

FREQUENTLY ASKED QUESTIONS ABOUT ESTATE PLANNING AND ADMINISTRATION

WHAT IS A WILL? A will is a legal document that describes how you want your assets to be distributed after your death. A will also contains other specific directions from you about who will handle the administration of your estate and who will be the guardian of your child if you die before they reach the age of majority.

WHAT IS A POWER OF ATTORNEY? A power of attorney is a legal document that allows you to give someone else the power to act on your behalf when you cannot do so, usually in respect to health care and financial matters.

WHY SHOULD I MAKE A WILL? If you die without a valid will, state law decides what happens to your assets, who will care for your children, and who will administer your estate. Your wishes will not be considered, so your assets may go where you don't want them to go, your children may be parented by people you would not have chosen, and a lawyer appointed by the court will handle your estate after you die.

IF I DIE WITHOUT A WILL, DOES THE STATE GET ALL MY ASSETS? No. If you die without a will, a state law called the *intestate statute* controls how your assets will be distributed. Your assets will be distributed to family members according to a "one size fits all" formula without any regard as to how you would have wanted them distributed. However, your assets will not go to the state except in rare, limited circumstances.

ARE ALL OF MY ASSETS CONTROLLED BY MY WILL WHEN I DIE? No. Many assets are passed on to beneficiaries outside of the will. For example, life insurance policy proceeds and retirement plan assets are distributed according to the beneficiary designation forms that you fill out. A bank account or house that you own jointly with another person will go to the other joint owner automatically if you both own the policy or house with rights of survivorship. It is extremely important for you to direct the disposition of these assets according to an estate plan that also dictates how assets will be distributed through your will.

WHAT IS PROBATE? Probate is a court procedure that determines whether a will is valid. If it is valid, then a personal representative is appointed to handle the administration of the estate. If you have a will, your executor will typically serve as your personal representative. The probate process gives your creditors an opportunity to be paid from your assets. Once all creditors are paid, the remainder of your assets are transferred to the beneficiaries that you named in your will. If you died without a will, the state law governing estate distribution will be applied. There is a

probate tax on assets that flow through a will based on the total size of your **probate estate**; this tax is paid out of your estate prior to distribution of assets to your beneficiaries.

DO I HAVE TO PAY TAXES ON ASSETS THAT PASS OUTSIDE OF PROBATE?

Possibly, depending on the size of your **taxable estate**. While you do not have to pay probate tax on assets that do not pass through your will, depending on the size of your taxable estate, you may have to pay state and federal estate and gift taxes on your taxable estate. In addition to all the assets passing through your will, your taxable estate includes assets that pass according to beneficiary designation forms that you signed for assets such as life insurance and retirement plans. Your taxable estate also includes assets titled in your name only, such as bank accounts and real estate. Removing assets from your taxable estate is a complex process that should be directed by an attorney with experience in estate planning.

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ADVANCE DIRECTIVES AND ESTATE PLANNING DOCUMENTS

HEALTH CARE POWER OF ATTORNEY

A document that allows you to name someone who can consent to or refuse medical care on your behalf if a physician has determined that you are unable to make or communicate decisions for yourself. The current version of the Health Care Power of Attorney in North Carolina allows you to record decisions about organ donation and body disposition (e.g., autopsy, burial, cremation).

ADVANCE DIRECTIVE FOR A NATURAL DEATH (typically called a Living Will)

In this document you can leave instructions for health care professionals about how you want to be treated when you are near the end of your life. You can decide whether you want your life to be prolonged by the use of artificial liquids or nutrition when you are no longer able to eat and drink because you are in coma and not expected to regain consciousness.

HIPAA AUTHORIZATION

A document that allows you to name individuals who can receive medical information about you when you cannot give that permission to health care professionals. You are waiving privacy rights created by HIPAA, which is the federal statute governing access to protected medical information for the individuals you name.

MOST FORM (Medical Orders for Scope of Treatment Form): a “portable living will” also known as “the pink form”

The MOST form can only be obtained from a physician. It must be filled out by a physician in consultation with a patient or patient representative. In it you can express your feelings about the type of care you want to receive when you are at the end of your life. It includes several options in addition to the options offered in the Living Will concerning artificial nutrition and hydration. It is geared primarily to patients who are seriously ill and/or whose life expectancy is less than one year. The original signed form, which is a medical order, is placed in your medical file and must be sent with you when you are transferred to another setting – hence, the nickname “a portable living will.”

DNR (Do Not Resuscitate Form) also known as “the yellow form”

A physician’s order instructing medical personnel to refrain from resuscitation even if they believe that you are in cardiac arrest.

