

A Consumer's Guide to Estate Planning with

# living trusts



## *welcome*

Most people want to protect what they have in order to eventually pass it on to the people they love and the causes they care about. Many of us believe we have one of two choices when thinking about these issues. 1) We do nothing, and hope for the best, or 2) We make a will. While a traditional will is a common estate planning tool, there are four lesser-known estate planning documents that will help you protect yourself and your family from almost any financial or legal problems arising from your death or incapacity. They are:

- ...1 Durable Power of Attorney
- ...2 Health Care Directive
- ...3 Revocable Living Trust
- ...4 Pour-Over Will

This guide explains your estate planning options and the measures you can take to protect yourself and your family in the event you die or become incapacitated. Although we have general recommendations, we do advise that you seek legal advice about your own personal situation to make sure your goals and objectives will be carried out in the most effective manner. Each situation is unique and you need to consult with an experienced estate planning attorney to make sure you choose the best option.

Before doing that, however, it is helpful to see what can happen when a person fails to plan...

## **estate plans of famous people** \_\_\_\_\_

### Elvis Presley

You remember Elvis Presley, don't you? Well, when Elvis died, his estate was valued at over \$10 million! That's a lot of money now, so you can imagine how big of an estate that was back then. From those riches, Elvis' executors had to pay off nearly \$4 million in debts, \$2 million in estate administration costs and

\$3.3 million in estate taxes. That left poor Lisa Marie with less than 10% of Elvis' fortune. Hardly a great result!

### **Groucho Marx and the Living Probate Nightmare**

The comedian Groucho Marx never did any estate planning, and it's too bad. When Groucho was in his mid-eighties his business agent continued to book him as a guest on talk shows at a time when he was suffering from dementia. Groucho's son wanted this to stop so he went to probate court to be named Groucho's guardian. This type of proceeding is sometimes referred to as a "living probate," because the subject matter of the probate proceeding is still living.

Groucho's business agent also wanted to be Groucho's guardian. A big court battle ensued over who should be appointed guardian. Groucho's son had a lawyer, the business agent had a lawyer, and the judge appointed a lawyer to represent Groucho. Who do you think paid all of those lawyers' fees? If you said, "Groucho," you're right. Eventually, the court declared Groucho incompetent and appointed a neutral party to be his guardian. These expenses continued during the remainder of Groucho's life, and when he died, the "death" probate of Groucho's estate began, along with all of its costs.

Had Groucho planned ahead, and perhaps signed a living trust, he could have stated who he wanted to act on his behalf if he became incapacitated and to whom he wanted to leave his estate when he died. Also, it all would have been private, because a living trust doesn't need to be filed with the probate court.

### **why do people do estate planning? ———**

Estate planning allows a person to achieve many important goals, two of which are fundamental. First, it allows you to pass your estate to the people and causes you care about, but it must be in writing. If you fail to state your wishes in writing, then state law determines who will inherit your estate. Why let the state determine who gets your hard earned assets when you can be in charge?

Second, proper estate planning allows you to select who you would like to manage your finances if you become incapacitated, as well as make known your wishes about your desired health care if you cannot communicate to your doctor. Why end up like Groucho Marx, when it just takes a few easy steps to legally make your wishes known?

## **planning for incapacity** \_\_\_\_\_

One estate planning goal is to plan for any future incapacity. Who would you want to make financial decisions for you if you become incapacitated? Who would you want to make medical decisions on your behalf if you could not tell the doctor yourself?

If you fail to plan ahead and you become incapacitated, someone will have to petition the probate judge to become your guardian. This will start the whole "living probate" process, along with all the expenses that go along with it. This is true even if you are married. Your spouse does not necessarily have the legal right to make decisions on your behalf just because you are married.

The "living probate" nightmare can be avoided with two simple, yet crucial, documents.

### **1. Durable Power of Attorney**

A durable power of attorney is a simple document that allows you to name an agent to make financial decisions on your behalf if you are incapacitated. You may name primary and successor agent(s), or co-agent(s). It is "durable" because the power of attorney is valid the moment you sign it and remains valid if you become incapacitated.

The power of attorney is valid until either 1) you revoke it in writing, or 2) upon your death. Be sure you trust the person you appoint as your agent, because you will be granting that person broad powers.

### **2. Health Care Directive**

A health care directive is the document that allows you to name a health care agent to make medical decisions on your behalf if you can't communicate directly with your physician. The health care directive is a combination of a living will and a medical power of attorney in a single document. As with the power of attorney, you may name primary and successor agent(s), or co-agent(s).

The health care directive grants your agent the power to gain access to your medical records and to consent to release those records to others. Also, your health care agent has the power to make medical decisions for you, but only if you can't communicate directly to your physician.

Finally, the health care directive gives instructions to your agent about your desired care. For instance, you may give instructions about your wishes regarding a

terminal illness, whether you want to donate organs, whether you wish to be buried or cremated, and various other wishes.

