

PLANNING AHEAD, DIFFICULT DECISIONS

# Introduction To Estate Planning



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Issued in furtherance of extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Glen Whipple, director, University of Wyoming Extension, University of Wyoming, Laramie, Wyoming 82071.

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**M**any people tend to avoid the discomfort of issues relating to death and dying, including estate planning. Because of this, more than half of Americans lack basic wills. The subject can be unpleasant, but planning now can prevent painful difficulties down the road. It is often a good idea to deal with the topic sooner, rather than later, so everything is in place when you, a family member or other loved one, and possibly even a very close friend, dies. It is always best to consult an attorney, and possibly an accountant, in creating your estate plan.

Estate planning usually addresses six major questions:

1. Who will make my financial decisions when I can't make them?
2. Who will make my health-care decisions when I can't make them?
3. What will happen to my property after I die?
4. What will happen to my remains?
5. What is the legal procedure for transferring my estate to my heirs?
6. Who will care for my minor children?

**Among other important questions are:**

1. What are the Wyoming requirements for valid wills?
2. How do you revoke a will?
3. What other tools are available?

## Who Will Make My Financial Decisions When I Can't Make Them?

A person can delegate his or her financial decisions via an instrument called the Durable Power of Attorney. This document allows someone to appoint an agent to make financial decisions on his or her behalf.<sup>1</sup> (For more information about Wyoming state laws covering topics discussed in this publication, go to <http://legisweb.state.wy.us/titles/statutes.htm>.) There exists a broad range of delegable powers, including almost anything that someone could do with his or her finances, or the document could specify only a very narrow range of powers (e.g., the ability to act on behalf of the maker regarding a specific financial transaction). The powers often covered include opening and closing bank accounts, borrowing and lending money, giving gifts, settling lawsuits, etc. Consequently, it's important to choose someone you trust to act as your agent upon your death.

There are two types of Durable Powers of Attorney. An Immediate Durable Power of Attorney goes into effect immediately and is often used by people who have difficulty managing affairs or by couples who own most of

their property jointly. A Springing Durable Power of Attorney goes into effect once it's been determined that you are legally incompetent to manage your affairs. A springing power will often specify the circumstances in which it will become effective (e.g., one or two doctors certify that you are incompetent).

Unlike a traditional Power of Attorney, which becomes invalid when you become incompetent, these powers are made "durable" by adding specific text to the document so that they will remain in effect or take effect if you become mentally incompetent. (See *Durable Power of Attorney Bulletin* 1250.11).

## Who Will Make My Health-Care Decisions When I Can't Make Them?

You can delegate health-care decisions through an instrument called the Advance Health Care Directive. This document is the modern combination of a health care power of attorney and an advance directive (what used to be called a "Living Will").<sup>2</sup> The advance directive component allows you to make binding decisions regarding a range of end-of-life options. The Health Care Power of Attorney component is like the Durable Power of Attorney but is limited to health-care decisions. It allows someone to make decisions regarding health care on your behalf once you can't do so for yourself. By default, the Health Care Power of Attorney goes into effect once your primary care physician or primary health-care provider determines that you cannot make decisions for yourself. However, the document can specify a different standard (e.g., two or more physicians).

You can make several decisions via an Advance Health Care Directive:

- You may name a guardian in the event that you need one.
- You may direct whether you want your life artificially prolonged if you have a terminal illness.
- You may direct whether you want CPR (it is a good idea to get a "Do Not Resuscitate Order" if you want one).
- You may direct whether you want to donate organs or your body (it is a good idea to indicate on your driver's license if you want your organs donated, and be sure your wishes in the Advance Health Care Directive match your wishes on the driver's license to avoid problems).
- You may name a primary physician to determine your capacity to make decisions for yourself.

To be valid, an Advance Health Care Directive must be in writing, signed, and dated. It must be either notarized or signed by at least two witnesses (witnesses cannot be a

health provider, the agent you're appointing, or the operator of a care facility). An Advance Health Care Directive can be revoked or changed at any time. Most states recognize Advance Health Care Directives, but be aware that different states have different laws.

