Helping to Secure Your Lifestyle and Your Legacy

Items to Discuss Before Meeting With an Attorney

HOCHHEISER & DEUTSCH Company Inc

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There are several topics that should be considered prior to meeting with the attorney who will draft a will or a trust.

Guardians for Minor Children

Who is best able to cope with the raising of your minor children? A brother, sister, or a close friend may be a better choice than a grandparent.

Factors to consider would include the ages of the proposed guardians and their children, the ages of your children and the number of them who are still minors, and the health and financial situation of all parties. Decide on alternative choices, in the event your first choice is unwilling or unable to serve. If you name a couple as guardians and one of them dies, would you want the surviving co-guardian to act as sole guardian? What if they divorce?

Executor of the Estate

If all or part of your estate passes through probate, whom do you want to handle the details of paying your debts and death taxes and distributing the remaining assets to the beneficiaries named in your will?

Living Trust

Is it important to you to avoid probate? Make a list of your assets and their approximate values, along with a list of mortgages or other debt on any property. Your attorney can give you an estimate of what it will cost your heirs to pass your estate through probate.

The living trust is frequently used to avoid or reduce probate expenses. Ask your attorney to explain the advantages and disadvantages of this type of trust.

Trustee

If you have a trust, either in your will or a separate living trust, you will need to name a trustee to manage investments, pay taxes, make distributions, etc. In the event he or she dies, you will want to provide for one or more successor trustees.

Advantages of a Will

Avoids Distribution Under the Law of Intestacy

If a person dies without a will, he or she is said to have died "intestate." States have laws to deal with this situation. These state "intestacy" laws will typically pass property to certain relatives of the decedent. These laws have been drafted to be fair in the average situation, but most persons would like to choose who will receive their estate when they die.

Permits the Nomination of a Guardian for Minor Children

Without a nomination in a will, the court will appoint a guardian of the person for minor children. Relatives are not always the best choice for a guardian and consideration must be given to the financial situation of the potential guardian, as well as his or her health, age, willingness and ability to care for your children.

Waiver of the Probate Bond

In the absence of a will, the court will require a fiduciary bond to be posted by the administrator (executor) of the estate to guarantee the replacement of any funds embezzled or diverted by him. Since this additional cost must be borne by the estate, the estate owner may want to waive the bond requirement in the will. Great care should be used in selecting an executor.

Choosing the Executor

The duties of the executor of an estate can be very time consuming and frustrating, especially to a spouse who has just lost his or her loved one. In the will, a qualified individual and/or a corporate trust company can be chosen to handle these responsibilities.

Making Specific Bequests to Individuals

An individual may bequeath specific items of jewelry, heirlooms and furniture, or make cash bequests, and be certain that they will pass to the proper persons. Without a will, written or oral instructions may not be followed.

Types of Wills and Trusts

There are many varieties of wills and trusts to fit the needs of each individual. Only a qualified attorney should draft these documents.

A few of the more common documents are listed below.

- **Basic will:** A basic or simple will generally gives everything outright to a surviving spouse, children or other heirs.
- **Will with contingent trust:** Frequently, married couples with minor children will pass everything to their spouse, if living, and if not, to a trust for their minor children until they become more mature.
- **Pour-over will:** The so-called "pour-over" will is generally used in conjunction with a living trust. It picks up any assets that were not transferred to the trust during the person's lifetime and pours them into the trust upon death. The assets may be subject to probate administration, however.
- **Tax-saving will:** A will may be used to create a testamentary bypass trust. This trust provides lifetime benefits to the surviving spouse, without having those trust assets included in the survivor's estate at his or her subsequent death.
- **Living trust without tax planning:** Generally, the surviving spouse has full control of the principal and income of this type of trust. Its main purpose is to avoid probate. If required, the trust can also be used to manage the assets for beneficiaries who are not yet ready to inherit the assets outright, because they lack experience in financial and investment matters.
- **Bypass trust:** This type of trust allows the first spouse to die of a married couple to set aside up to $12,920,000[1] in assets for specific heirs while providing income and flexibility to the surviving spouse. The appreciation on assets in the trust can avoid estate tax.

