



RAMMELKAMP BRADNEY

• Attorneys at Law •

***BASIC TOOLS OF  
ESTATE PLANNING***

*Richard R. Freeman  
Attorney at Law*

232 W. State Street • P.O. Box 550 • Jacksonville, IL 62651 • ph 217.245.6177 • fax 217.243.7322

*Branch Offices*

520 E. Allen Street • Springfield, IL 62703 • ph 217.522.6000 • fax 217.522.6018

46 S. Hill Street • Winchester, IL 62694 • ph 217.742.5215 • fax 217.742.3537

## **BASIC TOOLS OF ESTATE PLANNING**

*Richard R. Freeman  
Attorney at Law*

Congratulations on your decision to seek out more information regarding estate planning for you and your family! Please remember, however, this is only the first step. The process usually involves several more steps before it is completed. This, of course, includes working with an attorney knowledgeable in estate planning matters. It is not uncommon for the process to take several months to complete. As a result, oftentimes people fail to follow through with completing the process. This can leave many questions and problems unresolved for your surviving family. After all, they are the ones that pay the price for your failure to plan! Also, once a plan is established, do not assume you are set for life. More than likely, your plan will need to be reviewed and updated on a regular basis and as your family and financial situation changes.

What follows is a basic sketch of some of the most common components of an estate plan and a general discussion of their purpose and advantages. Please keep in mind this is only a general outline and discussion. You should consult an attorney regarding the specifics of your situation and the documents that may be most appropriate for you.

### **BASIC COMPONENTS OF AN ESTATE PLAN**

Most estate plans make use of one or more of the following instruments or tools, in conjunction with appropriate tax planning:

1. Will
2. Trust
3. Durable Power of Attorney for Property
4. Health Care Directive
5. Common Ownership of Property
6. Long Term Care Planning

### **DO I NEED A WILL?**

In most all cases, you should have a Will. The Will provides for the disposition of property held in your name only or as a tenant in common. It is a road map for your family. The following are some common reasons for needing a Will:

1. RULES OF INTESTATE DISTRIBUTION – If you die without a Will, the laws of the State of Illinois determine who takes the property held in your name only or as tenants in common.

a. If a spouse survives and there are no descendants, then the spouse takes everything;

b. If a spouse survives and there are surviving descendants, then one-half to the spouse and one-half to the descendants;

c. If no spouse survives and there are surviving descendants, then the surviving descendants take everything;

d. If none of the above, then to parents, brothers and sisters, and so on.

Generally, most people prefer to control who receives their property at their death rather than allow state law to decide for them.

2. PROVISION FOR MINOR CHILDREN – It is common to provide for the care and protection of minor children in the event of the death of both parents. This usually involves two aspects:

a. Nominating a Guardian for the children – someone with legal authority to take care of them under the supervision of the Court.

b. Trust for Minors – typically provides that all or part of the assets of the estate will be held in a separate entity (the Trust) to be managed by an individual or financial institution (the Trustee) for the benefit of the minor children until they reach a specified age or event in life.

c. Same principles can extend to grandchildren.

3. PROVISION FOR SURVIVING SPOUSE – This may be in the form of an outright transfer to the spouse of all or part of your estate, use of a life estate or one or more trusts. In most instances with larger estates, this is an important estate tax planning area and opportunity.

4. DISTRIBUTION OF ASSETS AMONG BENEFICIARIES – The Will allows you to state exactly how you want your assets to be distributed among the beneficiaries you select.

5. AID IN ESTATE TAX PLANNING – The Will can be used to help eliminate or minimize estate taxes in many cases.



6. SELECTION OF EXECUTOR OF YOUR ESTATE – The Executor is the individual or institution you select to handle your estate upon your death.

7. PROBATE vs. NON-PROBATE PROPERTY – Probate property is that property which will be distributed pursuant to the terms of your Will. Generally, it is any property you own at the time of your death in your own name or as tenants in common with another. Non-probate property is not subject to the terms of your Will and includes the following:

a. Instruments that allow you to name a beneficiary, such as: Life Insurance, Pension & Retirement Accounts, IRAs.

b. Property held by a Trust at the time of your death.

c. "Payable on Death" accounts and instruments - can include stocks, mutual accounts and brokerage accounts that are so designated.

d. Jointly held property with a right of survivorship feature (joint tenants and tenants by the entirety).

e. Life estates. The interest of the life tenant terminates upon the death of the life tenant with title fully vesting in the holder of the remainder.

## ***TRUSTS – WHAT ARE THEY? WHY MIGHT I WANT ONE?***

1. GENERAL EXPLANATION – A Trust is an entity created either by Will or by a separate agreement during life. Its most basic purpose, common to all trusts, is to hold property for the benefit of the beneficiaries of the Trust pursuant to a specific set of instructions contained in the document establishing the Trust (either the Will or separate agreement). The individual or institution charged with responsibility for managing the property placed in the trust is called the Trustee. By law, the Trustee is charged with a very high duty of care in dealing with the property (called a fiduciary duty).

