ESTATE PLANNING BASICS Q&A

Why do I need a Will? What happens if I die without a Will?

A. A Will is important to
(1) Make sure your property passes the way you want; and
(2) Make the probate process a lot simpler, faster, and cheaper by providing for an Executor to operate "Independent" of Court Supervision.
(3) Provide for guardianship of minor children, if applicable;
(4) Establish trusts for minors or beneficiaries under a specified age, or for heirs who are incapacitated or just not good with money, if applicable.
(5) Establish a trust in the Will to take effect upon death for estate tax reduction or elimination if a taxable estate is involved.

A. If you die without a Will,
(1) State law determines how your property passes, and it depends on whether it is separate or community property, real estate or personal property, a surviving spouse or not, kids or not, kids of both or not, etc. Not having it spelled out properly in a Will could mean the property will NOT pass the way you would want, or your spouse's property might not pass to you as you would expect; AND could require expensive guardianship proceedings for minor children or grandchildren who inherit in some cases. (For example, if a spouse with separate property - including inherited or gifted property - dies, that property or most of it may go to the children or to that spouse's family – not the surviving spouse as they might expect. In a blended family situation, even the community property of the first spouse to die and most of their separate property does not pass to the surviving spouse as they might expect, unless that is provided in a Will.)
(2) The handling of your estate could be unnecessarily difficult and expensive if you do not have a Will saying how your property passes, and naming your spouse or other person as an "Independent Executor" to carry out the terms of the Will independent of court supervision.
(3) The Court determines who will serve as the guardian of the minor children, in the absence of a designation by the parents in either a Will or other legal Designation of Guardians for the children.
(4) To the extent the property passes to minor children without a Trust for Minors set up in a properly drafted Will, expensive guardianship proceedings will be required for the child's estate even if one of their parents is still alive!

(5) As discussed below, it could cost your estate hundreds of thousands or even millions of dollars in estate taxes if estate tax planning is needed and is not done.

Are there going to be any estate taxes on my estate? Are there things I can do to avoid or reduce any estate taxes?

A. There will be estate taxes if your estate, **including the face value of any life insurance**, is over the exemption amount. Any taxable part of your estate will be taxed at approximately 45%, possibly increasing to 55% next year! [The exemption amount is currently only $1Million for 2011 and after – **including the face value of life insurance**!]

A. The use of By-Pass / Credit Shelter Trusts in Wills is one of the basic estate tax planning methods to eliminate estate taxes. (Instead of the first spouse to die leaving all of their property to the surviving spouse outright, so that the surviving spouse is left with an estate that is more than the exemption amount when they die (and subject to a 45% or more estate tax); the first spouse leaves as much as possible (up to the current exemption amount at the time of death) in a "Bypass/Credit Shelter Trust" provided in the Will to take effect upon the death of the first spouse, for the surviving spouse to use for life (and the surviving spouse can even be the Trustee/Manager of the Trust), then to the kids after the surviving spouse passes. If properly drafted this Trust "bypasses" or keeps the money out of the surviving spouse's taxable estate, reducing or eliminating estate taxes on that amount and any increase on it, but still allows it to be available to the surviving spouse to the extent needed. (The estate tax credit of the first spouse to die "shelters" it from taxes.)

Should I have a Living Trust instead?

A. I don't *generally* recommend living trusts, because I believe they can be an unnecessary complication, and that the reasons often given for them are not good ones.

(1) They only operate to avoid probate if fully funded with all assets, so a "Pourover Will" and probably probate still required. I feel Court supervised probate is best avoided by the appointment of an "Independent Executor" in the Will - meaning independent from court supervision in the probate process.
(2) Same estate tax planning can be done with a trust in a Will that doesn't take effect until death, and then only to extent needed (simpler, cheaper).
(3) Disability planning can be done with a Power of Attorney.
(4) Generally Trusts are more expensive to set up and maintain.
(5) Raises questions about Homestead protection from creditors, Homestead tax exemptions, violation of "due on sale" clauses, etc.
(6) Trusts can easily lead to disputes and litigation, with resulting costs.

I will do them if the client wants to after I explain the options to them, or in a situation where a living trust might be advantageous for other reasons. (Family members trying to get to the money from the individual owner with charm or bullying, out of state real estate which would require an ancillary probate in that state, etc.)

Are there any other estate planning documents I should have while I'm at it?

A. Yes. General and Medical Powers of Attorney, and Designation of Guardians as a backup to Powers of Attorney; Directive Regarding Life Support if desired; and a HIPPA compliant Authorization for the Release of Medical Info to specified persons including those designated under the Medical Power of Attorney.

What is a "Power of Attorney", and why would I need one?

A. A document to appoint someone else to act as your agent in the event of disability or incapacity, to avoid the need for an expensive and complicated guardianship proceedings that might otherwise be required.
B. A General Power of Attorney for Property and Financial matters, and a Medical or Health Care Power of Attorney for medical or health care decisions. (Required by law to be in separate documents.) (Discuss the term "Durable" Power of Attorney, and three options.)