FINANCIAL POWER OF ATTORNEY (also called a Durable or General Power of Attorney)

A document which allows you to name someone to make financial and other life decisions for you if you are not able to make them for yourself. You essentially give your agent responsibilities for making decisions in all areas other than health care. For example, your financial power of attorney can pay bills, handle business or property transactions, and ensure that your taxes are paid.

WILL

A document which allows you to control how your assets will be distributed after you die. In it you can name guardians for minor children as well as set up trusts to benefit your spouse and/or minor children. You can also name the person who you want to manage your affairs after you die. Note that many assets, such as life insurance and IRAs, pass outside of the will, going to the beneficiaries you name in beneficiary designation forms provided by the companies that manage those policies.

TRUST

There are a variety of trust arrangements that allow someone else who you name to manage designated assets according to your instructions. Trusts can be set up during your lifetime or come into existence only after you die. They can benefit you during your lifetime; they can also be designed to benefit your spouse, your children, or others you name during your life and/or after your death. Only licensed attorneys with experience in estate planning are in a position to decide what, if any trust arrangement, is appropriate for you and your family.

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PRACTICAL SUGGESTIONS WHEN MAKING END-OF-LIFE AND ESTATE PLANNING DECISIONS

1. **Consult a lawyer about advance directives, wills, and trusts** Buying document “packages” or downloading documents is legal, but lack of professional advice in completing them can have serious legal, financial, and personal repercussions for your family in times of great emotional distress before and after you die.
2. **Talk with your family and friends about your end-of-life choices** Your advance directives give legal weight to these choices (e.g., health care power of attorney and living will), but to be effective these documents must be backed up by family members who are willing and able to talk to health care professionals about those discussions. Continue these discussions after you sign your documents. Your values and preferences may change as your life circumstances change, as health care options change, etc. Be sure to update your agents and your doctor as these discussions progress.
3. **Name back-ups for all agents**, including your durable and health care powers of attorney, executor of your will, and trustees, when applicable.
4. **Be sure to name secondary or contingent beneficiaries** when completing forms for IRAs, pension plans, and insurance policies.
5. **Whenever possible, name a family member or friend who lives near you to serve as agents for both health care and finances.** Making decisions long-distance, especially about health care, is extraordinarily difficult and fraught with problems.
6. **If you want to donate one or more organs**, spell out those details in your health care power of attorney in addition to indicating your wish to be a donor on your driver’s license.
7. **Ask your lawyer or a close family member or friend to hold originals of all documents except the MOST and DNR Forms.**
 - a. Do **not** put originals of any of these documents in your safe deposit box. In emergencies, it may be impossible to get them (e.g., at night or on the weekends), box keys are often hard to find in other people’s houses, and your agents probably have not been listed with the bank as co-signers with access to your box.
 - b. Put **copies** of all documents in an easily accessible place in your home, and tell family members and agents where they can find them.
 - c. Give **copies** of all advance health care directives (i.e., health care power of attorney, living will, and HIPAA authorization) to your physician and ask that they be placed in your medical record. Give copies to the people who will serve as your health care powers of attorney (your primary agent and back-ups).

- d. Give **copies** of your durable power of attorney to your primary agent and back-ups.
8. **Keep a record of who holds originals and copies of all your documents.** Send your lawyer a copy of this list. In all probability you are going to want to revise one or more of these documents during your lifetime, so you will need to retract all existing documents. Having a list of all holders makes this a somewhat less laborious process.
9. **Take copies of advance directives whenever you go to the hospital or a nursing home.** Ask that they be placed in your medical record.
10. **Register your advance directives** with the North Carolina State Registry or another organization that makes them available online (e.g., DocuBank). Be sure your physician, health care power of attorney, and back-ups have the information they need to access your directives online. Give family members the same access information.
11. **Carry an advance directives card in your wallet** indicating that you have registered your advance health care directives and how to access them.
12. **Revisit all documents periodically (every two or three years) and talk with a lawyer whenever any of the following occur:**
 - a. There is a significant change in the value of the assets that you are distributing.
 - b. You move to another state.
 - c. There are changes in family circumstances: marriage, divorce, birth, or death.
 - d. One of your agents or back-up agents can no longer serve in that capacity. This includes your health care and durable powers of attorney as well as executors and trustees.
 - e. There are significant changes in your health or life prospects, including diagnosis of a serious health condition and/or a significant decline in your health status, particularly if it diminishes your ability to live independently.
 - f. Your financial or personal goals for your estate plan change.

