Estate Planning

Estate Planning involves the planning for your possible mental incapacity during your life and the certainty of your death. There are several key legal documents you should consider to help with this process.

Will

A will is a document containing your instructions and wishes as to how your property and assets are to be distributed after your death. Any person, of any age, should seriously consider a will at the earliest. A will should not only be for people who have reached an age where death is not far away. People die at all ages and a will is needed especially if you have assets and property to be allocated to those you wish to benefit.

A will is the expression of the person's wishes concerning how their property is to be distributed. It is a written statement, signed in compliance with the various formalities covered by legislation. It is a legal document containing the names of the people you want to benefit, as well as details of your possessions at the date of your death. The people you want to benefit are called beneficiaries.

Your property or possessions will include everything you own, such as your home, land, vehicles, bank accounts, benefits of insurance policies, furniture, boat, investments such as shares, personal jewelry, artwork, and so on. A will is the only way you can ensure your assets will be distributed according to your wishes after your death.

Does Using A Will Avoid Probate?

No. Property you own at your death will require the initiation of probate, a court process. Probate can take six months to a year or more and result in large legal, bond and Probate Court fees.

Living Trust

A trust is a legal arrangement under which one person, called a trustee, holds legal title to property for another person, called a beneficiary. You can be the trustee of your own living trust, keeping full control over all property held in trust.

A "living trust" (also called an "inter vivos" trust) is simply a trust you create while you're alive, rather than one that is created at your death.

Different kinds of living trusts can help you avoid probate, reduce estate taxes, or set up long-term property management

Trust agreements are made up of three parties:

- **Trust Creator -** The person who creates the trust agreement, also commonly referred to as the Donor, Grantor, Trustor or Settler.
- **Trustee -** The person or entity responsible for managing the property that the Donor decides to title in the name of the trust.
- **Beneficiary -** The person or entity that receives the benefits of the property that is titled in the name of the trust.

Under this type of legal arrangement, the Donor will transfer ownership of certain assets to the Trustee who will manage the assets for the benefit of the Beneficiary.

Living Trusts vs. Testamentary Trusts

When comparing living trusts with testamentary trusts, if the trust has been created to go into effect during the Donor's lifetime, then it is referred to as an "**inter vivos trust**" or "**living trust**." On the other hand, if the trust has been created to go into effect only after the Donor dies, then it is referred to as a "**testamentary trust**." Also, if a trust is created under the terms of a Will, then it is a "**testamentary trust**".

Revocable Trusts vs. Irrevocable Trusts

When comparing revocable and irrevocable trusts, if the trust is a **revocable trust**, then in most cases the Donor, Trustee, and initial Beneficiary will be one in the same person.

If the trust is an **irrevocable trust**, such as an Irrevocable Life Insurance Trust, then in most cases the Donor cannot be the Trustee and Beneficiary, otherwise the purpose of the irrevocable trust will be defeated. The most common use of an irrevocable trust is to move assets out of the Donor’s name and down to the next generation for their use and enjoyment, which in turn will reduce the value of the Donor’s estate for estate tax purposes.

Why Do People Create Revocable Living Trusts?

The two most common uses of a Revocable Living Trust are to plan for mental disability and to avoid probate of the assets that have been funded into the trust prior to the Donor's death. In a nutshell, probate is the court-supervised process of paying your debts and distributing your property to the people who inherit it.

The average probate court process drags on for months and even years before the beneficiaries get anything. Court and legal fees and payments to creditors can greatly reduce the amount beneficiaries receive.

How Does A Living Trust Avoid Probate?

Property you transfer into a living trust before your death doesn't go through probate. The successor trustee -- the person you appoint to handle the trust after your death -- simply transfers ownership to the beneficiaries you named in the trust. In many cases, the whole process takes only a few months and there are no lawyer or court fees to pay. When all of the property has been transferred to the beneficiaries, the living trust ceases to exist.

Is It Difficult To Transfer Property To a Living Trust?

Making a living trust work for you does require some crucial paperwork. For example, if you want to transfer your house into your trust, you must sign a new deed, showing that you now own the house as trustee of your living trust. This and the transfer of other assets into your trust can take time and sometimes involves some hassles, but the benefits can be significant.

Is A Living Trust A Public Document Like A Will?

No. A will becomes a matter of public record when it is submitted to a probate court, as do all the other documents associated with probate including the inventory of the deceased person assets, for example. The terms of a living trust, however, need not be made public.

If I Create A Living Trust, Do I Still Need a Will?

Yes. A will is an essential to direct the distribution of property that you don't transfer to yourself as trustee of your trust. However, in your will, you can leave all of your property to your trust. This type of will is called a “Pourover Will”.

