

DOCUMENT REVIEW

Considerations and Documents of Estate Planning

Wealth & Estate Planning Strategists
Family Office Resources

When engaging in estate planning, individuals can consider and prepare for a range of important circumstances including: disposal of assets upon their death; protecting and providing for their beneficiaries and; ensuring medical or financial decisions will be made in the case of their physical or medical incapacity. Addressing these circumstances may involve preparing any one or more of a Last Will and Testament (a “Will”), a Revocable Trust, a Health Care Proxy, a Living Will, and a Power of Attorney (all of which are addressed below). As an example, preparing a Will can avoid an intestacy when someone passes away. When someone dies intestate (without a Will) their estate is administered, and their assets disposed of pursuant to applicable state laws; those laws may not mirror the decedent’s wishes or intentions. If an individual becomes incapable of managing their personal or financial affairs and does not have certain paperwork in place, such as a Power of Attorney, a court proceeding may be required to appoint a guardian or conservator to do so. Preparing a Will or POA can, therefore, ensure a decedent’s wishes are carried out and could prevent the need for time-consuming court proceedings.

Control of Assets Upon Death

Will

A Will is a document in which you, as an adult, can name a representative (Executor) of your estate and lay out how your property in your name will be distributed after your death. A Will needs to be drafted and signed in accordance with the formalities of your state. It only takes effect after your death and upon approval of the court. You can revise and revoke your Will up until your death. Property passing in accordance with your Will is called “probate property” and can include property you owned individually or as tenant in common and your share of any community property. Probate is the judicial process of proving a Will is valid. The main goal of probate is to have a representative appointed for your estate.

Testamentary Trust

A testamentary trust is created under your Will and will take after your death. Property transferred to testamentary trust is administered by the trustee you name who is under a fiduciary duty to manage, invest and administer the property for the benefit of designated beneficiaries.

Revocable Trusts

A revocable trust, also known as a living trust, on the other hand, is a private document created during your lifetime. You can include language in the document allowing you to readily amend or revoke the trust. You continue to own the assets in the revocable trust for income tax purposes and the assets will be included in your gross estate for estate tax purposes. On your death, a revocable trust becomes irrevocable. Trust property is disposed of according to the terms of the trust and the trust provisions effectively act as a Will substitute. Moreover, assets already in the trust at the time of death avoid the probate process. In contrast to a Will, the trust itself also avoids probate and therefore remains a private document. From an investment perspective, revocable trusts can seamlessly, and without the delays associated with a probate proceeding, transfer control over the trust assets to the successor trustee (typically when the settlor is incapacitated or deceased), which can be particularly useful when an individual owns a concentrated and volatile equity position.

Personal Effects

- Are there any items of special significance that you want to give to anyone in particular?
- Assuming your personal property goes to the survivor of you and your spouse, how do you want the property disposed of on the survivor's death? Do you want it to pass to children? Do you want it to pass equally, or as they may agree, or another way (e.g., as the executor decides)?

Examples of Trust Structures

Depending on the size of your estate, it may make sense to have assets equivalent to the maximum amount that may pass free of federal gift and estate tax (\$13.61 million in 2024) "bypass" the surviving spouse and be paid to a trust. The trust assets would not flow directly to the surviving spouse, but this structure also would not necessarily deprive the surviving spouse of use of the trust assets. Generally speaking, you may:

- Make a gift of the amount outright or in trust to beneficiaries other than your spouse (e.g., your children or other individuals).
- Create a trust that benefits your spouse or your spouse and descendants, giving the trustee the discretion to distribute income and principal of the trust to any permitted beneficiary.
- Give your spouse the option of either taking the assets or "disclaiming" them into a separate trust.
- Generally speaking, each U.S. citizen spouse should consider owning assets individually equal to the exemption amount (\$13.61 million in 2024) to take full advantage of the federal estate tax exemption. This enables each spouse to take maximum advantage of estate tax exemption and allows for growth on those assets outside of the surviving spouse's estate. However, if a spouse is not able to fully utilize the estate tax exemption because the spouse dies without sufficient assets to fully utilize the available estate tax exemption, the surviving spouse's estate may be able to use the predeceased spouse's unused estate tax exemption amount, during the surviving spouse's life or when the surviving spouse dies, if a timely election is filed after the death of the first spouse.

Another consideration is whether the balance of your estate should flow directly to your surviving spouse or whether you want the balance to be held in trust for your surviving spouse's benefit. Use of a marital trust, also known as a "QTIP" trust, or qualified terminable interest property trust, allows you to control the disposition of the property held in the QTIP trust upon the death of the surviving spouse. In order for a QTIP trust to qualify for the marital deduction (which is effectively a deferral of the estate tax until the surviving spouse's death), the surviving spouse must receive all income from the QTIP at least annually. The surviving spouse's access to principal may be as liberal or restrictive as you may desire.

In the case of a non-US citizen spouse, a QTIP trust cannot be used. However, a substitute marital trust, referred to as a “QDOT” or qualified domestic trust, may be used to obtain the marital deduction.

Consider also whether you wish to grant to your spouse a power of appointment over trust assets. With respect to the “bypass” trust and QTIP trust, the surviving spouse can be given the right to appoint trust property to or among individuals (outright or in further trust) on the surviving spouse’s death. Note, however, that this power may not apply to assets that the surviving spouse disclaims.

Gifts to Children

Generally, children or other descendants inherit assets upon the death of the surviving spouse. Do you want property to pass to them outright or in trust?

