# ESTATE PLANNING INFORMATION

(Colorado Resident)

[dated material – January 1, 2013]

1. **GOALS;**
2. **WILLS;**
3. **PROBATE AVOIDANCE;**
4. **ADVANCE DIRECTIVES (also called Living Wills);**
5. **HEALTH CARE POWERS OF ATTORNEY;**
6. **STATUTORY DURABLE (FINANCIAL) POWERS OF ATTORNEY;**
7. **DISPOSITION OF LAST REMAINS (funeral and memorial services);**
8. **FEDERAL ESTATE TAXES;**
9. **BLENDED FAMILIES;**
10. **TAKING CARE OF DEPENDENTS;**
11. **MEDICAID QUALIFICATIONS;**
12. **TAKING CARE OF OUR PETS (aka the "furry kids").**

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**1. GOALS**:

a. Provide for the financial well-being of loved ones:
b. Plan for possible incapacity - to avoid court involvement;
c. Avoid or minimize death/estate taxes;
d. End-of-life decision making;
e. Specific bequests and transfers of assets;
f. Maintain privacy;
g. Reduce or eliminate costs of probate;
h. Avoid ancillary probate in other States;
i. Shelter assets for the next generation;
j. Funeral and Memorial Arrangements.

**2. WILLS**:

Matters normally considered in preparing a Will:

- Disposition of your assets;
- Designation of Personal Representative (Executor);
- Guardians for minor children (under 18);
- Trusts for children, particularly if minors or delayed inheritances;
  - naming trustee to handle assets;
- Minimizing or avoiding estate taxes;
- Arrangements for pets.

(NOTE: HAVING A WILL DOES NOT AVOID PROBATE.)

**3. PROBATE AVOIDANCE**:

Assets of more than $63,000 (total value), or ANY real estate even if worth less than $63,000, in person's own name (which is not automatically transferred to someone else at death, such as through joint tenancy or "pay on death accounts"), require a probate. "Probate" is a court proceeding to determine the validity of a Will, pay debts, collect and distribute assets, and see that the wishes of the deceased are carried out.

- Consider adding a spouse to your assets as a joint tenant with right of survivorship. It is NOT a good idea to add children or other persons as joint tenants since events in the lives of these other persons can jeopardize your assets (such as divorce, death, tax liens, creditors). Joint tenancy may not a good idea if your estate will be subject to federal estate taxes (see FEDERAL ESTATE TAXES below);
- On your bank and investment accounts, name a beneficiary or POD (pay on death) designatee;
- Create a living trust, where assets are placed in name of your own trust and controlled by you. Then, a successor trustee later takes over when you can no longer act. The trust cannot die (same as a corporation), so there is no probate of trust assets;
- For your real estate, now sign and record a Beneficiary Deed to transfer ownership of the real estate. The Beneficiary Deed is effective on death (even though recorded before death), can be cancelled before death, allows a step-up in basis for income tax purposes on later sale of the property by your beneficiary , would disqualify you for Medicaid (but not Medicare), beneficiaries cannot sell the property until death of owner, and the owner can continue to live in the property. A Beneficiary Deed has limited usefulness – talk to a knowledgeable attorney.

**4. LIVING WILL (aka Advance Directives):**

Separate document that is signed now and retained for possible later use.

- Deals with a. life support systems and artificial nourishment;
- If a person is diagnosed by two doctors as being in a terminal condition or vegetative state that is not reversible (moment of death is being prolonged), then the Living Will directs whether or not to remove life support systems, and/or artificial feeding and hydration;
- You can direct how long to wait (number of days) before removal of life support and/or artificial nourishment;
- Your religious convictions may affect whether or not to use this document and what you should include in your Living Will;
- Having this document can help your family know what you want, and help avoid family disagreements about what to do.

**5. HEALTH CARE POWER OF ATTORNEY**:

Another separate document that is signed now and retained for possible later use.

