INHERITANCE & ESTATE PLANNING

Estate planning is the process of determining how the assets you own at the time of your death – your estate – will be distributed after your death. The distribution of your estate, both real and personal property, at the time of death is determined in four ways: (1) certain property (for example, life insurance or retirement accounts) will pass to the persons you have designated on a beneficiary designation form to receive the property; (2) if you do not have a Will or your Will is invalid, your assets will be distributed according to state law; (3) certain assets that you own joint with rights of survivorship will pass to the surviving owner; or (4) if you have a valid Will, your own assets will be distributed according to your Will.

For large estates, estate planning commonly involves planning the distribution of your property in an effort to reduce any state and federal estate tax liability. Estate planning also commonly involves the drafting of trusts that allow you to designate some or all of your property, real and personal, to be held by a trust and managed by someone (a trustee) for the benefit of another (a beneficiary). People also use estate planning and trusts when they have young children (children under 18) or family members with a disability as a means to provide for their care in case of their death.

If you have young children, family members with disabilities, or substantial assets, you may want to discuss these issues with an attorney who specializes in estate planning.

WILLS

The primary purpose of a Will is to tell your survivors how you want your property distributed when you die. A Will only governs property that does not pass by rights of survivorship or beneficiary designation. Therefore, it is important that you know how each asset will pass to a survivor at your death. A Will can leave property in a variety of ways. For example, a Will can give property to specific people or charities, a Will can set up a trust for your minor children so that your assets are used for their care and education, a Will can be set up to ensure a beneficiary with disabilities will retain public assistance eligibility, or to provide for a spouse in a second marriage situation but ensure any remaining assets pass to your children. If you have substantial assets, you can also set up trusts in your Will to help reduce state and federal estate tax liability. If you wish, you can choose to leave your estate to charity.

Along with spelling out how you want your property distributed, your Will must name a Personal Representative (commonly referred to as an “executor”). This is the person who will administer your Will in the probate court. Your Personal Representative must be age 19 or older. Any property that you own that does not pass by rights of survivorship or beneficiary designation will go through the probate process. There are various probate processes available depending on the value and type of assets.

In general, the probate process involves many tasks, such as identifying and gathering your property; notifying your heirs, devisees, and creditors of your death; paying your debts and taxes (including filing all necessary tax returns); and distributing your property according to your Will or according to state law. Your appointed personal representative does not need to live in the same community or even in Alaska, but it may be more convenient if she or he does. People usually choose a loved one or a close friend to serve. Regardless, the Personal Representative is entitled to receive a reasonable sum as compensation unless you indicate otherwise in your Will. Generally a Personal Representative has to obtain a bond to serve in that capacity. If you want your Personal Representative to serve without having to post a bond, you must specifically state that the Personal Representative may serve without bond in your Will. Keep in
mind the cost of the bond will most likely come out of the assets of the estate.

A Will may also provide that a trust be set up at your death. A trust allows property to be held by one person for the benefit of another. For example, if you set up a trust in your Will for your minor children, you must name a trustee to manage the trust. The trustee is in charge of managing the trust assets for your children’s benefit according to the rules you have set forth in your Will for the creation of the trust. A bank or other financial institution can also serve as trustee, but you should find out how much they charge before naming them. Keep in mind that a trust is its own legal person with its own expenses and requirements (trusts must be registered and file income tax returns) so a trust is not inexpensive to set up or administer. A Will can also establish a Uniform Transfers to Minors Accounts (“UTMA”) for your minor children if the value of an estate does not justify a trust. You would want to name a custodian to manage the funds for your minor child to a stated age (age 18 to age 25).

A Will also should nominate a guardian or co-guardians for your minor children or for a child or spouse for whom you are currently serving as a guardian. The guardianship will become effective upon filing the Will with the court. If an objection to the named guardian is made, the court will strongly favor your nomination, but the court cannot force that person to serve as guardian and will not appoint a guardian who might not act in the child’s or dependent’s best interest. If your children have a surviving parent when you die, that person usually takes custody automatically. This occurs even if you are not married to the other parent at the time of your death, unless it is not in the child’s best interest. If you do not want your ex-spouse to have custody, you can state that intent and your reasons in your Will and the court will consider those reasons in determining custody. The court also may consider the wishes of children over 14 when appointing a guardian.

A Will also can disinherit someone who might otherwise inherit from you if you did not have a Will. For example, you may state that your spouse will not receive any assets under your Will. A spouse, however, will have the right to claim certain exemptions (totaling $55,000) and may receive a share of the estate under the elective share statute (the elective share is a complicated formula). As another example, you may have a child you want to disinherit. You should specifically mention this person’s existence and your intent to disinherit him or her. You do not need a reason for disinherit someone. If you do not have a surviving spouse, a disinherited child may be entitled to a portion of your estate under the personal property exemption (regardless of the age of the child), and the homestead and family allowances if the child is a minor or dependent on you.