It is important to distinguish Advance Health Care Directives from euthanasia. The advance directive documents only give power to terminate life-support measures; they don't give power to assist with suicide or euthanize someone. In *Cruzan v. Missouri Department of Health*, the U.S. Supreme Court acknowledged that people have the right to refuse life-saving medical care, and that states can impose procedures to make sure that the wishes of a person who is incompetent are followed.<sup>3</sup>

An Advance Health Care Directive is a sensitive, but important, document that allows you to make your wishes known and appoint someone whom you trust to carry those wishes out.

## What Will Happen to My Property After I Die?<sup>4</sup>

At any given point, most of us know who we would want to receive our property after we die. However, the courts can only determine legal ownership of property based on the provisions of Wyoming law and what they can read in documents that meet standards established by the Wyoming Legislature. So if you have not prepared the proper documents, a court will divide your estate based on the default requirements provided by the Wyoming Probate Code.

### ***Intestate Succession***

If someone dies without a will, he or she is considered to have died "intestate." Since the person did not sign legally binding documents regarding his or her intent, Wyoming law will determine the distribution of the person's property and other matters.

An intestate person's property will pass according to the formula created by the Wyoming Legislature.<sup>5</sup> These rules state that if the deceased has a surviving spouse and children, the spouse inherits half of the estate. The surviving children and descendants of non-surviving children inherit the other half. If, on the other hand, the deceased has a surviving spouse, but no children nor descendants of any children, the spouse inherits all of the deceased's property. Otherwise, property passes in the following order:

- Surviving children and the descendants of deceased children.
- Surviving parents, siblings, and descendants of deceased siblings.

- Grandparents, uncles, aunts, and their descendants.

If the deceased leaves no heirs, his or her property will go to the State of Wyoming (a very rare process known as "escheat").

If someone dies intestate while owning property, the court will typically need to appoint someone to administer that person's property (such property is referred to as the person's "estate"). The appointed person is referred to as an "administrator" or a "personal representative." A relative can administer an estate if entitled to receive some part of the estate in the following order: surviving spouse or competent person requested by the spouse; children; parents; siblings; grandchildren; next of kin entitled to a share of the estate; creditors; any other competent person.<sup>6</sup> A non-Wyoming administrator is not allowed unless there is a Wyoming co-administrator.<sup>7</sup>

### ***Testate Succession***

If you have a valid will at death, you are considered to have died "testate." A will specifies what is to be done with your property when you die.

Wyoming Statute (W.S.) § 2-6-101 states: "Any person of legal age and sound mind may make a will and dispose of all of his property by will except what is sufficient to pay his debts, and subject to the rights of the surviving spouse and children."

The law provides for a "surviving spouse's elective share." This provision states that the spouse may, at his or her option, take a certain percentage of the deceased's estate instead of what the will provides if the will deprives the surviving spouse of that percentage. The surviving spouse may take half of the estate if there are no surviving descendants or the surviving spouse is the parent of any surviving descendants. Or the surviving spouse may take one quarter of the estate if he or she is not the parent of any of the deceased's surviving descendants.<sup>8</sup>

Other benefits of a will allow the signer (also known as the "testator") to:

- Name a person to act as the personal representative of his or her estate.
- Create a written list of who should receive specific items of tangible personal property.<sup>9</sup>
- Name someone to act as the guardian and conservator of any minor children.
- Name someone to take care of household pets.
- Require that minor beneficiaries' inheritances be held in trust until the beneficiaries reach a certain age.
- Make other decisions regarding the administration and taxation of the testator's estate.

## What are the Wyoming Requirements for Valid Wills?<sup>10, 11</sup>

Formal wills must be in writing or typed and must be signed and dated. Two competent, disinterested witnesses must generally witness the document being signed and dated. In some circumstances, it may be appropriate for a will to be witnessed by an interested witness, but attorneys avoid the practice if possible.

