



# BUSTAMANTE

FINANCIAL PLANNING

## Will and Estate Planning

### Questions and Concerns:

- Do you have a Will, Trust and/or other documents that provide instructions upon your death? If so, does it address your wishes today?
- In the event you are unable to decide on your medical attention, do you have instructions to guide the health provider? If so, is it up-to-date?
- Is there a separate property list? Is it updated? Are valuables or collectables documented and appraised?
- Is there a password access file so that my Personal Representative can close my internet accounts?

### **Do you have a will, trust and/or other documents that provide instructions upon your death? If so, does it address your wishes today?**

Estate planning provides orderly estate administration on an individual's terms. Everyone has an estate plan either dictated by the individual's will (testate) or an estate plan without a will dictated by the residing state (intestate). In addition, New Mexico is a community property state and there are transfer provisions to the surviving spouse depending on how assets were acquired and titled. Dying intestate may be problematic because of probate costs to assign a personal representative (executor) and the probate law might not go according to the decedent's intentions. Even when dying intestate and the probate law does follow the decedent's intention, a will provides clarity and leaves no doubt. Furthermore there are circumstances where an estate plan is essential as stated below:

*Minor Children* – When asked “Who will care for your young children in the event of your death?” this often motivates parents to act. A will indicates who will be the children's guardian. Without this document, appointment of a guardian by the courts can be lengthy, costly and messy.

*Providing for Incompetency* – A document such as a power of attorney or trust will designate the person who should act on a person's behalf. Otherwise the court will have to appoint a conservator to handle one's affairs.

*Providing for Medical or End-of-life Needs* – It is important that a person names an individual s/he feels confidence in to make appropriate medical decisions, especially if it is a non-spouse or non-relative.

*Divorce and Remarriage (Blended Families)* – Often providing for children from two different marriages and the existing spouse can provide complexities. An estate plan with a well drafted will or trust will help the personal representative and/or trustee to act on a decedent's intent and avoid unintentionally disinheriting one's children.

*Wealth Transfer by or to Noncitizens* – Special rules apply to these situations. Often this requires an estate planning attorney who specializes in this situation.

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*Taxable Estates* – In 2013, the estate tax exemption is \$5,250,000 per individual and is adjusted for inflation for subsequent years. If an individual has assets above \$5million or a married couple above \$10million, a proper estate plan can reduce, avoid or prepare for such taxes on amounts above the exemption. Even if your assets are below that amount, inheritance or other windfalls can affect your estate tax situation. Annually, ask your tax advisor to inform you of any tax changes that would impact your situation. Taxes do change.

*Same-sex Relationships or Unmarried Cohabitants* – A property agreement is particularly useful as those involved share purchases and expenses. It is often essential that they also have their estate plan in place to avoid intestacy. In regards to health care decisions, a significant other may be the one a person wants to designate those decisions.

*Business Ownership* – Proper estate planning is critical to assure a smooth transition of a business. This is particularly important when the owner is key to its survival and success.

*Other issues* – There are many other concerns that should be considered such as special needs children, charitable intentions and adopted children. In the case of adopted children, language on the will could state, “...all children born of Jane and Joe Dow...” could unintentionally disinherit an adopted child after the will was drawn.

The following are techniques used to distribute property after death.

#### **Will Substitutes**

The use of will substitutes is a very common way to distribute assets upon death. They are very effective but can unintentionally supersede a will or trust. Therefore careful understanding of asset titling is vital. Below is a list of some of the will substitutes:

*Joint Tenants with Right of Survivorship (JTWROS)* – Joint accounts such as checking, savings or certificate of deposits will automatically transfer the account to the survivor of the account. Each person on the account has access to the account while one of the owners is still alive.

*Pay-on-Death (POD) or Transfer-on Death (TOD)* accounts will only allow the designated beneficiary account access only upon the owner’s death.

*Designation of Beneficiary* – S/he is usually identified on retirement plans, life policy and annuities. The owner will designate who will receive the proceeds of the account upon death of the insured.

*Community Property* – New Mexico is a community property state and community property laws apply to married couples. Generally each spouse has access to the property of the other spouse’s property upon death. There are specific actions and conditions that must be adhered to avoid sole and separate property from reverting to community property.

