



ESTATE PLANNING COURSE NOTES

(an in-depth summary of the course material)

BEFORE WE DIVE IN

A FEW THINGS TO KNOW BEFORE WE GET STARTED

What we'll cover in this course:

- Basics of estate planning
- What it is and why it's important
- Estate planning documents every adult needs; Things to know when creating and using them
- Other issues related to your planning/questions you may have

Important:

- Every plan is unique
- Laws vary by state
- Laws can change
- We'll let you know when you might need to look up something specific
- Contact an attorney for help with complex issues or questions that aren't answered here

INTRO TO ESTATE PLANNING

WHAT IS ESTATE PLANNING AND WHY IS IT IMPORTANT?

Estate planning is the process of planning, preparing, and executing the legal documents you need, to plan in advance for two situations: DEATH and INCAPACITY.

What could happen if you DIE without an estate plan in place?

- Your property may not end up where you want it to go
- The people you love the most, won't get the help they need
- Conflict, tension and disputes among your family members
- The various parts of your estate may not work together to accomplish your objectives
- Your estate might owe unnecessary estate taxes

What could happen if you become INCAPACITATED without an estate plan in place?

- Loved ones are left to solve problems for you without the legal authority they need
- The need to file a costly and time-consuming guardianship proceeding in order to help you
- Trauma and difficulty your loved ones will experience as they hurdle one barrier after another

YOUR ESTATE PLANNING TOOLKIT

EIGHT (OR NINE) ESTATE PLANNING DOCUMENTS EVERY ADULT NEEDS

Estate planning doesn't have to be complicated. Every estate boils down to eight (or nine) basic documents.

- **Will**- distributes your property when you die; some people supplement their Will with a **Trust**
- **Disposition of Remains Document**- specifies what you would like to happen to your body after you die; sometimes this is included as part of a Will instead of being it's own stand-alone document
- **Durable Power of Attorney**- names an agent who has the authority to do the things you would normally do (usually financial in nature)
- **Health Care Power of Attorney**- names an agent who can make health choices for you
- **HIPAA authorization**- gives health providers permission to share your confidential health information with others; this is sometimes included as part of a Health Care Power of Attorney document instead of being a stand-alone document
- **Living Will (Advance Directive)**- spells out your wishes for end-of-life care
- **Guardianship Designation for Minor Children**- nominates someone to care for minor children when you die or become incapacitated; some states allow this to be a stand-alone document. Others require this to be a provision in your Will or Power of Attorney
- **Digital Diary**- a record of the usernames and passwords you use to unlock your electronic devices and access online accounts (not a legal document); can be used after your death or during your incapacity

YOUR ROADMAP

HOW THE REST OF THIS COURSE IS ORGANIZED: A BIRD'S EYE VIEW

(See course materials entitled: 'COURSE OUTLINE' and 'BIRD'S EYE VIEW')

PLANNING FOR DEATH: THE BASICS

UNDERSTANDING YOUR WILL

A Will is the legal document that distributes your property when you die. It is often considered the backbone of an estate plan

Important provisions often found in a Will:

- **Introductory language** declaring your intent to make a Will
- **Family identification**
- **Distribution** section (See additional information below)
- **Takers of Last Resort** provision
- **Executor** provision-- puts someone in charge; (see additional information below)
- **Payment of Debts** provision (payment of debts is required even if there is no provision for this in your Will.)
- **Powers and Authority**
- **Guardianship Designation for Minor Children**
- **Disposition of Remains** (can also be a stand alone document)
- **General Provisions & Definitions**

When distributing property in a Will, property is generally broken down into 3 types:

- Tangible Personal Property (given away first)
 - o Things you can touch and feel; does not include real estate, bank accounts, or investment accounts
 - o Can be distributed via a Personal Property Memorandum (this lists tangible personal property, and the people you want to receive that property); not all states recognize a personal property memorandum
- Specific Property (given away next)
 - o Identifiable and distinguishable from your other property (e.g.: \$50,000, or 'my house at 123 Cherry Tree Lane')
- Remainder/Residue--everything else (given away last)

Tips for distributing property:

- Avoid placing restrictions or conditions on the distribution
- Giving percentages can be a better approach than dollar amounts
- Be specific when describing property
- Name back-up beneficiaries/heirs; Can do this in the following ways:
 - o Name another person to receive the property if the primary beneficiary predeceases you
 - o Simply allow the gift to 'lapse' and be distributed with the residue
 - o If backups are to be children/grandchildren, consider distributing: "...to my children, by representation, per stirpes or per capita" (this distributes property down the family line)

