

Estate Planning

Robert A. Tufts
Ph.D., J.D. LLM (tax)
Visiting Professor
Alabama Cooperative Extension System
Auburn University
tuftsra@aces.edu

Disclaimer

- This information has been prepared for informational and educational purposes only. It does not constitute legal advice and should not be relied on as such because the information is general in nature and may not apply to particular factual or legal circumstances.
- No attorney-client or any other relationship is created or intended to be created by the dissemination or receipt of this information.

Reasons for lack of planning

- Over half of U. S. adults do not have a will
 - Ignore issues involving their own death (refusing to accept that death can occur unexpectedly)
 - So busy pursuing careers that they don't make time for planning
 - Don't have sufficient assets to warrant the time and expense of planning
 - Believe their lives are too unsettled to undertake long-range planning
 - Some fear the family conflicts that are likely to arise

Result of lack of planning

- Unnecessary emotional turmoil and family distress
 - Who takes care of your minor children
- Inordinate conflicts and delays
 - Who owns your property
 - Who administers your estate
 - Heir property
- Significantly increased legal fees
 - Bond and inventory

Estate Planning

- Primary goal is peace of mind
- Estate plan consists of
 - A plan to dispose of assets in a tax-advantaged manner to the appropriate person at the right time
 - Naming guardians to raise minor children and naming fiduciaries to handle their assets
 - A will to dispose of assets at death
 - A trust to dispose of assets beyond your death
 - A durable power of attorney to appoint someone to manage your finances if you are not able
 - Advance Directive for Health Care for directions regarding health care

Estate Tax Planning

- Minimize/eliminate transfer taxes
 - Estate tax is 40%
 - Gift (annual exclusion amount is \$15,000)
 - Generation-skipping transfer tax (transfers to grandchildren are taxed twice)

Tax Cuts and Jobs Act of 2017

- Doubled the applicable exclusion amount to \$10 million
 - For 2021 the indexed for inflation amount is \$11.7 million (or \$23.4 million per couple)
- Expires 12/31/2025
 - Reverts to \$5 million indexed for inflation since 2011
- Portability of the deceased spousal unused exclusion amount for estate and gift tax purposes is available
- Stepped-up (or stepped-down) basis
 - Not for IRD (income in respect of a decedent)

Testate vs. Intestate Succession

- Your plan
- Alabama's plan

Alabama's Plan for Your Estate

- Spouse but no children
 - Spouse: first \$100,000 plus half of the remainder
 - Decedent's parents: the other half

Requirement that devisee survive testator by five days. Ala. Code 43-8-220

- A devisee who does not survive the testator by five days is treated as if he predeceased the testator, unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

Alabama's Plan for Your Estate

- Spouse and children of that marriage
 - Spouse: first \$50,000 plus half of the remainder
 - Children: the other half

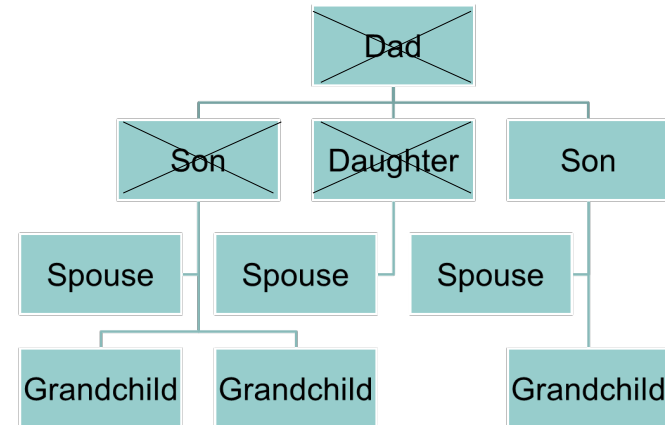
Alabama's Plan for Your Estate

- Spouse and children of previous marriage
 - Spouse gets half
 - Children get the other half

Alabama's Plan for Your Estate

- No spouse but children
 - To children equally
 - By representation

By Representation



Alabama's Plan for Your Estate

- No spouse or children
 - Parents if either survive decedent
 - Issue of parents, e.g. brothers and sisters or their children
 - Grandparents or their issue, e.g. uncles and aunts, and cousins
 - The State of Alabama

Estate Planning

- Documents to put the transition plan in place
 - Transition will happen whether you plan for it or not

Basic Documents in an Estate Plan

- Advance directive for health care
- Power of attorney
- Distribution plan
 - Will
 - Trust

Advance Directive for Health Care (Living Will and Health Care Proxy)

- Directions for the providing, withholding, or withdrawal of life-sustaining treatment and artificially provided nutrition and hydration if you are terminally ill or permanently unconscious
- You can also appoint a health care proxy
- Proxy can make any health care decisions the principal could make but for lack of capacity
 - except psychosurgery, sterilization, abortion or involuntary hospitalization or treatment for mental health issues