If you don't have a will, any property that isn't transferred by your living trust or other probate-avoidance device (such as joint tenancy) will go to your closest relatives in an order determined by New Hampshire state law, called the intestacy student. These laws may not distribute property in the way you would have chosen.

Can A Living Trust Reduce Estate Taxes?

A simple probate-avoidance living trust has no effect on taxes. However, a more complicated living trust can reduce the federal estate tax bill for people who own a lot of valuable assets.

One tax-saving living trust is designed primarily for married couples. It's commonly called an AB trust, though it goes by many other names, including “tax planning trust,” "and bypass trust”, in the typical arrangement, each spouse leaves property, in trust, to the other for life, and then to the final

beneficiaries, often the couple's children. This type of trust can save up to hundreds of thousands of dollars in estate taxes, money that will be passed on to the trust's beneficiaries

How does an AB Trust Work?

Instead of leaving property outright to the surviving spouse, each spouse through the terms of his or her trust leaves his or her property in a continued trust that can be used for the benefit of the surviving spouse. Because the surviving spouse does not own the property outright, the property isn't subject to estate tax when the surviving spouse dies.

When setting up an AB trust, each spouse names final beneficiaries who will receive the trust's property when the surviving spouse dies. Spouses often name the same people, for example their children as final beneficiaries, but it's not mandatory.

The Surviving Spouse's Rights

The surviving spouse has limited power over the assets in the exemption trust. The extent of this power depends on the terms of the trust, within certain limits set by the IRS. If a surviving spouse is given more power than the IRS rules allow, the surviving spouse becomes the legal owner of the trust property, which means the property is subject to the estate tax.

At most, the surviving spouse may:

- receive all interest or other income from the trust property
- use the property, for example, he or she can live in a house held in trust
- spend the trust property in any amount for his or her health, education, support and maintenance, in his or her accustomed manner of living. (IRS Reg. 20.2041-1(c)(2).)

In other words, the surviving spouse has the right to use all of the trust principal for what really concerns most older couples: the surviving spouse's health care and other basic needs.

After the death of the surviving spouse, the trust property is distributed to the final beneficiaries, chosen by the deceased spouse in the original trust document. The surviving spouse's property is also distributed to his or her beneficiaries.

Drawbacks of an AB Trust

Before creating an AB trust, couples should understand the limitations and drawbacks of this type of trust. For example, once one spouse dies, the trust shielded from estate tax, which we call the family trust, cannot be changed because it is an irrevocable trust.

Other possible drawbacks include:

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- **Restrictions on the surviving spouse's use of the property.** As discussed above, the surviving spouse has only limited rights to use trust property in the irrevocable trust.
- **Expense of legal or accounting help.** When one spouse dies, the survivor will need to hire a lawyer to determine how to best divide the couple's assets between the irrevocable trust and the surviving spouse's revocable living trust. How the property is divided can have important tax consequences.
- **Trust tax returns.** The surviving spouse must get a taxpayer ID number for the irrevocable trust and file an annual trust income tax return. Like any tax return, this requires some work.
- **Recordkeeping.** The surviving spouse must keep separate records for the irrevocable trust property.
- **Uncertainty about the tax laws.** Because Congress is almost sure to tinker with estate tax laws again soon, you may end up wanting to change or revoke a trust you create now.

Another challenge to creating an AB trust is that the future of the estate tax is uncertain. In fact, there is no estate tax for 2010. Going forward, the estate tax will be reinstated with a graduated tax rate reaching 55% and an applicable exclusion of $1,000,000. It is possible Congress may change the estate tax soon by increasing the estate tax exclusion to either $3.5 million or $5,000,000.

Types of Irrevocable Trusts

Irrevocable Life Insurance Trust

Many people aren't aware that all of the proceeds from life insurance policies that they own at death will be included their estate for estate tax purposes. This is because if the policy owner can withdraw the cash value and change the beneficiary, then the policy owner will be deemed to have **incidents of ownership** over the proceeds and the IRS and, if applicable, state taxing authorities, can then tax the proceeds at death.

Thus, if you own a $1,000,000 term life insurance policy at the time of your death, then the insurance proceeds will already use up your $1,000,000 exemption from federal estate taxes if you were to die in 2011.

How an Irrevocable Life Insurance Trust Works

One way to avoid the taxing of life insurance proceeds at death is to establish an **Irrevocable Life Insurance Trust**, or **ILIT** for short.

