TEXAS ESTATE PLANNING BASICS

Including

Wills and Living Trusts

By Ronald G. Greening

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The National Academy of Elder Law Attorneys, Inc. (NAELA) is a professional association of attorney concerned with improving the availability and delivery of legal services to older persons. With the emergence of elder law as an acknowledged area of practice, NAELA is striving to define the area of practice, establish practice standards, and create an information network among elder law attorneys. Through NAELA attorneys exchange ideas and information on substantive elder law issues and the development of an elder law practice.

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Texas Estate Planning Basics

How to give what you have to whom you want in the way you want!

Earning money and spending it are two great pleasures of life. However, deciding who gets what and how when you are gone is a task most people would rather ignore.

In fact, only 30% of Americans have taken the time to plan their estates. Unfortunately, even many of those who have are led to believe that a simple will is all they need.

Estate planning is made up of three areas: accumulating assets, preserving those assets from predators, and distributing assets when you die. Although it may sound simple, there are challenges that may prevent your estate from being managed and distributed according to your wishes. These challenges can be broken down into three categories: probate, estate taxes, and guardianship.

WHAT IS PROBATE?

Probate may occur whenever someone dies with assets in his or her name. Unfortunately, probate is often confused with taxes. Probate has nothing to do with taxes.

The main purpose of probate is to change the title of assets that were owned by a deceased person to his or her heirs. The titles of assets are generally held in the owner's name. When an asset owner dies, assets cannot be transferred without the names on the titles being changed. Typically, the probate court is the only institution authorized to change the title of assets that were owned by a deceased person.

In addition to changing the title, the probate court handles other matters concerning the decedent's estate. For example, the court resolves disputes, authorizes payment of creditors, inventories assets and distributes the assets with good legal titles to the heirs named in the will if the probate court finds the will to be valid. If there is no valid will, the assets are distributed according to state law.

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Disadvantages of Probate

Although probate is easier in Texas than in most other states, you should be aware of its disadvantages.

First, probate can be a long and painstaking process. Probate usually takes from several months to two years. There are many cases that take even longer.

Another major disadvantage of probate is that it is a matter of public record. The probate court records that list your assets and their value and who received your assets are open to the public during the probate process and forever after. Community property laws in Texas usually cause all assets of married couples to be listed in the public record.

In fact, many probate court records are available on the internet. This leaves the surviving spouse or other heirs vulnerable to financial scam artists who have unrestricted access to the amount and types of the surviving spouse's and other Beneficiaries' assets.

Probate will not only occur in the state in which you resided at the time of your death, but also in every state where you own real estate.

Moreover, unless you have a carefully written will, the probate court may require that your executor or administrator post a financial bond to ensure that she fulfills her duties.

However, the most shocking aspect of probate is the manner in which probate fees are calculated. Many states' laws set the fee attorneys and executors can charge. They require that fees be a fixed percentage of the estate. Using this method, fees can range from 4% to 10% of your family's gross estate. Good news! Instead of a percentage of the estate, Texas allows an attorney to charge any reasonable fee, without limitation, to probate a person's estate. The average attorney's fee for probate in Texas urban areas is 3.5% of the estate.

Save money by dying as a Texan! Probate costs in Texas are generally the lowest in the nation.

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INCAPACITATION

Up to this point our focus has been on the legal consequences of your death. We have yet to discuss who would manage your finances in the event you were disabled, either mentally or physically, and unable to manage your finances.

Power of Attorney

A Power of Attorney is a legal document by which you appoint an agent to conduct your financial affairs. A common law Power of Attorney automatically terminates upon the death or mental incapacity of the person creating it. However, you can create a Power of Attorney that will not be automatically canceled upon your mental incapacity. This is called a Durable Power of Attorney and is authorized in the Texas Probate Code.

Powers of Attorney are only voluntarily accepted in Texas. Title companies, stock transfer agents, banks, and others are not required to honor them. Powers of Attorney, even Durable Powers of Attorney, are often not accepted. You and your loved ones may learn this alarming fact after it is too late and be forced to pursue a costly, controlling, and time consuming guardianship.

