

Alumni Virtual Events Series

Co-Hosted by the Office of Planned Giving and Gonzaga's School of Law

Estate Planning 101: What you Need and Who Needs to Know

Questions & Answers

The following is a general overview of some estate planning considerations and pointers and does not constitute legal advice. Make sure to consult with your estate planning attorney to make sure that your particular estate plan meets your needs and objectives.

All answers, unless provided otherwise, are based on Washington law.

Question:

I wonder if you can talk a bit about planning devices you would recommend to plan for cognitive impairment not severe enough to qualify as legal incapacity.

Answer:

See Washington Law Help at: <https://www.washingtonlawhelp.org/issues/aging-elder-law/living-with-dementia>.

See also: <https://www.washingtonlawhelp.org/resource/advance-directive-for-dementia?ref=pLswg>.

Question:

What happens if the witnesses to a will can't be located?

Answer:

Good question. If the will is not contested – there is no problem. If the will is contested and a contestant claims the will was forged, not signed, etc. then the witnesses must be located. A great way to avoid problems is to have the witnesses sign a “self-proving affidavit.” That eliminates the search for witnesses later.

See: <https://wa-wills.com/legal-library/write-your-will/will-drafting-instructions/signature-lines-and-affidavit/>.

Question:

Could I (an attorney) draft a will for myself and my wife--where I would inherit everything from my wife? I vaguely remember the RPCs saying an attorney could not draft a will where the attorney inherits a portion of the estate?

Answer:

Absolutely. Any family member who is an attorney may draft a will for another family member. However, a family member who drafts a will that has an “unnatural disposition” of the estate of the deceased will have the burden to prove he/she did not unduly influence the testator. For example, if one child of the testator takes ½ of the estate and the other three children receive the other ½ - the burden will be on the proponent of the will to show that was what the testator intended to do.

Question:

Can you address DocuSign applications for these topics?

Answer:

The law in Washington is that wills, trusts, and codicils must be signed. That has not changed. However, the Legislature passed Senate Bill 5641 and it was signed by Governor Inslee on April 26, 2020. The bill allows for electronic notaries. The bill was to take effect on 10/1/20, but due to COVID, Governor Inslee made the law effective immediately. That is Declaration 20-27. The proclamation provides in part the following:

WHEREAS, many professional services require the use of notary services for a variety of purposes that impact our vulnerable populations, including the need for advanced healthcare directives, wills, deeds of trust, durable powers of attorney for health care, irrevocable trusts or living trusts, real estate transfers, consents to travel documents for minors, adoptions, and affidavits of identity for a variety of purposes;

FURTHERMORE, based on the above situation and under the provisions of RCW 43.06.220(2)(g), I also find that strict compliance with the following statutory obligations or limitations will prevent, hinder or delay necessary action in providing relief to vulnerable populations and the businesses and professionals that serve them in the provision of estate and end of life planning, travel and adoptions, while applying appropriate social distancing measures, by removing the delayed effective date of and allowing for the new electronic notary services provisions authorized by, Senate Bill (SB) 5641, An Act relating to electronic notarial acts by remotely located individuals, Chapter 154, Laws of 2019, and codified within RCW 42.45, to take effect immediately, which relief is necessary for coping with the COVID-19 State of Emergency under Proclamation 20-05, and that the specific effective date provisions in Section 10 of SB 5641 is hereby waived and suspended, effective March 27, 2020 until midnight on April 26, 2020.

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Question:

How should you do a codicil?

Answer:

A codicil has the exact same requirements of a will.

Question:

What is the advantage of putting your will in a repository?

Answer:

It is there in case your will is never found. If a will is not found, it is presumed revoked. This would allow a relative to go to the State to receive a copy of your will.

Question:

What tips can you offer for finding and then selecting an estate lawyer?

Answer:

To the extent you can, it is great to get a referral from a friend or acquaintance who has had a positive experience. Your CPA or financial advisor will likely have some good recommendations. I would try to avoid just going online to find an attorney as a lot of the material online is paid advertising and it may be difficult to find an expert that fits your needs vs. someone who just has more effective advertising. When you think you have found an attorney make sure that you interview them and are comfortable with them. Often attorneys will provide a free initial consult/meeting. Take advantage of this and get to know them. Discuss their areas of expertise and make sure it fits your needs. If you have a complex estate, or situation, make sure to discuss this and whether it is a good fit for the attorney. Potentially ask for references. Also, make sure you understand their fee structure.

Question:

A minor inherited a sizable investment portfolio (no real estate, solely stocks and bonds, etc.). Minor is now 18+. It is sufficient that at this time, they've only named beneficiary for their investment, and POD appointed for bank account. Would you recommend that they establish a trust, or a will? Isn't listing beneficiaries enough for now?

Answer:

There is a lot to unpack in this question. Where does the minor live? How much money do they have? What do they want to see happen if they die? Who are the intended beneficiaries and what are their needs? Generally speaking, if their estate is not sizeable enough that they have any tax planning needs, and the designations they have on file for the investment account and bank account are consistent with their desires (and it makes sense for the designees to receive the portfolio/bank account outright, as opposed to in trust), then they likely do not have to set up a trust or will simply because of the investment portfolio and bank account, but it is probably worth spending a couple hundred dollars to discuss this with an attorney to confirm.

