

Wills, Trusts & Advance Directives

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TABLE OF CONTENTS

INTRODUCTION.....	1
Purpose of Estate Planning	1
Common Estate Planning Tools	1
PLANNING FOR YOUR LIFETIME DISABILITY	2
Durable Powers of Attorney for Financial Affairs	2
Durable Powers of Attorney for Health Care	3
Living Will.....	5
Nomination of Guardian	6
Disability Planning Conclusion	6
PLANNING FOR YOUR DEATH.....	7
Will Substitutes.....	7
Wills.....	8
Trusts	11
Testamentary Trusts vs. Living Trusts.....	11
Living Trusts	11
Revocable vs. Irrevocable Living Trusts	11
Revocable Living Trusts for Asset Management and Probate Avoidance	11
Revocable Living Trusts for Tax Planning.....	13
MISCELLANEOUS TOPICS.....	14
Intestacy	14
Common Law Marriage.....	15
Lifetime Gifts.....	15
Anatomical Gifts.....	16
CONCLUSION	16

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INTRODUCTION

This public information booklet outlines some considerations and tools for planning your personal, family, and financial future. The information in this booklet is based on New Hampshire law in effect at the time of publication and is issued as a public service for general information only. It is not a substitute for legal advice but is intended to help you recognize when you need legal advice and to help you understand the legal advice you receive.

Purpose of Estate Planning

Proper estate planning enables you to:

- * designate the person(s) who would handle your financial affairs and make medical decisions for you if you should become unable to make those decisions yourself;
- * express your wish concerning sustaining your life by artificial means;
- * pass your assets to the people or the organizations that you wish to benefit after your death;
- * nominate Guardian(s) for your minor children or for yourself;
- * minimize estate taxes.

Common Estate Planning Tools

Estate planning involves the use of several or all of the following documents:

- * Durable General Powers of Attorney (for financial affairs);
- * Durable Powers of Attorney for Health Care;
- * Living Will;
- * Nomination of Guardian;
- * Wills;
- * Trusts.

In addition to using wills and trusts, there are several ways in which you may pass property to a designated beneficiary, including:

- * lifetime gifts;
- * joint accounts;
- * in trust for, payable on death, or transfer on death accounts;
- * beneficiary designations.
- * Life estates

PLANNING FOR LIFETIME DISABILITY

All of us dread the lack of control that results from physical and mental incapacity. The way to maintain some control over our lives when we are faced with those unfortunate circumstances is to decide now, while we are still competent, just who we want to handle our financial affairs and make medical decisions for us when we are no longer able to do so. The documents by which we designate the people that we wish to act for us are called durable powers of attorney.

The concept behind powers of attorney is rooted in the common law of agency, whereby a person (called the principal), grants another person (called the “agent” or “attorney-in-fact”) the authority to act for him or her. Under the common law of agency, however, an agent could act for a principal only in those circumstances in which the principal could act himself or herself. If a principal became mentally incompetent, and thus unable to act legally for himself or herself, the agent no longer had the authority to act on behalf of the principal. Until the common law was expanded by statute, guardianship was the only means by which someone could act on behalf of a mentally incompetent person. New Hampshire now has statutes that apply to durable powers of attorney for financial affairs and durable powers of attorney for health care.

Durable Powers of Attorney for Financial Affairs

Durable powers of attorney for financial affairs may be drafted so that they are effective immediately upon execution or drafted so that they become effective at some later time, when triggered by a change in circumstance. The latter type of durable power of attorney is often called a springing power of attorney. Both types of durable powers of attorney are valid. The choice of one type or the other is a matter of convenience.

Many springing powers of attorney provide that the authority granted to the agent will come into being when the principal becomes unable to handle his or her financial affairs. Most people do not wish to turn over the management of their financial affairs to their agents before it is absolutely necessary. With a springing durable power of attorney, the client is assured that he or she will remain in control of his or her financial affairs for as long as possible. A difficulty that arises with such springing powers of attorney is that the agent would need some documentation of the principal’s lack of competency in order to use the power of attorney. While a physician’s note or affidavit might be sufficient documentation for some purposes, it is unlikely that such documentation would suffice for other purposes, such as a real estate transfer.

A compromise between the two alternatives of a springing durable power of attorney and an immediately effective durable power of attorney is the option of executing a durable power of attorney that is immediately effective, but directing that a third party (such as the lawyer who drafts the document or a trusted relative or friend who is not designated as the agent) hold it in escrow. The escrow agreement, which could be a simple directive letter, would set forth the terms on which the power of attorney is to be released to the agent.

Durable powers of attorney, whether springing or immediately effective, may be general powers of attorney, which grant the agent the greatest possible authority, or limited powers of attorney, which, as the name implies, limit the agent's authority to performing specific actions or dealing with specific assets. People often use limited durable powers of attorney to name an agent to handle a real estate sale when the principal is out of town.

Only a person who is mentally competent may execute a durable power of attorney for financial affairs. There is no specific form that must be used for a durable power of attorney for financial affairs. However, the power of attorney must be in writing and must include the words "This power of attorney shall not be affected by the subsequent disability or incompetence of the principal," or similar words that indicate that the document is designed to be effective after the principal has become incompetent. The document must be signed by the principal and acknowledged before a Justice of the Peace or Notary Public. Many states require that the durable power of attorney be witnessed by two independent witnesses, as well as the Justice of the Peace or Notary Public. Although New Hampshire does not require those two witnesses, it is advisable to have the document witnessed, in case it has to be used in other states.

