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Six Basic Estate Planning Documents (And why it's not about the documents)

A common misconception is that estate planning is only for people with a lot of money or financial assets. Nothing could be farther from the truth. Everyone should have some form of estate planning. An estate plan serves the purpose of seeing that your wishes and desires are followed concerning your money, your property, your health care and your children. Additionally, a properly designed estate plan can provide for the transfer on non-financial assets, such as your values, wisdom and knowledge. An estate plan can be very simple, expressing your desire of how you would like to be treated in the event of a severe illness and who you want to care for your minor child or even your pet.

Six basic documents can serve as the foundation for your estate plan. Although most of these can be prepared without an attorney, it is always wise to seek the advice of a competent and experienced estate planning lawyer who can help you be sure your wishes will be carried out with the least expense and headache for your survivors. Remember that an estate plan only deals with two things: everything you own and everyone you care about.

1. Last Will and Testament

A will is a written document in which you identify what you'd like done with your assets upon your death. The will can also name a guardian for your children. A will can be a very simple document, but can also include trust language to provide financially for minor children or pets, and can even provide complicated tax planning and dynasty transfers for larger estates. Wills can also include other instructions, requiring the Personal Representative (executor) to seek and obtain additional benefits, such as VA burial benefits.

A problem with a will is that it usually must go through probate, although that will depend on the amount of assets. Probate can be costly and time consuming. Also, unless carefully drafted, a will may be subject to dispute or wishes may not be followed due to idiosyncrasies of state law and/or vague or inconsistent drafting.

2. Living trust

A living trust is a contract that holds title to and controls your property. The trust is a very useful document that can provide detailed instructions for how your affairs should be handled in the event of your disability or death. Many people use trusts to save taxes and avoid probate. The fact that a trust can provide instructions for management of your affairs if you are incapacitated is an advantage over a will. Also, trusts can create sub trusts for the distribution of property, offering protections over assets transferred to beneficiaries. These are particularly useful if planning for someone with special needs.

A problem with living trusts is that it is important to make sure all your assets are placed in the name of the trust. If not, the trust instructions will have no bearing on those assets titled in some other way. Many people spend a lot of money to design detailed trusts, but those trusts prove useless because very little gets titled in the name of the trust.

3. Financial power of attorney

A financial or general power of attorney allows a person you designate (your agent) to access and control your financial assets. Those powers can take effect immediately, or they can "spring" into effect if an event you define triggers its operation, such as incapacity or unavailability.

A problem with a financial power of attorney is that it provides the authority for someone to control your assets as if they were you, but provides no instructions for how you want them to manage those assets. The powers are often so broad that financial powers of attorney have been called "licenses to steal." Although Arizona has severe penalties for the misuse of these powers, many people operate under the radar and never get caught.

Another problem with these powers of attorney is that financial institutions cannot be forced to accept them. Instead, the agent under a power, or some other person, may be forced to go to court and be appointed as conservator. A well drafted general power of attorney will nominate the agent as a court-appointed conservator, should the need arise.

4. Health care power of attorney

This document identifies the person you'd like to make medical decisions on your behalf if you become unable to make them yourself. Usually it "springs" into effect when you are incapacitated and cannot communicate decisions on your own.

It is very important that you communicate to the person designated, how you would want to be treated in the event of various medical events. The agent under your health care power of attorney is required to make the decisions you would have made had you been able. Many people never have the discussion with the proposed agent to describe the types of health care decisions desired.

5. Living will

Through a living will, you tell people what you want done if you need life-sustaining medical treatment. This document usually indicates if you would want extraordinary measures, such as artificial hydration or nutrition, or cardiopulmonary resuscitation, if you are in a terminal condition, irreversible coma, or vegetative state. Remember Terri Schiavo?

6. HIPAA release

A Health Insurance Portability and Accountability Act, or HIPAA, release allows medical professionals involved with your care to discuss your medical condition with your agent under your health care power of attorney. Without this release, medical personnel may refuse to provide the agent with information needed to make a decision. The HIPAA release can be either a separate document or a clause in the health care power of attorney.

The health care power of attorney and living will can be registered through the Arizona Secretary of State so health professionals can access them online through a password-protected account. Other documents, such as a Mental Health Care Power of Attorney and a Pre-Hospital Medical Directive (DNR) are also available in Arizona but are not discussed here.

Remember that estate planning is not really about documents. It's about results. If the documents don't accomplish your goals, they are useless. Always seek the advice of an experienced estate planning attorney who will listen to you, learn about your situation and be willing to teach you how to apply the law to your particular situation to achieve your desired results.

Ronald Zack is a Tucson Estate and Elder Law Planning attorney in Tucson, AZ. In addition to wills, trusts, powers of attorney and other planning documents, Ronald Zack can help with any actions in Probate Court - guardianships, conservatorships, probate administration. Please call for a comprehensive evaluation that will focus on your needs and your particular situation.

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