CHAPTER 93

When Should We Do Estate Planning? Make Sure You Plan for Your Disability and Death While You Still Can

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Clearly, you need to prepare your estate plan before you die. You must also prepare your estate plan before you have lost mental capacity.

As you may have noticed, procrastination with regard to planning and signing your will or trust is something you are likely to do month after month, year after year. It seems to be one of the easiest tasks to put off. Some of you have been diagnosed with a severe medical condition or terminal illness, yet you still delay. Others have minor children for whom you should appoint guardians in the event of your death, incapacity, or for temporary emergencies. Others of you are no doubt thinking, why worry about it? There's always tomorrow, right? Wrong! None of us knows when tragedy will strike or when we will die.

You may be thinking you have already told your loved ones how to implement your desires after you die. But you are operating under an incorrect assumption that your spoken instructions will be enforced. Oral instructions and directions, even from your death bed, are not enforceable for making property distributions after your death. Your will or trust must be written and executed by you.

All states require you to have legal capacity at the time you sign your will, or in other words, to be of "sound and disposing mind."

"Being of sound and disposing mind" means you 1) understand the nature of your testamentary act, 2) understand and know the nature and extent of your property, and 3) remember and understand your relationships to your living relatives — your spouse, descendants, parents, and others who are affected by your will or trust.

Following are a few real life situations provided as examples of what can occur when you delay your written instructions. Without an estate plan, your loved ones may not be taken care of in the way you wish.

> **EXAMPLE 1:** Client came in with his wife to amend his existing trust. They discussed the changes and scheduled an appointment to come back

in a couple of days to sign the trust amendment. The next morning, the wife called the attorney to inform her that husband had just suffered a heart attack and died on the golf course. Prior to meeting with the attorney, the client had rendered his primary changes to a typewritten paper which he had signed; other changes were discussed with the attorney and agreed upon. After the death, the Court honored the changes in the signed typewritten version but not the orally agreed-upon changes even though they were verified by an impartial third party and no family member objected to them.

EXAMPLE 2: Wife contacted attorney on behalf of her husband who was terminally ill and asked the attorney to prepare certain documents on behalf of husband who was still cognizant and verbal at the time. Attorney prepared the documents immediately and went to their home to meet with husband. During the time it took to prepare the documents and drive to their home, husband had passed into a state of semi-consciousness and never regained full consciousness. The documents could not be executed.

EXAMPLE 3: Husband and wife were going through a divorce. All decisions concerning the division of their property had been agreed upon by them: All property would go to Spouse A. However, the final divorce decree had not been signed and issued by the court. Spouse A died in an accident without having signed any will. Under the State intestate statutes, all of the property passed to the surviving spouse, Spouse B.

If you elect not to set up your own estate plan, your state's law has a plan for you. If you have no signed will or trust, your state's intestate statutes will dictate to whom your property will be distributed and who will be named to make those distributions. Your state's law also sets forth procedures for selecting guardians for your minor children, if you have not done so before you die or become incapacitated.

Many are in agreement with their state's intestate law because it produces the results they want as to distribution and persons in charge. But you must know your own state's law in order to determine if it actually produces the result you want. There are other reasons, however, why you should consider preparing your own estate plan rather than relying on your state's statutes. For one, you might move to another state with different laws that do not agree with your wishes. A more likely occurrence though, is that by preparing your own estate plan you are likely to avoid probate altogether. Probate in many states can be quite expensive and time-consuming. Relying on a state's intestate laws, or on a will, usually results in probate. Trusts and other estate planning mechanisms can avoid the cost and delay of probate.

Do not delay.

Proper planning now will lead to peace of mind, so you can rest assured that your loved ones will be provided for in the manner you desire.

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