

Chapter 6

COMMON ESTATE PLANNING SITUATIONS

With the basics of wills and trusts in mind, how might you use these devices in planning your estate? This chapter sets out the most common considerations, focusing on "typical" married couples of various kinds. The next chapter will discuss estate planning for people who don't fit these common patterns. Keep in mind that this discussion applies to people who die with estates worth less than \$1 million, the present level at which the federal estate tax takes effect.

GENERAL CONSIDERATIONS FOR MARRIED COUPLES

While no two marriages are alike, most married couples share some basic estate planning needs, some of which are outlined below. What's more critical than the specifics that appear here, however, is that you discuss these matters with your partner. Often, couples will arrive at a lawyer's office only to discover that they have different fears and desires about where their money should go after they die. The husband might want some of his property to go to the couple's grown children, to help them get started in life. The wife, on the other hand, might see the limited job market for herself and want more of his money to go to support her. These are intimate matters that will have to be hammered out between you and your partner--preferably before you talk to a lawyer.

When you get married, you should be sure to rewrite your will or at least modify it by codicil. In some states a will is **revoked** (that is, canceled) by marriage, unless the will expressly declares that it was executed in contemplation of the particular marriage and that it shall not be revoked by that marriage. In all states, the law provides that your spouse can take a share of your estate, no matter what

your will says (see next chapter). You'll want to factor that into your estate plan and you may want to alter your will to account for it.

Most married couples with modest estates (and that's by far the majority of them) will execute simple wills in which each partner leaves everything to the surviving spouse. This is especially true if the couple is past the prime earning years or if one of them has depended on the other for support, and the children are grown and earning money.

A married couple's estate plan will usually change over time: they accumulate more assets, children are born and then leave the household, and the chances diminish that one spouse will long outlive the other. Here are some considerations for both young and middle-aged couples, assuming that one or both spouses work outside the home and that together they have a middle-class income.

Younger couples

Marianne and Gilligan are in their thirties. They are concerned about things like taking care of their minor children if they both die and making sure there's money set aside to pay for college (see next section), and, if one of them dies, giving the other an adequate income.

Because they haven't paid off their house, they bought mortgage-canceling insurance. For their other debts, they've arranged a debt-payment schedule and life insurance plan so their children won't be burdened with this duty if they die soon. They haven't yet earned enough money to worry about estate tax planning.

For all these reasons, they need a relatively simple basic will that leaves everything to the surviving spouse. The principal goal is to protect the surviving partner, who may have several decades to live if the other dies unexpectedly. Passing the property by will avoids the complications and limited income of an irrevocable marital trust, which would give the surviving spouse only the income from their

assets, not the assets themselves. In addition, they made each other beneficiary of their life insurance policies and other benefit plans.

This estate plan and will are interim documents, which Marianne and Gilligan will update as their assets and incomes grow.

Thurston and Lovey, on the other hand, have substantial assets, including a family business. Their plan includes a marital revocable living trust that leaves the surviving spouse the family assets. This will avoid probate, which is likely to be more complicated and costly for a larger estate than a simple one. They also have life insurance for liquid assets. Finally, each also has a will that leaves the residue of the estate to the trust; that will pick up any assets somehow left out of the trust.

Both couples have health care powers of attorney that let each spouse make decisions for the other if either becomes incapacitated, and a living will. These are discussed in chapter twelve.

Neither Marianne and Gilligan nor Thurston and Lovey uses a reciprocal power of attorney. Young couples (whose marriages statistically are most likely to collapse) should generally not execute reciprocal powers of attorney as a way of planning for incapacity. Should the breakup turn nasty, one partner who is legally entitled to act on the other's behalf might drain the other's savings account or squander his or her assets out of spite or greed. A **springing power of attorney** ([see chapter 7](#)) is far safer.

Providing for minor children

If you die and your spouse survives you, he or she will naturally have custody of your minor children, so you might think there'll be no need for a personal guardian for them. Even if you're divorced, it's almost impossible for the custodial parent to deny the noncustodial parent custody of their child if the custodial parent should die (there are rare exceptions, such as if the surviving parent is in jail

or has been found incompetent by a court).

