Estate Planning - The Basics

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Table of Contents

What is a Living Will?	4
What is a Health Care Power of Attorney?	4
What is a Financial Power of Attorney?	5
How does ownership of property pass at your death?	5
What is probate property?	5
Why is it important for me to have a Last Will and Testament?	6
What is a spousal election to "take against" the Will?	6
What if I file for divorce?	7
After my divorce - What updates should I make to my estate planning documents?	7
What is an "annual exclusion" gift?	8
What is the federal gift tax exemption?	8
What is the federal estate tax exemption?	8
What about Indiana inheritance taxes?	9
How much will it cost to have an estate plan prepared?	9
How often should I review my estate planning?	10

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Estate Planning may be defined as planning for your lifetime care and for your after-death arrangements, as well as planning for the orderly and efficient disposition of assets to achieve your goals. Estate Planning involves documents, but should be thought of as a *process*. Estate Planning may include significant planning to reduce and/or eliminate federal gift, estate, and/or generation skipping transfer taxes. Your personal financial planning should be coordinated with your estate planning.

Unless otherwise indicated, this brochure is applicable only to citizens of the United States who are residents of Indiana. This brochure is not intended, and may not be relied upon, as legal advice. Please consult with an attorney of Dobbs & Folz, for advice with respect to your estate planning.

What is a Living Will?

A Living Will is an expression of your intent that extraordinary life prolonging procedures not be utilized in the event that you have a terminal condition. The Living Will Declaration may also express your desire regarding the provision of artificially supplied nutrition and hydration while you are in a terminal condition.

Indiana law also allows a person to make a Life Prolonging Procedures Declaration, which is a declaration that you desire life prolonging procedures to be utilized in the event that you are in a terminal condition.

What is a Health Care Power of Attorney?

If a health care attorney-in-fact or a health care representative has not been properly appointed, Indiana law provides that the following persons may consent to health care on behalf of an incapable adult: the incapable adult's guardian, or, if there is no guardian, the incapable adult's spouse, or a parent, adult child, or adult sibling of the incapable adult (in no particular order). As you can imagine, these individuals may disagree, especially in a blended family. A Health Care Power of Attorney (or an appointment of health care representative) is a document that allows you to designate and prioritize who may (or who may not) consent to health care on your behalf if you are unable (because of your incapacity) to make health care decisions for yourself. You may also specify who may not make your health care decisions.

What is a Financial Power of Attorney?

A Power of Attorney for non-health care matters is a document whereby you (as the principal) authorize an attorney-in-fact to act on your behalf, with powers to manage your assets. You may designate multiple (or contingent) attorneys-in-fact. The scope of authority, and the duration of the authority, depend on the language of the document. Typically, the attorney-in-fact will be granted broad authority. The Power of Attorney document may be drafted to be effective immediately, or to "spring" into life and become effective only upon an event (such as your incapacity). A Power of Attorney may help avoid a need for a guardianship over your property in the event you become incapacitated, which is a very costly court proceeding.

How does ownership of property pass at your death?

At your death, the ownership of property may pass (i) according to title (for example, to the surviving joint tenant who has a right of survivorship), (ii) by beneficiary designation (for example, on life insurance, IRA assets, qualified retirement plans, etc.), (iii) by an "owner on death" designation (for example, a "pay on death" designation on a savings account), (iv) by a right conferred by law (for example, a "spousal election" - see "What is a spousal election to 'take against' the Will," below), (v) by "intestate succession" (see "Why is it important for me to have a Last Will and Testament," below) or pursuant to a Last Will and Testament, (vi) by contract (for example, pursuant to the settlement agreement in a divorce proceeding, or pursuant to a prenuptial agreement), or (vii) pursuant to the terms of an applicable trust agreement.

What is probate property?

"Probate property" is essentially property that is titled in an individual decedent's name at the time of the decedent's death that does not pass by any other means to another person after the decedent's death. The laws of intestate succession, or a decedent's Last Will and Testament, govern the disposition of probate property.

