A GUIDE TO ESTATE PLANNING

Shands, Elbert, Gianoulakis & Giljum, LLP
1 North Brentwood Boulevard, Suite 800
Clayton, Missouri 63105
314-898-4317

A GUIDE TO ESTATE PLANNING

If you died tomorrow, are all of your affairs in order? Have you been putting off doing your estate plan? Do you procrastinate by thinking "I will get around to it tomorrow,....or next month... or next year?" Eventually, 70% of all Americans fail to do any form of estate planning before the time of their death! The result can be disastrous. Probate...delays...unintended heirs...unnecessary taxes… and the exposure of all of your private affairs to public scrutiny are only a few of the possible problems. Every person needs to plan his or her estate. It does not matter if your estate is $50,000 or $5,000,000, or whether you are single or married, failure to act now to protect yourself and your loved ones can have devastating effects.

WHAT IS ESTATE PLANNING?

Estate Planning is the creation of a definite plan for managing your wealth while you are alive and distributing it after your death. When we talk about an estate, we mean all assets of any value that you own, including real estate, business interests, investments, insurance policies, personal property and even your personal effects.

Estate planning forces us to face the financial and emotional consequences of death and to take action to minimize the effects on our families. If people were asked to summarize their estate planning wishes, most would likely express some of the following desires:

- I want to maintain control of my property and affairs for the rest of my life, to the maximum extent possible;

- If I become incapacitated while I am still alive, I want my assets to be privately managed for me by persons I choose, for my benefit;

- I want my assets to be distributed after my death to the people I choose, according to my wishes;

- I want to protect my spouse and my children after I die, to the extent I reasonably can, to keep them from losing their assets on account of remarriage, divorce, lawsuits or disability;

- I want to avoid the unnecessary delays in passing on my property and to protect my family's financial privacy;

- I want to avoid unreasonable costs, including personal representative's fees, attorney's fees, court costs and other incidental costs; and

- I want to eliminate, or at least minimize, the payment of state and federal death taxes.

HURDLES WE FACE IN ATTAINING OUR GOALS

All of us face three potential obstacles in attaining our goals. A proper estate plan should avoid or overcome these hurdles.

- **Conservatorship (Living Probate)** – Conservatorship is a time-consuming and expensive court proceeding to manage your estate if you become incapacitated while you are still alive.
- **Death Probate** – Death Probate is the time-consuming and often expensive court proceeding to manage and distribute your estate after death.
- **Death Taxes** – Death Taxes are the taxes the state and federal governments require to be paid at your death. Recent increases in the exemption amounts have eliminated this worry for most taxpayers. However, for those whom are super wealthy a 40% tax still applies to assets over the exemption amounts.

WHAT IS A "LIVING PROBATE"?

A Living Probate is a legal proceeding in the probate court designed to protect someone who is mentally incapacitated. In some states it is referred to as a "conservatorship," and in other states it is known as a "guardianship" proceeding. A Living Probate is an expensive, time-consuming and inefficient way to take care of a disabled family member. When a person can no longer manage his or her own financial affairs, the probate court will appoint a guardian or conservator to care for that person. The appointment is made by the probate judge after a lawsuit is filed by an interested party in the probate court. Once appointed, the conservator must be bonded by a surety company each year, which can be quite expensive. Thirty (30) days after the appointment, the conservator must file an inventory in the probate court listing all of the incapacitated person's property. Most of us go through life by not exposing our private financial affairs to the general public. However, this is exactly what happens to an incapacitated person in a Living Probate. The majority of the conservator's actions are subject to prior approval of the probate court. Before a conservator can expend probate funds, he or she must petition the probate court for authority to take the necessary steps in caring for an incapacitated person. The amount of time and attorney's fees to establish and administer a guardianship estate are significant. It is not uncommon to expend $15,000 to $20,000 in probate administration fees within the very first year of a conservatorship.

WHAT IS A "DEATH PROBATE"?

Death Probate is a court proceeding designed to transfer the legal title of property of a deceased person to his or her heirs. The primary function of the probate court is to change the title of assets owned by a deceased person. This may be in accordance with the wishes of the deceased person expressed in a Will; or, if the deceased person did not have a Will, then his or her property will be governed by the laws of intestate succession.

If a person dies without a Will, the state where the deceased was "domiciled" (i.e. their legal residence) will govern whom will inherit that decedent's estate. If the children happen to be minors (under the age of 18), this will require a minor's guardianship estate to be opened in the probate court. A conservator must be appointed for any minor and the minor's inheritance will be kept under the supervision of the court until the child turns age 18. At age 18 the inheritance is paid outright to the child whom is now legally an adult. This is often a disastrous event that could easily be avoided with proper planning.

