PLANNING IT RIGHT THE SECOND TIME AROUND

TESFAYE O'NEILL
LAW & FINANCIAL

AMERICAN ACADEMY | OF ESTATE PLANNING ATTORNEYS

ABOUT THE FIRM

At Tesfaye O'Neill Law & Financial, we are dedicated to helping individuals and families protect what matters most through thoughtful, personalized estate planning. Our firm understands the importance of preparing for the future, protecting loved ones, preserving assets, and helping clients avoid unnecessary court involvement and estate taxes whenever possible. With experience in estate planning, family law, and probate-related matters, our team is committed to providing knowledgeable guidance with compassion, attention to detail, and a focus on each client's unique goals.

Founding attorney Girum Tesfaye's path to estate planning was shaped by both his professional experiences and personal loss. Early in his career, he worked as a judicial law clerk and later with federal agencies including the CFTC and SEC, where he saw firsthand how families can lose control over the assets and legacies they spent a lifetime building. After founding the firm and helping clients navigate family-related legal challenges, he realized estate planning was the best way to help families proactively protect themselves from crisis and conflict. Attorney Juliana "Juls" O'Neill shares that same client-centered mission. Drawing from her background in family law, she helps individuals, couples, and growing families create proactive estate plans that provide clarity, protection, and peace of mind. Together, they are passionate about educating the community and helping families create plans that keep matters private, reduce stress for loved ones, and provide confidence for the future.

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HOW TO ENSURE YOU'VE COVERED THE BASICS

One thing should be clear by now: we do our families and ourselves a great disservice when we fail to plan for every contingency. That's why a crucial first step in this entire process should be a consultation with an estate planning attorney. He or she will help you evaluate your family's needs and financial situation, and will draft a comprehensive estate plan that may include such tools as a Durable Power of Attorney for Health Care and Revocable Living Trust.

In addition, your estate planning attorney will show you how to reduce or eliminate estate taxes and how to ensure that after your death your estate will go to whom you want, when you want, and how you want without the expense, delay, or publicity of probate.

Of course, confronting your own mortality is a process that makes most people uneasy; but that's nothing compared to the anguish that often befalls the families of those who make no plans at all. So, even though the process can often be emotionally challenging in the beginning, the payoff in peace of mind for both you and your family will make it worth your while.

In general, you should have all estate planning documents reviewed. In particular, you'll have to review your fiduciary designations with the following questions in mind.

- *Who is designated as the trustee of a trust?*
- *Who is the Executor/Personal Representative of a will?*
- *Who is the Agent under a Property Power of Attorney, Health Care Power of Attorney, or Health Care Proxy?*

Many states have statutes which preclude an ex-spouse from inheriting under a will created during marriage. Some of the statutes also apply to trusts and beneficiary designations on life insurance or retirement plans. However, the laws vary tremendously and resolution of the matter can be further complicated where a divorce occurs in one state, but the estate plan or beneficiary designation is governed by the laws of another state or the federal government.

WHY CHOOSE A LIVING TRUST?

The desire to ensure that an heir is provided for materially is the most common reason for creating a Living Trust. In the case of minors, a trust allows a parent to provide for a child without giving the child control over the property. The parent can also mandate how the property is to be distributed and for what purposes.

A trust is also a useful tool for taking care of heirs who have mental impairments or lack investment experience. The trust document can establish that all money is controlled by a trustee with sound investment experience and judgment. Likewise, a trust preserves the integrity of funds when the recipient has a history of extravagance. It can protect the property from an heir's spendthrift nature as well as from his or her creditors.

This is also true of persons who may feel pressure from friends, con artists, financial advisors, and others who want a slice of the pie. A Living Trust can make it extremely difficult for a recipient to direct property to one of these uses.

A "spendthrift" provision in a Living Trust is often used to further preserve the integrity of assets. It prohibits the heir from transferring his or her interest and also bars creditors from reaching into the trust. Living Trusts are relatively easy to update, modify, or revoke in most cases. A will, however, is difficult to change, and establishing one requires many formalities.

SHORT-CIRCUITING THE ORDEAL OF PROBATE

Many Americans think that the benefit of a Living Trust is the avoidance of probate. Because property in the trust is not considered part of an estate, it does not have to undergo this sometimes lengthy process. The property is instead administered and distributed by the trustee, according to the specific terms of the trust.

Probate expenses can be significant. Costs vary according to the size of the estate and what it includes. It also varies by state. Some have very expensive and onerous procedures, while others offer a streamlined version of probate.

