

Family Estate Planning

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Appendix

Statements in this bulletin reflect Wisconsin legislation in effect as of June 30, 2017. Other states may have different laws; this information may not apply to property you own outside Wisconsin. This information was revised in 2017 by Mary Meehan-Strub, Karen P. Goebel, Philip E. Harris, and Linda Roberson. The authors wish to acknowledge and thank Richard J. Langer for his contributions on previous versions of this publication. The authors assume responsibility for these changes, but stress that this publication does not constitute legal advice and cannot be considered a substitute for discussing your specific situation with your own attorney.

Introduction

Planning an estate can be simple or very complex, depending on your assets and family situation.

Estate planning involves not only the disposition of property at death, but also the wise accumulation, use, and preservation of assets during life. It may include planning and executing documents such as a living will or powers of attorney that will carry out your wishes in case of a long illness, disability, incapacity, or incompetency.

Estate planning should be a continuing project. You need to modify your plan as:

- family circumstances change,
- assets change, and
- laws change.

The **goal of effective estate planning** is finding the best possible methods to meet your needs and wishes while minimizing current and future costs such as taxes and probate expenses.

This publication is intended to introduce the laws that affect estate planning in Wisconsin and to provide some ideas for planning. It is not intended to substitute for professional advice but will help you decide what professional advice you need and how to make the best use of that advice. This publication will also note the special challenges that non-traditional families face in their estate planning and will suggest possible solutions where they exist.

This booklet is organized into chapters that cover specific areas of concern in the estate planning process. These chapters are organized in three main areas.

- **Property ownership and distribution** covers how property is owned, the Wisconsin Marital Property Act, and probate procedures.

- **Estate planning tools** covers wills, trusts, powers of attorney, marital property agreements, and planning for incapacity.
- **Planning ahead** covers choosing a lawyer and selecting a financial advisory team.

Federal and state tax laws are covered in separate chapters, and a glossary at the end defines technical and legal terms.

Estate planning objectives

Since the ultimate goal of estate planning is to carry out your intentions for owning and disposing of assets and for taking care of family members, estate planning objectives depend entirely upon your desires. The following objectives are common to many people and may help you think about your own.

- **Financial security** — Many people want to make sure they have enough money to meet family members' basic needs. This concern arises at several stages of life. A young couple is often concerned about the financial security of their minor children in the event that one or both parents would die. People want to have enough money to pay living and medical expenses during retirement. They also want to make sure that if one spouse or partner dies, the surviving spouse or partner will have enough money to live on.
- **Minor children** — In addition to financial security for children, most people want to make arrangements for rearing minor children in the event of both parents' deaths. For non-traditional families, this is a difficult area.

- **Property disposition** — Many people have special plans for disposing of certain property. Family heirlooms may be earmarked for certain persons. Some people have a farm or other business that they want to turn over to children who will continue the business. Others have real estate they want to give to a particular person.

- **Fairness** — Most people want to treat surviving family members equitably. That does not always mean an equal division of the wealth that remains at death. Some children have more need than others or may have received help already. For example, if a couple were to die after paying for one child's college education but before the other went to college, an equitable distribution may include providing for the younger child's college education before the remaining estate is divided.

Some children have made greater sacrifices for the family, and deserve compensation. For example, a child who stays home to care for parents and help in the family business has invested time in the business and may deserve a greater share of the family wealth.

- **Minimize taxes and probate costs** — Most people want to minimize the amount of their tax liability and the costs of probating an estate.

Planning objectives often compete, and the planner must compromise. Each family's plan will differ, since each family differs in size, age, personal desires, health, property ownership, and means of livelihood. A family's plan must be tailored to fit its circumstances and should be reevaluated often.

Laws that affect estate planning

Legislatures and courts do not write a separate set of laws that apply only to estate planning. Instead, several sets of laws must be considered. You will find more detailed information on each of these areas in its section in this publication.

