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ESTATE PLANNING: NOW IS THE TIME

By Brenda Day
University Relations

Americans have been reminded recently that death can occur on a seemingly normal workday when we least expect it. While most of us know that we have little control over when and how we will die, we often procrastinate when it comes to estate planning. We can find many reasons for not putting our affairs in order. Sometimes we just don't want to think about death. But more often we don't tackle estate planning because it seems like such a daunting task -- to make all those decisions. Then there's the legalese and the paperwork involved. We often just don't know where to begin.

Elaine Gagliardi, associate professor of law at The University of Montana, recommends beginning with one controlling document that coordinates your estate plan -- usually a will or a trust. But it helps to know how wills and trusts function, she says, before you head off to an attorney's office.

A will only comes into play after death, Gagliardi says. It guides the courts in the probate process, which in Montana occurs in the district court of the county where the deceased resided at the time of death. Probate is an administrative process that settles estates according to the terms and provisions of the will. Assets also are probated when a person dies

-more-

intestate -- without a will. Montana probate procedures, regulated by state law, usually begin by determining the validity of the will and identifying the deceased's personal representative. The will then guides the court in the distribution of probated assets and in other concerns, such as guardianship of minor children and settling estate debts.

"The nice thing about probate is that it attempts to handle all creditors at one time," Gagliardi says. "And it does make an attempt to make sure that when the property is distributed, it is distributed free of any further litigation."

Much of the information the public receives about estate planning focuses on ways to avoid probate. But Gagliardi says some probate avoidance devices have consequences that should be considered before taking action.

The most common probate avoidance devices are:

- Life insurance policies and retirement plans: Pass directly to heirs by beneficiary designation.
- Pay-on-death accounts: Funds go to beneficiaries without probate.
- Joint tenancy with right of survivorship: Property passes directly to the surviving tenant.
- Revocable living trusts: Assets owned by the trust pass to heirs without probate.

Gagliardi says one difficulty with beneficiary designation, pay-on-death accounts and joint tenancy is that they often don't ensure that all heirs receive equal shares of the estate -- if that is the goal. "My clients might have a life insurance policy of a million dollars, a brokerage account worth a million and a home worth one million. So they think they'll give the life insurance to child A, the brokerage account to child B and the house to child C. Well,

if something happens to the real estate market, the stock and bond market, or they forget to make a premium payment on the life insurance, then one of those children is out."

Joint tenancy can get even stickier, Gagliardi warns. "If you have real property and you put it in joint tenancy, you've made a gift immediately when you change title," she says. "You've given away your half interest; it's gone, and you have no claim to it." Gagliardi does not encourage her clients to name children as joint tenants on their real property. "It is of no benefit to the children, and it is risky for parents," she says. "If you don't do it right, it can trigger gift taxes. And you do not achieve any substantial tax savings simply by placing your property in joint tenancy with right of survivorship."

Gagliardi says using joint tenancy on bank accounts carries the risk that either tenant can spend the money. She recommends asking a bank representative about other options that may work better for your needs. Some banks allow account owners to name a trusted individual as an agent who can make transactions, but has no right of survivorship unless named as a beneficiary. The account funds can then be passed to chosen heirs by marking the pay-on-death box and naming them as beneficiaries.

Unlike a will, a revocable living trust controls what happens to property held by the trustee both during life and at death. "You can act as the trustee of your trust, and the person or institution you name as successor trustee can function for you in case of incapacity," Gagliardi says. At death, assets owned by the trustee of the trust pass according to your directions -- without going through probate.

"There are some hassles with having a trust," Gagliardi says. "Some clients forget that

they have the trust. They set up this beautiful trust, transfer assets to it, and then they live another 15 years and buy everything in their own name -- forget to buy everything as trustee of the revocable trust." That's why, with a revocable trust, a pour-over will has to be drafted. The pour-over will can move assets into the trust at death, but like any will, it has to be probated.

Transferring real property into a trust has to be done right, Gagliardi says. "Most mortgages say if you change title to the property, the mortgage automatically comes due. So you have to call the bank and get them to consent to the transfer to the trust." But if a trust is done right, Gagliardi says it is an excellent estate planning tool.

Once you have decided how you want your assets distributed to your heirs and who will act as your personal representative, Gagliardi recommends going to an attorney who knows estate planning and tax laws and who bills on an hourly basis. Have the attorney draft the documents that will address your concerns.

"There are lots of books out there about how to draft your own will, " Gagliardi says. "Usually what happens with that is it ends up on an attorney's desk being litigated. I'm an estate planning attorney, so I think everybody should go to one. I have a biased viewpoint," she says, "but I have seen what happens when it is not done right."

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