



the **virtual** attorney

**ESTATE PLANNING 101:  
TOOLS, TECHNIQUES AND  
FAQS**



## **Estate Planning Checklist**

### **BASIC DOCUMENTS THAT SHOULD BE PART OF EVERY PLAN**

- Last Will and Testament
- Living Will
- Durable Power of Attorney For Healthcare
- Durable Power of Attorney For Finances and Property
- Direction For Final Disposition

### **ADDITIONAL CONSIDERATIONS FOR EVERY PLAN**

- Review and Update Insurance Beneficiaries
- Review and Update Beneficiary Designations for IRA, 401(k) and Other Retirement Accounts
- List Financial Accounts
- List the Location of Important Titles and Records
- List Digital Assets, Account Names, Log-In Credentials and Passwords
- Provide a Trusted Family Member or Friend With the Location of All Estate Planning Documents
- Closely Held Business Planning

### **ADDITIONAL DOCUMENTS THAT MAY BE INCLUDED IN YOUR PLAN**

- Revocable Living Trusts
- Irrevocable Trusts
- Trusts For Minor Beneficiaries
- Charitable Gifts
- Other Gifts to Friends and Loved Ones
- Educations Savings Accounts



## **Estate Planning Terminology**

<b>Agent (Attorney-in-fact)</b>	An agent (sometimes referred to as an attorney-in-fact) is an individual who is authorized to act on another's behalf in certain matters. In estate planning it arises through the use of a power of attorney. An individual (the principal) appoints another individual (the agent) to make decisions on the principal's behalf relating to medical, financial and property decisions, typically upon the principal becoming incapacitated and unable to act for himself.
<b>Authorization for final disposition</b>	An authorization for final disposition sets forth an individual's wishes regarding how his or her physical remains should be disposed of after death, whether he or she wishes to donate organs, desired funeral arrangements and the like.
<b>Bequest</b>	A "bequest" is the act of giving property under one's will. Strictly speaking, an individual will <i>bequeath</i> personal property, and <i>devise</i> real property (such as a residence).
<b>Codicil</b>	A codicil is a document that amends or revokes certain portions of a previously executed will. Codicils are executed in the same manner as wills requiring the testator and witnesses to sign. Depending on the state, a holographic will or codicil (one that is handwritten) may or may not be recognized as valid if all other will requirements are met (Illinois may recognize them while Wisconsin does not).
<b>Estate</b>	In the area of estate planning an individual's estate specifically refers to all of the property, in whatever form, owned by the individual at any given time.
<b>Decedent</b>	A decedent is simply an individual who has died.
<b>Descendant</b>	A descendant is a relative in the direct line of an individual (i.e. children, grandchildren, great-grandchildren, etc.). The term also usually includes adopted children who are typically given the same right as naturally born children in estate planning matters.
<b>Devise</b>	"To devise" has similar meaning as "to bequest". Both mean to give something to someone in a will. Traditionally, "devise" referred to giving real property (land, buildings, etc.) and "bequeath" was used for other movable items. The distinction has largely fallen out of use.



## **Fiduciary Duty**

In the area of estate planning a fiduciary duty is imposed on trustees, personal representatives and agents appointed under a power of attorney. A fiduciary (an individual such as a trustee) is expected to exercise a heightened standard of care when he is acting in the interests of another. This includes a duty of loyalty and a duty to act in the best interests of another (whether it is beneficiaries of a trust, a decedent of an estate or a principal who has appointed him an agent through a power of attorney).

## **Guardian**

A guardian is an individual who is legally responsible for the care and management of a minor child in the event the parents are no longer living or able to care for the child. A guardian is also appointed to take responsibility for the person and property of an individual in the event he or she is deemed incompetent. Typically one is appointed in a will

## **Guardian *ad litem***

A guardian *ad litem* is a guardian who is appointed by the court to act in the same manner as a guardian appointed in a will or other document. The difference between a guardian and guardian *ad litem* is the amount of court involvement in making a determination of who should be appointed.

## **Grantor (Settlor)**

A grantor, settlor and trust-creator are all one in the same. They all refer to an individual who establishes a trust.

## **Heirs at law**

Heirs at law are those individuals who take the property of an individual dying without a will (intestate). Heirs at law are determined by the intestacy laws of the state where the person lives at the time of death.

## **HIPAA release**

Privacy laws limit who can access medical records of an individual and information relating to healthcare. A HIPAA release form permits another individual (usually a family member) to access medical records in order to make an educated decision regarding medical treatment and it permits a healthcare provider to share information regarding the medical status of a patient with loved ones.

