Wills, Revocable Trusts and Powers of Attorney

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Revocable trusts, wills and powers of attorney are established while individuals are living, as a key cornerstone of an estate plan. What is an estate plan? Basically it is a plan (1) to provide protection in the event of disability, and then (2) to pass on your property after death. The idea is to carry out your wishes and help to avoid family strife in the process. It is an opportunity for you to make a set of bylaws for your family, to smooth out some of the rough edges as disabilities occur and the generations advance. Along the way, you can hold down probate costs and estate taxes, or even eliminate them.

Your estate at death is your property, divided into two parts: (1) your Probate Court estate and (2) your property that does not go to the Probate Court before it goes to your heirs. Your Probate Court estate includes any bank and brokerage accounts in your name alone. The part of your estate that does not pass through your will or go to the Probate Court includes: jointly held property (if the other joint owner survives you), as well as property passing through a revocable trust established prior to your death. With an estate plan and some adjustments in the way you "title" your property, you can decide whether your estate will go through Probate Court. Remember that a will only works in Probate Court. Joint property and revocable trusts operate outside of the Court supervision process, and are considered to be will substitutes. By planning ahead you can choose which approach you prefer.

Whether a part of your estate goes before the Probate Court or not, the tax authorities consider all your property to be part of your estate when they decide whether you owe any taxes at your death. Remember that estate taxes imposed at death are (1) different from, and (2) in addition to, income taxes. Under current law, the estate tax will not be imposed for deaths occurring in 2017 if the person who died owned less than $5,490,000 at death. However, Congress could change its mind in the future and reduce the exemption due to economic conditions and need for more revenue.

Now let's discuss individually the various documents most often used in estate planning: wills, revocable trusts, durable powers of attorney and living wills.

Do you have a will? What happens if you do not have a will or a will substitute? Many people think that the surviving spouse receives everything. This is not true. Depending on whether there are children, stepchildren or parents living, the surviving spouse may receive less. Without a will, your particular concerns cannot be taken into account. With a will or will substitute, you can decide who gets your property. You can name a guardian for a minor child. You can choose an executor who will attend to your financial affairs after your death knowing what you wanted to achieve. You can remember special people. You can leave property to a charity you like. You can have a plan in place for children and loved ones in case an automobile accident or other accident takes your life and at the same time takes your spouse's life.

You can even disinherit a child, but only if you mention that child by name. Remember that a spouse cannot be disinherited--and is entitled to claim at least one third of the real estate and personal property you own at your death as a protection for widows and widowers. Also, remember that a will has to be signed in a particular way. If it is not signed properly, it is totally invalid.

Next let's discuss revocable trusts. A revocable trust can be a will substitute. Think of it as a legal document which creates a place to put your property--think of a revocable trust as a box for money to be put in and taken out of by you as you choose. You can be your own trustee. You can put real estate as well as personal property into it. The income tax authorities consider the property you put in your revocable trust to be your own, so you fill out your Form 1040 income tax return in the same way as before. It doesn't change the way you live. The difference is that when you die, the property you put into your revocable trust while you were living, does not go through Probate Court--it is now in the non-Probate part of your estate. If all your property is in the trust, there are no Probate Court proceedings. The property goes to whomever you choose but your wishes are carried out by your trustee, whom you have chosen to take control of the trust after you die, without Court supervision unless someone requests Court supervision. It is still a good idea to have a will in place, in order to name a guardian for a child, for example, or in case all your property was not put into the trust prior to your death, but otherwise the trust can be a substitute for a will. Using a living trust as a will substitute saves your heirs from the time, expense and public supervision of probate, if that is what you want. Remember also that Court supervision is designed to protect your estate and may be the preferred approach depending on circumstances. The point is that you decide which approach to take. All trusts are subject to Court review upon request of an interested party.

Some people have a trust built into their will--so it only comes into existence after death. That type of trust is not a living trust. It has Court supervision and requires yearly Court accountings and your trustee, perhaps accompanied by an attorney, goes into Court for hearings. If you set up a trust separate from your will while you are living, and retitle your assets appropriately, then your trustee does not go into Probate Court for accountings unless someone requests Court supervision.

Also, with a revocable trust you can decide what age your children or others will need to be before they receive their inheritance. You may want your trustee to hold the proceeds until your children reach the age of 25 or 30 or any other age you pick. Try to remember what you might have done with an inheritance at age eighteen (18). While safeguarding the assets, your trustee can also provide money as needed for your children for college, to buy a home or for other worthwhile purposes. And, if you have an heir who has disabilities you can leave an inheritance for them through a special needs trust.

Revocable trusts can also be an excellent way to help address the issue of what happens to inheritances for children in the event of remarriage or new relationship after your death.

Next, I want to discuss durable powers of attorney. Often there is a period of disability prior to death, so planning ahead for your own possible disability later on may be the most important planning you do for yourself. Have you established durable powers of attorney? There are two types of durable powers of attorney: (1) general powers of attorney including provisions for

financial matters and (2) powers of attorney for health care, also called advanced directives. A durable general power of attorney allows someone you pick to pay your bills and make financial decisions for you if you are away on a trip or if you become disabled to the point of being unable to sign legal documents. What if you get sick or have an accident, and become severely disabled and unable to pay your bills? Who is going to make decisions for you? If you are disabled, who will sign when jointly owned property needs to be sold or refinanced and both signatures are required? Without a durable power of attorney for finances, it would be necessary to go to the Court to establish a guardianship. This requires a Court petition and Court hearing with an attorney appointed by the Court to consider taking the opposing viewpoint. Then the Court issues an order finding you to be unfit, and there is public supervision of your finances and regular Court accountings possibly for the rest of your life. A power of attorney is considered a "guardianship substitute" as long as you establish it before the decisionmaking disability arises. All powers of attorney are subject to Court review upon request of an interested party.

A durable power of attorney for health care allows someone else to make health care decisions for you if you are unable to make health care decisions for yourself, because you are sick or have had an accident and are unable to give informed consent for an operation, hospitalization or nursing care and other services at home. Living wills are also an option. Many people would like to instruct the doctor not to artificially prolong their life if there is no hope of recovery. This can be done in New Hampshire with a living will. As with all estate planning documents, health care advance directives have to be done in a particular way as required by the law, and have to be done while you are able to make the decision. Health care powers of attorney and living wills are very personal decisions that can have a tremendous impact on your life and physical comfort. Remember to include specific instructions in your health care power of attorney concerning access to medical records and other matters of importance to you. In some ways the health care powers of attorney and living wills are the most important estate planning decisions of all.

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