



THE CONSUMER'S GUIDE
TO
WASHINGTON STATE

Estate Planning

A COMPARISON OF
THE LONG TERM EFFECTS
OF WILLS & TRUSTS
COMMONLY USED
FOR
ESTATE PLANNING

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The Purpose of this Guide

It has often been stated that Life is a Journey. As we go through life we are constantly facing decisions which will take us down one path or another. Many times, when we make a decision, we will experience unknown or undesirable results. Major decisions generally do not allow us to go back and try another path.

Take for example the all too common lament: “If only I had _____.” Go ahead . . . fill in the blank. We all have stories to fill in; that is part of life. “If I only knew then what I know now, I would have made another decision.”

We all make decisions based upon information. We strive to get the best information that we can, in order to make the best decision. Most often the choice works out for the best; sometimes it does not. Again, that is life. We laud our accomplishments for good decisions and lament decisions that are not so good. But, if we analyze the good from the bad, the constant factor seems to be the quality of the information upon which we base the decision.

Similarly, as we accumulate assets we are faced with decisions of what to do with those assets and how to best

use those assets. We can use the assets for day to day living or we can accumulate assets. In the area of Estate Planning, today's fundamental decisions about how to transfer assets will affect our heirs. Today's decisions may also affect our own futures.

As with any journey, the quality of information will affect the quality of the decisions. This is no more important than in the legal area of Estate Planning

The fundamental purpose of this Guide is to provide you with the best information available and to provide that information in a usable and unbiased manner, so that you can make the best decisions.

Before we talk about options, we want to become familiar with the purpose of the Estate Plan.

The Purpose of any Estate Plan

A successful Estate Plan can be analogized to a well planned journey. The objective of any journey is to move yourself and your loved ones from Point A (the starting point) to Point B (the desired destination).

The primary goals of any journey are twofold:

- 1) to make the best decisions possible which will allow us to efficiently arrive at our desired destination; and
- 2) to arrive at that destination safely.

As we plan any journey, the paramount issues are the safety of the journey and the certainty that we will arrive at the desired destination.

Similarly, the objective of any Estate Plan is to move accumulated wealth from Point A (yourself) to Point B (your intended heirs). Just as in planning a journey, the primary goals of the Estate Plan are twofold:

- 1) to make the best decisions possible which will efficiently transfer accumulated wealth; and
- 2) to arrive at that destination safely.

The paramount issues in an Estate Plan also revolve around safety and certainty. Safety of the Plan in that no mistakes are made. Certainty of the Plan in that the assets actually end up transferred to the intended heirs.

Without both safety and certainty, the plan may fail. A failed Estate Plan could very well place the assets into the wrong and unintended hands. Without qualified decisions, based on proper advice, the Estate Plan may end up costing much more than the initial price.

Estate Planning Options

As in most states of the United States, the basic options for Estate Planning for residents of the State of Washington are relatively limited. The most common estate planning documents are the following:

1. Last Will and Testaments
2. Revocable Living Trusts

These two documents accomplish the very same purpose; to get assets from point A to point B. There are variations on these two basic documents, but the variations are essentially designed to address contingencies.

Some estate planning attorneys use an outdated combination of a Will and a Trust, (a Trust inside of a Will). You need to remember that the basic estate planning document is really nothing more than one of these two primary options. We will talk about a Trust inside a Will later.

Before we discuss the basic differences in Wills and Living Trusts, a word of caution:

Mistakes in estate planning usually do not show up until the person who made out the estate plan has passed away.

After the person who made out the estate plan has passed away it is generally too late to correct the mistake. Mistakes in the preparation of the document could very likely render the plan ineffective to accomplish the intended purposes. This would be a failed Estate Plan.

The unfortunate result of a mistake is that the estate plan could very well not be followed. An unintended result can be a very costly failure.

