

An Ounce Of Prevention

A Simple Estate Plan is Only Four Important Legal Documents Away

BY GINA BARRY

When it comes to estate planning, the old adage is true. An ounce of prevention is worth a pound of cure.

Many people believe that they do not have enough money to need an estate plan; however, the need for an estate plan is not solely related to the amount of your wealth. Meeting with an estate planning and elder law attorney before a problem arises will enable you to avoid problems and added expense later. At the very least, every person who is eighteen years of age or older should have a simple estate plan. Certainly, more complicated estate plans are needed for some individuals, but for the majority, the simple estate plan functions quite nicely.

A basic estate plan is comprised of four legal documents. Below you will find a brief explanation of each document.

1. Last Will and Testament

Everyone needs a Will. Your Will directs the disposition of your probate estate. When you pass away, your probate estate consists of any property that is held in your name alone and that does not have a beneficiary designation.

A common misconception is that you do not need a Will if everything you own is held jointly or has a beneficiary designated. While jointly held assets normally do pass to a surviving joint owner, there must be a surviving joint owner for this plan to work. For example, if the person whose name is on your accounts happens to be with you in an automobile accident and you both pass away, there will be a need to probate your estate as there will be no surviving joint owner to take the account. If there is no Will, the property will pass as directed by the Commonwealth rather than as directed by you.

A Will is also necessary so that you can designate an executor, the person who will carry out your

estate. Your executor will gather your assets, pay your debts from your assets, and make distribution of the remainder of your estate to your heirs as set forth in the Will. If you have minor children, you can also designate within your Will whom you want to take custody of your minor children as their guardian after you pass away. By not making a Will, you forfeit your power and ability to make these designations and to direct the disposition of your property.



2. Health Care Proxy

A health care proxy is a document in which you designate someone to make health care decisions for you in the event you are incapacitated and unable to make your own health care decisions. If you later become unable to make your own decisions, the person you have named will be able to step into your shoes and begin making decisions for you. Many people designate their spouse, with the children serving as alternates, to serve as their agent for health care decisions, but close friends and medical professionals are occasionally named as well.

“Living will” language is normally included within the health care proxy. The living will language addresses your end-of-life decisions and generally sets forth that you do not want extraordinary medical means used to keep you alive when there is no likelihood that you will recover. By including this language in the health care proxy, if you do not want to be kept alive by life support systems, your wishes will be hon-

ored by the person you have named to make your health care decisions. For this reason, it is especially important to choose someone who will be able to honor your decision.

Your health care proxy may also address any special requests you may have with regard to your funeral or disposition of your bodily remains. For example, you may wish to donate organs or you may wish to be cremated. Many people think that this information should be placed in their Will, but by the time the Will is read, it is often too late to honor the wishes of the deceased.

3. Durable Power of Attorney

A durable power of attorney is a document in which you designate someone to make financial decisions for you. This document is in full force and effect when it is signed, but it is expected that it will not be used unless you are unable to handle your own financial affairs.

The power of attorney is a very powerful document. It gives authority to the person you designate to handle all of your financial decisions. For example, the person you have designated can sell your real estate, withdraw funds from or deposit funds to your bank accounts, and rollover bonds. Essentially, the person designated in your power of attorney can do anything you could do with regard to your finances if you were able.

If you do not have a valid health care proxy and durable power of attorney in effect and you become unable to handle your medical and/or financial affairs, your family members will need to petition the probate court to appoint them as your guardian to make your medical and financial decisions. The guardianship process is expensive as there are attorney's fees as well as court fees to be paid. The guardianship process is also public and can be embarrassing as all the documents filed with the court may be viewed by the public and as all hear-

ings are conducted in open court. The necessity for a guardianship can easily be avoided by having both a power of attorney and health care proxy in effect at the time of incapacity.

4. Homestead Declaration

The homestead declaration is a one-page form that, once properly recorded in the Registry of Deeds, puts everyone on notice that you have declared your principal residence to be your homestead. The homestead declaration will protect your home from creditors or judgments up to \$500,000 that arise after the declaration was recorded. There is a \$10 filing fee for the declaration.

There are some misconceptions about the homestead declaration. It will not protect your real estate from nursing home or tax liens where the state and federal government are involved. Nonetheless, if you are sued or if someone gets a judgment against you, which is not completely out of the question in our litigious society, you will enjoy the protection of the equity in your home.

With these four documents, most people can help their family members or trusted companions avoid expensive and painful legal hassles related to their long term care and their estate. Again, individuals with more complicated estates may require different or additional documents to fully protect their interests and their beneficiaries' interest in the estate, but for the majority of people, an estate plan is only four documents away. ♦

Gina M. Barry is an Associate with the law firm of Bacon & Wilson, P.C., Attorneys at Law. She is a member of the National Academy of Elder Law Attorneys and concentrates her practice in the areas of Estate Planning, Probate Administration and Litigation, Guardianships, Conservatorships, and Residential Real Estate; (413) 781-0560 or gbarry@bacon-wilson.com.