Texas Estate Planning Made Simple

Choosing the Right Plan for Your Family

by Richard P. Johnson, Attorney

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The Johnson Firm, PC
ATTORNEYS-AT-LAW

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We, at the law firm of The Johnson Firm, P.C. specialize in helping families. For over 40 years we have helped families develop estate plans to protect their assets and families from creditors and predators and the occasional wayward in-law through wills and living trust planning, probate and trust administration, and asset protection. We also assist families in applying for Medicaid and VA benefits to help families protect what they have spent a lifetime to build from the potentially devastating costs of nursing homes and long-term care. What distinguishes our law firm from others is that we are a father-daughter family team. Being family, we can relate to other families with compassion and understanding to help bring peace of mind, and clearly inform our clients of their estate planning options to devise the best plan for their needs.

Richard P. Johnson, Attorney, is Board Certified in the practice area of Estate Planning and Probate Law by the Texas Board of Legal Specialization. Richard is recognized by his peers and clients alike for his expertise in estate planning, probate, and asset protection. Richard speaks extensively on the subject of estate planning, asset protection, and elder law. He has been a frequent presenter throughout Texas before organizations, including financial institutions, accounting firms, law firms and colleges.

Marcie Johnson, Attorney, graduated from Texas Tech School of Law. She received her Bachelor's Degree from the University of Texas. Marcie is a VA accredited attorney and concentrates specifically in the areas of Medicaid, VA Pension, probate and trust administration. She serves regularly as an Attorney/Guardian ad Litem for Collin County.

BEST D 2018

Marcie was named one of D Magazine's Best Attorneys in Dallas 2016 and 2018 and has spoken before audiences nationally on elder law issues.

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"Our family taking care of your family."

At our firm, my partner, who is also my daughter, and I have a motto, "Our family taking care of your family." When families call on us for help, we strive to create a lifetime relationship, not a one-time transaction, in which we can guide families through life's changes.

When families visit our office to discuss estate planning, a common complaint we hear among those trying to create an estate plan, is that there is just too much information to make a decision that feels right. Friends, family and the Internet all share differing opinions on how best to plan. But which plan really is the best for your family?

Our purpose in this book is to provide some insight to help make that decision a little easier. Please do not fall into the common trap of avoiding planning altogether because the options seem overwhelming. Estate planning is too important to wait until the perfect time to take action. Any step in the right direction is a good step, even if your family has to modify that plan at a later date.

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Our approach...

Our approach to counseling families on estate planning begins by determining the ultimate goal of the client. In our experience, if a couple is married, they generally want to take care of each other first, and then take care of their children, if they have any. They want to pass their property the way they want, when they want, and they want to do it the most efficient way possible. They do not want to pay unnecessary attorneys fees, court expenses, or taxes. If this describes your family, then basically, there are two different approaches to consider: the "Court Controlled Plan" and the "Family Controlled Plan." Both have their advantages and disadvantages and one is not necessarily always better than the other. The best choice depends on which path best suits the client's needs now.

What is a Court Controlled Plan?

This plan uses a Last Will and Testament ("Will") as its primary estate planning tool.

Wills must be signed and executed with certain formalities required by state law and are often set aside and forgotten until the will maker dies. Hopefully, the terms of the will still represent the will maker's intent at time of death. A will does not become effective until the will maker's death. An executor of a will cannot manage assets if the will maker becomes incapacitated or is otherwise unable to handle his or her business or personal affairs because the executor has no authority until it is given by the judge.

When death does occur, the will is presented for probate in the probate court of the county in which the will maker died. Is this required? For the will to be effective, the answer is yes. Some families choose not to go through probate only to find out years later that the property they thought they owned is legally owned by someone else because it did not go through the probate process.

What is Probate? Probate is the court process of formally acknowledging a will as the will maker's last will and testament and appointing a qualified executor to handle the affairs of the decedent's estate.

