***How to Prepare for the Unthinkable*:**

An Introduction to Basic Estate Planning in Texas

5 Things Every Family Should Have or Know

©Joel S. Pace, Esq.[1]

Introduction

I'll say it first to get it out of the way: no one likes to think about death or about some horrible thing happening to themselves or someone they love. Its natural.

When we hear a horrible story about some poor person who was killed by freak bolt of lightning or was permanently disabled in a car accident, we think "thank goodness it wasn't me" or "that could never be me." However, the indestructible "it's not going to happen to me" attitude of youth slowly gives way to the "I'm an adult now" reality that we have to take care of our families just in case.

This transition in thought happens to most people in their 30's as they start to get established in their careers and/or start to have children. For my family, it happened after the birth of our son, Grant. My wife and I were about to take our first vacation *post*-Grant. We planned this wonderful trip to Mexico to sit on the beach and do nothing except relax and enjoy each other's company without the ever-present "hiss" of a baby monitor (this was 2005 – technology has greatly improved!). About a week before we were scheduled to leave, my wife turned to me and said, "what if something happens to both of us at the same time? We need to make sure Grant is taken care of." We talked and decided that as parents we had a responsibility to take care of him even if we were gone. We were entrusted with this little miracle and we could not be irresponsible and not prepare.

And with that, we embarked on taking care of our family just in case the unthinkable happened to us.

Even though I am an attorney and had practiced law for almost 13 years at that time (now almost 26 years) and have prepared hundreds of wills and other estate planning documents, prior to that moment I had never written my own. Before then, there did not seem to be any pressing reason to think about it, much less plan for, well, ... death. I started looking into what I needed to do to protect my family. After reading and researching the issue, I have concluded that there are at least five basic things that my family, and, in my opinion, every family, needs to protect itself:

<u>THE FIVE THINGS YOU NEED TO HAVE:</u>

- Wills for each parent (covering guardianship and minors)

[1] Adapted from a paper written by Joel S. Pace in 2008.

- Statutory Power of Attorney for each adult/parent.
- Medical Power of Attorney for each adult/parent.
- Living Will/Physician's Directive for each adult/parent.
- Coordinated Insurance and Beneficiary Designation on Non-Probate Assets

After reading this paper, I hope you will have a greater understanding of each of these five things and have the framework to put together an action plan that meets your family's needs. This is of the greatest gifts you can give your family: piece of mind.

It's not fun to think about all of this. But, by taking care of your estate planning needs, you will have prepared your family to weather whatever happens.

Estate Planning | *A General Overview*

The vast majority of Americans are familiar with the concept of a Will, and while the majority of Americans understand the need for a Will, a large percentage never make one or consult a wills lawyer to draft one for them.

This has become much more important with the 2020 Coronavirus/COVID-19 pandemic. We are sheltering in place. People are losing jobs. Each night, we watch the news and see reports of more people infected and more people dying. All of the people who thought "I'll get to that later," are now panicked to get their wills and other documents in place. sd

Wills can take a variety of forms and can be used for a variety of purposes in Texas. In general, however, a Will is used to spell out how a person wants their assets divided at the time of their death. It may also address the payment of debts, conditions upon certain gifts to certain individuals, etc. The Will should be drafted as part of an overall estate plan for the person or married couple considering the Will.

At its core, a Will has traditionally been the foundation of any estate plan. In addition to the Will, someone should consider powers of attorney, living Wills, trusts, life insurance, non-probate assets, etc. in their overall estate plan. As will be discussed in his paper and in our meeting, all of these elements of the estate plan should be carefully coordinated to provide the maximum benefit to you and your family.

Now for some basics.

Will: A Simple Will contains basic provisions related to the disposition of a person's estate upon their death. The Will also appoints someone to handle the Testator's final affairs after death. Although the simple Will does not address estate tax concerns, it is the most appropriate option for someone whose estate does not present estate tax concerns. In some cases, the Testator's assets are great enough that they require consideration of various alternatives to avoid estate taxes at death. In these cases, the use of a Will that incorporates tax planning provisions is most appropriate. These provisions allow the Testator to use the assets during their lifetime, but upon death, the assets

are distributed in a manner consistent with the tax-savings goal of the tax provisions in the Will. Although a Will with tax planning provisions is obviously more complex than a Simple Will, it is appropriate for someone who has tax concerns.

