SP 822-E

Chapter 5
Estate Planning Tools

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Some people think that a will is the only item a person needs to plan an estate. However, a good estate plan includes a will and other documents to ensure a person's wishes are carried out if he or she becomes disabled, incapable of handling personal affairs or if the person dies.

Most attorneys recommend that the following documents be included in an estate plan:

1. A will.
2. A durable power of attorney (for finances).
3. An advanced care plan and health care agent (also called a living will and power of attorney for health care).

Estate Planning

To control your property while alive, take care of your loved ones and yourself if you become disabled, and, upon your death, give what you have to whom you want, the way you want. And, if you can, save every last tax dollar, professional fee and court cost possible.

These three documents, along with other tools and documents used in estate planning, are covered in the following pages. However, the multitude of laws and legal details of estates cannot be fully covered in this workbook. ***To ensure your plan includes all necessary components, you should hire an attorney who has additional training and experience in estate planning.***

The Will

One common question is, "Do I really need a will?"
No law in Tennessee requires a person to have a will. Around one-half of Tennesseans die without a will. So, do you need one?

YES, you need one!

- If you want to have any say in how and to whom those things you have spent your lifetime accumulating are transferred.
- If you want to name a guardian for minor or disabled children and name who would supervise the funds as the children are raised.
- If you want to donate to a charity, school or organization.
- If you want to name the executor of your estate and ensure someone is not appointed by the court.
- If you want to minimize the expenses of probating the estate and reduce or eliminate taxes.
- If you want to provide for the continuation of a business or family farm.
- If you want to greatly reduce the stress and confusion caused when a will does not exist.

Advantages of Having a Will

1. Provide financial security for spouse and children.
2. Transfer assets as you want, rather than how the state says they will be distributed when there is no will.
3. Reduce/prevent income and estate taxes.
4. Establish who is the executor or personal representative of the estate.
5. Reduce expenses and possible time delays of settling the estate.
6. Name guardians for minor children.
7. Provide for heirs as you wish.
8. Reduce stress and confusion by letting heirs know your wishes.

No Will = Intestate

Intestate is the legal term for dying without a will. When there is no will, the state of Tennessee has laws, part of the "code annotated," which specify how the estate is distributed, based on family relationships.

Many couples mistakenly think everything just goes to the surviving spouse. Most assets that are jointly owned with right of survivorship will transfer to a spouse or co-owner. Common examples are a joint checking account or a deed to the home that is owned as "joint tenancy with right of survivorship." Different estate tax rules apply for joint ownership with spouses as compared to co-ownership with anyone else. Most jointly held assets owned with a spouse transfer to the spouse directly. A joint asset co-owned with anyone other than a spouse generally will require one-half of the asset to be included in the value of the decedent's (deceased person's) estate.

If there are children, state law specifies the percentage of all other assets that are transferred to them. Generally, without a will, a spouse inherits one-third or a child's portion, whichever is greater. So, if there is one child, the spouse and child would each receive one-half. If there are two or more children, the spouse receives one-third and the children split the remaining two-thirds of the estate. Divorces and remarriages seriously complicate the issue. Without a will, a current spouse may inherit assets originally intended to be given to children from a previous marriage, or the opposite can occur.

Lack of a will can increase the expenses of probating the estate (probate information is covered later in this chapter). If there is no will to name the executor or executrix of the estate, either a family member can apply to the court to be appointed administrator of the estate (same duties as an executor), or the court will appoint someone to serve as administrator of the estate. An appointed administrator would be entitled to compensation for their work. The appointed administrator might not be the person you would have chosen. Far too often, family misunderstandings occur when there is no will to clearly state details concerning items promised to specific individuals during the decedent's life. Without a will, there is no document to ensure what was promised goes to the intended person. ***Quite simply, there is no excuse for putting your family through the additional stress, confusion and expense caused when there is no will!***

Contents of a Will

A typical will includes some standard sections. These include:

- Date the will is written.
- Stating who wrote the will and that the person is of sound mind.
- Naming an executor(s), also called a personal representative, to handle the probating of the estate.
- Specifying if bonding of the executor is required.
- Specifying if an inventory of assets is required.
- Naming the beneficiaries who will receive assets of the estate.
- Listing any specific items, amounts or percentages of assets to be given to individuals or charities.
- A residuary clause to direct the distribution of all remaining assets. Residuary refers to the rest (residue) of the estate not specifically given to someone.
- Listing other wishes or duties to be carried out by the executor.