Guardianship

Guardianship is a probate court proceeding (sometimes called living probate) in which a mentally disabled person is sued to take away his right to manage his assets and personal care. Those rights are then transferred to a person or financial institution appointed by the probate court to manage the mentally disabled person's ("ward's") finances and personal care. After the guardian takes over the ward's financial responsibilities, the court must then supervise the guardian's actions. Guardianship can be one of the most humiliating, expensive and time consuming legal proceedings. First, the court must appoint an independent attorney to represent the disabled person. The fees of the attorney are paid by the disabled person. Therefore, the family ends up paying two attorneys who may be arguing against each other. Second, the person designated by the court to manage the ward's assets (the guardian) must report to the judge all financial dealings made on the ward's behalf. All income and

expenses must be reported down to the penny. The two attorneys and court auditor then review the income and expenses at least annually. The law requires this in order to insure the ward's interests are protected. Without adequate estate planning, the chances of having a guardian appointed on your behalf are high.

The guardian takes control of all of the assets and income of the ward. The ward cannot sell his or her own assets or determine how his or her money will be invested without the consent of the guardian. Whether the protected person has any spending money is the guardian's decision.

Probate courts do not casually appoint guardians. The alleged disabled person must be given notice of a petition asking the court to act, must be present at a hearing on the petition, has the right to present and cross-examine witnesses and receives a court-appointed attorney. Once a guardianship is established, the ward has a right to have accountings and reports from guardians and a right to have the court periodically review the need for continuation of the guardianship.

Guardianship, when properly used, may be a good way to provide continuing management to persons who need such help.

The continuing involvement of the court can provide added protection to everyone involved.

Anyone can bring about a guardianship suit. If someone has filed a petition asking for the appointment of a guardian for you, you should contact an attorney (if you do not want the court appointed attorney). This attorney can advise you as to the procedures that are involved and the choices available to you. You will have to decide whether to oppose the petition, propose alternative solutions or oppose the appointment of the proposed guardian in favor of one of your choice.

If a family member needs to have a guardian appointed, you should contact an attorney who is familiar with this area of the law so that the necessary pleadings can be filed with the appropriate court and so that the correct procedures can be followed. The attorney can also advise you of various planning alternatives to guardianship that may be available. Such choices

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may include a Durable Power of Attorney, a trust and other options.

Legal care for the elderly is one of the fastest growing areas of the law. Those over age 80 account for a greater proportion of the American population every year. According to the U.S. Bureau of the Census, in 2007 there were more than 2 million Americans 90 years old or older, up from 1 million in 1990.

With our population aging, it is likely that more and more Americans will be subject to guardianship.

So far, that simple will you may have thought adequate to plan your estate has failed to protect your family from both probate and incapacitation.

In addition to exposing your estate to probate (and estate taxes, as you'll read in a later section), the "simple will" also fails to offer protection from guardianship. The simple will, or any will for that matter, offers absolutely no protection from the legal proceedings arising out of disability. By this point you should realize that a will may only provide very limited estate planning advantages.

REVOCABLE TRUST
(Living Trust)

Fortunately, there is a planning tool, the Revocable Intervivos Trust, which can eliminate both probate and guardianship and minimize or avoid federal estate tax liabilities. Broken down into its simplest terms, a trust is nothing more than another way of holding title to your hard-earned assets.

To avoid the cost and hassle of probate at death and guardianship if you become disabled, you must transfer the title of your assets out of your name. However, after transferring the title to your property, you obviously don't want to give up the right to control, manage, and dispose of it.

Change Title of Assets and Still Maintain Control

The good news is that you can change the title of your assets and still keep control. You do this by creating your own personal trust. A trust is a document created by you while you are alive. Picture the trust as a huge legal box that contains title to all your assets.

In every trust, there are three principal positions: Founder, Trustee, and Beneficiary. The Founder creates the trust and transfers her assets into it.

The Trustee is the person who, according to the trust rules, manages the assets in the trust. The Trustee makes all the financial and business decisions concerning the trust's assets, including buying, selling, and mortgaging. A Beneficiary has only one job – to enjoy the benefits of the trust.

You are the Founder, Trustee and Beneficiary

When you create your trust, you may lawfully occupy all three positions. You may be the Founder, the Trustee and the Beneficiary of your own trust! No, this is not a fraud or a sham. It is not, "one step ahead," of the Internal Revenue Service. It is a very conservative estate planning tool used by many.