Although outright distributions give your children flexibility, it also exposes your children to the claims of potential creditors. To the extent assets remain in trust, the trust may provide protection from creditor claims against your children and can provide a means for controlling how and when the assets are distributed to your children. You may desire to consider the following as examples of your potential choices:

- Full discretion to the trustee (other than any child who is a beneficiary of the trust) over how income and principal are distributed to your children over your child’s lifetime or until the child reaches a stated age.
- Mandatory distributions of income each year after each of your children reach a stated age combined with giving the trustee discretion over how principal is distributed (for “health, education, maintenance and support,” “to start a business,” “to purchase a residence,” “for emergencies”).
- Mandatory distributions of principal at stated ages (e.g., one-third when the beneficiary reaches age 30, one-half when the beneficiary reaches age 35, and the balance when the beneficiary reaches age 40).
- Upon the beneficiary’s death, property may pass to the beneficiary’s children or as the beneficiary appoints among the beneficiary’s descendants.

Contingent Beneficiaries

If no descendants survive you or the surviving spouse, who do you want to inherit your property? For example, you could provide that one-half of the amount should be payable to each of your and your spouse’s siblings, as a group; and one-half to each of your and your spouse’s parents, or if deceased, then to other particular individuals. Should you be charitably inclined, you may also provide bequests to charities.

- Preparation suggestion: Specify names and relationships to you of your family members and any other potential beneficiaries.

Fiduciaries

You may begin to consider who you want to appoint as fiduciaries:

- Executor of your estate. The executor gathers the assets of your estate, pays expenses and then distributes assets to your beneficiaries outright or to the trustee of any trusts you have established under your Will. Generally, it is a temporary role, but it is also a very important role.
- Trustee of any trusts. You should keep in mind that a beneficiary generally should not be sole trustee of a trust for his/her benefit unless certain restrictions have been imposed on his/her trustee powers by the trust agreement or state law.
- Guardians of any minor children. It should be noted that the court can always review the appointment to determine if it is in the best interests of the child(ren).
- Preparation suggestion: Gather names, addresses and telephone numbers of each individual you may wish to name as a fiduciary.

Management of Assets During a Period of Incapacity

Revocable Trust & Power of Attorney

If you have created a revocable trust and later become incapacitated, the successor trustee named in the trust, rather than a court-appointed guardian or conservator takes control of the trust. You would generally serve as the sole initial trustee of your revocable trust and then, upon your incapacity, the successor trustee will take control of the trust, and not a court-appointed guardian or an agent named in your Power of Attorney.

- Begin to think about whom you would want to name as successor trustee in such case (to avoid expensive, drawn-out court proceedings). Consider an alternate successor trustee as well in case your first-choice trustee is unavailable or does not wish to act.
- Preparation suggestion: Gather names, addresses and telephone numbers of each individual you wish to name as a successor trustee.

A Power of Attorney is an instrument by which you (the principal) appoint another person (the agent) to act on your behalf with respect to any or all of your property. Although not as robust as a revocable trust, a Power of Attorney can also facilitate the transfer of authority over your assets to a fiduciary. Unlike a revocable trust, though, a Power of Attorney terminates at your death.

- A Power of Attorney can be “durable,” which means that the power of attorney does not terminate once one becomes incapacitated or disabled.
- A Power of Attorney can also be effective immediately upon execution or, if you are reluctant to grant immediate powers, it can “spring” into effect at a specified future time or upon the occurrence of a specified event such as your incapacity or disability. Mechanism for Making Health Care Decisions During a Period of Incapacity.

Health Care Proxy & Health Care Directive / Living Will

A Health Care Proxy is an instrument by which you (the principal) grant another individual (the agent) the authority to make health care decisions in the event of your incapacity or inability to communicate. The agent can be any individual, such as a spouse, a trusted friend, or a family member. The Health Care Proxy becomes effective only if you become incapable of making your own health care decisions, including decisions with respect to the withholding or withdrawal of life-sustaining medical treatment and artificial nutrition and hydration.

A Health Care Directive, also known as a Living Will, is an instrument by which you express your intent or preferences with respect to health care matters, including the withholding or withdrawal of life-sustaining medical treatment and artificial nutrition and hydration. A Health Care Directive / Living Will often include broad language intended to cover unanticipated situations or new treatments. Under the Health Insurance Portability and Accountability Act (HIPAA), a privacy waiver may be required to enable physicians and hospitals to share medical information with your health care agent in an emergency. This waiver may be a separate instrument, but it is often included in the Health Care Directive.

If you have executed a Health Care Proxy and a Health Care Directive / Living Will, the health care agent is generally required to act in accordance with your wishes, but state law varies. The Health Care Directive / Living Will generally serves as specific evidence of those wishes.

- Begin to think about whom you would want to make medical decisions on your behalf in such case (to avoid placing medical care providers in control). Consider alternate agents in case your first-choice agent is unavailable or unwilling to act.
- Preparation suggestion: Gather names, addresses and telephone numbers of each individual you wish to name as agent.

Summary

An estate plan commonly employs all of the above tools. A revocable trust can govern the management and disposition of property on death or during incapacity. Wills and Powers of Attorney are necessary to deal with assets not transferred to such a trust. For health care matters, you can empower an agent with a Health Care Proxy to make health care decisions on your behalf and a Health Care Directive / Living Will serves as a guide to the health care agent.

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