Naming an executor:

- Name someone you trust
- Executor should have the skills for the job (responsible, organized, patient, emotionally grounded...)
- Not allowed: Non-US citizens not living in the US and people with a criminal history
- Your executor does not have to live near you
- You can name co-executors
- Be sure to name successor (back-up) executor
- If you don't have anyone you can name as the executor, consider a professional executor

Requirements for your will to be valid:

- You must be 18 years old
- You must be of sound mind
- It must be your intent to make a will
- Your Will must be in writing
- Your Will must be signed and witnessed correctly (usually in the presence of two witnesses)

Tip: use a "Self-Proving Affidavit" - eliminates the possible need to involve witnesses later on during probate

WHAT IS PROBATE AND SHOULD YOU AVOID IT?

Probate is the process of your executor taking your will to court and proving it is valid. During the process your executor will:

- Round up your property
- Pay your debts and taxes
- Distribute your property according to the instructions in your will
- Give regular accountings to a judge who oversees her as she does her job

Downsides to probate:

- Cost
- Time
- Difficulty
- Lack of Privacy

Good things about probate:

- Some states have expedited probate laws that allow an estate to be probated quickly
- Most states allow probate to be avoided entirely under some conditions
- In some states, fees can be reasonable for a simple estate
- An internet search can tell you: *how long probate takes in your state, *how much it costs, and *if/when probate can be waived where you live

WHAT IS A TRUST AND DO YOU NEED ONE?

A trust helps to avoid probate and has several other advantages. There are different types of Trusts. We will be referring to a Revocable Living Trust. It can be revoked, cancelled, changed or modified at any time during your life. It works for you during your lifetime, whereas a Will doesn't go into effect until you die.

A revocable living Trust is like an imaginary bucket that houses your property. The bucket has a rulebook that outlines the rules for how the property in the bucket is to be managed (known as the Trust Document, Trust Agreement, or the 'Trust') The Trust document:

- Names a Trustee to manage the Trust property
- Names beneficiaries who benefit from the Trust property
- Usually, you are the initial Trustee and beneficiary. When you die, a successor Trustee distributes your property to the named beneficiaries according to the rules in the Trust document.

A Trust has many benefits:

- Avoids probate (since no property is held in your name)
- Privacy
- Ability to control property after you have died
- Creditor protection for your beneficiaries
- Protect beneficiaries during a divorce
- Ability to plan more effectively for disability
- Beneficial if you own property in multiple states
- Can help minimize or avoid estate taxes

A RECAP: WILL VS. TRUST- A COMPARISON

	Will	Trust
Simple document	X	
Easy to create	X	
Inexpensive/Cost effective	X	

Avoids retitling assets	X	
Avoids probate		X
Allows control of property		X
Provides creditor protection to beneficiaries		X
Allows planning for disability		X
Private		X
Helpful for properties in multiple states		X
Name of person appointed in document	Executor	Trustee

Note: Even if you choose to use a Trust, you still need a Will. This is because if any property should get left out of your Trust bucket, you'll still have a legal document to distribute that property.

TESTAMENTARY TRUSTS

A testamentary trust is a Trust that is built into a Will

Benefits:

- Enjoy the simplicity of a Will
- No need to re-title assets into a Trust while you are alive

Down-sides:

- Subject to the time, expense and publicity of the probate process

PLANNING FOR DEATH: SOME SPECIFICS ABOUT TRUSTS

HOW TO GET PROPERTY INTO A TRUST

In order for your Trust document to work, your property must be owned by the Trust. A Trust that doesn't hold any property is like an empty bucket. Retitling assets is a two-step process: 1) creating the Trust, 2) getting the property into the Trust.

Property can be placed in a Trust in one of two ways:

- Changing the Title on the property (so it is held by the Trustee of the Trust)
- Update the beneficiary form associated with the property

The process of re-titling assets into a Trust is called "funding." It's important to have a 'fully funded' Trust, in which every piece of property has been addressed.

The process of transferring property to a Trust depends on the type of property:

- **Real property:** A new deed is filed in the county where the property is located. The deed transfers ownership to the Trust. (more specifically, it transfers ownership to from you as an individual... to you as the Trustee of the Trust)
- **Bank accounts:** Go to the bank and request a change to the name of the account. Alternative: ask to fill out a "pay on death" form.
- **Investment accounts:** Contact the brokerage firm. Complete their paperwork that changes the name on the account.

