



The 5 Most Important Estate Planning Documents



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1. Last Will and Testament

If you have a will, it does not mean you will avoid the probate process. A will merely provides instructions to the probate court about your wishes. Any individual assets that are not titled in the name of a trust, or do not have a beneficiary form stating who the asset will go to at your death, is a probate asset. When assets go through the probate process either formally or informally, the court looks to the decedent's will to determine who the decedent chose as beneficiaries. If the person who died did not create a will, the court must rely on state statutes to determine who will receive the decedent's probate assets. Sadly, only about 25% of Americans create a will. This means about 75% of individuals leave asset distribution decisions up to their state legislators.

In a will you name:

- Whom you want to raise your minor children should something happen to you and the other biological parent
- Whom you want to receive any of your financial assets, personal property, real property, or pets that go through the probate process
- Whom you want to act as your Personal Representative (some states call this the Executor) i.e. the person that manages the probate process for your family

If someone dies without a will (called intestacy) then we must follow state law. There are default state statutes that instruct the court as to who has priority to act as personal representative and to whom assets are distributed.

There are some surprising examples of what actually happens to assets under Arizona law, especially with blended families where a spouse has a child from a previous relationship. For example, Sally and Bob are married. Bob has children from a previous relationship. Bob inherited his families' farm which is titled in his name alone and he has kept it separate from the community property he shares with Sally. Bob suddenly dies without ever creating his will. First, all of the community property will be divided equally and Sally will get her 50% share of the community property. Bob's estate will be distributed as follows:

1. Bob's 50% of the community property will be awarded to his children equally.
2. Bob's separate property will be split equally: 50% of the family farm will go to his surviving spouse, and the other 50% will go to Bob's children equally.

For most blended families, this is not the scenario they expected. I recently had a probate estate for a widow who was married 18 years before her husband passed away. Husband's 20 year-old-daughter received all of the husband's community property assets. Assets that the husband and wife had spent 18 years building together.

There are no state defaults as to whom will be chosen to raise a decedent's minor child. In those extremely sad cases, there is litigation for a judge to make the determination as to who will raise the child based on what the judge believes is in the child's best interest. These trials can be very stressful and contentious. They also come at a time when a child is grieving the loss of a parent and now is uncertain who will raise them or even where they will live. How dare we as parents leave this critical decision about our most precious assets to someone we don't even know!

Lastly, in Arizona, one may create a holographic will that is handwritten and signed. A holographic will does not need to be witness or dated, but it is advisable to at least date the document. Holographic wills are mostly created in emergency situations or end-of-life situations in hospitals where there is not enough time to create a proper will. The drawback of holographic wills is that there is greater risk of making errors in the document that likely will increase court costs.

Do you want the court to decide who will raise your children? Or to whom your probate assets should be distributed? If not, I recommend you see an estate planning attorney who can advise you as to what provisions to place in your will based on your family and your goals. A comprehensive and properly drafted will can help ease your family's pain and expense during a probate process.

2. HIPAA Release

A universal HIPAA authorization release form that can be utilized anywhere— not just the office or hospital where you signed the document—is an important tool to include in your estate plan for several reasons.

First- a HIPAA release form allows your healthcare power of attorney to access your medical records so that they may make informed decisions regarding your healthcare needs.

For example, when my father-in-law Matt fell ill, my mother-in-law Carol began making his healthcare decisions per his Healthcare Power of Attorney. Unfortunately, Matt did not have a HIPAA release form. When it came to the end of his life, Carol was making medical decisions for Matt without fully knowing his medical history. This is because Matt—a private man—did not share with his wife or family that he had been diagnosed with a disease several years earlier. This information could have helped Carol make some extremely tough decisions near the end of his life.

Second- a HIPAA release form allows your loved ones to call the medical facility you are in to see how you are doing.

Several years ago my friend Mike helped his sister register and move into a hospice facility in Scottsdale, AZ. He called the next day to see how she was doing. The following conversation ensued.

Nurse: I'm sorry, we do not have a HIPAA authorization form on file so we cannot disclose any information.

Mike: That's OK. Just transfer me to her room and I'll speak with her.

Nurse: I'm sorry. We cannot do that. She is no longer at this facility.

Mike: Where is she?

Nurse: I'm sorry. We cannot disclose any information to you.

