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Estate Planning Fundamentals

Estate planning encompasses a wide range of techniques focused on protecting, preserving and passing on your wealth. This memorandum is purposefully simple and does not cover the wide array of planning devices that can be implemented to achieve your goals. Instead, the documents discussed below form the foundation of virtually every estate plan.

Last Will

Every estate plan should include a Last Will; however, to avoid probate administration after your death, all of your assets must pass directly to the beneficiaries *without* the need to look at your Last Will. If the Will needs to be consulted, then it must be done through the Probate Court.

You still need a Will in case it is necessary to deal with any assets that do not pass directly to a beneficiary. A “simple” Will directs the distribution of probate assets to your beneficiaries, such as your spouse or your children. A “pour-over” Will transfers any probate assets to a Trust to be governed by its provisions.

A Will is also the means by which you nominate guardians for your children. Note that this is only a nomination, and the Probate Court has the final decision with respect to what is in the best interests of a child; however, the Probate Court will honor your wishes absent evidence that your nominee is unfit for any reason.

Trust

There are many types of Trusts that serve an infinite number of purposes. The most common use of a Trust is to avoid probate administration in the event of disability or death. A well-drafted Trust will include provisions for a successor Trustee to take over should you become incapacitated or upon your death. The change of control is simple, efficient, and most importantly, outside of the purview of the Probate Court.

A Trust will also contain all of the provisions for the distribution of assets after death – provisions that are commonly thought of as being part of the Will. Because the Trust continues under the successor Trustee, there is no break in the title like you see when an individual owner dies. Because the Trust provides for the management and distribution of assets after your death, there is no need to look at a Will; therefore, there is no probate administration necessary to settle your estate.

Trusts can also be structured to provide estate tax savings, protect assets from creditors, protect assets from the bad choices of your beneficiaries, plan for family members with special needs, plan for second marriages and mixed families, plan for the care of pets, and any number of other purposes.

Power of Attorney

A Power of Attorney is a document that operates *during your lifetime*. This document grants another person the power to stand in your shoes and take any action you can take with respect to your property and other financial rights. The purpose of this document is to ensure someone can handle all of your financial affairs for you without the need to seek the appointment of a guardian or conservator through the Probate Court (a costly and public process).

A Power of Attorney is especially important for actions that a Trustee cannot be given the power to take, such as withdrawing benefits from retirement plans, filing tax returns and discussing your benefits with the Social Security Administration.

Note that a Power of Attorney is valid as soon as you sign it. It is not only effective if and when you become ill, as is commonly misunderstood. If a Power of Attorney was only valid if you were incapacitated, then it would still be necessary to prove you were incapacitated and defeat the very benefits of the document – efficiency and privacy.

Health Care Documents

Your Health Care Proxy identifies the person who will make health care decisions for you, but only when you are unable to make them for yourself (unlike the Power of Attorney, which operates immediately upon signing). In this circumstance, you are already under the direct care of a physician who can agree to work with the health care agent based on his or her assessment of your ability to make decisions. Usually, legal adjudication of your mental capacity is unnecessary.

A Living Will Declaration is a statement to your health care agent, family and physician with respect to artificial life-prolonging medical treatment. Although your wishes cannot be legally binding under Massachusetts law, it is very important that they are made known to those that will be called upon to make a difficult decision on your behalf.

Finally, a HIPAA Authorization is a simple document granting your health care agent access to your medical records if, and only if, your health care agent is called-upon to make a decision on your behalf, meaning you are unable to do so for yourself. HIPAA is the acronym for the federal law regarding privacy of medical records (Health Insurance Portability and Accountability Act of 1996).