A health care directive that sets forth your wishes can prevent a lot of heartache later on, so make sure that you have this document as a part of your estate plan.

## **passing property at death \_\_\_\_\_**

### **A Will**

A will is the document we think of most often when estate planning is mentioned. A will allows you to designate who will receive your estate when you die. You can leave your estate to whomever you want, with one exception. If you are married, you can not disinherit your spouse, unless your spouse gives his or her consent, or if you and your spouse signed an antenuptial agreement allowing you to do so.

Not only may you decide who is going to receive your estate, but you may also designate when and under what circumstances your beneficiaries will receive their inheritance. You may also nominate the executor of your estate, as well as the guardian of any minor children.

A downfall is that wills are easy to contest. This is because all of the heirs need to be notified about the will, even if the heir is not named in the will.

### **Wills Equal Probate**

It is important to note that a will only controls the distribution of assets which are titled in your name alone with no beneficiary. Those assets must go through the probate process. Consequently, when you think of a will, think of probate, because the only time your will has any legal effect is in the probate process.

For example, let's say you and your spouse own your house together in joint tenancy, but you have a will that leaves your estate to the church. In that case, who do you think gets the house on your death? If you said your spouse, you are correct, because the joint tenancy supersedes the provisions of the will. Likewise, let's assume your will names your spouse as the beneficiary of the estate, but your church is named as the beneficiary of your life insurance policy. In this case, the church will get the life insurance proceeds because the beneficiary designation of

the policy supersedes the provisions of the will. Again, the will only controls what happens to the assets that must go through probate.

### **What is Probate?**

Probate is the legal process in district court whereby the judge oversees the distribution of assets which are in your name alone and without a beneficiary designation, commonly known as "probate assets." Note: an asset with a beneficiary designation of "my estate" is also a probate asset. The judge first determines whether you died with a valid will. If you die with a will, your probate assets will be distributed to the beneficiaries named in the will. If you die without a valid will, your probate assets will be distributed to your heirs, as determined by state law.

The judge then appoints an executor of your estate. Your executor has three primary duties: **1) collecting your assets; 2) paying off your remaining bills; and 3) distributing the balance of your probate assets in accordance with your will, or to your heirs, if you die without a will.**

It may take time to get your executor appointed by the judge, and until the executor is appointed, your probate assets remain frozen. This may result in problems if the estate assets are subject to financial market conditions.

Probate is public, meaning anyone can go to court and find out what your estate is worth and the names of your beneficiaries.

Probate is big business. Attorneys, accountants, publishers, bonding companies, and the courts themselves all charge fees that will shrink the size of your estate.

Finally, because of numerous rules, probate can take a lot of time to administer. It is not unusual for a probate to take anywhere from nine months to two years to complete.

### **Can't I Just Own Everything in Joint Tenancy?**

It's true that if you co-own an asset in joint tenancy with another person (such as your spouse) there will be no probate on the first death. However, if the survivor keeps the asset in his or her name alone, there will be probate on the second death. In this case, joint tenancy only delays probate until the second death. It does not avoid probate entirely. Also, it is important to understand that when you co-own an asset, you have shared ownership, and as a result, you may expose that asset to the

creditors of your co-owner. Consequently, joint tenancy may not be the best answer to your estate planning concerns and objectives.

### **Beneficiary Transfers**

Certain assets allow you to designate a beneficiary to receive that particular asset upon your death. Common examples include life insurance, IRAs, 401k plans, "pay on death" bank accounts, and "transfer on death" brokerage accounts. As long as your beneficiary survives you, that asset will escape probate. On the other hand, if your beneficiary dies before you, or is disabled, or is a minor, or you name your "estate" as the beneficiary, then the probate court will need to be involved in passing that asset.

### **Revocable Living Trust**

A popular estate planning tool is the revocable living trust. More and more people are choosing to use the living trust as their primary estate planning document because of all the advantages it offers.

A living trust is created by a person, called the "grantor", who transfers property to a second party, called the "trustee", who must hold and administer the trust assets in accordance with the grantor's instructions, for the benefit of a third party, called the "beneficiary." One person can serve all three roles. This is usually the case when a living trust is set up.

The primary advantage of a living trust is that if it is properly set up, any assets owned by the trust will avoid the living probate (you remember what happened to Groucho Marx), as well as probate at death.

The living trust is held for the benefit of the grantor during his or her lifetime. Also, the grantor usually names him or herself as trustee when the trust is set up. The grantor may therefore buy and sell assets just as he or she could before the trust was established.

The trust is revocable, meaning the grantor retains the right to amend or revoke the trust at any time. Therefore, the grantor retains control over the trust.

If the grantor becomes disabled, a successor trustee is given instructions to use the trust assets for the benefit of the grantor. This also avoids the living probate.

Upon the grantor's death, the successor trustee is instructed to pay all of the grantor's bills transfer the trust assets to the grantor's beneficiaries. This avoids probate at the grantor's death.