You must follow certain formal requirements to ensure that your Will is effective. The person signing the Will is referred to as the “testator.” To make a Will, the testator must be at least 18 years old and of sound mind. In Alaska, a Will must be in writing and signed by the testator or at her direction and witnessed by at least two people. The witnesses should also sign an affidavit that they witnessed the testator sign the Will. This affidavit can be found in the Alaska statutes. [AS 13.12.504.] A handwritten Will is also valid in Alaska as long as it is handwritten by the testator and signed by the testator. A handwritten Will does not require witnesses.

Your original Will is very important in the event of your death, and it should be kept in a safe place. Most courts in Alaska offer a safekeeping service for Wills for a small fee (currently $40). If you keep the Will yourself, it is recommended you keep the Will in a fire proof box and not in a safety deposit box. It is only your original Will that may be admitted to probate. You can admit a copy to probate, you just need to do a formal probate.
What happens without a Will?

If you do not have a valid Will when you die, state law determines who inherits your estate (those assets not passing by rights of survivorship or beneficiary designation). These laws, called laws of intestate succession, give preference to your spouse, children, and parents. This means that if you own property with someone you are living with but are not married to, that person may not receive the property when you die. In order to provide for someone not included under state law, or to provide for someone in a different way than state law provides, you must have a Will or use a beneficiary designation or joint ownership with rights of survivorship, where allowed.

If you are married and your spouse dies without a Will, you are entitled to inherit all of his/her property if s/he has no surviving parents or children, or if both of you only have children from that marriage. If your spouse is childless but has parents living, you are entitled to the first $200,000 of his/her estate plus three-quarters of the remainder, and his/her parents receive the rest. If s/he has children with you and you have children from prior relationships, you receive $150,000 plus half of the remainder and your joint children get the rest. If s/he has any children from a prior marriage, you receive $100,000 plus half of the remainder and his/her children get the rest.

If your spouse has a Will that was signed before your marriage, you may receive the share you would have received had s/he not left a Will unless certain circumstances exist. If your spouse has a Will that leaves you out, disinherits you, or provides an amount less than what you would be entitled to under state law, you can choose to take one-third of his/her augmented estate. This is known as the “elective share.” The augmented estate is a complex concept that is set forth in the statute. It is important to remember that if you wish to receive your share of your spouse’s estate, you must make that decision within nine months of his/her death. The elective share must meet certain legal requirements and it is recommended you contact an attorney with expertise in probate and estate planning. In addition, a surviving spouse is entitled to a $27,000 homestead allowance, a $10,000 property allowance, and an additional family allowance for living expenses for the surviving spouse and children while the estate is being administered (not to exceed $18,000). The spouse can take these allowances even if s/he decides to take her/his one-third share of the augmented estate. Allowances are paid before creditors of the estate receive anything.

The laws governing inheritance apply equally to men and women.

For inheritance purposes, a “spouse” includes only someone to whom you are legally married. You are legally married even if you are separated or have filed for a divorce. If you get divorced, your ex-spouse is treated like a spouse who has died. Therefore, if you are divorced and did not change your Will, your ex-spouse will not receive a share of your estate, even if s/he is still named in the Will. This is true for life insurance as well, but not necessarily for all qualified retirement plans. Most private retirement plans are governed by federal law. Federal law does not automatically remove a former spouse as a beneficiary. Therefore, it is extremely important that you change your Will, the ownership of your bank accounts and your beneficiary designations on any life insurance policies and retirement accounts to avoid any confusion or the possibility that a retirement account will go to your ex-spouse.

A spouse who is planning a divorce or is separated is treated the same as one who is happily married. Under current Alaska law, a domestic partner or someone with whom you are living will not be treated as a spouse for inheritance purposes, even if you intend to marry or act as if you are married.

You can alter your rights as to these rules with a prenuptial or a postnuptial agreement (including an elective community property agreement). A prenuptial agreement is a contract between you and your spouse-to-be, executed before the marriage that spells out what your intent is with regard to property each of you own. A postnuptial agreement is the same type of contract, but is executed after you are married.
Either type of agreement requires you each to fully disclose the assets that you own. Each of you should have your own attorney when you do these types of agreements to make sure you are getting proper advice. Alaska also allows spouses to designate some or all of their property as community property. Community property can be beneficial but it is advisable to contact an attorney before signing a community property agreement or any agreement that alters your rights to property.

Special inheritance issues arise with regard to shares in an Alaska Native corporation. If there is no beneficiary designation on file with the corporation, it will pass by Will or intestate succession. Alaska statute provides that if there is no beneficiary designation or Will, a spouse receives all such shares if there are no surviving children. If the deceased spouse has children, the surviving spouse receives one-half of the shares and the children receive the other half. Shares with Alaska Native corporations are not subject to the probate court and the native corporation is responsible for determining who receives the shares. It is recommended that that you check your beneficiary designations if you own shares with an Alaska Native corporation.

**PROPERTY OWNERSHIP**

Not all property will pass according to what your Will says. How you own your property also plays a part in determining who will get that property. For example, most married couples own real property as tenants by the entirety with a right to survivorship such that on the death of one spouse the property automatically passes to and is owned by the surviving spouse. Most joint bank accounts also are owned with a right to survivorship. When you are making a Will or trust, you should review your assets to see how they are owned. Then you can decide if your overall plan makes sense or if you need to move some assets around. Real property cannot be owned with rights of survivorship by people who are not married; however, you can now pass your interest in real property with a transfer of death deed. A transfer on death deed allows you to designate a beneficiary (similar to a life insurance policy) to receive the real property at your death without probate. The transfer on death deed can be changed by you at any time and is revoked if you sell the property during your life. An agent under a power of attorney cannot change the deed unless you expressly allow it. A sample form of the deed is found in the Alaska statutes.