A will can be valid even if not signed by a notary public, although notarization significantly eases the process of proving the will's validity after the testator dies. If witnesses sign a notarized affidavit stating that the will was executed by the person signing it, the will is considered "self-proving." This makes it unnecessary for the witnesses to later testify that the will is valid before it can be admitted to probate. Otherwise, the validity of the will must be proven by the written or oral testimony of one of the witnesses (something that could be difficult if the witness does not outlive the testator or has moved away) or through some other evidence. W.S. § 2-6-114(a) states that: "Any will may be simultaneously executed, attested and made self-proven, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate under official seal..." (see a sample of a self-proving clause from statute attached to the end of this document). Further, W.S. § 2-6-204 says, "A will executed in compliance with W.S. 2-6-114 shall be probated without further proof," whereas W.S. § 2-6-205(a) states, "If the will is not self-proving, proof of a will may be made by the oral or written testimony of one or more of the subscribing witnesses to the will..." Finally, W.S. § 2-6-205(c) states, "If all of the witnesses are deceased or otherwise not available, it is permissible to prove the will by the sworn testimony of two (2) credible disinterested witnesses that the signature to the will is in the handwriting of the person whose will it purports to be, and that the signatures of the witnesses are in the handwriting of the witnesses, or it may be proved by other sufficient evidence of the execution of the will."

Wyoming law also allows the creation of certain informal wills that do not comply with the above requirements, known as "holographic wills." Such wills must be entirely in the testator's handwriting and signed by the testator. Holographic wills are not recommended, other than as a stopgap solution for situations in which it is not feasible to consult an attorney regarding a formal will. The validity of a holographic will must nonetheless be proven through some means before it can be admitted to probate.

## How Do You Revoke a Will?

A testator is free to revoke a will at any time that he or she is competent. W.S. § 2-6-117(a) declares that a will or any part thereof is revoked by a subsequent will that revokes the prior will or part expressly or by inconsistency, or by being burned, torn, cancelled, obliterated, or destroyed with the intent and for the purpose of revoking it by the testator or by another person in his or her presence and by his/her direction.

W.S. § 2-6-118 goes on to explain, "If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator or guardian, unless the will expressly provides otherwise..."

Even a basic will can give individuals and families much more control over who will receive their property and who will represent their estates during the probate process. It is recommended that you compile information regarding your estate planning needs and then consult an attorney regarding the preparation of a will.

## What Other Tools are Available?

Common tools and documents to use in accomplishing your estate planning desires include wills, Durable Powers of Attorney, and Advance Health Care Directives, but there are many additional estate planning tools that may be helpful depending on your situation, including:

- **A Living Trust** (also known as a revocable trust) created during your lifetime is used primarily to manage property during life and to provide for the ongoing management and distribution of your estate after death without going through the difficulty and expense of the formal probate process. (These trusts should be funded via transfers during your life and possibly with a pour-over will to catch any property that had not yet been transferred to the trust before your death.)
- **A Pour-Over Will** transfers property owned by you at your death to a trust that existed prior to your death. The intent is to transfer such property through your trust, rather than the cumbersome probate process, by sweeping up any assets that may not have been transferred to the trust during your lifetime.
- **Joint Ownership Documents with Rights of Survivorship**, often called joint tenancy, show that co-owners of property have a right of survivorship, meaning that if one owner dies, that owner's interest in the

property will pass to the surviving owner, rather than to the deceased owner's heirs. For instance, deeds for property and automobiles owned by married couples often show the owners as joint tenants with right of survivorship; however, property can be held in a joint tenancy with anyone. This method is often used to avoid probate (the legal process by which a court settles an estate) because the property automatically passes to the survivor. Property ownership can be converted to a joint tenancy by executing a new deed from the current owner of the property (often called the "grantor") to the desired recipients as joint tenants (typically called "grantees") of the property.

