GUIDE ElderLawAnswers

# The Key Elements of an Estate Plan

Execute a plan that spares loved ones confusion

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# Why plan your estate?

The knowledge that we will eventually die is one of the things that distinguishes humans from other living beings. At the same time, no one likes to dwell on the prospect of his or her own demise. But if you, your parents or other loved ones postpone planning until it is too late, you run the risk that your intended beneficiaries – those you love the most – may not receive all you would hope.

**Problems often arise when people don't coordinate the various methods of passing on their estate.**

We should begin a discussion of estate planning with a consideration of what "estate" and "estate plan" mean. An "estate" is simply everything a person owns: bank accounts, stock, real estate, motor vehicles, jewelry, household furniture, retirement plans, life insurance. An "estate plan" is the means by which the estate is passed to the next generation. This can be accomplished through a variety of instruments. Most retirement plans and life insurance policies pass to named beneficiaries, chosen when you take out the policy or at a later date. Property that is jointly owned passes to the surviving joint owner. Trust assets are distributed according to the terms of the trust. Property held in an individual's name alone comes under the instructions laid out in a will, or in the absence of a will, under the rules of "intestacy" set out in state law.

Problems often arise when people don't coordinate all of these methods of passing on their estate. To take just one example, a father's will may say that everything should be equally divided among his children, but if the father creates a joint account with only one of the children "for the sake of convenience," there could be a fight about whether that account should be put back in the pool with the rest of the property. A well-drafted estate plan also permits you to save as much as possible on taxes, court costs and attorneys' fees. Most importantly, it affords the comfort that your loved ones can mourn your loss without being simultaneously burdened with unnecessary red tape and financial confusion.

## Four Leading Excuses for not Having an Estate Plan

### Excuse #1: My estate is too small.

**Response:** For many individuals, especially those with smaller estates, the most important documents are a durable power of attorney and medical directives. While a will protects your estate after you're gone, a durable power of attorney and medical directives protect you while you're still here.

### Excuse #2: Joint ownership of accounts with my children is an adequate plan.

**Response:** No it isn't, unless there is only one child. It is impossible to keep separate accounts for more than one child equal. This is especially true if the parent becomes incapacitated and no longer has control over the accounts. Trying to save a few dollars by managing an estate in this fashion runs the serious risk of causing discord in a family for generations to come. Why take the chance?

### Excuse #3: I don't want to pay a lawyer to draw up the plan.

**Response:** Software is available that produces most of the estate planning documents an attorney will prepare. The chances are good, however, that such "one size fits all" approaches will prove inadequate in any specific case. In fact, few clients need just a simple will. If there's anything about your situation that's not plain vanilla, you need to see a lawyer (and only a qualified lawyer can tell you if your situation is indeed plain vanilla). The problems you may create by not getting competent legal advice probably won't be yours, but may well be your children's. Don't risk leaving such a legacy.

### Excuse #4: I just haven't gotten around to it.

**Response:** Reading this guide is the first step towards getting around to it.

All estate plans should include, at minimum, three important planning instruments: a durable power of attorney, a health care proxy and a will. A durable power of attorney allows you to designate someone to manage your property during your life, in case you are ever unable to do so yourself. The health care proxy, called a durable power of attorney for health care in some states, appoints another individual to direct your medical care if you are ever unable to do so yourself.  The health care

proxy should include or be accompanied by a medical directive (also known as an advance directive) providing guidance to your health care agent. The will is for the management and distribution of your property after your death.

If you do not have an estate plan, your estate will be distributed under the rules of intestacy. These direct that what you leave goes to your nearest relatives, whether that's your spouse, your children, or your nieces and nephews. That works for most people, but not for a lot of people – and fewer every day. Less and less do we live in the standard family model of a mother, a father and two or more children. More and more children are raised by single parents, lesbian and gay parents, and by grandparents. Over the last few decades, the number of children living in a household headed by a grandparent has skyrocketed, and in 2010 was estimated to be nearly 5.4 million, or 7 percent of all grandchildren. Anyone in an atypical situation needs a carefully considered estate plan.

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## The durable power of attorney

For many people, the durable power of attorney is the most important estate planning instrument – even more important than a will. A power of attorney allows you to appoint another person – your "attorney-in-fact" – to step in and manage your financial affairs if and when you ever become incapacitated.