The agent that you name in your durable power of attorney will not have authority to make gifts of your assets unless the durable power of attorney specifically authorizes those gifts. In addition, the agent may not make gifts that will cause you to become eligible for Medicaid or other forms of public assistance unless the durable power of attorney specifically authorizes such gifts. Agents named in durable powers of attorney that were executed after January 1, 2004, will not have authority to make gifts unless the power of attorney includes disclosure statements that must be signed by the principal and by the agent.

The principal's disclosure statement explains to you, as the principal, that the durable power of attorney grants the agent broad authority concerning your assets. It explains that the agent may use the power of attorney to dispose of your assets without prior notice to you, both before and after your incompetency, and further explains that you have the right to revoke the power of attorney as long as you remain competent. Lastly, it advises you to seek professional advice if there is anything about the durable power of attorney that you do not understand.

The agent's disclosure statement is an acknowledgment by the agent that he or she understands the agent's fiduciary duty to act in your interests, as a prudent person would act in the conduct of the person's own affairs, and understands the consequences of a breach of that agent's fiduciary duty. The agent acknowledges that the durable power of attorney is effective only if you were of sound mind when the document was executed, and acknowledges the need to seek professional advice if there is anything about the power of attorney that the agent does not understand.

Durable Powers of Attorney for Health Care

The durable power of attorney for health care is the document by which you designate the person who will make medical decisions for you if you are not able to make those decisions yourself. The person who acts for you under the durable power of attorney for health care is also

called your “agent.” You may designate anyone over the age of eighteen to act as your agent, except your health care provider or residential care provider, or a non-relative of yours who is employed by your health care provider or residential care provider. You do not need to name the same person as your agent under the durable power of attorney for health care that you name as your agent on the durable power of attorney for financial affairs. The skills and qualities demanded of the two roles are quite different.

If you have named your spouse as your agent, and subsequently, an action for divorce is filed, your spouse (or ex-spouse) may no longer serve as your health care agent. If you have named an alternate agent, that person will step in as agent. If, following the filing of an action for divorce, you would still want your spouse (or ex-spouse) to act as your health care agent, you will have to sign a new durable power of attorney for health care.

The New Hampshire Legislature has created a statutory form for the durable power of attorney for health care. The statute directs that a durable power of attorney for health care must be in substantially the same form as the document that was drafted by the Legislature. An organization called Foundation for Healthy Communities has published an *Advance Care Planning Guide* that includes a durable power of attorney for health care that is somewhat easier to understand than the form written by the Legislature, and many health care providers make that form available to their patients. This brochure discusses the form that was drafted by the Legislature.

As long as you are able to communicate your wishes concerning health care, and your doctor believes that you are able to understand the nature and consequences of a health care decision, you remain in control of your medical care. The health care agent will not have any authority to make decisions for you unless and until your doctor makes a note in your medical records that indicates that you are not able to understand the medical decision that has to be made. Conversely, the agent’s authority will end when and if you regain capacity to make health care decisions, and your doctor has noted that fact in your medical records. If you do not wish to have a doctor make that determination concerning your capacity, you may designate someone else who will have the authority to make that determination. The person that you designate may not be the person who will serve as your health care agent.

The durable power of attorney for health care applies to all medical decisions that you cannot make for yourself. It is not limited to decisions concerning terminal care, although when you sign a durable power of attorney for health care, you must specifically indicate whether your health care agent has authority to make decisions concerning keeping you alive by artificial means. If you give your agent the authority to make those decisions, you are not indicating what your wishes are concerning artificial life support. You are merely telling the doctor to follow the directions of your agent, whatever those directions may be. Obviously, you should discuss your wishes concerning artificial life support and other medical decisions with the people that you name as agent and alternate agent. Your agent has the duty to consult with your doctor and other health care providers and make decisions in accordance with your wishes and religious and moral beliefs. If your wishes are not known, the agent has the duty to act in your best interest and in accordance with accepted medical practice.

You may limit the authority of your health care agent in question four of the durable power of attorney for health care. People often limit their agent's authority when they have religious restrictions against the use of blood transfusions or organ transplants.

The Legislature has also limited your agent's authority by directing that the agent will not have authority to consent to voluntary sterilization or to voluntary admission to a state institution. Furthermore, the agent will not have authority to withhold life-sustaining treatment from a pregnant woman if withholding the treatment would prevent the development and birth of the child, unless the treatment would be physically harmful to the patient or prolong severe pain that could not be controlled by medication.

If you should object to a particular treatment or withholding of a particular treatment - even if you lack the mental capacity to make a reasoned decision concerning the treatment - your agent will not have the authority to override your expressed wish.

You must sign the durable power of attorney for health care in the presence of a Notary Public or Justice of the Peace and two witnesses who must affirm that you appear to be of sound mind and free from duress, and that you have affirmed that you are aware of the nature of the document and you are signing it voluntarily. Neither of the witnesses may be your agent or alternate agent, your spouse, or anyone who would benefit financially as a result of your death. Only one witness may be your health care provider or residential care provider or one of their employees. If you are not physically able to sign the document, someone else may sign for you at your request and in your presence.