Powers of Attorney: Anytime that someone is looking at their estate plan, they should consider the creation of powers of attorney to appoint someone (called an "agent") to act for them in the event of their incapacity. In Texas, two separate powers of attorney are needed to properly prepare your estate: (1) Statutory Powers of Attorney and Medical Powers of Attorney.

- A *Statutory Power of Attorney* is created to allow another to take care of financial concerns for you if you are unable to do so.

- A *Medical Power of Attorney* allows someone else to make medical decisions for you if you are unable to do so.

Both Powers of Attorney are very important should something happen requiring that someone step in and make decisions for you.

Living Will (a/k/a Physician's Directives): In the wake of the Terry Schiavo controversy (it's been some time since this happened – for more – click here), the concept of Physician's Directive has become very important to many people. The Physician's Directive addresses your desires regarding life-support treatment and medication in the event that you are in a life-threatening situation, a terminal illness or other condition in which you are not able to communicate these decisions to a doctor.

Insurance: Most people understand the concept of insurance as it applies to the car or home. However, a lot of people are not familiar with how they should coordinate the various insurance products that are available to ensure that their families are protected, and their estate maximized. These other insurance products include:

- life insurance
- supplemental income insurance
- Key-man insurance
- disability insurance
- long-term care insurance

Depending on your family's specific situation, you may need all of these or few of them. These policies can replace income, take care of catastrophic medical expenses, or the loss of a key business partner.

Non-Probate Assets. Also, you need to understand that a lot of property passes outside of probate and your will. Any account or asset that has a beneficiary designation is a "non-probate" asset. This includes life insurance, bank accounts, retirement accounts, investment accounts and

the like. You MUST regularly update these designations to make sure they are going to the right people.

Wills | *Overview*

For an individual or couple whose estate is not going to be subject to estate taxes (I'll explain this in a bit), the creation of a simple Will generally addresses most, if not all, of their estate planning needs.

The person creating a Will is known as the "testator." As most people understand, the purpose of a Will is to provide written instructions as to the division and distribution of assets following death. This can include specific gifts of specific personal property to loved ones or charities. The Will can also create trusts for various reasons, the main one being to provide for minor children. The Will also names people to settle the Testator's affairs upon his death (called the Executor or Independent Executor) and to serve as either trustee of any Trust created or to serve as the guardians for his or her minor children after death.

At the time that the Will is created, the Testator must:

1. have the proper capacity (ability to understand his decisions)
2. have the Intent to create a Will
3. sign and date the Will in the presence of two witnesses, and
4. never subsequently revoke the Will

If each of these elements is satisfied, then the Will is a valid document to control the disposition of the Testator's estate.

Under a Will, the Testator can lay out a variety of methods for the division of his estate. For instance, he can leave gifts of certain dollar amounts to various individuals or institutions, or he can divide his estate into percentages or shares (i.e.,½ of my estate, or to be split equally) to be given to certain specific people (Aunt Molly) or to classes of people (my children, or my nieces and nephews)

A well-drafted Will should be:

- Type-written
- Should appoint an *independent* executor and at least *two* alternates
- Should waive the requirement to post a bond
- Be signed by the Testator
- Have two witnesses who observe execution
- Include a Self-Proving Affidavit or be “self-proved” in which it is signed by the Testator, his two witnesses, and all notarized by a Texas Notary

Making the Will “self-proved” is very important. This allows the Will to be admitted to probate without the need to bring the two witnesses into court to testify (good luck finding them in 15 years, right?)

that you intended to execute your Will and were not crazy (lacked capacity) or under undue influence. In both the Affidavit and the Self-Proved Will (I'll call it simply the "Affidavit"), the Testator and his witnesses swear to the fact that the Testator signed the Will in the presence of the witnesses and that he intended it to be his Will and had the required capacity to create a Will. The affidavit also confirms that each of the witnesses were over the age of 14 at the time they signed the Will and that they saw each other sign the Will.

Although a Simple Will typically does not include any provisions targeted to eliminate estate taxes (because the estate tax threshold is so high – over $11,000,000 for individuals), it typically will include provisions related to guardians for minor children and also trusts for either minor children or incapacitated adults.

Wills | *Minor Children*

If your family includes minor children (under 18), there are additional considerations. Invariably, all parents of minor children share the concern of who will care for their children in the event they die before the children are adults. A will provides the means to make this choice.