What happens if there is no durable power of attorney? Without it, a family must wait for a court to appoint a conservator or guardian to manage the incapacitated person's affairs. That court process takes time, costs money, and the judge may not choose the person that the individual would have preferred. In addition, once a guardianship or conservatorship is in place, the representative may have to seek court permission to take planning steps that she could implement immediately under a simple durable power of attorney.

A power of attorney may be either immediate or “springing.” Most powers of attorney take effect immediately upon their execution, even if the understanding is that they will not be used until and unless the grantor becomes incapacitated. However, the document can also be written so that it does not become effective until such incapacity occurs (“springing”). In such cases, it is very important that the standard for

## Typical Concerns about Powers of Attorney

### I’m afraid that the person I appoint won’t manage my affairs properly.

Giving someone the potential power to manage your affairs can be frightening. This is why it is important for you to appoint someone you trust to be your attorney-in-fact. She must use your finances as you would for your benefit. Giving someone a power of attorney does not limit your own rights in any way. It simply gives the other person the power to act when or where you cannot act.

### Does a power of attorney take away my rights?

Absolutely not. Only a court can take away your right to manage your own affairs, through a conservatorship or guardianship proceeding. An attorney-in-fact simply has the power to act along with you, and as long as you are competent, you can revoke the power of attorney.

### I don’t have anyone I trust enough to give them power over my affairs.

If you do not have someone you trust to appoint, it may be more appropriate to have the probate court looking over the shoulder of the person who is handling your affairs through a guardianship or conservatorship. In that case, you may use a limited durable power of attorney to simply nominate the person you want to serve as your conservator or guardian. Most states require the court to respect your nomination “except for good cause or disqualification.”

### What if I change my mind?

You may revoke your power of attorney at any time. You need to send a letter to your attorney-in-fact telling her that her appointment has been revoked. From the moment the attorney-in-fact receives the letter, she can no longer act under the power of attorney. If you have recorded the power of attorney with the land records of your county or at the probate court, you must record the revocation as well.

determining incapacity and triggering the power of attorney be clearly laid out in the document itself.

However, attorneys report that their clients sometimes have difficulty in getting banks or other financial institutions to recognize the authority of an agent under a durable power of attorney. A certain amount of caution on the part of financial institutions is understandable: When someone steps forward claiming to represent the account holder, the financial institution wants to verify that the attorney-in-fact indeed has the authority to act for the principal. Still, some institutions go overboard, for example requiring that the attorney-in-fact indemnify them against any loss. Many banks or other financial institutions have their own standard power of attorney forms. To avoid problems, you may want to execute such forms offered by the institutions with which you have accounts. In addition, many attorneys counsel their clients to create revocable or “living” trusts in part to avoid this sort of problem with powers of attorney.

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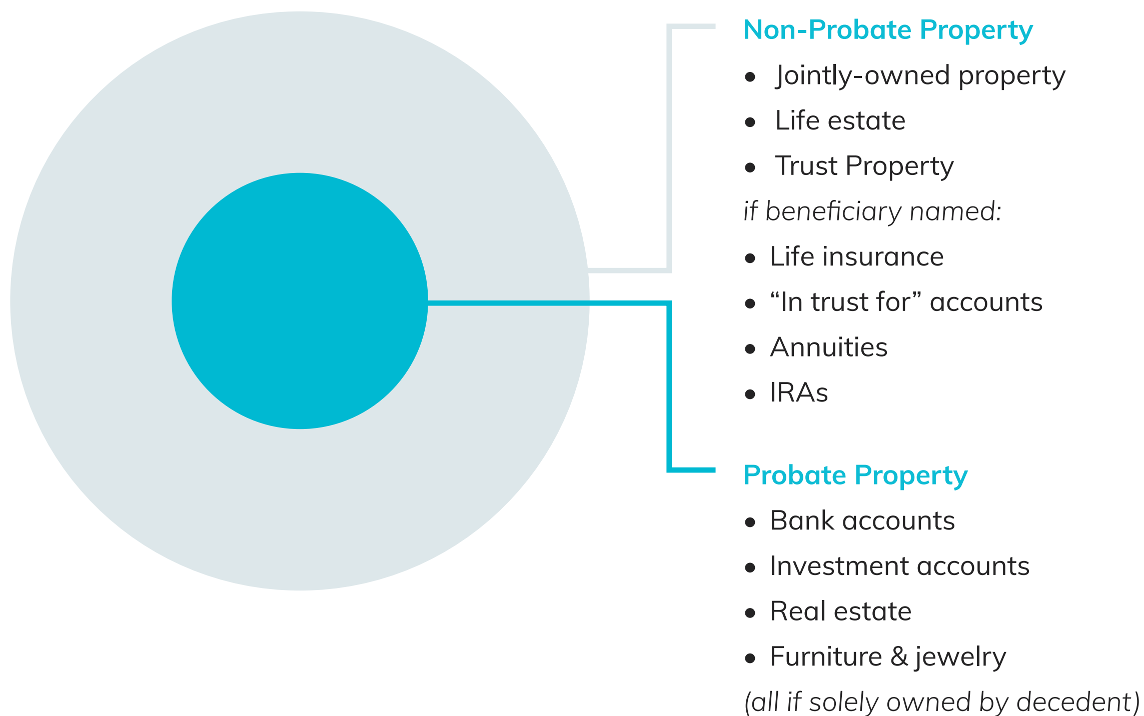
## The will

