

ESTATE PLANNING 101

***What You Need to Know About Estate Planning
in Kansas and Missouri***

**Greater Kansas City
Federal Executive Board**

**119th Pre-Retirement Planning Seminar
December 2, 2020**

Prepared and Presented By:

Craig C. Reaves, CELA, CLU, ChFC
Elder and Special Needs Law Attorney

REAVES LAW FIRM, P.C.

4400 Madison Avenue, Kansas City, Missouri 64111

Telephone (816) 756-2100; Fax (816) 756-0333

email: info@ReavesLawFirm.com

ADMITTED TO PRACTICE LAW IN MISSOURI AND KANSAS

REAVES LAW FIRM, P.C.

4400 Madison Avenue

Kansas City, Missouri 64111-9309

(816) 756-2100 FAX (816) 756-0333
ADMITTED IN MISSOURI AND KANSAS

An Elder Law Attorney's Perspective on Estate Planning

Four Things to Focus On

I. **Get Your Estate Plan in Order - Six Easy Steps**

1. List what you own today
 - A. How each asset is titled
 - B. Name of beneficiary, if any
 - C. Value of each asset
 - D. Income tax basis of each asset
 - E. Include retirement accounts and life insurance death benefits

2. Decide where you want your assets to go if you were not living today
 - A. Family - spouse, children, grandchildren, siblings, etc.
 - B. Charities
 - C. Friends, others
 - D. How much money or what percentage of total assets to each?
 - E. Where should they go if a person you choose does not survive you?

3. How do you want each of them to receive your assets? Only two options:
 - A. Outright, with no restrictions, or
 - B. In trust - many different options

4. What process do you want to use to transfer assets? Two options:
 - A. Probate (court oversight) - Last Will and Testament controls
 - B. Avoid Probate - only three ways
 - 1) Joint with right of survivorship
 - Assets transfer to surviving owner outright (not in trust)
 - Other owner(s) must survive you
 - Makes other person owner with you now; this is risky
 - 2) Beneficiary designation / Transfer on Death / Pay on Death
 - Assets must be distributed outright (not in trust)
 - Recipient must survive you
 - 3) Living Trust
 - Assets can be distributed outright or in trust
 - You can control where your property goes if recipient does not survive you

5. Fund your estate plan
 - A. Title all assets correctly
 - B. Name correct beneficiaries
6. Be sure to coordinate all documents, asset titling, and beneficiary designations so your plan is carried out

II. What if you become incapacitated?

1. Without proper planning a guardian & conservator must be appointed for you
2. Durable Power of Attorney must be signed while you have intellectual capacity
 - A. Legal and Financial
 - B. Health Care
 - C. Should comply with HIPAA

III. Do you want to be kept artificially alive on life support?

1. Need Advanced Directive - no matter what your answer. Two kinds:
 - A. Instructive - Living Will, Health Care Treatment Directive
 - Must follow decision of physician
 - B. Proxy - If physician says you have crossed the line, then people you nominate can decide what/when to stop
2. If want artificially supplied nutrition and hydration (feeding tubes) stopped, you must explicitly say so in the document
3. Talk to your family and people named in your Advance Directive/Health Care Durable Power of Attorney
 - A. So they know what you want
 - B. So they can better cope if your life support is stopped

IV. Plan for your potential need for long-term care

1. You will need income and/or assets to pay for long-term care
 - If not sufficient, consider purchasing long-term care insurance
2. Don't plan to qualify for Medicaid unless you have to; it is there as a last resort, not a life goal
3. Make sure there is sufficient flexibility in your estate planning documents so they can be adapted and changed as circumstances and laws change. This includes powers to transfer assets, establish trusts, spend money in a manner that benefits you and protects assets for Medicaid eligibility, if that becomes necessary.

CRAIG C. REAVES
Attorney at Law
REAVES LAW FIRM, P.C.

Craig C. Reaves has been licensed as an attorney since 1978. The major emphasis of his law practice is in the areas of Estate Planning, Elder Law, Special Needs Trusts and planning for persons who have a disability. He practices law in both Kansas and Missouri.

Mr. Reaves was one of the first attorneys to become a Certified Elder Law Attorney (CELA)* by the National Elder Law Foundation, and has continued to be Certified since 1995. He is listed in Who's Who In American Law and Who's Who in America. He has been selected for inclusion on the Kansas and Missouri Super Lawyers list since 2005 and has been included in the current editions of The Best Lawyers in America since 2007. He is an adjunct professor and teaches an Elder Law course at two schools of law - the University of Kansas and the University of Missouri-Kansas City, and he has contributed to a law school course at Stetson University College of Law. Mr. Reaves is a contributing author to the LexisNexis treatise *Fundamentals of Special Needs Trusts*.

Mr. Reaves received both a law degree (JD) and a Bachelor of Science in Business with an emphasis in Political Science from the University of Kansas. He also holds the Chartered Life Underwriter (CLU) and Chartered Financial Consultant (ChFC) designations.

Mr. Reaves is a sought after speaker and educator. He is involved with many professional and charitable organizations, some of which are listed below.