- **Cars:** Generally these are *intentionally* left out of a Trust.
- **Life insurance:** Update the beneficiary form with the life insurance company. You may list the Trust as the beneficiary, or a person or people. The life insurance will remain in your name while you are alive. When you die, the life insurance company will make the check payable directly to the successor Trustee or to the people/person you have named on the form.
- **IRAs:** (similar approach to life insurance). If you plan to name the Trust as a beneficiary for a qualified IRA, you should consult with a professional.
- **Tangible property** with no title or ownership record: Use a general Assignment of Assets document. This document works with your Trust and formally transfers all your tangible personal property to the trust bucket.

Rule of thumb: If the property has a beneficiary form- use it. Otherwise, update ownership by changing the name on the title or ownership record.

WHAT HAPPENS IF SOMETHING GETS LEFT OUT OF A TRUST?

A pour-over Will acts as safety net. It contains a provision that instructs your executor to give your property to the Trustee of your Trust. Thus, the Will catches any property that is held in your personal name, and "pours it over" into your Trust. The catch: pour-over wills must go through probate.

UNDERSTANDING YOUR TRUST DOCUMENT

A trust document is very similar to a Will. But it also has some key differences.

Important provisions of a Trust include:

- **People involved**, and your intent to create a Trust
 - o Trustor/Grantor- person setting up the Trust;
 - o Trustee- person who manages the Trust property
- **Trust name**
- **Family Information**
- **Trustees:** Initial Trustee(you) and successor Trustee
- **Property management** during your lifetime
- **Property distribution:** identifies the property you want to give away and who you want to give it to; Similar to property distribution in a Will (see section entitled "Understanding Your Will")
- **Continuing Trust instructions**
- **Takers of Last Resort**
- **Power to amend or revoke** your Trust
- **Grantor incapacity**
- **Trustee Powers**
- **General Provisions and Definitions**

Additional provisions for married couples include:

- **Trust Property Contribution**
- **Define how contributed property is to be used**
- **Death of a Spouse**

Your Trust must be valid (meet your state's requirements). Most states require:

- Mental capacity
- Intent to create a trust
- Trust property
- Beneficiary
- Dated and signed (a good practice is to sign the Trust in front of a notary)

OTHER DOCUMENTS THAT WORK WITH YOUR TRUST

There are a handful of other documents that work alongside a trust and help it do its job:

- **Certificate of Trust:** provides proof to third parties that your Trust exists; provides information about your Trust without you needing to provide the entire document
- **Assignment of Assets:** formally transfers property into your Trust that does not have a title
- **Personal Property Memorandum:** Allows you to list tangible property along with the person you want to give it to
- **Addendum/Exhibit:** lists the property you intend to put in your Trust

CAN A MARRIED COUPLE SHARE WILL OR TRUST?

A married couple can NOT share a Will. Each spouse must have their own Will. A married couple can, however, use a joint Trust to hold their property together.

Joint Trusts work best if the couple:

- can agree on the successor Trustee
- share the same idea about how Trust property is to be managed

How does a joint Trust work?: Both spouses manage the Trust property jointly while they are alive. When the first spouse dies, the surviving spouse continues to manage the Trust property. When the surviving spouse dies, the successor Trustee steps in to manage/distribute the Trust property.

A joint Trust is not a good idea when:

- spouses have significant individual property
- spouses have different ideas about how they want property distributed
- spouses have a prenuptial agreement
- there's a possibility one spouse might be sued

WHAT IS THE TAX ID NUMBER FOR YOUR TRUST?

The tax ID number is your social security number. For joint Trusts, either spouse's social security number can be used.

HOW SAFE IS YOUR MONEY?... IT'S ALL ABOUT THE TRUSTEE

Because there is no court watching over your successor Trustees, they can sometimes do things they're not supposed to.

A Trustee is a big job and has a lot of responsibilities. Crucial to choose the right Trustee. Consider the following:

- Someone you trust implicitly
- Has the skills needed for the job
 - o Organized
 - o Motivated
 - o Responsible
 - o Good with money
- Likely to have the time to devote to the job
- Can work well with family dynamics
- Age: choose someone who is likely to offer your Trust some longevity
- You may consider naming co-Trustees to work together (but make sure they get along well)
- If friends/family are not an option for you, consider naming a professional fiduciary
- If you'd like to do more to ensure the safety of your Trust property, consider naming a Trust protector

PLANNING FOR DEATH: LET'S DIVE A LITTLE DEEPER

THINGS PEOPLE THINK ARE COVERED BY THEIR WILL OR TRUST BUT MAY NOT BE

Not everything is covered by a Will or Trust. It's important to know how assets work so you can coordinate them properly with the rest of your estate plan.