In addition to moving accumulated wealth from Point A to Point B, some other important factors in the Estate Plan can include:

1. Medical and Health Care Issues;
2. Taxation Issues;
3. Special needs of heirs.

Last Wills and Testaments

A Last Will and Testament is not really an estate plan at all. A Will is a written document authorized by the Washington State Probate Statute. It is merely a document which sets up an end point (Point B) without really stating how to achieve that end.

The Probate Statute mandates how to get from Point A to Point B. All of the decisions about how to get from Point A to Point B are forfeited to the Probate Code and Courts.

The Washington State Probate Statute states that a Will is the first Phase of a two Phase process:

Phase I:

The first phase is the drafting and execution of the Will. The document essentially has three requirements:

- A. The Will identifies the heirs of the person who made out the Will; and
- B. The Will sets out how the estate is to be shared between the named heirs.
- C. The Will nominates an ‘Executor’ who asks the Probate Judge for permission to administer the decedent’s estate.

If one of the primary requirements of the Will changes then a new Will or amendment (called a Codicil) must be prepared. If one of the primary requirements of the Will is no longer valid when the person who made out the Will passes away, the Will is invalid and could end up being invalidated by the Probate Judge.

To be safely recognized by a Court of Law, a Will is required to be in writing and witnessed by two persons who are not heirs of the estate.

By using a Last Will and Testament, the person who made out the Will gives up their decision making. They have merely set up a target (point B) and abdicate to the Probate Judge the decision making process.

Generally speaking, the cost for preparation of a Last Will and Testament should be no more than a few hundred dollars. The reason that Wills are so inexpensive is because they do very little; they are only allowed to provide an endpoint.

Once prepared, the Will essentially is stored in a safe placed until the person who made out the Will passes away. At that time, Phase II of the process begins.

Phase II:

The second phase of the Last Will and Testament is called the 'Probate' phase.

The Washington State Probate Statutes are very clear: If a person dies and has a Last Will and Testament, that Will must go to the probate phase.

There are only three exceptions to this statute:

1. If the person was married and had a valid ‘Community Property Agreement’ then the assets can be transferred to a spouse; (we will talk about this later) or
2. If the person had less than \$60,000 in non pre-arranged assets at the time they passed away: or
3. If the person had previously placed their assets into a Trust.

The Probate Phase is Statutorily mandated because of the use of a Last Will and Testament. Even if the Will contains language that the Will may be “non-probate” or “non-court intervention” or some combination of those terms, there is no choice, the Will *must* go to Probate unless one of the three exceptions exist.

Many people are under the false belief that their Will may not have to go to Probate. If you have that belief, then you need to find out whether your Will must go to Probate. The Washington State Probate Statute is very clear and very inflexible.

Probate is a mandatory court proceeding whereby a Probate Judge verifies that the Will was prepared

correctly and requires that the Executor follow the terms of the Will. Despite much posturing by some attorneys probate is a long and costly process. We discuss the procedure of a typical probate later in this guide.

There cannot be a Will without a probate.

If the decedent had over \$60,000 of ‘probatable’ assets then Washington State Law is very clear, there must be a probate of the Will. Probatable assets are assets which are non pre-arranged. In other words nobody can access the asset after the owner dies. Probatable assets generally include the following:

- any form of ownership of real estate;
- receiving payments under a Real Estate Contract;
- investment accounts;
- bank accounts;
- safe deposit boxes;
- government bonds; or
- any other form of property account where there is no co-owner

There exists a common falsehood that Washington State Probate Statutes are streamlined. Some lawyers play on this falsehood and actually lead their clients to the belief that probate is ‘easy’ or ‘streamlined’ or ‘no big deal’. Nothing could be further from the truth. A Probate is a

rigid court proceeding. **Any legal proceeding is a huge burden on those persons involved. It is time consuming and very expensive.**

Later in this Guide we set forth the legal requirements and steps in a Probate. Please take time to read that information.

Even a very straightforward Probate is a horrible waste of resources for the persons that are left behind. Worse, if a mistake was made, or if a poor decision was made, then the cost of the failure is incalculable.