Living Wills

A living will is the document by which you express your wish that you do not want to be kept alive by artificial means if two physicians, including your attending physician, determine that you are terminally ill or permanently unconscious. Unlike the durable power of attorney for health care, the living will does not take effect unless you are *permanently* incapable of participating in decisions about your health care. If your physicians act in accordance with your living will, and do not sustain your life by artificial means, your subsequent death will not be considered a suicide for any purpose. The living will in no way authorizes or approves euthanasia, and does not permit anyone to take any affirmative steps to end your life.

In the living will, you must specifically indicate whether you wish to be kept alive by artificial food and hydration, even if you do not wish to be kept alive by other forms of artificial life support. The question in the form drafted by the New Hampshire Legislature is somewhat confusing, because if you do not wish to be kept alive by artificial food and hydration, you must choose "Yes." The *Advance Care Planning Guide* published by Foundation for Healthy Communities also includes a form living will, which is somewhat easier to understand than the Legislature's form.

In the presence of a Notary Public or Justice of the Peace, you and two witnesses must sign the living will, all at the same time. You and the witnesses must swear that you signed the

living will as your free and voluntary act for the purposes expressed in the living will, that you and the witnesses all signed together, and that you were at least eighteen years of age, of sane mind, and under no constraint or undue influence at the time of signing. As with the durable power of attorney for health care, if you are physically unable to sign the document, you may have someone else sign it on your behalf in your presence and in the presence of the witnesses.

If you are sure that you do not wish to be kept alive by artificial means if you are terminally ill or permanently unconscious, you should sign a living will. Doing so will ease the burden on your health care agent who will have to give the order to your doctor. If you are not sure whether you would like to be kept alive under those circumstances, then you should not sign the living will, but you should discuss with your health care agent all of your feelings and concerns about end-of-life decisions. If you do not sign a living will, there is no legal presumption that you do or that you do not want to be kept alive by artificial means. A durable power of attorney for health care takes precedence over a living will, so even if you have signed a living will, your agent under the durable power of attorney may decide that the time is not right to withhold artificial life support.

Nomination of Guardian

If you have executed a durable general power of attorney for financial affairs and a durable power of attorney for health care, it is likely that you will not have to be placed under guardianship if you were to become incompetent. However, there are some cases in which a guardianship is necessary, even if you have executed those documents. For example, if the people that you designate as your agents are not able to serve, or misuse their authority, or if you should refuse the medical treatment authorized by your health care agent, someone will have to petition the Probate Court to be appointed your Guardian. Your Guardian will then have the authority to make financial and health care decisions for you.

New Hampshire law permits you, while competent, to designate the person or persons whom you would like to serve as your Guardian, if that should become necessary. Even more importantly, you may designate people whom you do *not* wish to serve as your Guardian. The law directs that the court may not appoint as Guardian anyone whom you have excluded.

Like the durable general power of attorney for financial affairs, there is no specific form that must be used to nominate a guardian or to designate the person who should not serve as your guardian. The nomination of guardian must be in writing, signed, and acknowledged before a Justice of the Peace or Notary Public.

Disability Planning Conclusion

For many people, durable general powers of attorney for financial affairs and durable powers of attorney for health care are the most important estate planning documents. Many people assume that in the event of their incapacity, their spouse would have the legal right to make medical decisions for them and to handle their financial affairs. People also assume that

they may act on behalf of their children for as long as their children are dependent on them. Neither assumption is legally correct. Once a young person reaches age eighteen, he or she is a legal adult, and if he or she should become incapacitated, a parent has no right to make decisions unless the parent has been appointed Guardian by the court, or has been designated as an agent under durable powers of attorney. Similarly, if a doctor is faced with the situation where a spouse is giving directions concerning the medical care of an incapacitated adult, and the adult children are expressing contrary wishes, in the absence of a durable power of attorney for health care, the doctor most likely will not act without the appointment of a Guardian for the incapacitated adult.

PLANNING FOR DEATH

While some of us may escape the affliction of mental incapacity, none of us will escape death. Planning for the transfer of assets at death is the focus of most estate plans. Assets may be transferred at death by will, by trust, or by will substitutes.

Will Substitutes

“Will substitutes” is not a legal term, but a term of convenience that describes a variety of means by which assets may be transferred upon death. The most commonly used forms of will substitutes are beneficiary designations, such as those on life insurance policies, annuities, or retirement accounts, “in trust for” bank accounts, “payable on death” securities or investment accounts, and accounts held as joint tenants with rights of survivorship. The beneficiary designations are contractual arrangements by which the life insurance company or the custodian of the retirement account agrees to pay benefits to the person designated by the owner of the policy or the retirement account after the death of the owner. In most cases, the designation of beneficiary is revocable by the owner, and the beneficiary has no right to the account until the owner’s death.