- Life insurance and IRAs: These do not go to the beneficiaries you have named in your will. They go to the people listed as the beneficiaries on the account.
- Real property: Depends on how the property is titled. If property is co-owned, it will transfer according to how co-ownership is listed on the deed.
 - o "Joint tenants with right of survivorship" - Property passes to the surviving owner.
 - o "Tenancy by the entirety" - Applies to married couples. Property passes to the surviving spouse.
 - o "Tenancy in common" - When one owner dies, his/her share does not automatically pass to surviving owners. It passes to the person/people named in the owner's will.
- Pay on death or Transfer on death property: This property passes to the person listed as the pay on death designee.
- Property titled in the name of a Trust: upon your death the property is automatically managed by the Trustee.
- Property naming Trust as beneficiary on a beneficiary form: property becomes payable to the Trustee after you die.

OTHER WAYS TO AVOID PROBATE

Some ways you can avoid probate without needing to use a Trust:

- Use a beneficiary designation (available for life insurance or retirement accounts)
- Real property held in joint tenancy or tenancy by the entirety
- Transfer on death deed (available for real property; not available in all states)
- Transfer on death title (available for automobiles; not available in all states)
- Pay on death form (available for some bank or brokerage accounts)

Caution: using these probate avoidance tools does have some downsides:

- does not allow you to have a "back-up plan"

- does not allow for your estate to have cash on hand to wind down your affairs

Using probate avoidance tools can make sense in limited circumstances:

- property will pass to a single person (example: an only child)
- limited time to prepare an estate plan and limited assets

TAKING CARE OF PETS

A pet Trust can be included as part of a revocable living Trust or a Will. In a pet Trust you set aside money for the pet and lay out some rules.

5 things you'll do in a pet Trust:

- Decide how much money you want to set aside
- Put someone in charge
- Name the pets who will be cared for by the Trust. (good idea to use generic language)
- Outline the kind of care you wish your pet to receive.
- Outline what happens with money left in the Trust when the pet dies

DISTRIBUTING PROPERTY 'PER STIRPES', 'BY REPRESENTATION', OR 'PER CAPITA'

If a child were to die before you and you simply want property to pass down through the family line, there are a few ways to do this:

- Per Stirpes: if a child predeceases you, that child's share is divided equally between that child's children.
- By Representation: similar to 'per stirpes' however, each generation is treated equally. Becomes different from 'per stirpes' if multiple children predecease you. In this case, the deceased children's shares are divided equally among all the grandchildren.
- Per Capita: means 'per head'. The deceased child's children become a substitute for that child's share. The number of 'heads' are then counted and the estate is divided equally among everyone.

PROPERTY THAT'S NOT EASILY DIVIDABLE, OR HAS A LOAN ON IT

If property is not easily dividable, your Executor/Trustee will determine the best way to distribute it. Communication with the beneficiaries will be important. Some options include:

- sell the property and divide the cash proceeds
- co-own the property

If one beneficiary wants to receive property that is being distributed equally to other beneficiaries, executor can arrange some options:

- beneficiary can buy out the other beneficiary's shares
- distribution can be made 'in kind'

Executor will take care of the details of how the asset is distributed. Your job is to clearly state who gets what share of the assets.

If property has a loan on it, your beneficiaries will take the property subject to the loan. You can specify that any loans be paid off before property is given to beneficiaries.

WHAT IS A BOND AND SHOULD YOUR EXECUTOR OR TRUSTEE HAVE ONE?

An estate bond is insurance that protects your property while your estate is being administered. Bonds are expensive and can take time to secure. Because of this, the requirement of a bond is often waived—since your Executor/Trustee is someone you trust. For Trusts, appointing a Trust protector is an easy way to protect the Trust property.

PROPERTY IN A MARRIAGE: COMMUNITY PROPERTY, SEPARATE PROPERTY, AND PROPERTY AGREEMENTS

If you are married— you can only give away what you own. States differ about what property spouses own in a marriage.

Community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, & Wisconsin):

- All income that is received by either spouse during the marriage, is owned in equal shares by each spouse
- Exception: gifts or inheritances
- All property acquired with community property is considered community property
- All separate property that is converted into community property (whether intentionally or not) is considered community property.

In community property states, you can only give away your share.