If you leave all your estate to your spouse, the children will presumably have no property to manage, so you might think there'll also be no need for a guardian of their property.

But what if you both should die, say in a car accident? Your will should provide for that real--if remote--possibility by nominating one or more persons to fill these roles.

If both parents die, the law requires a minor child to have a personal guardian to step in and in effect become the child's parent. Who would be the guardian for your children? Many people haven't given this question enough thought. Questions to consider: Who would provide the best care for your children if you die? Is the home you choose large enough for them? Will their guardians have enough money to provide your children with the kind of education and environment you prefer? What sort of financial provisions should you make for the children?

A will can nominate a personal guardian. The probate judge doesn't have to accept the testator's choice--although unless someone challenges that choice as not being in the child's best interest, the court will almost always go along.

It's better to nominate an individual as personal guardian; if you name a couple and they split up, what happens to the child? Be sure to consult with the person you name to be sure he or she wants the job, and name an alternative guardian in case your first choice should have a change of heart or die before the child is grown.

If you don't appoint a guardian for your children, someone (usually a friend or relative) may ask the court to name him and her as guardian. If no one volunteers, the court can choose someone, generally the nearest adult relative. Again, the guide is the child's best interest.

Property guardians

What about the person who will look after the children's property--the property guardian or property manager? Children under 18 can't legally own (without supervision) more than a minimal amount of property; the law requires an adult who is responsible for managing all property above that minimal limit for the child's benefit. You should definitely name a property guardian for your children, even if you don't leave them any money in your will, in case the other parent dies too.

Who should be the property guardian? Generally, the same person you name to be the child's personal guardian. You can appoint two different people to manage the child's money and personal affairs, but be aware that conflicts can arise if you split authority this way. Still, if the personal guardian lacks the financial expertise or inclination to manage money, it may be worthwhile to consider another relative or friend to be the property guardian. Consider an alternative to a bank or other institution as property manager, particularly for a small- to medium-sized estate; often their fees are too high and they are too impersonal to provide the level of service you want and need.

The difficulty with property guardians is that the law usually requires the guardian to put up a bond, file all sorts of legal papers, account for finances, and negotiate a maze of legal requirements--all of which would be at least doubled if that guardian dies or resigns and a successor guardian is appointed.

For example, all but twelve states require that the property guardian post a bond, and in some of those states you can't waive the requirement in your will. There may also be restrictions on who may serve as the children's property guardian. That's why it's best to minimize the role of the property guardian by setting up a simple trust for your children in your will. The trust would probably be funded by life insurance policies on each parent's life, payable to the surviving spouse, or to the children's trust if both parents die simultaneously. It would come into being at the death of the second parent.

In such a testamentary trust or a revocable trust to which the will pours over, you appoint

someone (a trustee) to manage the assets you leave to your children, set forth the conditions under which money would be paid to them, and give the trustee authority to spend, sell, or invest the assets for the children's benefit. Typically, the trust would provide for the children's care and education and make money available to them as they reach certain ages indicative of maturity--18, 21, 25, or 30. Trusts are far more flexible than guardianships, which require court approval of actions by the guardian and usually must follow strict rules for paying out funds to children, rules that may not agree with your wishes as to which of your children should receive which of your assets and when.

Custodian accounts

What if your estate is modest and you don't think it warrants setting up a trust for your children, but you still want to convey property to them upon your death? You can set up a custodian account for them while you are still alive and usually bequeath funds to that account through your will. The Uniform Gift to Minors Act (UGMA) or the Uniform Transfers to Minors Act (UTMA) have been adopted by almost all the states. Most states that permit you to make gifts to these accounts in your will.

The UGMA and UTMA authorize the creation of custodian accounts for minors. Thus, they're different from bank accounts you'd open in a child's name. But the mechanism they authorize is so simple that you can probably set them up using just a bank or brokerage. These laws allows you to open an account in a child's name and deposit money or property in it while you are still alive. You can make yourself custodian of the account, and set up a successor in case you die while the child is under 18 (or up to 21 or even 25 in some states). Use the child's social security number.