Avoiding probate means not only avoiding hassle and expense but also saving time. Probate can extend the amount of time before an heir receives an inheritance by months, years – even longer if the will is contested. Not only can this create hardship among the heirs, but the property in the estate may also suffer. Many assets must be carefully managed to preserve and enhance their value. Losses may easily occur during this interim period.

There is an emotional price to pay, too. Survivors may be continually reminded of the loss of a loved one as the process drags on.

Probate can also lead to loss of privacy. Wills and probate are public matters, whereas a Living Trust keeps the estate private. Typical probate documents list all assets, appraised value, and names of new owners. This information becomes available to marketers, media, creditors, and con artists.

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If the estate includes real property in more than one state, the process becomes even more complex. An ancillary administration is required to probate out-of-state real estate. As you can imagine, “double probate” is even more time-consuming, expensive, and emotionally taxing than a single probate process.

Probate also allows the original owner’s creditors a shot at the property. Although there is still some controversy about the extent of its creditor-shielding benefits, a Living Trust generally makes it much more difficult for an estate to be consumed by creditor claims.

MAINTAINING CONTROL

Living Trusts are harder to contest than wills. Part of the reason is that trusts usually involve ongoing contacts with bank officials, trustees, and others who can later provide solid evidence of the owner’s intentions and mental state. A Living Trust that has been in place a long period of time is less likely to be challenged as having been subjected to undue influence or fraud. And because it is a very private document, the terms of the trust might not even be revealed to family members, allowing less opportunity for challenges to its provisions.

A Living Trust also avoids the painful ordeal of “living probate.” That’s what happens when a person is no longer competent to manage property, whether because of illness or other causes. Without a Living Trust, a judge must examine whether you are in fact incompetent, and all of the embarrassing details of your incompetence will be dragged out in court. The judge will appoint a guardian – perhaps someone you would not want to manage your affairs. Guardians act under court supervision and often must submit detailed reports, meaning that the process can become quite expensive.

With a Living Trust, your designated trustee takes over management of trust property and must manage it according to your explicit instructions in the trust document. The terms typically set standards for determining whether you are incompetent or not. For example, you may specify that your doctor must declare you can no longer manage your financial and business affairs.

MANAGING ASSETS, EASING TAX BURDENS

Living Trusts also provide a way for beneficiaries to receive the guidance of professional asset managers. A bank may be named as a Successor Trustee or Co-Trustee, allowing an experienced trust department to manage the assets.

Of course, eliminating or reducing taxes is one of the primary goals of estate planning. Trusts allow for a highly flexible approach to taxes. Income taxes can be slashed by

transferring income-producing assets to a recipient in a lower tax bracket. Through the use of trusts, the state and federal government's estate tax exclusions can be doubled, without the filing of an estate tax return unless the decedent had more than the current estate tax exclusion. Note, the estate tax exclusion for the state may be lower than the federal exclusion.

And some trusts are a prudent destination for annual gifts that fall within the government's tax-free gift allowance.

PLANNING IT RIGHT THE SECOND TIME AROUND

Increasingly, Americans do not remain with their first spouse for life, with about half[1] of all first marriages ending in divorce. After disruption of the marriage, many people remarry. This trend toward multiple marriages has resulted in millions of "blended" families. While each family is unique, blended families bring even more challenges for estate planning. Each spouse may have children from prior marriages and the two spouses may have children together. Spouses may come to the marriage from different financial positions.

In the traditional couple's estate plan, the couple wants the surviving spouse to have access to all of the assets at the first spouse's death. They typically want the assets split equally among their children at the death of the survivor. This traditional couple's plan often does not meet the needs of blended families.

A growing number of blended families will use a combination of two trusts to gain greater flexibility. The first trust, the Family Trust, contains the first spouse's estate tax applicable exclusion amount. The assets in the Family Trust can be used for the benefit of any of the children when the predeceasing spouse wishes to benefit. The assets can also be used for the surviving spouse. The second trust is a Qualified Terminable Interest in Property (QTIP) Trust. A QTIP Trust leaves assets in trust for the surviving spouse. All of the income goes to the surviving spouse during his or her lifetime.

However, at the death of the surviving spouse, the assets are distributed as the predeceasing spouse directed. In other words, the assets could go to the children of the predeceasing spouse if desired. The surviving spouse does not have to have the ability to alter the disposition. By leaving assets in the QTIP Trust, they qualify for a marital deduction at the death of the first spouse. This means there need not be any estate tax due at the death of the first spouse.