PROFESSIONAL:

- Past President and Fellow of the National Academy of Elder Law Attorneys (NAELA)
- Fellow of ACTEC (American College of Trust and Estate Counsel)
- Charter member of the Council of Advanced Practitioners of NAELA
- Past President and Founding Board Member of the Missouri Chapter of NAELA and member of the Kansas Chapter of NAELA
- Member of the Special Needs Alliance, a national organization of lawyers dedicated to disability and public benefits law
- Member of WealthCounsel and Society of Financial Services Professionals
- Chair-Elect and Board Member of The Kansas City Estate Planning Symposium
- Former Member of the Disciplinary and Ethics Commission of the Certified Financial Planner (CFP®) Board of Standards
- Member of the Kansas, Missouri, American, and Kansas City Metropolitan Bar Associations, along with the Probate and Estate Planning Committees of each
- Admitted to practice law in the federal and state courts in Kansas, Missouri (Western District Federal), and the United States Tax Court

CHARITABLE:

- Past President of LifeCare Planning, Inc., a non-profit organization that assisted parents of persons who have a disability to plan for future care of their children
- Past President of the Brain Injury Association of Kansas and Greater Kansas City
- Past Secretary of the Arthritis Foundation-Western Missouri/Greater Kansas City Chapter
- Past President of the Kansas City Chapter of the Fellowship of Christian Athletes
- Founding board member of Respite Care Services, Inc.

* Neither the Supreme Court of Missouri, nor the Missouri Bar reviews or approves certifying organizations or specialist designations.

About Reaves Law Firm, P.C.

A Professional Law Corporation

Reaves Law Firm, P.C., was founded in 1988 by Craig C. Reaves for the purpose of providing creative, practical, and effective legal solutions for persons with estate planning and related needs. That focus has evolved to also encompass the highly specialized needs of persons who are elderly and those who have a disability.

Mr. Reaves and the staff of Reaves Law Firm, P.C. take great pride in providing personal services to our clients by addressing each client's needs on an individual basis. We concentrate our efforts in the complex areas of:

Estate Planning: Designing and preparing trusts, Wills, durable powers of attorney, and other documents to help our clients accomplish their estate planning goals while minimizing probate court involvement and taxes.

Elder Law: Helping persons who are elderly or have a disability to protect assets, qualify for public benefits such as Medicaid and SSI, and plan for long-term care.

Special Needs Trusts: Designing and preparing special trusts that allow assets to be used in ways that help the beneficiary without disqualifying him or her from Medicaid, SSI, or other benefit programs. These can either hold assets that belonged to a parent or other person, or lawsuit settlements, inheritances, or other assets that belong to the person who has the disability.

Trust Administration, Probate, and Guardianship: Assisting when needed to settle a trust upon the death of the trust maker, or to go to probate court to settle an estate or appoint a guardian and conservator.

The aim of each member of Reaves Law Firm is to help our clients accomplish their estate planning and other legal goals. We want to take the mystery out of the planning process. Any legal documents or planning strategies we prepare will be explained in straightforward language that our clients and their family can understand.

REAVES LAW FIRM, P.C.

Elder and Special Needs Law
4400 Madison Avenue, Kansas City, Missouri 64111
Telephone (816) 756-2100; Fax (816) 756-0333
e-mail: info@ReavesLawFirm.com

ADMITTED TO PRACTICE LAW IN MISSOURI AND KANSAS

ESTATE PLANNING 101
What You Need to Know About Estate Planning
in Kansas and Missouri

presented by

REAVES LAW FIRM, P.C.

In this seminar we are going to discuss subjects most of us would rather avoid: death, disability, probate, taxes, and stopping life support. Many people do not give much thought to the certainty of their own death, yet it will happen to each and every one of us. Estate planning forces us to face the financial and emotional consequences of death and take action to minimize the effects on our families. But if people were asked to summarize their estate planning wishes, most would simply say that:

- * They want their estate to be distributed to the people and charities they choose according to their wishes;

- * They want to avoid excessive attorney's fees, court costs, and unnecessary delays in passing on their property; and

- * They want to avoid, or, at least, minimize the payment of taxes.

This handout is provided as a supplement to the seminar you are attending. Most of the important ideas discussed at the seminar are outlined here.

Please feel free to make notes or jot your questions down on this handout so that they will be available to you if you choose to attend your private complimentary consultation.

By attending this seminar you are entitled to a free one-hour consultation with Mr. Reaves to discuss your personal estate planning needs and questions.

**To schedule your free consultation, please contact Reaves Law Firm, P.C., at
816-756-2100.**

Estate Planning 101
Table of Contents

I.	OVERVIEW	1
1.	What is your Estate?	1
2.	Definition of Estate Planning	1
3.	Three Hazards of Failure to Plan	1
II.	PROBATE	2
1.	Definition	2
2.	Disadvantages of Probate	2
3.	Advantages of Probate	3
4.	How to Avoid Probate	3
5.	Not Related to Taxes	3
III.	WILLS	4
1.	What is a Will?	4
2.	What Happens If You Do Not Have A Will?	4
a.	The Intestate Laws of Kansas	4
b.	The Intestate Laws of Missouri	5
IV.	OPTIONS FOR DISTRIBUTING YOUR PROPERTY	5
1.	Give outright	5
2.	Put in trust	5
V.	TRUSTS	6
1.	What is a Trust?	6
2.	Requirements of all Trusts	6
3.	There Are Only Two Types of Trusts	6
a.	Testamentary	6
b.	Living (Inter Vivos)	6
VI.	REVOCABLE LIVING TRUSTS	7
1.	Definition	7
2.	Common Design	7
3.	Advantages of Revocable Living Trusts	8
4.	Disadvantages of Revocable Living Trusts	8
5.	Other Thoughts and Information Concerning Living Trusts	9
VII.	TAXES	14
1.	United States Estate Tax	14