## **Intestacy**

Intestacy is the act of dying without a valid will. When an individual dies intestate his or her assets are then distributed by the court through the probate process according to the intestacy laws of the state where the individual died.

**Irrevocable Trust**

An irrevocable trust is a trust that cannot (typically) be amended or revoked. By creating an irrevocable trust, a grantor transferring property to the irrevocable trust effectively gives up all legal rights in that property. Typically, irrevocable trusts are used for the tax benefits they present to a grantor.

**Issue**

Issue in estate planning typically refers to an individual's lineal descendants of all degrees (i.e. children, grandchildren, great-grandchildren, etc.).

**Living (*Inter-vivos*) Trust**

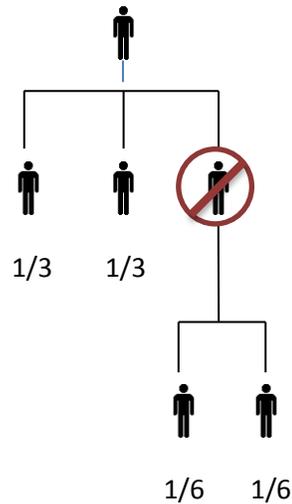
A living trust is a trust created during the settlor's lifetime. The settlor transfers assets to the trust to be managed by the trustee. Upon the settlor's death the assets in the trust pass outside of probate according to the terms of the trust. Typically unless stated otherwise a living trust is amendable and revocable by the settlor at any time.

**Living Will**

A living will is a document that sets forth an individual's wishes regarding lifesaving or sustaining procedures in the event he or she becomes incapacitated or otherwise unable to communicate his or her wishes. Typically it covers items such as the use of feeding tubes and other artificial life sustaining technology and when the use of such items should be discontinued.

**Per Stirpes**

Per stirpes distribution refers to the process of distributing a decedent's property in a manner so that each branch of the family receives an equal share regardless of how many members of that branch are living. For example, John Smith dies leaving his property to be distributed to his descendants in equal shares per stirpes. John has three children during life, Kim, Larry and Mark. Kim died before John, but she has two children who are still living, Nicole and Olivia. If John's estate is divided among his descendants per stirpes, then in this case Kim, Larry and Mark would each get  $\frac{1}{3}$ . Since Kim is deceased, Nicole and Olivia would split her share, each taking  $\frac{1}{6}$  of John's estate. So, Larry would get  $\frac{1}{3}$ , Mark would get  $\frac{1}{3}$ , Nicole would get  $\frac{1}{6}$  and Olivia would get  $\frac{1}{6}$ .



### **Personal Representative (Executor)**

A personal representative is the term used in Illinois and Wisconsin to describe the individual appointed to manage the legal affairs of a decedent. It carries the same meaning as executor in other states. Typically, a personal representative is appointed in a will. Upon the death of the decedent he or she manages the decedent's affairs, most notably, the probate process.

### **Pour-over will**

A pour-over will is used by an individual who have already set up a trust or trusts to pass any property remaining outside of the trust(s) upon death into the trust(s). The assets basically, "pour over" into the trust, thus the terminology. All assets would then be governed, managed and distributed according to the terms of the trust.

### **Power of Attorney**

A power of attorney is a written authorization to represent or act on another's behalf in certain affairs, typically of a medical or financial nature. A power of attorney is the document which gives an agent or attorney-in-fact the authority to act on a principal's behalf. A power of attorney can be drafted in a way so that the agent does not have any authority to act until such time the principal is incapacitated and unable to act for himself. This is known as a *durable* power of attorney. Typically in Illinois and Wisconsin this comes in two forms: a) the durable power of attorney for healthcare, granting authority to make decisions regarding medical treatment, and b) the durable power of attorney for finances and property, granting the agent the authority to act in financial and other transactions.

**Probate**

Probate is the formal process by which a will is proved to be valid or invalid, assets are collected, debts are paid, claims are filed on the estate and any remaining assets are distributed, either based on the terms or a valid will or, if there is no valid will, then according to the state intestacy statute.

**Revocable Trust**

A revocable trust is a trust that may be amended or terminated during the life of the settlor. Since the trust may be amended or terminated at any time the assets are considered to still be owned by the settlor. Therefore, it does not reap the tax benefits that an irrevocable trust would. Some main benefits of revocable trusts are: a) flexibility, b) ability to retain control of the assets during life, c) avoidance of probate, d) management of the assets by a trustee, and e) the ability to provide continuity of management in the event of a disability.