Probate Administration can be a long, complicated and very expensive process. The Personal Representative (referred to as "Executor" in some states) must hire an attorney who will file a petition to open the Probate Estate. Notice to creditors must be published and all assets of the estate must be inventoried and appraised. In most states, creditors are given six (6) months to file their claims against a deceased person's estate. Only after all claims and taxes have been paid and the court receives and approves a final report can the beneficiaries or heirs then receive their distributions. On average, beneficiaries and heirs will have to wait anywhere from nine months to two years before they receive their inheritance.

Both the attorney and the Personal Representative are entitled to be paid fees in accordance with a minimum fee schedule contained in the probate law. (See Exhibit A for a schedule of Missouri probate fees, which are based upon the size of the probate estate.) By referring to this schedule, you can determine the minimum amount of probate fees that your estate will incur at the time of your death.

WHAT ARE DEATH TAXES?

Death Taxes are generally divided into two distinct categories. The federal government applies what is known as the "Federal Estate Tax." The state in which a deceased person resides at the time of his or her death may also charge an "inheritance tax." Although Missouri has abolished its inheritance tax, this is not true in other states.

Currently, every American citizen is now entitled to a $11,400,000 exemption which is called the "Basic Exclusion Amount." This means that if the value of one's assets including the face amount of all life insurance on one's life is less than the Basic Exclusion Amount in 2018, there will be no Federal Estate Tax due upon one's death. Any amount in excess of this amount is potentially subject to a Federal Estate Tax rate of 40%. The Basic Exclusion Amount is scheduled to be reduced by one-half (1/2) beginning in the year 2026.

The Federal Estate Tax is a tax on everything that you own. This includes all assets of any value including real estate, business interests, investments, personal property, retirement accounts, pension plans and life insurance. Many people are surprised to learn that the federal government taxes your life insurance. Are you under the impression that life insurance is "tax free"? This is true for the recipient of life insurance, i.e. the beneficiary of the policy. The beneficiary does not have to pay income tax on the proceeds. However, if you own a life insurance policy, or if you can designate the beneficiary of a policy that an employer provides you, those life insurance proceeds are includable in one's gross taxable estate and subject to the Federal Estate Tax. When we consider the amount of life insurance on an individual's life in addition to all of his or her other assets, people are often shocked to discover that one's estate may have to pay significant federal estate taxes.

Married people are entitled to a special break. Since 1981, everything left to a surviving spouse qualifies for an "unlimited marital deduction." Keep in mind, however, that this is merely a postponement of the payment of the tax. Since 2010 there is now the opportunity to use the Deceased Spouse's Unused Exclusion Amount at the death of the surviving spouse. This is referred to as "portability" or 'DSUEA". To claim the DSUEA, the surviving spouse must file a timely election by submitting a Federal Estate Tax Return (IRS Form 706) within nine months after a spouse's date of death even when there will not be any federal estate tax due. Failure to make a timely filing wastes the DSUEA after the death of the first spouse.

WHAT ARE YOUR ESTATE PLANNING OPTIONS?

There are four basic approaches to planning your estate:

- Do nothing;
- Hold title to your assets in joint tenancy;
- Create a Will-based plan; or
- Establish a living trust-based plan.

WHAT HAPPENS IF YOU DO NOTHING?

Believe it or not, a majority of people choose to do nothing. It has been shown that most Americans have no written estate plan at all. Of those who have a plan, many have created a simple Will or rely upon joint tenancy ownership of their assets for the distribution of their estate. Unfortunately, for those who have no plan in place, state law will dictate how your estate is to be distributed at one's death. As you might imagine, the government's plan of distribution has no particular concern for what is in the best interests of your family!

WHAT IS JOINT TENANCY AND WHY DO SO MANY PEOPLE USE IT?

Joint tenancy exists when two people hold title together to an asset. This is often referred to as "Joint Tenancy With Right of Survivorship" (JTWROS). Right of survivorship means that, upon the death of one of the owners, the entire interest passes automatically to the surviving co-owners(s). Joint tenancy has been used for decades as a limited probate avoidance mechanism. People use it because they perceive it as simple and inexpensive.

Because a joint tenant's interest passes to the surviving co-owner(s) immediately at death, it is not controlled by an owner's Will or trust. For example, let's assume Bill and John own a hunting lodge as joint tenants with right of survivorship. Bill dies and his Will says that, upon his death, all of his estate should go to his wife, Mary. What happens to his interest in the lodge he owns with John? Since title passes automatically at death to the surviving joint tenant, John will own the entire property, and Mary will not have any interest in the lodge. This is only one of the unforeseen problems that joint tenancy with right of survivorship can create. Additionally, joint tenancy does <u>not</u> avoid living probate, nor does it provide any tax planning.