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MECHANISMS OTHER THAN WILLS AND TRUSTS FOR TRANSFERRING ASSETS AFTER DEATH

There are multiple ways to transfer assets to specific individuals after you die that operate outside of a will or a trust. In fact, most people hold the majority of their assets in IRAs, IRA Roths, and life insurance, all of which transfer benefits to individuals outside of a will or a trust. This handout describes the mechanisms most frequently used for these transfers. Please note that these mechanisms do remove assets from the probate estate, none of these mechanisms remove assets from an individual's taxable estate.

1. INDIVIDUALLY HELD ASSETS

All individually held assets will become part of an individual's estate when they die unless the account owner designates beneficiaries for these accounts. If no beneficiaries are named for these accounts, assets will be distributed according to terms of their will, if there is one; if there is no will, assets will be distributed according to the intestate statute. Distribution of assets through this process is delayed by the estate administration process in either case, and the estate will have to pay probate fees on all the assets.

When an individual dies, all bank accounts held in their name only, including checking, savings, and money market accounts, are frozen. Accounts remain frozen until all assets and debts can be identified and creditors paid. Surviving spouses or partners who are unaware of this process can be left without access to funds they need to pay multiple expenses related to the death in addition to normal household expenses.

Beneficiary Designations Account owners can avoid all of these consequences by meticulously naming beneficiaries for all of the accounts that they hold in their name only. The account owner of individually held accounts should name one or more **primary beneficiaries** for each account. The primary beneficiary (usually the spouse or partner) receives all the assets held by the owner when the owner dies based on designations made in these beneficiary forms. This transfer is governed by the contract between the account holder and the company managing the account, modified by the beneficiary change forms. The policy owner should also name one or more **contingent or secondary beneficiaries** (usually their children). In the event that the primary beneficiary dies before the policy owner, assets will automatically be distributed to the named contingent beneficiaries.

The mechanisms used to transfer assets after death have different names depending on the type of asset. Despite the different names used for the forms, they accomplish the same thing, which is to transfer assets based on the designations made in the form, rather than shifting these assets into the individual's estate.

- a. **Pay-on-Death Authorizations (PODs)** PODs allow an account owner to name primary and contingent beneficiaries for all **individual bank accounts**, including checking, money market, and savings.
 - *A practical note:* Unfortunately PODs are not routinely used, so most bank tellers will have no idea what you are talking about when you request a POD form. You will probably have to talk with a customer representative to obtain the appropriate form.
- b. **Transfer-on-Death Authorizations (TODs)** The mechanism for transferring assets in individual **investment or brokerage accounts** is called a transfer-on-death (TOD) rather than a pay-on-death (POD). TOD forms can be obtained from the representative managing your account or online through the company's website. Typically, representatives are familiar with these forms, but rarely offer them without this type of request.
- c. **Beneficiary Designation Forms** Investment accounts such as **IRAs, Roth IRAs, and annuities, as well as life insurance policies**, transfer assets after the owner's death according to the beneficiaries named on beneficiary designation forms. Employer-funded pension plans may distribute assets to a spouse or other beneficiary, although some plans do not include death benefits. You will need to refer to the plan description to determine if an employer-based plan will distribute assets to a surviving spouse or partner. Each company managing these types of accounts has their own form, which are frequently available online as well as from account representatives.
 - *Please note* that the rules governing beneficiary distributions for IRAs are different than those governing other assets and are quite complex. You should discuss your transfer plans with a financial planner or estate planning attorney before completing these forms.

2. JOINTLY HELD ASSETS

- a. **Joint Tenancy with Rights of Survivorship (JTWROS)** Couples, whether married or not, can own assets together in a joint tenancy with rights of survivorship. This form of ownership ensures that the surviving spouse or partner automatically inherits ownership of the asset when the first dies. The transfer takes place outside of a will as a matter of law; details of the ownership are spelled out in the deed (for real estate), title (for a car), or contract (for other assets such as bank accounts).
 - *Please note* that not all joint ownership situations qualify as joint tenancies with rights of survivorship. To determine the status of your joint asset, check your deed, title, or account statement for the words "joint tenancy with rights of survivorship" or

the initials "JTWROS." If you cannot find the initials JTWROS on your bank statement, you will need to go the bank and ask to see the signature card held for your account.

- *Also note* that adding a name to an existing deed, title, or account may be considered a gift by the IRS, so you should discuss your plans to create a joint tenancy with a financial planner or an estate planning attorney before you complete the forms. Only attorneys can add a name to a deed; individuals can add a name to a car title as well as bank accounts and investment accounts.
- b. Tenancy by the Entirety** Married couples in North Carolina enjoy an enhanced version of joint tenancy with rights of survivorship when owning a home called "tenancy by the entirety." A residence held jointly by a husband and wife cannot be used to satisfy debts incurred by either spouse. In other words, creditors cannot reach a home jointly owned by a married couple.