Property laws — Property laws govern ownership and the rights and duties with respect to that property. These rules define how property can be bought and sold, mortgaged, or given away. The federal government has left this area of the law to the states. So Wisconsin law is important to Wisconsin residents. Wisconsin's marital property law, effective January 1, 1986, governs the property rights and obligations of married people in Wisconsin. Real property in another state is subject to that state's laws.

Probate laws — At death, property owned by the **decedent** (deceased person) must be legally transferred to a survivor. State probate laws govern the process of determining who is to receive the property and then making the transfer.

Tribal laws — Probating the estate of all American Indians owning trust property is handled by the Bureau of Indian Affairs (see Resources, page 53).

Federal tax laws — After property and probate laws are applied to determine how property is transferred, federal tax laws are applied to determine the estate and gift taxes, if any, that must be paid to the federal government. The transfer method also affects the amount of federal income tax that must be paid.

Wisconsin tax laws — Wisconsin currently has no gift tax on lifetime transfers and no inheritance or estate tax on transfers at death.

Property ownership and distribution

Kinds of property

Real property

There are two basic kinds of property — real property and personal property. Real property consists of: land; permanent **improvements** to land such as buildings, fences, and crops; and whatever is underneath the surface of the earth, such as mineral rights.

Personal property

All other property is personal property, which may be either tangible or intangible.

Tangible personal property includes belongings such as cash, cars, furnishings, appliances, and clothing.

Intangible personal property

includes contracts with other people or entities, such as partnerships or corporations, or claims against them, such as mortgages or checking and savings accounts. The following list defines additional kinds of intangible personal property that people may own.

Life insurance — In general, a life insurance policy is a contract between the policy owner and the insurance company. According to the terms of this contract, the company agrees to pay policy proceeds to a beneficiary named by the owner upon the death of the insured. The insured person and the owner need not be the same. For unmarried people, the owner is the person designated as owner on the policy records. Marital property law applies different rules to life insurance owned by married people (see Life insurance on pages 11–12).

Savings bonds — The distribution of U.S. Savings Bonds proceeds is governed by U.S. Treasury Regulations rather than by Wisconsin inheritance law. These regulations provide for three forms of registration: in one name, in the names of two persons as co-owners, or in one name payable-on-death (POD) or transfer-on-death (TOD) to one other designated individual.

If a savings bond is registered in one person's name and he or she dies, the bond becomes part of the decedent's estate. When a bond is registered in the names of two persons, either of them may cash the bond. When one dies, the other is the sole owner.

When a **payable-on-death (POD) or transfer-on-death (TOD)** beneficiary is named, the designated beneficiary receives the proceeds on the owner's death.

Bank accounts — Savings or checking accounts at a financial institution may be held as single or joint accounts. Only the named individual can draw upon a single account, unless it is an agency account. Upon the designated owner's death, the single account is closed and becomes part of the decedent's probate estate — unless it is designated as payable-on-death (POD) or transfer-on-death (TOD) to a beneficiary.

A joint account may be held by any two or more people, and has **survivorship rights**. Upon the death of one party, the account becomes the property of the survivor(s) — unless there is strong evidence that the person who established the account intended the survivor to be an agent only for signing checks and making withdrawals. If you want to have such an agent, the better practice is to set up an agency account or give your agent power of attorney.

Accounts owned by married people are presumed to be marital property. Accordingly, a spouse may have an ownership interest in an account even if his or her name does not appear on the account.

Wisconsin law permits husbands and wives to create a **marital property account** the spouses co-own, but this account does not include the right of survivorship. A marital property account must be payable on request to either or both spouses and designated as a marital property account.

During the lifetime of the husband or wife, the account belongs to both without regard to their individual contributions to the account. Upon the death of the husband or wife, the survivor owns 50 percent of the net sum on deposit, and the deceased spouse's probate estate owns the other 50 percent.