Property held by a Trust is not subject to Probate.

### 2. DEFINITIONS

a. Testamentary Trust – a trust created by the Will of the deceased. Irrevocable once established.

b. Inter Vivos Trust – a trust created by an individual while still alive (sometimes called a Living Trust or Lifetime Trust). Can be Revocable or Irrevocable.

c. Revocable Trust – can be revoked, modified or amended at any time by the person who created the Trust. Usually an Inter Vivos Trust.

d. Irrevocable Trust – cannot be revoked, modified or amended after it is established. Can be Testamentary or Inter Vivos.

### 3. REVOCABLE LIVING TRUSTS

a. Plan for incapacity or disability.

b. Asset management tool.

c. Avoid guardianship in the event of disability or incompetency.

d. Confidential – no probate required.

e. No income tax advantage – all income taxed to the Grantor.

f. No estate tax advantages – still considered a part of the Grantor's estate.

g. Typically lower administration costs at time of death than a probate proceeding.

h. Many times assets can be distributed to beneficiaries much faster than through a probate proceeding.

### 4. IRREVOCABLE TRUSTS

a. Shifts assets held by the Trust outside of your estate – therefore, not taxable to Grantor's estate.

b. Useful as part of a gifting program to shift wealth.

c. Often used in conjunction with large life insurance policies.

d. On certain Trusts, income tax rate structure is severe.

e. Some fear loss of control because it is irrevocable once established.



## **POWERS OF ATTORNEY**

### **1. DEFINITIONS**

a. Power of Attorney – where individual delegates certain specified authority or powers to another individual or institution (the “agent”) allowing them to act on their behalf.

b. Durable Power of Attorney – the Power of Attorney will survive the incompetency of the principal. All powers of attorney are “durable” unless they specifically state otherwise.

c. Springing Power of Attorney – the Power of Attorney takes effect on a specified date or upon a specified event.

d. Limited Power of Attorney – the authority granted under the Power of Attorney is limited in duration and/or scope.

### **2. TYPES**

a. Financial/Property Power of Attorney – agent is granted powers over property or financial decisions.

b. Health Care Power of Attorney – agent is granted powers over medical and health care decisions.

### **3. PURPOSE AND BENEFIT**

a. Incompetency or disability – allows someone to continue to manage your affairs in the event of your incompetency or disability.

b. Avoid the need for a guardianship and being declared incompetent by the Court.

c. In the event a guardian is needed for some reason, can nominate who you want to be that guardian.

d. Can be helpful in implementing estate plan where assets are overlooked or forgotten.

## **HEALTH CARE DIRECTIVES – WHAT ARE THEY?**

Very simply, a health care directive is a written statement by you stating your wishes and intentions regarding medical treatment in the event you are unable to respond directly to the medical provider. Unless written direction is provided, or

the Court determines otherwise, the law presumes you want any and all medical treatments necessary to prolong your life. State statute provides two different forms for providing this written direction.

1. HEALTH CARE POWER OF ATTORNEY – This power of attorney allows you to name someone to make health care decisions for you on your behalf. Unless limited, this form allows the person you name to make, on your behalf, almost any health care decision that you could make yourself, if able. It allows you to choose from three options regarding your wishes about “extraordinary” medical treatment.

2. LIVING WILL – This document is a declaration of your intent (as determined and written by the General Assembly) regarding provision of “extraordinary” medical treatments in certain situations. It is limited in its scope and application.

3. OTHER FORMS – You are not required to use the State created forms. You can modify them or use different forms. However, in doing so, you run a risk of the form being misinterpreted by the medical provider or by the Court.

4. HEALTH CARE SURROGATE ACT – State law also provides a mechanism in the event you have not signed a health care directive. It requires two physicians to agree that you have a terminal condition, incurable condition or suffer from permanent unconsciousness. In that event, a hierarchy of decision makers is set forth who are to act in accordance with your wishes. Probably unwise to rely on this Act to handle the problem.

### ***COMMON OWNERSHIP OF PROPERTY***

The following are common ways to hold title to property:

1. JOINT TENANCY WITH RIGHT OF SURVIVORSHIP – Each own equally; on the death of the first, the other becomes the sole owner automatically. Not subject to probate.

2. TENANTS BY THE ENTIRETY – Applies to residential real estate only. Same as joint tenancy but not subject to creditors of one joint tenant. Not subject to probate.

3. TENANTS IN COMMON – Own an undivided interest in the property. Your share of the property passes pursuant to your Will and is subject to probate.

4. PAYABLE ON DEATH – Applies to certain bank and investment accounts, bonds and stocks. You own and control the asset during your lifetime. At your death, it is paid to the person you name. Not subject to probate.