Both laws give the custodian broad powers, with the powers under the UTMA being somewhat wider. For example, an UGMA custodian cannot take title to real property unless the statute has been modified.

When your children are over age 13, the income in these accounts is taxed by the federal government at the children's rate, which will almost certainly be lower than yours. For younger children, through the "kiddie tax," the federal government taxes income from the account at your tax rate.

The drawbacks? Some parents might be uncomfortable with the fact that a child 14 or older must pay taxes, or the fact that the funds become the child's property when he or she reaches age 18, leaving you no control over it then. Also, the kiddie tax doesn't give you any tax breaks. If you die before the child reaches 18, the funds revert to your estate and are taxed accordingly, unless you've named a third party as your successor custodian.

In the states that permit gifts by will to these accounts, you can also use this mechanism to leave a gift to children who aren't yours, say a favorite nephew. Or you could set up a trust just as you would for your own children, or leave it to the child's parents to be used for his benefit (although this wouldn't legally bind the parents to spend it on the child).

Using an UGMA, UTMA, or trust will reduce the amount of supervision and paperwork required by the court, and thus lower expenses to your estate. If most of the assets you leave to the child are handled by these methods, it can reduce the probate court's involvement to almost nothing. But even if you make gifts to your child in any of these ways, you still must name a personal guardian in your will, as well as a property guardian to manage property the child receives after you die and property inadvertently left out of the trust or UGMA/UTMA gift. You can make the same person the personal guardian, property guardian, custodian, and trustee.

Contingency plans for your children

Of course, you want to provide for your children, but sometimes you don't get around to changing your will when you have a new child. The law helps you out in that case. If you've made a will, then

have another child and die before you can change your will to include him or her, most states provide for a share of your property to go to this **pretermitted child**.

The share a pretermitted child is entitled to take varies from state to state. It also may depend on whether you left him or her a gift through some means other than a will (such as a living trust), and whether you had other children who received gifts in the will.

Generally, if you had no other children, the pretermitted child would receive the same share he or she would have had you died intestate (without a will). If you had other children, yet gave them nothing under the will (often people leave everything to the spouse), the pretermitted child would receive nothing, just like the other children. If, however, you left property to the other children, the omitted child may be entitled to what he or she would have received had you given each child an equal share. Thus, if you had two children and provided for them in the will, and a third was born later but left out of the will, the court would divide the amount of the estate you left to the other two children by three, and give the pretermitted child one-third of the total.

If you want to avoid this result, the best way is to keep your will up to date and specifically disinherit any children you don't want to provide for. Obviously, if it could be shown that you had intentionally disinherited any children yet to be born--usually by language in the will--no pretermitted child laws apply. They also usually don't apply to nonprobate instruments like a living trust.

What happens if you will some of your property to one of your children, but he or she dies before you do? Generally, a will can't make a gift to a dead person, so if a beneficiary dies before you, the gift **lapses** or fails (i.e., it goes back into your estate). However, many states have **anti-lapse** laws providing that a gift to a beneficiary who dies before you passes on to that person's descendants.

One way to accommodate late arrivals or early departures is not to bequeath your assets to children by name, but as a class (for example, "I leave all my property in equal shares to my children

living at my death and to the then living descendants of each deceased child, the descendants of a deceased child to take their ancestor's share, per stirpes"). If you have three children when you make the will, and one dies before you do, the remaining two children will inherit one-half of your estate instead of one-third, unless the deceased child leaves descendants, in which event the descendants take the deceased child's share.

What about children who don't fit the traditional categories, such as adoptees, children of a previous marriage, and so-called illegitimate children? In most states, adopted children are treated just like natural children unless you indicate otherwise in your will. To avoid problems, specify in your will that "child", etc. includes (or excludes, as you wish) an adopted child. If your will simply indicates that gifts will go to your children (without indicating which children), children from all your marriages will be included in that term. However, if you marry someone with children from a previous marriage and don't formally adopt these stepchildren as your own, they are not included in your bequest to your "children" unless you specifically say so. If you're a male, in most states a bequest to "children" includes only legitimate children. But in the case of a mother, a bequest to "children" usually includes illegitimate children.