Advance Directive for Health Care (Living Will and Health Care Proxy)

- An AD shall become effective when
 - the attending physician determines that the declarant is no longer able to understand, appreciate, and direct his or her medical treatment; and
 - two physicians . . . have diagnosed and documented . . . that the declarant has either a terminal illness or injury or is in a state of permanent unconsciousness
- May be revoked at any time

Advance Directive for Health Care (Living Will and Health Care Proxy)

- Any advance directive for health care shall be in writing, signed by the person making the AD, dated, and signed in the presence of two or more witnesses at least 19 years of age
- “The advance directive for health care shall be substantially in the following form, but in addition may include other specific directions.” §22-8A-4, Code of Alabama (1975)

Durable Power of Attorney

- Allows a person (agent, usually denominated as attorney-in-fact) to conduct your affairs if you are not present or not able
- Durable means it is not terminated by the principal's incapacity
- "All acts done by an attorney in fact pursuant to a durable power of attorney . . . have the same effect and inure to the benefit of and bind the principal and his or her successors in interest . . ." §26-1-2(b), Code of Alabama (1975)

Durable Power of Attorney

- A POA is effective when executed unless the principal provides that it becomes effective at a future date or upon the occurrence of a future event or contingency
- Terminates
 - at the death of the principal
 - the principal revokes the POA
 - the POA provides that it terminates
 - the purpose is accomplished
 - the agent dies, becomes incapacitated or resigns

Durable Power of Attorney

- A principal may appoint two or more persons to act as co-agents.
 - Unless the POA otherwise provides, each co-agent may exercise its authority independently
- A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated or is not qualified to serve
- Unless the POA provides otherwise, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances

Durable Power of Attorney

- A person that refuses in violation of this section [§26-1A-120] to effect a transaction in reliance upon an acknowledged POA is subject to, as its sole liability,
 - a court order mandating that the person effect such transaction in reliance upon the POA, and
 - liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the POA

Durable Power of Attorney

- The authority granted by a POA is specified in §26-1A-201 through -217
- “§26-1A-301. Power of attorney form
 - “A document substantially in the following form may be used to create a power of attorney that has the meaning and effect prescribed by this chapter.”

Jointly Owned Property

- Ownership
 - Joint with right of survivorship
 - Not affected by a Will
 - Not a probate asset
 - Tenants in common
 - Can be passed according to a Will
 - Probate asset
- Potential problem
 - Life estate

Non-Probate Assets

- Non-probate estate
 - Property owned jointly with right of survivorship
 - Retirement accounts
 - Life insurance proceeds (unless the estate is the beneficiary)
 - Life estate
 - Trust estate

Will

- Provides for the distribution of property owned by the decedent at his death
- Must be in writing and signed by the testator and two witnesses. §43-8-131, Code of Alabama (1975)
- Witnesses
 - Any person generally competent to be a witness may act as a witness to a will.
 - A will or any provision thereof is not invalid because the will is signed by an interested witness.
- Should be self-proving

Will

- Who may write a will
 - 18 years of age, and
 - Of sound mind
- Who may contest a will
 - Named in the will, and
 - Would take under rules of intestacy
- What are the results of a will contest
 - Take the will as written, or
 - Distribute the estate as if there were no will

Will

- Can be changed any time before testator's death or incompetency
- A will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will

Time limit for probate

Ala. Code 43-8-161

- Wills shall not be effective unless filed for probate within five years from the date of the death of the testator.

Incorporation by reference

Ala. Code 43-8-139

- Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.
 - A list made after execution of the will listing bequests is a wish or desire but has no legal significance

Revocation of a Will

- A will or any part thereof is revoked by a subsequent will which revokes the prior will or part expressly or by inconsistency
- A will is revoked by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence by his consent and direction
 - If no Will can be found the person is presumed to have destroyed it with the intent to die intestate

Revocation by divorce

- 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, or guardian, unless the will expressly provides otherwise

Co-representatives

Ala. Code 43-2-846

- If two or more persons are appointed co-representatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate.
- This restriction does not apply:
 - (i) when any co-representative receives and receipts for property due the estate;
 - (ii) when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate; or
 - (iii) when a co-representative has been delegated to act for the others.

Devolution of estate at death

AL Code 43-2-830

- (a) Upon the death of a person, decedent's real property devolves to the persons to whom it is devised by decedent's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of a testate estate, or in the absence of testamentary disposition, to decedent's heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates.

Devolution of estate at death

AL Code 43-2-830

- (b) Decedent's personal property devolves to the personal representative to be distributed to:
- (1) Those persons to whom it is devised by the testator's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of a testate estate; or
 - (2) In the absence of testamentary disposition, to decedent's heirs, or to those indicated as substitutes for them in cases involving renunciations or other circumstances affecting devolution of intestate estates.