Types of Wills

There are many ways to write or create a will. Using a lawyer trained in estate planning law to help write your will is best. Also, having a properly prepared will can reduce the likelihood of it being contested.

Handwritten or Holographic Will

A handwritten will can be recognized as a legal will. However, not knowing all the legal terms and items needed in a will could cause added expense when the will is probated. Even worse, it could possibly cause the will to be invalid. A holographic will must be entirely in the writer's own handwriting and must be signed and dated by the writer. Two individuals would have to verify in court that they are familiar with the deceased's handwriting and that the signature belongs to the writer of the will before the estate could be probated. If a handwritten will is created during a time of illness or distress, it should be replaced with a formally prepared will as soon as possible, and the holographic will should be destroyed.

Simple Will

A simple will names an executor and can provide for the distribution of assets to a spouse and children. It should also specify what happens if both spouses die together and if children die before parents. When no family exists, a simple will can be used to direct the giving of assets to a charity, school, organization or to others.

Sweetheart Will

Sometimes called a "reciprocal will," "husband and wife will" or "I love you will," this type of will provides for everything to go to the remaining spouse. This type of simple will might not provide for children, in case the surviving spouse remarries or becomes incapacitated.

Complex Will

A simple will might not be able to handle all the details in a more complicated estate. A more complex will may be needed in many situations.

- To transfer farm or business assets to heirs.
- To create a trust, establishing funds for raising minor or disabled children.
- To transfer some assets directly to children to ensure they receive a portion of the assets should the remaining spouse remarry or to prevent the spending of all the assets.
- To reduce or avoid estate tax.
- Other needs.

Pour-Over will

A pour-over will is often used to handle any remaining assets when a trust has been created to transfer the majority of the estate's assets. A pour-over will is commonly used with a living trust.

Assets Not Transferred by a Will

A will does not control some assets. Life insurance, individual retirement accounts (IRAs), 401(k)s and similar accounts with a named beneficiary transfer separately from a will. A will cannot override the named beneficiary. Other jointly held property, such as land with a deed listing a husband and wife as joint tenants with right of survivorship, would typically transfer directly to the surviving spouse. Jointly owned bank accounts generally transfer to the surviving spouse or co-owner. A bank account or certificate of deposit with a payable on death (POD) designation listing a person to which it is payable would transfer directly.

Power of Attorney

A power of attorney (POA), often called a durable power of attorney, allows another person to handle your financial matters. These are commonly created when a person is about to undergo major surgery or who has reason to think he or she might have limitations in the future or as a precaution as someone ages. A person should not wait until an event occurs to create and name a POA. Often when a POA is needed, a person may already be unable, due to injury or disability, to name one. If no POA has been executed and a disabled person requires management of his/her assets, a petition must be filed with the court for the appointment of a conservator. This process can cost thousands of dollars in legal and court fees, can take several months to complete and is a hassle for families already dealing with an ill loved one.

The person selected should be someone trusted to handle finances as you would have desired. The power of attorney can be written to limit or restrict the power of the named POA. For example, the POA could be given the power to pay bills and handle bank deposits, but the POA would not be allowed to sell or trade real estate or other assets. Two important facts about powers of attorney:

1. A POA is effective when written, meaning the person named as POA has the right to exercise it immediately. If you don't want the POA to take place at once, one option is to write a "springing" POA, which becomes effective when a doctor has certified the writer of the POA is incapable of managing his or her affairs. One issue with a "springing" POA is that some doctors are hesitant to provide such certification. The "springing" POA must authorize the doctor to release medical information.

2. A power of attorney's authority ends at your death. The person named as your POA has no rights or power to transact business on your behalf upon your death. Power after death is given to the executor of the estate named in your will after proper appointment by the court.