You may designate a person who will inherit your bank account after your death by setting up the account in your name “in trust for” the named beneficiary. Most banks will allow you to name only one beneficiary of an “in trust for” account. You may designate one or more people to inherit your securities or brokerage accounts after your death by titling the securities or accounts in your name “payable on death” to the named beneficiary or beneficiaries. During your lifetime, you are the only person who has access to those accounts, and you may change the beneficiaries or deplete the entire accounts during your lifetime. The beneficiaries have no right to those accounts until after your death.

Many people own property, real and personal, as joint tenants with rights of survivorship. When you own property as a joint tenant with rights of survivorship, the property will pass to the surviving joint tenant immediately upon your death. Unlike the accounts mentioned above which have a named beneficiary, however, accounts held in joint tenancy are the property of all of the joint tenants during the lifetimes of the joint tenants. As a result, one joint tenant may withdraw assets from joint bank accounts and brokerage accounts without the approval, or even

the knowledge, of the other joint tenant. Real estate held in joint tenancy may not be sold without the signature of all of the joint tenants.

If you own your real estate with another person, check your deed to determine whether the deed says that you own the property “as joint tenants” or “as joint tenants with rights of survivorship.” If the deed does not include that language, then you own the real estate as tenant in common with the other person. Your interest in that property will not automatically pass to the tenant in common after your death; rather, your interest will pass as part of your estate to the beneficiaries named in your will, or to your heirs at law, if you die without a will.

Another way to pass your real estate at death without the need to probate your estate is to execute a deed during your lifetime to the person or persons that you want to inherit the real estate, but retain for yourself the exclusive right to use the property during your lifetime. The exclusive right to use the property is known as a “life estate.” You would be what is called a “life tenant” and the people who would inherit the real estate after your death are known as “remaindermen.” As a life tenant, you would be responsible for all of the ongoing expenses of the real estate, and would be entitled to all income from the real estate. If the property were sold during your lifetime, you could not sell it without the signatures of the remaindermen on the deed, and you would have to share the proceeds of sale with the remaindermen, in accordance with actuarial tables that value your right to live in the property for life.

Wills

A will is the document that sets forth your wishes concerning the disposition of property that you own in your name alone, without a beneficiary designation, at the time of your death. Each state has its own law that governs the validity of a will. New Hampshire, like other states, recognizes the validity of a will that was validly executed according to the laws of the state or country in which it was executed. Nevertheless, if you have executed a will elsewhere, and now have become a resident of New Hampshire, it is advisable to have your will reviewed and updated by a New Hampshire attorney.

Anyone who is of sane mind and over the age of eighteen, or a married person under the age of eighteen, may execute a will in New Hampshire. The term for the person who executes a will is “testator” if the person is male, and “testatrix” if the person is female. The will must be in writing, signed by the testator/trix, or, if the person is unable to sign, by someone else at his or her direction and in his or her presence, and must be signed by two or more credible witnesses who, at the request of the testator/trix and in the presence of the testator/trix, attest to the signature of the testator/trix.

A witness to the will should not be a beneficiary or the spouse of a beneficiary of the will. If the witness is a beneficiary or a beneficiary’s spouse, the will itself will not be invalid; however, the gift to the witness or the spouse will be invalid.

The mere fact that a will exists does not in and of itself operate to pass your property. The will must be proven and allowed by the probate court before any of its provisions will take

effect. Since 1983, New Hampshire law has allowed a self-proving affidavit to be affixed to a will. At the time of execution of a will, the testator/trix and the two witnesses swear before a Justice of the Peace or Notary Public that all of the requirements to make a document a valid will were met.

It is not uncommon for someone to die with a will that does not have a self-proving affidavit attached to it. If the will does not include the self-proving affidavit, it will nevertheless be a valid will if the requirements are met. However, in order to prove that the requirements are met, one of the witnesses will have to appear before the Judge of Probate and swear that all of the statements that are listed in the self-proving affidavit were true at the time that the will was executed. It can be difficult to locate witnesses many years after a will was signed. If you have a will that does not include a self-proving affidavit, it would be wise to update your will, even if you do not wish to change any of its terms.

You may make gifts of specific assets or specific amounts of money to beneficiaries of your will, or you may make gifts of a portion or all of your estate to one or more people. You should designate what will happen to a gift if a named beneficiary predeceases you. It is difficult for some people to comprehend that they might not be survived by children or grandchildren, but those situations do occur, and it is better for you to choose what will happen to your assets than to let the New Hampshire law of intestacy determine who will share your estate.

You do not have to leave a gift to your spouse in your will. However, a surviving spouse who is dissatisfied with what you choose to leave him or her may claim a portion of your estate. The portion of the estate that the spouse is entitled to receive is called a “statutory share.” The amount of the statutory share depends on whether you are survived by children, parents, or siblings.

If, after you have executed a will, you are divorced, or your marriage is annulled, any gift to your former spouse and any authority granted to the former spouse in your will are revoked by the divorce or the annulment. The property that would have passed to the former spouse passes as if the former spouse and all descendants of the former spouse who are not also your descendants had all predeceased you. If you are in the process of divorce or are merely separated at the time of your death, the gifts in your will to your spouse and the authority granted to the spouse still stand. If you should remarry the former spouse, the gifts and the authority granted to the spouse will be upheld. If, after divorce or annulment, you want the former spouse to benefit under your will, or to exercise authority over it, you should execute a new will in which you specifically make clear your intention to benefit the former spouse.

