LEGACY LAW GROUP
ESTATE PLANNING, PROBATE & BUSINESS LAW SERVICES

## ESTATE PLANNING

# FREQUENTLY ASKED QUESTIONS

WILLS
TRUSTS

DURABLE POWERS OF ATTORNEY

ADVANCE DIRECTIVES

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# I. WILLS

## Q. WHY DO I NEED A WILL?

**A. Every adult should have a will regardless of his or her financial net worth.** If you die without a will, your property will be distributed according to the intestate laws of your state. Your property will be disbursed to your heirs and family members pursuant to the rules outlined in a statute, which may not necessarily be what you had intended. Thus, having a will ensures that your personal assets and belongings will go to family members, individuals, or charitable organizations you specifically designate to receive your property. Furthermore, if you have minor children, your will can include provisions to address who will care for and become the legal guardian of your children after your death.

## Q. CAN I MAKE A HANDWRITTEN WILL?

**A. The short answer to this question is, yes.** Each state has different requirements pertaining to what is considered to be a valid will. So long as the requirements are met, a will will be considered valid even if it is handwritten. However, the safer practice is to have your attorney prepare a printed will that is then executed according to you state's requirements. You can be sure that a professionally drafted will disposes of your property in the way you intended and that it will be accepted by a probate court. A handwritten will may be more vulnerable to challenges.

## Q. WHAT ARE THE REQUIREMENTS FOR A LEGAL WILL?

**A. Each state has its own statute outlining what is needed for a legal will.** However, in general a will is considered valid, regardless if it is a handwritten or computer generated document, so long as the following conditions are met:

1. The individual writing the will is of legal age;
2. The individual is of a sound mind, or has testamentary capacity. Essentially this means that a person understands that he or she is making a will and further understands the nature and extent of his or her estate and that he or she is disposing his or her assets upon death;
3. The individual's intention is to make a will to dispose of his or her property;
4. The individual voluntarily signed the will, and was not under duress to do so;
5. The will properly disposed of the individual's property; and
6. The will was signed, and dated in front of two disinterested witnesses. A disinterested witness is not listed in the will as a beneficiary. The witnesses also need to sign the will.

# Q. WHAT IS THE DIFFERENCE BETWEEN A WILL AND A LIVING WILL?

**A. A will is a document that allows individuals to specify how they would like their estate to be handled after their death.** A living will, on the other hand, is a document that allows individuals to state their wishes pertaining to medical treatment if they are no longer able to make those decisions themselves.

# Q. WHO CAN MAKE A WILL?

**A. Any individual can make a will so long as he or she is of legal age (in most states 18 years of age) and is mentally competent.** In other words, a person needs to know and understand that he or she is executing a will and making provisions to distribute his or her property to designated beneficiaries after his or her death.

# Q. DO I HAVE TO HAVE A CERTAIN AMOUNT IN ASSETS TO MAKE A WILL?

**A. No.** Anyone can make a will (so long as they are of legal age and mentally competent.) The size of a person's estate is not a factor in who is eligible to make a will.

# Q. WHAT PROPERTY PASSES UNDER A WILL AND WHAT PROPERTY DOES NOT?

**A. Any property or assets that are titled in your name may pass under your will.** Also, property that is titled in your name and with another person as "tenants in common" will pass under your will. Tenants in common is a type of ownership that allows each person to leave his or her ownership interest to specified beneficiaries in his or her will, as opposed to the other co-owner.

Assets that cannot be conveyed to others through a will are assets that "pass over" or "pass outside" of your will. Some examples of these types of assets are:

- Property owned as joint tenants (this property passes directly to the surviving co-owner and can include real estate, vehicles, and bank accounts);
- Life insurance proceeds; retirement accounts, pension plans or IRA proceeds; some banking and investment accounts (these assets pass in accordance with beneficiary designations );
- Any assets placed in a living trust (these assets pass under the terms of the trust) ; and
- Personal property items of small value (typically these are divided in accordance with a personal property memorandum attached to your will or by agreement among your survivors or in accordance with your wishes as stated during your life).

# Q. WHAT IS AN EXECUTOR, AND WHAT DOES HE OR SHE DO?

A. An executor is the person you choose in your will to handle the administration of your estate. An executor is sometimes referred to as a personal representative. His or her job is to carry out your wishes as specified in your

will. An executor's responsibilities include processing the will through probate and distributing the assets of your will to your designated beneficiaries. Specifically, this may entail such responsibilities as making burial or funeral arrangements; paying debts and taxes owed by your estate; inventorying, gathering, and liquidating assets; and even temporarily running a business.

## Q. WHOM SHOULD I CHOOSE AS MY EXECUTOR?

**A. You should appoint as your executor someone you trust and who is capable of serving.** Common choices for executors are spouses, siblings, adult children, or close friends. However, you should keep in mind that people close to you may be grieving, so you should appoint someone whom you can trust to handle your matters during a difficult time. You may not name a minor or a person who has been convicted of a felony to serve as executor of your will. Some states may have additional limitations or requirements if you choose someone who is out of state to serve as your executor. Typically, your attorney will suggest that you name an alternate person to serve as executor in the event that the first person you name is unable or unwilling to serve.

## Q. WHOM SHOULD I CHOOSE AS GUARDIAN FOR MY CHILDREN?

**A. Choosing a guardian for your children is one of the most difficult decisions a person needs to make when preparing estate planning documents.** Two types of guardianships exist: guardian of the person, and guardian of the estate. The guardian of the estate is the individual named to manage the money or assets of the child, while the guardian of the person is the individual who steps in to serve as the child's parent if the parents are no longer living or able to do so. One person can serve in both roles or you can name a different person for each. You should choose people who share similar values, parenting styles, and goals to you. Also, you may want to consider choosing someone who is young enough and/or physically capable of carrying out your wishes and able to serve as guardian until your minor children reach adulthood.

## Q. CAN I DISINHERIT A SPOUSE?

**A. The only way to ensure that your spouse will be disinherited is if your spouse agrees to it in a written, prenuptial or postnuptial agreement.** Otherwise most states have a law that protects a disinherited spouse. Some states have laws that protect the disinherited spouse based on the length of the parties' marriage, or whether they have children. Other states have laws where a disinherited spouse may be entitled to a "right of election," which allows a spouse to take a portion of the deceased's assets.

## Q. CAN I DISINHERIT A CHILD?

**A. In order to disinherit a child, you must have a will in place.** If you die intestate, or without a will, your property passes under the rules of intestate succession. Every state has a statute that outlines the order in which a deceased person's property will pass. Typically, a decedent's surviving spouse has priority followed by the

decedent's children and then other heirs. If you have a will, you can disinherit an adult child in every state except for Louisiana, which has some limitations. A few states have rules that limit the extent to which a parent may disinherit a minor child.

If you are intending to disinherit a child you should expressly state this in your will. A simple sentence such as "I intentionally have not provided any provisions under this Will for my child (state name)" will suffice. Expressly stating your intentions to disinherit a child in your will will ensure that your wishes are carried out, as most states have laws to protect children who were inadvertently or accidentally left out of the will. Without an express written statement of your intention, the law assumes that you made a mistake and will then include your child in the distribution of your property.

## Q. WHAT IS A NO CONTEST CLAUSE?

**A. A no contest clause is a provision in a will that penalizes any person who challenges your will or portions of your will.** The purpose of the clause is to prevent the person who challenges your will from receiving anything under your will. The no contest clause uses the threat of not receiving any inheritance at all to dissuade beneficiaries from challenging the validity of the will. Many forms of no-contest clauses exist, but one such example is:

> "If a beneficiary contests the terms of this Will, including without limitation, filing a contest to this will in probate under [state probate code], that beneficiary shall not be entitled to take any property under this Will, and for all purposes of this Will, that beneficiary shall then be deemed to have predeceased me."

Not every state will enforce these provisions, so it is best to consult with an attorney in your state regarding this issue.

## Q. WHAT IS A RESIDUARY CLAUSE?

**A. A residuary clause is a provision in a will that expressly disposes of any remaining estate property that was not distributed in the other provisions of the will.** The residuary estate is the property that remains after all claims against the estate have been satisfied and all the specific gifts and bequests have been made. The residuary clause, therefore, provides for a specific person or multiple persons to receive this remaining property. The clause also covers assets or property that was acquired after a will was created. Without a residuary clause, any remaining property (the residuary estate) will be divided in accordance with state intestate laws.