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Why is it important for me to have a Last Will and Testament?

If you do not have a Last Will and Testament, Indiana's laws of "intestate succession" will govern the disposition of such property. The laws of intestate succession, which are dictated by the Indiana Code, may require your probate property to pass in a way contrary to your wishes; to your spouse, minor children, parents, brothers and sisters, and/or descendants of deceased brothers and sisters of the decedent, depending upon the factual circumstances. For example, if you are survived by one child and by your spouse (the mother of your child), according to the laws of intestate succession, one-half of your property would pass to your surviving spouse and one-half would pass to your surviving child. If your child is a minor, an expensive guardianship proceeding in a court will be necessary, which will expire at age 18, when your child will receive your assets outright. It is important to have a Last Will and Testament, so that you may provide for the disposition of probate property according to your desires. You may also desire to establish a trust in your Will (a testamentary trust) to hold and protect such property for the benefit of your intended beneficiaries (such as your minor children). In your Last Will and Testament you can also specify your desire as to who should be appointed as guardian of the person and estate of any minor children surviving you, and you should specify who you would like to serve as the personal representative of your estate.

What is a spousal election to "take against" the Will?

There is a long-standing public policy against allowing a decedent to "disinherit" his or her spouse. Accordingly, Indiana law allows the surviving spouse of a decedent to elect to "take against" the Will of the decedent. Such an election in essence assures that the surviving spouse will receive a statutorily set minimum amount of your probate property (and in some circumstances, certain non-probate property), even if your Will does not leave any property to your surviving spouse. The election is available to your surviving spouse whether such spouse is your first, second, third, etc., as long as such survivor was your spouse at the time of your death. There are certain planning steps that can be taken to reduce the amount of assets that may be subject to the spousal election to take against a Will.

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Does the filing for a Petition for Dissolution of Marriage automatically delete my spouse as my heir or devisee and as a beneficiary of my life insurance, IRA assets or qualified plan assets, and does the filing of such Petition automatically remove my spouse as fact or attorney-in-fact for financial matters?

No! The filing of a Petition for Dissolution of Marriage does not automatically remove your spouse as an heir, devisee, beneficiary, attorney-in-fact, etc. Accordingly, if a marital dissolution proceeding is pending, you should immediately consult with an attorney at Dobbs & Folz and discuss the advisability of performing some "interim" estate planning to exclude your soon-to-be ex-spouse as your heir, devisee, beneficiary, attorney-in-fact, etc.

Does a Decree of Dissolution of Marriage (finalizing a divorce) automatically delete my former spouse as my heir or devisee and as a beneficiary of my life insurance, IRA assets or qualified plan assets, and does such Decree automatically remove my spouse as attorney-in-fact or attorney-in-fact for financial matters?

By statute, the Decree does automatically remove your former spouse as your heir (if you do not have a Will), as a devisee under your Will, and as a beneficiary of any revocable trusts you have created. The Decree does not, however, automatically remove your former spouse as a beneficiary of an irrevocable trust you created or as a beneficiary of your life insurance, IRA or qualified plan assets. Although the Decree may legally have the effect of automatically removing a former spouse as your named attorney-in-fact (for healthcare and/or financial matters), new powers of attorney should be executed in order to name a new attorney-in-fact, and a revocation notification should be provided to your former spouse to be clear he or she no longer has authority to act on your behalf. It is very important that you consult with an attorney at Dobbs & Folz as soon as your divorce has become final, to review and revise your estate planning.

What is an "annual exclusion gift?

An annual exclusion gift is the amount of a present interest gift that a donor may make per donee per year without utilizing any of his or her exemption against federal gift taxes. The "annual exclusion" amount is indexed for inflation. For 2023, the annual exclusion amount is $17,000.

What is the federal gift tax exemption?