IS WILL PLANNING A GOOD IDEA?

Many people plan their estates by signing a Last Will and Testament. A Will is a legal document that specifies how you want your assets distributed upon your death. As we have already learned, a Will does not control the distribution of all of your assets. Property held in Joint Tenancy With Right of Survivorship, life insurance proceeds, IRA accounts and retirement benefits all pass outside of your Will. Wills do not take effect until you die, so they are not useful for lifetime or disability planning. Upon your death, your Will becomes a public document when it is filed with the probate court and is available to anyone who wants to read it. Once your estate enters the probate process, it is no longer controlled exclusively by your family; instead, it comes under the supervision of the probate court. A Will does not avoid living probate. In fact, a Will guarantees death probate, and may not provide any tax planning.

WHY DO SO MANY ESTATE PLANNING PROFESSIONALS RECOMMEND A REVOCABLE LIVING TRUST?

A revocable living trust ("Living Trust") is a complete Will substitute. It can control all of your assets during your life and after your death. Here is how it works: When one sets up a living trust, he or she (the "Trustmaker") transfers the title of their assets (stocks, bonds, real estate, etc.) from one's individual name to the name of one's Living Trust. The Trustmaker also names himself or herself as the trustee and the beneficiary of the Living Trust. This gives you, and you alone, total and complete control over all your assets. You can buy, sell, trade, consume or do whatever else you want - just as you do now.

There are no new property taxes when transferring assets into a Living Trust. There are also no federal or state income tax returns that have to be filed for the Living Trust during one's lifetime. The income tax liability is the same whether or not one has a Living Trust. A Living Trust does not even require a separate tax identification number. A Trustmaker may use his or her social security number as the taxpayer identification number for his or her Living Trust.

The Living Trust has special instructions for the Trustee to follow in the event that you become disabled. One of the important features of the Living Trust is its ability to specifically design instructions for your personal care. In many cases, a competent spouse or trusted loved one can take over as your successor Trustee.

When you die, the assets you previously transferred to your Living Trust will not undergo probate administration. Whoever you name as your successor Trustee will immediately gain control of your trust assets, and your successor Trustee can hold or distribute those assets according to your exact instructions, after payment of expenses and taxes.

For married couples, a Living Trust can be designed so that it automatically divides into smaller sub-trusts called a Survivor's Trust, a Marital Trust and a Family Trust. Upon the death of the first spouse to die, the assets that are in the main Living Trust can be distributed to a Survivor's Trust, a Marital Trust and a Family Trust pursuant to a formula funding method selected by the Trustmakers when establishing their Living Trust.

A Survivor's Trust may be created in such a way as to give the surviving spouse maximum control and access to all of the assets. The spouse may spend all of the income and have an absolute right to withdraw any of the principal in any way the spouse wishes to do so. Sometimes a couple may wish to restrict the survivor's ability to spend all of the principal and include restrictions upon remarriage. Each trust can be crafted to the individual's needs and desires.

The Family Trust is often designed to benefit one's spouse and/or other loved ones. One can name children and/or a spouse as beneficiaries. A client can even name a parent or other person as a beneficiary. One of the primary reasons for creating a Family Trust for a married couple is to save Federal Estate Taxes. Every dollar that passes to the Family Trust will be free of Federal Estate Tax upon the second spouse's death. The appreciation in value of the Family Trust from the first spouse's death to the death of the second spouse also passes estate tax-free. The beneficiaries' rights under the Family Trust are set forth in instructions contained in the trust document as well as by rules formulated by the Internal Revenue Service. But even under these rules, beneficiaries can hold substantial rights to the Family Trust assets and have those assets used for their benefit. For example, a beneficiary might be given the right to have all income from the Family Trust distributed to a named beneficiary. Or, a trustee of the Family Trust might be given discretion to sprinkle the income among a class of beneficiaries. A beneficiary may also have a right to the principal in the Family Trust as long as a need falls into one of the four categories of "health," "maintenance," "support" or "education." The Internal Revenue Code refers to these needs as ascertainable standards. One does not have to give any beneficiary any or all of these rights; but, they are available if desired by the Trustmaker.