Older couples

Archie and Edith have paid off the mortgage on their home. They've accumulated many more assets than they had when they were young, and have to be concerned about lowering the taxes on their estate. With retirement near, they're concerned with assuring that the surviving spouse has enough funds for a comfortable life for his or her remaining years.

Like most older couples, they have left everything to the surviving spouse, with the expectation that the property will pass to the children or grandchildren upon his or her death.

Fred and Ethel, whose children are have already established themselves well in the world, are less concerned about providing for their children and want instead to concentrate on leaving a gift (probably in trust) for their grandchildren, with the parents to administer it. Since the surviving spouse will likely not live many years beyond the first spouse, each has set up a **marital trust** effective upon his or her death. The surviving spouse would live off the income from the trust, and at death the principal would go to the children or grandchildren.

Lucy and Ricky have enough assets to worry more about tax planning and giving gifts to friends and relatives outside their immediate family. To accomplish these goals, they created a **marital living trust**, which will avoid probate and help protect assets from taxes. They placed most of their assets into this living trust, and the surviving spouse receives the income from that trust for the rest of his or her life. When the second spouse dies, the property remaining in this life estate trust will pass on to their children or grandchildren; other beneficiaries would receive gifts via their will, which also picks up assets not placed in the trust at the time of their death. The successor trustee should be the child (and/or a professional trustee, if the estate is large enough) who is most capable of managing the money for the grandchildren's benefit. This type of vehicle requires the advice and active participation of a lawyer and other professional advisors.

Older couples, like younger ones, must plan for the possibility of their dying simultaneously. In that case, they'll want a provision that sets up a contingent gift for any grandchildren; that is, if one of your children dies before you do, the gift that would have gone to that child will instead pass to his or her children when they reach age 18 or 21. Sometimes the gift will be structured so that a contingent trust comes into being when you die, and the gift will be held in trust for the grandchildren till they reach majority age. Or the trustee can pay it out over time, so that the grandchildren don't suddenly have thousands of dollars at their disposal when they are still relatively young.

Bequests to children

If you have more than one child, keep in mind that you don't have to leave money or property to your children in equal shares, although this is the most common arrangement. Rather, you can leave each child the kind and amount of assets that best suit his or her situation. The grown child who just graduated from medical school, for example, would probably need less of an inheritance from you than the learning disabled child who just turned 19. The son who shares your interest in ichthyology would probably appreciate your aquarium more than your daughter, the stock car driver.

Disinheriting children

Children may be disinherited. In case your state has standards of specificity for disinheriting children you should be sure to name in your will the children you intend to disinherit: "I intentionally make no provision for my son, Oedipus." In a few states, you must leave the disinherited children a token amount, usually a dollar, to make sure they don't get a share against your wishes. Louisiana, as usual, is an exception to the general rule. It has a "forced heirship" policy which, absent certain exceptions, requires parents to leave a share of their estate to their children.

Single people

Married people aren't they only ones who need to plan their estates. If you're single and have children, you'll want to provide for guardianship using one of the techniques described above (if you're cohabitating with a lover of the same or opposite sex, [see chapter seven](#)). Whether or not you have children, you'll probably want to use a health care power of attorney, living will or other device discussed in chapter twelve to plan for your possible incapacity or terminal illness. You may want to

pass certain property to certain people--your antique dresser to the niece who so admires it, your Cajun accordion to a music-loving friend--which you can do with your will ([chapter three](#)) or a living trust (chapter five). And if you're wealthy, you'll want to use tax-avoidance techniques (discussed briefly in chapter eight) to give your property to relatives, friends or charities instead of the government. In short, as you read this book--whether you're thoroughly single, utterly married, or somewhere in between--look for estate planning techniques that seem appropriate to your circumstances.

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