An ILIT is a type of irrevocable trust that is specifically designed to hold and own life insurance

policies. Once the ILIT has been set up, you will transfer ownership of your life insurance policies to the Trustee of the ILIT. While you can't be a Trustee of the ILIT - otherwise you'll be deemed to have **incidents of ownership** in the life insurance - your spouse and/or children can be Trustees.

Once you've transferred ownership of the life insurance to the Trustee of the ILIT, you will have given up all of your **incidents of ownership** over the policies. Since you'll no longer own the policies, the proceeds can't be taxed in your estate when you die.

Who Are the Beneficiaries of an ILIT?

The ILIT will also be designated as the primary beneficiary of your life insurance policies. Thus, after you die, the insurance proceeds will be deposited into the ILIT and held in trust for the benefit of your spouse during his or her remaining lifetime, and then the balance will pass to your children or other beneficiaries. Aside from this, the ILIT can provide your family with a quick source of cash to pay your estate tax bill while at the same time not increase your overall estate tax burden.

Another benefit of the ILIT is that since the insurance proceeds will be held in trust for the benefit of your spouse instead of going directly to your spouse, the proceeds can't be taxed in your spouse's estate either.

And you can also take the ILIT one step further and set it up as a **Dynasty Trust** or **Generation Skipping Trust** for the benefit of your children and future generations.

Qualified Personal Residence Trust

A **Qualified Personal Residence Trust**, or **QPRT**, is a type of irrevocable trust that's designed to hold and own your primary or secondary residence and remove its value from your taxable estate. A QPRT works as follows:

After deciding the terms of your trust; who will serve as the initial and successor trustees, how long you want to retain the right to live in the residence (this is called the "retained income period") before it passes to your ultimate beneficiaries, and then who will be the ultimate beneficiaries of the trust when the retained income period ends.

Once the QPRT signed by you as the Donor and the person you designate as Trustee, the next step is to transfer ownership of your residence into the name of the QPRT. This is done by recording a new deed from your name into the name of the trust in the land records where the property is located. The next step is to obtain an appraisal of the residence as of the date you

transfer it into the name of the QPRT. This is necessary to establish the fair market value of the property for gift tax purposes.

Following the year in which you transfer the property into the QPRT, you need to file a Form 709, or gift tax return, with the IRS. The tax return will be due on April 15 of the year after you transfer the residence into the trust. This is necessary because the transfer of the residence into the QPRT is deemed to be a gift to the ultimate beneficiaries of the trust for gift tax purposes. If you live in a state that also has a state gift tax, then you'll also need to file a state gift tax return.

During the retained income period of the QPRT, you'll continue to live in the residence rent free and take all appropriate income tax deductions. And you'll also be required to maintain and repair the property for the benefit of the ultimate beneficiaries of the QPRT. When the retained income period ends, the trustee of the QPRT must transfer ownership of the residence from the name of the trust into the names of your ultimate trust beneficiaries. This is done by recording a new deed from the name of the trust into the names of the trust beneficiaries in the land records where the property is located. Once the retained income period ends, you'll need to pay fair market rent if you want to continue to live in the residence full time or if you want to use it periodically such as for vacations. This will help to further reduce the value of your taxable estate and pass more of your assets on to your ultimate beneficiaries without using any more of your gift tax exclusion since the rent payments won't be considered gifts to your beneficiaries

What Is A Durable Power of Attorney?

A durable power of attorney (DPOA) is a written authorization to act on someone else's behalf in a legal or business matter. The person authorizing the other to act is the *principal*, *granter* or *donor* (of the power), and the one authorized to act is the *agent*, the attorney-in-fact. It is considered “durable’ because it survives the principal’s disability.

How and When to Use A Durable Power of Attorney

The "durable power-of-attorney" is one of the most powerful and important planning tools that an attorney can recommend to a client, not only for estate planning, but also for Medicaid and other public benefit planning. When a person (the principal) signs a power-of-attorney, he gives another person (the agent) the power to act in his place and on his behalf in managing his assets and affairs. The agent's powers may be broad and sweeping so as to include almost any act which the principal might have performed. It should be noted, however, that in general, acts which are inherently testamentary in nature, such as the authority to make or revoke a will, may not be performed by an agent. A power-of-attorney can be either a "general" power-of-attorney, where the agent may perform almost any act the principal might have performed himself regarding the financial management of his affairs, or a "limited" power-of-attorney where the agent has one or

more specific powers, such as the power to sell a particular property to a particular purchaser at a particular time. A single principal may name one or more agents who can be authorized to act either "jointly" or "severally" (alone without the signature of the other agents or agents). The "durable" power-of-attorney is unlike the ordinary power-of-attorney which becomes inoperative upon the incapacity of the principal. The durable power-of-attorney, provides that those powers granted to the agent shall not be affected by the subsequent disability or incapacity of the principal or by the lapse of time.