## Q. CAN I LEAVE MONEY TO MY MINOR CHILDREN IN MY WILL? CAN I SET UP A TRUST FOR MY MINOR CHILDREN IN MY WILL?

The answer to both of these questions is yes. Money can be left to minors in a will; however because a minor cannot be on a title, or manage business or accounts in his or her own names, a court will appoint someone to administer the funds until the minor is 18 years of age. One solution to this issue is to establish a trust for your children in your

will, which will effectively hold the money or assets for your minor children until they reach an age of majority, or until they reach an age that you determine would be beneficial for them to have control of their inheritance. When you establish a children's trust in your will, you can choose a trustee to administer and manage the trust.

## Q. HOW DO I MAKE CHANGES TO MY WILL?

**A. You can make changes to your will through a few different methods.** Each state has different provisions or requirements, so it is best to consult with an estate planning attorney in your state (or an attorney at our firm) to ensure that your changes do not void your entire will. In some states, crossing out provisions and making handwritten changes could void your entire will.

One method of changing a will is through attaching a codicil. A codicil is a formal amendment to a will. It is a document that allows you to partially modify or revoke portions of a will. With a codicil, you can make simple changes to a will while leaving all the other provisions the same. It is signed and prepared in accordance with the rules pertaining to wills in each state.

Another method of making changes to your will without having to redo the entire will is by making changes to a personal property memorandum that is attached to the original will. This document will work so long as your original will references a personal property memorandum.

In some circumstances, it may be easier to write a new will altogether and revoke your original will.

## Q. WHERE SHOULD I KEEP MY WILL?

A. After you have your will properly executed in accordance with the laws of your state, you should keep your will in a safe and accessible place. Make sure you let others, particularly the person you have appointed to be executor of your estate, know where you will is located. If you choose to place your will in a safe, or fire and waterproofed box in your home, make sure you have provided others with the combination and location of the box. Placing your will in a safety deposit box at a bank could create additional challenges and delays after your death, as often an individual will need a court order to retrieve the contents in your safety deposit box. One solution to this problem is to have a safety deposit box in your name jointly with another individual. In addition, if you had your will prepared by an attorney, your attorney should also have a copy of your will and any other documents the attorney prepared for you.

## Q. WHAT HAPPENS TO MY WILL AFTER I DIE?

A. After you die, your will must be submitted to probate. Usually the person whom you have named as executor of your estate, or your personal representative will submit your will to the court. Once your will is filed with the probate court, it becomes a public record.

# II. TRUSTS

# A. ALL TRUSTS

## Q. WHAT IS A TRUST?

**A. A trust is a legal relationship in which one person (the trustee) holds legal title to property for the benefit of another (the beneficiary).** Many kinds of trusts exist, and each state has different rules outlining the specific requirements for trusts.

Trusts are used to accomplish a variety of estate planning goals. A trust may supplement a will, or replace a will. A trust may allow your estate to avoid probate. A trust may be created to manage a person's property or protect it from creditors. Some trusts provide tax benefits or reduce tax liabilities.

To create a trust, the trust maker (usually called the settlor or grantor in the trust document) transfers legal ownership of his or her property to a person or institution, the trustee. The trustee can then manage the property for the benefit of another, the beneficiary. Often the trustee receives compensation for serving as trustee. A trustee has a fiduciary duty to act in the best interests of the beneficiary.

Depending on the type of trust, a trust maker may name himself or herself a trustee or a beneficiary. Regardless of what kind of trust a person establishes, the trust will only become effective after the trust maker has funded it, i.e., transferred assets to it.

## Q. WHAT IS THE DIFFERENCE BETWEEN A REVOCABLE TRUST AND AN IRREVOCABLE TRUST?

**A. A revocable trust is a trust that the trust maker can change, amend, or revoke during his or her lifetime.** The trust maker still has complete control over the assets that he or she has transferred into the trust. Revocable trusts may include a provision that makes that trust irrevocable on the trust maker's death. On the other hand, an irrevocable trust is one that the trust maker cannot modify or revoke. The maker of an irrevocable trust permanently relinquishes any right to make changes to the trust.

# Q. WHAT IS THE DIFFERENCE BETWEEN AN INTER VIVOS TRUST AND A TESTAMENTARY TRUST?

**A. A testamentary trust is a trust that is funded and comes into existence only after the maker has died.** Testamentary trusts may be created by a will or living trust. A testamentary becomes irrevocable on the maker's death.

A testamentary trust, as opposed to an outright gift, allows the maker to have more control over the management and distribution of his or her property after death. For example, parents often establish a testamentary trust for the benefit of their minor children through which the trustee manages the assets and disbursement of money to the children until the children reach a certain age or attain certain milestones.

An inter vivos trust is a trust that is established and funded during the maker's lifetime. It may terminate after a specified period or on the trust maker's death, or it may continue after the trust maker's death. An inter vivos trust may be revocable or irrevocable. One type of inter vivos trust, the revocable living trust, may allow a person's estate to avoid probate IF his or her assets were transferred into the trust before his or her death.

Irrevocable inter vivos trusts are often used for protecting property from creditors or for certain tax benefits.

# B. REVOCABLE LIVING TRUSTS

## Q. WHAT IS A REVOCABLE LIVING TRUST?

**A. A revocable living trust is an estate planning tool.** A revocable living trust is created between the trust maker (called the settler or the grantor) and the trustee for the benefit of the trust beneficiaries.

The trust maker is you (or you and your spouse). The trustee is the person or persons whom you designate to manage your trust, typically you (or you and your spouse) during your lifetime and a successor on your death. Your trust beneficiaries are the individuals and/or organizations whom you designate to receive your assets on your death.

Once your revocable living trust is created, you transfer your assets into the trust. The trust assets, however, are still considered yours to be used for your benefit throughout your lifetime. The trust maker of a revocable living trust can change, modify or terminate the living trust during his or her lifetime.

Living trusts are usually drafted to include a back-up (or successor) trustee who will manage your trust in the event you die or become incapacitated. The trust will most likely include special provisions that allow for the management and distribution of the trust assets upon your death. On your death, your trustee distributes your property to your beneficiaries under the terms of your trust without the need to go through probate.

## Q. WHAT ARE THE BENEFITS OF A REVOCABLE LIVING TRUST?

**A. A revocable living trust provides several benefits that are not available with a will.**

When you die, the assets in your living trust do not need to go through probate. Probate can be time consuming and costly. With a revocable living trust, your trustee can manage your estate and transfer your assets to your designated beneficiaries immediately on your death without delay or payment of probate fees.

Because your trust does not need to be probated, it does not become a public document, so the details of your estate plan remain private.

If you own real estate in more than one state, a living trust can eliminate the need for multiple probate proceedings in each state in which the property is located.

A living trust permits you to name a successor trustee to take over management of the trust assets if you are incapacitated, which may avoid the need for a court-appointed guardian.

# Q. WHAT ARE THE DISADVANTAGES OF A REVOCABLE LIVING TRUST?

**A. A living trust is not the best option for everyone.** The main disadvantage to having a living trust is the upfront costs associated with it. Attorney fees will be higher for a living trust estate plan than a will-based estate plan because the attorney needs to spend more time preparing the documents and discussing the options and possibilities that are available under a trust-based plan.

In addition, maintaining the trust requires time, effort, and expense. The living trust is not effective unless the trust is funded. Therefore, once the trust is created it is necessary for you to transfer your assets into it. Whenever you acquire new assets, you will also have to transfer them to the trust. If assets are left outside the trust, your estate may need to be probated.

Sometimes holding assets through a trust can complicate dealings with third parties. They may be hesitant to accept checks drawn on the trust's account. You may have to first purchase real estate in your own name and then in a second transaction, transfer it to the trust. Or you may have to transfer an asset you want to sell from the trust to your own name before selling it. Insurers may not want to insure a vehicle that is held in trust and lenders may require loans to be paid off before a vehicle can be put in the trust.

Another downside of a living trust is that because a trust does not go through probate, the court does not have the ability to monitor the estate for fraud or abuse. Finally, minor differences exist between tax obligations for a trust-based estate versus a will-based estate. You should discuss these differences with a tax professional or your attorney before deciding which option is best for you.

