

ESTATE PLANNING

IN

FLORIDA

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Serving Pinellas County since 1976

INTRODUCTION

This guide was written with an eye to the uninitiated individual who is looking to begin his estate plan, make modifications to an existing plan, or who is worried about the possible effects of estate taxes, probate and long-term care on his assets. Please use it for informational and practical purposes on the many aspects of estate and asset protection planning in Florida. This guide is not intended to replace specific advice from a qualified attorney.

Much of an attorney's job is educating the client to enable him/her to make the correct decisions relative to the known facts. This guide will help you establish a general knowledge of the many different aspects of estate planning in Florida.

WHO ARE WE?

DeLoach & Hofstra, P.A. was founded in 1976 in Seminole, Florida by Dennis R. DeLoach, Jr. The estate planning attorneys of DeLoach and Hofstra, P.A., have extensive experience representing clients in planning their estates and protecting their assets for future generations. Each client is given personal attention and is treated with a sensitive, straightforward approach. Through this important process, we will guide you and provide you with valuable counsel. We will explain the relevant procedures and rules regarding probate, estate taxes, elder law and other important, practical matters. We use simple language to help you produce an efficient and effective estate plan, no matter how small or large your estate may be.

Our services include, but are not limited to, the following matters:

- Wills (simple and complex)
- Revocable and Irrevocable Trusts
- Charitable Giving and Charitable Trusts
- Life Insurance Trusts
- Durable Powers of Attorney, Health Care Surrogates and Living Wills
- Probate Administrations of all kinds
- Trust Administration
- Probate Litigation
- Asset Protection Planning
- Medicaid Planning
- Estate and Tax Planning
- Planning for Disabled Persons with special needs
- Elder Law
- Real Estate transactions

To obtain other handouts concerning the above services, please visit www.deloachandhofstra.com.



STARTING YOUR "ESTATE PLAN"

Having the knowledge that we will eventually die is one of the things that distinguish us humans from other living beings. Yet, no one likes to dwell on the prospect of his or her own death. The problem is, if you postpone planning for your eventual demise, you run the risk that your intended beneficiaries -- those you love the most -- may not receive what you would want them to receive.

This is why estate planning is so important, no matter how small your estate may be! It allows you, while you are still alive, to ensure that your property will go to the people you want, in the way you want, and when you want. It permits you to save as much as possible on taxes, court costs and attorneys' fees. Most importantly, it affords the comfort of knowing that your loved ones will be provided for without being simultaneously burdened with unnecessary red tape and confusion.

Basic estate planning involves preparing for your death or your incapacity (where due to illness you may no longer be able to function or communicate). The two most basic options available include creating a last will and testament or establishing a living trust.

YOUR LAST WILL AND TESTAMENT

Your will is a legally-binding written statement directing who will receive your assets at the time of your death. Your will also nominates a personal representative who will carry out your directions and represent your estate. A will can be a simple or complex document and is the cornerstone of any estate plan.

One very important aspect to consider is that your will governs only those assets in your individual name (probatable assets). Many types of property pass outside of probate, including jointly-owned property, property in trust, life insurance proceeds and property with a beneficiary designations, such as IRAs or 401(k) plans. Thus, in order to create a coordinated estate plan, you must know which of your assets are probatable and where and how your non-probable assets shall pass.

If you die without a will, your estate is distributed according to Florida's laws of intestacy, which generally provide for your property to be distributed equally among your family members. This may not be in accord with your wishes. **CONTRARY TO POPULAR BELIEF, IF YOU DIE WITHOUT A WILL ALL OF YOUR ASSETS DO NOT AUTOMATICALLY GO TO THE STATE OF FLORIDA.**

Many people try to avoid probate and the need for a will by holding all of their property jointly with family members. This way, the joint property is distributed to the surviving owner without the necessity of probate. While this may work in certain limited situations, it often leads to a variety of problems. Additionally, there are various tax and personal liability reasons for not holding property jointly with others.

Your will nominates the person to administer your estate and distribute it according to your desires and instructions. This person is called your "personal representative". If your nominated personal representative does not live in Florida, he or she must be related to you by blood.