The federal gift tax exemption is an amount that may be given away during lifetime (after applicable deductions, such as marital and charitable deductions) without gift taxes becoming payable. As a result of changes made to the federal gift and estate tax laws in 2018, the federal gift tax exemption is now $12,920,000 (25.84M for a married couple), in 2023. Any of the federal gift tax exemption that is used during a person's lifetime reduces the federal estate tax exemption that is available after a person's death. Annual exclusion gifts do not reduce, or utilize, the federal gift tax exemption.

What is the federal estate tax exemption?

The federal estate tax exemption is an amount that can be passed at death (after applicable deductions, such as marital and charitable deductions) without federal estate tax becoming payable. Any gift tax exemption used during a person's life reduces the estate tax exemption available at that person's death. The estate tax exemption (indexed for inflation) is the same as the federal gift tax exemption, $12,920,000 (25.84M for a married couple).

If your assets, including the death benefit amount of life insurance you own on your life, exceed the federal estate tax exemption amount, substantial federal estate taxes (a maximum rate of 40%) may be incurred. However, such taxes may be reduced or eliminated with proper planning - please consult with an attorney at Dobbs & Folz.

Note, in the past many estate plans were structured to minimize federal estate taxes, by transferring half of the assets to the husband (or his trust) and half of the assets to the wife (or her trust), because the federal estate tax exemption was individually exclusive, and it was important for each spouse to utilize each exemption; it was bad tax planning for the surviving spouse to inherit all the assets. The estate tax exemption was "use it or lose it." Under such

plans, at the first death, assets equal to one exemption were set aside in a trust, and any excess assets may have been allocated to a different trust (often called A/B Trust structure). With changes to the federal laws in 2011, which were made permanent in 2013, a surviving spouse can make a portability election to "port" any unused federal estate tax exemption from the first deceased spouse to the surviving spouse, who can then use both exemptions to shelter family assets from estate taxes at the second death. You should review your estate plan if it is structured this way, because creating one or two irrevocable trusts at the first death can be cumbersome to administer, and the half of the assets in the first deceased spouse's trust, would not receive a step-up in tax basis at the second spouse's death. That may be a detriment if the surviving spouse continues living for years or decades, and the assets have substantially increased in value between the first and second of your deaths. Step up in basis to fair market value at death is very powerful if there will be a subsequent sale.

If you are a widow(er), and you have assets "trapped" in your deceased spouse's credit shelter trust, there may be an opportunity to get those assets out of the trust, to receive a full step-up at your death, but an attorney should be consulted before attempting to remove those assets. Also, the portability election must be made by the estate of the first deceased spouse, which requires a filing of a Form 706 Federal Estate Tax Return, even if no tax is owed. Portability is not automatic, and it can be a multimillion dollar mistake if not timely elected!

Be aware that current Tax Act governing level of the gift and estate tax exemptions is scheduled to "sunset" or expire on January 1, 2026, at which time the estate tax exemption would revert back toward the previous levels of approximately $6 million per person, and $12 million for a married couple (as indexed for inflation). Therefore, while you may not have a tax problem now, you could have one in 2026.

What about Indiana inheritance taxes?

Great news! The Indiana inheritance tax has been repealed for all decedents dying after January 1, 2013. If your estate plan was structured to minimize the Indiana inheritance tax, it may no longer be appropriate. If you own property in other states, find out whether that state will tax such property upon death.

How much will it cost to have an estate plan prepared?

The cost to prepare an estate plan depends on your particular personal and financial situation, as well as decisions that you will make concerning your estate plan. Planning to reduce gift or death taxes may be important. Accordingly, it is impossible to estimate a cost prior to meeting with you and discussing your situation and desires in more detail. Good

planning is worth its weight in gold because it can preserve family harmony. After obtaining information about your assets and goals, an estimated fee can be provided.

How often should I review my estate planning?

You should review your estate planning any time there has been a significant change in your personal or financial situation, as well as any time there has been a significant change in the laws which may affect your estate planning. Even if you are not aware of any such significant changes, it is advisable to review your estate planning at least every five years. There have been major shifts in estate tax laws in both 2013, and recently in 2018, and it would be wise to contact an attorney to understand whether those shifts impacted your planning, and it's time to revise.