# Q. HOW DO I CREATE A REVOCABLE LIVING TRUST?

**A. It is best to contact an attorney who specializes in estate planning to help you create your living trust.** While many forms and programs are available online that would allow you to create your own living trust, a trust can be lengthy and complicated. To ensure that your estate planning goals are met, you should meet with an attorney who handles these matters on a regular basis so that he or she can draft your trust to accomplish your goals. A "form" may not cover your individual needs. Also, even if a trust is created and signed by you, it will not be effective unless it is properly funded and you have transferred your assets into it.

# Q. WILL A REVOCABLE LIVING TRUST AVOID OR REDUCE ESTATE, GIFT, AND INCOME TAXES?

**A. With proper planning and under certain circumstances a married couple may reduce their estate taxes with a revocable living trust.** However, the couple can obtain the same reduction by using wills that include one or more tax-saving testamentary trusts. Transfers of assets to a revocable living trust are not subject to gift taxes.

As the maker of a revocable living trust, you are responsible for the income taxes on any trust assets just as though the assets were still in your name, regardless of whether you or someone else is named trustee.

# Q. WILL A REVOCABLE LIVING TRUST PROTECT MY ASSETS FROM CREDITORS?

**A. A traditional revocable living trust that is established for estate planning for the purposes of avoiding probate will not protect your assets from creditors.** Although your assets are transferred to the trust, you, as the trust maker, are still are taxed on the assets and have control of the assets. In addition, you have the authority to revoke or terminate the trust at any time and then the assets revert to your name. If your goal is to shield your assets, you should discuss with your estate planning attorney whether other more complex trusts are appropriate for your estate plan.

# Q. WILL A REVOCABLE LIVING TRUST PREVENT A WILL CONTEST?

**A. The short answer to this question is no.** Technically, a trust is not a will, so the trust itself cannot be part of a will contest action. Under a traditional trust-based estate plan, a document called a pour-over will usually accompanies the trust. The pour-over will serves as a safety net for anything not covered by your trust. The pour-over-will, however, could be contested.

A living trust may reduce the likelihood of a contest because it is not a public record, but it does not guarantee the distribution of your estate will be uncontested. If your family members are unaware that another person is receiving more than they are, the likelihood of a contest is reduced. However, a living trust, like any other contract, can be challenged in court based on fraud, undue influence, or lack of capacity. These are also the same grounds on which a will is often challenged.

# Q. WILL A REVOCABLE LIVING TRUST HELP ME QUALIFY FOR MEDICAID OR OTHER GOVERNMENT BENEFITS?

**A. A revocable living trust will NOT help anyone qualify for Medicaid or government benefits.** The reason is that, under a revocable living trust, the trust maker (you) still has the ability to control your assets, either by managing their distribution or by revoking the trust and having the assets revert to you. With careful drafting and planning, several types of irrevocable living trusts, such as a special purpose trust or Medicaid asset protection trust, may help you to qualify for Medicaid or other government benefits. The laws regarding transferring property into these types of trusts are complex; therefore it is in your best interest to seek the advice of an attorney who specializes in this area to assess whether you do qualify for these benefits and to properly draft a trust that would achieve these goals.

# Q. DO I STILL NEED A WILL IF I HAVE A REVOCABLE LIVING TRUST?

**A. Yes.** You should still have a will to accompany your living trust. This type of will is called a pour-over will. Because your living trust deals strictly with your assets, a pour-over will acts as a safety-net for everything else pertaining to your estate plan that your trust does not cover. If you have minor children, for example, a pour-over will contains

provisions addressing the appointment of a guardian for them. Also, if you pass away before you transfer all your assets into your trust, the pour-over will transfers any assets in your sole name into your trust to be distributed to your beneficiaries.

## Q. WHAT PROPERTY SHOULD I TRANSFER INTO MY REVOCABLE LIVING TRUST?

**A. In order for your trust-based estate plan to be effective, you need to fund the trust.** Specifically, you should transfer your most valuable assets into your trust. This may include the following: real estate, business interests, brokerage accounts, money market accounts, stocks, bonds, mutual funds, royalty contracts, patents or copyrights, antiques, jewelry, and artwork. Even if you jointly own real estate with another person or entity, you may want to still consider transferring your share into your trust so that it can be distributed with the rest of your trust estate.

Life Insurance proceeds do not need to be transferred into your living trust, because you can name your beneficiaries in your policy and the proceeds can be distributed directly according to the terms of your policy. Also, retirement accounts such as 401k's or IRA's by law are not allowed to be owned by a trust entity Because you can still designate beneficiaries on those accounts, the proceeds can be distributed directly to your named beneficiaries rather than having to go through probate. Also, property of little value and personal checking accounts are types of property that should not be transferred into your living trust.

## Q. CAN I SELL PROPERTY THAT IS IN MY REVOCABLE LIVING TRUST?

**A. Yes.** If you are the trustee of your revocable living trust, you can sell the property just as if the title was still held in your name. Similarly, if your successor trustee is managing trust assets because you are no longer able to do so, he or she can sell or transfer the property out of the trust.

## Q. CAN I MOVE PROPERTY IN AND OUT OF MY REVOCABLE LIVING TRUST?

**A. Yes.** So long as you have your own, individual living trust, you may transfer property in and out of your trust as often as you wish. If you own a joint trust with another person, such as a spouse, you may need his or her written consent when moving the assets.

## Q. CAN I MAKE A LOAN FROM MY REVOCABLE LIVING TRUST TO A BENEFICIARY?

**A. Yes.** You should have your revocable living trust drafted in a manner specifically tailored to your estate planning goals. If allowing for your beneficiaries to receive a loan from your trust is one or your wishes, you should ensure that your trust is drafted accordingly. Therefore, you can have certain provisions included in your trust that outline the terms and conditions of how a trustee can administer a loan to a beneficiary.

# Q. CAN I REVOKE OR AMEND MY LIVING TRUST?

**A. Yes, so long as you have a revocable living trust, you can revoke or amend it at any time.** If you wish to make a minor change to your trust, you can create an amendment to the trust, which is a simple document outlining the changes. The document needs to be signed, dated, and kept with your original trust document. If you need to make substantial changes to your trust, you will need to create something called an amendment and restatement. An amendment and restatement avoids your having to transfer all your property into a new trust. Rather, the document serves to "restate" the terms of the original trust combined with any new provisions.

# Q. WHAT ARE THE RESPONSIBILITIES AND DUTIES OF MY TRUSTEE?

**A. The trustee's job is to manage the affairs of a trust and distribute its assets.** In carrying out this role, a trustee must follow the wishes of the trust maker pursuant to the instructions outlined or specified in the terms of the trust.

The duties of a trustee differ, however, when a trustee is serving as a successor trustee for a trust maker who is incapacitated, as opposed to when the successor trustee steps in when the trust maker has died. A successor trustee for an incapacitated trust maker is responsible for managing the trust assets as well as managing the care of the trust maker. When the trust maker dies, the successor trustee's responsibilities focus on executing the terms of the trust, which may include inventorying the assets, taking an accounting of the assets, and settling the trust estate.

Often the trust continues after the estate has been settled, (for example in situations where a sub-trust is created for the benefit of a minor child). In these circumstances, the trustee is still responsible for managing the trust on a longer basis. In doing so, the trustee must make sure that he or she keeps the assets of the trust separate from his or her own assets. In addition, a trustee must be communicative with the beneficiaries and treat them equally (unless the trust provides otherwise).

When managing the trust assets, the trustee must make conservative investments for the trust, or invest trust funds in a manner to earn interest with minimal risk to the trust assets. Finally, a trustee is responsible for maintaining accurate records, filing appropriate tax returns and reporting to the designated beneficiaries as outlined in the terms of the trust.

# Q. WHOM SHOULD I CHOOSE AS MY TRUSTEE?

**A. With a revocable living trust, most people choose themselves as the initial trustee.** This enables them to manage their assets for as long as they are able to do so. Married couples may choose to serve as co-trustees, which would allow for the other to step in as sole trustee in the event that one person dies or becomes incapacitated.

