

**“Estate Planning 101”**  
**The Basics of Estate Planning**

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I. **What is Estate Planning?**

- Estate Planning – The process of developing a plan for the management of your assets and personal affairs during lifetime and the distribution of your assets after your death.
- Estate Plan – May include some or all of the following documents:
  - Will
  - Trust
  - Durable Financial Power of Attorney
  - Health Care Power of Attorney
  - Living Will
- Estate planning is an important aspect of any personal and financial plan. Without an estate plan (or the appropriate estate plan) in place:
  - You risk a significant amount of your estate being eaten up by settlement costs and in some cases estate taxes; and
  - You lose the ability to make valuable decisions with respect to when, how and to whom your estate is distributed.

## II. Estate Planning Considerations

- Probate – The process of the settlement and distribution of probate assets after death that is overseen by the probate court.
  - Probate Assets - Assets that are titled in your name alone the disposition of which is controlled by the terms of your Will or by the state intestacy statute at your death.

### Examples:

- Bank accounts in your name alone
- Real estate in your name alone
- Non-probate Assets - Assets the disposition of which is controlled by a contractual arrangement.

### Examples:

- Joint and Survivorship bank accounts
- Joint and Survivorship real estate
- Assets titled in the name of a trust
- Insurance and other assets that pass by beneficiary designation
- Avoiding or Minimizing Probate -
  - Planning will often seek to avoid or minimize exposure to probate.
    - The probate process itself can be cumbersome and expensive, particularly without the appropriate planning and record keeping during lifetime.
    - Probate filings (including your Will and inventories and accountings of your probate assets) become part of public record - privacy considerations may dictate probate avoidance.

- Wealth Transfer Taxes – Wealth transfer taxes can be an important factor for consideration in formulating the appropriate estate plan.
  - Federal Estate and Gift Tax. Federal Estate and Gift Tax is imposed with respect to the cumulative transfer of property during lifetime and upon death. The tax rate on property ultimately subject to this tax is 40% in 2016.
    - Estate and Gift Tax Exemption. There is an exemption amount that allows each person to transfer a cumulative amount of assets during lifetime or at death free of Estate and Gift Tax. The exemption amount in 2016 is \$5,450,000 and is indexed for inflation.
      - This exemption amount is now “portable” in the context of a married couple - meaning that an election can be made at the death of the first spouse for the surviving spouse to use the unused portion of the deceased spouse’s exemption amount.
      - Married couple can pass up to \$10,900,000 to the next generation free of Federal Estate and Gift Tax by virtue of use of both spouses’ Estate and Gift Tax exemption amounts.
    - Unlimited Marital Deduction. There is an unlimited marital deduction which acts not as an exemption from tax, but as a deferral of Federal Estate and Gift Tax on assets that pass to the spouse – either directly or in a qualifying trust, taxing the assets instead at the death of both spouses.
    - Annual Gift Tax Exclusion. There is also an annual exclusion available for lifetime gifts which allows for transfers of a certain amount to any individual each year free of Federal Gift Tax and does not use any of the Estate and Gift Tax exemption amount –this annual exclusion amount is \$14,000 in 2016 and is indexed for inflation.
  - State Estate Tax. Some states also have a state estate tax that is imposed at the death of an individual. Ohio no longer has a

separate state estate tax – the Ohio estate tax was repealed as of January 1, 2013.

