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L E G A L P L L C

# **A GUIDED OVERVIEW OF THE ESTATE PLANNING PROCESS**

**For Those Looking to Plan Ahead**

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## OVERVIEW AND DISCLAIMER

Nowakowski Legal PLLC is pleased to provide you with this Estate Planning Start Up Guide for Those Looking to Plan Ahead. An estate plan consists of the management and disbursement of a person's net worth and assets (i.e. estate) generally upon that person's passing (however, some Estate Planning can consist of life time "gift" transfers as well). In addition, estate planning can also address a person's wishes (medical and financial) should they become Incapacitated, or otherwise unable to handle their own affairs. This is generally accomplished through the strategic use of wills, trusts, powers of attorney, gifts, and other legal devices.

The purposes of this guide is to give you a detailed, helpful, but most importantly easy to read point of reference for many of the things you will need to consider when planning for your estate. While we hope that this guide helps you to better understand the estate planning process, our ulterior purpose is the hope that you will utilize Nowakowski Legal PLLC's services when you are ready to move forward with preparing your own estate plan.

**Please be aware that this guide is not providing you with legal advice and it does not create an attorney client relationship between you and Nowakowski Legal PLLC. If you are interested in becoming a client of Nowakowski Legal PLLC, please feel free to contact us and schedule a consultation at any time.**

In addition, this guide does not include, nor should it be considered, a comprehensive description of all items that must be taken into account when creating an estate plan. We provide no representations, guarantees or warranties about the accuracy, reliability, completeness, correctness or timeliness of any and all information contained herein; this is due to the fact that different jurisdictions, areas, opinions, interpretations and practices exist which may or may not conflict with the opinions discussed herein.

## Other Helpful Resources

The following are several additional websites and references that contain free and extensive information that can help you to better understand the benefits, intricacies and options available when planning for your estate. We highly suggest that you check out each of the below to obtain a stronger grasp of the benefits to having a solid estate plan.

- The Internal Revenue Service - <https://www.irs.gov/filing/estate-gift-taxes>
- EstatePlanning.com - <http://www.estateplanning.com/>
- Sound Generations - <http://seniorservices.org/financiallegalprograms/Home.aspx>

- The American Association of Retired People - <http://www.aarp.org>
- The Tax Policy Center - <http://www.taxpolicycenter.org>

## Guide by Section

Please be aware that this guide only contains a very basic explanation for estate planning considerations. That being said, our goal was to at least touch upon as many of the major estate planning tools as possible in order to provide you with enough information to begin determining what you may need in regard to planning for your estate.

Additionally, we complete this Estate Planning Start Up Guide with a checklist of items and information generally needed for planning your estate. This provides a list of all the general items and information you would likely need to gather and bring to an attorney when hiring him/her to prepare your estate plan.

While the following sections are not in any particular order, we highly suggest that you hold off on gathering the items and information listed in the checklist until after you have reviewed the other sections of this guide; reading the other sections first will help to give you an understanding as to why those items are necessary.

## SECTIONS

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## WHAT IS AN ESTATE PLAN?

We live our lives trying to build what we are able, acquire what we can, and make as big a mark on the world as possible, but we unfortunately cannot take any of that with us when we die. So what happens to everything that you've done, built and accumulated during your life once you pass away or if you become unable to manage your own affairs?

Simply put, an estate plan is the strategic method through which you direct how and where your assets are transferred upon your death. Without having an estate plan prepared, your property, accounts, heirlooms, businesses and other possessions will be distributed in accordance with the current intestate laws of your State; this means you will have little to no control as to who gets what upon your death. In addition, without an estate plan in place, a large portion of your accumulated wealth could be subject to a severe amount of tax consequences (state and federal) and probate costs.

Another factor of estate planning is to put in place directives in the event you ever become incapable of making your own financial and/or medical decisions. Who should run your business if something was to happen to you? Who do you trust to pay all of your bills on time if you are incapacitated? What do you want to happen if you're medically deteriorating, in pain, but unable to speak for yourself? These are all very serious questions that if you don't have a plan ready, could result in decisions being made that you would not want.

