



Should You Have a Plan for Your Estate?

Part 1 of 2

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We all know that Hurricane Katrina was devastating, but there are some stories you may not have heard. Federal assistance was available to clean up destroyed property, but it was only available to landowners. In several cases, children were living on the land their parents had owned, and no one challenged their right to possess the land. However, they did not have legal title because their parents either did not have a will or the children did not probate or administer the estate. A document must be recorded in the Office of the Judge of Probate to change the title to land. The last recorded deed was in the name of the parents; so, the legal owner of the land was the estate of the parents, and the children did not qualify for the federal assistance.

No Estate Plan

Not having an estate plan can create both a financial burden and administrative hassle. If a decedent does not exempt his personal representative from posting a bond, the personal represen-

tative must give a bond equal to twice the value of the estate. The bond must be backed by two sureties, or a guaranty or surety company, and payable to and approved by the judge of probate. Therefore, the personal representative must first pay the money for a bond from his own funds before he can be appointed to probate or administer the estate. In addition to the bond, the personal representative must also file an inventory of all the decedent's property with the probate judge, and this inventory will become part of the public record.

Who owns the property? It is your property and you have the right to leave it to anyone you please, but you must exercise that right in the form of a will if you want to direct the disposition of your property. Maybe you have a child with special needs or want to do something for your favorite charity. Perhaps you want to leave the farm to your son and an insurance policy of equal value to your daughter. Maybe you want to take care of your

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spouse during his or her remaining life and leave the remainder to your children, without having to worry about your former spouse remarrying someone with children of their own.

Another problem that sometimes arises is, who takes care of your minor children? Suppose both parents are killed in a traffic accident. Would you want the grandparents to care for your children? Which ones? Would your brother, who has a family about the same age as yours, be a better choice? Does the children's guardian also manage their money? If you don't have an estate plan, we don't know the answers to these questions and a judge will have to answer them.

If you do not have a plan for your estate, the State has a plan for you. The plan is specified in the probate code (§§ 43-8-1 *et. seq.*, Code of Alabama, 1975), and it may not be what you would have wanted. For example, if you have a spouse and minor children, your spouse will get the first \$50,000 and half the rest while your minor children get the remainder. Your spouse, as conservator of the children's money, will have to make an annual accounting to the probate judge on how they spent the children's money. If that were not bad enough, the probate judge will hire an attorney for your minor children (paid from the children's money) who will determine if you spent the children's money for their benefit and not yours. By the way, you cannot use the children's money to pay for all of their expenses. Since you have a child support obligation, you must use your money to pay part of their expenses; otherwise, you are not a good steward of the children's money and may be replaced as conservator.

Estate Plans

An estate plan will generally consist of three documents: an advance directive for health care, which includes a living will and health care proxy; a power of attorney; and a distribution plan which can be either a will or a trust. If the distribution plan is in a trust, a power of attorney is not necessary, but the plan should include a "pour-over" will.

Everyone probably remembers the Terri Schaivo case. The question was, what would she have wanted? The purpose of the advance directive for health care is to make known your wishes if you should become terminally ill or permanently unconscious. The form also provides the opportunity to appoint a



health care proxy to speak for you if you cannot speak for yourself.

The power of attorney is an appointment of someone to manage your financial affairs. Basically you give an agent your signature authority, and the agent's signature binds you, just as if you had signed yourself. It is normally called a "durable" power of attorney because it is effective when the principal is no longer competent to manage his affairs; however, the principal has to be competent to give someone his power of attorney, and it terminates at the death of the principal. The power of attorney can be currently effective, or it can become effective only when the principal becomes incompetent ("springing" power of attorney).

A will provides for the distribution of property owned by the decedent at his death. The will must be in writing and signed by two witnesses, and it should be in the format of a self-proving will which basically means that the testator's and witnesses' signatures must be notarized. A will can be changed at any time before the death of the testator, either amended or revoked.

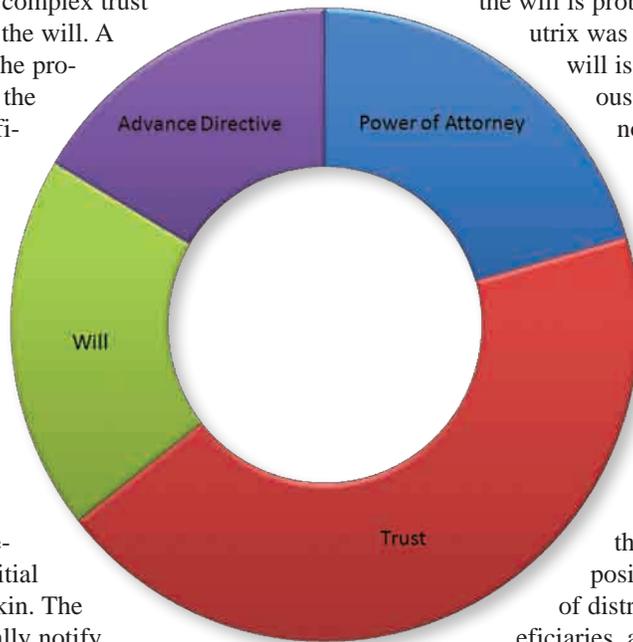
Jointly-owned property can be a substitute for a will, but there is no opportunity for planning. If a husband and wife own all their property jointly with right of survivorship, then the property will automatically become the sole property of the surviving spouse at the death of the first spouse, and the estate does not have to be probated. However, what happens to the property at the death



of the second spouse, or what if they die together in a common accident?

The distribution plan in a will can be as simple as, “all to my spouse if he/she survives me; otherwise, equally to my children,” or the will can create a rather complex trust to distribute the assets controlled by the will. A will provides for the distribution of the probate estate, which is not the same as the taxable estate. If an asset has a beneficiary designation, such as a life insurance policy or a retirement plan, or if the asset is owned jointly with right of survivorship, it is not part of the probate estate and will not be affected by a will.

A simple will, meaning a will that does not create a trust, provides for the outright distribution of the estate after the probate period. To be effective, a will must be offered for probate. The probate judge will appoint the personal representative or administrator after an initial hearing with the decedent’s next-of-kin. The personal representative must personally notify all known creditors of the estate and give notice to unknown creditors by publishing a notice weekly for three weeks in a local newspaper. Creditors are allowed up to six months to present their claims against the estate, and creditors must be paid before any assets can be distributed to the family.



Relatives may not be happy with the distribution plan in the will and may want to “contest” the will. “Grandfather promised me the truck” is not a valid argument. The result of a will contest is that either the executor/executrix was of sound mind and the will is probated as written, or the executor/executrix was not of sound mind, and none of the will is valid. If the will is invalid, a previous will may be effective, but if there is no valid will, the estate will be distributed according to the Probate Code.

At the end of the six-month period and after the debts are paid, the personal representative will distribute the assets remaining in the estate according to the distribution plan in the will. Once the assets are distributed, the decedent no longer controls the assets; if the child wants to sell the farm, that is his decision.

A trust is an alternative to a will that provides more control over the disposition of the decedent’s assets. Instead of distributing the assets outright to the beneficiaries, a trust can hold the assets and distribute them over a number of years, and the distribution can be contingent on the decedent’s wishes.

Part 2 of this article (in the next issue of *Alabama’s TREASURED Forests* magazine) will discuss the differences in a will and a trust, and why you might want to use a trust. 

