Estate Planning Documents Everyone Should Have

By Paul Chmieleski

Seventy-six percent (76%) of people want to transfer wealth to their family. Despite this desire, only 53% of people have an estate plan.[1] The most commonly cited reason people give for not having one is that they just haven't gotten around to it, and figuring out how to start is cited as the most difficult part of creating an estate plan. The basic message is that most people think estate planning is important but are often confused about how to get it done.

August is National Will Month. In recognition of this, a review of the basic estate planning documents that every adult should have is warranted.

The use of the phrase "every adult" is intentional. Twenty-three percent (23%) of people don't think they have enough money to worry about creating an estate plan. In reality, every person over eighteen years of age has assets - no matter how meager - that need to be properly and efficiently transferred should they pass. It is tragic when someone passes away, especially a young person. Their family will be grieving and have no desire to figure out what to do with the decedent's assets and belongings. Similarly, what if you are still alive but unable to handle your financial affairs or make medical decisions? Without estate planning documents, a guardianship and/or conservatorship will have to be created and the court will appoint someone, possibly an unrelated third party, to make financial and medical decisions for you. Whenever court oversight is required, things do not get done quickly nor do they get done cheaply.

So, what are the basic estate planning documents every adult should have?

1. Financial Power of Attorney

Financial powers of attorney are often overlooked but they are one of the most important estate planning documents for a person, whether eighteen or eighty years old. What happens if you are no longer able to handle your own financial affairs, temporarily or permanently, due to illness, travel, mental capacity, or some other reason? Without a financial power of attorney your bills cannot be paid, and no one will be able to manage your investments, access your bank accounts, or handle any of your financial affairs until the court appoints a conservator on your behalf. As a reminder, the person appointed as conservator may not even be someone you know. They are required to periodically report to the court and request approval to engage in various types of transactions. This can make for a slow, inefficient, and expensive process. In contrast, if you create a financial power of attorney, it will be someone you know and have chosen. Your agent can handle your financial affairs without court intervention, which is efficient and cost-effective. Keep in mind, even if you have a spouse, they will not be able to access or manage your individual assets without a power of attorney.

2. Health Care Power of Attorney/Proxy

A health care power of attorney (sometimes called health care proxies in some states) is the same as a financial power of attorney except it allows your agent to manage your health care, instead of your financial affairs. The

[1] Statistics are taken from the 2022 State of Estate Planning Report ("Report") published by Wealth.com.

most commonly thought of situation involves a child helping an elderly parent with their health care. Unfortunately, unexpected health problems can happen to anyone.

3. Advance Directive/Living Will

An advance directive allows you to provide direction regarding what should happen should you be suffering from a terminal condition and be unable to make your own decisions. For example, if you are in coma and it is determined that there is no medical probability of recovery, an advanced directive will say whether you want to continue receiving artificial methods of life-sustaining treatment (e.g., respirator), what types of pain relief, if any, you would like to be administered, and what types of nutrition should be administered if that is the only thing keeping you alive. Providing this direction removes a significant burden from your loved ones at an already emotional time.

4. Last Will and Testament

A will dictates how your assets will be distributed at your death. If you have minor children, it can also address who will care for those children and who will handle any assets given to them until they become adults. Wills are subject to probate which require court involvement. If you die without a will, your assets will be distributed according to state law. Furthermore, a guardian and conservator will have to be appointed by the court to care for your minor children and handle their financial affairs.

Wills sometimes contain testamentary trusts which are trusts created by your will at death. Because it will not bypass probate, a testamentary trust is often used by people in states where probate is relatively simple and inexpensive. A testamentary trust allows the trust creator to maintain assets in their own name while they are alive. When they pass away, the assets will be transferred via probate to a trust that will dictate how and when they are distributed to the trust beneficiaries.

5. Revocable Living Trust

A revocable living trust is established while you are alive and provides for trustee management of trust owned assets. Revocable living trusts work in conjunction with a financial power of attorney because, if you become incapacitated, the trustee can manage the trust assets without the need for court intervention. Any assets not owned by the trust are managed by the agent named in the financial power of attorney.

A common misperception is that while you are alive, your revocable living trust provides you with creditor protection. That is not true. A revocable living trust is considered owned by the trust creator and uses the trust creator's individual social security number. As a result, creditors can reach assets in a revocable living trust. Once the trust becomes irrevocable, beneficiaries can receive creditor protection for assets held in the trust.

After you pass away, assets in trust pass free of probate to the trust beneficiaries. Assets can be distributed outright or remain in trust for your beneficiaries for creditor protection, divorce protection, or simply to prevent a beneficiary from blowing the money that would otherwise go to them outright.

Revocable living trusts can also provide estate tax reduction benefits. The estate tax benefits of revocable living trusts are, however, limited to the joint estate tax exclusion amount for a married couple (currently $24.12 million). Irrevocable trusts are often used for estate tax planning beyond that limit.

A separate pour-over will should always be used with a revocable living trust. A pour-over will simply "pours" anything that was individually owned into the trust at death, so the terms of the trust control the disposition of all assets.

A standard estate plan should include all of the documents listed above (with a revocable living trust being optional). Sometimes advance directives and the health care power of attorney are bundled together in one document so there is no fixed number of documents. These estate planning documents will eliminate a lot of stress on your family in what will already be an emotional time.

And that is truly a gift that is priceless.