[1] https://www.apa.org/topics/divorce/

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The assets of the other spouse can have a completely different set of beneficiaries than the assets of the predeceasing spouse. So, the husband could leave the assets in the Family Trust to the wife for her life and then to his own children. On the other hand, the wife may decide the husband has sufficient assets and leave the Family Trust directly to her own children, excluding the husband. Both the husband and wife might decide to leave assets over the estate tax exclusion amount in QTIP Trusts for each other.

Each blended family is unique. Each couple has its own set of goals to accomplish. Proper estate planning can tailor a solution to help meet those goals. A qualified estate planning attorney can help you decide upon a plan that fits your unique situation.

DIVORCE, TAXES, AND YOUR ESTATE PLAN

Fortunately, some good news does exist within the arena of divorce, and it comes from none other than the IRS. Here's the benefit. The IRS generally does not consider the transfer of assets between divorcing spouses a taxable event. This includes cash that one spouse pays another as part of the divorce settlement. There are a few restrictions to this rule, but as long as you can demonstrate that you are divorcing for legitimate reasons not related to tax savings, you and your soon-to-be ex could transfer cash and assets without fear of a tax gain or loss to either party. At least, not in the short-term future.

Dependency Tax Exemption for Children

As in most divorce settlement negotiations, you and your spouse will probably have several bargaining chips on the table. One may be the dependency exemption for your children. These exemptions mean a lot to lower and middle-income taxpayers, but not as much to high-income Americans as a result of the deduction phase-out.

But as often happens after divorce, there may be a significant disparity in earnings between you and your spouse. And in that case, the dependency exemption may become a chip worth bargaining for.

Filing Status

Couples whose divorce won't be concluded by December 31 of a given year will have to make a difficult decision regarding the filing status they choose on their tax returns. Married filing separate is the most costly filing status available. That's why, if you and your spouse can agree to it, you may want to continue filing jointly until your divorce is final. There are two notable exceptions to this rule, however.

Exception 1: You probably shouldn't file jointly if your spouse has incurred taxes that he or she won't be able to pay. By filing jointly, you assume liability for your spouse's taxes as well as your own. If the IRS can't get satisfaction from your spouse, it will turn to you for payment.

Exception 2: You may not want to file jointly if you suspect that your spouse isn't fully disclosing income or is falsifying deductions. Once again, you may be held liable for your spouse's tax liability, plus associated penalties.

Who Gets the Capital Gains?

Let's assume that you are your spouse own stock that has appreciated substantially since you bought it. Purchased for $50,000 five years ago, the stock is now worth $100,000. If the two of you decide to sell the shares today, the gain would be $50,000, or the difference between your original investment and the selling price.

If you decide you'd like to keep the stock, and pay your spouse $50,000 (half the current market value) for full ownership, your total investment becomes $75,000. However, if you sell the shares, the cost basis used to determine your capital gains taxes won't be the $75,000 you've actually invested in the stock. Instead, the government will look at your original cost basis – $25,000 – and your spouse's original cost basis – also $25,000 – and deem that your actual cost basis is just $50,000! Therefore, the $50,000 cash you paid your ex-spouse for the stock goes to him or her tax-free, while you are left with a hefty capital gains tax.

Which Estate Planning Strategy is Best?

Fortunately, all the problems described above can be neatly countered with a well-designed tax and estate plan. If you already have an estate plan in place, your main concern will be having it updated as a result of the new changes that your divorce has introduced into your life. For most, these estate planning issues are of greatest concern during a divorce:

- Controlling to whom, when and how assets are divided today, and how they will be distributed after death.
- Capturing every tax break available during the divorce transition.
- Maintaining control and management of certain assets.
- Renaming beneficiaries.

Here are three estate planning strategies that may help you achieve these objectives:

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THE REVOCABLE LIVING TRUST

This popular estate planning tool is unlike a will in that it allows you to avoid probate which brings on potential delays, expenses, and public exposure. Instead, upon your death, your designated Successor Trustee assumes responsibility for management and distribution of your assets, which are owned by your Revocable Living Trust. Your trustee will follow the directions you have provided in your trust documents, including when you want assets distributed, to whom, and by what means.

THE CHILDREN'S TRUST

Another estate planning strategy popular among parents is the Children's Trust. It allows you to set aside funds which may be used at a later time to pay for college education or purchase a first residence.