Advance Care Plan (also called a living will or medical directives)

An advance care plan allows you to have written directions for your medical care if you are not able to make your own choices. Having an advance care plan helps eliminate confusion about the level of medical care you want if you are in a coma, injured and can't respond or have a terminal condition. You can specify the level of care desired in a variety of medical situations. Preferences like organ or tissue donation can be included in the advance care plan, so doctors and family members know your wishes.

The term advance care plan was clarified in Tennessee state law to reduce confusion between similar terms. A related term is *health care agent*, which has been called a power of attorney for health care or health care proxy. The health care agent would help doctors and family members make decisions concerning your care. Your health care agent should be someone who understands your wishes and would have the stamina and backbone to deal with doctors and family should tough decisions need to be made.

The Tennessee Department of Health provides a set of blank forms at https://www.tn.gov/content/dam/tn/health/documents/Advance_Directive_for_Health_Care.pdf to help people create their advance care plans. A copy is also provided in the appendix for Chapter 5 of this workbook. It is recommended that you have both an advance care plan and that you name a health care agent. An attorney is not required for either of these. A copy of the advance care plan should be provided to your doctor, health care agent and any hospital or medical facility where treatment is received.

Trusts

A trust is a legal agreement naming a person as a "trustee" of the assets included in the trust. As the creator of the trust, you are the "trustor" or "grantor." The trustee who is appointed by the trust document manages the assets according to the directions provided in the trust to benefit the "beneficiaries" of the trust. Some trusts are created in advance and others are created by a will. Where a will transfers assets upon death, a trust can be effective immediately. A common use of a trust is to provide the funds for the raising of minor or disabled children should both parents die. A trust can be used to provide for the continuation of a farm or business, so funds are readily available for the business to continue operating during the probate process. Trusts can be used to reduce the value of an estate to an amount close in value to the federal or state estate tax exclusion. A trust may better protect assets from a lawsuit or other legal action, where a will might not provide such protection because a trust more clearly establishes the beneficiaries of the assets and names a trustee to oversee the handling or distribution of the assets.

Testamentary Trust

Any type of trust created in a will is referred to as a testamentary trust. One of the main types of testamentary trusts is one to reduce estate taxes and preserve income for the surviving spouse. This type of trust becomes effective upon the first spouse's death. Upon the death of the first spouse, his or her will directs the establishment of the trust. The assets placed in the trust can generate income for the surviving spouse, while qualifying for the estate tax exemption and/or marital deduction to reduce or eliminate estate taxes upon the death of the surviving spouse. Another type of testamentary trust is a "family trust," which can be used to transfer assets to children or other heirs rather than a spouse. Due to the increased estate tax exemption, there is generally no tax advantage for small estates by creating a testamentary trust.

Other testamentary trusts include those providing for the management of assets for minor children until the children reach a designated age or ages. Testamentary trusts may also be used for adult children for asset protection or generation skipping.

Living Trust

A common type of trust called a living trust is created while the trustor is alive, unlike a testamentary trust that is created by the will. Living trusts are often created as a revocable living trust, because a person can amend or revoke it anytime during his or her lifetime. The trustor retains absolute control over the assets of the trust. Upon the trustor's death, the living trust becomes irrevocable. It either terminates, with the assets going to the designated beneficiaries, or it continues, with the trustee managing the trust assets for the beneficiaries. A revocable living trust can be changed, modified or discontinued at any time during the lifetime of the trustor.

Living trusts are often promoted inaccurately as a means of eliminating the need for probate. To prevent probate, ownership of all assets would have to be transferred to the trust. Any assets owned outside the trust would still require the probate process to transfer to an heir. The creation and maintenance of a living trust are generally much more expensive than a will. A revocable living trust can have the same tax planning as wills. Some people use high-pressure sales tactics to scare people into buying expensive living trusts that are not needed to properly transfer property. Often a much less expensive will could accomplish the same objective. It is important to get good legal advice about living trusts.

Irrevocable Trust

An irrevocable trust is created during the trustor's lifetime to remove assets or property permanently from the estate. Putting assets in an irrevocable trust is final. The assets cannot be reclaimed and the trust conditions cannot be changed once established. The assets in the irrevocable trust would not be included as part of the estate. They are often used to purchase life insurance. Any transfers to an irrevocable trust are gifts, and gift tax reporting may be required.