In the event you have minor children, a testamentary trust can be created in your will to allow the person of your choice, the Trustee, to hold the assets until the children reach an older, more responsible age. A testamentary trust can also provide for older beneficiaries who are not responsible with money and/or have creditor problems, or who are disabled. There are many options to discuss within this arena.

Perhaps most importantly, your will can appoint a person(s) to take your place as legal guardian of your minor children should you and your spouse both pass away.

REVOCABLE LIVING TRUST

The second main estate planning option is called a Revocable Living Trust. A trust is a legal arrangement which one person (or an institution, such as a bank), called a "Trustee," holds legal title to property for another person, the "beneficiary." The person who creates the Trust is known as the "Settlor". The rules or instructions under which the Trustee operates are set out in the trust instrument. Trusts typically have one set of beneficiaries during the Settlor's life and another set -- often the Settlor's children -- who begin to benefit only after the Settlor dies. The Trust is presently active, hence the name "Living Trust". Assets that would normally be subject to probate are transferred to and held by the Trustee so that upon the Settlor's death, the Successor Trustee continues to administer as specified in the Trust, all without the burden of probate.

There can be several advantages to establishing a Trust, depending on your situation. Best-known is the advantage of avoiding probate. Upon the Settlor's death, the Successor Trustee distributes the assets to the remaining beneficiaries without requiring probate. The avoidance of probate would likely save time and money for the beneficiaries.

In addition to the potential to avoid probate, another advantage of trusts is their continuing effectiveness even if the Settlor becomes incapacitated. In such a case, assets held in the Trust will continue to be held by the Successor Trustee for the Settlor's benefit. This is generally a better way to manage an incapacitated person's assets than through a power of attorney alone.

With a revocable Trust, the Settlor maintains complete control over the Trust and may amend, revoke or terminate the Trust at any time. The estate avoids probate while the Settlor maintains the ability to alter his estate distribution during his or her lifetime.

What is the main difference between a will and a trust?

The main difference is that the will directs the distribution of the probate assets while the Trust avoids probate in its entirety. Consultation with our offices will clarify the better choice for you.

How does a Revocable Trust avoid probate?

A revocable trust avoids probate by effecting the transfer of assets during your lifetime to your trustee. This avoids the need to use the probate process to make the transfer after your death. The trustee has the immediate authority to manage the trust assets at your death; appointment by the court is not necessary.

The “funding” of a revocable trust is critical to successfully avoid probate. Those persons who do not fully fund their trusts often need both a probate administration for the non-trust assets as well as a trust administration to completely distribute the assets. Because the revocable trust may not completely avoid probate, a simple “pour over” will is needed to transfer any probate assets to the trust after death.

When should I create a Revocable Trust?

There is no clear answer to that question. Generally, a trust is created to avoid the costs of probate, although there are other possible benefits. Thus, the cost to create and maintain a trust must clearly exceed the costs of probate. It can safely be said that the greater amount of your assets, the greater possible need for a trust. Of course, we will be glad to discuss with you how a trust can help your family.

Should a husband and wife create a Revocable Trust?

A husband and wife can create a joint trust, if that is their desire. Generally, a husband and wife own most of their assets jointly. As a result, there would normally be no probate when the first spouse dies as the assets would automatically pass to the survivor without probate. Some couples choose to create and fund a joint trust because of the possibility of simultaneous death. Others decide to hold off on creating a trust until after the death of the first spouse, considering that the odds of a joint death are very small.

INCAPACITY PLANNING

Any estate plan should include preparing for your possible incapacity. There are three (3) documents which are highly recommended in all incapacity situations: the durable power of attorney, the health care surrogate and the living will

Durable Power Of Attorney

For most people, the durable power of attorney is the most important estate-planning instrument available--even more useful than a will. A power of attorney appoints the person of your choice - - your "attorney-in-fact" -- to act in your place when and if you ever become incapacitated. Most powers of attorney take effect immediately upon their execution, even if the understanding is that they will not be used unless and until the grantor becomes incapacitated. A “durable” power of attorney means that the power survives your incapacity, such as a stroke or advanced dementia. NOTE: A DURABLE POWER OF ATTORNEY, LIKE ALL POWERS OF ATTORNEY, IS AUTOMATICALLY CANCELLED AT THE TIME OF YOUR DEATH.