- An agent is named to make health care decisions when the patient is unable to do so. A successor is usually named in case the first agent is not available;
- Doctors and hospitals are therefore able to know who will make decisions if the patient is unable to make the decisions (if patient is unconscious or unable to communicate);

- This document can help avoid court appointment of a guardian (and unnecessary expenses);
- It is used even when there is no life-threatening situation, perhaps simply an accident from which you are unconscious or under heavy medication until you can fully recover;
- If there is no Living Will and no Health Care Power of Attorney, many doctors and hospitals will not withdraw life support (even though you want it withdrawn) unless a court appointed guardian is given the authority by the court to make such a decision;
- This document can help avoid family disagreements about what to do. The named agent makes the decisions Make sure your agent is willing to carry out your wishes, especially in an end-of-life situation;
- New laws regarding Health Insurance Portability and Accountability Act (HIPAA) make it difficult for anyone besides you (such as your family or agents) to get your medical records. However, a signed Health Care Power of Attorney can permit your agent to obtain these medical records in order to make informed decisions for your medical needs;
- As with the Living Will, your religious convictions may affect the use of this document. Your religious organization may have special forms, and you will want to be sure that your named agent is willing to honor your convictions. Along this same thought, you will want to be sure that your named agent will not let his/her own religious convictions affect decisions on your behalf even though you may not share those same convictions;
- This document should say that it is effective immediately so that your agent can help you immediately if the need arises.

**6. STATUTORY DURABLE (FINANCIAL) POWER OF ATTORNEY:**

An agent is named in a written document who will handle financial and other matters, not related to health care decisions.

- Can be limited to take effect only if and when the person becomes incapacitated. So, it does not begin while the person is still able to make his or her own decisions;
- There are several financial areas in which the agent can act - signing checks, collecting money, paying bills, managing real estate, filing tax returns, etc;
- This document may help to avoid the need to have a court appointed conservator. [Note: a conservator handles financial matters, whereas a guardian handles personal decisions (where to live, medical help, religious matters, etc.)].
- The form should also require the agent, if requested, to provide an accounting to the beneficiaries of your estate. This accounting would describe what the agent has done with your assets.

**7. DISPOSITION OF LAST REMAINS**:

Making decisions for our last remains is difficult. Many of us simply do not make any

decisions for ourselves, and let family decide. This can be hard on the family or friends because often it is not known what a deceased relative or friend would have wanted. Some may desire burial, others cremation or organ/body donations – and what about funeral or memorial services? There are many alternatives available. It is sometimes awkward to tell family or friends what we want. Help is available in the nature of a form called "DECLARATION OF DISPOSITION OF LAST REMAINS".

We can fill in this form to say what we want for our funeral, ceremonies or memorial services, who should make the arrangements, describe any pre-arrangements we made, and include any special instructions.

This form can also state your intentions about making organ or tissue donations.

**8. FEDERAL ESTATE TAXES:**

Even though there is no Colorado Inheritance Tax, there could be a Federal Estate Tax, if a person dies owning assets (including life insurance and retirement accounts), in excess of certain amounts:

$5,250,000 for someone who dies in or after 2013;

- The tax is 35% on estates in excess of the exemption amount;
- There is no tax for assets (no matter how much) that are transferred between a husband and wife, during life or on death. If a person's estate is large enough, there are ways to use the exemption described above on the FIRST to die but still allow the exempted property to be available for use by the surviving spouse. This enables us to pass up to double the amount of the exemption ($10,500,000 in year 2013 and thereafter) to your children.
- The exemption should be preserved IN A WILL OR TRUST SIGNED DURING LIFETIME OF BOTH SPOUSES so assure that both exemptions are not lost.
- NOTE: There is currently available a program to transfer the unused exemption from the first spouse to die, to the survivor. However, we do not know if Congress will allow this "portability" to continue. Thus, it is recommended that the exemption be preserved in your Will or Trusts.
- An unmarried person (as well as a married person) may also take action to minimize or possibly avoid estate taxes by making lifetime gifts of no more than $13,000 per year per donee (person receiving gift).
- It is also possible to make gifts of up to the exemption amount ($5,250,000 in 2013 and later years, without paying any gift tax. However, gifts larger than the $13,000 per donee will cause loss of the estate tax exemption equal to the amount of the gift. For example, a gift in 2013 of $2,000,000 (total, not per donee) can be free of gift taxes, but that persons estate tax exemption will be reduced by $2,000,000, resulting in an exemption of $3,250,000.
- In proper circumstances, a family limited partnership can be used to transfer investment or business assets during lifetime to children, yet allow limited control of the assets to remain with you during your lifetime.
- If life insurance is a large part of your estate, having the insurance policy

owned by an Irrevocable Life Insurance Trust that you set up, can avoid the insurance proceeds from being taxed in your estate.