Securities — The term **securities** commonly refers to **stocks and bonds**. The most common kind of stock is **common stock**. When you buy common stock in a company, you become a stockholder and part owner of the company. Stockholders are entitled to voting rights and dividends, at the board of directors' discretion.

Preferred stock guarantees stockholders a fixed rate of dividend paid before dividends are paid to common stockholders. Owners of preferred stock also have prior claims against the company's assets in case of liquidation.

When you buy **bonds**, you are lending money to the company rather than buying a part ownership. A bond is an IOU issued by a corporation or branch of the government. The bond is a promise to repay the loan at a specified time and rate of interest at regular intervals.

If you buy federal government bonds, you are lending money to the United States of America.

If you buy corporate bonds, you are in essence buying a promissory note from the corporation, usually issued at \$1,000 each. As a bondholder, you expect to earn a fixed interest on the money lent. But in this case, you are a creditor of the corporation and not a part owner. Often, corporate bonds are sold to the public by investment bankers who buy the bonds from the corporation and then sell them to the public.

Municipal bonds are issued by a state or political subdivision, such as a county, city, town, or village, as a way of raising funds needed to operate or make improvements.

The term also designates bonds issued by state agencies and authorities. In general, municipal bonds differ from other bonds in that the interest paid on these bonds is exempt from federal income taxes and from state and local income taxes within the state of issue.

Mutual funds — Some people invest in mutual funds by buying shares in an investment company. The company (sometimes a trust) uses its capital to invest in other companies.

Retirement plans — At least 10 kinds of retirement plans are available: defined-benefit pension plans, money-purchase pension plans, profit-sharing plans, savings plans, employee stock-ownership plans, tax-sheltered annuity plans (TSAs), tax-deferred retirement plans such as 401(k)s, 403(b)s, and others, individual retirement accounts (IRAs), Keogh plans, and simplified employee pension plans.

Some are funded by the employer or by the employer with optional employee contributions. Others, such as IRAs or Keogh plans, allow employees or self-employed persons to contribute to plans they set up on their own.

Funds contributed to these plans may be invested in a variety of ways. For example, defined-benefit pension funds provided by employer companies are usually diversified among stocks, bonds, cash, and sometimes real estate. In contrast, employee stock-ownership plans invest funds on behalf of the employee in the employer company's stock.

IRAs are accounts the wage earner sets up with a bank, brokerage company, insurance company, mutual fund, credit union, savings and loan, or independent trustee.

Pension plans are an important form of property ownership for many people and may be one of the largest assets a working person owns. Plans have different kinds of benefits. Some provide **annuities** that pay out sums to the employee each month after retirement, some provide **lump sum payments**.

Some pension plans require that an employee work for a company for a certain number of years before the plan will **vest** — that is, be owned by the employee. If the employee terminates employment prior to becoming vested, he or she forfeits the money the employer has put aside as a pension contribution.

Ways to own property

You can own property in a variety of ways. The best way for you to own property depends on your individual or family situation, as well as your wishes and expectations for future ownership transfer of that property.

Sole ownership

Sole ownership is the simplest form of ownership. One person owns all the interest in the property. The owner may lease, mortgage, or transfer the property during his or her lifetime. At the owner's death, this solely owned property becomes part of the owner's probate estate and passes to those entitled to it by inheritance laws or under the owner's will.

Co-ownership

Co-ownership of property in Wisconsin may occur in one of three forms. The two traditional forms of property ownership are tenancy-in-common and joint tenancy. In these terms, **tenancy** means holding ownership rights. A third form of co-ownership applies only to married people — marital property ownership, discussed later in this section.

Arnold and Arthur are brothers who own a vacation cottage together as equal **tenants in common**. Arnold dies. Arthur still owns his one-half interest in the cottage. Arnold's one-half interest passes to the beneficiary he named in his will. If Arnold has no will, his one-half interest passes to his legal heirs.