- **Beneficiary Designations** are forms used to transfer life insurance, pension, Individual Retirement Accounts (IRAs), and annuity survivor and death benefits and other pay-on-death proceeds to your designated beneficiaries. Such assets do not pass through probate and are typically unaffected by terms of a will.
- **A Testamentary Trust** is a trust that takes effect upon the creator's death. Such trusts are often created by provisions of a will to provide for the management of property by a trustee, often for minor or incapacitated heirs.
- **A Bypass Trust**, also known as a "credit shelter trust," is designed to allow spouses to take advantage of their lifetime applicable exclusion amounts (the amount of money that can be given away tax-free, which, as of January 1, 2013, was \$5 million per person and \$10 million per married couple, as adjusted for inflation on an annual basis). The bypass trust is the most universally used method of saving estate taxes in family situations.
- **An Irrevocable Life Insurance Trust**, also known as an "ILIT," is a trust to hold life insurance policies. The creator of the trust regularly transfers funds to the trust equal to the creator's annual gift tax exclusion amount to pay the policy premiums. An ILIT is designed to prevent life insurance proceeds from being subjected to estate taxes.
- **Family Business Arrangements**, including plans for continued ownership, sale, and management under specific situations, including death, should be in the proper form. The terms of a succession plan will typically be fixed by the business's organizational documents and any buy-sell agreements between the owners. The type of business entity involved may affect succession planning (e.g., corporations, partnerships, limited liability companies, etc.).
- **Charitable Gift Designations** incorporated within a will or trust document specify the intent to transfer assets to a charity recognized by the IRS. Often these gifts will be deductible for income and estate tax purposes, although there are additional requirements

and limitations that may require consultation with a licensed attorney.

- **Minor's Trust** is an irrevocable trust to move property out of your estate for the benefit of minor children or grandchildren. If you have a taxable estate, such trusts can have complex tax consequences, which may require consultation with an attorney.

## What Will Happen to My Remains?

If you leave no instructions, Wyoming statutes provide that the following persons, in order of priority, may consent to treatment of your remains:

- Spouse,
- Adult children,
- Parents,
- Siblings,
- Grandparents,
- Stepchildren,
- Guardians.<sup>12</sup>

W.S. § 2-17-101(a) states, "If a decedent leaves written instructions regarding his entombment, burial or cremation, or a document that designates and authorizes another person to direct disposition of the decedent's body, the funeral director or undertaker to whom the body is entrusted shall proceed with the disposition of the body in accordance with those instructions or the instructions given by the person designated to direct disposition of the decedent's body..."

In some situations, it may be helpful to consider paying for funeral or burial arrangements before your death. Such "pre-need" arrangements can provide certainty and relieve the burden on your family, while serving other estate planning goals.

You may also wish to leave a written document stating whether you want family and friends to hold a funeral or memorial service for you. This is not legally binding but helpful to provide direction.

It is usually advantageous to discuss these wishes with your family and heirs before your death. Often, a deceased person's estate planning documents are not reviewed in significant detail until the funeral is over and the remains have already been disposed of.

## What is the Legal Procedure for Transferring My Estate to My Heirs?

Probate is the process of transferring property from a dead person to living person(s). The probate process can

take several months to complete, and the personal representative and attorney of the estate will be entitled to compensation based on a percentage of the probate estate, in addition to further compensation for extraordinary services, unless the personal representative or attorney file a written waiver with the court.<sup>13</sup> The process is also public and subject to mandatory court supervision. Consequently, many people seek to use different means of avoiding formal probate, including summary probate, trust transfers, and other probate alternatives.

Wyoming allows a summary probate process for estates valued at \$200,000 or less if an affidavit is filed and certain procedures are followed. W.S. § 2-1-205(a) provides that, if the entire probate estate, including personal property, does not exceed \$200,000, the person or persons claiming to be the distributees of the decedent may file an application for a decree in the district court of the county where the property is situated. This application may be filed after 30 days from the date of death of the decedent. Such a procedure is typically less difficult, time-consuming, and expensive than a formal probate. The procedure is available not only to those who have estates of \$200,000 or less, but to those who have effectively reduced the size of their probate estates to be worth \$200,000 or less by transferring their property through living trusts and other tools, which are often called “will alternatives.” Such trusts are more expensive than simple wills and may not be cost-effective for individuals of limited financial means.

It is possible to avoid probate by passing property in a trust, which is a legal concept dating back to Henry VIII. A trust establishes a relationship between a settlor, a trustee, and beneficiaries. The settlor transfers property to the trustee, who then manages the property for the benefit of the beneficiaries. Often, in a living trust arrangement, the settlor, trustee, and primary beneficiary are the same person as long as the settlor is alive and competent. Any property held in a trust avoids probate because probate is only required to pass property from the dead to the living. A trust never dies, so probate is unnecessary.