### Why Do It Now?

It's important to prepare for your estate when you're still physically able and of sound mind. If you were to fall gravely ill, become Incapacitated, or actually pass away prior to preparing your estate plan, well, then it will be too late. The Courts do not allow the preparation of most estate documents unless you are mentally competent to do so.

Also, nobody ever wants the worst to happen, but sometimes it does, and most often it is unexpected. While we all hope to live a long and fulfilling life, what would happen if you were to pass away tomorrow? You need to make sure that your loved ones are accounted for, your possessions are transferred to where you want them, and that any outstanding affairs that need to be settled are properly dealt with. An estate plan will help to assure these things will happen.

### What Does an Estate Plan Actually Do?

Simply stated, an estate plan protects your family and property after your death or incapacitation. Without an estate plan, your loved ones will be left without any direction as to what you would have wanted them to do. This can lead to confusion, disagreement, and the likelihood that your ultimate wishes are not adhered to. Being prepared for these situations will provide you and your loved ones with the guidance necessary in such difficult times.

Primarily, a well-made estate plan provides the following:

- Distribution of Belongings Upon Death in the Manner You Want



- Address the Costs and Expenses of Your Passing (i.e. funeral costs, final medical bills, administrative costs, etc.)
- Address the Lifetime Debts of the Deceased
- Names Guardians/Custodians for Minor Children
- Can Help to Simplify Probate, and in some instances, avoid it altogether
- Can Reduce Tax Consequences
- You Get to Choose Who Administers Your Estate (Personal Representative, Executor, Trustee, Etc.)
- Provides Direction to Financial and Medical Decisions Should You Become Unable to Make Them Yourself
- Reduces Conflict Between Beneficiaries/Heirs/Issue of Your Estate
- And More.

## What Happens if I do Not Have an Estate Plan?

So What happens if you do not have an Estate Plan, and you pass away without a Will, Trust, or other transfer mechanism in place? In such instances, upon your passing, the distribution of your Estate would be determined and directed by State statute. For example, in Washington State, WA RCW 11.04.015 sets forth how your assets are to be distributed upon passing without a Will, and statutes as follows:

*The net estate of a person dying intestate, or that portion thereof with respect to which the person shall have died intestate, shall descend subject to the provisions of RCW 11.04.250 and 11.02.070, and shall be distributed as follows:*

*(1) Share of surviving spouse or state registered domestic partner. The surviving spouse or state registered domestic partner shall receive the following share:*

*(a) All of the decedent's share of the net community estate; and*

*(b) One-half of the net separate estate if the intestate is survived by issue; or*

*(c) Three-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his or her parents, or by one or more of the issue of one or more of his or her parents; or*

*(d) All of the net separate estate, if there is no surviving issue nor parent nor issue of parent.*

*(2) Shares of others than surviving spouse or state registered domestic partner. The share of the net estate not distributable to the surviving spouse or state registered domestic partner, or the entire net estate if there is no surviving spouse or state registered domestic partner, shall descend and be distributed as follows:*

*(a) To the issue of the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or if of unequal degree, then those of more remote degree shall take by representation.*

*(b) If the intestate not be survived by issue, then to the parent or parents who survive the intestate.*

*(c) If the intestate not be survived by issue or by either parent, then to those issue of the parent or parents who survive the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or, if of unequal degree, then those of more remote degree shall take by representation.*



*(d) If the intestate not be survived by issue or by either parent, or by any issue of the parent or parents who survive the intestate, then to the grandparent or grandparents who survive the intestate; if both maternal and paternal grandparents survive the intestate, the maternal grandparent or grandparents shall take one-half and the paternal grandparent or grandparents shall take one-half.*