Another important bit of information that you may find useful is that a Will is not statutorily allowed to deal with the other important considerations that we set out above. Again, those considerations are:

1. Medical and Health Care Issues;
2. Taxation Issues;
3. Special needs of heirs.

Only a Trust is allowed to deal with these issues.

Mistakes in the preparation of the Will most likely will render the Will invalid. If a mistake can be corrected it is usually very costly to correct the mistake. If the mistake cannot be corrected, then the Will is invalid and the latest valid Will prevails. Given that most people

make a new Will for a reason, they would be very disappointed to discover that their latest intent cannot be carried out.

For this reason, it is recommended that if a Will is used that it is prepared by an Attorney who primarily specializes in Estate Planning.

Many attorneys say that they are estate planning attorneys, because they prepare Wills. However, the Trust and Probate Laws are simply too complicated to fully grasp unless the attorney devotes most of their work to that area. This area of the Law is becoming highly specialized.

The author of this Guide devotes a considerable amount of time in cleaning up deficient Wills. Unfortunately, the only way to clean up a deficient Will is to bring an expensive Petition (request) before a Probate Judge and to prove to that judge that a mistake was made. This Petition process is very costly. Fortunately, with the right information and decisions, this is a process which is very avoidable.

All of that having been stated, let us look at the alternative to a Last Will and Testament.

Revocable Living Trusts

Revocable Living Trusts or ‘Living Trusts’ as they are sometimes called, perform the same function as a Last Will and Testament. A Revocable Living Trust sets up a clear end point . . . Point B. But, where a Living Trust primarily differs from a Last Will and Testament is that the Living Trust sets out a clear path to Point B; and the instructions and decisions of how to achieve that end point.

A Living Trust is an exception to the Washington State Probate Statute. Because it is one of the exceptions to the Probate Statute, **a Living Trust does not go to Probate.** None of the requirements of a Probate come into play. So, if you elect to peruse the section of this Guide which discussed Probate, remember that none of that information applies to a Living Trust.

A Living Trust is authorized by the Washington State Trust Statute. This Statute allows far greater planning flexibility and control flexibility to those persons who utilize the Trust Statute.

Contrary to the limitations of the Probate Statute, the Washington State Trust Statute allows a person to:

1. clearly establish the end Point B;

2. clearly define how to go about transferring assets to that Point B;
3. clearly set out the decisions to be made to achieve that Point B;
4. clearly set forth the process to move the assets from Point A to Point B;
5. have the flexibility to change the trust with the changes in life;
6. anticipate common changes in life and further establishes a method to deal with changes that may occur;
7. decide whether the Living Trust should be self-correcting, in the event that some unanticipated change has occurred which may jeopardize the intended Point B.

Although much more complicated than a Will, a Living Trust is straight forward to establish. There are essentially three steps:

1. The person who sets up the Living Trust signs all of the documents necessary to set up the trust; (usually prepared by an Estate Planning Attorney)
2. The person who sets up the living trust transfers ownership of all or most of their 'probatable' property into the trust. Thus, the trust becomes the owner of the property.

3. The person who sets up the trust is the manager or ‘trustee’ of the trust and therefore still has the ability to control all of the property, the same as they could before they put the property into the trust. There is no loss of control or use of the assets.

As part of the Living Trust, the person who sets up the trust appoints a person to manage and distribute the property after they pass away. This person is called a ‘Successor Trustee’. This person, who is typically a relative (most often an adult child), only has power over the trust in the event that the person who sets up the trust becomes incapacitated or passes away. There is no need for a court or judge to appoint or oversee the actions by a Successor Trustee because the entire plan has been pre-arranged.

The Washington Will and Probate Code is not applicable to persons who have the foresight to place their probatable assets into a Living Trust.

Living Trusts should contain language that allows the document to be self-correcting in the event that an unanticipated change has occurred. Because of this, there is a greatly diminished possibility of having the estate plan not thoroughly followed. This provision essentially eliminates the use of a Judge to make decisions.