Typically, the settlor will transfer as much property as possible to the trust during his or her life. The settlor will usually sign a pour-over will as a safety net to catch any property not transferred to the trust during life. W.S. § 2-6-103 allows a person to designate in his or her will that the person’s property will pass by trust.

Trusts are more expensive up front (often about \$2,000 for a basic trust, depending on who prepares it), but they can reduce costs in the long run by reducing the size of the estate that goes through probate and thus reducing the cost or need for a formal probate. Trusts also have other

### Equity

One of the biggest hurdles in estate planning is coming to grips with what is fair within the family. UW Extension has resources to help with the situation, as do attorneys.

advantages, such as privacy, increased control over property, and special tools for minimizing the effect of transfer taxes on estates that exceed the applicable federal estate tax exclusion amount (\$5 million per person and \$10 million per married couple, as adjusted for inflation, as of January 1, 2013<sup>14</sup>).

There are several non-trust means of lowering the value of an estate for the purpose of avoiding a formal probate. These methods are often less expensive than a living trust plan. If property is jointly owned with a right of survivorship, the property passes to the surviving joint tenant without probate and does not count toward the \$200,000 property limit. Transfer-on-Death (TOD) and Payable-on-Death (POD) designations can be placed on accounts and investments.<sup>15</sup> Beneficiaries of life insurance policies, 401(k) plans, IRAs, pensions, etc., should also receive distributions without probate.

Drafting a trust raises many complex issues that cannot be adequately addressed here. You should consult an estate planning attorney, possibly in combination with an accountant, to plan a trust that will properly carry out your wishes, including taking into account the most current estate laws.

## Who Will Care for My Minor Children?

You may consider drafting a will provision nominating guardian(s) or conservator(s). Those nominees will be given preference by a court in future guardianship or conservatorship proceedings if their appointment is in your children’s best interest. (See *Guardianships and Conservatorships* Bulletin 1250.9)

## Final Thoughts

A good first step in considering what should be accomplished with an estate plan would be to discuss your estate with loved ones and with trusted family advisers. A discussion about their interests and preferences will help you make decisions about what actions to take, or actions to avoid like not giving unwanted property or responsibility to a certain individual. These conversations will help add to your list of critical issues that should be addressed and goals you would like to accomplish.

At this point you could then meet with an attorney and work to formalize your plans in a set of documents. If you already have documents in place, pull them out of storage and review the terms to see if they meet with your current intentions. Circumstances change, and the current version may not fit your current plans. Perhaps it is a new spouse, children (or children with special needs), divorce, a life-threatening illness, a business venture that could lose value if a tragedy occurred to the owner, and so on.

In the end, property will transfer. Your estate will be divided. Taxes may become due. And you will be remembered. The planning done in advance will make the transition more likely to be successful.

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<sup>1</sup> W.S. § 3-5-101.

<sup>2</sup> W.S. § 35-22-403.

<sup>3</sup> *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

<sup>4</sup> See University of Wyoming bulletin 1250.7, *A Walk Through Probate*

<sup>5</sup> W.S. § 2-4-101.

<sup>6</sup> W.S. § 2-4-201(a).

<sup>7</sup> W.S. § 2-4-201(c).

<sup>8</sup> W.S. § 2-5-101.

<sup>9</sup> W.S. § 2-6-124.

<sup>10</sup> See UW bulletin 1250.4, *Wyoming Wills: Some Suggestions for Getting the Most from Estate Planning*

<sup>11</sup> W.S. § 2-6-112.

<sup>12</sup> W.S. § 2-17-101(b).

<sup>13</sup> The fee schedules can be found at W.S. §§ 2-7-803 and -804. The personal representative and attorney are each generally entitled to receive 10% of the first \$1,000 of the estate, 5% of the next \$4,000 of the estate, 3% of the next \$15,000 of the estate, and 2% of amounts greater than \$20,000. In practice, this amounts to a fee of \$750 for the first \$20,000 of the estate, plus 2% of the amount exceeding \$20,000

<sup>14</sup> 26 U.S.C. § 2010(c).

<sup>15</sup> W.S. § 2-16-108.

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