Common law states (All other states and the District of Columbia):

- Separate property includes:
 - o property held separately in your name, as listed on a title or ownership document, and
 - o property you have purchased from your income or assets

These states have protection laws in place that prevent one spouse from disinherit the other. Typically, these laws give a surviving spouse the right to claim anywhere from 1/2 to 1/3 of the other spouse's estate.

If you and your spouse don't like the way your state identifies the way you share property you can change it:

- Prenuptial agreement: put in place before a marriage
- Postnuptial agreement: put in place after a marriage

What if you move from a community property state to a common law state (or vice versa)? If you're giving at least half of your property to your spouse— there's nothing to worry about. But if you plan to largely disinherit a spouse, you should chat with an attorney.

PLANNING FOR DEATH: SPECIAL CIRCUMSTANCES

DISINHERITING SOMEONE

You can disinherit someone by not mentioning them in your Will or Trust. A few rules to remember:

- Disinheriting a spouse depends on state law (see session entitled 'Property in marriage')
- Disinheriting a child—
 - o be sure to name the child in the Will or Trust—then give him nothing

- can use language that specifically disinherits the child
- not required to give the reason you're disinheriting
- No contest clause- only works if you give the person a small gift- so they have "something to lose"

SUBSEQUENT MARRIAGES AND BLENDED FAMILIES

Two common scenarios that affect married couples:

- A spouse in a blended family dies. The surviving spouse modifies the estate plan to give all property to the surviving spouse's children.
- A spouse remarries after the first spouse dies. Then modifies the estate plan to give all property to the new spouse.

Solution: A/B Trust. A revocable living Trust that contains a provision that allows the deceased spouse's property to be used to care for the surviving spouse. When the surviving spouse dies, remaining property is distributed to specific beneficiaries (typically the children of the deceased spouse).

How does an A/B Trust work?:

- starts as a joint Trust
- when the first spouse dies the Trust splits into the A bucket (holds the surviving spouse's property), and the B bucket (holds the deceased spouse's property)
- property in 'A bucket' is available to surviving spouse to use in any way he/she chooses; it is revocable
- property in 'B bucket' is used to care for surviving spouse, then distributed to named beneficiaries when surviving spouse dies; it is irrevocable; surviving spouse can serve as the Trustee of the 'B bucket'

Advantages:

- proactively addresses the issue of property being potentially diverted to unintended beneficiaries
- creditor protection
- avoid/minimize estate taxes

Disadvantages:

- surviving spouse must set up and maintain the B sub-Trust
- B sub-Trust must be administered- requires records, accountings and tax filings
- tax implications generally unfavorable to beneficiaries
- if surviving spouse is managing the B sub-Trust, a disgruntled beneficiary can take him/her to court

Determining whether to use an A/B Trust is a personal decision. Things to consider:

- family dynamics
- trust between spouses to carry out intentions
- avoiding expense and effort of setting up and maintaining sub-trust

PLANNING FOR LOVED ONES WITH SPECIAL NEEDS

Giving property to a special-needs child could disqualify them from receiving public benefits. Three planning options:

- Disinherit the child (simple but doesn't provide enrichment to the child)

- Give the estate to a trusted family member or friend, with some instructions (off the record) to use the money to help the special needs child (comes with risks: money may not be used for the child or could become subject to creditor claims)
- Leave the inheritance through a Special Needs Trust
 - Can be created as part of a Revocable Living Trust, or as part of a Will testamentary trust provisions
 - Sets money aside and places very strict limits on the funds:
 - cannot replace government benefits
 - can be used to supplement them
 - child cannot compel Trustee to make money available
 - assets are not considered to be available to the child so she continues to be eligible for public benefits
 - ensures money will be properly taken care of
 - parents can say what should happen to money that's left over

PLANNING FOR DEATH: UNDERSTANDING ESTATE TAXES

WHAT ARE ESTATE TAXES AND WILL YOUR ESTATE HAVE TO PAY THEM?

What are estate taxes?

- A tax that is payable by your estate before any distributions are made to your beneficiaries.

How do they work?

- Estate taxes exist at both the federal and the state level.
- If the net value of your estate exceeds the state or federal exemption amount, your estate will owe an estate tax.
- Exemption amounts vary by state and can change. An internet search can give you the current federal and state exemption amounts.