How can I make my wishes known regarding life support?

A. By executing an Advance Directive to Physicians and Family regarding life support. (Commonly known as a "Living Will".) You are making the decision yourself, while you are still able, instead of leaving the burden of that decision to someone else to have to make for you.

What do lawyers normally charge for estate planning documents?

A. I try to keep my charges at the lower end of the scale as I know it, and I generally charge around $500-$750 for a simple estate planning package for a single person, including a Will, Powers of Attorney, Directive Regarding Life Support, and the other documents referred to previously. I give couples a discount down to $375 per person because they are meeting with me at same time, and signing at same time, and info is often pretty much the same; so it doesn't take as much of my time as doing it for 2 people separately. I generally charge about twice as much for a taxable estate that necessitates estate tax planning trusts to avoid or reduce estate taxes, with guidance regarding the related coordination of any non-probate assets. Estates with special considerations might result in slightly higher charges (special complications or provisions, meetings and/or execution ceremonies requiring me to spend additional time for travel, etc.). (Some attorneys' charges are significantly higher than these.)

How does the estate planning process normally work?

A. I generally like to meet with the client or clients for at least thirty minutes to an hour or so; usually in my office, but not always if circumstances require a meeting somewhere else. If the client is real busy or cannot meet because of distance, or doesn't feel the need to meet, I can get the information and we can discuss it by phone or e-mail.

Then, I normally try to prepare drafts of the documents and e-mail them or otherwise deliver them to the client[s] within the next day or two if at all possible, and it usually is. I'll ask them to review them, call me with any changes, and we'll set up a time for them to come in a sign them before two witnesses and a notary public which I provide in my office; or which can be done out of the office if necessary.

What about the software or kits people can buy or download to prepare Wills and other estate planning documents without an attorney?

A. I certainly understand the desire to save money by doing it yourself, and I would have to review the particular product used to determine what all I thought about it; but I am already seeing some huge messes resulting from people using them. For example, not making the Executor "Independent" from court supervision – which generally makes the probate process a lot more complicated and expensive; not properly disposing of all assets, so that expensive proceedings are required in addition to probating the Will; not planning for the possibility of a prior death of one or more beneficiaries or appointees; not establishing Trusts if needed for minor children or grandchildren, or for adult children who have special needs - resulting in the need for expensive guardianship proceedings; not including estate tax planning when estate taxes are involved; people appointing co-executors or co-trustees which can lead to big problems, especially if the co-appointees don't get along well; etc. Also, the applicable laws differ from state to state, so that a "national" product may not be created in accordance with Texas law. I certainly would hope the hour or so I spend meeting with clients and explaining everything to them and advising them, in addition to preparing the documents for them, is worth the $200 or so price difference between the cost of the Will Kit and what I charge for a simple Will.

Read the disclaimer in fine print I've seen at the bottom of forms like this – saying things like "This form is for informational purposes only"; "This is not a substitute for the advice of an attorney"; "This form is not necessarily prepared by an attorney"; "No warranties are made as to the validity or effectiveness of this form under the laws of your particular state"; etc. In other words, the form itself might tell you it can't be relied upon.

What does "probate" mean? Is it always necessary? How does it happen, and what does it cost?

A. Probate is the legal procedure to have a proper court approve the Will and implement the collection of assets, payment of creditors, and distribution of remaining assets according to the Will. There are other names for the court proceedings required if there is no Will (administration, determination of heirship, Small Estate Affidavit, etc.), but they are sometimes also referred to as probating an estate. (Not having a Will can make the process much more difficult and expensive.)

A. Probate is not always required. For example, probate may not be required if the devisees who would take under the Will are also the natural heirs at law; *and* if they have access to the assets in the estate without any Probate Order, either because they are non-probate assets with beneficiary designation forms, or because they are co-signatories on all of the accounts and there is no real estate involved, or because only personal property items are involved, etc. A probate attorney can help you determine whether any kind of "probate" process is required, and which type is appropriate. (Probate of Will with Letters Testamentary if there are unpaid debts, claims by the estate, or other need for administration; Probate of Will as a Muniment of Title only if there are no debts, but just need transfer of ownership to be legally reflected for real estate, stock, accounts, etc.; Administration, Small Estate Affidavit, or Proceeding to Determine Heirship if no Will and no other administration is required; etc.).

A. My attorney fees currently range from $1,500 - $2,250 for the basic uncontested probate process, depending on which type and what all is required, in addition to the Court's filing fees of $200-$300. Contested matters are generally handled on an hourly basis since it is usually not possible to predict how much time and effort will be involved.

Presented By:
D. Lee Gwinn, Attorney
THE LAW & MEDIATION OFFICES OF
D. LEE GWINN
Ridglea Gardens
6500 West Vickery Boulevard
Fort Worth, Texas 76116
Phone: (817) 735-8885
Fax: (817) 738-4036
E-Mail: DLeeGwinnLaw@Charter.net