



***Important Legal Disclaimer:** We are not a law firm and are not qualified to render legal advice of any kind. Moreover, estate planning is a specialty area that requires a legal subject matter expert to advise on the particulars of a given situation, and each state has its own estate tax law. The best course of action is to consult the relevant experts (estate attorney, accountant and financial adviser) in your state.*

## Overview

Estate planning can be enormously complex, and the subject itself is unpleasant. That's why many people simply avoid the matter and end up doing nothing. This is a terrible financial planning mistake that often exacts its full price when a surviving spouse is most emotionally vulnerable.

The idea of consulting an estate attorney can be paralyzing, so this guide is designed to provide a high-level outline to help simplify the matter. The most important takeaway is simply to **do something now**.

If you die without a will, or "intestate," state law will determine what happens to your assets. Dying intestate denies you the opportunity to specify how and to whom your property gets distributed. Additionally, a probate court can invalidate a will for reasons such as improper or incomplete execution—in which case the probate court would also apply the state rules for intestate succession.

For this reason, we strongly recommend creating estate planning documents—and then reviewing and updating them periodically. Whether you hire an expert or do it yourself through a reputable online service, it's important to get it done.

As it is beyond the scope of this brief guide to cover the wide variety of individual situations, we focus instead on an illustrative overview for one common life arrangement: a married couple. We cover the planning aspects only, not the steps a surviving spouse would need to take after a death.

The following table lists the key steps in the estate planning process.



### Critical Key Steps

(Married Couple Illustration)

- ❑ Make a decision to either (i) hire an estate attorney to draft or update wills and other estate planning documents, or (ii) do it yourself.
- ❑ Hire a financial adviser both spouses like.
- ❑ Track all financial accounts and assets, and update regularly (either through a financial adviser or an online service).
- ❑ Use a digital password aggregator to keep track of log-in information for online accounts, and keep the password with your wills.
- ❑ Make sure each spouse's will gives the executor permission to manage digital assets.
- ❑ Set up bank and other financial accounts a surviving spouse will need immediate access to in both spouses' names or as "transferable on death" from one spouse to the other. (Some types of accounts in one spouse's name alone typically go through probate and may not be immediately accessible.) Consult with an estate attorney before retitling accounts if you think you may owe federal or state estate tax.

## Understand your federal estate tax exemption

Historically, the first consideration of estate planning has been taxes. For 2023, the federal estate and gift tax exemption is \$12.92 million per individual.<sup>1</sup> This means an individual can leave \$12.92 million to heirs and pay no federal estate or gift tax, and a married couple can shield \$25.84 million. As of 2023, the annual gift exclusion is \$17,000.

In addition to the 40% federal estate tax, some states impose additional estate or inheritance taxes. Twelve states and the District of Columbia impose an estate tax, while six states have an inheritance tax. Maryland imposes both.<sup>2</sup>

When federal estate and gift tax exemptions were significantly lower, tax minimization was the impetus driving many complex estate planning structures. But under current tax law, the overwhelming majority of Americans will never have to pay any federal estate taxes. So if you're lucky enough to live in a state with no state estate taxes, such as Colorado, the planning paradigm is now much simpler from a tax perspective. Nevertheless, **tax law can and does change over time.**

In fact, provisions from the 2017 Tax Cuts and Jobs Act that almost doubled the lifetime estate and gift tax exemption to its current rate are on track to sunset at the end of 2025. If Congress does not act before then, exemptions will revert to 2017 levels, adjusted for inflation, which would mean a roughly \$7 million individual exemption; \$14 million for married couples.<sup>3</sup> It is important to plan your estate under different scenarios with these potentially lower numbers in mind.

## Estate documents

Properly prepared and executed estate documents enable an executor or trustee to fully implement your intentions. First, you'll need to decide whether to set up a trust or if a will alone will serve your needs. The following table summarizes what you can do with these and other basic estate documents.

<p><b>Last will</b> (also called a "will" or "last will and testament")</p>	<p>A last will is a document that names an executor: the person who will take your assets through the court-ordered process of probate, which changes the title of your assets. A last will also outlines how you want to dispose of your assets and declares a guardian for any minor children.</p>
<p><b>Living trust</b> (also called an "inter vivos" trust)</p>	<p>With a living trust, you transfer your assets into a trust for your benefit during your lifetime. During your life, you are both the trustee and beneficiary of the trust assets. When you die, your chosen representative, called a "successor trustee," takes over management of the trust assets and distributes them to your designated beneficiaries according to your wishes. The major advantage of having a trust is that the assets in the trust do not have to go through probate.</p>
<p><b>Living will</b> (also called a "health care directive" or "advance directive")</p>	<p>A living will details your instructions regarding the use of extraordinary medical procedures to save or prolong your life. Through this document or a separate health care power of attorney, you identify the person you want to make health care decisions for you if you cannot do so yourself.</p>
<p><b>Durable power of attorney</b></p>	<p>This document authorizes someone to make financial and legal decisions on your behalf should you become unable to do so.</p>
<p><b>Letter of intent</b></p>	<p>A letter of intent outlines what you want to do with your remaining assets, but unlike the items listed previously, it is not a legal document. Your letter of intent can also include information about matters that are not yet settled when you write your will, such as plans for your funeral or which beneficiaries should receive specific family heirlooms. Although this document cannot override other legal designations you have made, it can provide guidance if any of your assets go to probate unexpectedly.</p>

<sup>1</sup> Katherine L. Keating, "Increased Gift and Estate Tax Exemption Amounts for 2023," *Foley & Lardner LLP*, February 13, 2023.

