Frequently Asked Questions in Estate Planning and Elder Law

What is Probate?

A Probate Court Proceeding, commonly referred to as "Probate" is the process that allows your assets to be transferred to someone else after your death. If you have a Will, the assets will be transferred as you have written in your Will. If you do not have a Will, your assets will be transferred to your heirs. If you have no heirs at the time of your death, then your assets will be transferred to the State of Michigan. The Probate Court Proceeding will also identify who the Personal Representative (formerly called Executor) of your estate will be. If you have a Will, the person whom you have named in your Will should be appointed Personal Representative, unless someone objects. If you do not have a Will, any interested party can petition the Court to be the Personal Representative of your estate. Probate Court Proceedings involve the payment of attorney fees, filing fees and inventory fees, and they are also public record.

What is the difference between a Will and a Trust?

With a Will you can distribute your assets and choose a Personal Representative of your estate as well as a Guardian and/or Conservator of any minor children you may have at the time of your death. However, if you have a Will, your estate must go through Probate, which involves payments of fees, a waiting period for disbursement of funds, and having the proceeding open for public record.

A Trust also allows you to distribute your assets to whomever you choose. However, with a Trust you can determine who receives the money, when they receive it, and what conditions must be met before they receive it. Trusts are not subject to Probate, so it eases the burden on your relatives after you die, by allowing assets to be distributed without having to go through the Probate process. Because Trusts allow you to pick the age of distribution, if you are distributing funds to a minor child, you can wait until they are much older to distribute that money with a Trust. If you have a Will, the money must be distributed to a child when they are 18 or 21.

Trusts are also recommended for people who have a taxable estate ($11.58 million in 2020), real property in more than one state, or many different kinds of assets. People in second marriage situations with children from previous marriages should also consider a trust to protect assets for their children. Getting good advice from a qualified estate planning attorney will help you choose what type of estate plan is best for you.

What is a Living Will?

A "Living Will" is a document in which you choose who would make medical decisions for you if you were unable to make them for yourself. In Michigan, we do not have "Living Wills"; we have "Patient Advocate Designations" or "Powers of Attorney for Health Care". A Patient Advocate is the person you choose to stand in your shoes and make a decision for you if you cannot make one for yourself. Many people believe that their spouse or children can automatically make these decisions, but you must have the designation in writing to avoid any confusion when the time comes that you need someone to act for you.

If I have to go into a Nursing Home, will I lose my house?

Michigan now has an Estate Recovery law. Estate recovery allows the state to come after a person's real property after his or her death, if they received Medicaid to pay for any long term care during their lifetime.

Most people who go into a nursing home do not have the money to pay approximately $10,000.00 per month for their care. As a result, they need to go on Medicaid to pay for it. Medicaid has very strict rules as to what a person can own. One of the things a person is allowed to own, and still be eligible for Medicaid, is a house. However, with Estate Recovery, the state can recover against the house for any costs they have paid for a person's care while in a nursing home. It is crucial, if you are concerned about long term care in the future, that you speak to an attorney who specializes in estate planning and elder law to give you all of your options.

Can't I just make my children co-owners of my house and other assets?

In most cases it is not the best idea to make your children co-owners of any of your assets. If you are concerned about avoiding probate, a Trust can transfer your house to your children without actually putting them on the deed. With your children on your deed, you lose total control of that asset. Another alarming thought is that, if your children have an accident or any creditors are after them, those creditors can come after your house to collect if their name is on the deed.

There can be tax consequences of deeding your property to your children while you are alive as well. They lose special protections that they would have if they inherited the property instead of receiving it during your lifetime.

Also, if you have to go into a nursing home, there are rules about what you have given away in the past five years, and adding a child to your deed is a gift to them which could stop you from receiving Medicaid, should you need to, in order to pay for your care.

Finally, if one of your children's names is on the bank accounts, after your death, that child can keep the entire amount, without distributing it to any of your other children. A good Durable Power of Attorney and Living Trust can accomplish the same goal as joint ownership without any of these concerns.

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