Tenancy in common — This exists when each of two or more persons owns an undivided interest in the property. Each owner has a right to a fraction of the property, but not to a specific part. Each tenant-in-common may transfer his or her interest during his or her lifetime. If an interest is owned at death, it becomes part of his or her probate estate. Thus, upon the tenant's death, each tenant's fractional interest will pass to those designated by inheritance law or under the tenant's will.

The tenants may agree to a physical division of the property, or they may bring a court action for a property partition or division.

Joint tenancy — This exists when two or more persons own the entire property with the **right of survivorship**. This means that at the death of one joint tenant, his or her interest passes directly to the surviving joint tenant(s). It does not become a part of the decedent's probate estate. Therefore, it cannot be controlled by his or her will and is not subject to creditors' claims against the estate. The last surviving joint tenant becomes the sole owner of the property.

Betty and Barbara own a piece of property as **joint tenants**. Betty dies. Barbara becomes sole owner of the entire property. Betty could not give away her ownership interest in her will.

During the lifetimes of all co-owners, their interest in the jointly held property is subject to the claims of their creditors and to division at divorce.

Beatrice makes her son Bob a **joint tenant** on her home. Bob's wife Bonnie subsequently files for divorce. Bob's interest in his mother's home is subject to division in this divorce action unless he can prove it was a gift.

For property acquired **before** January 1, 1986, Wisconsin law states that if husband's and wife's names are on a document of title, without any indication of contrary intent, they own the property as joint tenants. Thus, the survivor would succeed to an ownership interest in the whole property.

For property acquired **on or after** January 1, 1986, the Wisconsin Marital Property Act changed this rule. For discussion of property ownership by spouses, see pages 6–16.

Unless otherwise stated, co-tenants who are not married to one another are tenants-in-common. If they wish to be joint tenants with the right of survivorship, the deed or instrument of title must state that intention.

Ownership interests measured by time

Ownership interests may be measured by time and may vary in duration.

Fee simple ownership describes the interests of an owner who has an unrestricted right to lease, sell, mortgage, or otherwise manage and control his or her interests in property during his or her lifetime. Upon the owner's death, these interests pass according to inheritance laws or provisions of the owner's will.

Life estate ownership is limited to a lifetime. A life estate owner — called a **life tenant** — holds ownership rights for his or her lifetime. In some unusual circumstances, a life tenant's rights are measured by another person's lifetime.

Upon the death of the person whose lifetime measures the life estate, the ownership rights pass to another person whose interest in the property is called a **remainder interest**. The life tenant does not have the right to will any interest in the property in which he or she has a life estate. In this case, no interest in that property can be included in the life tenant's probate estate.

A person may create a life estate by conveying the remainder interest to another party, but retaining ownership of the life estate. In that case, however, for estate tax purposes the full value of the property will be included in the life tenant's gross estate at his or her death.

Generally, if someone other than the life tenant creates a life estate, it will not be included in a life tenant's gross estate for estate tax purposes.

A life tenant is entitled to receive income generated by the property. If the property is real property, the life tenant may occupy and use the property as he or she wishes, as long as the remainder interest owners' property rights remain intact. The life tenant is obligated to pay taxes and keep up maintenance on the property.

