

Dispelling Myths Regarding Planning For Incapacity and Death
St. Andrew's Village
June 6, 2014

Kirch and Rounds, P.C.
Attorneys at Law
3131 South Vaughn Way, Suite 200
Aurora, Colorado 80014
(303) 671 - 7726

A. What Is Probate?

1. Probate Of Will: Is It Necessary?
2. Assets Controlled By Will Or Intestacy Statute.
3. Role Of Personal Representative.
 - i. Letters Testamentary Or Letters Of Administration (Badge Of Authority).
 - ii. Duties: Collect Assets, Pay Bills & Taxes, And Distribute Assets.
 - iii. Entitled To Reasonable Compensation Based On Time Not Percentage: The Need To Keep Detailed Time Records.
4. Informal And Formal Probate.
 - i. The Flexibility To Switch Back And Forth.
5. Small Estate Affidavits.
 - i. If Colorado Probate Assets Are Less Than \$64,000 (2014) And No Real Estate Needs to be Conveyed.
6. Joint Tenancy, P.O.D., T.O.D., Beneficiary Deed, and Beneficiary Designations Outside Probate.
 - i. Beneficiary Deed - Pitfalls/Statutory Requirements.
 - a. Must List Grantees By Name.
 - b. For Four Months After Death Title Is Not Marketable.
 - c. The Residence is Still Countable Resource For Medicaid.
 - ii. Joint Tenancy For Convenience Purposes.
 - a. Constructive Trust Remedy to Prevent Unjust Enrichment.

7. A Will Says More Than Who Gets Estate.
 - i. Naming A Personal Representative (Residents Practically Better, But Not Necessary).
 - ii. Listing Tangible Personal Property.
 - a. If Will Refers To Written Memorandum.
 - b. Family Fights Are More Likely Over Personal Items.
 - iii. Protecting Minor And Incapacitated Beneficiaries.
 - a. Contingent Trust In Will Avoids Need For Court Appointed Conservator.
 - iv. Simplifying Administration
 - a. Encourage Sole Personal Representative, Otherwise More Cumbersome.
 - v. Contingent Circumstances.
 - a. Planning For Predeceased Devisees In Will.

B. Would A Living Trust (AKA A Revocable Trust) Be Better For You Than A Will?

1. No Greater Tax Savings - Common Misconception.
 - i. Wills Can Include the Same Estate Tax Savings.
2. Planning For Incapacity And The Use Of Durable Powers Of Attorney As An Alternative.
 - i. Avoiding Conservatorships.
3. Real property In More Than One State.
 - i. Avoid Multiple Probates In Other States.
 - ii. An LLC May be Better to Avoid Death Taxes in Other States
4. Funded Vs. Unfunded Trusts.
5. Trust Not Necessarily Better In Colorado With Informal Probate.
6. Trusts Do Not Protect From Creditors.
7. Simple Will And Power Of Attorney Works For Most People.

C. Do You Need To Be Concerned About Taxes After Death?

1. Federal Exemption - 2014 \$5,340,000.
2. Repeal Of Colorado Inheritance Tax In 1980 (Accounts And Safe Deposit Boxes Not Frozen)
 - i. Colorado Also Currently Does Not Have a State Estate Tax.
3. Saving Income Taxes By Beneficiary Designations On IRA(s) And Pension Benefits (Rollovers And Minimum Distribution Requirements).
 - i. Want Designated Beneficiaries On IRA For Income Tax Purposes.
 - ii. Advantages of Inherited IRA.
 - iii. Withdrawals Are Taxed As Ordinary Income.
 - iv. Using Roth IRAs For Grandchildren.
4. Asset Basis
 - i. Adjusted Basis At Death Saves Capital Gains Taxes.
 - ii. Tax Disadvantage Of Lifetime Gifting of Appreciated Assets. No Basis Adjustment.
 - iii. Importance of Valuing Assets at Death Even if No Taxes.
5. Use Of A Family/Credit Shelter Trust With A Disclaimer For Tax Status.
 - i. Put Assets Into Testamentary Trust So Not Included In Surviving Spouse's Taxable Estate.
 - ii. Relies on Surviving Spouse To Take Appropriate Action, but Provides Flexibility.
 - iii. Use of Portability May Be Better

D. Providing For Minor Children And Grandchildren.

1. Using Custodianships For Gifts During Lifetime And At Death.
 - i. Minor Does Not Have Access Until Age 21.
 - ii. Can Provide For In Beneficiary Designation
2. Naming Guardians.

3. Contingent Trust For Minor Children (Consider Life Insurance And Pension Benefit Beneficiary Designations).
4. College Funds/529 Plans.

E. Providing For A Surviving Spouse And Children By A Prior Marriage.

1. The Spousal Elective Share (With Vesting Schedule) And Prenuptial Or Postnuptial Agreements Waiving Rights At Death.
2. Trust Arrangements And Life Estates For Residence.
 - i. Surviving Spouse During Lifetime Then To Children Of Prior Marriage.
3. Contractual Wills
4. Danger: The Surviving Spouse Can Change Estate Plan.

F. Avoiding Family Disputes After Death.

1. Lists Of Personal Property.
2. Power To Divide In Personal Representative If Beneficiaries Cannot Agree Regarding Personal Property.
3. Disinheritance Provisions

G. Medicaid Planning.

1. 2006 Law Changes, Limiting Gifting.
 - i. 5 Year Gifting Look Back Period Does Not Start Until Donor Otherwise Eligible for Medicaid.
 - ii. Gifting Home Thru Life Estate Or Joint Tenancy- After 5 Years Home Not Subject To Medicaid Lien. Also Avoids Probate Recovery.

2. Income and Resource Limits.
3. Using Exemptions (E.G. Home).
4. Using Gifts.
5. Spousal Assets.
6. Life Estates, Revocable Trusts And Joint Tenancy.
7. Alternative To Medicaid Planning Is Long Term Care Insurance.
8. Importance of Written Care Agreements With Family Care Givers.

H. Use Of Gifts.

1. \$14,000 Annual Exemption in 2014.
2. Dangers Of Losing "Stepped-Up" Basis and Special Tax Treatment Of Residence (\$250,000 Gain Exclusion).

I. Powers Of Attorney, Living Wills, Medical Proxies And D.N.R.

J. Asset Management.

1. We Are Not Investment Advisors.
2. Fiduciary Duty Regarding Asset Management.
3. Portfolio Theory.
4. Asset Allocation/Asset Classes - Fixed Income Vs. Equities.
5. Diversify Risk.
6. Advantages Of Index Funds With Low Expense Rates.
7. Beware of Annuities (High Fees).