What you have really done is transfer title of your assets from yourself as an individual to yourself as a Trustee, to manage for the benefit of yourself as the Beneficiary.

By occupying all three positions, you can do anything you want with the assets in your trust. There are no restrictions. You can add new property to your trust. You can sell assets from your trust. You can spend assets in your trust if you want. If you made your trust revocable, you can amend, terminate, or revoke it at any time.

Trusts Eliminate Guardianship and Probate

With your assets in a trust, if you become disabled, there will be no need for a guardianship proceeding. This is because in your trust document you named a Successor Trustee to manage your assets for you if you became disabled. When you die, all assets in the trust will avoid probate because that trust already has title to the assets. The Successor Trustee you named will follow your instructions regarding the management and distribution of the assets.

What this means is, when you die with title to your assets in a trust, probate attorney fees and court hearings can be avoided. There

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will be no probate court delays in distributing the assets. The Successor Trustee you selected will distribute your property according to the terms of the trust. There will be no public record of your assets, their value, or who received them. No one other than the people you have named in your trust will ever know the details of your financial or estate planning.

Possible Distributions

Regarding distribution of assets, you have unlimited choices. Some frequently used options are:

Outright Distribution

A financially responsible child could receive his or her share outright immediately upon the death of both parents.

Young Beneficiaries

For young Beneficiaries, most people leave assets in trust for their general welfare until they are 18 years old. Between ages 18 and 26, the children receive trust assets only to pay for higher education. After that the assets may be equally divided and distributed over a period of time – perhaps equal to 1/3 of the child's income, for instance.

Heritage Trusts

Heritage Trusts are great vehicles to protect a Beneficiary's inheritance while ensuring that the trust assets are used according to your wishes. A Heritage Trust is essentially a trust created by you that does not hold any assets until after you die. Heritage Trusts usually place your child as both Beneficiary and Trustee when they reach a certain age, but limit the things trust assets can be used to pay for, as defined by you. In this way, Heritage Trusts can: protect assets from the child's spouse in the event of divorce; protect assets from creditors in the event of financial hardship; and upon the death of the child, remaining assets may be distributed to other Beneficiaries according to your wishes. A Heritage Trust provides both security and structure to the assets within the trust.

Supplemental Needs Trusts

A Supplemental Needs Trust (SNT) is a trust that has special provisions tailored for a Beneficiary who is receiving, or is thought likely to receive in the future, governmental assistance, such as Medicaid and Social Security. Using a SNT in this

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situation accomplishes two goals. First, it does not disqualify the Beneficiary from receiving public assistance while providing a way to support those needs that are not met by public assistance programs, e.g. routine dental care, recreation, and expenses for family members traveling to visit the Beneficiary. Second, SNTs provide a way to preserve some of a couple's assets to pass down after they are both deceased, even though one of them needs government support, such as Medicaid or S.S.I.D.

These options and many others can be customized by your attorney to reflect your desires and the needs of your family.

Choosing a Trustee

Naming a Trustee requires careful thought. Most people choose to be the initial Trustee of their trusts, but a Successor Trustee will have to be named to take over after the death or disability of the Founder(s). Family members, friends or financial institutions are often available to serve. Your attorney is able to counsel you regarding your decision.

As noted above, you can serve as your own Trustee or you can appoint a professional Trustee such as a bank or trust company. Most people appoint an individual such as a spouse, a relative, or a friend to serve as Successor Trustee. When deciding whom to select as Trustees, you should consider whether they are worthy of your trust and willing to accept the job.

A professional Trustee may be the best choice if your property will be difficult to manage or distribute. The disadvantages of professional Trustees are that they can be impersonal and charge annual fees ranging up to three percent or more of the value of the trust assets. Furthermore, many professional Trustees are unwilling to serve if the value of the trust assets is less than $600,000.

Your trust will describe the duties of your Trustee to manage the trust property, keep records, prepare tax returns and make distributions to your Beneficiaries. Your trust can also designate a Successor Trustee or provide instructions on how to select additional Successor Trustees.

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What about Income Taxes?

For income tax purposes, you are taxed in exactly the same way as you would have been without the trust. The Founders/Trustees of a trust continue to pay their income taxes just as they have in the past. When you are the Founder and the Trustee, there are no new income tax forms to file for your revocable trust.