Your will is a legally binding statement directing who will receive your property upon your death. It also appoints a legal representative, often called an “executor” or “personal representative,” to carry out your wishes.

The process by which a person’s property is passed to the people or institutions named in the will is called probate. However, a will covers only probate property. Many types of property or forms of ownership pass outside of probate. Examples of property that pass outside of probate and, thus, are not mentioned in a will, include: jointly-owned property, property in a trust, life insurance proceeds, and property with a named beneficiary, such as IRAs or 401(k) plans.




Filling out the following worksheet will help you make decisions about what to put in your will. The worksheet will also help a lawyer prepare a will that better meets the client's needs and desires.

## I. Your Estate

List the contents of your estate, including bank accounts, stock, IRAs, real estate, motor vehicles, life insurance, and anything else that you may own, whether by yourself or with another person. For this purpose, an estimate of the value is sufficient.

### Bank Accounts

1. ______________________________ $__________

2. ______________________________ $__________

3. ______________________________ $__________

4. ______________________________ $__________

### Stocks, Bonds, Treasury Notes, Other Investments

1. ______________________________ $__________
2. ______________________________ $__________
3. ______________________________ $__________
4. ______________________________ $__________

### Life Insurance, IRAs, Pension, 401(k)

1. ______________________________ $__________
2. ______________________________ $__________
3. ______________________________ $__________
4. ______________________________ $__________

### Real Estate

1. ______________________________ $__________
2. ______________________________ $__________

### Tangible Personal Property

This category includes furniture, jewelry or artwork – anything of significant value or that you would like to go to a particular person.

1. ______________________________ $__________
2. ______________________________ $__________
3. ______________________________ $__________
4. ______________________________ $__________

## II. Beneficiaries

Here, list the people you would like to receive a part of your estate, including family members, friends, and charities.

### Spouse

Name ______________________________________________

### Children

1. ______________________________________________
2. ______________________________________________
3. ______________________________________________
4. ______________________________________________

### Other Individuals

Include friends, grandchildren, brothers and sisters, or anyone else to whom you would like to give a part of your estate.

1. ______________________________________________
2. ______________________________________________
3. ______________________________________________
4. ______________________________________________

### Charities

List any religious or other non-profit organizations to whom you would like to make a bequest. This may reduce the taxes on your estate.

1. ______________________________________________
2. ______________________________________________
3. ______________________________________________
4. ______________________________________________

## III. Executor

Name the person or persons you would like to appoint to administer your estate. He or she (called the “executor,” “executrix” or “personal representative”) will carry out your wishes as stated in your will. Two people may serve together in this role. Also name an alternate in case the first appointed cannot serve for any reason.

**Executor, executrix**

1. ______________________________

2. ______________________________

**Alternate**

1. ______________________________

2. ______________________________

## IV. Guardian of Children

The most important purpose of a will for most younger people is the appointment of a guardian for their children under age 18. All people with children should have wills for this purpose.

Guardian ______________________________

Alternate ______________________________

## Four reasons to have a will

**1.** A will allows you to direct where and to whom your estate (what you own) will go after your death. When you die intestate (without a will), your estate is distributed according to the laws of your state. In general, those rules provide that your property will be divided among your closest family members. Such distribution may or may not accord with your wishes.

**2.** Often the probate process can be completed more quickly and at less expense if there is a will. With a clear expression of the deceased's wishes, there are unlikely to be any costly, time-consuming disputes over who gets what.