When naming an individual as a successor trustee, you should consider naming multiple individuals to serve if the first person you name is unable to act. Because the role of the trustee is to manage and distribute the assets of the

trust, it is important to choose someone whom you trust and who is responsible. Often this could be a spouse, adult child, relative, or close friend. Sometimes people choose a corporate trustee, rather than a family member or close friend. Corporate trustees may include bank trust departments, attorneys, or CPAs.

## Q. WILL I STILL NEED A DURABLE POWER OF ATTORNEY IF I HAVE A REVOCABLE LIVING TRUST?

**A. Yes.** When you have your estate plan prepared, you will need a durable power of attorney in addition to your living trust. A durable power of attorney, sometimes referred to as a financial power of attorney, allows you to name someone as your agent who can immediately handle your financial affairs if you become incapacitated and are unable to do so yourself. A trustee only has the power to manage your assets that are in your trust. A durable power of attorney, however, gives the agent whom you appoint the power to manage assets that are not included in your trusts, such as personal bank accounts and retirement accounts. The agent listed in your durable power of attorney also can pay bills on your behalf and even address insurance issues.

## Q. WHAT HAPPENS TO MY REVOCABLE LIVING TRUST WHEN I DIE?

**A. A revocable living trust becomes an irrevocable trust upon your death, and changes can no longer be made to it.** Your successor trustee becomes your trustee and then takes on the role of managing the trust funds and distributing the trust assets to your beneficiaries. Your trust will remain in existence for as long as it takes the trustee to complete this process. If a sub-trust was created for property to be held in trust for your spouse or minor children, the trustee will continue to manage the sub-trust until the beneficiary has satisfied all the conditions outlined in the trust in order to receive the full distribution of the trust property.

# C. OTHER TYPES OF TRUSTS USED FOR ESTATE PLANNING

## Q. WHAT IS A MINOR'S TRUST?

**A. A minor's trust is a type of a testamentary trust used to leave money or other property to a minor, but in the care of a trustee (person who manages the property) until the minor attains a certain age.** Often minor's trusts are in effect until the minor attains 18, 21 or 25 years of age. The minor's trust is created through either a living trust or a will, and it comes into existence on the trust maker's death.

## Q. WHAT IS A POT TRUST?

**A. A pot trust, which is sometimes referred to as a "family pot trust" is a trust in which the makers (usually parents in this type of situation) leave their money for their children or designated beneficiaries in a combined "pot" in one trust, as opposed to separate trusts for each child.** The trustee has the discretion to take money from the "pot" for the needs of each child as they arise. Once all of the children have reached a specified age (e.g., 18 or 21), the trust pot is usually divided into separate shares for each of the children. An advantage to a pot trust is that it allows the trustee to make unequal distributions to the beneficiaries as their needs may require. For example, one child may have greater medical needs than the others.

## Q. WHAT IS A SPENDTHRIFT TRUST?

**A. A spendthrift trust is a type of irrevocable trust that is created for the benefit of a beneficiary who may have a difficult time managing money and property.** The maker of a spendthrift trust names an independent trustee to manage the trust funds. The independent trustee's powers to protect the beneficiary from frivolous spending can vary and are described in the trust agreement. For example, the trustee may be allowed or required to make cash payments to the beneficiary or to purchase goods and services for the beneficiary. The spendthrift trust protects the trust estate because creditors of the beneficiary cannot attach a claim to trust funds, although they can reach distributions from the trust in the beneficiary's hands. To create a spendthrift trust, a provision must be included in the trust agreement specifically stating that the maker intends for the trust to be a spendthrift trust.

## Q. WHAT IS A MARITAL DEDUCTION TRUST?

**A. The estate and gift tax provides for an "unlimited marital deduction.**" A spouse can transfer all of his or

her assets to the surviving spouse, free of all federal estate and gift tax regardless of the size of the spouse's estate. Outright gifts qualify for the deduction, but gifts in trust must meet special Internal Revenue Code requirements. A marital deduction trust is a testamentary trust that meets these requirements.

Specifically, the surviving spouse must be the only named beneficiary of the trust. In other words the surviving spouse is the only person who can receive any assets from the trust for as long as he or she is living. Depending on the type of marital deduction trust, additional requirements must be met. Two common types of marital deduction trusts are the general power of appointment (GPOA) marital deduction trust and the qualified terminable interest (QTIP) trust. A marital deduction trust can be created in a will or living trust.

## Q. WHAT IS A GENERAL POWER OF APPOINTMENT MARITAL DEDUCTION TRUST?

**A. The general power of appointment (GPOA) marital deduction trust is created by the trust maker's will or living trust.** The maker leaves some or all of his or her estate in trust to the surviving spouse for use during the spouse's lifetime. The trust provides the surviving spouse with income and trust principal if needed. It also gives the surviving spouse a general power of appointment over the trust assets. A general power of appointment means the surviving spouse has the authority to dispose of the trust property on death as he or she sees fit without any restrictions.

On the surviving spouse's death, the trust assets are distributed to the beneficiaries named in the surviving spouse's will or living trust, usually the couple's children.

The assets in the GPOA marital deduction trust are not subject to federal estate and gift tax on the death of the first spouse. However, the general power of appointment causes the entire trust to be included in the surviving spouse's estate on his or her death. If the value of the surviving spouse's estate is high enough, estate taxes could be owed.

## Q. WHAT IS A QUALIFIED TERMINABLE INTEREST TRUST?

**A. A qualified terminable interest trust, often referred to as a Q-TIP, is a type of marital deduction trust that can be included in a will or living trust.** A qualified terminable interest trust permits the trust maker to do all of the following:

- Give his or her spouse all the income from the trust property for life;
- Claim the estate tax marital deduction for the full value of the property transferred to the trust, not just the income;
- Name the ultimate beneficiaries of the property on the spouse's death.

The QTIP trust must give the surviving spouse the right to all income from the property for life payable at least annually and must prohibit distributions of the trust property during the surviving spouse's life to anyone other than the spouse. QTIP property, except for the family residence, must be income producing property. The trustee can invade the principal for the benefit of the surviving spouse.

The trust qualifies as a QTIP trust only if the executor elects to treat the trust property as qualified terminable interest property on the deceased spouse's estate tax return.

This type of trust is often used by those who have been married more than once and have children or grandchildren from previous marriages. The trust allows the maker to ensure that trust assets pass to his or her family, rather than to the family of the surviving spouse as could be the case with a GPOA marital deduction trust.

On the surviving spouse's death, the assets are included in his or her estate. If the estate is large enough, estate taxes may be owed.

# Q. WHAT IS A QUALIFIED DOMESTIC TRUST?

**A. A qualified domestic trust, often referred to as a Q-DOT, is a trust that allows for married individuals to take advantage of the unlimited estate and gift tax marital deduction when the surviving spouse is a non-US citizen.** The transfer of assets outright to a non-citizen surviving spouse is not eligible for the marital deduction.

When property passes estate tax free to a surviving spouse who is a citizen, it is subject to tax in the surviving spouse's estate (if not consumed during his or her life). The concern with a non-citizen surviving spouse is that he or she will take the property outside of the United States where it will not be subject to estate tax on the surviving spouse's death.

With a Q-DOT, the non-citizen surviving spouse is entitled to all of the income generated from the assets held in the trust for his or her entire lifetime, but he or she is not entitled to the principal absent the trustee's authorization. If principal is distributed, estate taxes may be owned. When the surviving non-citizen spouse dies, trust assets pass to beneficiaries, usually the couple's children. Estate tax is payable on the assets left in the trust after the surviving spouse's death.

In order for a Q-DOT to be valid, certain criteria must be met. The executor of the deceased citizen spouse must make an election on the deceased spouse's return to treat the trust as a Q-DOT. At least one named trustee must be either a U.S. citizen or a domestic corporation. The terms of the trust must provide that the trustee may withhold the amount of a Q-DOT estate tax prior to any distribution of the trust assets. Finally, the trustee must ensure that an adequate amount of trust assets remains within the United States so as to guarantee payment of federal taxes.

# Q. WHAT IS A CREDIT SHELTER OR BYPASS TRUST?

**A. A credit shelter or bypass trust allows a married couple with significant assets to minimize their combined estate tax bill.** If the first spouse to die leaves his or her entire estate to the survivor, no estate tax is owed because of the unlimited marital deduction. But the full estate will be subject to estate tax on the death of the survivor, reduced by the survivor's unified credit only. The unified credit of the first spouse to die goes unused. The unified credit allows each individual to transfer a certain dollar value of property without any estate (or gift) tax liability. For deaths in 2017, the exclusion is $5.49 million.