2.	State Taxes at Death	15
VIII.	PLANNING FOR CHILDREN WHO ARE MINORS OR HAVE A DISABILITY	16
1.	Guardianship	16
2.	Conservatorship	16
3.	Trusts for Children	17
IX.	PLANNING FOR YOUR INCAPACITY	18
1.	Durable Power of Attorney	18
a.	When Effective	18
b.	Types of Durable Powers of Attorney	18
1)	General Durable Power of Attorney	19
2)	Durable Power of Attorney for Health Care	19
c.	HIPAA Requirements	19
d.	Do Not Rely on Standard Forms	20
e.	When Terminated	20
f.	How Often to Update	20
2.	Advance Medical Directive - Stopping Life Support (or not)	20
3.	Revocable Living Trust	21
X.	INFORMATION TO BRING TO AN ATTORNEY	22
1.	Family Information	22
2.	Financial Information	22
3.	Distribution Information	23
4.	Key People	24

I. OVERVIEW

1. What is your Estate? Your estate consists of everything you own or control. This includes not only the obvious things like your house, bank accounts, investments, and personal things, but also life insurance death benefits, retirement plan proceeds, and jointly-owned property. In the context of estate planning, these assets are valued at their fair market value as of the date of your death. For ease of reference, these materials will refer to the assets in your estate as your “property.”

2. Definition of Estate Planning:

The art of designing a program for:

- a. **Your lifetime:** So you can manage and enjoy your property as long as possible, and also have everything in place so people of your choice can continue to manage your property for your benefit without probate court involvement if you become incapacitated; and
- b. **After your death:** So your property is distributed to the people and charities you choose, with the lowest possible cost and confusion.

3. Three Hazards of Failure to Plan:

- a. **Transfer of Assets:** All of your property must be transferred to others after your death. Without proper planning, your property may not end up where you want it to go, and there may be excessive expenses and delays that could have been avoided. There are many methods by which your property can be transferred upon your death. These include the probate court system and methods that avoid that system. If you properly plan, you can choose which methods you want to use.
- b. **Taxes:** For many years U.S. citizens have been taxed on the transfer their property to others at their death. There have been many changes in the estate tax law since its inception, and as of January 1, 2018, Congress enacted more changes. With proper planning, it may be possible to minimize the effect of this tax.
- c. **Incapacity:** If you lose the ability to manage your own affairs, your loved ones will have no option but to ask the probate court to appoint someone as your guardian (to make personal and health care decisions for you) and as your conservator (to manage your finances and property). This will require continued oversight by the probate court. With proper planning this can be avoided.

II. PROBATE

1. Definition: The process of going to court for legal authority to collect the property of a deceased person, pay their bills, file tax returns, pay taxes, and distribute the property according to their Will, or, if there was no Will, according to the state intestacy laws.

2. Disadvantages of Probate:

a. Formalities: Probate is usually a very formal and rigid process. There are many steps involved, petitions and forms required, court appearances, and deadlines that must be met.

b. Cost: Costs of probate often average 5% to 10% of the value of property subject to probate. These costs generally fall into the following categories:

- 1) Court Costs
- 2) Publication Costs
- 3) Attorney Fees
- 4) Executor/Personal Representative Fees

For example, Revised Missouri Statute § 473.153 sets forth the following as the minimum compensation for the personal representative and the attorney. Each shall be allowed “as the minimum compensation for his services the following percentages of the value of the personal property administered and of the proceeds of all real property sold under order of the probate court:

On the first\$ 5,000, 5 percent;
On the next 20,000, 4 percent;
On the next 75,000, 3 percent;
On the next 300,000, 2 3/4 percent;
On the next 600,000, 2 1/2 percent;
On all over 1,000,000, 2 percent.”

To illustrate this, consider an estate worth \$100,000. The personal representative and the attorney are both entitled to \$3,300 (\$5,000 x 5% = \$250; \$20,000 x 4% = \$800; and \$75,000 x 3% = \$2,250. Adding these up totals \$3,300). When these are combined, the total fees are \$6,600. When court costs and publication costs are included, the total will reach approximately \$7,000, or 7% of the estate.

c. Publicity: Probate records are open to the public.

d. Delay: Probate often takes a year or more to finalize. However, partial distributions and family support allowances while the probate is open. Also, as a practical matter, it may take just as long to finalize a living trust after a person's death, so this is not as big a disadvantage as many people believe.

3. Advantages of Probate: Despite the disadvantages, there are some reasons to consider going through probate:

- a. When there is no one you trust to wrap up your affairs after your death, the Probate Court will oversee the person appointed and hold them accountable;
- b. When your family or beneficiaries do not get along and disagreements are anticipated;
- c. When your debts exceed the value of your assets; and
- d. Probate terminates all potential claims against your estate that are not filed within the claims period (Kansas - 4 months; Missouri - 6 months).

4. How to Avoid Probate: Whether will be necessary to enlist the help of the probate court to gain control of your assets after your death and transfer them from you to others depends on how each asset you own is titled (owned) at the moment you die.

<u>FOUR WAYS PROPERTY IS OWNED</u>			
1.	Sole Name/No Beneficiary	→	Probate: Will or State Laws
2.	Joint With Rights of Survivorship	}	
3.	Certain Contracts and Beneficiary Designations	}	→ No Probate
4.	Owned by Living Trust	}	

5. Not Related to Taxes: Avoiding probate does not mean that estate taxes will also be avoided. Most non-probate property is subject to estate taxes.

III. WILLS

1. What is a Will?

- a. Simply stated, a Will is a document that tells the Probate Court judge how the property remaining after it goes through probate should be distributed.
- b. A Will has no effect on property that does not go through probate.
- c. To be valid, a Will must comply with the laws where the person who signed the Will resides.

