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Estate Planning in North Dakota: THE BASICS

Getting Started

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People spend a lifetime working and building an estate (resources) to carry them through their retirement years. To many, "estate planning" sounds like something only for the rich. Yet few families today can do without it.

Some people avoid estate planning because it deals with attitudes and feelings about death, property ownership, business arrangements, marriage and family relationships. Others neglect or postpone estate planning with such excuses as "I'm too young" "I don't have that much," "It's too expensive," "I'm in excellent health" or "I don't have time." Investing some time and money now is worth the effort to avoid the confusion, delay, expense and family quarreling that might occur if you die without an estate plan. If you do not make a plan, state and federal laws decide what happens to your estate.

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Accept the fact that you are going to die someday. **Ask yourself: If I should die before tomorrow:**

— What would happen to the property for which I have worked a lifetime?

— Who would care for my minor children or aging parents?

— Would my spouse and children be provided for in a fair and equitable manner?

— Would the family business continue?

— Would the estate settlement be conducted by someone with my family's interests and needs in mind?

— Would estate and inheritance taxes, probate fees, and other administrative or legal costs be held to a minimum?

If you have not considered these and other related questions, now is the time to get started in estate planning.

What is estate planning?

Basically, estate planning is the process of arranging your affairs to meet your objectives regarding the use, conservation and disposal of your property. It involves the coordination of all your properties (stocks, bonds, cash, real estate, business interests, life insurance, retirement benefits and other assets) into a total program.

You can't take these "riches" with you. Someone is going to inherit your property, so having the results of your efforts distributed according to your wishes and conserved, as much as possible, from estate and inheritance taxes and other costs of estate settlement seems only sensible.

Basic steps in estate planning

There are six basic steps in the estate planning process:

1. Initiate the discussion.
2. Take inventory and evaluate the present.
3. Develop objectives.
4. Choose professional advisers and discuss objectives.
5. Consider alternatives and implement the plan.
6. Review and modify.

Step 1 — Initiate the discussion

Perhaps the greatest hurdle in the path of most families is lack of communication. All too often, family members are hesitant to discuss estate planning. Parents considering retirement may wish to delay any discussion because of the unpleasant overtones connected with growing old and dying. Adult children may not mention estate planning to avoid placing additional stress on their parents and grandparents and because they do not wish to appear greedy or as if they are trying to "take over."

How do family members initiate a discussion about the need to develop an estate plan without causing misunderstandings? One way is to use this publication as a conversation piece. Share what you learn with other family members. Encourage them to read the material. The NDSU publication FS-522, "Family Communication and Family Meetings," www.ag.ndsu.edu/pubs/yf/famsci/fs522w.htm, may be helpful.

Other ways to stimulate conversation include reading books, magazine articles and publications from banks, trust companies and other reputable sources or attending estate planning seminars or meetings. These may serve as the basis of discussion and illustrate the benefits of planning (and the consequences of not planning).

Other opportunities can come from visits with attorneys, bankers, accountants and insurance representatives. A discussion of estate matters may come up in an incidental fashion and serve to initiate action. Although the death of a neighbor, friend or relative is tragic, it may lead a family to realize that estate planning is not a subject to be overlooked.

Once the discussion is initiated, discussing the family's situation, concerns and objectives should be easier. Families need to make difficult decisions, but the alternative is letting someone else decide.

Step 2 — Take stock of the present

The next step is to make a critical review of your present financial situation. This step is crucial because it is the foundation of your entire estate plan. The end result will be satisfactory only if the information is complete.

The checklist on Page 5, "What My Attorney Should Know," will give you an idea of the information needed. It asks for family information, locations of legal and business papers, and names and addresses of people you consult for advice. The checklist also will help you determine what your estate contains (liabilities as well as assets) and its value, and how ownership of property is held (see the discussion on property ownership). Reviewing with professionals every document that bears on your personal and business situation is a good idea to avoid "surprises" later.