A credit shelter or bypass trust allows both spouses to use their unified credits against estate and gift tax.

The bypass trust is created by will or living trust and comes into existence on the first spouse's death. The will or living trust will provide that the estate of the first spouse to die is divided into two parts. One part, the marital deduction gift, goes to the surviving spouse and is protected from estate tax by the marital deduction. This gift can be outright or in a marital deduction trust.

The other part goes into the bypass trust and is sheltered from estate tax by the first spouse's unified credit. Income from the bypass trust is paid to the surviving spouse during her life. On the surviving spouse's death, assets in the bypass trust pass to the beneficiaries designated by the first spouse, typically the children. Assets in the bypass trust are not included in the surviving spouse's estate (they bypass it) because the second spouse is not considered to be the owner of the trust.

## Q. WHAT IS AN IRREVOCABLE LIFE INSURANCE TRUST?

A. An irrevocable life insurance trust (ILIT) is a trust that you establish to hold your life insurance policy. An ILIT removes life insurance proceeds from your estate. Many people are surprised to learn that life insurance death benefits can be included in the estate of the person who owned the policy. For example, if you purchased a $500,000 life insurance policy on your life, and you are the owner at your death, the entire $500,000 would be included in your estate for estate tax purposes.

In addition, an irrevocable life Insurance trust avoids probate and protects the cash value of your life insurance policy from creditors. Furthermore, an irrevocable life insurance trust enables you as the trust creator to control when and how your beneficiaries will receive the proceeds.

Once you have transferred a life insurance policy into the trust, you cannot revoke the trust and take the policy back in your own name. However, you can select the beneficiaries and the trustee, the person who will manage the trust. To avoid having the policy proceeds included in your estate for estate tax purposes, your estate should not be a beneficiary.

## Q. WHAT IS A CRUMMEY TRUST?

A. One technique for minimizing estate and gift taxes is to make annual or periodic gifts to your children in an amount that is less than the annual gift tax exclusion ($14,000 per person for 2017). A Crummey trust is an irrevocable trust that enables the trust maker to take advantage of the annual gift tax exclusion while retaining the gift in trust until the beneficiary is older than 21.

For the gift tax exclusion to apply, beneficiaries must have a present interest in the gift. In other words, a beneficiary must be able to immediately use the money. Thus, the beneficiary is given a right to withdraw each gift from the trust as the gift is made. The beneficiary must be notified whenever a gift is made to the trust. If the beneficiary (or his or her guardian) doesn't exercise this right within the period specified in the notice (usually 30 days), the right lapses and the beneficiary then will be able to access the money only according to the terms of the trust.

The Crummey Trust is named after Clifford Crummy, who was the first taxpayer who had set up a trust in this manner.

# Q. WHAT IS AN IRC §2503(C) TRUST?

**A. An IRC §2503(c) trust is an irrevocable trust established during the trust maker's lifetime for the benefit of his or her children.** Gifts to a trust created under IRC §2503(c) qualify for the annual gift tax exclusion without the need for withdrawal rights that are required for a Crummey trust. However, the trust must meet certain requirements. Both the trust assets and income must be available for the benefit of the beneficiary while the beneficiary is under 21 years old, which means that the trust must have only one beneficiary. Any property remaining when the beneficiary turns 21 must be distributed outright to the beneficiary, unlike the Crummey trust which permits assets to remain in the trust until the beneficiary is older than 21. If the beneficiary dies before age 21, the trust property must be distributed to his or her estate or as the beneficiary directs under a general power of appointment.

# Q. WHAT IS AN EXTENDED IRC §2503(C) TRUST?

**A. An extended IRC §2503(c) trust is a cross between a Crummey trust and a §2503(c) trust.** A §2503(c) trust is simpler to create and administer than a Crummey Trust, because there's no need for annual withdrawal rights and notice to the beneficiary of such rights. However, the fact that a §2503(c) trust must terminate when the beneficiary turns 21 makes the trust undesirable to trust makers who want the assets to remain in trust until the beneficiary is older.

A one-time right to withdraw the trust assets at age 21 can be used to extend a §2503(c) trust until the beneficiary is older. The withdrawal right in an extended §2503(c) trust must allow the beneficiary to empty out the entire trust. However, the withdrawal right can be limited in time. For example, if the beneficiary does not exercise it within 30 days of turning 21, the trust instrument can provide that the right will lapse and any funds not withdrawn will remain in trust indefinitely. The annual gift tax exclusion applies to each gift without the need for a Crummey notice.

# Q. WHAT IS A SPECIAL NEEDS TRUST?

**A. A special needs trust is a trust that is established to provide for the "special needs" of a disabled beneficiary and still enable the disabled individual to qualify for the government benefits.** The term "special needs" is a defined as the requisites for maintaining the happiness and comfort of a disabled individual when such requisites are not being met or provided by any governmental or private agency. The law provides an extensive list of "special needs," including but not limited to, medical and dental expenses, education, transportation, rehabilitation, dietary needs, spending money, and items to enhance self-esteem.

Receipt of an inheritance, lawsuit settlement, or financial gift could affect a person's right to continued eligibility for government benefits, such as SSI and Medicaid. If the money is instead placed in a special needs trust, a beneficiary can receive payments from the trust without losing his or her benefits. The disabled beneficiary must not have the power to control the amount of or frequency of the trust distributions or to revoke the trust.

# Q. WHAT IS A QUALIFIED PERSONAL RESIDENCE TRUST?

**A. A qualified personal residence trust (QPRT) allows the trust maker to transfer his or her residence to his or her children while minimizing estate and gift taxes.** A QPRT is an irrevocable trust into which the trust maker transfers his or her home or vacation home (or both in two separate trusts) while retaining the right to live in it for a specific term of years that the trust maker chooses. A QPRT reduces estate taxes by allowing the home to pass to the children on the conclusion of the term without further gift or estate taxes.

Gift tax is imposed on the initial transfer of the home to the trust, but the value of the transfer for gift tax purposes is reduced because the trust maker retains the right to live in the home. This reduction in value depends on the trust maker's age, current interest rates, and the length of the retained term. All appreciation in the home after the initial transfer passes to the children gift and estate tax-free.

If the trust maker fails to survive the selected QPRT term, the value of the home is included in the trust maker's estate. However, the estate receives a credit for any gift taxes paid. If the trust maker wants to live in the home after the trust term, he or she must pay market rent.

# Q. WHAT IS A GRANTOR RETAINED ANNUITY TRUST?

**A. A grantor retained annuity trust (GRAT) is an irrevocable trust that is created for a specific period of time as a tool to minimize estate and gift taxes.** The trust maker transfers assets to the GRAT and receives from the GRAT an annuity for a term of years.

The transfer of assets to the trust is a taxable gift to the beneficiaries in the amount of the fair market value of the assets, minus the value of the annuity. To avoid a taxable gift, the annuity can be designed to equal the value of the assets transferred, based upon the term of the GRAT and an assumed growth rate over the term that is established by the Treasury Department. This rate is fixed at the time the GRAT is initiated and is referred to as the IRC §7520 rate.

For the GRAT to be effective, the trust assets must appreciate faster than the §7520 rate. When the GRAT's total return outperforms the §7520 rate, the excess passes to the next generation free of estate and gift taxes. If the trust maker dies before the expiration of its term, the GRAT fails and its assets, including any income and appreciation, remain subject to estate tax.

# Q. WHAT IS AN INTENTIONALLY DEFECTIVE GRANTOR IRREVOCABLE TRUST?

The intentionally defective grantor irrevocable trust (IDGIT) is a sophisticated strategy for minimizing estate and gift taxes by freezing the value of assets. The IDGIT is an irrevocable trust that is treated as the trust maker's alter ego for income tax purposes but not for estate tax purposes. Typically the trust maker funds the trust initially with a small amount of seed money. Then he or she sells assets to the trust, removing them from his or her estate, in exchange for a promissory note.