2. What Happens If You Do Not Have A Will?

- a. **The Intestate Laws of Kansas:** If you live in Kansas at the time of your death, the laws of the State of Kansas will control the distribution of your probate property if you do not have a Will. The chart below contains a brief summary of these distributions.

KANSAS (Married)		KANSAS (Not Married)	
1.	All to spouse - if you do not have any surviving children or descendants	1.	All to your children equally (or descendants of deceased children) - Outright if 18 or older - Conservator must be appointed if under age 18
2.	50% to spouse, if you are survived by your children or descendants; remainder to your children equally (or descendants of deceased children)	2.	If no children or descendants survive you, to your parents equally
3.	If no surviving spouse, all to your children equally (or descendants of deceased children)	3.	If none of above, equally to your brothers and sisters (or descendants of those not living)
4.	Otherwise, similar to distribution if not married	4.	If none of above, equally to your grandparents (or their descendants if not living); or other relatives if related to you by at least the sixth degree
		5.	If none of above, to the State of Kansas

b. The Intestate Laws of Missouri: If you live in Missouri at the time of your death, the laws of the State of Missouri will control the distribution of your probate property if you do not have a Will. These are briefly summarized below.

MISSOURI (Married)	MISSOURI (Not Married)
1. All to spouse - if you do not have any surviving children or descendants	1. All to your children equally (or descendants of deceased children) - Outright if 18 or older - Conservator must be appointed if under age 18
2. To Spouse: First \$20,000 plus 50% of remainder, if you are survived by children (or their descendants) who were conceived or adopted by both you <u>and</u> your spouse; remainder to children equally (or descendants of deceased children)	2. If no children or descendants survive you - equally to your father, mother, brothers and sisters (or the descendants of any who are not living)
3. To Spouse: 50% if any surviving descendants are not also spouse's; descendants; remainder to your children (or descendants of any not living)	3. If none of the above, equally to your grandparents, aunts, uncles (or the descendants of any who are not living), or other relatives if related to you by at least the ninth degree
	4. If none of the above - equally to descendants of your spouse(s) who died while married to you
	5. If none of the above, to the State of Missouri

IV. OPTIONS FOR DISTRIBUTING YOUR PROPERTY

You have only two options for distributing your property to others (the “beneficiary”):

1. Give outright - the beneficiary receives all property in one lump sum with no restrictions;

OR

2. Put in trust - give property to someone else to hold in trust for the benefit of your beneficiary.

V. TRUSTS

1. What is a Trust? A legal arrangement under which one person or institution (Trustee) controls property given by another (Settlor/Grantor/Trustor) for the benefit of a third (Beneficiary).

A trust separates **Legal Ownership** (which is given to the Trustee) from **Beneficial Ownership** (which is given to the Beneficiary).

2. Requirements of all Trusts:

- a. **Settlor/Grantor/Trustor:** Creates and contributes assets to the trust.
- b. **Trustee:** Manages trust assets and uses them for the beneficiary
- c. **Beneficiary:** Receives the income and principal from the trust
- d. **Trust Terms:** Instructions for the Trustee, usually in a written trust agreement.
- e. **Assets/Corpus/Principal:** The property being held in trust

3. There Are Only Two Types of Trusts (or Put Another Way, Only Two Ways To Create A Trust):

- a. **Testamentary:**
 - This type of trust is created by your Will;
 - Therefore, this type of trust is not created until after your death; and
 - All of your assets generally must go through probate to get into this type of trust.
- b. **Living (Inter Vivos):**
 - This type of trust is a different document than your Will;
 - It is created when signed and funded, not after your death;
 - This type of trust can own property during your life; and
 - Property in a living trust does not go through probate at your death.

Two Types of Living Trusts:

1) **Revocable:**

- You can amend (change) or revoke (terminate) this type of trust prior to your death;
- This type of trust can be funded (hold assets) or unfunded during your life;
- Assets held in this type of trust will avoid probate at your death and conservatorship if you become incapacitated; and
- Assets held in this type of trust will not protect your assets from your creditors, or avoid estate taxes or income earned on trust assets from being taxed to you.

2) **Irrevocable:**

- You cannot change or revoke this type of trust;
- This type of trust can be funded or unfunded during your life;
- Assets held in this type of trust will avoid probate and conservatorship; and
- Assets held in this type of trust will often also avoid estate and income taxation to you.

VI. REVOCABLE LIVING TRUSTS

1. Definition: A Revocable Living Trust is a trust created by you during your lifetime. You retain the power to change (amend) or terminate (revoke) the trust at any time.

2. Common Design: A "Revocable Living Trust" is often designed as follows:

- a. You establish** the Living Trust (*i.e.*, you are the Settlor).
- b. You serve as the sole trustee**, or co-trustee along with your spouse, another person, or an institution, such as a bank or trust company. As trustee, you have the authority to manage the property you put in your Living Trust.
- c. You retain the power** to appoint new trustees, add or remove property, and change or revoke your Living Trust.
- d. During your lifetime** the assets in your Living Trust are used for your benefit (also can include your spouse, children, and others), or as you otherwise direct.

e. At **your death**, your Living Trust becomes irrevocable (*i.e.*, it cannot be changed or revoked) and trust assets distribute according to the terms of the Trust Agreement. Options are one or any combination of the following:

- 1) Continue as a single trust for all beneficiaries;
- 2) Divide into multiple separate trusts for each beneficiary; or
- 3) Distribute the trust assets outright to beneficiaries.