Charitable Remainder Trust

A charitable remainder trust (CRT) can be a testamentary trust or an inter vivos (lifetime) trust. A CRT can be established to transfer assets to a charity while retaining an income stream during your, and your spouse's, lifetime. Upon the death of the spouse or the end date of the life of the trust, the asset(s) would pass to the charity. The value of the remainder interest is deductible for income tax purposes in the year of the gift. They can also be set up with children as the income beneficiaries.

Other Trusts

Many other types of trusts are useful in estate planning. A life insurance trust, generation-skipping trust and others may be valuable in planning and reducing income and estate taxes. Before choosing any trust, thoroughly research its usefulness and seek assistance from legal and financial advisors.

IRAs and 401(k)s

One of the most important estate planning items often overlooked is ***naming a beneficiary of your IRA, 401(k) or similar retirement investment account***. The account would transfer to the named beneficiary outside of the estate, and a will cannot override the beneficiary named in the documentation of the IRA or 401(k). You may name one or more people as the beneficiary of your IRA or 401(k). Be sure to update beneficiaries if a beneficiary should die or in the case of marital status change.

The Secure Act of 2019 changed the rules on the distribution of assets from an IRA or 401(k) account upon the death of the owner of the account. If the spouse is the beneficiary of an IRA or 401(k), they may be able to transfer the account to their name. The assets would be disbursed based on their age and not those of the deceased spouse. Generally, any other beneficiary would have up to 10 years to withdraw the assets from the account. There are a few limited exceptions to the 10-year rule. This change has caused the need to plan more carefully the handling of "traditional" IRA and 401(k) accounts and who will be the beneficiaries. Non-spouses inheriting large accounts may be shifted into a higher tax bracket, due to the increased income. Withdrawals in each of the 10 years by the beneficiary may minimize the tax impact. A Roth IRA or 401(k) could be allowed to continue to grow until the 10^{th} year, since the disbursement would not be taxable income. The Secure Act increased the age when required minimum distributions (RMDs) must begin to age 72.

Federal Gift Tax

Gifting assets can be a valuable estate planning tool. Gifting can help reduce the value of the estate and reduce potential estate taxes. Of course, only unneeded assets should be gifted.

Current (2020) federal law allows any person to give away up to $15,000 per year to as many people as he or she wishes, free of any gift tax or reporting. A husband and wife can give up to $30,000 per year per person of jointly owned assets (equals $15,000 each). If these levels are exceeded, a gift tax return (Form 709) must be filed with the giver's income tax return. This does not mean a federal gift tax would have to be paid. The excess amount is deducted from the estate tax exemption amount. For most individuals and estates, this means there is no tax impact to gifts.

When an asset is gifted, the recipient has the same basis (value) in the asset as the giver. This may cause the recipient to incur capital gains tax should they sell the asset.

Other Planning Tools

Life Insurance

Life insurance can be used in many ways as part of an estate plan. Some of these are:

- An individual may purchase life insurance to provide funds for the surviving spouse or children.
- A whole life policy may be purchased to provide income during retirement by converting the policy to an annuity or withdrawing the cash value.
- Insurance dollars may be passed as an inheritance to nonfarm or nonbusiness heirs. This allows farm assets to flow to farming heirs. The insurance dollars allow all heirs to receive something, while preserving an intact farm or business.
- Insurance funds may be used to pay taxes, estate settlement costs or debt obligations.
- Farming heirs may purchase life insurance on their parents to provide funds for purchase of farming assets from other heirs.
- Farming partners may use insurance funds to ensure an operation could continue if one partner dies prematurely.
- Insurance may simply be used to create or enhance an estate.

Disability Insurance

Often, families suffer financially when one spouse is injured or becomes disabled due to illness. The loss of income and additional medical expenses can greatly change the family's financial situation and the ability to stay in business. Purchasing disability insurance can provide income should one spouse become disabled and may prevent having to make difficult financial choices while under the stress of a physical or mental impairment.