The living trust is private. Only the trust beneficiaries are entitled to see the trust. This makes the trust harder to contest.

Since the trust avoids probate, the time delay and expenses associated with probate are avoided. This means your beneficiaries will receive your estate faster and with less expense.

Finally, your successor trustee can be appointed shortly after your death, and therefore be able to act to protect your trust assets from market fluctuations.

### **Funding the Trust**

Setting up a living trust is a two step process. Step one is to sign the trust. Step two is to fund the trust. Funding the trust involves transferring the title of your non-retirement assets from your name **into** the name of your trust. For instance, if you own a stock, you would change the title from your name to the name of your trust.

However, not all assets go into the trust. For example, if you own an IRA, you don't want to put that into the trust. This is because the IRS would say what you really did was you took the money out of the IRA and then put it into the trust. And what do you have to pay when you pull money out of your IRA? That's right, you have to pay taxes! You don't want to do that. For those types of assets, we simply have you fill out a beneficiary designation form to direct who you want to receive those assets when you die, without probate.

When your assets are properly coordinated between your trust and the beneficiary designations, your estate will pass to your beneficiaries with the least amount of time, expense and taxes. What could be better than that?

### **Pour-over Will**

Every time we have a client sign a revocable living trust, we have the client sign a new will, commonly known as a Pour-Over Will. The Pour-Over Will complements the living trust and essentially states if you die before getting all of your assets transferred to the trust, the will pours all of your probate assets into the trust. This will ensure that all of your non-retirement assets will pass according to the terms of the trust. Of course, if you properly fund the trust during your lifetime, you will avoid probate and the Pour-Over Will will never be used.



## **other estate planning considerations————**

No estate plan is complete without identifying and planning for threats to your financial well-being. What's the point of doing estate planning if there is no estate to plan? Make sure you discuss with your estate planner the important issues of estate taxes, long-term care planning, and asset protection planning.

### **Estate Taxes**

Uncle Sam gets into the business of taxing the transfer of your wealth when you die through the estate tax. This tax is sometimes called the "death tax". There is both a federal estate tax and a Minnesota estate tax. The federal estate tax rate begins at 40% for estate over \$11.4 million (2019), adjusted annually for inflation. The Minnesota estate tax rate for 2019 begins at approximately 13% for estates over \$2.7 million. Estate tax can be onerous, but luckily there are steps you can take to minimize or eliminate the estate tax that is owed when you die. Be sure to ask your estate planning attorney if your estate will be subject to estate taxes, and if so, what measures can be taken to protect your estate.

### **Long-Term Care Planning**

Every client needs to address the risk of long-term care. The risk is real and the costs are high. It is not unusual for monthly nursing home expenses to exceed \$6,000 - \$7,500 per month. Not many of us could afford that expense for an extended period of time, on top of our already existing household expenses.

The presumption is that you are responsible for the cost of your own care. There may be government programs that might lend some help, including Medicare, Medicaid, and VA programs. Unfortunately, there are drawbacks to each of these programs. Medicare provides very limited long-term care benefits. You must be impoverished to \$3,000 before you can qualify for Medicaid. There are substantial waiting lists for veterans seeking VA benefits. Therefore, it is not realistic to rely on government programs to cover your long-term care expenses.

You should discuss with your estate planner what options are available to you to pay for future long-term care expenses. A possibility is buying long-term care insurance. If you don't qualify for long-term care insurance, or if it is not affordable, discuss alternative financial products that might be of some help.

It is important to address that issue and then make an informed decision regarding planning options.

Finally, if you or a family member is faced with a nursing home crisis and you do not have the financial means to pay for the care, make sure you contact an attorney experienced in these matters who will be able to guide you through the maze of rules to establish an asset protection plan designed to protect as much of your estate as possible.

### **Asset Protection Planning**

There are many threats to one's estate, including nursing home expenses, divorce or an unexpected lawsuit. Today's society is litigious. Without little warning and when you least expect it, something could happen that could put your entire estate at risk. With some simple steps, however, you can put yourself in a better position to protect your estate from unforeseen risks and creditors.

Discuss what options you have with your estate planning attorney. The solution may range from purchasing umbrella liability insurance, creating trusts or setting up creditor protected entities, such as limited partnerships or limited liability companies. It is amazing what relatively simple steps you can take to put you and your family in a stronger position.

### **conclusion** \_\_\_\_\_

Cornerstone estate planning involves making sure you have the necessary estate planning documents in place to protect you and your family. Those documents include:

- **Durable Power of Attorney;**
- **Health Care Directive;**
- **Revocable Living Trust; and**
- **Pour-Over Will**

Moreover, cornerstone estate planning addresses and plans for other threats to your estate, including estate taxes, long-term care expenses and unforeseen creditors.

The law is complex. Make sure you team up with an experienced estate planning attorney that can guide you through the process.