3. **Advantages of Revocable Living Trusts:**

- a. **Avoids probate** (court formalities, expense, public disclosure, and delay).
- b. **Avoids the necessity of probate court controlled conservatorship if you become incapacitated**, and it is often easier for the successor trustee to manage your assets than a person named in your financial Durable Power of Attorney.
- c. **Serves as a receptacle** for estate assets, retirement plans, and life insurance.
- d. **Brings together assets in multiple states**, and avoids multiple probates.
- e. **Relieves you of investment management**, if someone else is trustee.
- f. **Allows you to view the trust in operation** and to make changes if desired.
- g. **May be less vulnerable to attack** on grounds of your lack of capacity, fraud, or duress than a Will or testamentary trust.

4. **Disadvantages of Revocable Living Trusts:**

- a. It usually **costs more to create and fund** a Living Trust than a Will.
- b. Assets must be **retitled and transferred** (or made payable) to the Living Trust during your lifetime. This is not difficult, but will require some of your time to accomplish.

5. Other Thoughts and Information Concerning Living Trusts:

a. You still need a Will

- 1) A Will is the best place to nominate a person to serve as guardian for children who are minors or who are adults and have an intellectual disability.
- 2) A Will "pours over" into your Living Trust any assets titled in your name alone and required to go through probate.

a) This prevents potential conflicts between persons who would inherit probate property if there was no Will and those named as beneficiaries of your Living Trust.

b) These "non-trust" assets go through probate to reach your Living Trust.

b. To avoid probate and to be helpful if you become incapacitated, your Living Trust must be **funded**, *i.e.*, title to property must be:

- 1) Payable to your Living Trust upon your death, or
- 2) Transferred to your Living Trust **before** your death or incapacity. Technically, property is titled in the name of the Trustee.

Example: "Jane Doe, or her successors, as Trustee of the Jane Doe Living Trust Dated February 14, 2020."

c. Your Living Trust can **own or hold any kind of property**, such as real estate, bank accounts, stocks and other investments, personal property, safe deposit box, furniture, copyrights, royalties, life insurance, etc.

d. Your Living Trust can be **named as beneficiary** of life insurance, retirement plans (including IRA's), pay on death (POD) and transfer on death (TOD) accounts, and Wills.

1) If you are married, your spouse must consent to retirement plans other than IRAs being paid to anyone other than your spouse.

2) Also, Living Trusts cannot minimize income taxes by electing to roll retirement benefits over into a beneficiary-owned IRA; only your surviving spouse can make such an election. Therefore, if you are married, then usually your spouse is named the first beneficiary of retirement accounts, and your Living Trust is named as contingent beneficiary (in the event your spouse does not survive you).

3) If you are not married, usually your Living Trust should be named the primary beneficiary. There are exceptions to this, though, and you need to be sure to obtain advice from a competent estate planning attorney before changing beneficiary designations.

4) If your Living Trust is properly designed and drafted, it is possible for IRA distributions paid to your Living Trust to be held in an "inherited IRA" and paid out over a 10 year period of time to the people who are beneficiaries of your Living Trust. In certain circumstances, it is possible to make this payout over the life expectancy of your surviving spouse, your minor child (while a minor or in school), a person who is sufficiently disabled or chronically ill, and a person who is less than 10 years younger than you.

e. Living Trusts are **controlled by state law**. The rules and laws governing them will vary from state to state.

It is extremely important that **an attorney familiar with the laws of the state you live in, and authorized to practice law in that state, be consulted** before a Living Trust is established.

f. Living Trusts should only be prepared by a competent and experienced estate planning attorney.

1) **DO NOT** attempt to create one on your own, even with the assistance of computer programs and form books.

2) **DO NOT** purchase a Living Trust from a financial advisor or sales person, even if they say it will be written or reviewed by an attorney. They are practicing law without a license.

Although simple in concept, Living Trusts are very technical and complex documents. It is easy to miss important provisions, and no one will know there is a problem until it is too late to correct: after your incapacity or death.

g. A Revocable Living Trust **does not help you qualify for Medicaid**. All assets held in the Trust are deemed to be "available resources" and count towards the \$2,000 maximum available resources you can have and qualify for Medicaid in Kansas (\$4,000 in Missouri prior to July 1, 2020, and \$5,000 for the 12-months following).

h. A **Revocable Living Trust has no impact on taxes**. Since you retain so much power and control over your Living Trust (the total control of the assets in the Trust, right to remove and replace a trustee, and right to amend or revoke the Trust,

etc.) you are treated as the owner for tax purposes of all property held in your Living Trust.

1) Income Taxes: All income, capital gains, and losses are taxed to you during your life, whether or not you draw the money out of your Living Trust.

2) Tax Identification Number and Returns:

a) While you are living, no separate tax identification number is required for your Living Trust (your Social Security number is used) and no separate tax returns are filed. All income earned on assets owned by your Living Trust is reported on your personal income tax returns.

b) After your death, your Living Trust becomes irrevocable and must obtain its own tax identification number and file its own tax return (Form 1041).

3) Gift Taxes:

a) All transfers **to** your Living Trust during your lifetime are treated as transfers to you. If from you, it is not a taxable gift. If from anyone else, then all gift tax rules must be observed.

b) All transfers **from** your Living Trust during your lifetime are treated as gifts from you and all gift tax rules must be observed. This also subjects the gifts to a five year look back period for Medicaid eligibility purposes.

4) Estate Taxes: Assets owned by your Living Trust are taxed as part of your estate at your death.

h. If you are married and your taxable estate exceeds the amount that can pass estate tax free (the Estate Tax Exemption Amount),¹ then you and your spouse should properly design your estate plan to maximize the amount that will transfer estate tax free after the death of both of you.

1) One way to accomplish this is for each spouse to have his or her own separate Revocable Living Trust. This used to be the most common method chosen for residents of Kansas and Missouri. However, joint trusts (see below) are becoming more common since the portability provisions were added to the federal estate tax provision.