Step 3 — Develop objectives

As you begin forming an estate plan, think about objectives for your estate. What do you want to accomplish? Objectives vary from family to family due to differences in liabilities and assets, abilities and ages of survivors, number of children and values that are important to the person making the estate plan. The objectives of each family member, as well as overall family objectives, should be considered. Remember that objectives may change with your age, marital status, income, amount and kind of property, and other circumstances.

Some common objectives are listed below. Check those that apply to your situation and list any you wish to add. If you have a conflict among the objectives, they should be ranked in order of importance.

- ❑ 1. Provide security for the surviving spouse.
- ❑ 2. Relieve the surviving spouse of estate management responsibilities.
- ❑ 3. Provide security for both spouses after retirement.
- ❑ 4. Retire at age _______.
- ❑ 5. Provide security for an incapacitated family member.
- ❑ 6. Assure continuity of the farm, ranch or other business.
- ❑ 7. Provide educational opportunities for beneficiaries.
- ❑ 8. Assist beneficiaries, including in-laws, to get started in business.
- ❑ 9. Minimize estate and inheritance taxes.
- ❑ 10. Name guardians, conservators or trustees for minor children.
- ❑ 11. Name the personal representative (executor) of the estate.
- ❑ 12. Provide means for paying expenses of estate settlement, taxes and other debts.
- ❑ 13. Provide equitable (not necessarily equal) treatment of family members.
- ❑ 14. Transfer specific property to specific people.
- ❑ 15. Make gifts to family members and others during your lifetime.
- ❑ 16. Reduce income taxes by disposing of income property during your life.
- ❑ 17. Transfer property during your life by installment sale.
- ❑ 18. Provide for charitable bequests to a favorite charity or organization.
- ❑ 19. Minimize probate and settlement costs.
- ❑ 20. Review the current operation and ownership of the farm, ranch or other business.
- ❑ 21. Protect the estate from depletion through use of long-term care insurance.
- ❑ 22. Other ______________________________

Step 4 — Choose professional advisers and discuss objectives

Estate planning is technical and complex. Most people do not have enough time to learn all they need to know to plan an estate thoroughly or to keep up with changes in state and federal laws. That's where professionals, such as attorneys, accountants, financial advisers, trust officers and life insurance underwriters, can help.

An attorney with expertise and experience in property law, probate, trusts, tax law and other estate settlement issues generally serves as the key person on the team, coordinating the work of other team members.

When working with professionals to design and implement an estate plan, be aware that they may have different opinions. You have the final say, however. Making sure you become as knowledgeable as possible about your objectives, your situation and various estate planning alternatives and their consequences is important. Ask questions. Insist on understanding the plan and its implications.

Step 5 — Consider alternatives and implement the plan

You may have several ways to reach your objectives. Ask your professional advisers to explain the alternatives. Explore the consequences of each one. Decide who is to receive what, when and how.

You may need a sounding board, someone with whom to talk about your options, try ideas and get reactions. This may be your spouse, a friend, a partner or one of your professional advisers. A sounding board can help you explore the needs of your beneficiaries, your property and its value to your family, and the proper balance between providing for your own future and meeting your estate planning objectives.

Once the plan has been formulated, implementing it is important. Otherwise, the time, energy and money involved in the previous steps may have been wasted.

Step 6 — Review and modify

Once your estate planning is completed, you can relax but only temporarily. We live in a world of continuous change, so your plan should change with your circumstances. For example, the value or nature of your property may change; your objectives may change; recipients may marry, divorce, die or have children; or tax laws may be revised.

Some professional advisers suggest a review of an estate plan every three to five years, or whenever a major change in your situation or the tax laws occurs.

What can a plan do for you?

A good estate plan can help provide financial security for you and your family now and in the future. A properly designed plan may reduce income, estate or gift taxes and various estate settlement costs.

A well-thought-out estate plan can protect your family from bitter quarrels by providing for contingencies. It can prevent the forced sale or disposition of a farm, ranch or family business. It can provide for skillful property management for younger family members, as well as for older family members who can no longer manage their own financial affairs.