Devolution of estate at death

AL Code 43-2-830

- (c) The devolution of a decedent's property, real and personal, is subject to homestead allowance, exempt property, family allowance, rights of creditors, elective share of the surviving spouse, and to administration.



Spouse may retain dwelling

Ala. Code 43-8-114

- The spouse may retain possession of the dwelling house where the surviving spouse resided with the decedent, with the offices and buildings appurtenant thereto and the plantation connected therewith until homestead is assigned, free from the payment of rent.
- The obligation to pay rent, if any, on the dwelling shall be an obligation of the decedent's estate.



Omitted spouse.

Ala. Code 43-8-90

- (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision be reasonably proven.



Pretermitted child

Ala. Code 43-8-91

(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

- (1) It appears from the will that the omission was intentional;
- (2) When the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or
- (3) The testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision be reasonably proven.



Provisions

- Can you disinherit your spouse?
 - Elective share of spouse
 - The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or a waiver signed by the party waiving after fair disclosure
- Can you disinherit your children?



Waiver of right to elect and other rights

Ala. Code 43-8-72

- The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or a waiver signed by the party waiving after fair disclosure.



Advancements

- Property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement



Anti-lapse provision

Ala. Code 43-8-224

- If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by five days take in place of the deceased devisee

Nonexoneration

Ala. Code 43-8-228

- A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts

Limits of liability generally

Ala. Code 43-2-110

- No executor or administrator is liable, except in the case provided by section 43-2-62 [penalty for failure to give notice], beyond the amount of assets which have come to his hands or which have been lost, destroyed, wasted, injured, depreciated or not collected by want of diligence on his part or an abuse of his trust.

Priority of claims

- Homestead allowance (\$15,000)
- Family allowance
- Exempt property (\$7,500)
- Funeral expenses
- Administration expenses
- Expenses of last sickness
- Prior taxes
- Debts due employees
- Unsecured creditors (credit cards)

Source, determination . . . of exempt property and allowances. Ala. Code 43-8-113

- The surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property.
 - If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property.
- The personal representative may determine the family allowance in a lump sum not exceeding fifteen thousand dollars (\$15,000) or in periodic installments not exceeding \$500.00 per month, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash.
 - An aggrieved person may petition the court for relief

Trust

- An agreement between a grantor and trustee that sets management and distribution criteria
 - Grantor funds the trust
 - Trustee has legal title to the assets
- Assets are held for beneficiaries who have equitable title but not legal title or management rights
- A trust is applicable where only a limited interest is to be left to a beneficiary

Revocable Trust

- Purposes
 - Management of property
 - Accumulation or distribution of income to beneficiaries
 - Distribution of trust corpus to beneficiaries
 - Set withdrawal powers of beneficiaries
 - Authorize powers of appointment
- Trusts provide greater control over distributions, e.g. conditions and length of time
 - There can be more than one class of beneficiaries

Benefits of a Trust

- Limited liability
- Beneficiaries don't participate in management
- Beneficiaries cannot transfer their interest
- Only financial rights given in the trust document
- No withdrawal rights
- Creditor protection

Trust

- The trust instrument generally contains a complete set of guidelines for trust operation
- The person setting up a trust can make his own rules about how the trust will operate (subject to state law)
- The trust specifies who is entitled to and when the income from the trust is distributed and who is entitled to the assets on termination
- The trustee manages the assets in the trust, e.g. buys and sell livestock, etc.

Trust

- Trusts can be
 - Living (created during life sometimes called *inter vivos*) or testamentary (created under a will) and
 - Revocable or Irrevocable
 - Irrevocable trusts are generally used for tax planning

Revocable, Living Trust

- The revocable, living trust is the most common vehicle for estate planning without tax planning
 - The grantor is also the trustee and probably the initial income beneficiary
 - If so, there is no need for a separate income tax return
 - The grantor can contribute assets and remove them at will; and he can amend the trust document

Trust

- Trustee can be a “corporate” trustee (bank trust department) or any competent individual, such as an attorney, accountant or even beneficiaries
 - Successor trustees are identified to continue management of the assets after the grantor’s death
 - Successor trustees have to abide by the distribution criteria of the trust, e.g. if the trust does not allow the sale of the family land, then it cannot be sold by the successor trustees or the beneficiaries

Trust

- The life of the trust is governed by the state's rule against perpetuities
 - Traditional rule was that an interest must vest within a life in being plus 21 years
 - In Alabama, a trust that holds real property and allows the trustee to sell property can last for 360 years (100 years if no real property)
 - Several states have abolished the rule against perpetuities; so, a trust in those state could have perpetual life

Revocable Trust

- Privacy concerns – wills are public documents trusts are not
- Avoid the expense and trouble of court-supervised proceedings
- Property management in case of incapacity
- Protects residual beneficiaries
- Creditor protection
- Exempt from spousal election
- Only disposes of assets in the trust