For those with minor children, the trust can create a financial support network to care for all the minor children out of a Common Trust. For example, one might wish to maintain the entire trust until the youngest of the children reaches a certain age or finishes college. Perhaps when a child reaches a certain age, such as twenty-one (21), the child can then receive the income made on the investment of his or her trust principal. Sometimes people like to distribute their estate to their children at staggered distribution dates. The distribution dates can be personalized and made to fit the individual needs of one's beneficiaries. Or, a parent might choose to create a lifetime trust for a child that could shelter the beneficiary for the rest of his or her life from predators, creditors and spouses. Another option is to create generation skipping trusts to maximize wealth for grandchildren.

A Living Trust can be personally designed to care for you and your loved ones and to avoid Living Probate, Death Probate and Death Taxes. In addition, an Estate Planning Portfolio should include not only the Living Trust but a comprehensive package of estate planning documents that help protect your family and organize your estate.

One of the most rewarding aspects of being an estate planning attorney is the opportunity to help people protect their estates and provide for their families. However, if you do not take action to protect yourself with a comprehensive estate plan, the government has its own plan for you, which includes significant probate fees and death taxes. Once an estate plan is crafted for you, you and your family will have the peace of mind of knowing that you and your loved ones are protected.

EXHIBIT A

MISSOURI STATUTORY PROBATE FEES

Estate Size	Amount
$ 100,000	$ 6,600
$ 200,000	$ 12,100
$ 300,000	$ 17,600
$ 400,000	$ 23,100
$ 500,000	$ 28,100
$ 600,000	$ 33,100
$ 700,000	$ 38,100
$ 800,000	$ 43,300
$ 900,000	$ 48,100
$1,000,000	$ 53,100
$1,500,000	$ 73,100
$2,000,000	$ 93,100
$2,500,000	$113,000
$3,000,000	$133,100

Federal Estate Taxes (as described on page 3) for an individual dying in 2019 are shown below:

2019

TAXABLE ESTATE	FEDERAL ESTATE TAX[1]
$11,400,000	$ 0
$15,000,000	$ 1,440,000
$20,000,000	$ 3,440,000
$50,000,000	$15,440,000

[1] This does not include estate or inheritance taxes at the state level.

Shands, Elbert, Gianoulakis & Giljum, LLP

A t t o r n e y s a n d C o u n s e l o r s a t L a w

Shands, Elbert, Gianoulakis & Giljum, LLP ("Shands Elbert") is a St. Louis, Missouri law firm with offices in Clayton, Missouri.

Shands Elbert provides sophisticated, quality legal services in various areas of the law, including corporate and business formation, mergers and acquisitions, non-profit and education law, litigation, commercial transactions, employment, labor, real estate, tax, estate planning, and domestic relations.

We have assembled a talented group of lawyers to create a firm that has the size, depth and breadth of experience to serve the wide range of needs that our clients bring to us. The credentials and expertise of Shands Elbert lawyers rival those of any firm in the St. Louis area. Also, we back up our lawyers with a first-rate support staff and the latest technology. At the same time, we maintain a structure and philosophy which fosters, rather than stifles, flexible, creative and cost-efficient approaches to meeting our clients' needs.

Our clients directly benefit from this approach. We refrain from overstaffing matters with an overlapping hierarchy of multiple partners, associates and paralegals. Matters are handled by a lean and cost-efficient combination of the lawyers and support staff who have the experience and expertise best suited to meet our client's needs and objectives. Our focus throughout the representation of any client is on fulfilling our client's objectives in the most effective and cost-efficient manner possible. We believe in integrity, quality, and teamwork as core values.

SHANDS, ELBERT, GIANOULAKIS & GILJUM, LLP

Attorneys at Law

1 North Brentwood Boulevard, Suite 800
St. Louis, Missouri 63105

Telephone (314) 241-3963
Facsimile (314) 241-2509

Bradford L. Stevens
Direct: (314) 898-4317
Facsimile (314) 206-5217

BUSINESS & FINANCE
LABOR & EMPLOYMENT
LITIGATION
BUSINESS FORMATION
TAX & ESTATE PLANNING
SCHOOL LAW
PROBATE & TRUST ADMINISTRATION
REAL ESTATE
WEALTH PRESERVATION
CHARITABLE PLANNING & GIFT GIVING PROGRAMS

These materials are intended to provide guidance in estate planning. The materials comments do not constitute, and should not be treated as, legal advice regarding the use of any particular estate planning technique or the tax consequences associated with any such technique. Although every effort has been made to assure the accuracy of these materials, Mr. Stevens and Shands, Elbert, Gianoulakis & Giljum, LLP do not assume responsibility for any individual's reliance on the written information. Each person should consult with their own legal counsel to independently verify all statements made in the materials before applying them to a particular fact situation, and should independently determine both the tax and non-tax consequences of using any particular estate planning technique.