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IMPORTANT DOCUMENTS TO SAVE AND STORE

The following are key personal documents that need to be collected and stored. Most of them should be stored in one, easily accessible place in your home where your family and agents can readily find them. A few documents, like deeds and titles, should be stored in a safe deposit box or home safe.

1. Safe deposit box/safe information

- Safe deposit box location and number plus location of keys in your house
- Location of home safe and where the combination can be found

2. Estate Planning Documents

NOTE: Your lawyer may hold the originals of these forms. If you are holding the originals, do NOT keep them in a safe deposit box. Similarly, do not keep your sole copies of any of these documents in a safe deposit box.

- Will
- Health care power of attorney
- Living will
- Durable power of attorney
- HIPPA authorization
- Trust agreements
- Memos to executors re distribution of personal property

3. Personal documents

- Birth certificates, including your children's birth certificates
- Passports
- Citizenship papers, green cards, etc.
- Marriage license
- Pre- or post-nuptial agreements
- Separation and divorce papers
- Military and veterans documents
- Adoption papers
- Death certificate for deceased spouse or partner

4. Deeds and Titles

NOTE: these documents should be stored either in a safe deposit box or home safe.

- Deeds to houses you own
- Titles to cars and other vehicles like boats and trailers

5. Insurance papers

- Life insurance policies
- Home owner's policies
- Health insurance policies
- Long term care insurance policies
- Disability insurance policies
- Automobile insurance policies
- Insurance on other vehicles like boats and trailers
- Appraisals of valuable personal property such as jewelry, artwork, or coin collections

6. Financial information

- Mortgage policies on real estate
- Notes and other loan agreements
- Stocks, bonds, and mutual funds
- Loans that you have made
- Tax returns for past 7 years

7. Business and employment information

- Employment contracts
- Partnership agreements
- Documents for family businesses

8. Retirement Accounts

- IRA or other private pension plan descriptions
- Annuities

9. Funeral/memorial service information

- Contracts with funeral homes or crematoriums
- Cemetery plot contracts
- Funeral/memorial service plans

PERSONAL RECORD KEEPING AIDES

A detailed but easily accessible record of your personal affairs is invaluable to your family and friends if you are not able to act on your own behalf. It is also very helpful to family and attorneys responsible for closing your affairs after you die. The following are two "systems" for organizing, recording, and storing this type of information.

Passing on Thoughtfully: How to While You Still Can: A Helpful Guide for Record-Keeping, 2nd edition. By Trudy Couch, PhD.

This is a low-tech workbook that you can obtain in either hard copy form or as a CD. If you use the CD, you can fill the information in on your computer and store it there, making updates easy. Note that the CD version is called Getting It Together. Either version costs \$19.99.

The workbook and CD can be purchased by contacting:

Project Compassion
180 Providence Road, Suite 1-C
Chapel Hill, NC 27514
(919) 402-1844
www.project-compassion.org

Record Tree: Personal Record Keeping Software

This computer software allows you to store information on up to six people simultaneously (i.e., you, your spouse/partner, your parents, and your spouse/partner's parents). The program is very intuitive and easy to use. Information is stored on your computer hard drive and is encrypted. You can print information in a variety of formats. The program is \$44.95.

You can preview and order Record Tree at www.recordtree.com.

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LEGAL RESOURCES FOR PEOPLE WITH CHRONIC ILLNESSES

Caveat: Elder law attorneys can provide a great deal of assistance to patients with chronic illnesses, particularly in the area of long-term care planning in conjunction with estate planning. Elder law attorneys provide Medicaid planning and can ensure that clients receive appropriate public benefits such as Medicare and Social Security.

However, we are not experts in disability law. There are attorneys who specialize in helping people get Social Security Disability Income (SSDI), colloquially known as "disability lawyers," who should be consulted if you need to apply for disability benefits or appeal a decision in that regard. With that in mind, I'm providing a few resources on disability law that you might find useful, at least as an introduction to that area of law.

BOOKS

Estate Planning for People with a Chronic Condition or Disability. Martin M. Shenkman. Demos Health, 2009.

I haven't had a chance to review this book yet. But I'll let you know what I think as soon as I receive my copy from Amazon.

Know Your Rights: A Handbook for Patients with Chronic Illness, 2012 edition. Jennifer C. Jaff, Advocacy for Patients with Chronic Illness, Inc., 2012.