**Tangible Personal Property**

Tangible personal property is any property that can generally be moved, as opposed to real property (land, homes, etc.) In a will, an individual can generally make reference to a list of tangible personal property outside of the will directing that property should be distributed according to that list. The benefit of this approach is that the list can easily be updated as items are sold, given away or acquired, and thoughts change as to who that item should pass to upon death.

**Testator (or testatrix)**

A testator (or testatrix) is an individual who dies leaving a valid will. The adjective “testate” means having made a valid will before death.

**Trust**

A trust is a separately created entity which holds property to be managed and distributed according to a specific set of detailed instructions. Trusts come in a number of different forms and can be revocable or irrevocable, but each involves the same three entities. A trust is created by a *settlor*. It is then managed by a third party *trustee* per the terms of the trust agreement for the benefit of the *beneficiaries*.

**Trust Agreement**

A trust agreement is a written agreement which establishes the trust. In the trust agreement the settlor transfers legal ownership of property to the trustee to manage for the benefit of the beneficiaries.

**Trustee**

A trustee is an individual or organization (such as a financial institution) that holds or manages property for the benefit of another (the beneficiarie(s)). A trustee has legal obligations to make decisions regarding the trust property which are in the beneficiaries’ best interests and may be liable for damages for not doing so.



## **Will**

A will or testament is a legal declaration by which a person (the testator) names one or more persons to manage his/her estate and provides for the transfer of his/her property at death.



## **Frequently Asked Estate Planning Questions**

### **What happens if I die without a will?**

Dying without a will is called dying *intestate*. If you die without a will, state intestacy laws determine who will receive your property. These laws vary from state to state, but typically they follow a common scheme, distributing your assets to your spouse and children. If you are not married and have no children then your assets are distributed to other family members. Generally speaking, the intestacy laws follow a scheme which imitates how the average person would wish his or her assets would be distributed; it is a sort of guess by the legislature as to what you would most likely desire.

### **Will a will govern the transfer of all of my assets?**

A will provides for the distribution of many types of property you own upon your death from small personal items to homes or land. However, some types of property are not distributed according to a will, such as insurance policies. A will can contain provisions with direction that an individual receive a specific piece of property or it can direct that everything owed at death go to the same individuals. The important thing to remember is that, while a will can take care of many dispositions, there are some items which should be separately reviewed by an attorney to ensure they will be disposed of according to your wishes.

### **What do I need to do to properly execute my will?**

The steps necessary to validly execute a will vary from state to state, however, generally speaking you will need to sign your will in the presence of two adult witnesses who then sign the document as well. The reason for such strict requirements is that a court wants to be very sure that a document purporting to be a will does in fact reflect the final wishes of the author. Generally, a will does not need to be notarized but attestation from a notary does add a layer of verification which in some states actually establishes a presumption of validity.

### **What types of property will not be governed by the terms of my will?**

A will does not dispose of any property you hold with another individual with survivorship rights, such as property owned as joint tenants with right of survivorship. Upon death jointly held property automatically transfers to the other title holder. Similarly, property held in trust will not be affected by the terms of your will, as it is governed by the terms of the trust agreement. Annuities and retirement accounts provide for the payment of benefits outside of a will as well to a named beneficiary. You should consider an attorney when deciding how to structure your estate plan so that he can ensure that all items which pass according to terms other than those in your will can be updated to accurately reflect your wishes.

### **Why should I have a living will and a power of attorney for healthcare?**



A living will spells out certain types of medical treatment and life-sustaining procedures that you do and do not want (such as feeding tubes respiration machines, etc.). However, a living will cannot contemplate every single scenario that may arise. A durable power of attorney for healthcare enables someone else to act in the event a situation arises that has not been contemplated by your living will. For that reason it is wise to have both in place. A living will can dictate to loved ones how you wish to be treated while a durable power of attorney for healthcare will enable them (or one of them) to act in the event a decision which has not been contemplated needs to be made.

### **Who should I appoint as my agent to make financial and medical decisions on my behalf?**

Choosing an agent who will make potentially make medical and financial decisions on your behalf is possibly one of the most important planning decisions that you will make. Your agent should be someone you trust and someone in whom you have confidence to act in your best interests even in the face of stressful situations or outside pressure from other family members and friends. Your agent does not need to be a family member and the same person does not need to necessarily handle financial decisions and healthcare decisions. While not necessary, it may also be wise to appoint an individual who lives near you in the event they need to act on your behalf in short order.