Using A Springing Power

Most powers-of-attorney become effective immediately upon execution by the principal. Many principals, however, are justifiably wary about giving a currently exercisable power-of-attorney to the agent. Accordingly, most states allow a durable power-of-attorney to be drafted in such a way that it becomes effective only upon the principal's disability. Such a legal instrument is called a "springing" power-of-attorney, signed when the principal has capacity and not effective until the occurrence of a triggering event such as the onset of disability of the principal. The primary disadvantage of the use of the springing durable power is that because its operation is triggered by disability, the occurrence of the event may have to be conclusively established to the third person in order to induce such person to accept the authority of the agent. The document, therefore, should contain a clear definition of the term "disability."

Drafting Considerations

In most states, the principal, in planning for asset management, should consider granting to the agent other important specific powers in addition to those enumerated by statute and found on the conventional pre-printed form power-of-attorney. Unless such additional powers are specifically drafted into the document, the agent will have no authority to act. The following are a few of many specific powers which the principal should consider including in the power-of-attorney:

- The power to make gifts. In states where there is no specific legislative gift-making power, the attorney-draftsperson of the power-of-attorney should consider providing "gifting" authority for the agent. Such a power may be vital for both estate tax planning, in the event of the principal's incapacity, and for Medicaid and other public benefit planning. Caution must be exercised, however, in drafting the "gifting" power since, if drafted too broadly, the Internal Revenue Service may argue that the agent had what is called a "general power of appointment" so as to include the entire amount of the principal's assets in the agent's own estate for estate tax purposes should that agent die before the principal.
- The power to change the principal's domicile to another state where the Medicaid eligibility rules are more favorable.
- The power of access to safe-deposit boxes.
- The power to renounce or disclaim an inheritance and/or insurance proceeds. This power could be another powerful estate and Medicaid planning tool where not prohibited under state

law.

- The ability to sign tax returns, IRS powers-of-attorney and the power to settle tax disputes.
- The power to settle, pursue or appeal litigation on behalf of the principal.
- The power to deal with and collect proceeds from health and/or long-term-care insurance.
- The power to set up and fund trusts and the power to amend existing trusts.
- The power to revoke or amend the power-of-attorney itself.

In drafting powers-of-attorney, care should be given to confer powers with as much specificity as possible in order to avoid the possibility of a court construing a specific omission as an intent to fail to grant that specific power. Such an adverse finding could be to the detriment of the principal's assets.

Advantages for the Seriously-Ill

The use of a power-of-attorney for the management of the assets of a seriously-ill or disabled person has several advantages. It is especially useful in situations where the disabled person's assets may be modest and, accordingly, do not warrant the greater expense associated with other planning techniques such as trusts, conservatorships, or guardianships. The greatest advantage of the durable power-of-attorney is that it remains effective **after** the principal's incapacity. The agent, therefore, can act immediately, upon the principal's incapacity, to manage his assets in a falling stock market or to take various emergency measures without initiating costly and time-consuming court guardianship proceedings to attain court authorization for such transactions.

The durable power-of-attorney is also a useful planning tool for married couples where property is jointly owned. When one spouse becomes incapacitated, the other acting as the agent, can avoid a court proceeding and act promptly in situations where, although assets are held jointly, one spouse cannot act alone to sell, transfer or refinance property or registered securities without having to obtain the consent of the other joint owner.

What Is A New Hampshire Durable Power of Attorney For HealthCare?

A New Hampshire durable power of attorney for healthcare is specifically intended to allow your agent to make health care decisions when you are mentally or physically unable to make them for yourself. Another name for this type of legal document is an Advanced Directive.

Its Purpose

A durable power of attorney for healthcare in New Hampshire specifically gives an agent the power to consent, refuse to consent or withdraw consent to care necessary to diagnose, maintain or treat your mental or physical health. The power is also given to consent to admission to a health care facility but does not include the power to consent to admission to a state institution.

A durable power of attorney for health care in New Hampshire must be in writing and must be

signed either in the presence of a notary public or in front of two witnesses. If signed in front of witnesses, neither may be the agent, spouse or heir, a person entitled to benefit under a will or trust or the attending physician or someone acting on behalf of the physician. The witnesses must affirm that the person making the power of attorney was of sound mind, not under duress and understood the document they were signing and signed it of their own free will.

Revocation

A New Hampshire durable healthcare power of attorney may be revoked by orally indicating to the agent or the treating physician that you wish to revoke the power of attorney, by executing a new power of attorney or by divorce if the original agent was your spouse.