Long-term Care

The cost of care in a nursing home is a major concern. Nursing home costs currently range from $225 to $280 per day ($82,125 to $102,200 per year) or more for room and board plus medicine and doctor visits. The drain on a lifetime of savings can be considerable. Purchasing long-term care insurance to offset part or all of this potential expense could ensure there will still be assets for heirs to inherit. Depending on your age, the monthly cost of a long-term care policy can be significant. Figuring the monthly cost of coverage against the substantial cost of nursing home care may require much family discussion. Current health situation, family health history and financial situation all play a part in the decision process.

Many companies offer long-term care insurance to provide funds should a person become a patient at an assisted living facility or nursing home. Some policies also cover the cost of in-home care. The cost and potential payout from these policies vary widely. Most policies provide coverage for three to five years of care. It is wise to carefully research long-term care policies to get the best value. One factor that can increase the monthly cost of long-term care insurance is if the policy adjusts future payments based on inflation. For example, a policy might pay $200 per day for nursing home care today, but the amount would be adjusted each year for inflation. The policy would pay more in the future to provide basically the same coverage. Policies with this inflation adjustment capability will cost more than a policy with a flat monthly payment rate that does not change. Policies vary and it is important to work with a professional to understand what you are purchasing.

Funeral/Burial Prepayment

Most funeral homes and memorial gardens have prepayment plans or types of burial insurance to cover the costs associated with funeral services and internment into a grave or cremation. Most of these plans allow you to make selections regarding burial, cremation, visitation/viewing, and even monuments. Be certain of the expenses covered in any plan. Items such as the digging and covering of a grave (called opening and closing) can cost $500 to $1,000 and might not be included in all plans if an outside contractor is used. Having the ability to transfer the prepayment plan to a different funeral home can be a valuable option.

A prepaid plan with most of the choices made reduces the stress on family members who must make decisions during a very stressful time. Often, families overspend, thinking it is what the deceased would have wanted or because of their desire to honor the deceased. By prepaying, you have made the choices and covered most of the expenses for them.

Medicaid Planning (TennCare)

Medicaid includes a state/federal program for paying nursing home expenses for people with limited income and few assets. The rules for qualifying for Medicaid are quite stringent and require most of the assets of the individual or couple to be spent for care before Medicaid qualification requirements are met. Good planning can assist with qualifying for Medicaid sooner.

Many people transfer assets to family members to reduce the value of the estate, allowing them to qualify for Medicaid. The rules and possible penalties are very specific with regard to transferring assets to qualify for Medicaid. The "look-back" period is currently 60 months. Generally, if a person is qualified in all other ways for Medicaid but had a transfer during the look-back period, a formula is used to determine how long the Medicaid is delayed in beginning. Each state calculates the formula to be the value of an average monthly cost in a nursing home divided into the value of the asset transferred. Additionally, transferring assets may generate the need to file a gift tax form with an income tax return.

Example: Assume that a person qualifies for Medicaid in all other ways. If an asset worth $50,000 had been gifted during the look-back period and the average monthly nursing home cost is $5,472, then 50,000 divided by 5,472 equals 9.14. Medicaid payments would be delayed by 10 months. Failure to report asset transfers occurring within the look-back period can result in criminal fines and penalties and could cause the state to force sale of a gifted asset to reimburse the state for Medicaid expenses. Most qualified estate attorneys can include assistance with Medicaid planning as part of an estate plan. The federal gift tax exemption could be used.

If there are assets owned by a Medicaid/TennCare recipient, the state can perform asset recovery after the death of the recipient to recover some or all of the expenses paid for their care. Before the probate process can be completed and closed, the executor/executrix or administrator of the estate must obtain a letter from TennCare stating no funds are due. This is required even if the deceased was never on Medicaid/TennCare.

Letter of Last Instructions

Another document that can provide information about your wishes, and much stress relief for family members, is a letter of last instructions. This letter could be provided in advance to your lawyer, executor, spouse or other family members. The letter of last instructions can include:

1. Names, addresses and telephone numbers of those who should be notified of your death.
2. Instructions for your funeral and burial or cremation and memorial service.
3. Location of your will.
4. Location of your safe-deposit box and its key and a list of its contents.
5. Location of your essential personal papers.