<sup>2</sup> Morgan Scarboro, "Does Your State Have an Estate or Inheritance Tax?" *Tax Foundation*, April 5, 2018.

<sup>3</sup> "Prepare for future estate tax law changes," *Fidelity Wealth Management*, July 11, 2023.

## What Is Probate?



Probate is a court-supervised process for validating your will and distributing your property. The process can last anywhere from six months to over two years and may require lawyers or other professionals to be hired. Even if you die without a will, if your estate's value exceeds a threshold amount, it must still pass through the probate system. In such cases, the court decides how to distribute your estate among your relatives.

The probate process typically includes these steps:

1. Your will is filed with the local probate court and becomes public record.
2. Your executor inventories your property.
3. Your property is appraised.
4. All debts, including estate taxes, are paid.
5. The court validates your will.
6. Court costs, attorneys' fees and executors' fees are paid from your estate.
7. The remainder of your estate is distributed to your heirs.

To avoid or lessen the time and expense of probate:

1. Talk to your financial adviser to ensure your bank accounts, brokerage accounts and other financial assets are properly titled in joint tenancy with your spouse or have the proper "transfer on death" designations.
2. Make sure your beneficiary designations for your life insurance policies and retirement accounts properly designate either your spouse or a specifically named beneficiary.
3. Establish a living trust and retitle your financial and other assets, including all real estate you own, in the trust's name. Also, change the beneficiary designations for your life insurance policies and retirement accounts to your living trust.

For any assets not covered above, there is a small estate threshold to allow your executor to transfer non-real estate assets to your designated beneficiaries without going through probate. For example, Colorado's small estate threshold for 2023 is \$80,000.

## Avoid the 5 biggest trust mistakes

The ability to bypass probate is certainly an appealing reason to create a living trust. However, trusts can be complex and require ongoing maintenance to work properly, so they are not for everyone. Here are the five biggest mistakes we see with trusts:

- ❶ **Having an incorrectly drafted trust document:** Especially if you take the DIY approach, you must be careful that the language in the document is valid and fits all your objectives. One size does not always fit all.
- ❷ **Not funding the trust:** All assets must be retitled in the trust's name to avoid probate.
- ❸ **Naming the wrong successor trustee (or no successor trustee at all):** Your trust document must name a successor trustee to manage the trust when you can no longer do so. However, family conflicts can arise during the management and distribution of assets after you die, so naming multiple children or their spouses as co-trustees can be tricky, especially if they do not see eye to eye. For greater impartiality, it is often advisable to name a close family friend or a corporate trustee to fill the role.
- ❹ **Failing to update the trust:** As life events occur, such as the birth of a child or a divorce, you must update the trust to ensure the assets go where you want.
- ❺ **Having only a living trust:** A trust can help manage the financial aspects of your estate, but any medical decisions for end-of-life care will require additional documents, such as a living will. Furthermore, you will still need a last will, if only a very simple one, to cover any assets that have not been transferred to your trust.

## Special situations

This guide is designed to cover a single, simple situation of a married couple, but in estate planning, **one size does not—and can never—fit all**. Indeed, there are many special situations that absolutely require the advice of an expert, such as:

- Advanced age or serious illness
- Married couples with no children
- Blended families
- Disabled beneficiaries receiving government aid, such as Supplemental Security Income or Medicaid
- Non-U.S. citizens

## Naming beneficiaries

A beneficiary is any person who receives benefits from a will or a living trust. You should always provide for an **alternate, or contingent, beneficiary** in case the first one dies before you and there is no chance to update your estate documents.

The most common pitfall with regard to designating beneficiaries is failing to update your designations when your life circumstances change. For example, if you remarry or add a child to your family, make sure to account for the new person in your estate planning. Another issue is properly naming beneficiaries for your IRA or 401(k) accounts to ensure they have the option to further delay taxable distributions. The accompanying box lists some other common errors.

### Who Not to Name as a Beneficiary

- One person for everything
- Minor child or child's designated guardian
- The estate
- Outdated/deceased beneficiaries
- No one

Naming these beneficiaries (or failing to name anyone) will likely delay the distribution of your assets.

## Managing digital assets

In the modern world, you must take steps to simplify the management of your digital assets. These include:

- Tracking all financial accounts and other digital assets, such as social media accounts, online subscriptions and email accounts, and updating the list regularly, either through a financial adviser or an online service.
- Using a digital password aggregator to safely secure and keep track of log-in information for online accounts. Keep the password with your estate planning documents.
- Make sure each spouse's will gives the executor permission to manage digital assets.

## Next steps: Do something

Estate planning is complex, but it's no excuse to bury your head in the sand and do nothing.

The best advice is to take the next step and **do something**. Talk to your financial adviser or accountant. Hire an estate attorney. Do it yourself online. But by all means, take action now and do something.

October 2023



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