Unlike spouses, children do not have the right to claim a portion of your estate, if you choose to make a will that cuts them out. There is one important exception to that rule: if you do not mention your children, or the issue of deceased children in your will, the law concludes that you have forgotten about them, and they are then entitled to a share of your estate. The term for a child or issue of a deceased child who is not mentioned in a will is “pretermitted heir.” Unlike spouses, who must make an election to claim a statutory share of an estate, pretermitted heirs do not have to elect a share of your estate. They have an absolute right to the portion of your estate that they would have inherited if you had died without a will. You can see that it is thus most

important to mention your children and their issue in your will -- even if you do not leave them a penny -- to show that you have not forgotten them.

In your will, you may nominate a Guardian for your minor children. The nomination of a Guardian is one of the most important estate planning decisions that you will make. Although the Guardian must be appointed by the probate court, the court gives great deference to your wishes. You may designate a person to serve as Guardian of the Person of your minor children and the same person or a different person to serve as Guardian of the Estate of your minor children. Each year, until a child turns eighteen, the Guardian of the Person must file an annual report with the probate court reporting any changes in your child's life over the past year. The Guardian of the Estate must file an annual account with the probate court reporting every penny into and out of the guardianship during the year. The Guardian of the Estate must also be bonded.

As an alternative to a Guardian of the Estate, you may designate someone who would serve as Custodian under the Uniform Transfers to Minors Act who would accept a gift to minor beneficiaries of your estate. The Custodian would hold, manage, and use the minor's gift for the sole benefit of the minor, and distribute the balance of the gift to the beneficiary when he or she turns twenty-one. A Custodian has the same fiduciary duty to the minor beneficiary as a Guardian of the Estate, but performs the duty without court supervision, and without the need for a bond.

In your will, you nominate a person who, after being appointed by the probate court, will have authority to gather your assets, pay your debts, and distribute your assets to your beneficiaries. The person that handles those tasks is called an "Executor" if male or "Executrix" if female. In most cases, the Executor/trix will furnish a bond to the probate court and file an inventory of your assets and annual accounts of the administration of your estate. There are some exceptions to that general rule: if your spouse is the sole beneficiary of your will and is appointed Executor/trix of the estate or if you have no spouse and only one child and that child is the sole beneficiary of the will and is appointed Executor/trix, the court will waive the requirements of a bond, an inventory, and an account.

The probate court will oversee the administration of your estate, if you die with assets in your own name. Your will will be probated in the county and state in which you live at the time of your death. If you own real estate in a state other than the state of your primary residence, your estate will have to be probated in that other state, as well, in a process called "ancillary administration."

Some people prefer that their estates be subject to the probate process, because they want the court to supervise the administration of the estate. They may want the court to supervise how their estate is administered and divided because of difficult family relationships. Others prefer to avoid the publicity and expense of probate, and trust instead that the people that they choose to handle their affairs will do so properly. A common way to avoid probate of an estate, and avoid ancillary administration when real estate is held in another state, is to establish *and fund* a living trust.

Trusts

A trust is a useful tool for providing ongoing management of assets and, when needed, for tax planning. A trust is a relationship among the person who creates the trust, called the “Grantor” or “Settlor,” the person who manages the assets of the trust, called the “Trustee,” and the person who benefits from the trust, called the “Beneficiary.” There may be one or more grantors, trustees, or beneficiaries of a trust. The Trustee holds the legal title to the property of the trust, but must manage the trust property for the benefit of the beneficiaries, in accordance with the terms set out by the grantor in the trust document.

Testamentary Trusts vs. Living Trusts

Trusts that are included in a will, and therefore, that do not take effect until after the death of the Grantor/Testator/trix are called “testamentary trusts”. Testamentary trusts are subject to the on-going supervision of the probate court. The trustee of a testamentary trust must be appointed by the court, must be bonded, and must file an inventory and annual accounts of the trust until the time that the Grantor/Testator/trix has designated for the trust assets to be distributed to the beneficiaries.

Trusts that are created during the Grantor’s lifetime are called “living trusts” or “inter vivos trusts.” Living trusts are not subject to the on-going supervision of the probate court, although if any difficulty should arise during the administration of the trust, the probate court has jurisdiction to resolve the problem.

Living Trusts - Revocable vs. Irrevocable

Living trusts may be revocable or irrevocable. Irrevocable trusts, as the name implies, are not revocable once they have been established. People often use irrevocable trusts to remove assets from their taxable estates. A common use of irrevocable trusts is to hold life insurance policies and their proceeds. People sometimes transfer assets to irrevocable trusts to make themselves eligible for types of public assistance. You should *never* create and fund an irrevocable trust unless you receive competent legal advice and completely understand the consequences of doing so.

Revocable Living Trusts for Asset Management and Probate Avoidance

The most common type of estate planning trust is a revocable living trust. You would typically create a revocable living trust by signing a trust agreement. The agreement would be between yourself as Grantor and yourself as Trustee, and would set forth the terms on which the trust assets would be managed. During your lifetime, you would be the sole beneficiary of the trust, although, if you prefer, you could name other people, such as a spouse or children, as a permissible beneficiary if you should become unable to handle the trust yourself. In that case, the person that you name in the trust agreement as a successor trustee would step into your place and manage the trust assets.