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### **Will**

A will is a common document to bequeath property to named heirs. The will identifies the person or entity to act as a personal representative (executor) for the decedent's estate and to act on the instructions of the will. A will can be revised or revoked at any time.

### **Trust**

A trust document has many of the same attributes of a will such as the distribution of assets upon death. In addition, a trust also provides for individuals while they are alive to manage their financial affairs. A trustee is named to administrate the trust. Trusts can be revocable as well as irrevocable and different trusts can be established.

### **In the event you are unable to decide on your medical attention, do you have instructions to guide the health provider? If so, is it up-to-date?**

A person can be incapacitated due to severe health or accident related issues and cannot make either financial or medical decisions on their own. In times of emergency, this can impair health care providers regarding important health care decisions. It is also important to designate a person capable of making difficult decisions. This person may be someone other than a blood relative. In fact, some individuals want to remove that burden from a close family member. One might also want to separate the financial support aspect from the medical decision aspect. Therefore, a person needs to appoint someone who they have confidence and trust to act diligently and make sound decisions. Below are some of the instruments used to facilitate financial maintenance and medical decisions:

*Durable Power of Attorney (POA)* – This grants a person or entity (agent) the power to act on the financial behalf of an individual. This often includes bill pay, investing, borrowing and selling assets. The provisions can be broad or limited on what the agent can do. Generally, the durable power of attorney for financial maintenance is separate from the medical power of attorney for medical decisions, although the agent can be the same person.

*Trust* – A trust grants a trustee or successor trustee the similar powers as the power of attorney on assets that are in the trust. The acting trustee will maintain financial support and manage the trust in the best interest of the person (beneficiary).

*Living Will* – This gives the health care provider guidelines to limit unnecessary life sustaining actions in the event of a terminal illness, injury or irreversible coma.

*Health Care Durable Power of Attorney (Advanced Health Care Directive)* – This appoints a person (agent) to make health care decisions for an incapacitated individual. Often there are instructions that provide guidance for the individual to make health care decisions. An advance health care directive may also have limitation to life sustaining actions as in a living will.

*Authorization and Disclosure Form* – The Health Insurance Portability and Accountability Act of 1996 contains privacy restrictions. This form allows named individuals to have access to medical information that would otherwise be restricted by law.

**Is there a separate property list? Is it updated? Are valuables or collectables documented and appraised?**

Many wills provide a separate property list that identifies who gets the incidental property such as jewelry or furniture. It is a good idea to review this list at least annually to remove or add property items.

Collectables including art, photography, pottery and other collectables should be inventoried. Often the owner knows the history and value of the property. Having an appraisal also provides a property insurance valuation for such items listed. There are individuals who provide a service to help write up a collection that includes the history, how it was acquired and the estimated valuation. Often this service provides a coffee table book with photos and the stories of the collectables. This service provides four benefits: a photo inventory, a story, a value (or reference to a value) and a conversation piece. This also helps a personal representative set a price for sale or establish a value of the bequeath. One downside is that any changes in the inventory needs to be documented for any sale or gifting to make sure the item has not been misplaced or stolen.

**Is there a password access file so that my Personal Representative can close my internet accounts?**

With the advent of social media, there will be a time when a personal representative needs to have access to close a decedent's web sites. It is good to have a secure place to provide the Personal Representative user names and passwords to shutter the accounts.

**Conclusion**

Essentially, it is necessary to develop your own estate plan. As mentioned, there are several reasons to devise a plan. There are also numerous planning techniques. In many situations a general practice attorney can draft a straightforward workable document for simple estates. Depending on the situation, certain estate planning specialists will need to be engaged for more complex estates.

**How can a financial planner help in your estate plan?**

As part of comprehensive planning, a financial planner often assembles information so that the attorney can provide thorough estate planning advice and draft appropriate legal documents. The financial planner usually provides net worth statements, income statements, identifying goals and concerns, and titling of property information. The financial planner often educates clients about the importance of having an estate plan as well as utilizing the services of an attorney to draft the legal documents. It is important to note is that the attorney is a required specialist to draft the legal document. The financial planner role in this situation is, at best, the assistant to the attorney. The exception is, of course, if the financial planner is also an attorney.



**DISCLAIMER**

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