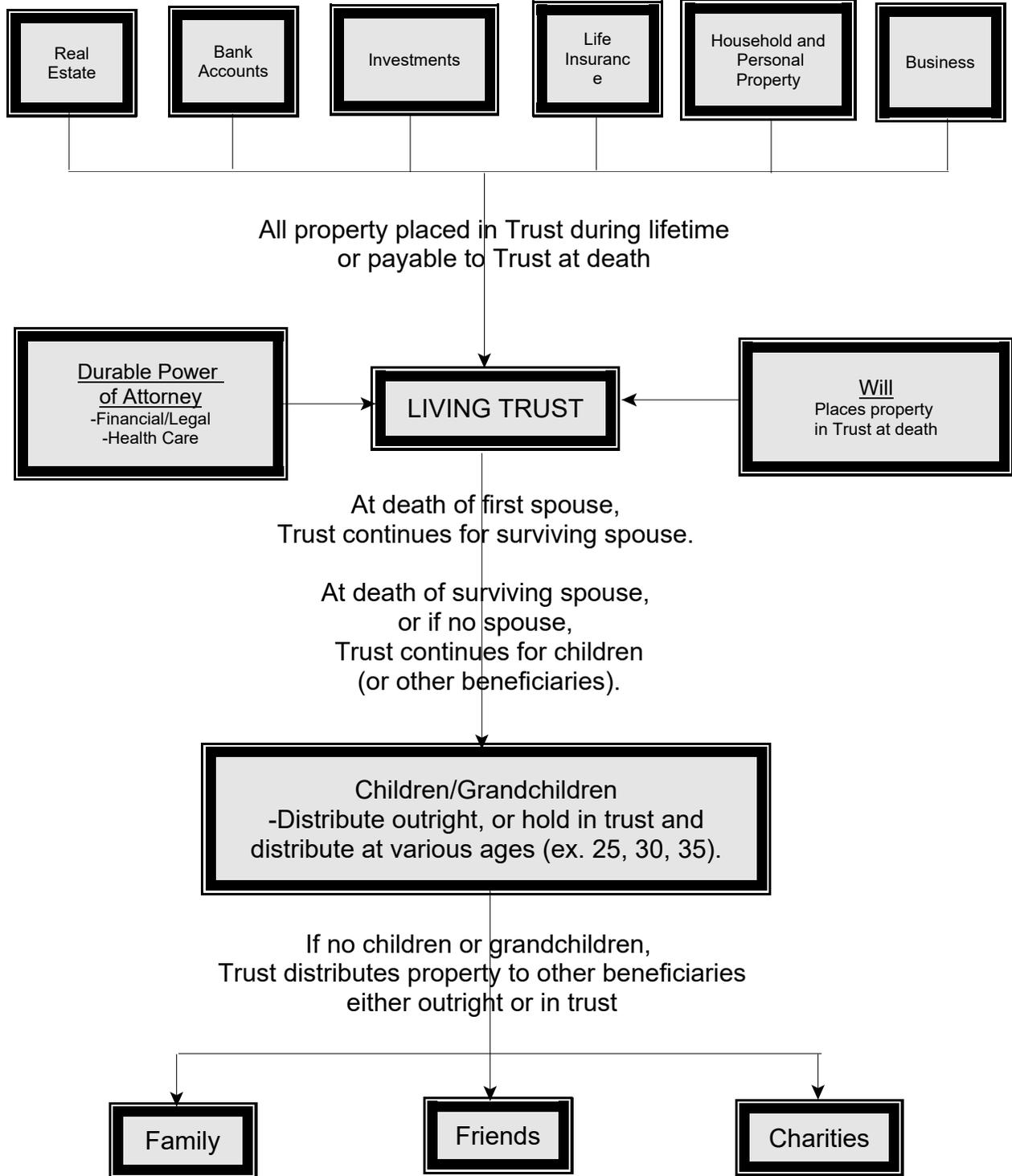
¹ This started at \$5,000,000 in 2010 and adjusted for inflation thereafter. In 2018 this doubled, and the inflation adjusted amount in 2020 is \$11,580,000. The doubling is scheduled to stop at the end of 2025.

2) Since the 2010 federal estate tax law changes became “permanent” in 2013, it is becoming more common for a married couple to use one Living Trust where both spouses are Co-Settlers. This is often referred to as a “joint trust.” If the size of the couple’s taxable estate is less than the combined estate tax exemption for both spouses, then the entire estate is often transferred to the surviving spouse, although a federal estate tax return must be filed in order to preserve the unused estate tax exemption for the surviving spouse.

3) If separate trusts are used they typically have assets of approximately equal value to take full advantage of estate tax credits and the ability to increase (“step up”) to fair market value the income tax basis in capital assets upon the Settlor’s death. However, this has become less important for estate tax purposes because the portability provisions of the current estate tax law allow the surviving spouse to use the portion of the deceased spouse’s estate tax exemption that was not used with the first spouse died. As a result of the portability provisions, a married couple can fully use both spouse’s exemptions to offset estate taxes, even if all of the assets pass outright to the surviving spouse when the first spouse dies.