✱ 5. LIFE ESTATE/REMAINDER – Ownership is divided between the life tenant, who is entitled to the use, occupancy and rents of the property during their lifetime, and the remaindermen, who own an interest in the property but do not receive benefits from the property until the death of the life tenant. Not subject to probate.

### **TRANSFER TAXES – A FEW BASICS**

The Unified Transfer Tax System allows for the transfer of property during your life (gifts) and at your death (inheritance) to be taxed under a unified system of taxation. The rate structure is harsh with a top rate of 45% in 2007.

1. EXCEPTIONS – The following are exceptions and deductions available to the transfer tax:

a. APPLICABLE EXCLUSION AMOUNT – Each individual receives an applicable exclusion amount that is a credit against transfer tax. Under current law, each individual can transfer tax-free up to \$1.0 million worth of cash and property during their lifetime and \$2.0 million at death. Anything above those limits is taxed under the unified transfer tax rate structure. Lifetime transfers are subject to gift tax. Transfers at death are subject to estate tax. Current law provides for the applicable exclusion amount for estate taxes to change as follows:

2006	\$2,000,000
2007	\$2,000,000
2008	\$2,000,000
2009	\$3,500,000
2010	Transfer Tax Repealed
2011	\$1,000,000

b. MARITAL DEDUCTION – Transfers between spouses during life and at death are tax-free by virtue of the unlimited marital deduction. With proper planning, the marital deduction can be utilized to allow a husband and wife to transfer up to a total of \$4.0 million worth of assets to their children free of estate tax.

c. ANNUAL GIFT EXCLUSION AMOUNT – Each individual, during his or her life, can give up to \$12,000 per donee per year tax-free without using any of his or her applicable exclusion amount. This amount can be doubled if the donor's spouse will agree to split the gifts. The Exclusion Amount is indexed for inflation.

d. EXCLUSION FOR PAYMENT OF MEDICAL EXPENSE AND TUITION – Each individual during his or her life can pay *directly* for



another person's medical and tuition expenses without any limitation. The payments must be made directly to the medical provider or the educational institution and not to the individual. No limitation is imposed on the amount that can be paid, nor does the payment count toward the Annual Gift Exclusion Amount or the applicable exclusion amount.

2. GROSS ESTATE – The gross taxable estate for purposes of calculating the estate tax includes the following.

a. All assets held in name of the decedent – cash, real estate, stocks, bonds, investments, personal property, etc.

b. Jointly held assets – assets held jointly with the spouse – 50% of the value; assets held jointly with anyone else - 100% of value unless you can show the other person contributed to the asset.

c. Life Insurance owned by the decedent – the death benefit of the policy is included.

d. Retirement Assets owned by the decedent – including IRAs, 401(k)s, and annuities.

e. Certain assets in which the decedent had an interest at the time of death, including certain trusts.

3. TAXING EXAMPLES – The following examples assume a single individual:

<u>Taxable Estate</u>	<u>2007</u>	<u>2011</u>
\$4.0 million	\$900,800	\$1,495,000
\$3.0 million	\$450,800	\$ 944,200
\$2.0 million	\$ 0	\$ 435,000
\$1.0 million	\$ 0	\$ 0

## **LONG TERM CARE PLANNING**

With increasing life expectancies, the aging of the baby boomers and our population in general, the issues surrounding long term care are becoming an important and integral part of estate planning and asset protection. While this is a concern for the senior, it is an even bigger concern for their children.

1. POSSIBILITIES – There are three basic ways to deal with long term care costs, each of which is appropriate in the right situation.

a. Public Assistance through the Medicaid program – after you have spent down your assets in order to qualify for assistance.

b. Self insure – pay for the care out of your own assets and income. This works fine for those that can afford to pay for the care out of their current income or do not otherwise care about preserving their assets. After spending down all of your assets, then can qualify for Medicaid.

c. Long term care insurance – this works well for those that can afford the premium and want to preserve and protect their assets.

2. BASIC SITUATIONS – There are four basic factual situations that substantially influence how to address long term care costs.

a. Those who cannot afford long term care insurance and have few assets – in this case it is necessary to spend down assets in order to qualify for public assistance.

b. Those who have sufficient income and/or assets to pay for the long term care costs themselves – they simply self insure.

c. Those in between – they do not have sufficient income to pay for the care themselves, but have enough assets and income that they want to protect them. This group needs to consider long term care insurance the most as they have the most at risk.

d. Those who fail to plan – they are either not insurable or waited too long to do any effective planning.

### **CONCLUSION – POINTS TO REMEMBER**

1. If you don't have a current Will or estate plan – get one.

2. Do powers of attorney for property and health care – and tell your family about them.

3. If your gross estate approaches or exceeds \$1.0 million you need to do estate tax planning – as always, seek out competent legal advise.

4. Address long term care issues and costs now so your spouse and children don't have to worry about it or their inheritance later.