HOW TO AVOID OR REDUCE ESTATE TAXES

If your estate will owe an estate tax, there are a number of ways to approach the tax:

- Pay the tax (if you plan to spend down your assets to below the exemption amount, or the amount of the tax isn't bothersome to you)
- Remove assets from your estate while you are alive (enjoy it by spending it on yourself, or gifting it to others)
- Move to a new state
- Create an A/B Trust (for married couples)
- Use charitable gifting
 - o Give any amount that exceeds the exemption to charity
 - o Charitable remainder Trust
 - o Charitable lead Trust
- Establish an Irrevocable Life Insurance Trust (ILIT)
- Buy life insurance to cover the cost of the estate tax

OTHER TAXES AND HOW THEY RELATE TO YOUR ESTATE PLAN

What are some other taxes that may come into play when you die:

- Income tax: inheritances are not considered income by the IRS. No income tax is due by your beneficiaries when they receive their inheritance. However, your personal representative or Trustee will have to file one last tax return for the income you made while you were alive.
- Inheritance tax: Exists in some states. Is paid by the beneficiary who receives the inheritance. Some people include a provision in their Will or Trust that pays the tax so the beneficiary does not have to pay it.
- Capital gains tax: Due when you sell an asset for more than you paid for it. Beneficiaries will generally receive a "step up" in basis in the value of assets they inherit. So, if they later sell the asset, the initial value of the asset that is used in calculating the tax, is the value of the asset on the date of your death.
- Gift tax: Can be due if you give property away and receive nothing in return (or less than the fair market value). Is imposed by the federal government and a small number of states. A federal gift tax is rare. This typically applies only to those who are likely to owe a federal estate tax.

PLANNING FOR DEATH: WHAT HAPPENS TO MY BODY AND OTHER THINGS TO KNOW

THE DISPOSITION OF REMAINS DOCUMENT

This document:

- states what you want to happen to your body after you die
- appoints an agent who has the legal authority to make arrangements for your remains
- states what you want to happen to your remains (cremated, buried, donated to scientific research)
- allows you to make additional directives
- can include additional information (like pre-need arrangements)

Sometimes this is a stand-alone document, or it may be a provision in your Will

OTHER "NON-LEGAL" THINGS THAT CAN HELP YOUR LOVED ONES

So far we've covered legal documents you need to prepare for your death. Here are a few 'non-legal' things you can do to help your loved ones after you die:

- Plan for your funeral or memorial service. Write down guidance or instructions. There are many funeral planning sites on-line. Things to consider:
 - o Where would you like your service to be held?
 - o What things would you like to happen at the service?
 - o Any religious observances?
 - o Good idea to choose a friend or family member to carry out your wishes
- Make financial arrangements to pay for your funeral
- Organize your key personal information
 - o Digital diary (covered in detail later)
 - o Accounts
 - o Contracts
 - o Tax records
 - o Birth and Marriage certificates
 - o Divorce papers
 - o Genealogy records
- Consider writing letters to the people you love

PLANNING FOR INCAPACITY: FINANCES

THE DURABLE POWER OF ATTORNEY DOCUMENT

A Durable POA allows you to name an agent to do the things you would normally do—especially things that are financially related. It is critical to help you if you become incapacitated. Without a durable POA your loved ones may need to petition a court for a guardianship.

Most important parts of a POA:

- Provision that puts someone in charge; Known as an 'Agent' or 'Power of Attorney'
 - o POA is a very powerful document, so choose your agent wisely
 - o Permissible to name co-agents. Make sure they get along well. Sometimes third parties will refuse to accept a POA that names co-agents. One thing that might help is allowing co-agents to act 'jointly and severally'
 - o Name one or two back-ups
- Statement about when it becomes effective.
 - o Immediate POAs are effective when you sign them
 - o Springing POAs don't become effective until you become incapacitated; These can have some downsides
- Language that makes it 'durable'. This means your agent will continue to have legal authority, even if you become incapacitated.
- Powers given to agent

POA should be properly executed:

- sign and date in front of two witnesses
- notarized
- sometimes people will do both

Prohibited from being a witness:

- related by blood or marriage
- your care provider

Safety tip:

- Never sign a POA and give it to your agent. Rather, let your agent know you've executed the document and tell him/her how to access it in an emergency.

A POA is only effective while you are alive. Once you die it has no effect.