THE IRREVOCABLE LIFE INSURANCE TRUST

The Irrevocable Life Insurance Trust, or ILIT, accomplishes several important objectives. First, it lets you remain in control of the distribution of your life insurance policy's proceeds long after you're gone. As with the Children's Trust, the ILIT disperses policy proceeds to your beneficiaries when and how you want. Because the trustee of the ILIT is your designee, you also ensure the proceeds remain out of your ex-spouse's reach.

Getting Help

Any of these solutions, or a combination of all three, may help you achieve the tax advantages and control you seek. Equally important is the peace of mind you'll gain when you know that, come what may, your children will be well provided for.

Because your goals and your family's situation are unique, seek out the counsel of an attorney who concentrates on these estate planning strategies. Only he or she will be able to show you how you can best employ them for your children's benefit.

FREQUENTLY ASKED QUESTIONS

Why Do I Need an Estate Plan?

Most of us spend a considerable amount of time and energy in our lives accumulating wealth. As we do this, there also comes a time to preserve wealth both for our enjoyment and for future generations. A solid, effective estate plan ensures that your heard-earned wealth will pass intact to those you intend to be your beneficiaries, instead of being siphoned off to government processes and bureaucrats.

If I Don't Create an Estate Plan, Won't the Government Provide One For Me?

YES. But your family may not like it. The government's estate plan is called "intestate probate" and guarantees government interference in the disposition of your estate. Documents must be filed and approval must be received from a court to pay your bills, pay your spouse an allowance, and account for your property and it all takes place in the public's view. If you fail to plan your estate, you lose the opportunity to protect your family from an impersonal, complex governmental process that is a burden at best and can be a nightmare.

Then there is the matter of the federal government's death taxes. There is much you can do in planning your estate that will reduce and even eliminate death taxes, but you don't suppose the government's estate plan is designed to save your estate from taxes, do you? While some estate planners favor wills and others prefer a Living Trust as the Estate Plan of Choice, all estate planners agree that dying without an estate plan should be avoided at all costs.

What's the Difference Between Having a Will and a Living Trust?

A will is a legal document that describes how you want your assets distributed at death. The actual distribution, however, is controlled by a legal process called probate, which is Latin for "prove the will." Upon your death, the will becomes a public document available for inspection by all comers. And, once your will enters the probate process, it's no longer controlled by your family, but by the court and probate attorneys. Probate can be cumbersome, time-consuming, expensive, and an emotional trauma in a family's time of grief and vulnerability. Con artists and others with less than pure financial motives have been known to use their knowledge about the contents of a will to prey on survivors.

A Living Trust avoids probate because your property is owned by the trust, so technically there's nothing for the probate courts to administer. Whomever you name as your "Successor Trustee" gains control of your assets and distributes them exactly according to your instructions.

There is one other crucial difference. A will doesn't take effect until you die, and is therefore no help to you with lifetime planning, an increasingly important consideration now that Americans are living longer. A Living Trust can help you preserve and increase your estate while you're alive, and offers protection should you become mentally disabled. Read on.

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The Possibility of a Disabling Injury or Illness Scares Me. What Would Happen If I Were Mentally Disabled and Had No Estate Plan or Just a Will?

Unfortunately, you would be subject to "living probate," also known as a conservatorship or guardianship proceeding. If you become mentally disabled before you die, the probate court will appoint someone to take control of your assets and personal affairs. These "court-appointed agents" must file a strict accounting of your finances with the court. The process is often expensive, time-consuming, and humiliating.

If I Set Up a Living Trust, Can I Be My Own Trustee?

YES. In fact, most Living Trusts have the people who created them acting as their own trustees. If you are married, you and your spouse can act as Co-Trustees. And you will have absolute and complete control over all of the assets in your trust. In the event of a mentally disabling condition, your hand-picked Successor Trustee assumes control over your affairs, not the court's appointee.

Will a Living Trust Avoid Income Taxes?

NO. The purpose of creating a Living Trust is to avoid living probate, death probate, and reduce or even eliminate federal estate taxes. It's not a vehicle for reducing income taxes. In fact, if you're the trustee of your Living Trust, you will file your income tax returns exactly as you filed them before the trust existed. There are no new returns to file and no new liabilities are created

Can I Transfer Real Estate Into a Living Trust?

YES. In fact, all real estate should be transferred into your Living Trust. Otherwise, upon your death, depending upon how you hold title, there will be a death probate in every state in which you hold real property. When your real property is owned by your Living Trust, there is no probate anywhere.

Is the Living Trust Some Kind of Loophole the Government Will Eventually Close Down?