State law requires that the will, to be effective, must be filed with the court and the applicant comply with Court Rules, which can vary from court to court. All probate pleadings become a public record. Anyone interested in finding out the details of the will, including what the will maker owned and the value of those assets can easily get that information. The will maker's privacy is lost. This may or may not be of concern to the will maker. It could be significant if assets need to be sold and the buyer already knows the value of the assets because its value has been declared within probate court.

Once the court authorizes an executor to take control of the decedent's estate, the process of gathering estate assets and paying off debts may be court supervised or unsupervised, depending on the terms of the will. The probate process may take months or even years to complete, depending on the complexity of the probate. The speed of the process depends somewhat on which county the will is probated, the type of assets distributed, the number of beneficiaries, whether anyone disagrees with the terms of the will, and the amount of debt owed by the estate.

When the probate process is completed, if assets are then distributed outright to the beneficiaries and they have unfortunate circumstances going on in their lives, they may or may not get to keep the inheritance. For example, if the beneficiary is going through a divorce and then suddenly receives an inheritance, the divorce judge may take the inheritance into consideration in splitting the other assets between spouses. If there is an outstanding creditor's judgment against the beneficiary when he or she receives an inheritance, the inheritance may be lost to satisfy the judgment. Or, if a beneficiary is going through a bankruptcy proceeding at the time of receiving an inheritance, it may all go to the bankruptcy trustee. Also, since minor children are not allowed to manage inherited assets, the court may establish its own trust for the minor beneficiary or may appoint a guardian to manage the child's inheritance until they reach the age of 18. All of this can be avoided if the will provided for the creation of trusts at the death of the will maker. In more complex wills, asset protection for beneficiaries and tax planning also can be achieved.

Although the simple will plan may appear to be less expensive than other estate planning options in the short run, it can get much more expensive when going through the probate process. Complex wills with asset protection and tax planning are generally substantially more expensive than simple wills. Remember, either simple or complex, a will is not a will until it goes through the probate process and a judge determines that the will satisfies the requirements of state law. If the will maker was married, the surviving spouse's will, to be effective, must go through probate on his or her death, as well. Two probates can get expensive.

What is a Family Controlled Plan?

This plan uses a Revocable Living Trust as the primary estate planning tool. The word "revocable" means that the plan can be changed. The word "living" means the trust works while you are still alive. Unlike a will, a person does not have to die before the trust becomes effective.

If a trustmaker becomes incapacitated, the living trust may continue operating as intended, potentially avoiding a guardianship proceeding. If the trust was properly funded, the living trust can also avoid probate upon death. Inherited assets can pass to beneficiaries in trust, so they get to keep the assets no matter what is going on at the time in their lives. Divorces, lawsuits, and bankruptcies will not jeopardize the beneficiary's use and enjoyment of the inherited assets because the beneficiary does not own the inherited asset. The trust owns the assets for the benefit of the beneficiary.

The living trust is a private document. It is not filed as a public record. The general public cannot find out what the trust owns or how the trustmaker plans to distribute assets among beneficiaries. The trust administration process can usually be completed faster than a probate process, primarily, because the family does not have to wait on the court's schedule to administer the trust assets. The family can determine its own time schedule for meeting with the attorneys and other professionals to begin the trust administration process. The living trust is typically more expensive to set up than a will based plan, but is usually less expensive in the long run. However, a complex will plan going through probate may cost as much or more than a living trust plan.

How Does a Living Trust Work?

A living trust may be described as a large bucket. All assets are placed into the bucket, with a couple of exceptions. The assets are placed in the bucket by retitling the asset into the name of the trust. In Texas, if a couple is married, the bucket generally has two handles. The handle holders are called trustees. If a person is single, then the bucket would usually have just one handle, (one trustee) unless the trustmaker needs help holding the bucket. Then the bucket would also have two handles (the trustmaker is a trustee and someone else chosen by the trustmaker is a co-trustee). While the married couple or single person is holding the bucket, management of assets is "business as usual." They can purchase assets and sell assets just like they did before creating the trust. The only difference is that, now, the title to the assets are in the living trust ("the bucket") and not in the trustmakers' individual names.

