

# ESTATE PLANNING 101

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# ESTATE PLANNING 101

## 1. Basic Estate Planning Documents.

- A. Will
- B. Powers of Attorney
- C. Health Care Directive
- D. Community Property Agreement

## 2. Why Have A Will?

A will is necessary to:

- select a guardian for children;
  - give property the way you want;
  - create a trust so that children do not receive too much property when they are young;
- and
- designate a “personal representative” who handles your business and home after death.

## 3. What Happens If You Die Without A Will?

In Washington when a person has no will, the law provides what happens to your property. A court will choose your personal representative and the guardian for your children and it may be someone you would not have chosen. In Washington, there are two types of property: community “marital” property and separate “individual” property. The law distributes property as follows:

Community property:

- 100% to living spouse.
- If no living spouse, 100% to children, and if no living children, then grandchildren.
- If no children or grandchildren, then 100% to parents.
- If no parents, 100% to brothers and sisters, or their children.
- If no parents or brothers or sisters, 100% to grandparents, or your aunts and uncles or cousins.

Separate property:

- If spouse and children survive, 50% to spouse and 50% to children.
- If no children survive, but spouse and your parents survive, 75% to spouse, and 25% to parents.
- If no children, parents or aunts/uncles, but spouse survives, all to spouse.

For this article, if you are a registered domestic partner, you will be treated as spouse as if you were married. This article does not discuss specific information on how to become a registered domestic partner. If you are in such a relationship, you should speak to a lawyer about your specific circumstances.

The law is similar to community property for unmarried couples living together in a “committed intimate relationship.” However, if you are in such a relationship, this article does not discuss the information fully, and you should speak to a lawyer about your specific circumstances.

#### 4. **How Does a Will Work?**

- (a) A Will has four basic components, it (i) identifies your family, (ii) names a guardian for your children, (iii) names a personal representative to handle your business and home at death, and (iv) distributes your property as you intend.
- (b) In Washington, a will must be signed in the presence of two witnesses. A person who acts as a witness to a will cannot receive more under the will than he or she would have received under the law; thus, it might be best for ~~a~~ non-family members to serve as witnesses.
- (c) Handwritten and unwitnessed wills created in Washington are absolutely not valid.
- (d) The living spouse has a right to his or her 50% interest in community property. Thus, the decedent’s will controls only the decedent’s one-half of the community property and 100% of the decedent’s separate property.
- (e) Children have no right to receive property under a will, unless they are named in the will. A will can be used to limit, restrict, or eliminate a child’s share.

5. **How Can a Will be Changed?**

- (a) In Washington, a will may be supplemented by a separate document to give items of tangible personal property (such as jewelry, furniture, artwork, and automobiles, but not other property such as financial assets or real estate), if the will permits this, and the statement is signed by the maker of the will. This separate document may be changed at any time without the need for a new will, so long as each separate document is signed.
- (b) In the event of a divorce, each former spouse is automatically written out of the other's will.
- (c) In the event that a new child is born, who is not named in the will, that child is normally entitled to the share of the estate that the child would have received under the law if the decedent had died without a will.
- (d) Any other changes to a Will must be made in a new Will or an amendment (called a Codicil) that satisfies the legal requirements of a Will discussed above.

6. **What Is Community Property And How Is It Different From Separate Property?**

- (a) In Washington (and eight other community property states) all acquisitions during marriage while a permanent resident of the state are presumed to be community property. All property acquired prior to marriage, and any gifts or inheritances (and the income from the property) are a spouse's separate property.
- (b) The "Quasi-Community Property" statute (RCW 26.16) provides that at the death of a spouse, separate property of the decedent which was acquired in another state, but would have been community property if the owner had then been a Washington resident is treated as community property. In other words, the living spouse automatically becomes the owner of 50% of that separate property.
- (c) Written agreements between spouses regarding whether property is community or separate property are generally legal, if they are signed and notarized.