NO. The Living Trust has been authorized by the law for centuries. The government really has no interest in making you or your family go through a probate that will only further clog up the legal system. A Living Trust avoids probate so that your estate is settled exactly according to your wishes**.**

Isn't a Living Trust Only For the Rich?

NO. A Living Trust can help anyone protect his or her family from unnecessary probate fees, attorney's fees, court costs, and federal estate taxes. In fact, if your estate is greater than $100,000, you'll find a Living Trust offers substantial benefits for you and your family.

Can Any Attorney Create a Living Trust?

NO. You should choose an attorney whose practice is focused on estate planning. Members of the American Academy of Estate Planning Attorneys receive 36 hours of extensive continuing legal education annually on the latest changes in any law affecting estate planning, allowing them to provide you with the highest quality estate planning service anywhere.

In Addition to Wills, What Are the Basic Estate Planning Tools Consumers Have Available to Them?

1. **Revocable Living Trust:** Device used to avoid probate and provide management of your property, during life and after death.

2. **Property Power of Attorney:** Instrument used to allow an agent you name to manage your property if you become incapacitated.

3. **Health Care Power of Attorney:** Instrument used to allow a person you name to make health care decisions for you should you become incapacitated.

4. **Annual Gift Tax Exclusion:** Technique to allow gifts each year without the imposition of estate or gift taxes. Check out our website for the current figure.

5. **Irrevocable Life Insurance Trust:** A trust used to prevent estate taxes on insurance proceeds received at the death of an insured.

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6. **Family Limited Partnership:** An entity used to: 1) provide asset protection for partnership property from the creditors of a partner, 2) provide protection for limited partners from creditors, 3) enable gifts to children but parents maintain management control, and 4) reduce transfer tax value of property.

7. **Children's or Grandchildren's Irrevocable Education Trust:** A trust used by parents and grandparents for a child's or grandchild's education.

8. **Charitable Remainder Interest Trust:** A trust whereby donors transfer property to a Charitable Trust and retain an income stream from the property transferred. The donor receives a charitable contribution income tax deduction and avoids capital gains tax on transferred property.

9. **Fractional Interest Gift:** Allows a donor to transfer partial interests in real property to donees and obtain fractional interest discounts for estate and gift tax purposes.

10. **Private Foundation:** An entity used by higher-wealth families to receive any otherwise taxable property so as to eliminate estate taxes on the death of a surviving spouse.

15 MOST COMMON REASONS TO DO ESTATE PLANNING

1. Designate who will manage your affairs if you become disabled and when you pass away.

2. Plan for Medicaid and its impact on your estate if you must go into a nursing home.

3. Avoid guardianship/ conservatorship, during your lifetime and probate when you pass away.

4. Protect children from a prior marriage if you pass away first.

5. Protect assets inherited by your heirs from lawsuits, divorces, and other claims.

6. Impose discipline upon children (and/or grandchildren) who may not be capable or experienced in managing money.

7. Provide for special needs children and grandchildren.

8. Ensure that a specific portion of your estate actually gets to grandchildren, charities, etc.

9. Protect a portion of your estate if you pass away first and your surviving spouse remarries.

10. Address different needs of different children.

11. Prevent or discourage challenges to your estate plan.

12. Reward/encourage heirs who make smart life decisions, and prevent the depletion of your estate by those who do not make smart choices.

13. Assure an education for children/grandchildren, despite what they (or their parents) dream of doing with the inheritance.

14. "Brady-Bunch" family estate planning: assure the step-parent doesn't spend your children's inheritance and/or provide for a spouse by sacrificing the intended legacy for children of a prior marriage.

15. Pursue charitable goals you may not otherwise feel you can afford. Considerably cutting probate expenses allows you to also leave a legacy to a charitable organization you admire.

For current estate tax, gift tax, & income tax figures, please visit our website at **www.ourfirm.com** or contact our office **at (###) ###-####**.

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ABOUT THE ACADEMY

This report reflects the opinion of the American Academy of Estate Planning Attorneys. It is based on our understanding of national trends and procedures, and is intended only as a simple overview of the basic estate planning issues. We recommend you do not base your own estate planning on the contents of this Academy Report alone. Review your estate planning goals with a qualified estate planning attorney.

The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive Membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services.

The Academy expects Members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects. To ensure this goal is met, the Academy provides over 40 hours of continuing legal education each year. The Academy has also been recognized as a consumer legal source by *Money Magazine, Consumer Reports Money Adviser* and Suze Orman in her book, *9 Steps to Financial Freedom*.

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