

chapter 13

ESTATE PLANNING AND POWERS OF ATTORNEY

We all know that we will eventually die. At the same time, no one likes to dwell on the prospect of his or her own death. But if you, your parents, or other loved ones postpone planning until it is too late, you run the risk that your children or other intended beneficiaries — those you love the most — may not receive all that you would hope, or may not be taken care of in the way you would hope. That is what estate planning is all about — making sure that your loved ones are taken care of when you are gone. All adults need to do estate planning — whether you have fifty thousand or five million dollars, you probably want to distribute your assets in a certain way upon your death, which means you need to do estate planning.

We should begin a discussion of estate planning with a review of what “estate” and “estate plan” mean.

An “estate” is everything you own: bank accounts, stocks and bonds, real estate, motor vehicles, retirement plans, life insurance, jewelry, household furniture, etc.

An “estate plan,” generally, refers to the means by which your estate is passed on to your loved ones on your death. Estate planning can be accomplished through a variety of methods, including:

- Revocable Living Trusts
- Last Will and Testament / Probate
- Lifetime Gifting

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- Joint Ownership
- Beneficiary Designations
- Life Estates

Problems often arise when people don't coordinate all of these methods of passing on their estate. To take just one example, a father's will may say that everything should be equally divided among his children, but if the father creates a joint account with only one of the children "for the sake of convenience," there could be a fight about whether that account should be put back in the pool with the rest of the property.

A well-crafted estate plan permits your family to save potentially hundreds of thousands of dollars on taxes, court costs and attorneys' fees. Most importantly, it affords the comfort that your loved ones can mourn your loss without being simultaneously burdened with unnecessary red tape and financial confusion.

Good estate planning also includes signing three additional documents: (1) an Advance Medical Directive, which includes a Living Will and a Medical Power of Attorney; (2) a Durable General Power of Attorney for legal and financial affairs; and (3) an Advance Care Plan. Taken together, these three important documents allow you to decide in advance who will manage your legal, personal, and financial affairs in the event of your disability, and exactly how you will be cared for. Estate planning (including the decision as to whether to use a Will or a Living Trust as your primary estate planning tool), is vitally important for someone who may soon be entering a nursing home.

Because most people use a Revocable Living Trust as their primary estate planning tool, a basic understanding of Living Trusts is important when planning your estate. Since the purpose of a Living Trust is to avoid probate, to understand the usefulness of a Living Trust you must first understand how probate works.

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EXPLANATION OF PROBATE

Using a Last Will and Testament as your primary estate planning tool means that your estate will go through probate upon your death. Although the probate process is quite complicated and time-consuming for the executor, the purpose of probate is to provide some measure of protection for your beneficiaries.

Phase 1 of Probate: To initiate the probate process in Virginia, an Executor nominated in a Last Will and Testament must take the original Will and an original death certificate and make at least one appearance at the probate office to officially “qualify” and be “sworn in” as executor. Once qualified, an executor is accountable to the probate court and is required to prepare and file various legal and financial documents, including a detailed initial inventory of the estate and detailed annual accountings showing everything coming in to and going out of the estate. During the initial phase of probate, the executor must see to it that all estate assets are accounted for and that any valid debts, expenses, and taxes are paid. There are strict limitations during this initial probate phase as to how much the executor may distribute as support to a surviving spouse and/or minor children. After at least one year from the date of death (and often significantly longer), the Executor may distribute the remaining assets of the estate either:

1. To the beneficiaries you have named;
2. To the trustee named in your Will (if your Will has testamentary trust provisions, typically because your beneficiaries are under a specified age), to be held and administered according to the testamentary trust provisions set forth in your Will and subject to ongoing probate; or
3. To the trustee named in your Living Trust (if you have a Living Trust) to be held outside of probate and administered

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according to the terms set forth in your Living Trust, free of any court supervision.