No one is going to force you to make an estate plan. You may do nothing if you wish. However, not making an estate plan is, in fact, making one. For example, if you don't make a plan, your solely owned property and share of tenancy in common property will pass to the people and in the proportions prescribed by North Dakota law. This may or may not be the disposal you would prefer for your estate.

What your attorney should know

You can save time and money by having necessary information and documents in hand for that first visit to your attorney and other estate planning professionals. The following checklist is a condensed summary of information your attorney will need. You also may need actual documents, such as wills, deeds, major debt instruments, past gift tax returns, income tax returns and financial statements for the past five years, trust instruments, information relative to income tax basis of property and any other document in which you are not sure (after checking the document) how the property is titled or who would be responsible for the debt.

1. Personal information (family members' names, birth dates, addresses, occupations, Social Security numbers). Who will be guardian of minor children if both parents pass away? Who will be the trustee of any trusts that may be created by the will?
2. Real estate (type of property and size, location and description, year acquired, cost, how titled, market value)
3. Personal property (motor vehicles, machinery, livestock, crop inventory, home furnishings, jewelry, art, antiques, personal items. Describe the property and include cost, value, who owns it, how it's titled.
4. Bank and savings accounts (name of institution and location, exact names on accounts, amount in each account, how accounts are titled on the signature card, the number for each account)
5. Stocks, bonds and other securities (description, when purchased, number, exact name of owner, face value, cost)
6. Life insurance, long-term-care insurance policies and liability policies (company and address, policy number, face amount and any supplemental values, cash value and any outstanding policy loan, exact name of owner as the proceeds could be included in the insured's estate for estate tax purposes, name of insured, beneficiary)
7. Trusts (type, location, trustee, who established, exact name of beneficiary, value of trust property)
8. Notes, mortgages and other accounts receivable (description, year acquired, value, person who owes you, repayment plan)
9. Mortgages and other real estate debts (description, name of creditor, date due and amount remaining to be paid, whether the debt is an individual or joint responsibility, whether it's insured)
10. Liens against personal property (description, name of creditor, date due, remaining amount to be paid, whether the debt is an individual or joint responsibility, whether it's insured)
11. Other personal liabilities (unsecured notes, notes endorsed, real estate taxes, personal property taxes, state taxes, federal taxes, unsettled claims and name of creditor, date due, amount remaining to be paid, whether the debt is an individual or joint responsibility, whether it's insured)
12. Retirement plans (pensions, profit sharing, deferred compensation, individual retirement accounts, Social Security, qualified domestic relations orders and amount invested, accrued benefits, annual benefits, death benefits)
13. Other financial information (income last year, current income, salary, qualified domestic relations orders, retirement income, annuities, rents, interest, bonuses, dividends, trusts, capital gains)

14. Taxable gifts (amounts, when made)
15. Where important papers are kept (husband's and wife's wills, trust documents, deeds, insurance policies, stocks and bonds, financial statements, income tax returns for last five years, gift tax returns, contracts, partnerships and corporation agreements, profit sharing plans, divorce decrees, pre- and post-nuptial agreements, employment contracts, pension benefits).

The publications HE-446, "Inventory of Important Papers," www.ag.ndsu.edu/pubs/yf/fammgmt/fe446.pdf and HE-445, "Family Records: What to Keep Where and For How Long," www.ag.ndsu.edu/pubs/yf/fammgmt/fe445.pdf, may help you gather some of this information.

Property ownership

Estate planning requires an understanding of property and property rights associated with its ownership. The form of property ownership has an important impact on the degree of control during life, as well as how property will be taxed and distributed after death.

Property can be categorized broadly as real or personal. Real property includes land, attached structures and mineral rights. Personal property includes both tangible and intangible property. Tangible personal property encompasses such things as household goods, automobiles, business or farm equipment and stored grain. Intangible personal property includes bank deposits, life insurance policies, stocks and bonds.