### **Who should I appoint as my personal representative?**

A Personal Representative is the individual whom you appoint (or in the absence of a will, the court appoints) to administer your estate when you die. Much like your agent, the person you select should be someone you trust and someone in whom you trust to carry out your final wishes. The person should be capable of handling financial matters and maintaining detailed records. Many times the personal representative will be an adult child or sibling; however, it is important to consider whether the appointment of one child or sibling will put strain on any other family relationships.

### **Who should I appoint as the guardian to my children?**

A guardian is the person who has legal responsibility for your children in lieu of his or her parents. There are many things to consider when picking a guardian. This is the person who will be parenting your children, so it is important to pick someone who loves your children, is responsible and capable of raising your children. It is also important to keep in mind the effect on your child. Is your child fond of this person? Does the person live nearby so that the child does not need to be uprooted. Will your children still have easy access to their other relatives? Once a guardian is selected you should discuss your selection with that individual to ensure they are willing to act. You should also consider appointing an alternate guardian in the event that the first cannot act or changes his or her mind.

### **What is probate?**

Probate is the formal process by which a will is proved to be valid or invalid, assets are collected, debts are paid, claims are filed on the estate and any remaining assets are distributed, either based on the terms or a valid will or, if there is no valid will, then according to the state intestacy statute.



### **Is probate something I should avoid or is it necessary?**

Probate is not necessarily a bad thing, but it can be time consuming and costly especially when a large number of assets and debts are involved or when beneficiaries are challenging how the estate is being distributed. While some planning to avoid probate is beneficial to many individuals it is still required in some form almost all the time as there are usually at least a few assets that remain in an estate upon death (solely owned bank accounts, assets acquired after death or assets acquired prior to being able to plan for their disposal). However, the time and costs associated with probate can be minimized if probate avoidance is considered for assets while planning your estate. Many states also have simplified probate procedures for estates below a certain amount, so if you do not currently have many assets then perhaps probate avoidance does not need to be high on your list of estate planning goals.

### **Should I have a revocable trust?**

It depends on a number of factors such as age, size of your estate and family situation just to name a few. Revocable trusts provide a number of benefits such as the avoidance of probate and the ability to plan for management of your assets in the event of disability. However, they are not a necessity in order to establish a comprehensive estate plan, and they may not be worth the additional cost and complexity to a number of people. For example, a young couple with small children and few assets may not need a revocable trust to accomplish planning goals, however, an elderly couple with a home which they desire to leave to an adult child may benefit from transferring it to trust, enabling them to continue to live in the home for their lives and then transferring it to the child outside of probate upon death with the added contingent benefit that the home will be managed by the trustee in the event of a disability.

### **What is the lawyer's role in estate planning?**

An estate planning lawyer will help you organize your estate and explain the implications, pros and cons of various estate planning tools and techniques. He is familiar with estate planning laws and procedures and can guide you through the complexities of the process. He can anticipate difficulties that may arise in the event of your disability or death and can advise on how best to plan for those contingencies. He can also ensure that your estate planning documents are clear, concise and structured in a way that is easy to follow, leaving no room for interpretation and minimalizing the chances your dispositive scheme will be challenged. Ultimately, how you would like your affairs carried out is up to you, but with a lawyer's assistance you can ensure that those wishes will be carried out according to your plan.



## **Review of Your Estate Plan**

While estate planning contemplates the future and tries to accommodate the possibility of major life events changing a plan, it is important to review your estate plan with your attorney regularly to ensure that it still reflects your wishes and is consistent with current laws. Specifically, it is strongly recommended that you review your plan with your attorney upon the occurrence of any of the following life events:

- There has been a change in your marital status or that of your children, grandchildren or any other beneficiary
- There has been an addition to your family through birth, adoption or marriage
- A spouse or other family member has died, become severely ill or incapacitated
- You have become responsible for the wellbeing of a family member
- You have recently received a substantial gift or inheritance
- You have recently made a substantial gift or charitable donation
- Your income levels or sources of income have changed
- You are retiring
- You have gotten involved with a new business venture or purchased a substantial interest in an existing business
- You have attempted to change your estate plan on your own



## **The Virtual Attorney Contact Information**

For questions on estate planning or to discuss your own needs feel free to contact me anytime:

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