In a Will, you can include a provision that designates the person(s} you want to care for your children in the event of your untimely death (a "guardian"}. The decision on who to appoint as your minor children's guardian is a major one. It is not something that should be decided quickly. You and your spouse, if any, should discuss how you want your children raised, whether that person you're thinking of shares your values, morals, and religious beliefs. Most importantly, you need to discuss the idea of serving as the guardian of your children with the person that you are considering designating. Believe it or not, there are guardians who find out about their appointment when they are contacted by the Executor of the Estate or the Probate Court after someone has died. Additionally, you should always designate at least one alternate guardian.

Wills | *Trusts for Minors*

Likewise, you can designate someone to manage any money that you leave for your children (a "trustee"). The Trust is created in your Will, but it does not become effective until you die (this is referred to as a "contingent" or "springing" trust). However, upon that death, the Trust is funded with the assets that you designated for your children to receive. Through this Trust option, you can designate that the Trust continue until your children reach a certain age or for their lifetimes. You can even designate a tiered (I referred to this as a "multi-point") distribution of the trust assets - say 1/3 at age 21, 1/2 at age 25, and the remainder at 30 years of age. When the Trust terminates, your children will receive the assets of the Trust outright. However, prior to the termination date, the Trustee will have the ability to make distributions for your children's health, support, education, and maintenance. This provides a mechanism for a responsible person to be able to make decisions for your children in the event you are not alive to do so and gives your children time to mature. The Trust entity also provides protection to the Trust's assets.

Wills | *Estate Tax Planning Features*

Note: *For our Essential Estate Planning Package, tax planning/avoidance is not part of the package. If you need to plan to avoid estate taxes, you will need a different package. Contact us to discuss this if it is your situation.*

Wills | *Compared to Revocable Trust Planning*

Historically, the most prevalent method of disposing of someone's assets at death was the use of a traditional Will. Regardless of whether a Will is very simple or it includes complex tax planning provisions, the use of the Will as the mechanism for laying out the division and distribution of assets at death has always been widely used. However, in recent years, with the increasing difficulties related to probate in some states, the use of Revocable Living Trusts has increased as an alternative method to laying out someone's desires for the division of their estate upon death. Although both methods of estate planning have benefits, estate planning professionals in Texas differ as to which method is most appropriate.

Traditional Estate Planning: Under traditional estate planning, the key document used to control the disposition of a person's estate upon death is the Will. As discussed, the Will can include a variety of provisions. It can be simple, or it can include complex tax provisions. It can lay out the division of assets, name a trustee and/or guardian for minor children, include spendthrift provisions, name executors, and address provisions for paying debts at death. Although it does not become effective until the Testator has died, the Will generally addresses all of the issues related to the division of a person's estate at death.

Because the probate process in Texas is fairly simple, the probate of a well-drafted Will can generally be completed efficiently and in a cost-effective manner.

Revocable Living Trust Planning: Under a Revocable Trust Planning scenario, the key document used to control the disposition of a person's estate upon death is the Revocable Living Trust. Generally, a Revocable Trust is created for the purpose of avoiding the probate process upon death and therefore becomes effective during the lifetime of the Grantor of the Trust. The goal behind the Trust is to transfer all of the assets to the Trust during the Grantor's lifetime and then, upon his death, all of his assets are divided and distributed pursuant to the terms of the Trust agreement.

Because all of the assets have been supposedly been placed in the Trust, no need exists at the time of death to go through the probate process. However, it is important to understand that very few of these trusts are ever funded fully with all of the Grantor's assets. Accordingly, it becomes necessary to probate the Grantor's Will to dispose of the remaining assets that were not placed in the Trust. When this happens, the original purpose for creating the Trust (to avoid probate) was completely frustrated.

While some attorneys in Texas will tout the fact that a Revocable Trust can save estate taxes, any and all tax-saving alternatives that can be employed in a Revocable Trust can also be used in a traditional Will.

Will v. Revocable Trust | *Compared*

A Will does not become effective until someone has died and is therefore fairly easy to amend or modify. The Revocable Trust on the other hand becomes effective as soon as it is created, and it is therefore more difficult to amend.

Generally, a well-drafted Will can be drafted at a much lower cost than a Revocable Trust.

Likewise, because a Revocable Trust generally ends up omitting certain assets, it is necessary to have a Will in addition to the Trust. As a result, it becomes necessary to have a simple Will in addition to the Trust, which increases the cost of the process.

It is sometimes difficult to understand the process of owning all of your assets out of Trust during your lifetime. Conversely, under a traditional estate planning scenario, you retain all of your assets as you normally would. Only after someone has died does title to his assets transfer to someone else.

