

"Knowledge is of no value unless it is put into practice." Anton Chekhov

What are the Core Estate Planning Documents?

Introduction

The purpose of this memorandum is to provide an overview of the estate planning process and its related core legal documents. While estate planning can be as diverse and complex as the individuals and families for whom estate plans are prepared, all estate planning should include a discussion of the Core Estate Planning Documents. Although the implementation of the Core Estate Planning Documents will effectively handle the majority of estate planning needs, additional estate planning documents may be required when conducting asset protection planning, advanced tax planning, and business succession planning. Fortunately, the implementation of advanced planning techniques typically builds upon the Core Estate Planning Documents. As a result, having an understanding of the Core Estate Planning Documents is vital, regardless of the level of complexity embodied in an estate plan.

The Core Estate Planning Documents (C.E.P.D.)

- (i) "Pour Over" Will;
- (ii) Trust;
- (iii) Healthcare Power of Attorney;
- (iv) Business Power of Attorney;
- (v) Living Will;
- (vi) HIPAA Designation;
- (vii) Limited Liability Entities; and
- (viii) Marital Agreements.

WILL

(i) A "**will**" is a legal document whereby an individual sets forth how and to whom they want their estate to be transferred following their death. A "**pour-over**" will refers to a type of will whereby the will document specifically sets forth that the

individual's assets passing under the terms of the will are to be "poured over" into the individual's trust and distributed according to the terms of the trust.

The term "**estate**" generally describes an individual's assets, including the personal belongings and real estate which are owned by the person at the time of their death.

Major Detriment of NOT Preparing a Will

If you do not prepare a valid will, you are relying on the State of Arizona to determine who shall receive your assets. As the State of Arizona does not know you, your family situation, who you would like to receive your estate or how you would like your business affairs handled, the State should not be empowered to make these decisions for you.

Major Detriment of Preparing a Will and NOT a "Pour Over" Will

Further, by failing to execute a "pour over" will in conjunction with your trust, your will and trust documents may contain conflicting terms which could greatly affect the distribution of your estate.

Major Detriment of ONLY Preparing a Will Without a Trust

Preparation of a will alone does not avoid the administrative requirements associated with probate. The term "**probate**" describes the court's process of wrapping up and distributing an individual's estate after their death. Since the probate process involves the court system, all documents filed with the court are considered part of the public record. This unlimited access to your probate documents allows for the general public to review your assets and how they are to be distributed. Further, probate can be a costly and time intensive process. Therefore, if

privacy is a concern to you and your family, you should take the necessary steps to avoid the public exposure and the unnecessary court and attorney fees associated with the probate process. One of the simplest ways to avoid probate is to execute and fund a trust in conjunction with a “pour over” will.

TRUST

(ii) A “trust” is a legal entity that is used to hold legal title to an individual’s property. (e.g. your residence, real estate holdings, bank accounts, investment accounts) A “trustee” is an individual or institution who is appointed in the trust document to safeguard the trust property for the trust’s beneficiaries. Trust “beneficiaries” are the individuals who benefit from the distribution of the trust’s assets.

Major Benefits of Preparing a Trust

- 1) Avoids probate.
- 2) If out of state real property (e.g. a second home) is an asset titled into the decedent’s estate and the trust is properly funded, the family or trustee will not have to probate the real property in the out of state jurisdiction where the property is located.
- 3) Allows you to establish rules specifying to whom, when and how a beneficiary can inherit trust property. For example, if you name your children as trust beneficiaries, the trust can contain guidelines establishing the ages the beneficiaries can receive a distribution of their inheritance as well as how the children can spend their inheritance.
- 4) Provides tax saving benefits through tax minimization planning.
- 5) Provides a cost effective method for estate planning when compared to the costs associated with probating an estate.
- 6) Allows for protections against a beneficiary’s creditors or in the event of their divorce.

HEALTHCARE POWER OF ATTORNEY

(iii) A “Healthcare Power of Attorney” is a revocable document authorizing an appointed agent to make medical decisions in the event the person creating the power of attorney is unable to make medical decisions for themselves. This type of document is commonly executed between family members.

BUSINESS POWER OF ATTORNEY

(iv) A “Business Power of Attorney” is a document that is used by an individual to appoint an agent to act on their behalf. A business power of attorney is a very powerful document requiring the careful drafting of its terms. Failure to properly prepare a business power of attorney could result in the granting of unnecessary powers to the agent. Conversely, failure to create a business power of attorney could result in the inability to perform necessary business functions in the event of incapacitation or an inability to physically sign time sensitive documents.

While the scope of a business power of attorney can vary, the powers included will range from being able to manage all of a person’s financial affairs (called a **general business power of attorney**) to only performing specific tasks (called a **limited business power of attorney**). Although these documents can generally be revoked at any time, they are powerful documents requiring careful consideration when selecting an agent and the scope of their authority.

LIVING WILL

(v) A “Living Will” is a document that informs your doctors as to the medical measures you want or do not want taken in the event you can no longer make these decisions for yourself. Specifically, this document deals with the decisions concerning whether you want life prolonging medical procedures taken or only those procedures used to alleviate pain and promote comfort. This document is used in conjunction with a healthcare power of attorney. As evidenced by the highly publicized and controversial Terri Schiavo case, failure to prepare a living will and healthcare power of attorney can result in unintended consequences.

HIPAA DESIGNATION

(vi) A “Health Insurance Portability and Accountability Act” (“HIPAA”) designation is a document that allows for the release of protected healthcare information to identified individuals in order to assist them in making informed decisions about medical treatment and the payment of medical bills.

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LIMITED LIABILITY ENTITIES

(vii) “**Limited Liability Entities**” are types of business entities that limit the liability of its members. These entities play an important role in asset protection, tax planning, and privacy protection planning. Unfortunately, not all entities provide the same protections to their members due to differing state laws. Therefore, it is important to consult with an experienced asset protection attorney to insure the correct entity is utilized to provide liability protection, asset protection and privacy protection for your specific situation.

MARITAL AGREEMENTS

(viii) “**Premarital or Postmarital Agreement**” is simply an agreement between two people, prior to or after their marriage, setting forth how the assets they acquire during their marriage are to be divided in the event of a divorce or death. Further, a marital agreement can also be used to maintain the separate nature of property acquired prior to marriage. Marital agreements have a negative connotation but they can be very helpful especially when considering the alternative which is to file a lawsuit to stop the state or federal government from dictating how your marital assets are to be divided. Couples looking to take the guess work out of how their marital assets are to be divided or couples simply looking to protect their pensions, personal assets or real property, should consider learning more about how marital agreements can benefit them and their spouse.

Conclusion

Although every individual and family has unique estate planning needs, every estate plan likely requires the implementation of the above referenced documents. By properly implementing these Core Estate Planning Documents, and when required advanced estate planning documents, the associated benefits far outweigh the legal uncertainty associated with failing to act. Further, the upfront expenditure of time and money will routinely be far less than the time, energy and costs associated with probating your estate, especially when dealing with out of state property. Most importantly, however, is the emotional and financial security that proper estate planning provides to your loved ones. Lastly, a portion of the costs incurred in the estate planning process is tax deductible.

About the Author

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Scott F. Burns, Esq. is an Arizona attorney whose clientele includes professional athletes, business owners, and families desirous of protecting their personal and professional legacies through the use of asset protection strategies, estate planning and business consulting.

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