



# The Time is Now: Create an Estate Plan Today

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Your to-do list: Eat right. Get your exercise. Develop an estate plan.

That's right, an estate plan. While not as enjoyable as a catch-up meal with a friend, or as invigorating as a morning walk, an estate plan needs just as much attention, if not more. In fact, without one, your assets could end up in legal limbo for a long, long time, placing your loved ones with the task of sorting out your final wishes. And that's just the proverbial tip of the iceberg. The critical importance of establishing an estate plan is often overwhelming, misunderstood, neglected or simply left for someone else to deal with in your absence.

Estate planning doesn't mean the exercise is only for people with great wealth, those with an estate of grand proportions. If you have assets, you have an estate that calls for your attention before it becomes someone else's nightmare. An estate plan is your roadmap to how your assets should be distributed and when. It ensures your wishes are recognized and carried out. Below are some areas to

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consider as you make your own plans.

### ***Distributions***

First, consider the current state of potential beneficiaries' affairs and how they might impact your intentions.

Pending bankruptcy, lawsuit or divorce; addiction, disability or vulnerability; criminal background, bad spending habits or overall lack of responsibility are some examples of impact areas that could sideswipe your good intentions.

Without such attention, you're charting a course for disappointment. A client many years ago – following the deaths of his parents and grandparents – was appointed trustee of his grandparents' trust. The client, now the trustee, was responsible and financially savvy. A beneficiary of the trust, his uncle, had substance abuse issues.

The trust required my client, as trustee, to distribute the uncle's share "outright and free of trust" at a certain age, which the uncle had reached. Believing the distribution would lead to the uncle's ultimate downfall in light of his history of substance abuse, my client refused to make the distribution. However, the way the trust had been written, the trustee, my client, was not allowed such discretion. The uncle took legal action against the trustee and was instructed to make the distribution. Within weeks of receiving the inheritance, the uncle was dead from his addiction.

To avoid unpleasant outcomes, the creation of a "discretionary distribution" trust, rather than an age-based "mandatory distribution" trust, is an important consideration.

A discretionary distribution trust provides the trustee flexibility to evaluate a beneficiary's situation and, if necessary because of personal challenges or difficulties, withhold distributions, regardless of the beneficiary's age. In other words, in the case of such personal crisis, the trustee is able to make distributions to a third party on behalf of the beneficiary. The third party is responsible for the

payment of the beneficiary's expenses – expected or not (think rehabilitation, lights bills or the mortgage, medical). At the appropriate time, the trustee can make arrangements for the beneficiary to receive the distribution directly.

### ***Children as beneficiaries***

My first piece of advice when it comes to providing for your children, no matter their age: Do not – as a time-saving, effort-alleviating measure – include your children as joint owners on your bank, investment accounts or property deeds. Although ensuring immediate access to an inheritance without legal wrangling, it also leaves wide open the possibility, even the lure, of abuse.

Also, by including your “beneficiaries” on your accounts, you run the risk of assuming their financial mistakes. Should one file bankruptcy, the bankruptcy trustee can take control of your account. Should the IRS garnish the wages of a tax-delinquent benefactor on your account could be garnished. Tax consequences must be considered: Including a beneficiary on your accounts may be considered a taxable gift. Trust issues should command your attention before including someone on your account: Particularly in cases of multiple beneficiaries, will the accounts be shared equally, as per your wishes? The list of possibilities goes on and on; any one should be reason enough not to use this method as a substitute for an estate plan.

There's a fix for such a conundrum. By executing a general power of attorney on behalf of a trusted loved one, you provide authority over your finances without allowing them ownership of your accounts. You become the “principal,” once you have designated your “attorney in fact,” who becomes the “agent.”

Properly executed, power of attorney enables the agent to pay the principal's bills and ensure financial responsibilities are met, while protecting against abuse or activity occurring without your authority. This can be accomplished through a “springing” power of attorney, which limits the power to special conditions, i.e., your physician's written statement that you are no longer capable of managing your affairs.