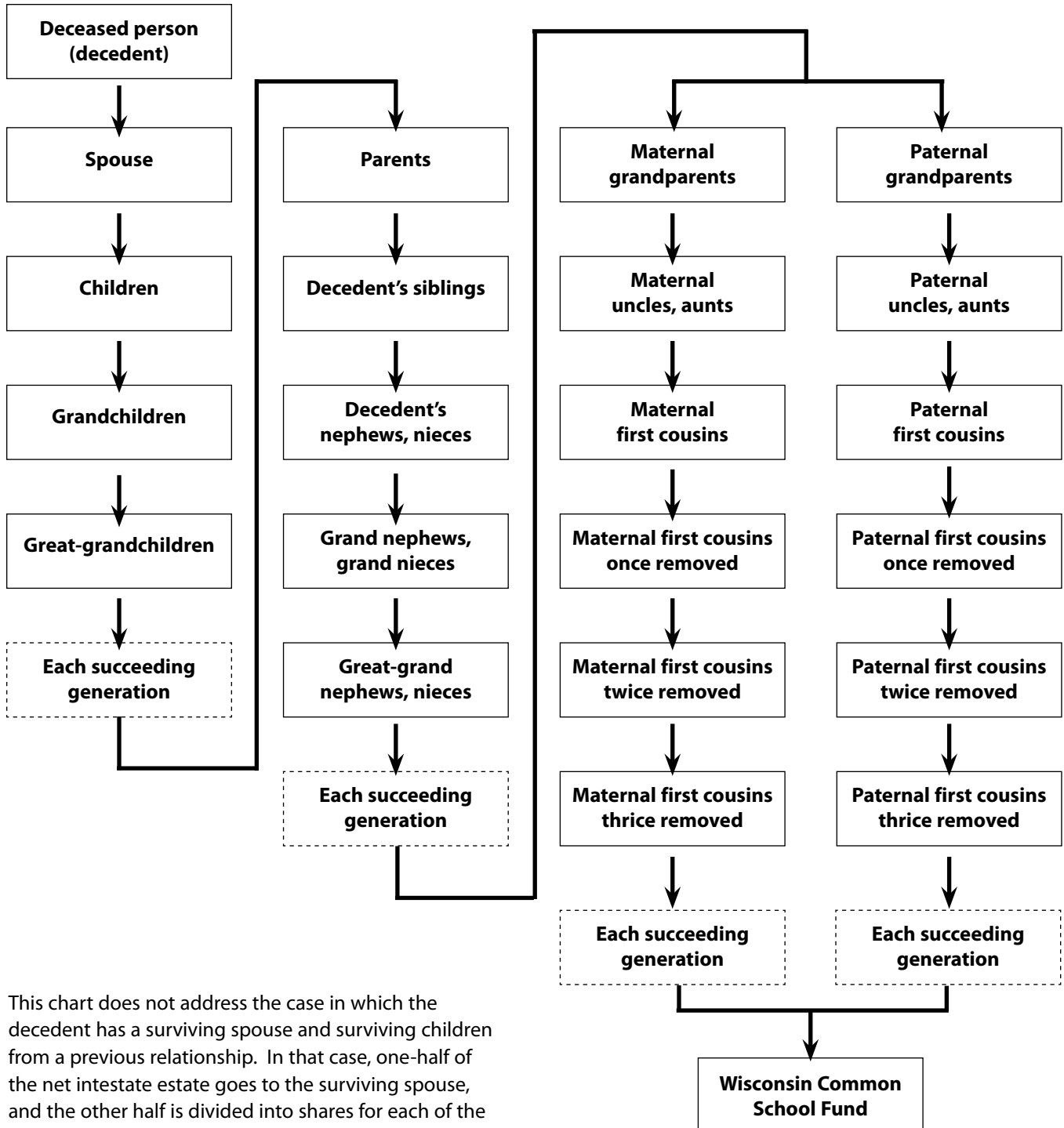
A life tenant may sell his or her life interest or lease the property during his or her lifetime. But the buyer or lessee gains no greater rights in the property than the original life tenant has.

Life interests in personal property are usually created by trusts. If the tenant and owner of the remainder interest agree, they can lease, mortgage, or transfer the property the same as a sole owner.

Cora's will states that some property passes to her daughter Christine during Christine's lifetime. And on Christine's death, the property passes to Christine's daughter Catherine. Christine holds a life estate in the property, and Catherine has a **remainder interest**.

Intestate succession flow chart

This chart shows the order of distributing the **net intestate estate** (after debts and taxes are paid) when a Wisconsin resident dies without a valid will.



This chart does not address the case in which the decedent has a surviving spouse and surviving children from a previous relationship. In that case, one-half of the net intestate estate goes to the surviving spouse, and the other half is divided into shares for each of the decedent's children.



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