If you become incapacitated and you never created a power of attorney, the only likely recourse is a court ordered guardianship, addressed further below. The guardianship process is lengthy, expensive and onerous. Though no one plans to become incapacitated, a power of attorney can avoid a lot of difficulty and/or financial burden.

The following may be of interest and help to you regarding your durable power of attorney:

Person Designated. When you have designated someone as your attorney-in-fact, you, of course, have delegated this to someone whom you know will be faithful and who will uphold this fiduciary obligation in the highest manner. If you have any doubts as to whether or not this person will uphold these obligations in your best interest, then we suggest that the Power of Attorney be canceled. The power of attorney is active when created, unless the document provides otherwise.

Recording Power(s) of Attorney. If a real estate transfer is likely to be involved, then we suggest that the Power(s) of Attorney be recorded so that the authority given to the attorney-in-fact is on the public record. If additional copies are needed, then certified copies can be obtained. Normally, a power of attorney is not recorded.

Use of Power(s) of Attorney. The Power of Attorney may be used for a broad range of business and other activities. One cannot predict the many ways a power of attorney can be helpful. If you wish to use the Power of Attorney immediately, it may be best to have it approved by the entities in question. The refusal to honor the Power of Attorney is contrary to Florida law, but you will often need a letter from these offices, at the least, to fix any problems the institution may have with the document.

Where to Keep the Power(s) of Attorney? If it is going to be used in the immediate future, then we suggest that the original be delivered to the attorney-in-fact with you retaining a copy. If you do not contemplate using the Power of Attorney in the near future, then you should keep it in a safe and accessible place. One option is to leave the original with this office, which is given out only if needed or on an emergency basis.

Termination. Your Power(s) of Attorney may be terminated at any time and is automatically terminated by the grantor's death.

Advanced Directives

Living Will and Health Care Surrogate Designation

Any complete estate plan should include both a designation of health care surrogate and a living will. These documents are generally referred to as *advanced directives*.

A living will allows you to document your wishes concerning medical treatments at the end of life. A health care surrogate designation allows you to appoint a person to make medical decisions on your behalf when you are unable to make those decisions yourself.

Your surrogate should be someone you trust and who understands your desires. You will need to ask if he or she is willing to act on your behalf. Not everyone is able to be an effective agent. Talk to your surrogate about your wishes regarding end-of-life medical treatment. Even family members may not know how much treatment a loved one desires. Talking clarifies what you want and diminishes a surrogate's potential guilt and anguish over whether he or she is doing the "right thing".

ESTATE AND GIFT TAXES

The Federal Estate Tax is a transfer tax based upon your gross estate, taxing that amount of your estate that exceeds the applicable credit amount. There is a great deal of misunderstanding regarding estate taxes. Generally speaking, unless the value of your estate exceeds the credit amount (\$3,500,000 in 2009), your estate (i.e., your heirs) will not have to pay any estate taxes. If your estate does exceed the credit, taxes are assessed only on the value of the estate exceeding the credit amount.

Please refer to the table below. If the law does not change, the estate tax credit will once again be reduced to \$1,000,000 in 2011, after the elimination of the estate tax in 2010.

Even if an estate exceeds the credit amount, not all estates are taxed. For example, there are no estate taxes for assets that pass to the surviving spouse, no matter the amount. Also, gifts to charities are not taxed. Florida, like many states, does not have an estate or inheritance tax.

Tax Year Tax Rate Exemption Equivalent

Tax Year	Tax Rate	Exemption Equivalent (Credit Amount)
2008	45%	\$2,000,000
2009	45%	\$3,500,000
2010	N/A	N/A
2011	55%	\$1,000,000

In addition to the above estate exemptions, you are also allowed to transfer (gift) \$13,000 per year to the individuals of your choice. This can provide for excellent planning opportunities with larger families.