In order to avoid probate of your estate after your death, during your lifetime you would transfer your assets to the trust. The process of transferring assets is called “funding the trust.” You would transfer real estate to the trust by means of a deed. You would transfer your tangible personal property (furniture, jewelry, etc.) that does not have a certificate of title by means of a bill of sale. You would transfer your bank accounts by sitting down with the customer service person at the bank and re-titling your accounts in your name as trustee of your trust. You would contact your broker and arrange to have investment accounts transferred to the name of the trust. When the time comes to re-register your vehicles, you would re-title them in the name of the trust. When you transfer insured property to the trust, make sure that you contact your insurance company and arrange to name the trust as an insured party. You may name your trust as the beneficiary of life insurance policies or retirement accounts.

Even though your assets would be held in the name of the trust, you would still be in complete control of the assets. As Trustee, you manage the assets, and can buy and sell assets in the name of the trust. Even if you chose someone else to serve as Trustee, you would remain in control through your right as Grantor to change the terms of the trust, or revoke the trust completely. During your lifetime, the trust would use your social security number as its taxpayer identification number. You will not need to file a separate income tax return for the trust. All income earned on trust assets will be reported on your own income tax returns.

The trust agreement will specify what happens to your property after your death. The trust agreement, however, will apply only to property that is either in the trust prior to your death, or property that passes to your trust after your death by means of your will or a beneficiary designation. Many times, people think that they have transferred all of their assets to the trust, but someone later discovers an asset that the Grantor did not know he or she had owned. If you were killed in an accident, the claim for wrongful death would be an asset of your probate estate that you could not have transferred to the trust prior to your death. Therefore, even if you believe that you have transferred all of your assets to your trust during your lifetime, you should have a will that leaves your property to your trust. That type of a will is commonly called a “pour over” will because it pours your estate over into your trust.

After your death, the successor trustee of the trust (whom you have named in the trust agreement) will apply for a new tax identification number for the trust. The successor trustee will then pay your debts and distribute the trust assets as you have directed. In many cases, the successor trustee will continue to hold the assets and manage and use them for young trust beneficiaries until the beneficiaries reach an age where they can responsibly manage the assets themselves. When you establish the trust, you would choose the age at which the beneficiaries could receive their gifts. Most people want to make sure that the trustee controls the assets at least until the beneficiaries complete college. Many people want the trustee to manage the assets for several years after the beneficiaries have completed college. It is not at all uncommon to have trusts that provide that a beneficiary may receive a portion of the principal of his or her share at one age, and then the balance of the principal several years later.

Sometimes couples choose to establish a joint trust. Typically, both people would be the grantors, trustees and beneficiaries of the trust during their lifetimes. The trust would state whether it would become irrevocable after the death of one grantor, or whether the surviving

grantor would continue to have the ability to change the terms of the trust or to revoke it completely. If the reasons for creating the trust were to avoid probate of your estate, or to provide for the management of trust assets for young beneficiaries, it is usually advisable to allow the survivor to amend or revoke the trust.

Trusts are commonly used when a person wishes to ensure that his/her spouse is adequately cared for after his/her death, but at the same time wants to ensure that any children from a prior marriage receive his/her assets upon the surviving spouse's death or remarriage.

If, after you have executed a revocable living trust, you are divorced, or your marriage is annulled, any gift to your former spouse and any authority granted to the former spouse in your trust are revoked by the divorce or the annulment. The property that would have passed to the former spouse passes as if the former spouse and all descendants of the former spouse who are not also your descendants had all predeceased you. If you are in the process of divorce or are separated at the time of your death, the gifts in your trust to your spouse and the authority granted to the spouse still stand. If you should remarry the former spouse, the gifts and the authority granted to the spouse will be upheld. If, after divorce or annulment, you want the former spouse to benefit under your trust, or have authority over the trust, you should execute a new trust in which you specifically make clear your intention to benefit the former spouse.

Revocable Living Trusts for Tax Planning

People often use trusts to minimize estate taxes. A comprehensive discussion of estate tax far exceeds the scope of this brochure; however, an overview of the tax law will help you to understand how trusts may be used to minimize those taxes. The federal and state estate tax law is in a state of flux as this brochure is being written (April 2004). Federal law currently imposes an estate tax on estates that exceed \$1.5 million. That amount will gradually increase to \$3.5 million in 2009, but, after a year in which the federal estate tax law will have been completely repealed, the estate tax will return in 2011 with a tax on estates over \$1 million.

Federal law currently permits a credit against the federal estate tax for death taxes paid to states. New Hampshire's estate tax is limited to the amount that the federal government will allow as a deduction for state death taxes. For example, a taxable estate (gross estate less allowable deductions) of \$2.5 million results in a total taxable estate of about \$712,000. The credit for state death taxes is approximately \$72,000, resulting in a net federal tax liability of approximately \$640,000. The total amount of tax that the estate will pay is \$712,000. The estate will pay \$72,000 of that amount to New Hampshire, and the balance will be paid to the federal government. The current federal law does away with the credit for state death taxes in 2005. As a result, if New Hampshire does not change its estate tax law, then using the example of the \$2.5 million estate, the entire \$712,000 will be paid to the federal government and New Hampshire will receive nothing.