Powers of attorney alleviate the necessity of a “living probate,” a legal proceeding

identifying guardianship for a person no longer capable of managing their affairs or making decisions about their care. Conservatorships and guardianships are probate court proceedings as a result of the absence of power of attorney. The court has the authority to appoint one or more people to handle decisions about the incapacitated person's life.

A revocable living trust (RLT) is another solution, as a general power of attorney has few protections and expires upon the principal's passing. In addition to a power of attorney, you can utilize an RLT as a way to give your beneficiaries instructions for and authority over your assets as you desire.

Consider designating your beneficiary as your co-trustee, allowing them access to your accounts without exposing your assets to their creditors or adverse tax consequences. As well, the designation of beneficiaries as successor trustee, allows them authority over your assets only upon your own incapacity or passing.

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A "Statement of Wishes" is an important consideration as well. It is a nonbinding and valuable addition to estate planning. If you have preferences about beneficiaries receiving assets at certain ages – birthdays, graduations, marriage, etc., – this informal document can be updated as necessary and provide useful guidance to the trustee or executor in the handling of your assets, based on your wishes.

### ***Look ma, no probate!***

A recurring misconception about estate planning is that a will is the beginning and the end. Wrong. Your will marks the beginning of the probate court process, which can result in considerable costs, time-consuming proceedings that delay the ultimate distribution of assets, and can be a stressful experience for both trustee and beneficiary.

Probate has been defined by industry wags as "a lawsuit you file against yourself after you die with your own money for the benefit of your creditors." Other pitfalls

of probate include: loss of control as the executor comes under the supervision of the court and judge appointed to oversee the administration of the estate; a loss of privacy, as the proceedings become a matter of public record and often the target of ambulance chasers and scammers; family feuding as the court often places beneficiaries in adversarial positions; and more.

As a cure, an RLT is a useful estate planning tool. Transferring your assets to such a trust will keep your estate out of court. Think of a trust as a contract between three parties: The trust-maker places their assets into a trust and makes the rules (the legislative branch); the trustee is in charge of the trust, enforcing the wishes of the trust-maker while carrying out its instructions (the executive branch); the beneficiary is the recipient of the designated assets (the citizen).

In creating an RLT, you become all three parties. You create the trust for your own benefit and remain in charge of your assets; you maintain control. Your trust is not taxed. You can amend the trust at any time.

The provisions included in your RLT are important. The best and most effective of this type of trust becomes irrevocable upon the principal's passing, yet is flexible enough to comply with changes in the law or even allow for the replacement of trustees. Consider such provisions as maximizing possible estate tax exemptions for a spouse's passing and protects and provides for the surviving spouse.

Other considerations when creating a RLT include the protection of assets against crisis events such as creditors, medical emergencies, etc.; provisions that remove trust assets from the taxable estates of beneficiaries and their heirs; and clarity around the distribution of tangible personal property such as heirlooms, furniture, jewelry, collections, etc. Your Statement of Wishes needs to be among the provisions in a revocable living trust. When appropriate, include recognition of a beneficiary's special needs and how a distribution might impact government benefits, if any, and even provisions to protect against a beneficiary's possible suit against their distribution.

### ***Life insurance caveats***

Do not carry life insurance policies that name your spouse as the primary

beneficiary and your children as secondary recipients. Such a structure can lead to trouble down the road. For instance, if a beneficiary is a minor at the time of the principal's death, a conservatorship must be created through the court system and remain in place until the beneficiary turns 18 years of age. If a beneficiary runs into financial issues with creditors, life insurance distributions can become available to those collectors. Depending on your net worth and without proper planning, you may be subject to as much as a 40 percent estate tax, as a life insurance policy is included in your estate for estate tax purposes.

The above, in real life, might look like this: A client came to me some years ago, life insurance policy in hand, following the death of their parent. The parent had designated as beneficiary of the policy "my estate."