If one spouse is unable to hold the bucket because he or she becomes incapacitated or disabled, then the other spouse continues to hold the bucket and operate it as if their spouse was still holding it. Because managing the bucket does not change when one spouse becomes incapacitated, usually guardianship proceedings in court can be avoided. If both spouses are unable to hold the bucket because they are both incapacitated, then someone else holds the bucket and manages the assets for the benefit of the trustmakers. The new bucket holder (also known as a "successor trustee") may be one or more of the children, a trusted advisor of the family, or even a professional. Once again, there is no guardianship proceeding for the other

spouse's assets because the trust contained instructions for someone else to take control. The successor trustee steps into the shoes of the trustmaker without going through the court process. The same is true for a single trustmaker. If the trustmaker can no longer hold the bucket because of an incapacity, the bucket is handed off to someone else chosen by the trustmaker to take over.

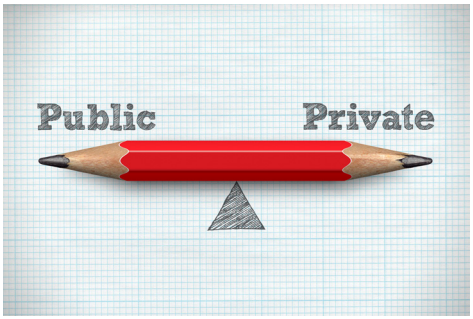
When one spouse dies, the bucket can continue to be held by the surviving spouse and managed the same way as when both spouses were alive. In the case of second marriages or blended families, the assets in the bucket may have stipulations to provide remarriage protection. If the couple has a large estate, the assets may be used and controlled by the surviving spouse, but the trust may provide that assets be split between multiple buckets to take advantage of estate tax planning techniques. The current Federal Estate Tax Exemption is $13.61 million per person in 2024. Texas currently has no separate estate tax although other states do. By splitting assets among multiple buckets, the couple can take advantage of two estate tax exemptions ($27.22 million estate tax exempt in 2024). That exemption is scheduled to be reduced to $5 million each on January 1, 2026.

After both spouses have died, the named successor trustee collects all assets, pays legitimate debts, and then the bucket is passed down to the beneficiaries. The bucket can then be emptied and divided among beneficiaries or the bucket may have instructions to continue holding assets for the beneficiaries' benefit. If there is more than one beneficiary, each beneficiary may receive his or her own separate trust bucket which protects the inheritance from divorces, creditors or predators.

Pour Over Will

If you create a living trust plan you still need a will. While the goal may be to avoid probate with a living trust plan, the unexpected can happen. That is why you need a special type of will which we call a "Pour Over Will." This will is intended to catch assets that should have been in the trust but were left out either intentionally or by accident upon your death. The will ensures that all intended assets are placed into the trust and pass according to your instructions in the trust.

Which Plan is Better? It Depends!



Let us compare the two estate planning choices:

The choice between options should take into consideration each family's circumstances. One family's priority may be lower up front cost while another's may be control, privacy, or asset protection. There is no "one size fits all" in good estate planning. It boils down to what the family wants to accomplish with the plan.

"Court-Controlled" Will-Based Plan	"Family-Controlled" Trust-Based Plan
Works only after death	Works while alive
Probate	No Court involvement
Public process	Private
Outright inheritance or trust created in probate	Inheritance can be protected in trust
Costs less upfront	Costs more upfront
Administration is overseen by Probate Court	Administration is private if trust properly funded

Additional Documents to Consider

With either a will plan or a trust plan, additional documents should always be part of the plan:

Power of Attorney

A Power of Attorney is useful to allow someone you trust to take care of your business affairs if you are unable or unavailable.