In my opinion, for most people, the use of the traditional method estate planning is generally preferred over a revocable trust plan. The traditional method is more cost-effective, in spite of the costs of going through probate. Likewise, most people in Texas understand the concepts related to a Will more completely than they do revocable living trusts. Regardless, the decisions related to the best method for a particular client to use should be considered carefully.

To summarize:

	Wills	**Revocable Trusts**
Issue		
When effective	Death	Immediately
Ease of Modification	Easy	Difficult
Cost	Low	Much Higher
Maintenance	Low	Higher
Risk/Errors	Low	Higher
Probate	Easy	Maybe?
Need to transfer asserts	No	Yes
Potential Estate Taxes	Yes	No

Wills | *Handwritten Wills*

A lot of people have heard that you can simply write out your will. Well, it's true. Texas is one of the few states that recognizes handwritten wills, also known as "holographic" Wills. A

handwritten will can be valid in some circumstances. However, they are not recommended. Rather, they should only be used if there is no other choice.

In order for a handwritten Will to be valid, it must be written completely in the handwriting of the Testator (the person whose Will it is). If any part of the document is not in the Testator's handwriting, then the handwritten Will is not going to be valid. In addition to the handwriting requirement, the Will must be signed by the Testator, and it must be dated. On the date the Will is signed, the Testator must have had the competence to create a Will. He must have intended for the document to be a Will, and he can never later revoke the Will for it to be valid.

As a side note, a handwritten Will that is not completely in the Testator's handwriting can be valid, but it must be signed in the presence of two witnesses, and those witnesses must sign the Will in the presence of the Testator and in the presence of each other. It is important that any time a Will is witnessed, the witnesses must actually see the Testator sign the Will, and the witnesses must sign the Will in the presence of the Testator and each other. The Will cannot be signed outside the presence of the witnesses, and the witnesses cannot sign the Will outside the presence of each other.

Routinely, handwritten Wills become the subject of litigation after the Testator's death. Because most Testators do not understand what is required to make a valid Will, the Will may have defects. These defects may be as obvious as having another person write a portion of the Will, or they could be less obvious mistakes related to unclear wording or intentions. When the provisions are unclear, they open up opportunities for the family to fight over the correct interpretation of the provisions. These fights are not only costly and time-consuming, but they have the effect of tearing families apart.

When a question arises as to whether the Testator wrote the entire Will himself, it becomes necessary to hire handwriting experts to compare samples of the Testator's handwriting to the handwriting of the Will. If they do not match, then the Will is not valid.

Likewise, when language contained in the Will is unclear, the various members of the family must solicit testimony from friends, family, and others who knew the Testator. Whichever party can produce the most credible testimony as to the Testator's true intentions will prevail in the lawsuit.

Whether having to hire handwriting experts or collect family and friends to provide testimony, lawsuits related to handwritten Wills are very tough. These difficulties are easily avoided by the execution of a proper Will drafted by an attorney.

I do not recommend using a self-prepared Will.

Powers of Attorney (POA) | *Overview*

Although many people have heard the term 11power of attorney," most do not fully understand what it means. A power of attorney allows someone to designate another person to make either medical or financial decisions for them in the event that they are not capable of making those

decisions themselves. While a power of attorney can still be effective if someone is unconscious or incapacitated, it ceases to be effective as soon as they die.

Most people do not think about powers of attorney until after the need for them. That is a common situation that leads to stress, extra expenses, and prolonged delays. Whether it is to make medical decisions for your father after a car accident, or after your grandfather has succumbed to Alzheimer's Disease or Parkinson's Disease (both dementia inducing illnesses), having a power of attorney in place before the need can greatly reduce the stress, anxiety, cost and time involved in taking care of your loved one's during their time of need.

The Texas Legislature has created two different types of powers of attorney: 1) the Medical Power of Attorney, and 2) the Statutory Durable Power of Attorney. The forms for both of these documents are created by the Legislature, but they must be understood and executed correctly to be effective.

POA | *Medical Power of Attorney*

The Medical Power of Attorney form allows you to designate a family member or friend to make medical decisions for you in the event that you are not able to do so. It is limited to medical decisions. The Medical Power of Attorney does not become effective until such time as you require medical care but cannot make decisions for yourself. The person you designate to make these decisions is known as the "agent," and the agent has broad authority to make medical decisions, unless you specifically restrict his authority.

