Essential estate planning documents (wills, healthcare proxies and living wills, general powers of attorney and revocable trusts)

The TIAA group of companies does not provide tax or legal advice. This article provides general information that you should discuss with your personal tax and legal advisors to determine how it may apply to your individual circumstances.

Estate planning is a conscious approach to organizing your personal and financial affairs in order to deal with the possibility of incapacity, mitigate the impact of income and estate taxes, control the disposition of your assets at death and put in place the legal documents to effectuate your plan. If you fail to engage in such an approach, you could be leaving a legacy of unintended or omitted heirs, legal battles and hurt feelings.

The legal documents

Planning for incapacity

Many people think of estate planning as limited to disposing of assets at death. However, it is also advisable to plan for the ongoing management of your affairs in the event of incapacity. Typically, durable powers of attorney, healthcare proxies and living wills are used for this purpose.

What is a power of attorney?

In general, a power of attorney is a document that allows you to designate someone to act on your behalf, also called an attorney-in-fact or an agent, to manage your day-to-day financial or personal affairs. If the power of attorney contains language describing it as “durable,” it is considered a “durable power of attorney,” according to the law. This means that the document will remain in effect in the event you become incapacitated or disabled.

Typically, you execute a durable power of attorney to ensure your attorney-in-fact is authorized to act on your behalf in the event you are unable to continue to manage your own affairs. If your attorney-in-fact acts within the authority given to him or her in the power of attorney, then those acts are binding upon you, meaning that you are held responsible for them as if you’d made the commitments yourself.

Who may be appointed as your attorney-in-fact?

The individual named as your agent or attorney-in-fact may be involved with your financial and personal matters, so it's important to choose someone you trust implicitly and with whom you are comfortable sharing such information.

State laws vary as to whom you may appoint. Some states forbid minors to act as attorneys-in-fact. In other cases, healthcare providers may not be appointed unless they are related to you.

Often, people select a spouse or family member. The individual you select should have the financial acumen to act for you in making your financial decisions. In addition to your initial attorney-in-fact, you may designate successor attorneys-in-fact who will serve in the event your original designee is unable or unwilling to do so.

What are the powers granted to an attorney-in-fact?

Laws in each state allow an attorney-in-fact to perform a number of acts, which typically include the ability to sign tax returns, access safe deposit boxes, receive income on your behalf, write checks, pay your expenses, access your retirement accounts and Social Security information, and handle other day-to-day financial matters. You may give your attorney-in-fact additional powers.

What is the effective date of a durable power of attorney?

Your durable power of attorney may be effective immediately, or you may choose a specific date or event, such as your incapacity, at some point in the future. A power of attorney that becomes effective only upon your incapacity is often referred to as a "springing" power of attorney, because it springs into use when you become incapacitated and unable to act for yourself.

Your durable power of attorney becomes void at your death. At that point, the authority given to your attorney-in-fact ends. In addition, you typically have the power, either under state law or as provided in the document, to revoke your durable power of attorney at any time.

What is a healthcare directive, living will and medical power of attorney?

A healthcare directive provides general healthcare instructions to your doctor or treating physician if you become incapacitated and are unable to make such decisions for yourself. A living will enables you to state your specific wishes or preferences about certain medical procedures such as those concerning the administration of certain life-sustaining procedures or life support systems if you are terminally ill. In some states, it's common that a healthcare directive and living will are combined into the same document.

The medical power of attorney, which your attorney may draft as part of your healthcare directive or living will, or which may be created as a separate stand-alone document, names an attorney-in-fact, sometimes called an agent or a healthcare proxy. This person is authorized to discuss your treatment with medical care providers and to make

healthcare decisions for you that are consistent with your wishes. The people you designate to act for you in making medical decisions may be different than those you designate in a durable power of attorney to act for you in making financial or business decisions.

Who may be appointed as a healthcare proxy?

In appointing a healthcare proxy, consider that the individual named will be instrumental in making healthcare decisions for you. Generally, the person selected to act for you should either be a family member or a close friend who is familiar with and will respect your wishes. State law may have some restrictions, but generally anyone of legal age (18) may be designated.

How can a living will, healthcare directive or medical power of attorney be revoked?

Generally, a living will or healthcare directive may be revoked either as provided under state law or within the provisions of the document. To avoid any confusion as to whether the document remains in effect, you may wish to execute a written revocation and have the copies of the revoked living will or healthcare directive collected and destroyed. As with a durable power of attorney for finances, you typically have the power, either under state law or as provided in the document, to revoke your medical power of attorney at any time, as long as you have the mental capacity to do so.

Are there any laws to protect my privacy with healthcare matters?

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 is a privacy law which generally states that medical and other healthcare providers may talk to you, and no one else, about your diagnosis and care unless you specifically authorize others to receive this information. This law is intended to protect your medical records and other health information, and allows you to obtain and control access to this information.