Trusts are Valid

The Texas Trust Code and the laws of all other states provide for the creation and use of the revocable trust. The Texas Supreme Court has even written about the benefits of trusts in Texas.

Your attorney and advisors can help you establish a trust-based estate plan for yourself and your loved ones. You can change or cancel your trust plan at any time. As Founder, Trustee, and primary Beneficiary, you control every aspect of how your property will be used. You also appoint your Successor Trustees, naming as many or as few Successor Trustees as you like, with specifications of who takes care of what. Of course, a trust-based estate plan truly comes to life when you add your specific instructions with the help of your attorney.

A Word of Caution

Proper estate planning revolves around your relationship with a licensed attorney. Unfortunately, there are many businesses and salespersons masquerading as estate planning professionals. They are inundating the public with sales schemes that involve selling wills, trusts, and other estate planning tools without the involvement of attorneys to design and draft documents specifically addressing their clients' needs and desires. These plans represent the *opposite* of proper planning.

The trust planning process requires professional thoroughness by attorneys and respect for the overall well-being of the client and the client's family. It aspires to the highest ethical professional behavior and lends dignity to the client and the planning process.

Trusts are not for everyone, but many people can can save time and money by eliminating the need for guardianship and probate.

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Deciding whether to create a trust requires analysis of the extent of your assets, the types of assets you own and your personal preferences concerning their management. Real estate you own located outside your state of residence may require more than one probate on your death. Trusts can eliminate such expense and delay.

Making Estate Plan Changes

Review your estate planning tools whenever important life changes take place: when there's a change in the way you want your estate to be distributed, a change in the person or persons you wish to serve as your Successor Trustees under your trust, a change in marital status, the death of a Beneficiary or Successor Trustee, a significant increase in your net worth, a receipt of retirement benefits from your employment, a sale of significant assets, you move to another state, or experience a drastic change in your health. Be sure your estate plan keeps pace with the value of your property and changes in the tax laws. Revisions can be made with an amendment to an existing trust or by drafting a new document.

Never **try to make a change by inserting or deleting words in your will, trust, or other estate planning documents. You could upend your entire plan!**

ESTATE TAXES

If you are going to die, die as a Texan. It's a good deal! The state of Texas does not tax estates nor Beneficiaries of estates.

However, the Federal Estate and Gift Tax are still very much active. At the time of this writing, Federal Estate Tax laws are likely to change. Each person currently receives a $3,500,000 exemption and is taxed 45% on any amount above this. The Federal Estate Tax is currently scheduled to go away entirely in 2010 and revert to a maximum of 55% tax with an exemption of $1,000,000 in 2011. In all likelihood, however, the Federal estate tax will continue to exist and the exorbitant rate of 45% will persist.

If your estate is greater than the estate tax exemption, you should certainly seek counsel to learn how you can reduce, if not eliminate, the estate tax burden on your estate when you die.

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What a Trust Can Do For You

1. A trust avoids probate. With a trust, your assets can go directly to your Beneficiaries after your death. Probate attorney fees and court costs can be avoided. There will be no court delay in distributing your assets and your estate planning goals will be completely private.

2. A trust eliminates guardianship proceedings. If you become incapacitated or are unable to manage your estate, the Successor Trustee you have named will step in and manage your affairs without delay, government interference, or expense.

3. A trust can protect children from a previous marriage. Both the surviving spouse and children from a previous marriage can receive fair treatment and protection under the terms you want in your trust.

4. A trust allows you to determine the way your estate is managed and distributed even after your death. A trust can create protective trusts for young children, disadvantaged children, adult children and grandchildren. It can provide care, support and education for your heirs by turning over assets to them at a certain age or under conditions chosen by you. Even insurance proceeds can be paid to the trust so your Successor Trustee can manage them for the benefit of your family.

5. A trust can insure that your wishes are carried out and are protected from attack. Most trusts contain a “no contest clause” which protects your estate from attacks by greedy Beneficiaries and their lawyers.

6. A trust can reduce or eliminate federal estate taxes. A trust with a bypass trust provision can allow a married couple to pass $7,000,000 absolutely estate tax free to their heirs. This goal can also be accomplished by setting up a testamentary trust in a will.

7. A trust gives you peace of mind. Most importantly, when your trust is completed, you and your family will relax, knowing that your estate will be managed and distributed by someone you have selected and trust.