The transaction has no income tax consequences. The trust maker has no gain or loss on the sale of the assets or receipt of interest payments on the note because the trust maker and the trust are not treated as separate taxpayers. Moreover, the sale is not a taxable gift so long as the note is for the fair market value of the transferred assets and it bears interest at an appropriate rate. The interest rate is determined by the Treasury and depends on the term of the note.

The trust maker pays income taxes on trust income reducing his or her estate while allowing trust assets to grow tax free for the benefit of the beneficiaries' (typically the children). Appreciation of the trust assets at a greater rate than the interest rate on the note is passed free of estate and gift taxes to the beneficiaries. If the trust maker dies before the note is paid, the fair market value of the note is included in his or her estate and could be subject to estate tax. However, post-sale appreciation in trust assets in excess of the interest rate on the note should be excluded.

# Q. WHAT IS A CHARITABLE REMAINDER TRUST?

**A. A charitable remainder trust is an irrevocable trust that holds assets that are contributed to charity when the trust ends.** During the trust term, the trust makes payments to one or more beneficiaries. These may be the trust maker and his or her spouse, the trust maker's children, or other parties.

The payments from the trust to the trust maker or other beneficiaries can be in the form of either a fixed percentage of the value of the assets (a charitable remainder unitrust), which will vary from year to year, or an annuity (a charitable remainder annuity trust), which will always be the same amount. The trust can last for the lifetime of the trust maker and spouse or other beneficiary, or a specified number of years up to 20. The trust may be funded either during the trust maker's lifetime (an inter vivos trust) or on the trust maker's death (a testamentary trust).

Typically individuals with highly appreciated assets use a charitable remainder trust to provide themselves with a lifetime stream of income and achieve significant income and estate tax savings while supporting a favorite charity. The trust removes assets from the trust maker's taxable estate and provides the trust maker with an immediate income tax deduction for the value of the charitable remainder interest.

The income earned by the charitable remainder trust is tax exempt. Assets that have long term appreciation are exempt from capital gains tax when sold by the charitable remainder trust. Consequently, the trust maker can contribute an appreciated asset to the trust. The trust can sell the asset free of capital gains tax and use the proceeds to buy income producing assets to fund the annuity or unitrust payments. Because of the tax savings, a charitable remainder trust can provide a trust maker with more income over his or her life than if the trust maker had sold the asset himself or herself.

Trust income received by the trust maker or other beneficiaries is taxable.

Ongoing contributions can be made to a charitable remainder unitrust. Ongoing contributions are not permitted to charitable remainder annuity trust.

# III. DURABLE POWERS OF ATTORNEY

## Q. WHAT IS A POWER OF ATTORNEY?

**A. A power of attorney is a document that you sign to give another person authority to manage your affairs.** When you sign the form, you name a specific person to serve as your "agent" or "attorney in fact" to act on your behalf. The duties may include signing legal documents or handling financial matters. A power of attorney does not eliminate your power over your own matters, and you are still able to make your own decisions. Rather, implementing a power of attorney allows another individual to share your power. The powers granted under a power of attorney can be very broad or limited to a specific event. For example, you may grant an agent power of attorney to sign a deed for your property in your absence.

## Q. WHAT IS A DURABLE POWER OF ATTORNEY?

A. A durable power of attorney is similar to an ordinary power of attorney in that you grant another individual authority to serve as your agent and handle financial matters for you. However, an ordinary power of attorney ceases to be valid if you become mentally incapacitated. A durable power of attorney does not. Under a durable power of attorney, your agent is required by law to act in a manner that is best for you both financially and physically.

## Q. WHY DO I NEED A DURABLE POWER OF ATTORNEY?

**A. Every adult should have a durable power of attorney because nobody can predict the future.** A durable power of attorney ensures that a person, whom you have chosen and trust, is ready and able to handle your financial affairs if you are unexpectedly unable to do so yourself because of an accident, illness, or absence. If you do not have a durable power of attorney and you become incapacitated or mentally unfit, then your family members may have to file with the Probate Court to have someone appointed to handle your affairs. Preparing ahead of time allows you to have control of who will handle your affairs for you. Also, having an agent empowered to act on your behalf will avoid lengthy delays and eliminate the costs and stresses of court.

## Q. DO I NEED A DURABLE POWER OF ATTORNEY EVEN IF I HAVE A REVOCABLE LIVING TRUST?

A. The short answer to this question is yes. The individual that you appoint as your agent through your durable power of attorney will have authority to handle financial matters that the trustee of your living trust is not authorized to do. Specifically, your trustee is limited to managing or handling the assets that have been transferred into your living trust. Your agent named in your durable power of attorney will be able to manage assets that

cannot be or simply were not transferred to your living trust, such as life insurance, checking accounts, retirement accounts, and any other assets owned outside the trust. In addition, you can give your agent powers to write checks, collect government benefits, file tax returns and even handle legal actions on your behalf, all of which are duties that fall outside of the parameters of a trustee's powers.

## Q. WHAT WILL MY AGENT BE AUTHORIZED TO DO BY MY POWER OF ATTORNEY?

**A. An agent under a durable power of attorney is granted power to handle your financial matters for you in the event you are unable to do so yourself.** These powers can be fairly broad and you can grant the agent all rights, powers, and discretion to handle any financial matters on your behalf, including the following:

a) Buy, sell, and rent real estate, including collecting rent on properties held in your name;
b) Manage accounts with financial institutions, including writing checks and depositing funds into your accounts;
c) Handle stock transactions, including buying and selling stocks;
d) Buy and sell personal property;
e) Access your safety deposit box;
f) Manage any of your insurance and retirement accounts;
g) Manage any government benefit accounts held in your name;
h) File all your tax returns;
i) Handle any litigation or claims filed against you, or file claims and suits on your behalf;
j) Manage any commodities or option transactions;
k) Manage any of your business operations; and
l) Handle any transactions on behalf of your estate.

This is just a sampling of the rights and powers an agent can have under a durable power of attorney. You do not need to grant all these powers; you can limit the powers you grant your agent.

## Q. CAN MY AGENT MAKE HEALTH CARE DECISIONS FOR ME?

**A. An agent under a durable power of attorney for financial matters cannot make health care decisions for you.** Rather, you will need to execute a separate durable power of attorney pertaining to health care (sometimes called a health care proxy) that will allow an individual whom you appoint as your agent to make medical decisions on your behalf.

## Q. ARE THERE ANY POWERS MY AGENT CANNOT BE GIVEN IN A DURABLE POWER OF ATTORNEY?

**A. Although your agent may be granted broad powers under your durable power of attorney, certain acts cannot be delegated to your agent.** For example, your agent cannot perform personal acts on your behalf, such as drafting or amending your will or living trust. Your agent cannot vote for you, or handle matters pertaining to

marriage or divorce. Also, your agent's duties involve acting in your best interests. Therefore, your agent is not allowed to give away your property to others, unless this power was otherwise specifically granted to him or her. You must execute a separate durable power of attorney (sometimes called a health care proxy) to give your agent the power to make medical decisions.

## Q. WHAT OBLIGATIONS DOES MY AGENT HAVE TO ME?

**A. Your agent is obligated to act in your best interests with strict standards of honesty and loyalty.** In doing so, your agent is required to ensure that your property is safe and to keep your property separate and apart from his or her own property. Part of your agent's responsibility includes keeping detailed and organized records of all the financial transactions made on your behalf.

## Q. WHOM SHOULD I NAME AS MY AGENT?

**A. Because an agent under a durable power of attorney is usually granted broad powers, the person you choose should be someone you trust completely and know will act in your best interests.** You should have absolute faith in the agent's loyalty, competence, and devotion. You also want to choose someone who is willing to serve. People often select a family member, close friend, or a professional with a reputation for honesty.

## Q. CAN I NAME MORE THAN ONE AGENT?

**A. Yes.** You can select more than one person to act as your agent. In doing so, however, you need to decide whether you will grant your agents authority to act individually or only jointly. Pros and cons exist for each method. Granting your agents power to act individually allows one agent to act quickly on your behalf. On the other hand, requiring your agents act jointly provides a built in safeguard to ensure your agents are acting in your best interests. A downside of requiring the agents to act jointly is that they could disagree on how to handle the matter, or one may be unavailable, which could cause delays in the action.

Additionally, attorneys often suggest that you name at least two individuals to serve consecutively as your financial agents. Listing two different people ensures that you will have a named agent in place in the event that the first person you named is unable to serve.