6. Location of life, health, property and burial insurance policies.
7. Location of papers for pension or retirement plans, IRAs, etc.
8. Location of membership certificates to unions, lodges or fraternal organizations that provide death or cemetery benefits.
9. List of personal and real property you own (i.e., checking and savings accounts, all real property and location of deeds, stocks, bonds or other securities, business property, location of titles or other records).
10. Location of any separate list of how you want tangible property distributed after your death.
11. Location of income tax returns and supporting documents.
12. Location of all credit cards.
13. Location of any trust funds, names of trustees and copies of trust fund agreements.
14. Names of advisors such as your lawyer, banker, insurance representative, broker, accountant or tax advisor.
15. Your father's full name and mother's full maiden name, which are needed for the death certificate.
16. Instructions and directions concerning your business.
17. Other instructions as needed.

Conservation Easements

Conservation easements have become popular in recent years as a way for farm and landowners to ensure their land will be used for farming, recreational or wildlife purposes forever by placing a conservation easement on the deed to the land. This change prohibits all future owners of the land from developing the land for any purpose other than those stated in the conservation easement agreement. The following paragraphs help to explain what a conservation easement is, how one works and the possible tax advantages.

What Is a Conservation Easement?

A conservation easement (or conservation agreement) is a legal agreement between a landowner and a land trust (or other qualified agency) that permanently limits uses of the land to protect its conservation values. It allows the owner to continue to own and use the land and to sell it or pass it on to heirs, while keeping the land free from development. The land may only be used in the future for farming, wildlife or recreation. A conservation easement is permanent (into perpetuity) and applies to all future owners of the land.

When a conservation easement is donated to a land trust, the owner gives up some of the rights associated with the land. An easement on property containing rare wildlife habitat might prohibit any development, for example, while one on a farm might allow continued farming and the building of additional agricultural structures. An easement may apply to just a portion of the property and does not require public access. A conservation easement may allow for a limited number of future homesites on the property, depending on the size and other limitations of the easement. Such future homesites would need to be designated in the original documentation of the conservation easement.

The basic process for creation of a conservation easement is to find a qualified donee organization to oversee the easement in the future. There are multiple organizations in Tennessee who handle conservation easements. The largest two are The Land Trust for Tennessee and the Foothills Land Conservancy. The donee organization can assist the landowner in the proper creation of the easement, helping ensure the protection of the land into perpetuity. A qualified property appraisal, survey and creation of the legal documents are a few of the expenses involved in the creation of the conservation easement. Properly established, the conservation easement becomes a qualified conservation contribution for income tax purposes.

A conservation easement cannot prevent the taking of the land by eminent domain. For example, open land in an easement needed for a new highway or public school might be easier for a state or county to take than developed land. However, there has been limited success in getting a highway rerouted to protect a portion of the easement.

Potential Income Tax Savings from a Conservation Easement

The establishment of a conservation easement may qualify as a qualified conservation contribution for income tax purposes. If the donation meets federal tax code requirements, it can qualify as a tax-deductible charitable donation. The amount of the deduction is the difference between the property's value with the easement and its value without the easement. The current income tax savings may provide an incentive for landowners to consider a conservation easement on all or a part of their land. If considering a conservation easement for income tax saving, careful study of the value of the potential tax impact needs to be done before proceeding with a conservation easement.

The appraisal establishes a value of the property before and after the creation of the conservation easement. The amount of the reduction in value becomes the value of the conservation contribution and may be used to offset a portion of adjusted gross income on the landowner's future income tax returns. A qualified farmer can deduct up to 100 percent of adjusted gross income. Other individuals may deduct up to 50 percent of adjusted gross income. If the value of the conservation contribution is more than the allowed deduction, the unused portion may be carried forward up to 15 years under current tax laws (2020).

Conservation Easements and Inheritance Tax

The current estate tax exemption prevents most family farms from having to pay inheritance taxes. As **Table 1** shows, in 2020, an estate of up to $11,580,000 is excluded from federal estate tax. For those who might be impacted by inheritance taxes, a conservation easement could reduce the value of the estate due to the lowered value of the land in the easement. By removing some of the land's development potential, the easement lowers its market value, which in turn lowers estate tax.