THE PROBLEM WITH ADDING AN ADULT CHILD TO YOUR BANK ACCOUNT

Adding an adult child to a bank account is commonly done as a matter of convenience. But doing so comes with some risks:

- You could owe the IRS gift taxes
- Your assets could be reached by your child's creditors
- Your child's ex could end up with your money
- Your estate plan may not accomplish its objectives
- Your grandchildren could lose college aid
- Your child could lose eligibility for public benefits

- Your child could take your money

Solutions:

- Execute a durable power of attorney document
- Execute a Trust
- Determine whether your bank will allow you to name a 'signor' who is NOT a 'co-owner' of the account

PLANNING FOR INCAPACITY: HEALTH CARE

THREE HEALTH DOCUMENTS EVERY ADULT NEEDS: AN INTRODUCTION

Health Care Power of Attorney

HIPAA Authorization

Living Will

THE HEALTH CARE POWER OF ATTORNEY

Allows you to name a person (known as an agent) to make health care decisions for you in the event you're unable to speak for yourself.

Most important parts of the document:

- Put someone in charge-known as the 'agent' or 'health care power of attorney';
 - o Agent should:
 - understand your personal approach to your own health
 - understand your philosophy about death and dying
 - understand what things are important to you and what things make your life meaningful
 - know under what circumstances you would not want your life to be prolonged
 - o Co-agents are permitted but usually not a good idea in a Health Care POA
 - o Good idea to name back-up (successor) agents
- Statement regarding when the document becomes effective and how long it will stay in effect
- Powers given to agent (typically grants very broad authority); Typically doesn't go into detail about the specific decisions you want your agent to make. Rather, it names a person who has broad authority to make needed decisions. (Specific decisions can be put in a Living Will.)
- Guardian nomination
- Other provisions, like allowing agent to be compensated and not held liable for actions in good faith

Document must be properly executed:

- states commonly require the document either be signed and dated in front of 2 witnesses or signed in front of a notary
- witnesses typically can NOT be:
 - o Related to you
 - o Health providers
 - o Receiving anything under your Will or Trust

Have a conversation with your agents in advance

THE HIPAA AUTHORIZATION

This document does not put anyone in charge. It gives health providers permission to share your health information with named individuals. HIPAA stands for the Health Insurance Portability and Accountability Act. It prohibits your doctors from sharing your confidential health information with others.

Works hand in hand with your Health Care POA. Since a Health Care POA names an agent who will make health care choices, it is important to give doctors permission to share your health information with that agent. Can be a stand-alone document, or can be contained as a provision within a Health Care POA

Typical provisions contained in a HIPAA document:

- Identification: name, contact information, date of birth
- Covered Entities: people/entities that are allowed to disclose your information
- Information to be disclosed
- Authorized recipients
- Redisclosure (if a recipient rediscloses your information, it is no longer protected by HIPAA)
- Signed and dated by you (notary not required, but always a good idea)

THE LIVING WILL

Also known as an Advance Directive. Does not put anyone in charge.

- Outlines your wishes for the kind of care you want to receive (or don't want to receive) at the end of your life.
- Only used if you are in a permanent coma, or if you are terminally ill, you have reached the end of life, and you can no longer speak. (If you are in an accident and you need lifesaving medical care, you will still receive the care you need.)
- Governed by state law. States vary widely when it comes to the options they provide. If your state document doesn't offer you the options you want, you can attach additional directives.

Signing requirements- vary by state but usually require:

- Notarized, or
- Signed by two witnesses
- Excluded witnesses- people who:
 - Are related to you
 - Are your health care providers
 - Stand to receive anything under your Will or Trust

Similar to a POLST (Physicians Order for Life Sustaining Treatment)... but is a different document.

CUTTING THROUGH THE CONFUSION: DIFFERENT NAMES, SAME DOCUMENT

In the world of estate planning, the terms used to refer to these health care documents are not consistent. The terms 'Advance Directive' can be used to refer to the Health Care POA or the Living Will (or both). Additionally, one or more of these documents may be combined into one document, and that document could go by a number of different names.

How do you navigate this? Review the documents. You are looking for three things:

- something that names an agent to make health care choices for you
- something that gives health providers permission to share your health information with your agent
- something that outlines your end-of-life choices

In this way, regardless of what the documents might be called or the way in which they are put together— you can be sure your future health care needs are met.

SPECIAL CIRCUMSTANCES—SPECIAL DOCUMENT: THE DEMENTIA DIRECTIVE

Many standard Living Wills do not cover dementia. Yet dementia is the number one reason people lose the ability to direct their own health care. Dementia directives:

- Allow you to communicate your health care wishes in advance if you develop dementia.
- Allow you to talk about the type of care you wish to receive at different stages of the disease
- Not a legal document. But can be an effective way to record your future wishes.
- Best filled out before a dementia diagnosis. Over age 60
- Can be found online often free of charge

PLANNING FOR MINOR CHILDREN

GUARDIANSHIP DESIGNATION FOR MINORS

Allows you to appoint a person who has the legal authority to care for and make decisions for your minor child if you die or become incapacitated. State law varies. Some states allow a stand-alone document; others require the guardianship designation to be contained in a Will or Power of Attorney document.