[1] The applicable exclusion amount is the dollar value of assets protected from federal estate tax by an individual's applicable credit amount. For 2023, the applicable exclusion amount is $12,920,000. In 2022, the applicable exclusion amount was $12,060,000.

- **QTIP trust:** A type of trust known as a QTIP trust allows the first spouse to die to specify who will receive his or her assets after the surviving spouse dies. Use of a QTIP also permits the deferral of death taxes on the assets until the death of the surviving spouse.

  QTIP means "qualified terminable interest property." The income earned on assets in a QTIP trust must be given to the surviving spouse for his or her lifetime. After the death of the surviving spouse, however, the assets then pass to beneficiaries chosen by the first spouse to die, frequently children of a prior marriage.

  Even if there are no children of a prior marriage, some estate owners use this type of trust to prevent a subsequent spouse of the survivor from diverting or wasting estate assets. A QTIP trust can only hold certain qualifying property. For this reason, it is often used in tandem with a bypass trust.

- **Qualified domestic trust:** Transfers at death to a noncitizen spouse will not qualify for the marital deduction unless the assets pass to a qualified domestic trust (QDOT). The QDOT rules require a U.S. Trustee (unless waived by the IRS) and other measures that help ensure collection of a death tax at the surviving noncitizen spouse's later demise.

Note: Additional trusts may be used for current income tax savings or to remove life insurance from the taxable estate, but the above-described documents should generally be considered for a person's estate plan.

The Importance of Beneficiary Designations

Some types of assets allow the owner of the asset to name a "beneficiary." If the original owner later dies, ownership of the asset passes automatically to the named beneficiary. Because beneficiary designations are easy to use, they can be a key estate planning tool. However, significant negative tax, financial, and even personal problems can arise if the "wrong" individual or entity is named as the beneficiary.

Common Named Beneficiaries

A number of individuals, entities, or organizations are commonly named as a designated beneficiary:

- **Spouse:** A married individual's spouse is perhaps the most common beneficiary designation. Assets passing to a surviving spouse generally escape federal estate tax because of the unlimited marital deduction.[1]
- **Children:** Children, as adults or minors,[2] are often named as beneficiaries. Step-children or other children adopted informally generally need to be specifically identified.
- **Other family members:** Brothers and sisters, aunts and uncles, and nieces and nephews are frequently encountered beneficiaries.
- **Estate:** In some situations, the asset owner will name his or her estate as the beneficiary.
- **Trust:** As a part of a more complex estate plan, a trust may be named as a beneficiary. The trust must exist at the time of death for the beneficiary designation to be valid.
- **Charity:** A charity may be a designated beneficiary, which can reduce the owner's taxable estate.
- **Corporation or partnership:** Buy-sell agreements, key man insurance, stock redemption, split-dollar arrangements, and salary continuation plans are all valid business reasons why a corporation or partnership may be named as a beneficiary.

[1] The discussion here concerns federal income and estate tax law. State or local law may vary.

[2] In many states, 18 is the "age of majority" when an individual is considered, for legal purposes, to be an "adult." In some states the age of majority is 21.

The Importance of Beneficiary Designations

General Considerations in Making Beneficiary Designations

There are a number of general issues to consider when using beneficiary designations:

- **Keep beneficiary designations current:** Divorce, the birth of a child, the death of a beneficiary, or any number of other life changes can result in the need to update a beneficiary designation. Lack of planning can result in an ex-spouse receiving retirement benefits intended to provide for others or for assets to inadvertently be paid to the estate when a named beneficiary has predeceased the owner.
- **Your estate or executor as the beneficiary:** In these situations, the transferred assets must generally go through a costly and time-consuming court-supervised process known as "probate." During probate the proceeds can be subject to the claims of creditors. In some situations there may be valid estate planning reasons for naming the estate as a beneficiary.
- **A minor as beneficiary:** In most states, a minor generally cannot legally enter into contracts or own property. If a minor is named as the beneficiary of an asset, the end result is frequently an expensive court-appointed guardianship with court supervision of the use of these funds. Once reaching his or her majority, the individual then takes control of the assets.
- **Per Capita vs. Per Stirpes:** A beneficiary designation form will generally use one of these two terms to specify how an asset will be distributed if a named beneficiary predeceases the asset owner. In a "Per Capita" distribution, generally, each survivor (a living beneficiary or a deceased beneficiary's heirs) receives an equal share. In a "Per Stirpes" distribution, generally, a deceased beneficiary's heirs divide his or her share into equal portions. Many states have modified these rules.
- **Spousal rights:** In some states, a surviving spouse may have the right to claim a portion of a decedent's estate, including part of assets that can be transferred by a beneficiary designation. In Community Property[1] states, a surviving spouse may have rights that need to be considered.

[1] The Community Property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. In Alaska, spouses may opt-in to a community property arrangement.

Bypass Trust

Under federal law, each individual has an "applicable exclusion amount," a specified dollar amount of assets protected from federal estate tax. Between spouses, however, a person can pass any size estate to his or her U.S. citizen spouse[1] without concern for a federal estate tax because of the "unlimited marital deduction." For many married couples, an "I love you" will simply leaves everything to the surviving spouse.

Before 2011, however, when the surviving spouse later died, and the combined estate passed to the ultimate heirs, there was only the survivor's single applicable exclusion amount to shield the estate from federal estate tax. Using the unlimited marital deduction at the first death, in effect, wasted the applicable exclusion amount of the first-to-die.

To preserve the applicable exclusion amount of the first-to-die, many married couples used a "bypass" trust (also called an "exemption" or "credit shelter" trust). At the first death, the bypass trust would be funded with assets up to the applicable exclusion amount in effect for that year. A bypass trust is not subject to federal estate tax at either the first or second death, even though the assets in the trust may appreciate greatly in value.

A bypass trust is also useful in that it can be written to give the surviving spouse access to the income from the trust for life, as well as access to the trust principal, in extreme situations, for his or her health, education, support, and maintenance.

2010 and 2012 Tax Legislation

The 2010 Tax Relief Act brought a number of significant changes to federal estate tax law. One provision increased the applicable exclusion amount to $5,000,000 in 2011 and to $5,120,000 in 2012. Another section provided that any applicable exclusion amount remaining unused at the death of the first-to-die of a married couple could be carried over and used by the survivor, in addition to the surviving spouse's own applicable exclusion amount.

The American Taxpayer Relief Act of 2012 made permanent a number of the provisions in the 2010 Tax Relief Act, including the increased applicable exclusion amount and the carryover of any unused spousal applicable exclusion amount.

[1] If the surviving spouse is not a U.S. citizen, special rules apply.

Bypass Trust

Tax Cuts and Jobs Act of 2017

The Tax Cuts and Jobs Act of 2017 (JCTA), for 2018 – 2025, increased the base applicable exclusion amount from the $5,000,000 level set in the 2010 act, to $10,000,000.[1] Adjusted for inflation, the applicable exclusion amount for 2023 is $12,920,000. Thus, for married couples, for 2023, the combined effect of all these changes is to effectively protect from federal estate tax up to $25,840,000 in assets, with or without a bypass trust.

Is the Bypass Trust Dead?

With such a large dollar amount protected from federal estate tax, many estate owners will find that a bypass trust is no longer necessary, at least from a *federal* estate tax perspective. When planning for *state* death taxes, however, which often have much lower taxability thresholds, the bypass trust may continue to be a valuable estate planning tool. Note that there may also be *non-tax* reasons for including a bypass trust in an estate plan.

Those with estates large enough to be subject to federal estate tax will likely benefit from continuing to use bypass trusts as a part of their estate plan.

Seek Professional Guidance

All estate owners are strongly advised to consult with appropriate financial, tax, and legal professionals as to the steps to take to best benefit from this changed estate planning environment.

[1] Under current law, in 2026, the $5,000,000 base applicable exclusion amount will again apply, adjusted for inflation.