In this case, the policy, with its "my estate" beneficiary designation, had the effect of forcing the parent's children into probate court to realize the life insurance benefits.

What is unfortunate about this example is the parent with the life insurance policy had an RLT. Had the parent completed a change of beneficiary form provided by the insurance company, and listed her trust as the beneficiary, the probate process would have been avoided.

### ***Fund your trust***

One of the important benefits of establishing a trust is the protection it provides against beneficiaries ending up in probate court, whether or not they are challenging the distribution; one way or the other, without a trust, they will face probate. With this in mind, I encourage clients to fully fund their trust.

This sounds like a no-brainer. But, fully funded means bringing everything of value into your trust. Your estate plan is not complete until you have transferred ownership of your real estate, personal property, business interests, bank accounts, life insurance policies, stocks, annuities and investment accounts to the trust. If you have a Honus Wagner T-206 baseball card, it should be in your trust.

Create a worksheet in your trust notebook you can use to keep track of what assets you have transferred and when. Keep documentation proving these transactions

and transfers with your worksheet.

Additionally, a good estate plan incorporates a “pour-over” will, a safety valve in case those of your assets acquired after creating a trust are not transferred to the trust prior to your passing. The left-out assets will have to be probated, but the pour-over will directs the personal representative in the probate action to transfer probated assets into the trust. The probate judge will allow this transfer.

### ***Give meaning to your money***

It is not uncommon to hear a client remark, “I don’t care what my kids do with the money; I’ll be long gone.” You should care. You should consider the impact of a financial gift. Reflect for a moment on the unhappy endings of many a lottery winner. Instant wealth, immediate access to financial gain. Google “tragic tales of lottery winners.” Story after story of blown riches.

**Giving meaning to your assets – significance beyond its purchasing power – can have a transformative impact on those left behind. Your distribution can help to shape a beneficiary as well as their heirs.**

I don’t know that I have ever heard a client tell me, “I don’t care what my kids become.” Yet, in leaving hard-earned assets without ruminating on the impacts of the gift, some fail to consider how their distribution might change a beneficiary’s life – for the good or for the worse.

What you leave may not be millions. It may not be – in your estimation – life changing.

But, giving meaning to your assets – significance beyond its purchasing power – can have a transformative impact on those left behind. Your distribution can help to shape a beneficiary as well as their heirs. Integrate your own values into your estate plan – include philanthropy as an example of your own largesse; communicate early and often what your assets mean to you based on their reflection of your values and how your beneficiaries can continue your legacy by building their own; create values-based incentives or milestones in your plan, such as distributions upon achievements reflecting your values.

In line with the above is my advice not to “hide” your wealth. This falls under the “communication” category as you plan and create an estate plan. Be open with your beneficiaries, take the time to meet with your loved ones. Share your asset base and the structure of your estate plan. This can be done over a meal, during a retreat in the mountains, anywhere that all feel comfortable and are encouraged to participate in the conversation. Make the plan understandable, use visuals or handouts. Address concerns, explain your reasoning as you go through the plan.

### ***Don't wait, plan your estate***

The reasons to begin your estate planning today are countless. The above, as noted, represent the tip of the iceberg. The answer to the question, “What should I do about my estate *now* for the benefits of loved ones *tomorrow*?” is “Begin the plan.”

As important as a good meal and exercise are, your estate plan offers peace of mind, allowing you to dictate who receives your possessions and valuables, reducing taxes on what you leave behind, and minimizing the chances of family dysfunction and legal hassles.

Think of it this way: By planning your estate trust now, you can ensure that your beneficiaries are taken care of after your passing, just as you wish.

### ***About the Author***

A graduate of Arizona State University who later earned his law degree from the McGeorge School of Law at University of the Pacific, Kent Phelps' expertise in full-service estate planning has been honed during a 26-year legal career.

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