BASIC ESTATE DESIGN WITH A LIVING TRUST

Single Person or Married Couple With Estate Less Than Estate Tax Exemption



VII. TAXES

1. United States Estate Tax:

a. **Your "estate"** for estate tax purposes includes everything you own or control the distribution of at the time of your death, whether or not it goes through probate. In addition to the property you would normally think of (such as real estate, bank accounts, investments, and your personal belongings), this also includes your retirement accounts and life insurance death benefits.

b. **The Federal Estate Tax Law as of January 1, 2020** On December 22, 2017, H.R.1, known as the Tax Cuts and Jobs Act (TCJA), became law. The effective date for most of the provisions is January 1, 2018. Section 11061 dealt with the federal estate and gift taxes. In order to understand the change made, an explanation of prior law is necessary.

In 2010, Congress changed the federal estate tax in the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("TRA 2010"). That law made two significant changes to the federal estate tax. First, it set the amount that can pass estate tax free (the "estate tax exemption") at \$5,000,000 per person and tied it to an inflation factor, so it increases each year there is a Social Security increase. In 2020, this exemption had increased to \$5,790,000 per person. Second, it allowed a surviving spouse to use not only that spouse's estate tax exemption upon the surviving spouse's death, but also any estate tax exemption that was not used by the first spouse to die. The effect of this was to give a married couple an exemption equal to \$10,000,000, as adjusted for inflation. Previously, any estate exemption not used by the first spouse to die was lost.

Section 11061 of the TCJA, which became effective as of January 1, 2018, doubled the initial exemption amount in the 2010 law to \$10,000,000 per individual and \$20,000,000 per married couple. This also doubles all of the inflation increases since 2010.

However, this increased exemption terminates in 10 years. This change only applies to people who die between January 1, 2018, and December 31, 2025. Unless Congress extends this, on January 1, 2026, the exemption reverts to the original \$5,000,000 amount, increased by inflation.

As a result of the election in the fall of 2020, it is possible many of the current tax laws may change in the future. At the time these materials are prepared, there is much discussion about what those changes could be and when they could become effective if enacted, but no one knows for sure what will actually happen.

c. **The amount that can pass estate tax free** (the "estate tax exemption") as of January 1, 2020 is \$11,580,000 per person and \$23,160,000 per married couple.

The **tax on assets in excess of this amount is 40%** (in comparison, in 2012 the tax rate was 35% and in 2009 it was 45%).

There is an automatic adjustment of the income tax basis for all assets owned or controlled by a person when they die. This basis adjusts (“steps up” or “steps down”) to the fair market value of the assets on the date of death. This has the effect of **eliminating all capital gains upon death**.

Also, a surviving spouse can elect to use the unused portion of the deceased spouse's estate tax exemption if an appropriate election was made in the estate tax return of the first spouse to die. This is referred to as "portability" and allows a married couple to effectively transfer up to \$23,160,000 estate tax free if both spouses die in 2020. This requires the surviving spouse to file an estate tax return within nine months following the deceased spouse's death.

Annual Gift Exemption: In 2020, the amount that can be given away each year gift tax free is \$15,000 per person.

d. The **amount of your taxable estate up to the estate tax exemption** will not be subject to estate tax. This can be given to any person or charity estate tax free.

e. However, if **your estate exceeds the estate tax exemption amount**, the excess will be subject to estate tax **unless** it is given to:

- 1)** Your **surviving spouse** (the Marital Deduction), or
- 2)** **Charity** (the Charitable Deduction).

There is no maximum dollar limit on either of these deductions.

f. If your estate exceeds the estate tax exemption amount and the excess does not go to your surviving spouse or a charity, the excess will be subject to the federal estate tax. Currently, this excess is taxed at a flat 40%.

g. If there is an estate tax payable at your death, it must be paid within nine (9) months after the date of death.

2. State Taxes at Death: In addition to the United States Estate Tax, many states also impose their own tax when a resident of the state dies. There are two types of state death taxes: an inheritance tax and an estate tax. An inheritance tax is a tax paid by the estate of the person who died, but it is calculated based on how closely related the people who received (inherited) property are to the deceased person. In contrast, an estate tax is a tax paid by the estate of the person who died, but it is calculated based on the value of the property that is included in the estate of the deceased person upon his or her death, no matter who receives the property. Missouri repealed its estate tax in 2005. For many years Kansas had an inheritance tax, but it was replaced by an estate tax, and the Kansas estate tax expired on January 1, 2010. As a result, neither Kansas nor Missouri currently has an inheritance tax or estate tax, but many other states do.

VIII. PLANNING FOR CHILDREN WHO ARE MINORS OR HAVE A DISABILITY

1. Guardianship: If no parent is living, the local probate court will appoint a person (called a "guardian") to take custody of your children who are minors (under the age of 18) or, even if adults, who are intellectually disabled enough that they need someone to make decisions for them.

a. Naming a Guardian: You can nominate people of your choice to serve as guardian for your children, in the order you prefer, in your Last Will and Testament. This will not prevent the child's other natural parent from having priority for custody of your child. However, you should still nominate guardians of your choice since the other natural parent may not be living or able to accept custody. When the court appoints a guardian, it will give preference to the people you named.

b. List Any Preferences: Any special needs, concerns, or preferences should be stated in your Will. Examples include attending private school, keeping multiple children together, keeping contact with your family, etc.