The Medical Power of Attorney must be signed by the person granting the power, by two witnesses, and by a notary public. A copy should be provided to your regular doctors, as well as to hospital staff, if you are having a planned surgery. It is also good practice to provide a copy of the Medical Power of Attorney to the people named in the document so that they are aware of the responsibility they have been given.

POA | *Statutory Durable Power of Attorney*

The Statutory Durable Power of Attorney allows you to designate someone to make financial decisions for you in the event that you are unable to do so for yourself. Like the Medical Power of Attorney, the Durable Power of Attorney is a form created by the Texas Legislature and is effective even after you are incapacitated. However, the Durable Power of Attorney ceases to be effective upon your death. What this means is that the person holding the Power of Attorney for you cannot make financial decisions for your estate; rather, that is controlled by your Will, or the Probate Court.

The Durable Power of Attorney allows the designated agent to make a wide range of financial decisions, unless you have specifically restricted that authority. If unrestricted, the agent can pay bills, buy or sell real estate, buy or sell investments, pay your taxes, etc.

POA | *Advantages for Drafting Now*

The biggest reason for creating powers of attorney is to avoid the necessity for a court-ordered guardianship in the event that you suddenly become incapacitated.

If you do not have a power of attorney in place when you are incapacitated, your family will have to file a special type of court proceeding called a Guardianship Proceeding. Guardianships can be difficult, time consuming, and costly for all who are involved. By creating powers of attorney, you are designating someone to make medical and financial decisions for you when you are not capable of making those decisions. Because you have granted this right to those designated in the Powers, you can avoid the necessity for the guardianship.

Physician's Directives (Living Wills) I *Overview*

Although it has been some time since it happened, the Terry Schiavo controversy, brought the issue of living wills to the public's attention. A Living Will or Physician's Directive is a document used to provide instructions directly to a doctor regarding a patient's desires for being placed on life-support and for receiving certain other medications and treatment if that person ends up in two very specific situations:

- a terminal condition (cancer or ALS); or
- an irreversible condition (coma).

Like the forms for the different types of powers of attorney, the form for the Physician's Directive has been prescribed by the Texas Legislature. It must be signed by the person issuing the instructions, and it must also be signed by two witnesses and a notary. On the face of the form, options are provided for either allowing or restricting life support. The form also provides definitions for what constitutes a 11terminal11 condition or an 11irreversible" condition. Likewise, it defines what life support or 111ife sustaining treatment" is.

It is important for anyone contemplating creating a Physician's Directive to understand a couple of things. First, the agent under the Medical Power of Attorney has the authority to make the decision whether or not to authorize or deny life support. Some people would prefer to have this decision made by a family member or loved one, while other people would prefer to leave the decision to a doctor rather than putting a family member through the turmoil of making such a difficult decision.

Second, inasmuch as the Physician's Directive is a directive from a patient to the doctor, the only way that the doctor will know about the Physician's Directive is for the doctor to have been supplied with a copy by you or a family member. Because many hospitalizations are not planned (i.e. emergencies), you should discuss your desires related to life support with your family members and friends so that they can act accordingly in the event of an unforeseen tragedy.

The creation of a Physician's Directive is a very personal decision. Some people are strongly in favor of it, while others are opposed. When considering this decision, give careful consideration to the issues addressed above.

Insurance I *Overview*

When most people think of insurance in the context of estate planning, they only think of life insurance. While life insurance is certainly the bell-cow of the insurance equation, it is not alone. There are a number of different insurance products that you should consider as part of your estate plan to protect your family. After all, life insurance only pays if you die. What if you do not die, but are severely disabled and cannot work.

As "baby boomers" have aged, the insurance industry has continued to develop new insurance products to address their needs. Here are a few concepts that you should be familiar with and start to consider as part of you plan.

Insurance | *Life Insurance*

Life insurance has come a long way since the days when it was known as burial insurance and used mainly to pay for funeral expenses. Today, life insurance is a crucial part of many estate plans. You can use it to leave much-needed income to your survivors, provide for your children's education, pay off your mortgage, and simplify the transfer of assets. Life insurance can also be used to replace wealth lost due to the expenses and taxes that may follow your death, and to make gifts to charity at relatively little cost to you.

The main reason to have life insurance is to help ensure that your family will not suffer financially when you die. When you die, most likely your paycheck will stop, and your family may not have enough money to maintain their lifestyle and live comfortably for years to come.