*(e) If the intestate not be survived by issue or by either parent, or by any issue of the parent or parents or by any grandparent or grandparents, then to those issue of any grandparent or grandparents who survive the intestate; taken as a group, the issue of the maternal grandparent or grandparents shall share equally with the issue of the paternal grandparent or grandparents, also taken as a group; within each such group, all members share equally if they are all in the same degree of kinship to the intestate, or, if some be of unequal degree, then those of more remote degree shall take by representation.*

In many instances, the above statutory distribution method will result in the person's assets being distributed as they would have wanted regardless. As would be expected, if a person does not have a Will, then the order of distribution is fairly straightforward; distributions would be prioritized to the spouse, children, parents, siblings, etc. However, there are many instances where this would not be the distribution that a person would want with their Estate, nor does this method in any way provide for any tax benefits, nor does it allow for the person to select who will administer their Estate upon their passing.

If you want more control over where and how your assets are distributed upon your passing, then it is highly recommended that a person prepare an Estate Plan.

## What Does an Estate Plan Consist Of?

What your estate plan consists of is entirely dependent on several factors; the size of your estate, how many people you wish to name as beneficiaries, where you want your worldly possessions to be distributed, what you want to be done if you are ever incapable of making your own financial/medical decision, and a myriad of other factors. That being said, there are several general components to an estate plan which are used as the primary vehicles for seeing your wishes upheld.

These primary vehicles are as follows:

- Last Will and Testament
- Trusts
- Powers of Attorney
- Joint Accounts with Right of Survivorship
- Pay on Death Account(s)
- Guardianship
- Insurance Policies
- Health Care Directives
- And More.

Several of the above examples will be discussed in greater detail throughout this guide. Of course, for a more thorough explanation and review as to what will work best for you, it is highly advised that you meet with an attorney to discuss your options for estate planning. Nowakowski Legal PLLC is available to discuss with you all of your estate planning needs. Contact them today to schedule a free consultation.

## TO PROBATE OR NOT TO PROBATE: WILLS, TRUSTS, AND OTHER MEANS

Other than providing guidance to loved ones as to how you want your worldly possessions to be distributed, estate planning can also have some major benefits in regard to probate, federal estate taxes and (potentially) State estate taxes. Depending on the methods you use to set up your estate plan, the size of your estate, and whether or not the State in which you live has inheritance and/or estate taxation (i.e. Washington State has an estate tax), an estate plan can reduce the time it takes for your beneficiaries to receive the assets you wish to transfer to them and it can potentially reduce the amount of taxes and costs that will be deducted from your estate prior to it being transferred to your beneficiaries.

This section will only be discussing the disbursement of your assets upon death; the following section will then discuss in detail the adherence to your financial and medical directives upon incapacity.

### What is Probate?

Probate is the legal process in which a Court will oversee the disbursement and resolution of the deceased's remaining financial and personal affairs. Upon filing a probate with the Court, it will immediately appoint an executor (personal representative) of an estate whose job it will be to determine the relevant assets of the decedent, gather said assets, and distribute the assets in accordance with a will or relevant law (or both) to creditors, heirs, and beneficiaries of the decedent.

Depending on how your estate plan is structured (or if you have an estate plan at all), probate is the means by which your Estate will be transferred to your heirs and beneficiaries. This is one of the primary reasons why it is important to have a well-made estate plan in place prior to your death; an Estate Plan will either help to simplify and direct the probate process, and in other instances, an Estate Plan can result in the avoidance of Probate altogether.

Washington State, and most other States, have put in place statutes that have helped to simplify and streamline the probate process so that it is not nearly as complex and frustrating as it at one time was. As such, in many instances, probate is an extremely viable method to utilize in the transfer of a persons Estate to their heirs and beneficiaries.

