to access a decedent's lockbox before the appointment of a personal representative, but they are restrictive and will certainly not be free.

Most importantly, tell your nominated personal representative that you have a will, and where it is located, so they can find it after you pass away.

We hope that this information is helpful to you, and if there is any way we can be of assistance, please don't hesitate to call our office at 303-862-4564.