Power of Attorney for Healthcare

A Power of Attorney for HealthCare allows someone to make medical decisions for you if you are unable to make them for yourself.

Directive to Physicians

A Directive to Physicians , also called a Living Will, allows you to instruct your physician to allow you to die gently, as peaceful as possible, without additional forms of life support, if there is no one authorized to make medical decisions for you and you are terminally ill.

Declaration of Guardian

A Declaration of Guardian allows you to choose who will serve as your guardian in advance if a court determines that a guardian is necessary.

HIPAA Authorization

The Health Insurance Portability and Accountability Act authorization gives authority to people you choose to be able to access your medical information and talk with treating medical providers about your condition. Without this authorization a person has no right to consult about you with your medical providers which may include doctors, nurses, medical assistants and facility staff.

No Plan

Some families claim that the easiest estate plan to create is no estate plan at all. They have had loved ones who never went through any type of administration process upon death. This could be true depending on the type of assets owned at death. Assets which allow for a designated beneficiary usually do not go through the probate process. Examples include retirement accounts with a named beneficiary, life insurance proceeds that go to a named beneficiary and some bank accounts that allow for a payable on death designation that automatically pass the account to a named person on death.

But, if the decedent owned any titled assets without a named beneficiary, such as real estate, probate is usually required. Probate must be filed within four years of the decedent's death in Texas. If probate is not filed and four years have elapsed, Texas law will determine who owns the property and it may not be the person named in the will.

Married couples often mistakenly believe that under Texas law, their assets automatically pass to the surviving spouse and then to the children upon death. Blended families with children from a prior marriage are often surprised by Texas' distribution rules in which the surviving spouse will share real estate ownership with step-children. This means that your spouse's children may own half of the house that you and your spouse owned as a homestead. This unintended outcome could have been avoided, if the family had created an estate plan. So having no plan at all can be the absolute worst plan you could have.

When Do We Need to Take Care of Your Family?

When, as your estate planning attorney, do we need to take care of your family? You need us when you die or become incapacitated.

You hire us to create an estate plan that will take care of your family at some unknown future date (when you die or become incapacitated).

Our firm is connected with some of the top estate planning experts in the country. Between our firm and the other experts we know we can solve any complex issue regarding your estate plan. However, there are a number of things we will never know:

- We don't know when you are going to die.
- We don't know what the law is going to be at that time.
- We don't know what your assets will be at the time of death or what the value or character of the assets will be at that time. (Do you own the same assets you owned ten years ago?)
- We don't know what your family situation will be at that time.
- We don't know what is going to be important to you at that time.

So, when you boil it down, you are asking an estate planning attorney to create a plan that is going to work and take care of your family:

- At an unknown time
- For unknown laws
- For unknown assets (value or character)
- For an unknown family situation
- For things we don't even know that might be important to you at that time.

For these reasons, it is imperative that your plan is reviewed regularly by your estate planning attorney and other advisors. If changes need to be made, they can be made at a time convenient to you, not during a crisis situation. Our firm offers a Family Care Program where your assets, planning documents and values are reviewed on a regular basis to ensure your plan can grow and change with you. Contact us to learn more about our Family Care Program and how our family can help yours.

Where Do I Go From Here?

As you can see, there is more to estate planning than merely preparing a will or a trust. So when you hear someone say "All you really need is ....", you probably should seek a professional's opinion if you are serious about planning.

It is our firm's mission to help clients understand their estate planning options and the overall operation of that plan. We want you to feel comfortable that you have weighed your options and can make an informed decision that will give your family peace of mind. We want to ensure that the estate plan you choose works the way you intended. We highly recommend that no choice should be made without consulting with a qualified attorney who can evaluate your specific needs and suggest a plan that is suitable for you and your family.

If you need help in choosing the right plan for you and your family we would be happy to assist you in making that decision.

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