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Estate Planning:

I. What is Estate Planning?

Estate Planning is the process of developing a plan while you are alive to manage your assets and provide for what will happen to your assets once you die. This plan may help avoid unnecessary taxes or probate and makes it easier for your loved ones to be informed of and carry out your wishes.

II. Estate Planning includes determining:

1. What you own;
2. How you want your property distributed after you die;
3. Putting all of this into a legal document such as a will or setting up a trust.

It is important to note that if you have an estate of any kind a will alone may not be the best option; instead a trust or other estate planning techniques may be appropriate.

III. What is a Will?

A will is a legal document that states your final wishes. You can specify how you want your real property (land and the buildings on the land) and personal property (money, clothes, cars, jewelry, etc.) to be distributed upon your death. It can also determine how you want any other matters to be resolved after you die. To carry out your wishes in your will you must appoint someone to be your "personal representative" (sometimes also referred to as "executor"). You may also name alternates if for some reason the person you choose cannot act for you.

You may change your will as many times as you want up to the time of your death. A will does not go into effect until you die and it only applies to property that you still own at the time of your death. **A will does not avoid probate**.

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IV. What are the requirements for making a Will?

1. You must be at least 18 years old;
2. You must be of “sound mind” meaning you have the capacity to think, reason and understand for oneself;
3. You must intend for the document to be your will; and
4. It must be in writing and signed by you or by someone for you in your presence and at your direction.

You are not required to have witnesses when you sign your will, however, the best practice is to have two witnesses and to sign in front of a notary.

V. What are some of the things that I can include in my Will?

1. Appoint a personal representative/executor for your property/estate;
2. Nominate someone to be a guardian for minor children in your custody or a mentally incapacitated person that you have guardianship over;
3. Decide what you want to do with your pets;
4. Establish a “testamentary trust” which does not take effect until you die;
5. Decide if you want to donate your body and organs;
6. Detail instructions for your funeral/burial/cremation;
7. Decide what you want done with your property/estate;
8. Disinherit people.

Guardianship Nomination

When nominating someone in your will to be a guardian over minor children or a mentally incapacitated person keep in mind that that person does not automatically become the guardian. There is no guarantee that the Court will approve if the person nominated in the will. Further court proceedings in addition to the nomination are needed.

VI. What is a Trust?

A Trust is an arrangement where property is held by a “trustee” pursuant to a written trust instrument, for the benefit of you or your beneficiaries. You can be both the trustee and the beneficiary of your trust or you can designate someone else. There are a number of different types of trusts that are formed to meet different needs.

A trust created during your lifetime is called a “living trust.” A living trust may be revocable, meaning it can be revoked or changed by the creator of the trust, or irrevocable, meaning it cannot be revoked or changed by the creator of the trust. There are benefits to each, and which type may be appropriate for you will depend on your specific situation. You can also create a “testamentary trust” in your will, which does not take effect until you die.

A trust may help you avoid probate, but may not be necessary depending on the size of your estate.

***Before deciding to use a trust for your estate planning you should speak to an attorney who is skilled in this area of law. Legal Aid does not assist or give advice on trusts.**

VII. What is Probate?

Probate is the court process for collecting your assets, paying your bills and other debts, and distributing your property to your beneficiaries or heirs. Probate is necessary when a person dies owning property in their individual name. If the person had a will, they are said to have died "testate." If there was no will, the person is said to have died "intestate."

In most situations, if all parties are in agreement, an estate can be probated "informally" by filing with the Registrar of the Probate Court. This can be a relatively simple process that does not require any court hearings. If there is any disagreement, or in more complicated situations, an estate must be probated "formally" through the Probate Court, which can be a lengthy and expensive process.

As part of the probate process, a personal representative will be appointed to administer your estate. This is done through the issuance of either "Letters Testamentary" (if there is a will) or "Letters of Administration" (if there is no will). These Letters will allow your personal representative to act on behalf of your estate for a specified period of time.

VIII. Are there other ways to transfer property after death?

If your estate is worth less than $100,000 when you die (not including vehicles in your name), your successors (spouse, children, etc.) can complete an "Affidavit for Collection of Personal Property of the Decedent" and present it to anyone who owed you money or has possession of your personal property. The court has a form that can be used. The affidavit is usually used to close a bank account or to transfer ownership of a car *(the court has a form specifically for vehicles)*.

If you own property in "joint tenancy" with someone, the property will automatically pass to the surviving co-tenant(s) when you die. The same is true if you hold property as "tenants by the entirety" with your spouse – the property will automatically pass to your spouse. However, if you co-own property as "tenants in common" with someone, your interest in that property will be subject to probate.

A "Transfer on Death Deed" allows you to transfer property, effective upon your death, to one or more beneficiaries. A Transfer on Death Deed must be recorded, but can be revoked at any time before death. The deed does not affect your ownership of the property while you are alive, and does not give your beneficiary any right in the property until after you die.

Certain types of assets, such as life insurance policies, annuities and bank accounts, allow you to designate a beneficiary who the asset will go to after you die, called POD or Payable Upon Death accounts. These assets would not be subject to probate.