However, there are still some drawbacks to utilizing probate; such drawbacks include the following:

- **Expense** – generally, probate costs are based on the size of the estate going through probate. Add this to the likelihood of needing to hire an attorney to assist with probate, compensating an executor (personal representative) for the work they put in to the action, and having to pay any additional costs and/or fees that arise throughout the probate process, and you might be looking at a sizable amount of money that will not be finding its way to your beneficiaries.
- **Not Private** – going through probate is a public matter. Everything that occurs through the probate process is a matter of the public record and your beneficiaries (and the entire public for that matter) will be aware of what assets you owned, who you transferred them to, and anything else regarding your financial or personal situations you had resolved through this process.
- **Less Control** – this is not as great a concern if you have a will, but if you are intestate (without a will), you may be giving up your right to choose how your assets will be distributed, where your minor children



will be placed, and other such important items. Instead, your state's laws will govern such matters and will be enforced by the Judge in your probate matter.

- **Time** – one of the greatest concerns and drawbacks of probate is the amount of time it can take to finalize everything. Depending on the size of the estate, the amount of beneficiaries that contest the distributions, and the difficulty in tracking down creditors, heirs and beneficiaries, probate can take anywhere from several months to several years. This could be a long time for your loved ones to wait to receive any assets you would have liked to have given them.

While the above drawbacks are well worth considering, as mentioned above, they are by no means as harsh as most people are led to believe. The probate process is a formalized process for the transfer of a person's Estate, and has the added benefit of implementing Court oversight (which adds a layer of protection that ensures a person's Estate is distributed appropriately).

On average, about 60-80% of people that pass away will have their Estate go through probate. With that being the case, if your Estate is likely to go through probate, then you should at the very least have a Last Will and Testament included in your Estate Plan.

## Last Will and Testament – Generally Results in Probate

The most well-known estate planning tool is the last will and testament. A will is a legal document that, if prepared properly, will distribute your estate to the individuals whom you direct. In addition, it can be used to provide some direction to your loved ones upon your death as to your funeral wishes, custody of minor children, and other such items.

It is important to note that a will still usually requires a person's Estate to go through probate. However, a properly constructed will is key to ensuring that if you do go through probate, the process will be as streamlined as possible and it will clearly direct the executor (personal representative) as to how your assets should be distributed and your affairs should be resolved.

So why use a will if it won't avoid probate? For one thing, for the 99% of people that have modest Estates, a Will is much less expensive to prepare and implement, and the costs and simplicity of probating a Will far outweigh the costs and complexity of administering a Trust. Additionally, for many people, a Trust truly only provides major benefits in the event that their Estate is above the State or Federal threshold for Estate Taxes (i.e. the majority of people are below these thresholds).

For those that do have a Trust, a Will can be used as a backup device for distributing any assets you may not have specifically placed in to a non-probate vehicle. For example, perhaps you have a few bank accounts which you did not transfer to a trust or which you did not create as a joint account; a will could be used as a "catch-all" device designed to state that any remaining assets within your estate will be devised to whom you designate (this is what is known as a "pour-over" will). In addition, a will can be used to specifically declare whom you wish to appoint as your executor (personal representative) of your estate. Also, in the event that you have any minor children, a will is a vehicle in which you are able to name a custodian or guardian for the child(ren).

Simply put, a Last Will and Testament is the most common choice for an Estate Plan.



## Trusts – Generally Avoids Probate (if prepared, implemented and maintained appropriately)

Another form of Estate Planning that can be utilized to transfer your assets upon passing is through a Trust. Unlike a Will, a Trust will potentially allow you to avoid probate. However, a Trust is a much more complicated Estate Plan, and if it is not fully prepared, implemented and maintained appropriately, it may not fully result in your Estate being transferred upon your passing (and will result in a probate being required anyway).

A trust is a complicated legal arrangement in which you transfer assets to a designated third party, known as the trustee, whose purpose is to manage the funds in accordance with the trust document and on behalf of your desired beneficiary(ies). The benefit of a trust is that they can be arranged in a multitude of ways and can specify exactly how and when the assets pass to the chosen beneficiaries.