## Q. WHEN DOES A DURABLE POWER OF ATTORNEY BECOME EFFECTIVE?

**A. A durable power of attorney can be drafted in two different forms.** One form is takes effect a soon as you sign the document and remains in effect if you become incapacitated. The alternative form, known as a "springing durable power of attorney," does not become effective until you become incapacitated. The document typically includes language that you are incapacitated once a doctor finds you are no longer able to handle your affairs. Sometimes the springing durable power of attorney is drafted to require two independent doctors to determine

that you are unfit to handle your affairs. Remember this is not the same as being declared incompetent by a court of law.

## Q. IF I EXECUTE A DURABLE POWER OF ATTORNEY, WILL I STILL HAVE CONTROL OF MY PROPERTY AND FINANCES?

**A. Yes.** Executing a power of attorney does not eliminate your power and control over your property and finances. The power of attorney is a document that allows you to "share" your power with a person whom you appoint as your agent. As long as you are still capable of making your own decisions, you can instruct your agent as to what actions he or she can do on your behalf. When you become unable to make the decisions for yourself, your agent can then handle your financial matters for you.

## Q. CAN MY AGENT TAKE MY MONEY OR PROPERTY WITHOUT MY PERMISSION?

**A. Your agent is not supposed to take or use your money without your permission.** However, by appointing someone as your agent, you may be giving that individual access to all of your accounts. A small risk does exist that your agent may abuse his or her powers and spend your money or sell your property contrary to your wishes. Therefore, it is important that you choose an individual whom you trust to serve as your agent.

## Q. WHAT SHOULD I DO IF I THINK MY AGENT IS MISUSING MY POWER OF ATTORNEY?

**A. If you suspect that your agent is abusing his or her powers, you should immediately revoke the power of attorney.** You should also notify all your banks and other financial institutions that you have revoked the power of attorney. Finally, you also have the option of going to your Probate Court and requesting an accounting of your financial affairs from your agent. To do this you most-likely will have to pay a filing fee to start the action, but then your agent will be forced to provide a detailed accounting of how he or she spent your money.

## Q. CAN I REVOKE A DURABLE POWER OF ATTORNEY?

**A. Yes.** You can revoke a durable power of attorney at any time so long as you are mentally competent to do so. If the actual document was never given to anyone, you simply need to destroy it. However, if you have provided your agent and any other financial institutions a copy of the document, you will need to have another document prepared that revokes your power of attorney. This document should be acknowledged and witnessed in the same manner as your original power of attorney. Then, you should provide the document revoking your power of attorney to your banks and financial institutions for them to keep on record.

# Q. DO I NEED TO EXECUTE A NEW POWER OF ATTORNEY IF I MOVE TO ANOTHER STATE?

**A. Laws pertaining to durable powers of attorney vary for each state.** Therefore, you should consult an attorney within the new state to ensure that your power of attorney is effective and satisfies the requirements of your new state to make your document enforceable.

# Q. WHERE SHOULD I KEEP MY POWER OF ATTORNEY?

**A. You should keep your power of attorney with your other estate planning documents.** It is important to keep the power of attorney in a safe and secure place that is easily accessible. You should notify your agents and / or family members of where your document is in case they need to locate it. Also, you should give a copy of your power of attorney to the individual you named as your agent. You may also want to provide financial institutions with which you have a relationship a copy of your power of attorney. If you choose to keep your power of attorney in a safety deposit box, make sure that you arrange with your financial institution for your agent to have access to your safety deposit box. You should also provide your agent with a key to your safety deposit box.

# Q. WHEN SHOULD I GIVE MY POWER OF ATTORNEY TO MY AGENT?

**A. You can give a copy of your power of attorney to your agent at any time after you have created the document.** However, if the power of attorney is not going to be used immediately, it is best if you keep it in a safe and secure location. If you choose not to give your agent a copy of your power of attorney at the time you create the document, you should make sure that your agent knows where you keep the document in case he or she needs access to it if you are unable to provide it yourself.

# Q. WHAT ARE THE REQUIREMENTS FOR A VALID DURABLE POWER OF ATTORNEY?

**A. A durable power of attorney must:**

1. Be written.
2. Be signed by the principal.
3. Be notarized.
4. Designate another person as attorney-in-fact or agent.
5. Contain language to the effect that the agent's powers will continue after the principal's incapacity (or will begin upon the principal's incapacity, if the power is a springing power).

# IV. ADVANCE DIRECTIVES: LIVING WILLS AND HEALTH CARE DURABLE POWERS OF ATTORNEY

## Q. WHAT IS AN ADVANCE DIRECTIVE?

**A. An "advance directive" is a document or documents in which you provide instructions or express your wishes about the medical care you want to receive if you become incapable of making treatment decisions for yourself.** The two most common types of advance directives are the living will and the durable power of attorney (DPOA) for health care.

## Q. WHAT IS A LIVING WILL?

**A. A living will (also known as a directive to physicians or health care declaration) is a document** is which you set forth the types of medical care and treatment you want to receive or don't want to receive when you can no longer speak for yourself because you are terminally ill, near death, or permanently unconscious.

## Q. WHO CAN MAKE A LIVING WILL?

**A. Any competent adult** can make a living will.

## Q. WHEN DOES A LIVING WILL TAKE EFFECT?

**A. A living will takes effect when you are unconscious or no longer mentally competent to make your own treatment decisions.** Incompetency means you don't have the ability to understand the consequences of a treatment decision including the risks, benefits, and alternatives. Thus, you could be conscious and able to communicate, yet not be competent to make a health care decision.

## Q. WHAT ARE THE REQUIREMENTS FOR A VALID LIVING WILL?

**A. The specific requirements vary from state to state.** Some states provide a form which may or may not be mandatory. Typically you must sign your living will and your signature must be notarized or witnessed usually by two competent adults. Certain persons may be disqualified from serving as witnesses, such as relatives,

beneficiaries of your estate, and your health care providers.

Some states allow you to make an oral living will before witnesses but the better practice is to put your wishes in writing.

## Q. WHAT TYPES OF TREATMENT CAN I REQUEST OR REFUSE IN MY LIVING WILL?

**A. In your living will, you may request that your health care providers administer life sustaining treatment, withhold life sustaining treatment, or withdraw life sustaining treatment after a period of time.** You have a federal constitutional right to refuse medical treatment, even if that refusal is likely to lead to death.

You may want different instructions for different situations, for example, the last stages of a terminal illness versus a state of unconsciousness from which you are not expected to recover.

The types of treatment you'll want to consider include:

1. **Cardiopulmonary resuscitation.** If your heart stops beating, do you want health care professionals to administer CPR, drugs, and electrical shock with a defibrillator to attempt to restart it?
2. **Intubation and ventilation.** If you are unable to breathe on your own, do you want to have a tube inserted in your windpipe that is connected to a machine that will help you breathe?
3. **Feeding and hydration.** If you are unable to eat or drink, do you want to be fed and hydrated with an IV or feeding tube?
4. **Dialysis.** If your kidneys fail, do you want to be connected to a machine to remove toxins from your body?
5. Antibiotics/antivirals. If you have an infection, do you want it treated with medications, or allow it to go untreated even if that may hasten death?
6. **Surgery.** If surgery becomes necessary to prolong your life, do you want to undergo it or let nature take its course?
7. **Palliative care.** Instead of aggressive life prolonging care, would you prefer to receive only medications and other treatment for the purpose of keeping you pain free and comfortable.

Discussing these decisions with your doctor before making your living will is a good idea. Your doctor can explain the risks, benefits, and consequences of these treatments so you can make a more informed decision. Your doctor should tell you if he or she has reservations about following your instructions in which case you can seek another doctor.

## Q. ONCE I HAVE MADE MY LIVING WILL, WHAT SHOULD I DO WITH IT?

**A. Your health care providers can follow the instructions in your living will only if they know what your instructions are.** To ensure your wishes are known, you should give a copy of your living will to your doctors and your hospital or care facility when you are admitted. If you have a durable power of attorney for health care, you'll want to provide your agent with a copy of your living will. In addition, consider giving a copy to family members who are close by and likely to be in a position to see that your wishes are carried out. And you'll want to take a copy with

you when you travel. You may also want to put a card in your wallet stating the name of your health care agent (if you have one) and where your living will (and health care power of attorney) can be found.