Two responsibilities of guardian:

- Guardian of the person— legal authority over the child
- Guardian of the estate— legal authority over the child's inheritance/money to be used to care for child

The guardianship process:

- A guardian is always appointed by a judge
- Your guardianship designation is actually a 'nomination.' The judge considers your nomination in making her decision
- The legal standard is always 'in the best interest of the child'
- Non- custodial parents typically will not be overlooked
- Money is placed in a conservatorship if no other plans have been made for money while the child is a minor

PLANNING FOR DIGITAL ASSETS

THE DIGITAL DIARY

Not a legal document—but crucial to helping loved ones. A record of the usernames and passwords you use to unlock your electronic devices like your phone, tablet, or computer, and to access any cloud accounts. Not having one can create a huge barrier for the people you love.

- each time you access an online account, jot down username and password information until you feel your list is complete
- store with your estate planning documents
- be sure to write down password to unlock devices
- update your digital diary periodically
- does not need to be stored on paper
- consider subscribing to a password manager; be sure to leave the master password with your documents

WHAT NEXT?:

REVIEWING, SIGNING, STORING, AND UPDATING YOUR DOCUMENTS

REVIEWING YOUR DOCUMENTS

Your documents can't be corrected after you have died or become incapacitated. Important to review them to make sure they are correct and accurate, and meet your state's requirements. It's a good idea to have them reviewed by an attorney.

Unbundled legal services

- you hire an attorney for a specific part of the representation
- you can prepare your documents on your own and hire an attorney to review them and advise you
- clearly define the scope of representation
- internet search can help you find an attorney near you

HOW TO SIGN YOUR DOCUMENTS

Your documents are not legal until they're properly executed. Signing requirements vary depending on the type of document and state law. These are the most common requirements:

Will

- YOU are required to:
 - o be over 18,
 - o of sound mind,
 - o intend to make a will,
 - o not be under any coercion to sign your will
- You must have two WITNESSES. (some states require three). They must be:
 - o over 18,
 - o of sound mind,
 - o "disinterested" (not inheriting anything under your will),
 - o aware you are signing your will.
- SIGNING REQUIREMENTS:
 - o You and your witnesses must be in each other's physical presence
 - o You must sign your will in front of your witnesses
 - o Your witnesses must then sign the will in front of you.

- Note: notary is typically not required for your Will to be valid. However, it is common to include a Self-proving Affidavit at the end of the Will. You and witnesses swear under oath before a notary that you signed your will and your witnesses saw you do it.

Trust (and documents that work with your trust)

- Signed and dated before a notary
- For joint Trusts, both spouses must sign and date before a notary

Disposition of Remains Document

- typically has the same signing requirement as a Will

Durable POA, Health Care POA, and Living Will:

- Two witnesses or notary (or sometimes both)
- Restrictions about who can be a witness. Can NOT be:
 - o related to you by blood or marriage,
 - o receiving something under your estate plan
 - o care provider or someone who works at the place you receive care

HIPAA Authorization:

- Signed and dated by you (usually no witnesses or notary required)

Guardianship Designation

- Signed and dated before two witnesses or a notary (or sometimes both)

Digital Diary

- not a legal document. No signature, witnesses or notary needed.

WHAT TO DO WITH YOUR DOCUMENTS

Now what?...

- Make sure they're stored in a safe place
- If stored in a safe deposit box be sure to include your agents, Executors, and Trustees on the access list at the bank!
- Tell the people you've put in charge where they're stored
- Consider storing a copy in a separate location
- Good idea to give health documents to health providers
- A handful of states require that a Trustee register a Trust with the local court—but there are typically no legal consequences if it is not registered

HOW TO REVISE YOUR DOCUMENTS AND KEEP THEM CURRENT

Review and update your documents when you experience a major life change or every 3-5 years.

Changing your documents depends on the type of document.

- **Wills:** Simple changes can be made with a codicil; Extensive changes require a new will.

- **Trusts:** Simple changes can be made using a simple amendment; Extensive changes require a Trust restatement (replaces your existing Trust document with a new one; name of your Trust stays the same, so no need to retitle assets)
- **Other documents:** require new document

LET'S TIE ALL IT TOGETHER

FINAL REVIEW

- See course materials entitled: 'COURSE OUTLINE' and 'COURSE BIRDS EYE VIEW'