Also, the receipt of an inheritance or gift is not income to the donee. The estate tax and income tax are separate taxes and rarely interact.

CREDIT SHELTER TRUST

Credit shelter trusts are a way to take full advantage of the estate tax exemption. The first \$3.5 million in 2009 of an estate is exempt from taxes, so theoretically a husband and wife would have no estate tax if their estate is less than \$7 million. However, if one spouse dies and leaves the entire estate to the surviving spouse, the surviving spouse would then have assets greater than \$3.5 million. When the surviving spouse dies, any part of the estate over \$3.5 million will be subject to a substantial estate tax.

To avoid this problem, the spouses can create a credit shelter trust as part of their estate plan. When one spouse passes away, the first \$3.5 million of that spouse's estate is put into a trust for the surviving spouse's benefit. The surviving spouse can receive income and principal from the trust for his or her lifetime, but the assets therein will not be included in the surviving spouse's estate when he or she passes away.

If a couple's assets exceed the \$3.5 million, a properly structured and funded credit shelter trust can potentially save the family hundreds of thousands of dollars.

GUARDIANSHIP

Even with the best estate and incapacity planning, a guardianship may be necessary. Every adult is assumed to be capable of making his/her own decisions unless a court determines otherwise. If an adult becomes incapable of making responsible decisions due to a mental disability, the court will appoint a "guardian" upon petition by an interested party. Guardianship is a legal relationship between a competent adult (the "guardian") and a person who, because of incapacity, is no longer able to take care of his or her own affairs (the "ward").

The guardian is authorized to make legal, financial, and health care decisions for the ward. Depending on the terms of the guardianship, the guardian may or may not have to seek court approval for various decisions.

Correct estate planning can, in most cases, avoid a guardianship. A guardianship is to be generally avoided due to its high costs and inefficiency.

PET PLANNING

In creating your estate plan, you may want to consider what would happen to your companion animal upon your death or incapacity. While there are many options to discuss in this arena, please be aware that you are allowed to leave assets in trust to help pay for your pet's medical and other expenses, should they survive you.

THE FLORIDA PROBATE PROCESS

The emotional trauma brought on by the death of a close family member often is accompanied by bewilderment about the financial and legal steps the survivors must take. The spouse who passed away may have handled all of the couple's finances. Or perhaps a child must begin taking care of probating an estate about which he or she knows little. This task may come on top of commitments to family and work that can't be set aside. Finally, the estate itself may be in disarray or scattered among many accounts, which is not unusual with a generation that saw banks collapse during the Great Depression.

The following is a general guide to help families and beneficiaries understand the Florida probate process. The process can be confusing to all parties and we want to do our best to highlight the steps, time periods, and common questions and answers. Remember, however, if you are faced with the probate process, we highly recommend you contact a qualified, experienced law firm, such as DeLoach & Hofstra, P.A.

What Is Probate?

Probate is the legal process of settling the estate of a deceased person and, more specifically, distributing the decedent's property. As discussed throughout this document, the probate process only involves assets in the decedent's probate estate, which includes only those assets in the decedent's own, individual name. Probate does not generally cover assets that are jointly held with rights of survivorship, life insurance, IRAs and 401Ks, annuities, and property held in a living trust.

The court having jurisdiction over the decedent's estate (generally referred to as the "probate court") supervises probate in order to ensure the decedent's property is distributed according to the direction of his or her will and the laws of the state. Much of the probate process involves making sure all of the decedent's creditors are paid before the heirs receive their distributions.

The decedent's will usually nominates the personal representative (also known as the "executor"), a person tasked with carrying out the instructions set forth in the will. The personal representative's most common task is the marshalling of the decedent's assets throughout the probate process. If there is no will, or if the will does not name a personal representative or if he or she declines to serve, then the probate court will appoint a personal representative upon petition of interested parties.

