

# Estate Planning Basics

Danielle R. Kincaid

The Elder Law Group

1730 E. Republic Road, Suite F, Springfield

417-708-2044

[Dkincaid@TheElderLawGroup.com](mailto:Dkincaid@TheElderLawGroup.com)



# What is “estate planning”?

- Planning for death
  - Avoiding Probate
  - Naming Guardian for Minor Children
  - Control of Assets after Death
  - Minimizing Tax Implications
  - Right of Sepulcher
- Planning for Incapacity
  - Temporary, Permanent, and End of Life Decisions
  - Asset protection

# Planning for Death: Avoiding Probate

- **Joint Ownership** (*CAUTION*: Tenancy in Common with Real Estate, Access for Creditors, Contrary Inheritance Wishes)
- **Beneficiary Designations** (Payable on Death, Transfer on Death, Beneficiary Designations, Beneficiary Deed)(*CAUTION*: death of beneficiary, minor beneficiary, beneficiary with special needs)
- **Trusts** (Revocable Living Trust, Irrevocable Trust, Medicaid Asset Protection Trust, Special Needs Trust)(*CAUTION*: funding of trusts)

# Joint Ownership

- Joint Ownership of assets is a way to avoid probate. But, there are potential issues:
  - Real Estate owned as tenancy in common (default) instead of as joint tenants with right of survivorship.
  - Potential access for creditors.
  - Unintended consequences/contrary inheritance wishes.
  - Transfer deemed a “gift” for Medicaid purposes.
  - Loss of step-up in basis.

# Joint Ownership of Bank Accounts

- RSMo. 362.470: “If more than two persons are named as depositors and one of them dies, the deposit becomes the property of the survivors as joint tenants.”
- RSMo. 461.031(2): “On death of one of two or more joint owners... the right of survivorship continues as between two or more surviving joint owners.”
- Joint tenancy of bank accounts may NOT be defeated by parol evidence indicating a contrary intent. See *In re Estate of LaGarce*, 487 S.W.2d 493, 500-501 (Mo. 1972).

# Beneficiary Designations

- Beneficiary Designations are a way to avoid probate.
- Every asset has a way to add a beneficiary:
  - Bank Accounts: Payable on Death (POD)
  - Vehicles, trailers, boats, boat motors, etc.: Transfer on Death (TOD)
  - Real Estate: Beneficiary Deed
  - Investment accounts, IRAs, life insurance, etc.: Beneficiary
- Potential Issues:
  - Death of beneficiary
  - Minor beneficiary
  - Beneficiary with creditor issues
  - Beneficiary with special needs

# Beneficiary Deeds

- RSMo. 461.025
- Must be recorded before the death of the owner.
- May be revoked by the owner prior to the owner's death.
- What if the beneficiary dies before the owner's death? See RSMo. 461.045. If beneficiary is a lineal descendant, then the property goes to the beneficiary's lineal descendants, per stirpes, unless "no LDPS" is placed in the Beneficiary Deed.
- Not all states allow Beneficiary Deeds (also called Transfer on Death Deeds). If your client owns real estate in this/these states, the client will likely need a trust.

# Trusts

- **Every trust has three parties:**
  - Grantor/Settlor (Creator of the Trust)
  - Trustee (Administrator of the Trust)
  - Beneficiary (Beneficiary of the Trust)
- **Revocable Living Trust = Most Common**
  - Avoids probate if properly funded
  - Does NOT provide asset protection for the Grantor/Settlor
- **Allows Grantor/Settlor more control of their assets after death.**
  - Minor beneficiaries
  - Adult beneficiaries with special needs
  - Spendthrift beneficiaries
  - Beneficiaries with additional issues or mental health concerns

# Trusts

- A Trust is WORTHLESS unless it is funded.
- How to fund a Trust:
  - Retitle assets in the name of the Trust;  
OR
  - Add the Trust as the beneficiary
- Caution: Potential negative implications for adding an IRA as a beneficiary of a Trust

# Other Types of Trusts

- Special Needs Trust: Allows the beneficiary of a trust to continue receiving needs-based government benefits (Supplemental Security Income, Medicaid, Food Stamps, Rental Assistance, etc.)
- Irrevocable Trust: May or may not be a Medicaid Asset Protection Trust
- Medicaid Asset Protection Trust: Protects assets and allows grantor/settlor to qualify for Medicaid

# Random Assets

- Safe Deposit Box
- Savings Bonds
- Personal Property (non-titled): cattle, tractors, family heirlooms, etc. RSMo. 474.333.
- Physical Stock Certificates
- Small Businesses

# What is Probate?

- Probate is the court-supervised process to transfer legal title of property whose owner(s) are deceased.
- Why do people want to avoid Probate?
  - Lengthy process, and delays are frequent.
  - Public process.
  - Expense.
  - Reminder of a loved one's death.

