Estate Plan Guide

If you know who you love, who you trust and what you have, you can start your Estate Plan.

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Forward:

This booklet found its way into your hands on purpose. Either you asked for it or someone who is concerned about you put it there. In either case let me encourage you to begin your plan with the knowledge that you only need to know a few limited things. This guide will give you a basic understanding of Estate Planning documents.

Estate Planning is one of the most important yet neglected areas in many persons' lives. Simply you either have one or you don't. People without an Estate Plan will have affairs decided by statutes and judges. This may mean that your property goes to the wrong people or the right people but at the wrong time. You may lose the ability to choose who will manage your affairs or medical decisions if you become unable to do so. Again a court may decide these issues.

My clients express how relieved they are once the Estate Plan is completed. If this guide begins to overwhelm you remember that all you really need to know is who you love, who you trust and what you own.

Richard Winblad

How Do I Begin My Estate Plan?

Relax; there are only three things you need to know before you begin:

Who do You Love?

Who needs to be taken care of when something happens to you?

What do you own?

What homes, property, bank and retirement accounts, assets and personal belongings do you own?

Who do you trust?

Who do you want to take care of your children, make healthcare decisions for you and handle your checkbook if you cannot or after you are gone?

Too many people think that they do not know enough to begin to make an Estate Plan. Because they feel that they are not prepared, they fail to take any action.

This guide is designed to provide enough information to put you at ease with the process. It includes information about the different parts of an Estate Plan.

Last Will and Testament:

A Will is an important part of every Estate Plan. Although many Estate Plans include a Trust, the Will does things that no other legal document can.

A Will is a legal document that does several things:

Executor: It names an Executor to be in charge of your estate if your estate needs to be probated. This person is overseen by the probate court and is responsible for collecting your assets, paying creditors and distributing property according to your plan.

Distribution Choices: A Will can distribute property according to your desires.

Waive Bond: It can waive the general requirement that the Executor obtain a bond.

Guardian Nomination: It can select guardians for minor children or dependents.

Pour Over Into a Trust: If a Trust is created as part of your Estate Plan the Will insures that any unaccounted assets are put into the Trust.

Create a Trust: A Will can create a Trust at your death to provide for your family.

Disinherit: Children and others can be disinherited or given unequal shares. Spouses cannot be disinherited unless a prenuptial agreement is in place.

Avoid Intestacy: Without a Will the government's intestacy scheme will determine how your assets will be distributed.

What are a Will's limitations?

- **Not Effective until Death**: A Will only becomes effective upon the death of the Testator (the person who made the Will). It is not a substitute for a Power of Attorney which enables someone to act on your behalf.
- **Probate Required:** In all but few limited situations a Will must be admitted to probate by a judge in order for its terms to be carried out. A Trust is usually the best way to insure that your assets are distributed without the need for court involvement.

- **Non-Probate Assets:** A Will does not distribute assets that pass automatically such as joint tenancy property, transfer on death deeds and joint or payable-on-death accounts. Such assets pass without regard to the language of a Will.
- **Beneficiary Designations:** A Will does not change beneficiary designations. IRAs, Insurance Policies, and Bank Accounts often have beneficiaries or payable-on-death designations. The companies holding those assets will transfer the property according to beneficiary designations without regard to what a Will says.

How is a Will Created?

- **Self-Proving Will:** A self-proving Will is signed by the Testator (the maker) in the presence of two unrelated adult witnesses. The Testator requests that the witnesses attest to his or her signature to the Will. The Testator and witnesses sign an oath that the maker was of sound mind. A notary certifies the signatures of the Testator and the Witnesses. If these formalities are performed then the Will can be admitted to probate without the need for the witnesses to be available to testify that about the signing.
- **Standard Will:** A standard Will has two unrelated adult witnesses but the Testator and witnesses are not required to take an oath. At least one of the witnesses must testify about the signing of the Will before it can be admitted into probate.
- **Holographic Will:** A Will that is entirely written in the Testator's own handwriting, signed and dated. Holographic wills are often invalid because they are poorly drafted and fail to meet the legal requirements.
- **Oral Wills:** Oral Wills are invalid. No matter how many times someone expressed their intentions, a person without a written Will or Trust is considered intestate. The only exception is a soldier or sailor's oral Will made the day they received a mortal injury during a conflict.

