When Should You Update Your Estate Plan?

Once you've created an estate plan, it is important to keep it up to date. You will need to revisit your plan after certain key life events.

Marriage

Whether it is your first or a later marriage, you will need to update your estate plan after you get married. A spouse does not automatically become your heir once you get married. Depending on state law, your spouse may get one-third to one-half of your estate, and the rest will go to other relatives. You need a will to spell out how much you wish your spouse to get.

Your estate plan will get more complicated if your marriage is not your first. You and your new spouse need to figure out where each of you wants your assets to go when you die. If you have children from a previous marriage, this can be a difficult discussion. There is no guarantee that if you leave your assets to your new spouse, he or she will provide for your children after you are gone. There are a number of options to ensure your children are provided for, including creating a trust for your children, making your children beneficiaries of life insurance policies, or giving your children joint ownership of property.

Even if you don't have children, there may be family heirlooms or mementos that you want to keep in your family. For more information on estate planning before remarrying, click here.

Children

Once you have children, it is important to name a guardian for your children in your will. If you don't name someone to act

as guardian, the court will choose the guardian. Because the court doesn’t know your kids like you do, the person they choose may not be ideal. In addition to naming a guardian, you may also want to set up a trust for your children so that your assets are set aside for your children when they get older.

Similarly, when your children reach adulthood, you will want to update your plan to reflect the changes. They will no longer need a guardian, and they may not need a trust. You may even want your children to act as executors or hold a power of attorney.

Divorce or Death of a Spouse

If you get divorced or your spouse dies, you will need to revisit your entire estate plan. It is likely that your spouse is named in some capacity in your estate plan – for example, as beneficiary, executor, or power of attorney. If you have a trust, you will need to make sure your spouse is no longer a trustee or beneficiary of the trust. You will also need to change the beneficiary on your retirement plans and insurance policies.

Increase or Decrease in Assets

One part of estate planning is estate tax planning. When your estate is small, you don’t usually have to worry about estate taxes because only estates over a certain amount, depending on current state and federal law, are subject to estate taxes. As your estate grows, you may want to create a plan that minimizes your estate taxes. If you have a plan that focuses on tax planning, but you experience a decrease in assets, you may want to change your plan to focus on other things.

Other

Other reasons to have your estate plan updated could include:

You move to another state

- Federal or state estate tax laws have changed
- A guardian, executor, or trustee is no longer able to serve
- You wish to change your beneficiaries
- It has been more than 5 years since the plan has been reviewed by an attorney

Contact your attorney to update your plan.

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How to Make Changes to Your Will

As life circumstances change (births, marriages, divorces, and deaths), it may become necessary to make changes to your will. If an estate plan is not kept up-to-date, it can become useless. The best way to make changes is either through a codicil – an amendment to the will – or by creating a new will.

While it may be tempting to just take out a pen and make changes by hand, this is not recommended. Changes will not be effective unless you use the same formalities as you did when drafting the will. And depending on state law, changes made by hand on the will may void the will altogether. If you sign your name to handwritten changes and have the changes witnessed, it is possible a court will find that the changes are valid, but there is no guarantee and there are likely to be delays with the court while your final wishes are sorted

out.

If you have small changes to make to your will (i.e., changing your executor or updating a name that has changed), a codicil may be appropriate. The benefit of a codicil is that it is usually cheaper than redoing the entire will. The same rules for wills apply to codicils, which means the codicil should be dated, signed, and witnessed. Always keep a codicil with the will so your personal representative can find it easily.

If you have significant changes to make to your will (i.e., adding a spouse or removing a beneficiary) or have more than one change, it is generally better to update your will rather than write one or more codicils. The updated will should include a date and a clear statement that all other previous wills and codicils are revoked.

Before you make any changes to your will, you should consult with your attorney.

For more information on when you should update an estate plan, click here.

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Using a No-Contest Clause in Wills and Trusts

If you are worried that disappointed heirs could contest your will or trust after you die, one option is to include a “no-

contest clause" in your estate planning documents. A no-contest clause provides that if an heir challenges the will or trust and loses, then he or she will get nothing.

A no-contest clause may be a good idea if you have a beneficiary who may be upset by the property distributed to him or her. However, no-contest clauses (also called in terrorem clauses) only work if you are willing to leave something of value to the potentially disgruntled heir. You must leave the individual enough so that a challenge is not worth the risk of losing the inheritance.

Most states allow no-contest clauses, but there may be restrictions. In many states, if the contest is based on probable cause or good faith, then the no-contest clause is unenforceable. That means that if the court determines there is a good reason for the contest, the clause won't prevent the challenging heir from inheriting. In addition, a no-contest clause may apply to some portions of your estate plan, but not others. For example, your heirs may be able to challenge your executors without violating a no-contest clause.

Two states –Florida and Indiana – will not enforce no-contest clauses no matter what. If you write your will in a state that enforces no-contest clauses and then move to Florida or Indiana, the no-contest clause will be void.