# What about a Last Will & Testament?

- A Will does NOT avoid Probate.
- Unlike the movies, a Will does NOT control assets after the death of the Testator/Testatrix.
- Joint ownership of assets, beneficiary designations, and ownership of assets by a Trust WILL control the disposition of assets over a Last Will & Testament

# What about a Last Will & Testament?

- RSMo. 473.050.1: A will, to be effective as a will, **must be presented for and admitted** to probate. (emphasis added).
- RSMo. 473.050.3 provides the timeframe in which a Will must be presented for and admitted to probate, and if not presented and admitted within that timeframe, “is forever barred from admission to probate in this state.”

# So why have a Last Will & Testament?

- The only place to legally name the guardian of a minor child. RSMo. 475.045, 475.046.
- Directs the Court how to dispose of probate assets, which could occur due to the failure to fund a trust, a lost beneficiary designation, a deceased beneficiary, etc.
- Pour-over Will with a Trust

# Missouri Intestacy Statutes

- Found in RSMo. 474.010.
- Surviving spouse does NOT receive 100% of assets if there are surviving issue of the decedent.
- Surviving spouse does have an opportunity to make additional claims: Election to Take Against Will (474.160), Family Allowance (474.260), Homestead Allowance (474.290), Exempt Property Allowance (474.250), Omitted Spouse (474.235)

# Death and Incapacity Planning

- Right of Sepulcher (RSMo 194.119)
- Autopsy Request (RSMo 194.115)
- Organ Donation (RSMo 194.245)

# Incapacity Planning: Health Care Power of Attorney

- RSMo 404.800, et seq.
- Missouri is one of the few states that does not have a default surrogate statute.
- A healthcare power of attorney is not a DNR and is not a TPOPP (called POLST in other states) \*see article included in materials.
- Issues with naming joint Agents.
- The Missouri Bar provides a free Health Care Power of Attorney and HIPAA authorization form:  
<http://missourilawyershelp.org/legal-topics/durable-power-of-attorney-for-health/>

# Incapacity Planning: Advanced Healthcare Directive

- RSMo 404.820, et seq.
- Also called a “Living Will” or “Physician’s Directive”
- Cruzan v. Director, Missouri Dep’t of Health, 497 U.S. 261 (1990). “Under the due process clause, a state may require that an incompetent person’s wishes as to the withdrawal of life-sustaining medical treatment be proven by clear and convincing evidence... A state has a legitimate interest in the protection and preservation of human life...”

# Incapacity Planning: Financial Durable Power of Attorney

- RSMo 404.700, et seq.
- What makes it “durable”? RSMo. 404.705.
- An Agent under a DPOA may NOT engage in certain tasks unless those tasks are specifically listed in the DPOA. RSMo. 404.710(6).
- Trust should reference the DPOA, and DPOA should reference the trust.
- Issues with naming joint Agents.
- Fast growing area of litigation.

# Incapacity Planning: Failure to Plan

- Guardianship/Conservatorship.
- \$660.00 filing fee in Greene County, MO.
- Unpleasant process for loved ones.
- Annual settlement/report.



# Durable Power of Attorney for Care and Custody of Minor Child

- RSMo. 475.602, 475.604
- May not exceed one year.
- Statute requires very specific language.
- Can be used when parents are otherwise unavailable (vacation, ill, etc.)
- \*See sample included with materials.

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# Notes/Issues

- Many clients think they have a “simple” estate and they want a “simple” estate plan.
- Death and money do weird things to people.
- Every client tells me their family “isn’t like that” and “won’t fight.”
- Do not assume your client or their family will act rationally upon the death of a loved one. This is especially true when the peacekeepers (parents) pass away.
- You should have your client complete a “worksheet” with basic information, including family dynamics.

# Notes/Issues

- An estate plan should be done prior to an adult person's incapacity or death. Not when they reach a certain age. Not when they reach a certain asset level. Not when they go on their dream vacation.
- Client's should not assume that things will "work out": leaving all assets to a trusted family member to administer, assuming their spouse will have the legal right to handle assets upon incapacity, etc.

**QUESTIONS?**





THE

**ELDER LAW**

**GROUP**

**Danielle R. Kincaid**

**1730 E. Republic Road, Suite F**

**Springfield, Missouri 65804**

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