WEBSITES

Advocacy for Patients with Chronic Illness, Inc.: www.advocacyforpatients.org

This organization provides free information, advice and advocacy services in areas including but not limited to the following:

- How to get your own medical records.
- How to get and keep health insurance.
- How to get health insurance coverage for particular treatments, drugs, and/or therapies.
- How to get private disability insurance coverage.
- How to get Social Security Disability Income.
- How to assert your rights under the Americans with Disabilities Act.
- How to assert your rights under the Family and Medical Leave Act.
- How to ensure that schools accommodate students with chronic illnesses.

You may request help by emailing patient_advocate@sbcglobal.net or by calling (860) 674-1370. If we can't help you, we will try to direct you to an appropriate resource.

Advocacy for Patients with Chronic Illness, Inc. will provide advocacy services not including litigation. If your claim cannot be resolved without litigation, we will attempt to refer you to an attorney in your area to bring suit on your behalf.

Disability Rights North Carolina: www.disabilityrightsnc.org

Disability Rights North Carolina is a 501(c)(3) nonprofit organization with offices in Raleigh and Asheville. Its team of attorneys, advocates, paralegals and support staff provide advocacy and legal services at no charge for people with disabilities across North Carolina. As the state's federally mandated protection and advocacy system, Disability Rights North Carolina is charged with protecting the rights of children and adults with disabilities living in North Carolina.

Practical Legal Stuff in Simple English: www.laweasy.com

This is a website for laymen prepared by attorney Martin Shenkman. I'm including it here because he has become something of an expert on estate planning for chronically ill patients following his wife's diagnosis with MS. I value the advice that he provides in free online articles and commend them to you; however, but I do NOT recommend that you draft your own estate planning documents using free or inexpensive forms provided by Mr. Shenkman or anyone else (e.g., LegalZoom).

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WHAT IS ELDER LAW?

Unlike virtually all other areas of law, elder law is not defined by its content focus, but rather by the population that it serves. Attorneys who practice elder law serve older adults; in the process of providing them with legal advice, they frequently provide advice to their families as well.

Attorneys who primarily work with the elderly bring more to their practice than an expertise in the appropriate area of law. They bring to their practice knowledge of the elderly that allows them and their staff to ignore the myths relating to aging and the competence of the elderly. At the same time, they take into account and empathize with some of the true physical and mental difficulties that often accompany the aging process. Their understanding of the afflictions of the aged allows them to determine more easily the difference between the physical versus the mental disability of a client. They are more aware of real life problems, health and otherwise, that tend to crop up as persons age. They are also tied into a formal or informal system of social workers, psychologists, physicians and other elder care professionals who may be of assistance to seniors and their families.

Legal problems that affect the elderly are growing in number. Our laws and regulations are becoming more complex. Actions taken by older people with regard to a single matter may have unintended legal effects. It is important for attorneys dealing with the elderly to have a broad understanding of the laws that may have an impact on a given situation to avoid future problems. Unfortunately, this job is not made easy by the fact that elder law encompasses many different fields of law. Some of these include:

- Medicaid planning including preservation/transfer of assets
- Long-term care insurance as an alternative to Medicaid spend-down
- Medicare claims and appeals
- Supplemental health insurance decisions, claims, and appeals
- Social security and disability claims and appeals
- Disability planning, including means of delegating management and decision-making to another in case of incompetency or incapacity through health care powers of attorney, durable or financial powers of attorney, and "living wills."
- Conservatorships and guardianships
- Estate planning, including planning for the management of one's estate during life and its disposition on death through the use of trusts, wills and other planning documents

- Long-term care placements in nursing home and life care communities
- Nursing home issues including questions of patients' rights and nursing home quality
- Elder abuse and fraud recovery cases
- Housing issues, including discrimination and home equity conversions
- Age discrimination in employment
- Retirement, including public and private retirement benefits, survivor benefits and pension benefits
- Probate
- Administration and management of trusts and estates
- Health law
- Mental health law

Most elder law attorneys do not specialize in every one of these areas. So when an attorney says he/she practices elder law, find out which of these matters he/she handles. You will want to hire an attorney who regularly handles matters in the area of concern in your particular case and who will know enough about the other fields to question whether an action being taken might be affected by laws in any of the other areas of law on the list. Because attorneys practicing elder law are part of an informal multi-disciplinary team, when they identify problems that fall outside of their area of expertise, whether they involve legal issues they do not routinely handle or they concern health issues that they cannot treat, they will be able to refer you to other professionals who can help you.

To find an elder law attorney who practices near you, consult the website for the National Academy of Elder Law Attorneys (www.naela.org).

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