Key points to remember:

- *A Will only distributes non-probate property. Property held in joint tenancy, payable-on-death and beneficiary designations are not changed by a Will.*
- *With few exceptions, a Will must go through probate.*
- *Formalities must be followed when a Will is signed in order to be valid.*

Family Trust Also called Revocable Trust or Living Trust

The Family Trust has become a common part of many Estate Plans. In fact, most attorneys believe it malpractice to create an Estate Plan without considering whether a Trust is appropriate. A Trust does much more than a Will.

No Probate Court: One major advantage of a Trust over a Will is the ability to avoid the expense, loss of privacy, frustration and delays of probate court. Instead of going to probate court, the Trustee you choose has full control over the property and is required to follow your distribution instructions.

Distributions: A Trust gives you the ability to give detailed instructions concerning when, how and to whom distributions are to be given.

- **Immediate Distributions:** Perhaps one of the most attractive features is the ability to have property distributed immediately and without the need for probate court supervision.
- **Delay Distributions:** A Trust can delay distributions of assets until an heir reaches a financially mature age.
- **Special Needs Dependents:** You can choose a Trustee to manage the assets and pay bills for somebody with special needs.
- **Spendthrift Provisions:** You can prevent individuals who are irresponsible or have substance abuse problems from squandering their inheritance by placing a Trustee in charge of the assets.
- **Income distributions:** You can instruct the Trustee to pay income to designated persons or organizations.

Flexibility: Revocable Trusts can be amended if your needs or the needs of your beneficiaries change. For example, if one of your heirs has a misfortune which makes them more financially vulnerable than others, the Trust can be modified to provide for him or her.

Avoid Probate: Probate is a court proceeding usually expensive, public, lengthy and frustrating. A Trust avoids the need for probate because your property is held in a Trust. You, and not a court, will name the person or company to serve as Trustee when you are gone.

Your Choice of Trustee: You decide who serves as Trustee. Initially, you will serve as the Trustee. Married couples usually elect to have each of them act as co-Trustees then the survivor serves. The successor Trustee can be a person or a Trust Company or Trust Department of a Bank.

Disinheritance: In a Trust, as in a Will, heirs can be disinherited or given property in unequal shares. Generally speaking, spouses cannot be disinherited unless a prenuptial agreement is in place.

Continuity of Management: The person (or married couple) creating a Trust usually chooses themselves to be the Trustee(s) until their death or incapacity. Then a successor Trustee that you name takes over.

This inures that there is no interruption in authority to pay bills, manage property and conduct business. Without a Trust there is nobody in charge until they are appointed by the probate court.

Privacy: The contents of a Trust are generally free from public examination. Therefore, the distribution plan and the nature of the assets are kept private. In contrast, a Will must be filed in a public record, and the executor will usually be required to file an inventory and appraisement.

No separate tax return: No separate tax return or employer identification number is required while you are the Trustee. Upon your death tax returns are required for estates with Wills and Trusts.

No government involvement: Trusts created for an Estate Plan require no governmental oversight. There is no agency that regulates Trusts. The terms of a Trust are contained in a private document with very limited requirements for disclosure of its contents.

Your Property is still Yours: Having a Trust does not limit your control. You may sell, give away, rent, lease or dispose of anything you own just as you do now.

Funding Requirement: In order for a Trust to work your property must be held in the name of the Trust. This usually means that real property must be re-retitled, bank accounts renamed, etc. If property is not put in the Trust it will pass through the Will. That is why care should be taken to insure that all property is placed in the Trust. You might think of this as doing the work in advance so a probate court doesn't have to.

Myths about Trusts:

***Trusts* are for the very wealthy:** Untrue: Trusts can be for anyone with assets or beneficiaries that need to be protected. There is no minimum estate value that is needed to create a *Trust*.

***Trusts* are complex:** False: Most Trusts are simple. The client continues to use the property just as before.

***Trusts* can be done without an attorney:** True: However, many attorneys hire other attorneys to prepare their *Trusts* and *Estate Plans.* This is because attorneys recognize that devastating mistakes can occur if a Trust is not drafted or funded correctly.

Non-Probate Assets:

Some assets will pass automatically *even* if a Will or Trust says otherwise. Therefore, it is important to understand how these work so that an Estate Plan can function as intended.