If you include a no-contest clause in your estate plan, you need to be sure there are no mistakes. If you leave out important property or aren't clear about property in your possession, your heirs could be completely disinherited if they try to fix any mistakes.

While a no-contest clause can be a good tool, there are other ways to discourage a will contest. To learn more, click here. Talk to your elder law attorney to determine the best method to protect your wishes.

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Effort to Fix Medicare's 'Observation Status' Loophole Gathers Steam

Support is building for legislation to correct a technicality in Medicare law that is preventing thousands of hospital patients from being covered for a subsequent nursing home stay.

Medicare pays all or part of the costs for up to 100 days of a nursing home stay, but only if the patient was first admitted to a hospital as an inpatient for at least three days. To avoid financial penalties from Medicare if they readmit patients too quickly, hospitals are increasingly not admitting patients at all but rather placing them "under observation" to determine whether they should be admitted.

Although Medicare's guidelines say it should take no more than 24 to 48 hours to make this determination, in reality hospitals sometimes keep patients under observation for up to a week. If the patient moves to a nursing home after the hospital stay without having been admitted or admitted for fewer than three days, the patient must pick up the tab for the nursing home – Medicare will pay none of it (unless the patient is lucky enough to be in a Medicare Advantage plan that chooses to cover the costs).

In a 2013 report, the Inspector General for the U.S.

Department of Health and Human Services identified more than 600,000 hospital stays that lasted for three or more nights but did not qualify the patient for coverage of nursing home care. In a recent report, AARP's Public Policy Institute found that between 2001 and 2009, Medicare claims for observation status grew by more than 100 percent.

But as hospitals' use of observation status expands and more beneficiaries are being denied nursing home coverage, the issue is attracting increased attention. In January, the observation status loophole made the NBC Nightly News in a three-minute segment titled "The Two Words That Cost Medicare Patients Thousands."

Rep. Joe Courtney (D-CT) has introduced bills since 2010 to allow the time patients spend in the hospital "under observation" to count toward the requisite three-day hospital stay for Medicare coverage of skilled nursing care. The legislation has gone nowhere, but Courtney is now optimistic that Congress will finally take action. His latest bill, H.R. 1179, was introduced with Iowa Republican Rep. Tom Latham and has 137 co-sponsors. A companion bill in the Senate introduced by Sen. Sherrod Brown (D-OH), S. 569, has 25 co-sponsors.

And last week, the American Bar Association passed a resolution urging Congress to enact the bills or similar legislation. In announcing news of the ABA's resolution, the Center for Medicare Advocacy, which has sued to force the government to change its rules governing how hospitals admit patients, said that it "and other advocacy groups are hopeful that increased awareness of the Observation status problem will lead to a solution.

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Medicaid Expansion Signups Hindered by Fear of Estate Recovery

A fear that the government will seize their house after they die is causing some people to not sign up for expanded Medicaid under the Affordable Care Act (ACA). A long-standing provision in Medicaid law allows states to recoup Medicaid costs by putting a claim on the home or other assets of older deceased Medicaid recipients.

In 1993, Congress passed a law requiring that states try to recover from the estates of deceased Medicaid recipients whatever benefits they paid for the recipient's long-term care. But the law allows states to go further and recover all Medicaid benefits from individuals over age 55, including costs for any medical care, not just long-term care benefits.

The ACA gives states the option of expanding Medicaid eligibility to individuals and families with incomes up to 133 percent of the poverty line, and so far 26 states have taken this option. Now that more people are becoming eligible for Medicaid under the ACA, there are potentially more people who may have their houses (or other valuable assets) sold after they die to pay off Medicaid debt. People subject to this estate recovery would have to live in one of the 26 states, and their state would have to be recovering the costs of all Medicaid benefits, not just long-term care. Still, there are protections: the state cannot take a house if there is a surviving spouse, a child under age 21 or a child of any age who is blind or disabled.

According to the *Washington Post*, the realization that their house might be subject to estate recovery is giving some with low incomes second thoughts about signing up for Medicaid, even though not doing so will likely mean going without any insurance at all. ACA plans bought in the regular marketplace are not subject to estate recovery, but individuals who qualify for expanded Medicaid coverage are not able to get a subsidy to buy coverage in the marketplace. If someone doesn't want to be subject to estate recovery, there are two options: buy a plan from the marketplace without a subsidy, or buy no insurance at all.

In order to encourage people to sign up for Medicaid, both Oregon and Washington have changed their rules to allow estate recovery only for long-term care debt. In addition, advocates are asking the federal government for clarification on whether Medicaid estate recovery will apply to people who purchase expanded Medicaid coverage. A spokesman for the Centers for Medicare and Medicaid Services told the *Post*, "We recognize [the] importance of this issue and will provide states with additional guidance in this area soon."

For the *Washington Post* article, click here.

For more on Medicaid's estate recovery rules, click here

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