**3.** Only with a will can you choose someone to administer your estate and distribute it according to your instructions. This person is called the "executor" (or "executrix" if it is a woman) or "personal representative," depending on the state's statute. If there is no will naming this person, the court will make the choice itself. Usually, the court appoints the first person to ask for the post, whoever that may be. Litigation can arise if family members cannot agree on who should take on this role.

**4.** One of the most important functions of a will is that it permits parents to appoint the person who will take their place as guardians of their minor children should both parents pass away. In some states, it may also be possible to do this in a separate document.

# Trusts

A trust is a legal arrangement through which one person (or an institution, such as a bank or law firm), called a "trustee," holds legal title to property for another person, called a "beneficiary." The rules or instructions under which the trustee operates are set out in the trust instrument. There can be a number of advantages to establishing a trust, depending on the individual situation:

**Probate avoidance.** Upon the death of the donor (the person creating the trust), the trust either continues for new beneficiaries or terminates, depending on the terms of the trust. In either case, this occurs without requiring probate. This can save time and money for the beneficiaries.

**Tax savings.** Certain trusts can create estate tax advantages both for the donor and the beneficiary. These are often referred to as "credit shelter" or "life insurance" trusts.

**Asset protection.** Other trusts may be used to protect property from creditors or to help the donor qualify for Medicaid coverage of nursing home care.

**Privacy.** Unlike wills, trusts are private documents and only those individuals with a direct interest in the trust have any right to know of trust assets and distributions.

**Durability.** Provided they are well-drafted, another advantage of trusts is their continuing effectiveness even if the donor dies or becomes incapacitated.

## Kinds of Trusts

Trusts fall into two basic categories: revocable and irrevocable.

## Revocable Trusts

Revocable trusts give the donor complete control over the trust. He may amend, revoke or terminate the trust at any time. The donor can take back the funds he put in the trust or change the trust's terms. Thus, the donor is able to reap the benefits of the trust arrangement while maintaining the ability to change the trust at any time prior to death.

Revocable trusts are generally used for the following purposes:

**1. Asset management.** They permit the trustee (the person who manages the trust) to administer and invest the trust property for the benefit of one or more beneficiaries of the trust.

**2. Probate avoidance.** At the death of the person who created the trust, the trust property passes to whomever is named in the trust. It does not come under the jurisdiction of the probate court and its distribution need not be held up by the probate process. However, the property of a revocable trust will be included in the donor's estate for tax purposes.

**3. Tax planning.** While the assets of a revocable trust will be included in the donor's taxable estate, the trust can be drafted so that the assets will not be included in the estates of the beneficiaries, thus avoiding taxes when they die.

**4. Disability planning.** Wills only provide for death. Trusts can help a person have a plan in place in the event of their own illness.

## Irrevocable Trusts

An irrevocable trust cannot be changed or amended by the donor. Any property placed into the trust may only be distributed by the trustee as provided for in the trust document itself. For instance, the donor may set up a trust under which she will receive income earned on the trust property, but the trust bars access to the trust principal. This type of irrevocable trust is a popular tool for Medicaid planning. In addition, irrevocable trusts are often used with life insurance policies as an estate tax planning device.

## Testamentary Trusts

A testamentary trust is a trust created by a will. Such a trust has no power or effect until the will of the donor is probated. Although a testamentary trust does not avoid the need for probate and becomes a public document as it is a part of the will, it can be useful in accomplishing other estate planning goals. For example, the testamentary trust can be used to provide funds for a surviving spouse that would be protected if she required Medicaid-covered nursing home care, an option that is not available through the use of a revocable or "living" trust.

## Special Needs Trusts

The purpose of a special needs trust is to enable the donor to provide for the continuing care of a disabled spouse, child, relative or friend. The beneficiary of a well-drafted special needs trust will have access to the trust assets and still be eligible for benefits such as Supplemental Security Income, Medicaid and low-income housing. A special needs

trust can be created by the donor during life or be part of a will. For more information on planning for people with special needs, visit specialneedsanswers.com.

## What a standard estate plan should include:

- Revocable, or “living,” trust to avoid probate
- Will, for personal items and anything not in the trust
- Durable power of attorney, appointing someone you trust to handle your finances, in case you cannot
- Health care proxy, appointing someone to make medical decisions for you, in case you cannot

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## Medical directives

Any estate plan should include a medical directive. Just as we need to plan for our eventual demise, we also need to plan ahead for the possibility that we will become sick and unable to make our own medical decisions. Medical science has created many miracles, among them the technology to keep patients alive longer, sometimes seemingly indefinitely. As a result of well-publicized “right to die” cases, states have made it possible for individuals to give detailed instructions regarding the kind of care they would like to receive should they become terminally ill or are in a permanently unconscious state.