Contractual Beneficiary Designations:

Some assets are designed to pass through beneficiary designations or payable-on-death instructions given to banks, insurance companies and other institutions. Common examples include:

- Life Insurance Policies & Annuities
- Bank Accounts, IRAs and 401ks
- Disability and other Health Policies

Beneficiary designations are also part of Estate Planning. They are a simple way to distribute assets but they have limitations:

- There is very little control over timing of distributions;
- There is a limited ability to name contingent beneficiaries which may result in the need for probate which may result in unintended disinheritances or uneven distributions; and
- Limited ability to maximize value through tax and other planning.

Many of these disadvantages may be avoided by naming a Trust as a beneficiary. Rather than money or property being paid directly to the beneficiary, it is paid to the Trustee who manages and/or distributes the property according to your wishes.

Real Estate: Joint Tenancy, Life Estates and Transfer on Death Deeds

Real property may be titled so that ownership transfers by the filing an affidavit of the surviving interest owner after the other owner dies. Property held in this way is not subject to probate. Common examples include:

- Joint Tenancy,
- Life Estate, and
- Transfer on Death Deeds.

Neither a "Joint Tenancy," "Life Estate" nor a "Transfer on Death Deed" can be modified by a Will or Trust.

Joint Tenancy: Joint Tenancy is one of many ways two or more people can hold title to property. Most married couples hold title to their homes as Joint Tenants. It is one of the simplest ways to hold property. Here is how it works most of the time:

Usual Example: John and Mary are married and own a home together. The deed names them as "Joint Tenants." John dies. Mary files an "Affidavit of Surviving Joint Tenant." She is now the sole owner of the home. The property is not subject to probate or claims of John's estate.

Common Mistake: Mary thought that it worked pretty well when her husband died and thinks that this would be a great way to pass on property to her children. However, this can lead to disastrous consequences because every person named on the deed becomes an owner. Each "Joint Tenant" has the right to occupy the whole of the property but cannot exclude any other Joint Tenant.

The children's troubles or problems can impact ownership of the property, including:

- Tax or Judgment Liens;
- Bankruptcies;
- Divorce property division;
- Partition action by greedy co-tenants; and
- Occupancy rights of co-tenants.

Examples: Mary owns property and wants her son Doug and daughter Sue to inherit it. Both Doug and Sue have children. She also wants to avoid the expense of probate. She deeds the property to herself and her children as Joint Tenants expecting them to "inherit" the property when she dies. Then one of the following occurs:

Unintended Disinheritance: Sue dies first and Mary dies second Doug will own all of the property and Sue's children will receive nothing. *Continued.*

Liens: Doug has financial problems (gets sued, tax liens, filed bankruptcy or gets divorced). Doug's interest in the property may be subject to liens or claims that may prevent the property from being sold or mortgaged.

Greed: Sue becomes estranged from the family and files a lawsuit to have the property divided. Or she could sell her interest in the property to somebody else who can take the same action.

Inflexibility: Agreement of all of the joint tenants is necessary in order to sell, mortgage, lease or change who will inherit the property. Even if they are agreeable, financial troubles of one of the joint tenants may prevent or complicate the transaction.

Life Estate:

A life estate is when ownership in land is split into two parts. The first part is the Life Estate which is owned by the "Life Tenant" who is entitled to possession and enjoyment of the property as long as he or she is alive. The second is the remainder interest which belongs to the "Remainderman" who receives title to the property after the Life Tenant dies.

Advantages: The Life Tenant is not subject to the liens or claims of the remainderman. In other words, the Life Tenant cannot be interrupted in her occupancy of the property.

Disadvantages: The Life Tenant cannot sell or mortgage the property unless the Remainderman agrees. Financial or divorce problems of the remainderman may prevent the transaction. The Life Tenant may also be prevented from leasing the property or developing the mineral interests without the remainderman's consent. Like joint tenancies their financial troubles may limit choices.

Transfer on Death Deed:

Transfer on Death Deeds transfer property to a named individual after death of the owner. The owner of real estate executes a Transfer on Death Deed and files it in the county where the property is located. When the owner dies the beneficiary files a Transfer on Death Affidavit and receives the same title that the previous owner had.

Advantages:

- The named beneficiary is not granted an immediate interest in the land. Therefore, their financial problems or liens against them do not impact current property owner.
- The owner is free to sell, mortgage, and transfer the property without consent or notification to the beneficiary.
- The owner can revoke the deed if he no longer wants that beneficiary to receive it.
- There is no need for probate and it is not available to pay creditor's claims.