In order to better understand a trust, you should first have an understanding of the parties to a trust. Trusts generally contain the following three types of parties:

- **Grantor/Trustor** – this is the party creating and funding the trust. They will have the trust document drawn up, determine who the trustee and beneficiaries will be, determine what assets will be placed in the trust, and will dictate how the trust is to be managed and disbursed.
- **Trustee** – this is the party who will oversee the management of the trust. They will have a fiduciary duty to manage the trust as directed and in the benefit of the beneficiaries. While they do have control over the management and disbursement of the funds, the trust assets are not to be utilized in any other manner by the trustee other than as directed within the trust document.
- **Beneficiary** – this is the party who is specifically named to benefit from the trust. However, they are only able to benefit from the trust in the manner the trust directs. For example, if a trust states that a beneficiary is only to receive a disbursement upon acquiring a college degree, then the beneficiary will not obtain that disbursement until he/she obtains a college degree.

Trusts are versatile forms of asset transfers and if done properly, may result in you being able to avoid probate altogether. Additional benefits of trusts include, but are not limited to, the following:

- **Tax Benefits** – In the event that you have a large Estate that would generally fall outside the Federal and/or State exemption for estate taxes, Trust(s) can be utilized to structure distributions in such away that you can minimize your tax liability. This is generally only needed for high-wealth individuals, and you will want to speak with an attorney (and possibly a tax professional) to learn how best to apply a Trust for these purposes.
- **Better Control** - You can make the terms of a trust to your exact specifications. This means you can control to whom distributions may be made, when distribution can occur, and under what conditions distribution will be provided. For example, you can specify that your trust is to pay out to your child \$1,000.00 a month after he reaches the age of 25, but only if he has acquired a College Degree.
- **Better Privacy** – a trust generally does not go through probate and is instead handled privately. As such, the transfer of your estate to your beneficiaries will be more private and the general public will not have as much access to your personal affairs.

A multitude of variations for trusts exist which can assist you in planning for your estate. It is important to note that trusts are complex arrangements that generally require the advice and counsel of a qualified attorney. Nowakowski Legal PLLC is available to discuss any and all questions you may have in regards to utilizing a trust or trusts with your estate plan. Feel free to call and schedule a free consultation.

## Other Estate Transfer Methods: Pay on Death Beneficiary, Joint Ownership, and Lifetime Gift Transfers

Additional methods exist to avoid probate, at least partially; the following are a few examples:

**Pay on Death Beneficiary** – Many bank accounts, investment accounts, IRAs, and other financial accounts will allow for a person to name a “Pay on Death Beneficiary” to the account(s). This is another method of transferring assets upon passing and one that will in most instances avoid probate. A person who is named as a “Pay on Death” beneficiary will simply need to inform the financial institution of your passing, and the financial institution will transfer the account to the designated beneficiary without the need for probate.

**Joint Ownership with Rights of Survivorship** - Certain properties and assets can be held jointly in life so that upon the death of one of the joint owners, the remaining owner(s) will take the decedent’s portion automatically; if done properly, these accounts can be transferred outside of probate. Examples of what can be held jointly are such things as properties, vehicles, bank accounts, and more. Assets transferred in this method will once more pass outside of probate, and thus could be a method to avoid probate.

**Lifetime Transfers** - Alternatively, one of the best methods to avoid probate and estate taxes is to utilize recognized methods of making lifetime transfers. In layman’s terms, you can begin to transfer some of your assets to your loved ones prior to your death for the purposes of avoiding probate and estate taxes. You need to be made aware that the IRS does regulate lifetime transfers of assets but does allow for certain exemptions which you can (and should) capitalize on. For example, you are allowed to make a gift to an unlimited number of individuals of up to \$17,000.00 per year (\$34,000.00 from a married couple “splitting gifts.”). Multiple other methods of lifetime transfers exist which can be capitalized upon; you should speak with an attorney to learn more about what they are and if they can be utilized for you.