Advance Health Care Directives

End-of-Life Decision Making

Modern medicine can now keep a person alive in situations that, in years past, would have resulted in the individual's death. Frequently, a patient in such a condition is unable to communicate his or her wishes with regard to the type of medical care to be provided. In the absence of any other guidance, the attending physician will typically use all available means to keep the individual alive, even when death is certain, with no hope of recovery.

However, many individuals feel that once death is inevitable, life should not be artificially prolonged through the use of such technology. The decision to start or withdraw such life-sustaining support, although always difficult, can be made easier with advance planning.

The term "advance health care directives" is commonly used to describe two key documents (sometimes combined into one) designed to address these end-of-life decisions:

- Living Will.
- Durable Power of Attorney for Health Care.

Individual state law governs the use of these documents, and such legislation can vary widely. Individuals who live in more than one state may need to execute a living will and a durable power of attorney for health care for each state.

Living Will

A living will, also known as a "directive to physicians," is a written statement of the individual's health care wishes should he or she become seriously ill and unable to communicate. The document is designed to provide guidance to someone else appointed to make health care decisions for the individual, or to the attending physician if there is no health care agent. A living will might include:

- Directions as to pain medication.
- Directions as to when to provide, withhold, or withdraw artificial nutrition and hydration, and all other forms of health care, including cardiopulmonary resuscitation.

- A discussion of any religious beliefs that might impact medical treatment.
- Instructions for funeral and burial services.

Because it is impossible to foresee the future, the living will should be written in the broadest possible manner, to cover a wide range of situations.

Durable Power of Attorney for Health Care

In a durable power of attorney for health care, sometimes known as a "health care proxy," an individual (the principal) appoints another person (the agent) to make health care decisions if the principal is incapable of doing so.[1] A durable power of attorney may employ a "springing" power, which means that the power "springs" into life when the principal becomes incapacitated.[2] Additional powers granted to the agent could include:

- Access to medical records.
- Authority to transfer the principal to another facility or to another state.
- Ability to authorize a "Do Not Resuscitate" (DNR) order.
- Postmortem powers to dispose of the remains, to authorize an autopsy, or to donate all or part of the principal's body for transplant, education, or research purposes.

Other Points

- **Talk about the issues:** the individual should spend time talking with family, friends, clergy, and physician about his or her wishes in end-of-life decisions.
- **Make the documents available:** if a living will and/or a durable power of attorney exist, be sure that those involved know where to locate the documents.

[1] Many states have provision in their laws for the appointment of a surrogate such as a spouse, domestic partner, or other close family member to make health care decisions for the principal, in situations where no durable power of attorney for health care exists.

[2] Under the Health Insurance Portability and Accountability Act (HIPAA), a physician is prohibited from discussing a patient's medical condition without the patient's consent. Thus, if an individual becomes incapacitated, the person named as agent under a durable power of attorney for health care may not have access to the principal's health-care information. Without this information, the agent would be unable to legally establish that the principal had become incapacitated, and would not be able to trigger any "springing" power. A HIPPA authorization can be used to give the agent access to the principal's health-care information.

- **Revocation:** an individual can generally revoke a living will or durable power of attorney at any time.

Additional Resources

Non-profit organizations such as the following provide support and education on end-of-life issues:

- **National Hospice and Palliative Care Organization:** (703) 837-1500; on the internet at: https://www.nhpco.org

Seek Professional Guidance

The counsel and guidance of legal, religious, and medical professionals is essential to the successful preparation of advance health care directives.

Avoiding Probate

The probating of a will permits a court of law to supervise the transfer of assets from the decedent to his or her heirs. A typical probate lasts about one year, with six months generally being a minimum time if everything proceeds according to schedule.

Because of high attorney's fees, executor's commissions and court costs, and the often-unwanted publicity and the time delay involved in probating an estate, many people attempt to avoid probate administration. Some of the methods of avoidance are listed below.