Disadvantages:

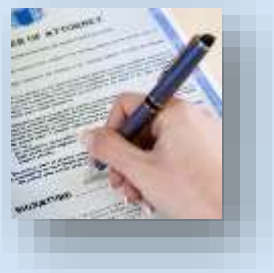
- If the beneficiary does not act timely after the owner's death the property becomes part of the owner's estate and subject to probate.
- If the owner wants another beneficiary to receive the property the previous deed must be revoked.
- Difficult to name contingent beneficiaries.

Planning for the Possibility of Incapacity

When most people think of Estate Planning they believe that it only involves distribution of their property when they are gone. It is more than that. It is important to name reliable people to make decisions and manage assets if you become unable to do so.

Powers of Attorney:

A Power-of-Attorney grants someone you choose the power to make decisions and enter into binding contracts on your behalf.



In Estate Planning, a Power of Attorney is used to plan for the possibility of incapacity.

What would happen if you became incapacitated and had no plans in place?

- No one could legally handle affairs, sign checks or enter into contracts on your behalf.
- Your family would need to have a court declare you incompetent and appoint a guardian.

Terms Definitions and Concepts:

"Principal": Person who gives another the power to act through a power of attorney to an agent.

"Attorney-in-Fact" or **"Agent"**: Person to whom power is given. An Agent has the duty to act only in the Principal's best interest.

Incapacity: Title 10 Oklahoma Statutes § 10-103(4) defines an incapacitated person as:

a. any person eighteen (18) years of age or older:
(1) who is impaired by reason of mental or physical illness or disability, dementia or related disease, mental retardation, developmental disability or other cause, and
(2) whose ability to receive and evaluate information effectively or to make and to communicate responsible decisions is impaired to such an extent that such person lacks the capacity to manage his or her financial resources or to meet essential requirements for his or her mental or physical health or safety without assistance from others …

Financial Power of Attorney:

Powers given can include the ability to manage finances, trade stocks, settle disputes, make gifts, buy or sell land, etc. Without a Power of Attorney, your family may be forced ask the court to appoint a guardian to look after your affairs or to approve the sale of property that is in your name.

Durable and Non-Durable Powers of Attorney

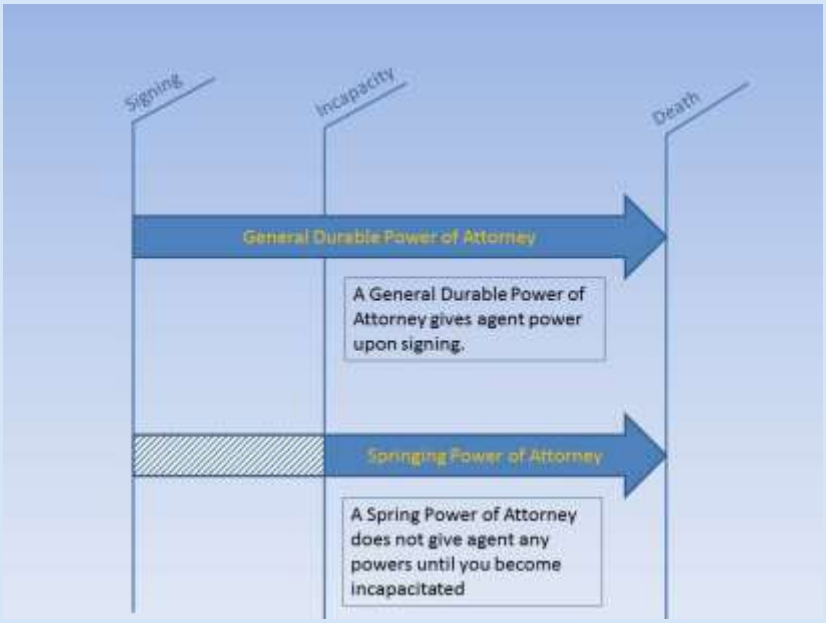
Oklahoma recognizes two basic types of Powers of Attorney, Non-Durable and Durable. A non-durable Power of Attorney ceases when you become incapacitated. When planning for incapacity the Power of Attorney *must* be durable. Statutory requirements must be followed to make the Power of Attorney durable. Generally, the durable Power of Attorney is executed with the same formalities as a Last Will.

Choices with Durable Powers of Attorney:

Standard Durable Power: This grants your agent the power to act immediately after signing of the Power of Attorney. Your agent can continue to act for you even if you become incapacitated.