Upon your death, life insurance proceeds can be available very quickly, so that your family has money to meet their short-term financial needs. Life insurance proceeds left to a named beneficiary don't pass through the process of probate, so your family will not have to wait until the estate is settled to get the money they need to pay bills. If you do not have life or other insurance, your family may have to struggle to make ends meet until the estate is finally probated. Probate can take 4 months to over a year.

You can plan ahead and purchase sufficient life insurance to cover the potential costs of settling your estate, including taxes, fees, and other debts that the estate would have to pay.

You can use insurance to minimize your estate tax liability too. Using life insurance, you can leave a substantial gift to his favorite charity. Since gifts to charity are estate tax deductible, such gifts were not subject to estate taxes when you died.

Insurance | *Other Types*

There are many other types of insurance that you may want to consider as part of your estate plan. These can include:

- *Disability Insurance* - Replaces income if you cannot work due to injury.
- *Long-term Care Insurance* - pays for your medical care as you age so that you do not have to engage in a Medicare spend-down
- *Burial Insurance* - Pays for Funeral
- *Key-Man Insurance* - if you have a business partner without whom the business would not work or would be less profitable; this pays for his loss.
- *Umbrella Policies* - Provide general protection from any tort liability (if you die in a car accident and kill a family of 4).

Just like choosing a lawyer, you need to have a relationship with a good, qualified independent insurance agent. This agent can help you determine what you need in collaboration with you attorney.

The Probate Process in Texas | *Overview*

We have discussed the term “probate" a lot up to this point. Unless you have been through it, you may be asking yourself what “probate" means. At this point, I think it is prudent to give you a very basic overview of the probate process.

In Texas, e probate process is fairly simple if you understand the definitions, the process, and the timelines. Here is a short broad overview of the types of probate administrations and personal representatives. In Texas, probate cases are going to fall into one of four categories of probate administrations:

- testate administrations (Decedent died with a Will},
- independent intestate administration,
- dependent intestate administrations, or
- the probate of a Will as a Muniment of Title.

The category of administration can determine how easy or how difficult the probate process can be to navigate.

Probate | *With a Will*

When someone dies with a Will, the Will generally names a person to serve as the Executor of the Estate. Following the Decedent's death, the named executor is going to file the Will for probate and ask the Court to appoint them to represent the estate's interests. Among the duties of the executor include the obligation to identify the Decedent's assets, pay debts, pay taxes, prosecute claims owed to the estate, and properly distribute the estate assets upon conclusion of the probate. Generally,

the probate of a proper Will is the simplest form of probate. The executor is generally appointed as the 'independent' executor, which gives them great flexibility in carrying out their obligations.

Probate | *Intestate* (no will)

In cases where the Decedent dies without a Will, the default rule in Texas requires a dependent probate administration.

As the name would imply, the administrator of the estate is dependent upon the Court for supervision of the probate process. While the dependent administrator will have the same responsibilities as the independent executor described above, the dependent administrator will be required to seek the Court's approval for each small step in the process. Its neither enjoyable nor quick. Additionally, the dependent administrator will be required to post a surety bond and to complete and file detailed accountings with the Court every year. This additional oversight and the ensuing restrictions dramatically increase the cost and the time involved in the probate administration. Likewise, from a practical standpoint, the dependent administration requires that all attorneys' fees, costs of litigation, etc. be approved by the Court prior to payment. Depending on the particular Court, these fees may be cut dramatically depending on that Court's view on fees.

As an alternative to the dependent administration, the Texas Estates Code provides a mechanism for the Court to create an independent administration, even though the Decedent died without a Will. Under that provision, if all of the heirs of the estate agree, then the Court can appoint an independent administrator and waive the requirement of a surety bond. By doing this, the rather difficult and cumbersome dependent intestate administration is substituted with the less burdensome independent administration. Like independent executors appointed in a Will, the independent administrator appointed pursuant to the court-created independent administration has very little court supervision. This freedom and flexibility relieve the administrator of having to seek the Court's approval prior to pursuing claims, paying expenses, etc.

Probate | *Heirship Determination*

It should be noted that under either scenario when someone dies without a Will, the Court is going to be required to make a judicial determination of heirship. This determination is a judicial finding as to the identity of the Decedent's heirs and the proportions of the estate to which each is entitled. In order for the Court to create the independent administration under the Code, the heirship determination must be completed at the same time that the Court appoints the independent administrator. If the administration is going to be dependent, however, the determination of heirship can wait until some later point after the appointment of the dependent administrator.