Federal and New Hampshire laws permit an unlimited deduction against estate tax for gifts to spouses who are United States' citizens. Trusts can be drafted to minimize estate taxes by taking advantage of the combination of the estate tax exclusion for gifts to non-spouses and

the marital deduction for gifts to citizen spouses. By definition, then, only married couples may take advantage of the tax-planning opportunities. You may have heard the terms “By-pass trust,” “A-B Trust” or “Credit shelter trust,” all of which refer to tax-planning trusts.

Couples who wish to use trusts as a tax-planning tool should create two separate trusts. If you were to establish a tax-planning trust, the trust would include the same provisions for your lifetime benefit as a trust that was not designed for tax planning. Following your death, the trust assets would be divided into two parts: one part would hold assets whose value did not exceed the amount that can pass to a non-spouse free of estate tax (often called “the credit shelter trust”) and the other part would hold the rest of your assets. The part that is not the credit shelter trust would be for the sole benefit of your surviving spouse during his or her lifetime. That part that benefits your spouse may be in the form of a marital trust which can be dissolved at any time by the surviving spouse to become an outright gift to the surviving spouse (a voluntary marital trust), or in the form of a trust that is held for the sole benefit of your spouse (most commonly a “marital QTIP trust,” although certain other trusts will qualify for the marital deduction). Your spouse may benefit from the credit shelter trust during his or her lifetime, but may not have unlimited control over or unlimited rights to the assets in the credit shelter trust. After your spouse’s later death, the assets held in the credit shelter trust will pass free of estate tax - using *your* estate tax credit - to the people that you have named as the beneficiaries. Your spouse will then be able to use his or her own estate tax credit against his or her estate in transferring assets to the beneficiaries.

If you did not take advantage of this tax planning, and if you had left your entire estate to your spouse, then there would not have been any estate tax at the time of your death (because of the unlimited marital deduction), but when your spouse later died, he or she would be able to use only one credit, and the entire amount of your credit would have gone unused.

MISCELLANEOUS TOPICS

Intestacy

If you die without a will, you are said to die “intestate”. If you have any property in your own name, the probate court will supervise the administration of your estate, in almost the same manner as if you had died with a will (“testate”). The person appointed to administer your estate would be called an “Administrator,” if male, or an “Administratrix,” if female. The duties of the Administrator/trix are the same as those of the Executor/trix who would have administered your will, if you had died testate.

The main difference between the administration of a testate estate and an intestate estate is in what happens with your assets. If you die testate, your will controls what happens to your assets. If you die intestate, New Hampshire law specifies who will inherit your assets, and in what proportions. There are numerous possible combinations of heirs, depending on the value of the estate, and whether you were survived by a spouse, issue, parents, or grandparents.

Common Law Marriage

New Hampshire does not recognize common law marriage as long as both partners are alive. Only after the death of one partner can the survivor be adjudicated a common law spouse. The probate court has jurisdiction to determine whether a surviving partner is a common law spouse, and thus entitled to the benefits conferred upon a spouse. To be adjudicated a common law spouse, the survivor must prove that the couple had lived together for a minimum of three years prior to and up until the death of his/her partner; had acknowledged each other as husband and wife; and were generally reputed in the community to be husband and wife.

Lifetime Gifts

Many people choose to make gifts during their lifetime to reduce their taxable estates or merely to have the pleasure of seeing their loved ones enjoy their gifts. There is no limit on the amount that you may give away. There are tax consequences to some gifts, but most people do not need to be concerned with those tax consequences.

In the first place, you may give up to \$11,000 per year to as many people as you like without any tax consequences at all, as long as the gift is something that the donee can enjoy right away. You do not even need to file a gift tax return. That figure of \$11,000 is called the “annual gift tax exclusion amount” and is indexed for inflation. If you are married, and your spouse agrees to split a gift with you, you may give \$22,000 to as many people as you like in a given year. In that case, you would have to file a gift tax return, so your spouse can check the box that says he or she agrees to split the gift with you.

You may also give more than \$11,000 per year to one person without paying gift tax, until the total amount of your gifts in excess of the annual exclusion gifts during your lifetime reaches \$1,000,000. For example, if you were to give your son \$15,000 this year, you would file a gift tax return next year at the same time that you file your income tax return. You would report the gift of \$15,000, subtract the \$11,000 that you are entitled to give him with no tax consequences at all, and would wind up with a “taxable gift” of \$4,000. The IRS will keep your gift tax return on file, and will know that you may make additional gifts of \$996,000 before you have to pay any gift tax. The following year, if you should give your daughter \$20,000, you would report the gift, subtract the \$11,000 that you are entitled to give her with no tax consequences at all, and would wind up with a taxable gift of \$9,000. As a result, you will have made a total of \$13,000 in taxable gifts, and your available gift tax exclusion would be reduced to \$987,000.