Springing Power: Your agent will not have any powers until you become incapacitated. Then the power "springs" into existence. You can specify that two doctors determine that you are incapacitated or some other contingency must occur before the powers can be used.

Combination: Often a client may grant their spouse a Standard Durable Power and name a secondary agent to serve only if they become incapacitated and their spouse is unable act for them.



Caveat: The person named as a Power of Attorney can make decisions without court supervision. These can be disastrous if they do not act with your best interest in mind. Care should be taken to name only highly reliable and ethical individuals. Persons with greed, substance abuse, financial or legal problems should not be chosen.

Advance Healthcare Directives "The Living Will"

An Advance healthcare directive, sometimes called a "Living Will," is legal document which instructs health care providers of the level of care you desire if you are unable to speak for yourself.

Under Oklahoma Law it is presumed that you would want life sustaining treatment continued including the use of feeding tubes unless a contrary desire has been communicated. The best way to insure your wishes are honored is to have a Living Will.

Avoid Family Conflicts

If you do not have a Living Will your family may disagree about what your wishes would have been. Terri Schiavo's family found themselves in a seven-year court battle that could have been avoided if she had a Living Will. Therefore, even if you want all life sustaining treatment including feeding tubes: it is still important to make a Living Will. An Advance Directive or Living Will provides the best and legally enforceable way to communicate your instructions and avoid conflicts.

The Oklahoma Advance Healthcare Directive "Living Will"

Three End-of-Life Conditions:

The Oklahoma Form describes three "end-of-life" conditions which may trigger the Living Will if you are incapacitated. Two doctors must agree that you have one of these conditions:

- Your death is expected within 6 months regardless of treatment; or
- You are in a persistently and irreversibly unconscious condition; or
- You have an end-stage irreversible condition, caused by injury, disease, or illness, which results in severe and permanent deterioration indicated by incompetency and complete physical dependency for which treatment would be medically ineffective.

Treatment Options:

For each of these conditions you may select different treatment options:

- Feeding Tubes and IVs Only: This choice instructs doctors to withhold life extending treatments except that you should be given nutrition and hydration through feeding tubes or IVs if necessary.
- Do everything: This instructs doctors to do everything possible to extend life including artificially administering nutrition and hydration (feeding tubes) if you are unable to take these by mouth.
- Do Nothing: This choice instructs doctors to end life sustaining treatments and to not use feeding tubes or IVs.
- Other: You are not limited to these options. You can include other instructions concerning the care you do or do not want.

Health Care Proxy

A Health Care Proxy is a person you choose to make medical treatment decisions for you in the event that you are unable to make such decisions. Your proxy can make decisions but they must follow the instructions in your Living Will. It is important that you discuss your values with the person you select. Communication with persons selected as a health care proxy is important.

Organs and Tissue Donation

Oklahoma's form includes the option to give instructions on organ donation. You can donate selected organ, tissue or your entire body. You can specify that your donation will be used for transplantation, therapy, research and/or teaching.

Other Personal Care Documents:

Medical Power of Attorney

A Medical Power of Attorney is similar to the Living Will in that it grants powers to a trusted individual. This may include housing and healthcare decisions not covered by your Living Will. This power may be effective immediately or "springing" as described above.

Do-Not-Resuscitate Form:

A "Living Will" is not the same as a Do-Not-Resuscitate or DNR form. A DNR instructs medical personnel to not administer cardio pulmonary resuscitation (CPR). It should be signed only by someone who has a terminal condition and has made an informed decision that he or she does not want to be resuscitated under any circumstance. It is not usually part of an Estate Plan.

Key Points to Remember:

- *Your Living Will is used only if you are unable to make and communicate medical decisions.*
- *If you cannot communicate and do not have a Living Will or told your doctor otherwise, the law assumes:*
    - *That you would want all life sustaining treatments possible;*
    - *That if you cannot take food or water orally that you want to receive them through feeding tubes or IVs; and*
    - *That you want pain relieving treatments or medicines.*

Other Estate Planning Needs

IRA Beneficiary Trusts: There are special rules that apply to non-spouses who inherit IRAs. You can arrange your IRA so that your children receive the money over time thereby allowing it to grow while deferring taxes.

Special Needs Trusts: An heir with a physical, mental disability or chronic illness can have a Special Needs Trust designed so that he or she is not disqualified from receiving needs-based government benefits.