When Judges equate to very expensive dollars, the use of a Living Trust is very inexpensive.

Contrary to a Last Will and Testament, a Living Trust can also be used to accomplish the following:

Living Trusts avoid Guardianship. As part of the preparation of the Living Trust, the person who sets up the Trust plans for and pre-arranges for contingencies. For example, if the person who sets up the trust becomes incapacitated for some reason and cannot handle their own finances, then the trust sets out what is to happen in that event. Additionally, the trust clearly sets out what is to be done in the event of death, and how that is to be accomplished.

Living Trusts can be prepared to handle Community Property. It may or may not be the goal of spouses to transfer property directly to one another. A Living Trust speeds up that process. On the other hand, if it is the intent of a spouse to *not* transfer property to the spouse (such as in the case of a second marriage) then the trust can be used to establish clearly defined lines of what property may transfer directly to children or other heirs.

Living Trusts can be prepared to handle Joint Property. The same arrangement can be made for persons who are not married. Transfers directly to a partner or to children (instead of the partner) can be clearly defined.

Living Trusts can plan for Extended Illness. There is no question that a Long Term Illness can be financially devastating. Trusts are commonly used to protect property from seizure in the event that a person goes into a Long Term Care Facility. We discuss Long Term Care and Medicaid Planning in the *Washington State Consumer's Guide to Medicaid.*

Other Considerations

I: A Trust inside a Will

Some attorneys create what are called ‘Testamentary Trust Wills’, which essentially place all of the provisions of a trust inside a Last Will and Testament. Remember, a Last Will and Testament is only allowed to state who the assets go to, not how or when they go to the intended heir. Only a trust is allowed to state how and when the assets go to an intended heir. So the logic of placing a Trust inside of a Will is to take affirmative action on how assets get from Point A to Point B.

Placing a Trust inside a Will is a throwback to pre-year 2000 when Federal Estate Taxes were a common consideration. Prior to that time, each person would be allowed to only pass \$600,000 to their family without incurring high Federal Estate Taxes on the amount in excess of \$600,000. This amount was called the Federal Estate Tax Credit Threshold.

The idea behind this plan was to allow a spouse to use their deceased spouse’s Federal Estate Tax Credit and then to move the sum of \$1.2 million to their children tax free. It was a good idea at the time. But, after President George W. Bush signed the law in year 2001

which raised the Federal Estate Tax Credit to \$2 million each, the idea is no longer useful for most persons.

The problem with placing a Trust inside a Will is that the Will *must* be probated to activate the Trust. Because of this requirement, the client ends up paying much more than what they needed to pay. The client pays much more for the Will because it is much more complicated; the heirs pay for a probate of the assets and to activate the trust; and the heirs continue to pay for the ongoing maintenance and reports to the court, which are required by the Probate code. The idea is no longer favored among Estate Planning Attorneys, but is still used by attorneys who are not up to date in this area of the law.

For persons who have estates valued greater than \$2 million, (which amount increases through year 2010) then the use of a Living Trust is a much more cost effective document to be used. The Living Trust does everything that placing a Trust inside a Will accomplishes but takes advantage of all of the efficiencies of the Living Trust.

If placing a trust inside a Will is recommended, then the client needs to request a written cost commitment for the full utilization of the document. This attorney is probably not up to date on the reasons and efficiencies of Estate Planning Laws.

II: Community Property Laws

Because Washington is a Community Property State, we have certain advantages over states which do not have the Community Property Laws. Essentially, the Community Property Laws allow married persons to sign a short Contract, which states that if one of them passes away, then the other spouse will inherit all of the property without the necessity of a probate.

Community Property Agreements are valid only between married persons. Not between persons who are not married and they are not allowed to move property between parents and children or other heirs.

But, the Laws of the State of Washington require that a husband and wife sign the short contract, called a Community Property Agreement, in order to take advantage of this law. If such an agreement is not signed and one spouse passes away, then a Probate must be conducted of their estate in order to remove the deceased spouse's name from the probatable property.