Probate | *Muniment of Title*

As an alternative to the aforementioned methods of probate, Texas law recognizes the probate of a Will as a muniment of title. Under this method, the Will is recognized by the Court as valid, but no executor or administrator is appointed. Rather, the Will is recorded in the deed record

of the county in which the Decedent resided at the time of his death, and that recording serves to link the chain of title in any property from the Decedent to the persons named in the Will. Thereafter, a certified copy of the Will can be used to transfer title to any property.

It should be noted that the muniment of title method is the only method that exists for probating a Will more than four (4) years after the date of the Decedent's death. This method can be difficult to pursue, but it can be effective if completed correctly.

Obviously, this brief overview of the types of probate in Texas is not exhaustive.

Non - Probate Transfers, Assets | *Overview*

Probate assets are those assets which pass under the provisions of someone's Will or by Texas law if they died without a Will.

Non-probate assets, on the other hand, are those assets that pass according to a beneficiary designation card or other contract. Non-probate assets generally include:

- life insurance
- retirement plans (401K, 403b, pensions)
- investment accounts
- payable on death bank accounts
- joint tenant with rights of survivorship accounts.

For each of these types of accounts, the owner of the account has the option to complete a beneficiary designation card on which they designate who shall receive the proceeds of the life insurance or other account upon their death. When someone completes one of these beneficiary designation cards, they create a contract with the financial institution holding their money that the financial institution will the money pursuant to the beneficiary designation card rather than under the Will.

If no beneficiary is ever designated or if the named beneficiary dies prior to the owner of the account, then the account or life insurance will revert to the estate of the account owner, and it will pass according to the provisions of his Will or under Texas law if he had no Will.

Non-Probate Assets | *Coordination with Probate Assets*

When someone has significant non-probate assets, they should pay close attention to coordinate those assets with the assets passing under their Will. It is important that all of the assets someone owns at the time of death be coordinated as part of a comprehensive estate plan.

Failure to coordinate the non-probate assets with the provisions of the Will can jeopardize the planning put in place with the Will. This can result in higher estate taxes, and it can also cause certain beneficiaries to benefit in greater proportions than the decedent intended.

Non-Probate Assets | *Estate Tax Consequences*

As a general rule, all non-probate assets are included in the Decedent's estate for purposes of computing the Estate Tax. Proceeds from life insurance, retirement plan benefits, payable on death accounts, and the like are all included in the estate for purposes of paying taxes, even if beneficiaries have been designated to receive one or more of these accounts. Because the provisions of the Will can be designed to reduce or eliminate estate taxes, it is important that you fully discuss the types of non-probate assets that you have so that your lawyer can adequately advise you regarding the coordination of your assets.

Non-Probate Assets | *Conclusion*

In the last several years, the use of beneficiary designations as a method of avoiding probate has exploded. However, this tool is not as used in Texas or as important. The probate process in many other states is much more burdensome than in Texas, and the use of non-probate designations can reduce or eliminate the difficulties involved in probate in those states. But Texas has a much easier probate process, which reduces the necessity of non-probate assets. Regardless, any non-probate beneficiary designations need to be carefully coordinated with other assets to ensure that the entire estate plan works together. When thinking about your Estate Plan, you should review your non-probate assets to ensure that they are correctly coordinated with the provisions of the overall estate plan.

Conclusion

Estate planning is an essential part of your family's well-being and security. Unless you have a very large estate (i.e., over $10,000,000), estate planning can be a fairly quick and relatively inexpensive process. You can greatly increase your family's preparedness for the unexpected by investing in the preparation of four key documents and the serious consideration of one other. The four documents are:

1. Wills
2. Medical Power of Attorney
3. Statutory Power of Attorney
4. Physician's Directive

Add to these four documents a comprehensive and carefully thought out insurance portfolio and you will have taken a major step to secure your family's future.

If your estate exceeds the lifetime exception to federal estate taxes (for 2020 - $11.58 million for a single person and $23.16 million for a married couple), then you have more work to do. You will need to work with an attorney to structure your estate plan to try and minimize any estate tax liabilities so that your estate goes to your loved ones, not the federal government.

I hope this article helps you decide what is best for your family. If you have questions or need assistance, please call me. I can be reached at joel@lpfirm.com, 512-637-8562, or my cell at 512-653-3150.