Spendthrift Provisions: You may not want some beneficiaries to receive sums of money. These may include individuals with:

- Substance Abuse Problems
- Gambling Problems
- Poor Money Management Skills
- Creditor or Greedy Spouse Issues

Trusts can be designed to protect the inheritance of individuals with these issues.

Firearms Trusts: The National Firearms Act "NFA" makes it illegal to possess Title II Firearms without license. Only automatic weapons, silencers, short barreled rifles and short barreled shotguns fall into this category. A Firearm Trust may be needed to prevent your executor, Trustee or heirs from possessing or transferring these firearms in violation of criminal laws.

Pet Trusts: Provisions may be made for the care of a pet or animal after you are gone or become incapacitated. You may nominate a caregiver to look after your pet and a Trustee to manage the funds and oversee the care. The caregiver and Trustee can, but do not have to be, the same person. Oklahoma Law provides for simple administration for a pet Trust valued less than $20,000.

Tax Planning:

This is a very general discussion of a complicated issue. The reader cautioned to remain aware that significant tax consequences may be involved in Estate Planning and Gifting. Estate and gift tax figures based on 2015 rates.

Although most Oklahomans do not need to worry about Estate Taxes. It is important to consider potential tax implications of you Estate Plan.

Federal Estate Tax for Individuals: As of 2015 estates under $5.43 million are not subject tax. The tax rate above this amount is 40%.

Married Couples: Marital Deduction: All property left to a spouse is free from the Estate Tax (IRC §2056(a) if your spouse is an American Citizen. With proper Planning, your spouse can combine your $5.43 exemption with theirs for a total of $10.86 million.

Oklahoma Estate Tax: Oklahoma repealed its estate tax in 2010.

Basis and Capital Gains

Basis is the amount you pay for something such as land, stock, vehicles, etc. For example, if you purchase a land for $100,000 then your basis the land is $100,000.

Capital Gains: When you sell something for more that its basis the difference is a capital gain. For example, if you buy land for $100,000 and sell it for $150,000 then your capital gain is $50,000. Capital gain is income upon which you pay income unless it an exempt transaction.

Inherited Stepped-Up Basis: When you inherit property the "basis" is the value of the property when it is inherited. This is called a stepped-up basis. See IRC §1014(a). In the example above, if your child inherits the land worth $150,000 at your death and sells it for that amount, there would be no capital gains.

Gifted Basis: If you give your child property during your lifetime, their basis is the same as yours. However, but they may not be eligible to claim capital losses if they sell it for less than your basis.

Gift Taxes: Generally begin at $14,000 per recipient.

Key Points to Remember:

- *Most people do not have complicated tax planning issues.*
- *It is usually better from a tax standpoint for your beneficiary to receive an inheritance than a gift if the property has increased in value.*
- *Tax and legal advice should be sought before making significant gifts.*

Final Disposition and Funeral Arrangements

Funeral Arrangements:

Named representative: You can name a person to make any funeral or internment decisions that you have not already made. This can help prevent family conflicts about your wishes.

Your Estate Plan can include directives regarding your funeral. These may include:

- Whether you want burial or cremation.
- Your choice regarding religious ceremony location.
- Any preplanned arrangements through a funeral director.
- Location of family burial plots or preferred cemetery.
- Instructions regarding ashes.
- Open or closed casket.
- Flag ceremony for veterans or burial at sea for Navy veterans.

What are the next steps?

1. Complete a questionnaire about important people in your life and your possessions. Form Available Here. Or Call 405.340.6554
2. Meet with attorney to discuss plans, concerns and to find answers for specific questions. At this point we will provide you with a cost estimate.
3. The attorney prepares the legal documents for your review and make any revisions.
4. Documents are signed, witnessed and notarized in our office.
5. Assets are re-titled and beneficiaries changed.
6. The documents are organized in an Estate Planning binder for safekeeping.

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About our office: This pre-statehood home converted to an office serves as a relaxed environment to meet with clients. Click for Directions

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We are pleased to offer this booklet as a resource to aid you in developing your Estate Plan. This guide describes many of the documents that are used in a typical Estate Plan. Our goal in writing this booklet was to describe Estate Planning in plain English.

It is intended that this will be an aid to you as you begin, complete or revise your Estate Plan.

It is our sincere hope that this motivates you to begin and complete your own Estate Plan.

The authors.