INCOME TAXES ON INHERITANCE: The recipient of an inheritance does not owe any income tax – the inheritance is not income. However, when the recipient sells the inheritance (if it is an asset other than cash), an income tax may have to be paid if there is a profit on the sale. The "basis" of the inherited asset (for income tax purposes) is the value of the asset at the time of death of the original owner who died leaving the inheritance. .

HOW TO PLAN NOW:

If a husband and wife's estate, including life insurance and retirement funds, is over $1,000,000 but less than $10,500,000, use of a "DISCLAIMER WILL" may be best - special clauses are included in your Will. A "Disclaimer Will" allows the spouses to keep ownership of assets in joint tenancy between them, and also enables the surviving spouse to "disclaim" some joint tenancy assets in order to transfer some assets to the credit shelter trust (tax exempt for the children) to reduce or eliminate federal estate taxes if the need arises. For persons with estates of more than $10,500,000, they may want to consider not owning assets in joint tenancy, and having their Wills provide for automatic credit shelter trusts.

**9. BLENDED FAMILIES:**

If you have a blended family (where one or both spouses have children from a prior marriage), there is often concern about making sure that all of the children enjoy the inheritances that the parents desire.

(Note: most couples own assets (real estate, bank accounts, investments, etc) as joint tenants. Joint tenancy means that the surviving spouse becomes the sole owner of the assets - the provisions in a Will do not control jointly owned property. Once the surviving spouse owns the assets, then his or her Will controls the ultimate disposition of those assets.)

If there is a death of one of the spouses, a problem could arise if the surviving spouse decided to change his or her Will to remove the stepchildren. This might happen if the surviving spouse were to remarry, or become subject to the influences of other persons who want the Will changed. The law says that under normal circumstances, a person can change their Will at any time.

There are some ways to protect children's' inheritances in a blended family:

- Children can be named beneficiaries of life insurance, or certain bank accounts or certificates of deposit ("Pay on Death" designation); or
- A Nuptial Agreement made between the spouses (signed before OR during the marriage) creates a "contract" to obligate the spouses to provide for the stepchildren, no matter which spouse may die first. These agreements can provide for the surviving spouse to use any money needed during his or her lifetime, but if there is money left over, the inheritance to step-children can be protected; or
- Do away with joint tenancy ownership of some or all assets in order to create

tenants in common (each own a 1/2 interest that passes according to the person's Will). Then provide in the Will that the children inherit the ½ interest in the assets rather than the surviving spouse. Normally the Will requires the assets to be held in a trust for the lifetime of the surviving spouse so that he or she can use part of the assets if needed for his or her support. Then the balance goes to the children. A surviving spouse has certain rights to inherit by law that cannot be cut off in a Will UNLESS that spouse waives those rights in a signed Nuptial Agreement;

- Set up a Living Trust for each spouse and place their share of the assets in their own trust. This follows the process mentioned above to keep the assets available for the surviving spouse, and then to the children. However, there is no probate for assets in the Trust (since the assets are transferred into the trust prior to death). And, no one can change the Trust (nor the Will of the first to die), whether there is a remarriage, or someone trying to take advantage of the surviving spouse.

**10. TAKING CARE OF DEPENDENTS:**

Financial care for a dependent (such as children, parents, special-needs persons) can be continued even though the person providing the financial support dies or becomes incapacitated.

- Outright gifts;
- Transfers into trust, where a trustee will handle finances for the dependent;
- If the dependent is on Medicaid or other governmental benefits (such as SSI), then careful planning is needed to assure continued governmental benefits. A "special needs trust" may be used to preserve governmental benefits). This trust can be included in your Will or in a separate Trust document;
- Besides a trust, a court appointed guardianship and/or conservatorship can also provide financial protection to a dependent.

**11. MEDICAID QUALIFICATION**:

This is a government welfare program to help low income and low asset persons pay medical and nursing home expenses. A person may qualify even though they have an expensive home they keep while they are in an assisted living facility.