Joint Tenancy

Joint tenancy is a form of title arrangement, usually between spouses. The joint tenancy is dissolved after one tenant dies, with title passing automatically to the surviving joint tenant. There may be income tax disadvantages to this arrangement. Creditors of either joint tenant can attach the asset. It may also frustrate estate tax savings which are anticipated from carefully drafted wills and trusts.

Community Property with Rights of Survivorship

Title passes automatically to the surviving spouse with no income tax disadvantages as with joint tenancy.

Totten Trust

A Totten trust is a vehicle for passing savings accounts to heirs. Passbook accounts are held in trust for another. Typical wording would be: "John Doe, in trust for Johnny Doe."

Life Insurance

The proceeds of life insurance are rarely subject to probate administration, unless the insured's estate is the beneficiary or all of the named beneficiaries pre-decease the insured.

Lifetime Gifts

Even gifts made shortly prior to death will avoid probate. However, they may be brought back into the estate for death tax purposes. Also, gifts carry the donor's basis to the donee, whereas appreciated assets in the decedent's estate will generally get a new or stepped-up basis.

Revocable Living Trust

The revocable living trust is an effective method of avoiding probate. It has the additional advantage of providing management of the funds for the heirs for some time after the decedent's demise. Also, in the event the person setting up the living trust (also called an inter-vivos trust) becomes mentally incompetent or otherwise incapacitated, a successor trustee can take over management of the estate. Generally, this type of trust will not produce any estate tax savings.

Transfer on Death (TOD)

Many states have adopted the provisions of the Uniform TOD Security Registration Act, which permits securities and securities accounts to be registered so that ownership automatically passes to named beneficiaries at the death of the owner(s).

Transfer on Death

Many states have adopted a version of the Uniform TOD Security Registration Act. TOD is an acronym that stands for "transfer on death". The provisions of the Act permit securities and securities accounts to be registered so that ownership automatically passes to named beneficiaries upon the death of the owner or the last-to-die of multiple owners. In general, the result is a simplified, nonprobate transfer similar to pay-on-death (POD) transfers of bank accounts or Totten trusts. Assets transferred via TOD registration generally receive a full step-up in cost basis.

In the case of multiple owners, the property must be titled so that ownership will vest in the survivor of them before the asset passes to the named beneficiary. Thus, the owners may hold the property as joint tenants, as tenants by the entireties, or as "owners of community property held in survivorship form." A disadvantage of multiple ownership is that all parties must sign for any future account changes.

Beneficiary Designations

Beneficiary designations determine who receives the assets at death. The Act allows naming a contingent beneficiary to receive the assets if the beneficiary fails to survive. It also provides that "lineal descendants per stirpes[1]" may be substitute beneficiaries.

Acronyms Approved in Statute	Example of Use
TOD = transfer on death	John S. Doe TOD John S. Doe, Jr.
POD = pay on death	John S. Doe POD John S. Doe, Jr.
JT TEN = joint tenants	John S. Doe Mary B. Doe JT TEN TOD John S. Doe, Jr.
SUB BENE = substitute beneficiary	John S. Doe TOD John S. Doe, Jr. SUB BENE Peter Doe
LDPS = lineal descendants per stirpes	John S. Doe Mary B. Doe TOD John S. Doe, Jr. LDPS

Creditor and Third-Party Claims

Generally, the Act does not provide any protection against the claims of third parties such as creditors, or individuals with other interests, such as a spouse's community property interest. A creditor or other party asserting a conflicting interest can do so simply by giving notice to the registering entity (the broker-dealer). As a practical matter, this will usually block transfer of the asset until the conflict is resolved.

[1] "Per stirpes" is a Latin term which can be translated variously as "per branch" or "by the roots." In estate planning it refers to a common method of dividing an estate among the heirs of an estate owner.

Seek Professional Guidance

As a general rule, TOD registration as an estate planning tool is most useful in smaller estates, those without estate tax problems, or in situations involving a single estate owner with a single beneficiary. Estate owners are advised to seek the advice and counsel of a competent estate planning attorney in their state of residence before making any decisions regarding the use of TOD registration.