7. **Is There Any Property That Is Not Controlled By My Will?**

Certain assets of a decedent are not affected or controlled by a will at death. These are called non-probate assets and include:

- (a) Property held in joint tenancy with right of survivorship (JTWROS). This form of title is “Mr. Nguyen and Mrs. Nguyen as Joint Tenants With Right of Survivorship.” At the death of an owner, property held in JTWROS passes automatically to the living owner. For bank accounts only, title in the name of “Mr. Nguyen or Mrs. Nguyen” will create a right of survivorship. If the title to property is held in the form of “Mr. Nguyen and Mrs. Nguyen,” or “Mr. Nguyen and Mrs. Nguyen, as tenants in common,” each person owns 50% and the decedent’s 50% of the property passes as provided in the will or by intestacy.
- (b) “Pay on Death” bank accounts.
- (c) Property held in trust for another is controlled by the trust instrument, not the will. This includes assets held in a “living trust” which is a revocable trust used primarily as a will substitute to avoid probate.
- (d) Life insurance, pension, 401(k) plans, retirement benefits, IRAs and annuities are controlled by a beneficiary designation.
- (e) A community property agreement to transfer of community property at death to the living spouse.

8. **What Is A Probate (And Should I Avoid It)?**

Probate is a court proceeding to complete the decedent’s business and home. It involves appointment of a personal representative (also called an “executor”) to:

- (a) Locate and gain control of decedent’s assets.
- (b) File an inventory of assets with the court.
- (c) Pay decedent’s debts and taxes. Death tax returns are due nine months after death
- (d) Dispose of remaining assets as provided in the will or by intestate succession.

Out of state or out of country real property normally requires more probate in that state or country to change title. It is generally recommended that out-of-state or out of country real property be held in a revocable trust to avoid probate.

9. **What Is A Trust And How Does It Work?**

- (a) There are two basic types of trusts, revocable trusts that are used during a person's life to avoid probate, and irrevocable trusts that are often used to hold property for the benefit of a child until the child is responsible enough to own the property.
- (b) Creating a trust requires two acts:
  - (i) creation and signing of the trust document; and
  - (ii) transfer of assets to the trustee.
- (c) Any individual and most types of banks may be trustees. The essential criteria for trustee selection are trustworthiness and good judgment.

10. **What is the Benefit of a Having Powers Of Attorney?**

A durable general power of attorney is a notarized document to give another legal authority to act on your behalf with respect to financial matters, and a health care power of attorney allows another to make health care decisions on your behalf. These documents are important in the event you become incompetent or non-functioning.

Powers of attorney can avoid costly and complicated guardianship proceedings, because you, rather than the court, are determining who should make financial or health care decisions on your behalf. In addition, a power of attorney can be available right away, whereas a guardianship proceeding can take several weeks or months, which means that valuable time can be lost while important decisions are postponed.

11. **What Happens In A Guardianship?**

The courts have wide discretion in the selection of a suitable guardian, giving special recognition to family members and the wishes of the non-functioning person.

A guardian is not quick because the courts must decide whether an individual is not functioning based on the following criteria:

- (a) Whether there is a significant risk of personal harm based upon inability to provide for nutrition, health, housing or physical safety.
- (b) Whether there is a significant risk of financial harm based upon a inability to manage property or financial business and home.

12. **What is the Purpose of a Health Care Directive.**

A Health Care Directive (also known as a living will – not to be confused with a “living trust”) is a witnessed statement reflecting requests on medical care in catastrophic situations. It is highly recommended that each adult family member have one in force. Most importantly, a Health Care Directive informs your doctor or health care provider whether or not you want to have medical care, in which you cannot make health care decisions for yourself.

13. **Common Estate Planning Mistakes.**

- (a) Not Having an Estate Plan.
  - (i) If you have children that would need a guardian at your death, and you want your property to be given in a not usual way, then a will is necessary. Even if you don't need a will, other estate planning documents such as powers of attorney and a health care directive can be critical if you become non-functioning.
  - (ii) A will and powers of attorney are particularly important if you are in a unmarried relationship, because the living person will not inherit your property under the law, and may have to go to court to assert his rights to your property.
  - (iii) A will is important if a spouse has a child from an earlier marriage, to make sure that this child is treated fairly.
- (b) Believing that probate can be avoided by having all property in the joint names of husband and wife, with a right of survivorship.
  - (i) This is a mistake because probate is only avoided at the death of the first spouse, but not at the death of the second spouse and not if both spouses die simultaneously. A will is still necessary to give property at the second death.
  - (ii) Holding property in right of survivorship does not address important issues such as guardianship of children or trusts for children.
- (c) After the first death, holding all property in a right of survivorship account with a responsible child, and relying on that child to divide the property fairly among his or her siblings. Even the most responsible child may be tempted to give himself to a larger share of the estate.
- (d) Using a deed to put title to real estate in the name of a trusted relative to avoid probate at the death of the true owner.
  - (i) The trusted relative may die before you.

- (ii) The trusted relative has the legal power to sell the real estate without your consent.