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Typical Estate Planning Portfolio

Flow Chart	A one-page overview describing how your assets will be managed and distributed by your Trustee.
Revocable Trust	Avoids guardianship and probate and reduces or eliminates federal estate taxes.
Trust Property	Summary of assets owned by your trust.
Pour Over Will	Transfers any assets outside your trust into your trust after your death.
Affidavit of Trust	Summary copy of selected portions of your trust.
Instructions	Guidelines for using your trust and making transfers of assets to and from your trust in the future.
HIPAA	Authorization for designated Successor Trustees and others to obtain limited, appropriate medical information about you.
Life Insurance Summary Form	Allows you to keep track of information regarding all of your life insurance policies.
Location List & Family Information Form	Allows you to track where all your important documents are located and whom to notify in case of death or disability.
Estate Planning Letter	Your instructions for distributions of small items of personal property, burial and funeral instructions.
Directive of Physicians (Living Will)	Authorizes termination of artificial life support systems if there is a terminal illness and death is imminent.
Anatomical Gift Donation	Authorizes organ donations.
Durable Power of Attorney	Authorizes someone to manage your property even if you become mentally incapacitated.
Medical Power of Attorney	Authorizes someone to make health care decisions if you become mentally incapacitated.
Declaration of Guardianship	Your request to the probate court judge to appoint a specific guardian for yourself or your minor children, should one be required.
Disposition of Remains	Allows you to provide instructions for the disposal of your remains after you die, such as burial or cremation.
Other Documents	Deeds, assignments and other documents transferring property to your trust.

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About the Author

Ronald Greening, Attorney and Counsellor at Law, is the founder of The Greening Law Firm, P.C. After working as an electrical engineer for three years and returning to law school, he has been in active legal practice since 1975 and back home in Austin since 1983. He is a member of the Real Estate, Probate & Trust Law Sections of the State Bar of Texas and the Probate and Estate Planning Law Section of the Austin Bar Association. He is also a founding member, past president, and director of the American Academy of Trust Estate and Elder Law Attorneys and a member of the Texas and National Association of Elder Law Attorneys and member of the Estate Planning Council of Central Texas. He is fully licensed by the Texas Supreme Court, Washington, D.C. Court of Appeals and various federal courts. His practice is limited to estate planning, estate administration, probate, elder law and Medicaid planning.

Ron lives on Lake Travis and has a herd of one Longhorn steer who lives in his backyard. You can see a likeness of his former Longhorn in front of Ron's Austin and Georgetown offices.

Ron advocates the education of the public and financial planning professionals to help people make informed decisions relating to their estate planning including the use of trusts as a proven way to protect families from the expense and delay of guardianship and probate, and to minimize federal estate taxes. His motto: Planning Adds Predictability.

The Greening Law Firm, P.C. is committed to researching and preparing high quality, tax-sensitive estate plans. The mission of the law firm is to help you accomplish your estate planning goals and to take the mystery out of the estate planning process. The Greening Law Firm, P.C. clients have their estate plans explained in straight-forward language that they and their families can understand. Your loved ones should be relieved of needless court interference, public records, attorney fees and government interference when your estate is settled. You should have the peace of mind that comes from knowing your loved ones are legally protected thanks to your estate planning decisions.

The Greening Law Firm, P.C. conducts workshops for the public as well as accredited continuing education seminars for C.P.A.'s, C.F.P.'s and other professionals. The firm offers free initial office consultations regarding estate planning, probate, estate administration, and Medicaid planning. Please call 476.0888 or 931.0888 for information regarding upcoming workshops or to schedule a complimentary consultation.

Please call 476.0888 or 931.0888 (our Georgetown office) or 800.768.8898 if you would like to receive additional copies of this book.

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Your Notes and Questions

Proper Planning Adds Predictability

You may attend an Estate Planning Workshop taught by Ron Greening. Please consult www.GreeningLawFirm.com for dates and locations or call 476.0888.

This book is designed to provide you with general information about estate planning. It is not meant to give specific legal or tax advice. The actual structure of your estate plan may involve complex legal and tax issues not addressed in this book. Every estate plan must be designed to meet the needs and desires of the individual. You are advised to seek competent legal counsel to develop your estate plan.

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