These instructions fall under the general category of “health care decision making.” This phrase can encompass a number of different documents, including a **health care proxy**, medical instructions or directives, and a **living will**. The exact document or documents depend on the particular state’s laws and the choices an individual makes.

## The health care proxy

If you become incapacitated, it is important that someone have the legal authority to communicate your wishes concerning medical treatment. Similar to a power of attorney (and sometimes called a durable power of attorney for health care), the health care proxy is a document executed by a competent person (the principal) giving another person (the agent) the authority to make health care decisions for them if they are unable to communicate such decisions.

By executing a health care proxy, you ensure that you have someone to represent you in dealing with health care professionals and to carry out your instructions if you become incapacitated. A health care proxy is especially important to have if family members may disagree about treatment. And, with the strict new health care privacy rules now in force, it's more crucial than ever that everyone consider creating an advance medical directive that specifically names those persons who are entitled to access to health care information about them. Under the privacy rules of the Health Insurance Portability and Accountability Act (HIPAA), which became effective in April 2003, doctors, hospitals and other health care providers may no longer freely discuss a patient's status or health with spouses or other family members — unless the providers have in hand signed consent forms from the patient. Remember: a general power of attorney for financial matters will not suffice. The instrument must refer specifically to HIPAA.

In general, a health care proxy takes effect only when a physician determines that you are unable to communicate your wishes concerning treatment. How this works exactly can depend on the laws of the particular state and the terms of the health care proxy itself. If you later become able to express your own wishes, you will be listened

to and the health care proxy will have no effect.

Since the agent will have the authority to make medical decisions in the event you are unable to make such decisions yourself, the agent should be a family member or friend whom you trust to follow your instructions. Before executing a health care proxy, you should talk to the person you want to name as the agent about your wishes concerning medical decisions, especially life-sustaining treatment.

Once the health care proxy is drawn up, your agent should keep the original document, or at least have access to it if you keep it. You should have a copy and your physician should also keep a copy with your medical records.

If you are interested in drawing up a health care proxy document, you should contact an attorney who is experienced in elder law matters. Many hospitals and nursing homes also provide forms, as do some public agencies.

Accompanying a health care proxy should be a medical directive (also known as an advance directive). Such directives provide your agent with instructions on what type of care you would like. A medical directive can be included in the health care proxy or it can be a separate document. It may contain directions to refuse or remove life support in the event you are in a coma or a vegetative state, or it may provide instructions to use all efforts to keep you alive, no matter what the circumstances. Medical directives can also be broader statements granting general authority for all medical decisions that are important to you. These broader medical directives give your agent guidance in less serious situations.

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## Living wills

If you would like to avoid life-sustaining treatment when it would be hopeless, you need to draw up a living will. Living wills are documents

that give instructions to withdraw life-sustaining treatment if you become terminally ill or are in a persistent vegetative state and unable to communicate your own instructions. Like a health care proxy, a living will takes effect only upon your incapacity. Also, a living will is not set in stone; you can always revoke it at a later date if you wish to do so.

A living will, however, is not necessarily a substitute for a health care proxy or a broader medical directive. It simply dictates the withdrawal of life support in instances of terminal illness, coma or a vegetative state.

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## The risks of not planning

You may wonder whether you need a lawyer to do your estate plan. Maybe yes and maybe no. But why take any chances? A man who recently died apparently had an aversion to lawyers, but not to estate planning. Both in his apartment and in his safe deposit box he left many pieces of paper saying that he wanted all of his estate to go to his favorite niece. These included a trust that he got out of a form book, statements that property in the safe deposit box belonged to his niece, and other papers purporting to be his last will and testament.

Unfortunately for him, and even more for his favorite niece, none of these papers had any legal standing. The trust was not funded. The statement of ownership of assets in the box was not a completed gift to the niece because there never was delivery – the act of giving the assets to her. And, the purported wills were not properly witnessed. So the niece got a third of the estate instead of 100 percent. In a less cooperative family this also could have led to costly litigation, ironically to the benefit of lawyers whom the uncle was trying to avoid.