- Because of the very strict asset and income levels, a person may lose all benefits even though they have only a few cents more than the maximum levels;
- Some assets, such as up to $536,000 equity in a home, are exempt in figuring out if a person qualifies for Medicaid.
- NOTE: If on spouse is still living in the home, it can be worth more than $536,000 and still allow Medicaid for the spouse who can no longer live at home. Giving away a home may DISQUALIFY the owner from Medicaid. And, transferring ownership to avoid probate (such as deeding it to children, to a Trust, or by a Beneficiaries Deed), will likely disqualify the person from Medicaid;

- The stay-at-home spouse of the person who goes into a nursing home, can receive some assets and income without jeopardizing the other spouse's Medicaid qualifications;
- If a person qualifies for Medicaid, then there is usually no need for "Medigap Supplemental Insurance". Such insurance is for the person who can be covered only under Medicare, and hence does not receive full coverage for all medical expenses, but does not qualify for full coverage under Medicaid, because assets or income is too great.
- Many people think that if they give away their assets then they will qualify for Medicaid. It depends on how much and when the gifts are made. If and when Medicaid is needed, the government will look back FIVE years to see if gifts were made. If any gifts were made, the person is disqualified from Medicaid for a period of time beginning when the person needs nursing home care. Obtaining advice before gifts are made, can help to avoid giving too much, and help qualify for Medicaid as quickly as needed.
- In these days of budget cuts (federal and state), Medicaid is a regular target. Medicaid is good for those of us who cannot afford medical care, but I worry that the care provided will be reduced over the years to minimal levels that may not desirable to those of us who can pay our own costs.
- I have a detailed explanation of Medicaid. Call if you would like a copy.

**12. TAKING CARE OF OUR PETS:**

If you do not have relatives or friends who can take care of your pets if you become incapacitated or die, here are some suggestions:

- To cover the situation if you die before your pet, include a "gift" of your pet to someone whom you know will take care of it. This gift can be made in a "Memorandum Disposition of Personal Property" that can be referenced in your Will. You should discuss this with the person to be sure that they are in agreement;
- If you become incapacitated (accident or illness), give specific authority and direction to your "agent", named in a Power of Attorney, to take care of your pets or find someone who can. And provide in your Power of Attorney that if you are not likely to recover, or if your incapacity may last a long time, to give your pets to someone (if the agent cannot take your pets) or to an organization who can handle the duties on a long term basis (you can authorize the agent to make a cash gift to help defray costs);
- It is a good idea to give your agent a copy of your Power of Attorney. You should consider giving him/her information about your pets (vet, location of pets if they are not kept at home (such as horses boarded at a stable), food and diet, housing, grooming and other special care instructions). Note: a copy should also be kept with your Will and Trust;
- Provide a gift of money to whoever will be taking your pets if you die. This gift must be made in your Will (or Trust if you have one), and would specify the purposes for the monetary gift – to take care of your pet's needs;
- Provide in your Will for a trust fund to be used for the pet's care, with directions where the balance goes when your pet dies (some people give the balance to a named charitable organization such as a Dumb Friends League or MaxFund). Often the

decision of whether to use a trust rather than simply giving money to someone (with the hope that they will spend it on your pet), depends on how much money you want to set aside. A trust may be worth the extra costs if your pets will likely need substantial money over several years: such as a sickly pet needing medical care, very young pets, horses or other large animals that have expensive boarding/feed costs, etc.;

- If you want your pet to be "euthanized", a letter can be written and placed with your Will, describing the specifics. It may be comforting to provide how, or by whom, a pet is to be "euthanized", and what burial arrangements you would like done. This is often a very difficult task for someone to carry out, especially if your pet is still healthy. Consider "euthanizing" as an option, rather than mandatory, if no other alternatives are available;
- Direct your Personal Representative to give the pets to a responsible organization that places pets in homes. Any cash gift that is effective on your passing must be in your Will or Trust.

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**MESSAGE:** This Information Sheet is intended to provide general information only. It is not intended to cover all of the legal issues that arise in each situation. It is suggested that none of the documents described above should be obtained or signed without first talking to an attorney who is knowledgeable about such matters. This material is dated and the enclosed information may change because of new laws, regulations, or other impacts.

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