Phase 2 of Probate: If your Will has provisions for the creation of a testamentary trust upon the conclusion of the initial phase of probate, then the testamentary trustee named in your Will is accountable to the probate court and, just like the executor, is required to prepare and file various legal and financial documents, including a detailed initial inventory of the trust and detailed accountings showing everything coming in to and going out of the trust every year. During this second phase of probate, the trustee must see to it that all trust assets are accounted for and that any valid debts, expenses, and taxes are paid from the trust when due. Upon the occurrence of a pre-determined event (typically a beneficiary reaching a specified age), the trustee may then terminate the trust by distributing all remaining assets to your named beneficiaries.

EXPLANATION OF REVOCABLE LIVING TRUSTS

A trust is a legal entity which is capable of owning financial assets, real estate, and/or other property.

A testamentary trust, as explained above, is a trust created by the Probate Court pursuant to trust provisions written into your Last Will and Testament. A testamentary trust does not take effect until after your death and generally not until after your Executor has completed the initial phase of probate. Trustees of testamentary trusts in Virginia are generally required to file accountings with the Commissioner of Accounts every year that the trust exists.

A **living trust** is a trust that comes into existence during your lifetime, and a Revocable Living Trust is simply a living trust that can be revoked or modified during your lifetime, as opposed to some living trusts that are irrevocable. Using a Revocable Living Trust as your primary estate planning tool means that your estate

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will not go through probate upon your death. You create a Revocable Living Trust by signing a contractual document called a “Declaration of Trust” or “Trust Agreement.” You are typically the trustee of your own trust until your death, although if you are about to enter a nursing home you may decide to make someone else your initial trustee. If you are the initial trustee, then upon your death, a successor trustee whom you have named takes over as trustee of the trust and, after paying any valid debts, expenses, and taxes, distributes the trust assets to or for the benefit of your named beneficiaries or, if called for in the trust, continues to hold the trust assets until the occurrence of a predetermined event.

The main feature of a Revocable Living Trust is that the trustee is not accountable to the court, and therefore not subject to probate. Most people therefore use a Revocable Living Trust as their primary estate planning tool in order to make things easier for their trusted loved ones by avoiding the time and complications of probate. There may also be some advantages to you by using a Revocable Living Trust to consolidate your assets and simplify your finances. On the other hand, some people like the idea of court supervision and therefore prefer that their estate go through probate, and some people simply prefer not to spend the extra money it typically takes to create a living trust or the extra time it takes to properly fund a living trust.

FINANCIAL POWER OF ATTORNEY

A Durable General Financial Power of Attorney authorizes your agent, called “Attorney-in-Fact,” to act on your behalf and sign your name to financial and/or legal documents. The Financial Power of Attorney is an essential tool if you are unable to carry on your legal and financial affairs due to age, illness, or injury. Having a Financial Power of Attorney will generally avoid the need to go through the time-consuming, expensive, and publicly embarrassing guardianship process, which process is subject to

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probate court supervision. During the guardianship process, someone goes to court to have you declared mentally or physically incompetent and the court appoints one or more persons to serve as your legal guardian and/or conservator.

HEALTH CARE POWER OF ATTORNEY

A Health Care Power of Attorney (also called a Medical Power of Attorney or an Advance Medical Directive) authorizes another person (called your “Medical Agent”), to make decisions with respect to your medical care in the event that you are physically or mentally unable to do so, as certified by two physicians. This document includes the type of provisions that used to be in what was commonly called a “Living Will,” allowing you to indicate your wishes concerning the use of artificial or extraordinary measures to prolong your life artificially in the event of a terminal illness or injury. You will also use this document to indicate your wishes with regard to organ donation, disposition of bodily remains, and funeral arrangements.

ADVANCE CARE PLAN

An Advance Care Plan is a document that is created by special software that gathers, organizes, stores and disseminates information provided by you in an interview, in order to better serve your future healthcare needs and to guide those who you will depend on for future care. The Advance Care Plan identifies your specific needs, desires, habits and preferences and guides your caregiver in a unique manner. See page 57 for a detailed example of the tremendous benefits of an Advance Care Plan.