Beware Syndicate Conservation Easements

Landowners considering a conservation easement should beware of "syndicated conservation easements." The IRS is actively pursuing groups who are promoting selling property to give investors a huge tax saving by purporting to create a large charitable contribution through a conservation easement. These syndicates often claim the tax saving is much larger than the initial investment in the property. Both the groups selling the easement and the individual taxpayers involved may be subject to back taxes, fines and penalties if the easement is found to be improper or illegal.

Table 1. Federal Estate Tax Exclusion Amount (as of 2/1/2021)

Year	Federal Exclusion
2015	$5,000,000
2016	$5,450,000
2017	$5,490,000
2018	$11,180,000
2019	$11,400,000
2020	$11,580,000
2021	$11,700,000

Current law (passed in 2017) provides for the exclusion to be adjusted annually for inflation. The law expires in 2025, and the exclusion would revert in 2026 back to the 2017 exemption level adjusted for inflation, unless a new law is passed.

Probate

Probate is the legal process to distribute the estate according to the provisions of a will or according to state law when there is no will. The probate process is not highly complicated. Current Tennessee law requires the involvement of an attorney to oversee the probate process to ensure all details are handled properly.

Probate includes a number of steps. While not all are necessary in all estates, the steps may include:

1. Petition to the court to probate the will or administration of the estate.
2. Appointment of the executor (male) or executrix (female) (executor/executrix is sworn in, often by court clerk).
3. Notice to creditors (usually a newspaper advertisement provided to the local paper by the court clerk and covered in the probate fee).
4. Securing of bond by executor, if required.
5. Assembly, inventory and appraisal of property (if required or needed).
6. Classification and payment of demands against the estate (such as debts and liens against the decedent's property).
7. Management (and sale, if necessary) of property.
8. Payment of state and federal taxes (income and estate filing of tax returns, if required).
9. Accounting to the court and distribution of property.

Most of the probate steps are handled directly by the executor or administrator. An executor is called a personal representative in some states. The duties of the executor include:

1. Proves the will in probate court by providing the original copy of the will to the court clerk to be verified by a judge, who allows the opening of the estate and beginning of the probate process.
2. Secures copies of death certificates.
3. Establishes estate bank account(s) to handle funds.
4. Collects and inventories assets and property.
5. Pays bills and collects debts.
6. Files tax returns.
7. Manages probate property; converts property to cash, if needed.
8. Defends or brings lawsuits, if necessary.
9. Distributes property.
10. Files final accounting with court, makes distribution to beneficiaries/heirs and closes estate.

Most probate courts desire the estate probate process to be completed within 12 months or less. The size and complexity of the estate may lengthen the probate process. When choosing an executor, you should select someone who is capable, willing and able to keep peace among family members, able to meet legal requirements and is located nearby, if possible.

Probate is not expensive when additional legal assistance is not required. The opening of the estate to begin the probate process in most Tennessee counties costs between $250 and $400. Costs may be higher when local newspapers charge higher rates to print the notice to creditors. Often, when a family member serves as executor, he or she is not paid for doing so, other than for reimbursement of expenses, but an executor can take a fee. When no will exists and the court appoints an administrator, the administrator is entitled to compensation for his or her work. Executors and administrators might receive 3 to 5 percent of the value of the estate as compensation, depending on the size and complexity of the estate and depending on court rules or guidelines.

Some assets do not transfer through the probate process. Assets owned by joint tenancy with right of survivorship, joint bank accounts and payable on death (POD) accounts would all transfer directly to the joint owner or named person. Assets in a trust transfer according to the trust document. Beneficiaries of life insurance would receive the proceeds of the policy. Beneficiaries of IRAs, 401(k)s and similar retirement accounts would become owners of those accounts and would be required to follow IRS rules concerning the distribution of the funds. There may be income tax advantages to the estate and the beneficiary when the retirement accounts transfer directly outside of the estate.

A "Sample Attorney Estate Planning Questionnaire" is included in the appendix for Chapter 6 of this workbook. This form provides a sample of the type of information an attorney will need to begin the process of writing your will and developing your estate plan. Your attorney may require additional information, depending on the complexity of the estate. This topic is covered in more detail in Chapter 6.

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