## POWERS OF ATTORNEY: AUTHORIZING OTHERS FOR MEDICAL AND PERSONAL AFFAIRS

Another aspect of estate planning is putting in to place a plan directing others as to what you want to occur should you become Incapacitated, or otherwise unable (or sometimes unwilling) to handle your own affairs. This can be as simple as executing a power of attorney allowing someone to handle your financial decisions, assigning a specific person to make medical decisions on your behalf should you become incapable of doing so, or having a living will set in place directing how you wish to be medically treated should certain circumstances occur. Regardless, the underlying theme remains the same; if you want to ensure that your directives are adhered to once you are no longer capable of physically giving them yourself, you need to make sure you have an estate plan in place.

This section will only be discussing living directives that provide instruction as to what you wish done in the event you are still alive, but unable to or do not wish to handle your own affairs; the previous section discussed in detail the disbursement of your assets upon death.

### Powers of Attorney

A power of attorney is a document which can grant the legal authority to a separate third-party entity to act on your behalf in handling your affairs. The most common uses for powers of attorney is for a person to grant another individual control over some portion of their finances or their healthcare. It is important to note that a power of attorney can be as broad or as specific as the person granting the power wants it to be. For example, you could grant a person authority to handle all of your finances, or you could grant them authority to only deposit money on your behalf in to a specific bank account.

You can generally set up powers of attorney to either be active immediately, or to not become active until some form of triggering event (i.e. your incapacity). Powers of attorney are very versatile and useful for allowing others to act in your name.

Also, a power of attorney can be set up to be either durable or non-durable. A non-durable power of attorney is automatically revoked upon the grantor becoming incapacitated. A durable power of attorney remains in effect in the event that the grantor becomes Incapacitated. Regardless, the grantor of a power of attorney, whether durable or non-durable, has the ability to revoke the power of attorney at any time.

So why use a non-durable versus a durable power of attorney? A non-durable power of attorney can ensure that your designated attorney in fact (i.e. the grantee) does not take advantage of the granted power in the event that you become Incapacitated (because the power of attorney is automatically taken away upon either of those two events occurring). However, if you trust the individual and you want them to continue handling your designated affairs even if you become incapacitated, then you can provide them with a durable power of attorney.

As stated above, the major purposes for which powers of attorney are utilized tend to be for either Financial or Medical purposes. Please see the following:

- **Financial Powers of Attorney** – A financial power of attorney allows a person (the principal) to name another individual or entity to make financial decisions on his/her behalf. The principal needs to make sure that whomever they grant this authority to is very trustworthy; depending on how much authority you grant the attorney in fact over your finances, they could have access to all of your money, property and



other assets. Principal's often chose a close friend, family member or hire a professional institution to perform as an attorney in fact for a financial power of attorney.

- **Medical Powers of Attorney** – A medical power of attorney allows a person (the principal) to name another individual or entity to make medical decision on his/her behalf. Most medical powers of attorney are designed to not “trigger” until the principal is incapacitated. As always, it is very important that you make sure that you trust whomever you grant this authority to.

Powers of attorney do not have to be granted simply for the purposes of handling your affairs at the end of your life. Powers of attorney can be utilized at any stage of your life to designate an individual as your attorney in fact for purposes of handling matters in your name. An example would be to perhaps provide a trusted business partner with the power to sign payroll on your behalf, allow an individual watching your child the authority to take him/her to the hospital if necessary, or to allow a family member to manage your medical requirements.

## Health Care Directives

Commonly called a “living will,” health care directives are an estate planning tool in which you provide instructions for medical providers to follow in the event you become terminally ill and are incapacitated. Generally, it will provide a statement as to if you want life sustaining medical treatment when you are seriously ill; a person will instruct as to if they want to continue being artificially provided nutrition and hydration when there is little chance of recovery from an incapacitated state.

So what is the difference between a medical power of attorney and a health care directive? Primarily, a medical power of attorney requires that you appoint someone to oversee your medical treatment, but a health care directive is a direct statement to your medical providers as to how you want them to act in a specific situation.

It is important to note that while health care directives are commonly called “living wills,” these are not actually a will and should not be considered to substitute for one. A health care directive is simply a legal document that can be prepared and utilized for purposes of providing an advance directive to medical providers for when you are in a deteriorating medical state.