Steps Of Probate

With the help of a knowledgeable probate attorney, the probate process is not as daunting as usually people believe. Probate has a number of explicit steps, which involve gathering the decedent's assets, providing an inventory to all interested parties, paying all of the decedent's valid debts, and finally, making distribution to the heirs. The following steps are used in a formal administration, which is used when the decedent's estate exceeds \$75,000:

Step 1: Locate Original Will; list assets and addresses of beneficiaries;

Step 2: Petition the Court for Appointment of Personal Representative (executor);

Step 3: Publish in a local newspaper notice to creditors, and provide direct notice to any known creditor of decedent;

Step 4: Inventory assets within sixty (60) days of the appointment of Personal Representative;

Step 5: Gather all estate assets for purposes of paying creditors and making distribution;

Step 6: Sell/dispose of property, at Personal Representative's discretion; and

Step 7: Close estate after creditors' period expires (ninety (90) days from publishing notice to creditors), bills have been paid and all matters settled.

Summary Probate Administration

In certain instances, a Summary Probate Administration can be used. This procedure can generally be done with smaller estates. The estate's value, not including homestead property, cannot exceed \$75,000 and there can be no debts.

A Summary Probate Administration is generally less expensive in attorney's fees and costs, can take as little as a month to complete, and does not involve the appointment of a personal representative. While this may be attractive in many circumstances, such an administration does have limitations.

How much are attorney's fees and costs?

Generally speaking, Florida attorneys charge a fee based upon a percentage of the value of the probate estate assets. Florida Statutes establish the fee. While fees vary based upon complexity and amount of work, a typical fee is approximately 2.5-3% of the value of the probate estate.

Costs vary, but are typically around \$500. Our office will quote an approximate fee before beginning any work.

Do I need an attorney to probate the estate?

Yes. This is a court process and you should engage an attorney to handle the estate administration.

What happens if there is no last will and testament?

If a last will and testament cannot be located or was never created, the estate assets are distributed according to the laws of intestacy. These laws generally provide that the assets are distributed equally to classes of family members in a set and specific order.

Is my inheritance taxable as income to me?

Receipt of an inheritance is not taxable as income. There may be some income tax consequences relative to certain items such as annuities and IRAs, which you may need to discuss with your tax professional.

Does the Personal Representative get compensated for his or her duties?

The personal representative is entitled to a reasonable fee as set forth in the Florida Statutes. Family members, however, frequently waive their rights to such fees.

How long does probate take?

In most cases, the probate process normally takes anywhere from 1-6 months.

How do I avoid probate?

The best way to avoid probate, in most situations, is to create and fund a revocable living trust.

Conclusion

While we believe the probate process is generally something the family would like to avoid, our offices will work with the personal representative to help ensure all of your questions and problems will be handled in a timely and efficient manner. We are committed to provide our client's families with the highest service at reasonable cost.

HOW TO START YOUR ESTATE PLAN

Whether you need simple wills, complex estate planning or Medicaid and/or asset protection planning, our office can help you. We speak in "plain English", helping you with the legal, and practical aspects of your planning. Our clients are often pleasantly surprised on the simplicity of starting their estate plan.

First, we would like a general list of your assets. We do not need specific account numbers or exact amounts, but we need an idea of the size of your estate and the potential complexity of your plan. This means a list (with values) of your real property (land), bank accounts, stocks, bonds, IRAs, life insurance, etc. We will also need to know the joint owner and beneficiary of any account you have, if available. This information is kept strictly confidential.

Next, you need to have some thoughts on who your appointed agents would be. Who would be the personal representative (executor) of your will? Who would make your financial and/or health care decisions if you were incapacitated? Who would be the trustee of your trust?

If you have minor children, who would be their guardian? This is likely one of the most important decisions you can make. Similarly, who would be in charge of the children's assets were you to die?

Were you to die, who would receive your assets? If those people were not living, to whom would your assets be distributed? Further, are your children responsible enough to receive their inheritance? We will discuss all of your options.

If you have old estate planning documents (wills, trusts, etc.) these can be very important as we may be able to amend them, possibly saving you money.

In our initial conference, we will discuss your particular situation, review your assets and discuss your goals and concerns.

LEGAL DISCLAIMER: This handout is provided for informational purposes only. It is not to be considered or construed as rendering legal advice and it does not constitute a binding legal opinion. The reader should consult an experienced estate-planning attorney to review his or her own specific situation.