**What is your probate estate?**

The word “estate” has different meanings. In its broadest sense, your estate is all of the property you own at your death. This may include real property (your house), the face value of life insurance policies, retirement accounts, the value of your interest in jointly held assets, bank accounts, and personal property (your car, household furnishings and jewelry). The total value of these assets as of the date of your death is your “gross estate” for federal and state inheritance taxes. Your “taxable” estate – the amount that will be used to determine whether you will owe federal estate taxes at your death – is the value of your gross estate less certain deductions. In 2015, the amount that an individual can pass free of estate taxes is $5.43 million. That amount will increase each year for inflation. A surviving spouse also has the right to file a “portability” election to assume the deceased spouse’s unused exemption, which must be filed within nine months of the date of death. Alaska does not have an inheritance tax; however, if you own real property in another state, an inheritance tax might be due in that state. If you have significant assets, you should consult an estate planning attorney to discuss the inheritance tax.

Your Will only controls assets that pass through probate. There are many assets that might pass to others when you die without going through probate. Insurance policy proceeds and jointly held accounts are two common examples. For example, if you have a $100,000 life insurance policy that names your children as beneficiaries, that money will pass to them directly at your death. If you name your spouse as beneficiary and then get a divorce, Alaska law removes him/her as beneficiary unless the policy provides otherwise.
If you designate “my estate” as the beneficiary of your policy, those same funds will belong to your probate estate and will be administered according to your Will if you have one or the laws of intestacy if you do not. However, be aware that this law may not change the beneficiary on certain retirement accounts when you get a divorce. Therefore, it is imperative that you change your beneficiary designations to the persons you want to receive those assets.

In order to make sure your assets pass according to your wishes, you need to do two things. First, you need to have the right estate planning documents in place, such as a Will. Second, you need to make sure you have property titles and beneficiary designations in order so that the property will pass the way you want. This may mean filling out new beneficiary designation forms or doing deeds to retitle property.

**OTHER ESTATE PLANNING TOOLS**

**What is durable power of attorney?**

A durable power of attorney (DPOA) is a document you sign that gives another person, your “attorney-in-fact,” the power to make decisions for you when you sign the Power of Attorney or if you become disabled. The person you designate can be anyone you choose: a family member, a friend, or a co-worker. DPOA’s can be limited for specific acts such as purchasing a house or can encompass all day to day activities. By choosing someone you trust and who knows you, a DPOA allows you to choose how you would want to act if you become disabled. If you become disabled and do not have a DPOA, the court will appoint a guardian or conservator for you. The power of attorney form used to designate another person to act for you is set out in AS 13.26.332-335. You can also use a DPOA to nominate a conservator for you in the event you become disabled. You should carefully read, understand, and consult an attorney before signing a power of attorney. It is important to remember that even if you have a DPOA, your designated person would need to become your “representative payee” if you receive any social security benefits.

You can sign an Advanced Health Care Directive authorizing another person to make your health care decisions. The health care power of attorney is different from the durable power of attorney discussed above. If you do not have a health care power of attorney, your spouse or other family members may make your health care decisions, including the decision to terminate life sustaining measures. You also can nominate a guardian to make the health care decisions for you if you are disabled. The advanced health care directive can be obtained at any hospital in Alaska.

**What are Living Wills?**

You may sign a declaration (“Living Will”) that life-sustaining procedures be withheld or withdrawn in the event of a terminal illness that will result in death within a short time. The Living Will is a part of the Advanced Health Care Directive (AHCD). The Advanced Health Care Directive can be signed in the presence of two witnesses or a notary. Both witnesses must be personally known to you and at least one of them cannot be the agent appointed in the AHCD; related by blood, marriage or adoption; or be a person who will receive a portion of your estate under your Will. You should provide a copy of the Advanced Health Care Directive to your primary care physician.

**PLANNING FOR FAMILY MEMBERS WITH DISABILITIES**

Estate planning for children or adults with disabilities involves special concerns. Trusts (or even the right to receive funds or property from a trust) can result in disqualification for Medicaid and other public assistance programs, therefore it is vitally important that you do not leave assets directly to a person...
receiving public assistance. A “Supplemental Needs Trust” is one way to provide for a disabled person without loss of benefits. The Supplemental Needs Trust restricts the trustee from distributing amounts that would disqualify the beneficiary for benefits such as Medicaid but that allows distribution to add to the benefits already being received. The property held by the trust may not be owned by the disabled beneficiary. You should consult with a professional about setting up this type of trust.

**Do I need an attorney?**

Drafting Wills, estate planning, creating trusts, or giving a durable power of attorney are all distinct legal acts that have special statutory and legal effects. It is recommended that you see an attorney to discuss any and all aspects of these legal documents.