Property ownership has two major elements: degree of interest in (or control over) the property and the relationship between co-owners (when more than one person has a present interest in the property). Note that absolute ownership of property does not exist. In all civilizations, governments may reserve the right to levy taxes on property, to regulate ways in which it may be used and to appropriate private land for public use by the power of eminent domain.

Fee simple absolute

The closest thing to absolute ownership is called "fee simple absolute." With property held this way, the owner (or owners) generally has power to sell it, borrow against it, receive income from it, lease it and transfer it to others during life or at death.

Life estates and remainder interests

A more limited form of property interest is a life estate. Holders of a life estate, or life tenants, share property interests with "remaindermen" (people designated to receive a transfer of the property after the death of the life tenant).

Life tenants manage and receive income from property during their lifetimes but cannot dispose of the property at death. Life tenants generally may not sell or mortgage the property without the permission of the remaindermen and are responsible for property taxes, mortgage payments and adequate property maintenance. Note that the terms and provisions of a life estate may vary, depending on the instrument creating it.

Sole ownership

With sole ownership, only one name appears on the deed or title. All solely owned property becomes a part of the owner's gross estate and, upon death, passes to named beneficiaries under a will or to heirs according to North Dakota law (if no will exists).

Co-ownership

Co-ownership of property occurs when two or more people hold legal title to the property. North Dakota has two types of co-ownership: tenancy in common and joint tenancy with right of survivorship.

Tenancy in common: This form of ownership exists when two or more people hold an undivided ownership of land or other property. Each of the multiple owners has a partial, undivided interest in the property. Each has the right to enter upon the whole land and to occupy and enjoy the whole. Each can sell or gift his or her respective undivided interests without the permission of the other owners. Each has the right to the profits from the tenancy in proportion to his or her ownership interests and each has an obligation to pay the expenses of the property in proportion to his or her ownership interest.

A tenancy in common in real estate is created by the words "to A and B." For personal property, a transfer "to A or B" or "to A and/or B" also may denote tenancy in common.

When a tenant in common dies, his or her undivided property share passes to the beneficiaries specified by will or, if no will exists, to heirs under state law. The property does not pass to the co-owner unless the co-owner is named as the beneficiary in the will or is considered an heir under state law. Only the portion of the property owned by the deceased tenant in common is included in the gross estate for federal and North Dakota estate tax purposes.

Joint tenancy: This form of ownership carries with it the right of survivorship. Note that under North Dakota law, transfers to two or more people create a tenancy in common, rather than a joint tenancy, unless a joint tenancy *clearly* was created. Therefore, a joint tenancy ownership is created by the words "to A and B as joint tenants with right of survivorship and not as tenants in common." In this instance, two or more people own property together, again with undivided interests. Each owner can terminate co-ownership by selling or transferring his or her interest in the property.

The right of survivorship controls the disposition of property at the death of one co-owner. Property owned in joint tenancy immediately passes to the surviving joint tenant(s). Wills or state intestate laws do not control property held in joint tenancy. Even if listed in a will, property held in joint tenancy with right of survivorship supersedes or bypasses instructions in a will.

Some people are tempted to use joint tenancy with right of survivorship as an alternative to a will. This form of co-ownership has some advantages. For example, it is a quick and convenient way to pass property to surviving joint tenants, it may provide quick access to funds or property for the surviving joint tenants, and it can save some of the delays and expense associated with probate. However, it also has several potential disadvantages.

Joint ownership gives another person equal control over jointly held property. For example, a joint owner could withdraw all the funds in a joint bank or savings account, without permission of the other joint tenant. Jointly held property may be subject to inclusion in marital property (for purposes of dividing property during a divorce, for example) or have a lien placed upon it because of a lawsuit settlement against one of the joint tenants.

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This publication is not intended to be a substitute for legal advice. Nor is it intended to serve as a complete and exhaustive text on estate planning. Rather, it is designed to provide basic, general information about the fundamentals of estate planning so you will be better prepared to work with professional advisers to design and implement an effective estate plan.

Information in this publication is based on the laws in force on the date of publication.

For more information on this and other topics, see: www.ag.ndsu.edu

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