Mike spent the next few hours calling around to hospitals, other hospice facilities, and even the morgue to find his sister. After failing, he called the hospice facility back. A very nice nurse told him, "Hypothetically, Mike, if we were going to move a hypothetical patient, we hypothetically would transfer them to the hypothetical facility at this hypothetical address." A nurse had to break Federal law for him to find his sister, but what if she hadn't?

Third- a HIPAA release form can restrict individuals you do not want to get access to your medical information.

My mom experienced heart problems while on vacation a few years ago and we had to life-flight her to a Denver area hospital. Before we were able to present any documents to the hospital, a very nosy, but concerned cousin called the hospital and started getting access to my mom's medical information and status. We were able to stop this flow of information by showing the hospital that this person did not have any legal authority to access this information.

Help yourself and your family avoid these headaches by including this tool in your estate planning toolbox!

3-5. Powers of Attorney

A Power of Attorney (POA) is a document that allows your chosen agent to help you while you are alive. In Arizona, there are three separate POAs:

- **Financial, (also called Durable)**
- **Healthcare, and**
- **Mental Healthcare.**

Arizona is only one of a few states that have the latter so many out-of-state healthcare documents are ineffective when it comes to helping a patient with Alzheimer's, dementia, or a traumatic brain injury.

Here are a few examples of how these documents could be used.

Several years ago, a wife wanted to sell the family car before the end of the year to take advantage of a tax break. The problem was her husband was on title to the vehicle and he was overseas working. When you are in another country, the only way to get a document notarized is to make an appointment with either the US Embassy or Consulate. These appointments can sometimes take 4-8 weeks to schedule. She had to wait weeks before getting her husband's notarized signature back on the car title. If she had been POA for her husband, she could have signed the document immediately on his behalf.

A client's daughter went overseas as part of a college-abroad program. Unfortunately, her daughter's purse including her phone and wallet were stolen in Spain. Because daughter had made her mom her POA before she traveled, mom was able to contact daughter's credit card companies, banks, phone company, and credit reporting agencies to notify them of the theft.

A 93-year old client came to our office to sign the POA we had created for her. Her health was declining and she expressed concern that she would not be able to attend the meeting she had in a few days with the title company for her house closing process. I told her not to worry. "Send your daughter to the meeting instead! You just made her your POA."

My mom wasn't feeling well several years ago during our family vacation in Colorado. My brother-in-law drove her to the emergency room. Several hours later she went in cardiogenic shock and had to be life-flighted to another hospital. Mom stayed in the hospital for 19 days, mostly in and out of consciousness in the ICU. During that time, my family relied on her POA to make medical decisions for her.

Powers of Attorney (POA) are state specific documents. That means each state has its own rules on what each document must say and how it must be executed. Because of this, a POA from Arizona may not work in Ohio and vice versa. If you just moved here from another state you should make sure to update your POA documents. Snowbirds should have a state-specific set of documents for each state they live.

Here at Cholewka Law, one of the biggest mistakes we see people making is taking advice from folks that are not trusted estate planning attorneys.

People listen to their neighbor, their brothers and sisters, their friends, and their hairdresser. These people don't have malicious intent, they're not trying to lead you astray, but they are not estate planning attorneys. They might be giving you the answers from another state or what happened to their friend or their family member, but it's important to talk to somebody that is in your local area that knows the local laws so that they can give you the best estate planning advice for you. Every family has different goals, different assets and a different situation to consider when planning an estate.

Some of our most expensive probate cases are people who used paralegals or online document services to prepare their estate plan. Most of these documents aren't state specific and neither can give you legal advice. They're just going to input your answers into a form and in some cases you would be better off with nothing than a poorly executed document.

This is not an area where you call your neighbor the divorce attorney, or the attorney you used for your personal injury case. It's important to have a trusted estate planning attorney that is local and where the majority of their practice is in estate planning. Here at Cholewka Law, estate planning and probate is all we do. Our goal is not only to provide you with estate planning documents, but to guide you through the process and prepare a personalized estate plan that works. We want to keep you out of court, we want you to have documents that will work if you need to use them.

The very first step in planning is deciding to take action. If you are interested in reviewing your options and speaking with an attorney about planning for your family, call our office at 480-497-3770 to schedule a consultation. We look forward to helping you protect your family when something should happen to you.