So, a Community Property Agreement is a very good document for married persons who are in the first marriage.

But, a Community Property Agreement is a bad document for persons who are in their second marriage, or who

have been married more than one time. This is because a Community Property Agreement trumps all other written or non-written estate planning documents.

What this means is that a husband and wife who may want the property that they brought into the marriage to be distributed to their own children, rather than their spouse, or their spouse's prior children, then a Community Property Agreement would eliminate that intent. All property would go to the surviving spouse, who would be free to do whatever they want with the deceased spouse's property.

If you do not think that your spouse might do this, you need to know that the author is frequently contacted by children of a deceased spouse who complain that their step father/mother has disinherited them. There is nothing that can be done at that point about the complaint.

The other possible downfall of a Community Property Agreement is that such an Agreement eliminates the savings of Federal Estate Taxes, should a couple have more than \$2 million. The Internal Revenue Code is very clear on this point, a married couple must use a Trust to minimize the Estate Taxes. Neither a Community Property Agreement nor a Last Will and Testament are allowed to minimize any form of Federal Taxation.

The bottom line is that Community Property Agreements are good for people who are in their first marriage and have less than \$2 million of assets.

III: Powers of Attorney

A Power of Attorney is Written Authorization which permits someone (called the Attorney in Fact) to sign some one else's name (called the Principal).

In the State of Washington, we have two different types of Powers of Attorney.

A: Financial Power of Attorneys

The first type is a Financial Power of Attorney. This document allows the Attorney In Fact to make any and all financial decisions for the Principal. The document can be as broad or restrictive as the Principal desires, but is generally very broad. The document also allows the Attorney in Fact to sign the Principal's name on any document, again authorized in Power of Attorney.

Without a Financial Power of Attorney, should a person become incapacitated, a Court Guardianship of the Estate of the Person must be engaged. The purpose of this type of lawsuit is to get a Judicial Decree which appoints an Attorney in Fact (called a Guardian in the proceeding).

One of the biggest problems with Powers of Attorney is that they may not be honored by all financial institutions. Bank and Investment Companies are not required to

honor Powers of Attorney. A Power of Attorney which is not honored is called a ‘broken Power of Attorney’. This problem is compounded by the fact that broken Powers of Attorney are not discovered until it is too late to fix them. By that time, the Principal has probably lost capacity to make a new Power of Attorney. (It probably would not be used before then.)

A Broken Power of Attorney, or the lack of a Financial Power of Attorney, requires Estate Attorneys to initiate a Guardianship proceeding.

B: Health Care Power of Attorneys

The second type is a Health Care Power of Attorney. This document can no longer be combined with a Financial Power of Attorney (for documents created after March 1, 2004).

The document permits the Attorney In Fact to make health care decisions for the Principal, in the event that the Principal cannot make health care decisions for themselves. The document also permits the Attorney in Fact to talk to the Principal’s health care providers.

Without a Health Care Power of Attorney, should a person become incapacitated and need health care, a Guardianship of the Person would be required.

C: Guardianship

A Guardianship Proceeding is the most archaic and costly proceeding that Estate Attorneys engage in. The cost easily runs into a five figure fee and ongoing reports to the court are required. In addition, any request to spend any amount in excess of \$2500 cannot be taken without court permission.

The procedure of Guardianship is well beyond the scope of this Guide. The brevity of this explanation should not be construed to mean that Guardianship is not a big deal. On the contrary, such a proceeding is a huge deal. Should you have questions about Guardianship or the effect of lack of a Power of Attorney or a Broken Power of Attorney, it would be advisable to contact an Estate Planning Attorney.

Probate

As explained above, Probate is the Second Phase of the Last Will and Testament. Again, under Washington State Laws, if a person has a Last Will and Testament, and if they do not have one of the three legally recognized exceptions to Probate, then a Probate is mandatory. The Probate Laws are very inflexible, there are no other exceptions.