## Q. CAN I CANCEL OR CHANGE MY LIVING WILL? HOW?

**A. Yes, you can revoke or change your living will at any time.** You should review your living will periodically to make sure it still expresses your wishes. Especially appropriate times to review your living will are before you enter the hospital for treatment, when you are diagnosed with a serious illness, and if your marital status changes.

State laws typically provide that you can revoke your living will be destroying the original, signing and dating a written revocation, or executing a new living will that is inconsistent with the old one. The safest practice is to destroy the original and execute a written revocation or a new living will stating your current desires. Then you should be sure to give the new document to everyone to whom you gave a copy of your old living will, i.e., your doctors, hospital or care facility, health care agent, and family members.

You can also revoke your living will by telling your care providers that you no longer want them to follow it.

## Q. WILL MY DOCTOR HONOR MY LIVING WILL?

**A. Your doctor is not required to honor your living will.** Your doctor may refuse to follow your instructions if he or she has moral, religious, or ethical objections or believes it would not be consistent with sound medical practice. Your living will merely gives your doctor immunity from liability for following your directions.

There are some things you can do to increase the chances that your doctor will honor your living will. First, discuss your wishes with your doctor and seek assurances that he or she will follow them. Second, make sure your doctor has a copy. Third, make sure your family members are aware of your wishes and give them a copy of your living will. Finally, execute a durable power of attorney for health care naming an agent to make decisions for you. Make sure your agent knows your wishes and is prepared to advocate for you.

## Q. WHAT IS A HEALTH CARE DURABLE POWER OF ATTORNEY (DPOA)?

**A. A health care durable power of attorney is a document in which you name a person to make health care decisions for you when you are not able to make your own decisions.** Depending on where you live, the person may be called your health care agent, surrogate, proxy, or representative.

## Q. WHO CAN MAKE A HEALTH CARE DPOA?

**A. Any mentally competent adult** can make a health care DPOA.

# Q. WHAT ARE THE REQUIREMENTS FOR A HEALTH CARE DPOA?

**A. Every state has its own requirements.** Some states provide a form, which may or may not be mandatory. Typically a health care DPOA must be in writing signed by you and notarized or witnessed by two competent adults. Certain persons may be disqualified as witnesses such as relatives, beneficiaries of your estate, the person named in the health care DPOA as your agent, and your health care providers.

# Q. WHOM SHOULD I NAME AS MY HEALTH CARE AGENT?

**A. First, you should name a person with whom you can comfortably discuss your wishes for medical care and end of life treatment.** This should be a person who is willing and able to listen to you and capable of understanding your wishes. Having a frank discussion with your agent (and with your doctor) is probably the most important thing you can do to ensure your wishes will be followed.

Second, you want to name a person whom you trust to carry out your instructions.

Third, you should name a person who is nearby, if possible, and will be readily available to discuss your needs with your health care providers.

Fourth, you want to choose someone who is assertive. You want someone who can articulate your wishes to health care providers and firmly insist they be carried out in the face of possible resistance from health care providers and family members.

People usually choose a spouse, or an adult child or sibling. However, your agent need not be a relative. A trusted close friend can be an excellent choice. If you have named an individual as your agent for financial decisions in a durable power of attorney, you may want him or her to also serve as your health care agent.

# Q. CAN I NAME MY DOCTOR AS MY HEALTH CARE AGENT?

**A. No.** State law generally precludes you from naming your doctors or any other health care providers or employees of your health care providers or of the hospital or other facility at which you receive care.

# Q. SHOULD I NAME MORE THAN ONE AGENT?

**A. You should consider naming an alternate agent who will serve if the first person you designate is unable to serve as your agent.** Naming two agents to serve together is generally not a good idea. It creates the possibility of disagreements which may confuse health care providers, cause delays, and need to be resolved in court.

# Q. WHAT TYPES OF DECISIONS CAN MY HEALTH CARE AGENT MAKE?

**A. You can decide what decisions you want your health care agent to make.** You can give your health care agent broad authority to make virtually all health care decisions for you if you are unable to make them for yourself. Or you can limit the agent's power. Some people limit their agent's power to the instructions in their living wills.

With broad powers, your health care agent will be able to:

- Access your medical records.
- Decide in which medical facilities you will receive care.
- Choose your health care providers.
- Visit you when you are in a hospital or medical facility

Consent to or refuse most types of medical and mental health treatment. State law may provide that certain treatments cannot be authorized by your health care agent. These typically include abortion and some extreme mental health treatments. Your agent also cannot authorize treatment or withdrawal of treatment in conflict with your living will. Furthermore, your agent must make your health care decisions according to the agent's knowledge of your wishes, which is why it's so important for you to have a candid discussion with him or her. If the agent does not know your wishes, the agent must base the health care decisions on your best interests.

So long as you have full confidence in your agent, consider giving him or her broad powers to make decisions for you as it can be difficult to foresee what anyone's medical needs may be in the future. Giving your agent full authority may reduce the chances of having the issue end up in court.

# Q. IF I EXECUTE A HEALTH CARE DPOA, WILL I BE GIVING UP THE RIGHT TO MAKE MY OWN DECISIONS? IN OTHER WORDS, DOES MY HEALTH CARE DPOA GO INTO EFFECT AS SOON AS I SIGN IT?

**A. No, you do not give up your right to make your own health care decisions when you execute a health care DPOA.** Your agent cannot make health care decisions for you until your doctor certifies that you are incompetent. Incompetent means that you lack the ability to understand the consequences of a treatment decision, including its risks, benefits, and possible alternatives.

# Q. WHO WILL MAKE MEDICAL DECISION FOR ME IF I DON'T HAVE A HEALTH CARE DPOA?

**A. If you do not have a health care DPOA, family members will determine who makes medical decisions for you if you are not able to make them for yourself.** As a general rule, the authority goes in order to your spouse, adult children, parents, and then to your nearest living relative.

If you want a non-relative to make your health care decisions, you will need a health care DPOA. Furthermore, a health care DPOA can serve as a tie-breaker if your family members do not agree on your treatment.

# Q. CAN I CANCEL OR CHANGE MY HEALTH CARE DPOA? HOW?

**A. Yes, you can revoke or amend your health care DPOA at any time.** State law typically provides that you can revoke your health care DPOA by destroying the original, signing and dating a written revocation, or executing a new health care DPOA that is materially different from the preceding one.

The safest practice is to destroy the original and execute a written revocation or a new DPOA expressing your current desires. Then you should be sure to give the new document to your current agent and alternate, your doctor, and hospital or care facility.

You can also revoke your health care DPOA by stating your intention to revoke it. A divorce will revoke your health care DPOA if you named your former spouse as your agent.

# Q. ONCE I HAVE MADE MY HEALTH CARE DPOA, WHAT SHOULD I DO WITH IT?

**A. Keep the original along with your living will in a safe place where you and family members can easily locate it.** Give a copy to your agent and your alternate agent as your agent may need to present it to health care providers to prove his or her authority. Provide a copy to your doctor and your hospital or care facility when you are admitted. Take a copy with you when you travel. You may also want to put a card in your wallet stating the name of your health care agent and where your original health care DPOA and living will can be found.

# Q. SHOULD I HAVE BOTH A LIVING WILL AND A DPOA FOR HEALTH CARE?

**A. The best policy is to have both documents.** They work together to ensure that your wishes are understood and followed. A living will allows you to make your wishes clear so that your agent will not have to rely on guesswork to determine what you would have wanted, your family members can be reassured that your agent is acting in accordance with your wishes, and both your agent and family members are relieved of the emotional burdens of making these difficult decisions. A living will that is consistent a health care DPOA may make doctors and hospitals more willing to follow your instructions.

# Q. WHEN SHOULD I EXECUTE A LIVING WILL AND HEALTH CARE DPOA? AREN'T THESE DOCUMENTS ONLY FOR ELDERLY OR TERMINALLY ILL PERSONS?

**A. Living wills and health care DPOAs are not just for the sick or elderly.** Every adult should consider putting these documents in place. A catastrophic accident or medical crisis rendering a person permanently unconscious could occur at any time. Many people execute living wills and health care DPOAs as part of a comprehensive estate plan prepared by their estate planning attorney.