- When will Federal Estate and Gift Taxes be a planning concern?
  - Federal Estate and Gift Taxes will generally not be a planning concern until the taxable estate meets or exceeds the Federal Estate and Gift Tax exemption amount.
  - Taxable estate includes all of an individual's assets, probate and non-probate, including the full-face value of insurance policies owned by the individual on his or her life and the value of any retirement accounts and IRAs.
  - When you visit an estate planning attorney they will need to see a list of all of your assets, their values and how they are titled in order to determine if Wealth Transfer Tax is an important planning concern and to address exposure to probate.
- Generation-Skipping Transfer Tax. The Generation-Skipping Transfer (“GST”) Tax is a separate tax imposed on the transfer of wealth during lifetime or at death that skips a generation. The tax rate on property exposed to this tax is also 40% in 2016.
  - GST Exemption. There is an exemption amount that allows each individual to transfer a cumulative amount of assets during lifetime or at death free of the GST Tax. The GST Tax exemption amount (“GST Exemption”) is \$5,450,000 in 2016 and is indexed for inflation.
    - The GST Exemption is not portable in the context of a married couple. Accordingly, if it is not used by the first spouse during lifetime or at death, it is wasted and the surviving spouse only has his or her separate GST Exemption available.

- The GST Tax and planning with the GST Exemption is generally relevant in higher net worth situations when Estate Tax is a factor and may be a factor for future generations.
- Other Important Factors. There are many other considerations that will be important in formulating the appropriate estate plan.
  - Personal and family considerations such as:
    - Marital status
    - Age and situation of beneficiaries
  - Nature of Assets: *e.g.*
    - Closely Held Business
    - Significant wealth in qualified retirement plans and/or IRAs
  - Creditor Exposure
  - Charitable Intentions

### III. Estate Planning Documents.

- Durable Financial Power of Attorney. The durable financial power of attorney is an important document utilized in an estate plan. It is a document whereby you give another individual the authority to handle your assets and financial affairs during your lifetime.
  - Particularly helpful in enabling an individual to avoid a court supervised guardianship should he or she become incapable of handling their own financial affairs
- Health Care Power of Attorney and Living Will. Health care powers of attorney and living wills are also important foundational estate plan documents.
  - Health Care Power of Attorney. The health care power of attorney, like the durable financial power of attorney, enables an individual to appoint someone to make decisions for them - in this instance health care decisions. The designated agent's

authority is only effective when you cannot make decisions for yourself.

- Living Will Declarations. The living will declaration (sometimes referred to as an advance directive) is a document whereby you make a specific direction to your physician (that cannot be overridden) that you do not wish to have artificial means of life support administered. It is only effective if you have been determined by two physicians who have examined you to be in either of two conditions (both defined by statute) - a permanently unconscious state or a terminal condition.
- Last Will and Testament. A Will is a document that provides for the distribution of probate assets after your death. It must be signed with the requisite statutory formalities, that is in the presence of two disinterested and unrelated witnesses who must also sign in your presence and in the presence of each other. The Will allows you to specify the distribution of your probate assets, name an executor and express your wishes as to guardians appointed for your minor children.
- Trust. A trust is an arrangement between a donor, the person who is setting up the trust, and a trustee that provides for the management, investment and distribution of assets according to the terms of the trust agreement. A trust can be revocable or irrevocable and can be utilized for a variety of purposes in an estate plan.
  - Revocable Living Trust.
    - Established by an agreement entered into by the donor and trustee during the donor's lifetime and is fully revocable by the donor during his or her lifetime
    - Can be funded during lifetime or death or partially during lifetime and at death
    - Revocable living trust is a typical foundational estate planning document:

- Facilitate Probate Avoidance. Assets titled in the name of the revocable living trust at the time of the donor's death avoid probate.
  - Mechanism to Care for Minor Children or a Younger Person. A revocable living trust provides a mechanism to hold assets for children who have not attained the age you determine appropriate for them to receive outright distribution of the assets.
  - Asset Management. Revocable living trusts are the ideal tool for addressing asset management needs as a person ages. An individual can transfer asset management responsibility to the trustee, and the trustee becomes responsible for the safekeeping of property, tracking and accounting of income and receipts and paying bills.
  - Estate Tax Planning. Revocable living trusts often include provisions designed to minimize exposure to Federal Estate Tax.
- Other Specialized Trusts. Other more specialized trusts may also be appropriate as part of an estate plan for purposes such as reducing estate taxes, asset protection, planning for beneficiaries with special needs, and accomplishing charitable objectives.