The cost of the Probate Phase is valuable information in making the decision of a Will versus a Trust. Washington State Attorneys are entitled to charge what is called a 'Reasonable Fee' for their services in working through the Probate process. There are no laws which guide what may and what may not be 'reasonable'. Because of this, the cost of a Probate can vary widely.

Contrary to what some attorneys may tell, Probate is a very complicated and complex process. It is also very unnecessary. So that you know the process, we invite your review of the legal steps required. All of these are taken directly out of the Probate Code.

Probate is essentially a six step process. Those steps are:

Step 1: Have the Last Will and Testament approved by

the probate judge. This first step requires the Probate Attorney to prepare and file the following documents with the Probate Court.

- a. Petition for Probate of Last Will and Testament,
- b. Oath of Personal Representative

Once the attorney takes these documents to the court and gets the Judge's signature the following documents are issued:

- c. Certificate of Testimony in Proof of Will
- d. Order of Solvency and Directing issuance of Letters Testamentary.
- e. Order Admitting Will to Probate

After the judge signs these documents, the attorney then processes and files the following documents:

- f. Notice of Appointment as Personal Representative.
- g. Letters Testamentary

Step 2: Publish Notice to Creditors in a local newspaper.

When Step 1 is completed, the attorney arranges for a 'Notice to Creditors' to be published in a newspaper on three separate occasions. Newspapers charge money for this service. Fees for this publication can range from \$150 to over \$500, depending on the attorney.

The publication period runs for a minimum of 4 months. During this 4 month period, the assets are required to be held in locked accounts. This waiting period ensures that any creditors or Will Contests can be dealt with by the court.

Step 3: Prepare Inventories of all assets and debts.

While the 4 month waiting period of Step 2 is progressing, the attorney arranges for valuation of all of the real estate owned by the decedent. This requires real estate appraisals. The heirs have the ability to agree about the cost of personal property, but it is required to be itemized. Cash and investments and bank accounts are placed on what is called an ‘Estate Inventory’ with the real estate and personal property, so that the judge will know that the estate is solvent, that is, that there are more assets than debts.

Step 4: Pay all expenses, claims and taxes.

After Step 4 has concluded, the judge will grant permission to pay any estate expenses or creditor’s claims or taxes. This step should take no more than 30 days.

Step 5: Prepare and file the plan for distribution.

After the judge approves the payment of expenses,

claims and taxes, then the attorney prepares a plan for distribution of the remaining assets. This plan is called the 'Declaration of Completion' and if all of the heirs agree on the plan, then it is filed with the court. The step typically takes about a month.

Step 6: Gain the Probate Judge's approval to distribute the assets.

30 days after the Declaration of Completion is filed with the court. And if no heir or any other party disagrees with the plan, then the Personal Representative is allowed to actually distribute the assets to the heirs.

So, what has been accomplished through the Probate Process:

1. The assets have been locked away from the heirs for a minimum of 6 month period
2. Appraisers have been hired
3. The assets and debts of the decedent have been made public
4. Attorneys have been paid for all of these 'reasonable' services.
5. The heirs have been frustrated due to the length of the process
6. The attorney can charge whatever they believe to be 'reasonable'

Remember that none of this happens with a Living Trust, because a Living Trust is one of the three exceptions to Probate.

Finally, it has been stated that “knowledge is power”. Hopefully, you now have valuable information which will help you make the decision which is right for your circumstances. If you have any questions, or need further information, please feel free to call the author of this guide.

ABOUT THE AUTHOR

Richard C. Greiner was admitted to the Washington State Bar Association in 1983. He is a member of the Washington State Bar Association Section on Real Property, Probate and Trust. He is past President of the Central Washington Estate Planning Council. He has prepared over 5000 estate plans, ranging from simple Wills to complicated estates in excess of \$12 million. He is a frequent lecturer on the topics of Estate Planning, Medicaid Planning and Trusts. He can be reached at the following:

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