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Question:

If parties get divorced, does the will/trust need to be re-drafted?

Answer:

No. Upon the “dissolution, invalidation, or termination of a marriage,” all the provisions in the will favoring the former spouse are automatically revoked. The same is true of a trust.

Care should be taken to check Payable on Death or Beneficiaries listed on such things as life insurance policies or pensions. The U.S. Supreme Court held that Washington’s automatic revocation provisions do not apply to ERISA (The Employee Retirement Income Security Act) property. That case is *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

Question:

Will sample documents (particularly of the "big three" - will, power of attorney, health care directive - trusts) be provided to participants after the webinar? The lawhelp website did not have any sample wills or trusts. Thank you for the great presentation!

Answer:

Thanks! A number are available here: <https://www.washingtonlawhelp.org/issues/aging-elder-law/powers-of-attorney-health-care-directives>.

For a will, Washington Law Help recommends the following: <https://wa-wills.com/legal-library/get-started/>.

Question:

If you give \$5 million today under the \$20 million exemption and the law changes - does that gift use your exemption under the new tax law?

Answer:

The exemption is currently approximately \$11.6 million/person, \$23.2 million between spouses. If the exemption amount is reduced in the future, it is hard to tell what congress will do with reference to existing gifts. It is very likely that any gifts that use exemption will still count against whatever the reduced exemption amount is—thus, if the exemption goes back to \$5 million, under the hypothetical above, you would have no more exemption.

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Question:

After the death of my spouse I created a Testamentary trust. Do I need to specifically mention this in my will or will it follow the same distribution stated in my will?

Answer:

We need more information on this. Was the "Testamentary Trust" created under your Wife's will? If so, the provisions of her will govern how the trust is used and disposed of. Her will may give you a limited or general power of appointment (allowing you to direct where the assets go when you die) which likely would have to be referenced in your will. If instead this is a trust you established, we still need more facts. Is it revocable? Irrevocable? You should consult with your estate planning attorney to make sure this is addressed and answered.

Question:

Does the State Estate Tax apply based on where the decedent passed away, where the assets (real property) are located, or where the person receiving the inheritance lives?

Answer:

This varies state by state but at least in Washington, it depends on whether the decedent was a Washington resident. Washington taxes residents on all property that is in the state of Washington. This includes all real property in the state and all intangible property (stocks/bonds/interests in LLCs) owned by the decedent. For out of state residents, Washington only taxes property located in the state. The computation is a bit complex and for both in and out of state residents, takes into consideration property not subject to the tax. If you are a WA resident with a total estate of \$2.193 million or more (regardless of location) or are not a WA resident but have WA real property and have a total estate of \$2.193 million or more, you need to be talking to an attorney versed in WA estate tax law to understand your potential estate tax liability. I would anticipate that other states work in a similar fashion—if you live in or own property in a state that has an estate tax, you should be talking with your estate planning attorney about how this may impact your estate.

Question:

Can you speak to TOD designation for assets?

Answer:

Transfer on death designations can be good or bad. Essentially, you can designate where an account passes when you die. If you do so, generally speaking, this asset passes pursuant to the designation and not your will. This can be convenient and simple and can even avoid probate, if all your assets have transfer on death designations. This can also wreak havoc on your estate plan if you have a sizeable estate with careful tax planning considerations or if the TOD beneficiaries are persons that should not receive assets outright or are different than your intended beneficiaries. If you have any estate plan in place, MAKE SURE TO DISCUSS ALL TOD DESIGNATIONS WITH YOUR ESTATE PLANNING ATTORNEY TO MAKE SURE THE DESIGNATIONS SYNC UP WITH YOUR ESTATE PLAN AND OBJECTIVES.

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Question:

Is Patrick licensed in Idaho? How does he charge for his services?

Answer:

Yes. Patrick (McNulty '10 J.D.) is licensed in both Washington and Idaho. Patrick typically charges by the hour and is happy to provide an estimate (<http://www.randalldanskin.com/portfolio-item/mcnulty-patrick/>).

Question:

Are all attorneys skilled in estate planning?

Answer:

No. There are attorneys who are highly skilled in estate planning and tax advantages. One must be trained in taxation to provide the best advice.

Question:

Why would you put your burial instructions in a will when the will is reviewed after the post-burial? Wouldn't the burial instructions be better placed in an Advance Healthcare Directive?

Answer:

Hopefully the decedent has already told his/her family what he/she wants in terms of burial, cremation, etc. This should be in writing and signed. A healthcare directive is for when the decedent is still alive. Very few cases have been litigated on this subject – but there are some high-profile cases. Ann happened to write a law review article on this – see <https://theelderlawjournal.com/2018/09/01/murphy/>.

Question:

Is the Law Clinic available online?

Answer:

Yes, you can access the Law Clinic at: <https://www.gonzaga.edu/school-of-law/clinic-centers/law-clinic>.

Question:

What happens if a will can't be located?

Answer:

A will that is not found is presumed revoked. That presumption may be rebutted if a proponent of a lost will produces clear, cogent, and convincing proof of what was in the will and that the person believed his/her was still valid.

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