There are exceptions to the rule that gifts that qualify for the annual gift tax exclusion have to be gifts that the donee can enjoy right away. Gifts to a custodian for the benefit of a minor child under the Uniform Transfers to Minors Act qualify for the annual gift tax exclusions, as do gifts to special trusts for minors that provide that the funds will be distributed to the child when he or she reaches age 21 or, if the child should die before that, to the child’s estate, or as the child directs in a will that the child would have executed.

There are special rules for gifts that are used for education or medical care. If you were

to make a gift directly to an educational institution for tuition, or to a medical institution for services provided to anyone, those gifts are not subject to gift tax, no matter how large the amount. The payment must be made directly to the institution in order to qualify for this exception to the gift tax rules: you may not reimburse someone for the tuition he has paid or for the medical bills that she has paid.

Anatomical Gifts

If you plan to make a gift of all or part of your body following your death, you should sign a document of gift. There is no specified form for a document of gift. The only requirements are that you be at least eighteen years of age, of sound mind, and sign the document of gift. If you are unable to sign, you may have another person sign on your behalf in your presence and in the presence of two witnesses, both of whom also sign the document and acknowledge that it has been so signed. The easiest and most common way for you to indicate that you would like to be an organ donor is to have that designation put on your driver's license. You may specify your wish to be an organ donor in your will, but unless you have discussed your will or your wishes with your family members it may well be that your remains will have been disposed of before anyone reads your will.

You may also express your *refusal* to make an anatomical gift by a written document signed in the same manner as a document of gift, by a statement attached to or imprinted on your driver's license, or by any form of communication addressed to a physician or surgeon during a terminal illness or injury.

If you have not made an unrevoked refusal to make an anatomical gift, the following persons, in the following order, have the right to make that gift: your spouse, an adult child, a parent, an adult sibling, a grandparent, a guardian, an agent under your durable power of attorney, and a person authorized or under obligation to dispose of your body. If one person in a class at the same or higher level disagrees with the decision to make the gift (e.g., if you are not survived by a spouse and one child wants to make the gift, but another child does not want to make the gift), the gift will not be made.

CONCLUSION

As you can see, planning for your disability and for the transfer of assets either during your lifetime or after your death is not simple; yet such planning is among the most important things that you can do. Although facing the issue of your own mortality can be difficult, and sometimes painful, there is a tremendous sense of satisfaction once you complete the process and sign your estate planning documents. You know that even if you should lose the ability to direct what happens to you or to your assets, you have chosen trusted people who will act on your behalf, and you have made things as easy as possible for them.

Although this booklet has presented an overview of various documents and considerations in the field of estate planning, it is not a substitute for legal advice. You should

not attempt to create your own estate plan using form documents from a book or from the internet, nor should you attempt to draft your own estate planning documents. The cost of obtaining expert assistance is relatively small in comparison to the extraordinarily costly mistakes and complications for your loved ones that could result if you attempt to do your own estate and financial planning. Depending on your circumstances, your planning should include consultation with an attorney experienced in handling trusts and estates, a tax accountant, a financial planner and your primary care physician. If you are uncertain how or where to begin the process, and you do not have an attorney, call the New Hampshire Bar Association's Lawyer Referral Services at (603) 229-0002. Staff can refer you to attorneys who handle estate planning matters. You may contact several attorneys and select the one who best fits your circumstances and needs. You may also want to read the New Hampshire Bar Association pamphlet, "Selecting, Hiring and Working with a Lawyer."

The most important thing is to get started on the process as soon as possible.

Public Services Provided by the New Hampshire Bar Association

LAW LINE

Volunteer lawyers are available to answer your legal questions. Call 1-800-868-1212 (NH only) on the second Wednesday of each month between 6:00 p.m. and 8:00 p.m. for free legal information.

A QUESTION OF LAW

This column, published regularly in local newspapers, provides general legal information on various topics of interest to the public. If you have a question of law, send it to: Question of Law, New Hampshire Bar Association, 112 Pleasant Street, Concord, NH 03301. A library of recent "Question of Law" columns is also posted, by topic, at www.nhbar.org under the "For the Public" heading.

SPEAKERS BUREAU

Schools, clubs, civic and other groups can contact the New Hampshire Bar Association at (603) 224-6942 to arrange for a lawyer to speak on legal topics.

LAW-RELATED EDUCATION (LRE)

To improve young people's understanding of the law, the NH Bar Association sponsors programs and competitions such as "We the People - The Citizen and the Constitution," and the "Mock Trial Program," and maintains a resource library of law-related education curricula, publications and videos.

LAWYER REFERRAL SERVICE (LRS)

LRS provides referrals statewide for those who can afford to pay for an attorney's Services (603) 229-0002. E-mail LRSreferral@nhbar.org for more information, or visit our web site at www.nhbar.org under the "Need a Lawyer?" heading.

REDUCED FEE REFERRAL PROGRAM

Reduced Fee provides referrals statewide to qualified individuals who can afford to pay something for an attorney's services, but who cannot afford an attorney's regular fees:

(603) 229-0002. E-mail LRSreferral@nhbar.org for more information, or visit our Web site at www.nhbar.org under the "Need a Lawyer?" heading.

NH Bar Association Online - www.nhbar.org

Find information about the NH Bar Association, and access to legal news, law-related articles and pamphlets, and other legal information online.

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