You can, however, insert language into your living will or healthcare directive to authorize the medical provider to share this information with your agent or proxy. This language will generally express your intent that your healthcare proxy be treated as you would with respect to your rights regarding the use and disclosure of your individually identifiable health information or other medical records.

Transferring assets upon death

A central part of any estate plan is a document that disposes of assets at death. Traditionally, that document has been a will. In many states, people use revocable trusts (sometimes referred to as “living trusts” or “inter vivos trusts”) in place of wills to dispose of their assets at death.

Last will and testament

Everyone should consider having a will, even someone with a limited number of assets to transfer. Without a will, the laws of your state determine how your assets are distributed and who administers your estate.

Your will disposes of assets held in your individual name. Your will does not dispose of any assets that pass at your death by operation of law. For example, your retirement plan assets pass to the person(s) named on your beneficiary designation. Any property you own with another as "joint tenants with right of survivorship" passes automatically to the surviving owner.

The process of distributing assets and managing probate must be handled by a party called the executor or personal representative, whom you name in your will. Probate is the court-supervised process of administering your estate, including accounting for your assets and liabilities, paying your debts and expenses, and distributing your remaining assets to your beneficiaries. Because the probate process can be complex, it is important for your personal representative to be experienced in these matters or authorized to hire an experienced professional. The personal representative may be an individual, a corporate fiduciary or a combination of both.

Revocable trust

A revocable trust is a legal arrangement where you, as the grantor or settlor, transfer title to property to a trustee to be managed on your beneficiaries' behalf. During your lifetime, you and others of your choosing may be the beneficiaries. Your trust is "revocable" because you can change or revoke it at any time during life. Revocable trusts can be established for a variety of estate planning reasons, including the ability to manage most or all of your assets during your lifetime in the event of a disability.

Unlike a will, any assets transferred to a revocable trust during your lifetime are not subject to probate at your death. Your trustee will hold or distribute your trust assets according to the terms of the trust agreement. By avoiding probate, your assets may be available for your beneficiaries quicker, and the assets will not be subject to the publicity or costs associated with the probate process. If you own real estate in another state (e.g., a vacation home), you avoid a separate probate proceeding, known as ancillary probate, in that state by having a trust own the property. It's important to know that even if you create and fund a revocable trust during your lifetime, you will still need a will to dispose of assets that you own in your individual name. Often it is referred to as a "pour-over will" because it typically pours all of those assets passing under your Will into your revocable trust for administration and distribution upon your death.

Should you consider a trust? Every situation is different. In some states, probate is a costly and lengthy court process. In other states, it is a simple matter, so your attorney may suggest that a revocable trust is unnecessary. This consideration, along with the nature of assets, your desire for privacy (probate files, including the inventory of your assets, are open to the public), where the assets are located, whether you need to plan for federal or state estate/inheritance taxes and whether your family would benefit by having assets held in trust for a period of time or indefinitely, impacts the choice. Regardless of whether you use a will or revocable trust as your primary estate planning document, you should also make sure to coordinate the beneficiary designation for your retirement plan assets with these documents.

Trustees

Every trust needs a trustee. The party that holds the property for the benefit of the grantor, or his or her beneficiaries, is the "trustee." This is a fiduciary relationship; thus, the actions of the trustee are subject to rules and regulations established by state law. Typically, the grantor (the party that formed the trust) himself or herself is the initial trustee. In many instances, the grantor's spouse will be a co-trustee or act as sole trustee if the grantor cannot. Because the trust is designed to be effective during your life and after your death, you must also choose successors that will serve if you (and/or your spouse) cannot. Who should you choose as a successor trustee to serve if you and/or your spouse are unable to serve? Should you choose an individual or a corporate trustee? The choice varies with your family situation.

Estate tax planning

Transferring assets to a revocable trust will remove those assets from your estate for probate purposes, but not for estate tax purposes. For estate tax purposes, the value of your "gross estate" will determine the amount of estate tax due at your death. Your gross estate includes all of the assets you own or control at death—whether in your name individually or held in a revocable trust. Because you retain the right to alter your revocable trust at any time, there are no estate tax planning benefits inherent in using a revocable trust.

If your estate is large enough to be subject to estate taxes (typically, if your assets exceed your remaining federal estate tax exclusion amount—$12,920,000 in 2023), or, if you live in a state that has a separate state-level estate tax, your estate plan should include some form of tax planning. This usually involves certain marital, credit shelter and perhaps other forms of trusts. This type of tax planning can be accomplished through the terms of a will or revocable trust. Revocable trusts, by themselves, do nothing to reduce your estate taxes.

Conclusion

Everyone who is of legal age, should consider having a general power of attorney and a healthcare directive/power of attorney and a living will, if they so desire. A will should be considered, and if your situation is complex or you simply want to avoid probate, you should consider a revocable trust.

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