2. Conservatorship: If your children who are minors or have an intellectual disability have assets, the Court will also appoint a conservator to manage their property until they reach age 18 (if a minor) or no longer have an intellectual disability. When they reach this threshold their conservatorship property is turned over to them with no restrictions. A child with an intellectual disability may need such assistance for the remainder of his or her lifetime.

a. Naming a Conservator: When you nominate a guardian in your Will the court will typically appoint the same person as a conservator for your child if one is needed. However, you can nominate other people, or the court can appoint any person or trust company as conservator if the court believes such action will be in the child's best interest.

b. Limiting Conservator's Control: If you do not want the conservator to have any access to property that you leave to your children, you must make other arrangements. Most common is to establish a trust to hold all of the child's property and name someone else as trustee (see below). Care should be taken to distribute **all** assets (including your tangible personal property such as clothing, jewelry, and personal effects) to the trustee, not to the children who have a disability or are minors.

c. Court Imposed Requirements for a Conservator:

- 1) Must purchase a **Surety Bond** equal to amount being managed for the child, or place all of the assets in restricted accounts that cannot be accessed without a court order;
- 2) **Annual Accounting** must be filed with the court;
- 3) **Annual Audit** by the court; and
- 4) All assets under management must be turned over to the child when the conservatorship ends, which for a minor child is when the child turns 18 years old.

3. Trusts for Children: In order to avoid a conservatorship, it is necessary to establish a trust for anything left to your child who is a minor or has an intellectual disability. In addition, a trust is needed if you have a child who has any type of disability and who may be eligible for Medicaid or SSI. Property is then left to the trustee rather than to your child.

a. Testamentary Trust v. Living Trust: You can use either a trust that is established by your Will to be effective after your death (testamentary trust) or established by a separate document that is also effective during your life (living trust) and evolves into a trust for the benefit of your child. Advantages and disadvantages of these are covered in prior sections of these materials.

b. Who Can Be Trustee: The trustee (who is in charge of the money in the trust) can be any adult person, an institution (bank with trust powers or separate trust company), or a combination.

c. Property To Give To Trustee: All property should be made payable to the trustee (or your estate, if a testamentary trust is used). For example, insurance benefits, retirement plans, IRA's, tangible personal property, real estate, bank accounts, and investments.

d. Terms of Trust: Usually the trustee is directed to invest the money and use income and/or principal for the support, maintenance, health care, and education of your children who are named as beneficiaries of a trust. Remaining principal is often distributed at two or three different times (example: 1/3 at age 25; 1/2 of what is left at age 30; and remainder at age 35). However, care should be taken to make sure trust terms fit each of your children's circumstances. For example:

- 1) If any of your children **have a disability**, a normal "support" trust will prevent the child from receiving many means-tested government benefits (such as Medicaid and SSI) until the trust money is all gone. Instead, you should use a supplemental care ("special needs") trust.

2) You may want to structure **incentives** for your children to (i) attend college or other education after high school; (ii) stay off drugs and alcohol; or (iii) obtain and keep employment, etc.

3) You may want to specifically authorize and direct the trustee to spend money so your children can remain in **contact with your family**. Example: The trust can pay for travel for your children to visit your relatives, or vice versa. You may authorize money to pay for legal fees to enforce visitation rights by your parents (the child's grandparents).

e. Removal of Trustee: A trust should allow the current beneficiary or someone else, such as a Trust Protector or Trust Advisor, to remove a trustee and appoint a person or trust company as successor. This is to provide a check on the potential abuse of trustee powers. If a child is a minor or has an intellectual disability, then his or her guardian will normally have the authority to remove the trustee and appoint a successor on behalf of the child. You may not want the potential guardian (your ex-spouse?) to have such power.

IX. PLANNING FOR YOUR INCAPACITY

Statistics show that at almost any given time during your life it is more likely that you will become disabled than die. Your ability to make rational decisions may be lost in an instant (through an accident, stroke, etc.) or gradually (through the effects of a disease like Alzheimer's or Parkinson's, or just the natural aging process). If you become intellectually incapacitated and you have not done any planning, the only way your family or friends will be able to legally assist you and make decisions for you is to go to court to have a guardian and conservator appointed for you. This is true even if your spouse is living. In order to avoid this, or if you prefer to not be attached to mechanical life-sustaining machines for a prolonged period of time, then the following should be considered.

1. Durable Power of Attorney: This written instrument is used to appoint someone (the "attorney-in-fact" or "agent"), or a series of people, to legally act on your behalf even if you are intellectually incapacitated.

a. When Effective: You can choose to make your Durable Power of Attorney effective at one of the following times:

1) When you sign it, **OR**

2) After a physician or two certifies you are intellectually incapacitated.

b. Types of Durable Powers of Attorney: There are two types of Durable Powers of Attorney. Although it is possible to combine them into one document, it is usually better to keep them separate.

1) General Durable Power of Attorney: This document appoints an person to make legal and financial decisions on your behalf. This may also be referred to as a Financial Durable Power of Attorney or a Property Durable Power of Attorney.

Examples of Authority Granted: Signing contracts and tax returns for you; endorsing and depositing your checks; gaining access to your safe deposit box; protecting and handling all of your assets and possessions that are not in a Living Trust; selling your property; spending your money for your benefit; making gifts on your behalf; applying for Medicare, Social Security, Medicaid, and other public assistance, etc.

2) Durable Power of Attorney for Health Care: This authorizes someone to make all health care related decisions and signing required forms. Usually this instrument is only effective after a physician has determined you are unable to make or communicate decisions (*i.e.*, you are intellectually incapacitated).

Examples of Authority Granted: Authorizing any medical, surgical, or other health care treatment to be performed on you;

- Admitting you to a hospital, nursing home, or other treatment facility;
- Authorizing surgeries and the administration of drugs and other medical treatment;
- Refusing any or all of the above on your behalf, even to the point of authorizing your agent to remove artificially supplied hydration and nutrition through tubes;

c. HIPAA Requirements: As of April 14, 2003, the Privacy Regulation portion of HIPAA (the Health Insurance Portability and Accountability Act) became effective. All Durable Powers of Attorney, whether health care or general/financial, should comply with this law. If not, it is quite likely that the agent appointed by the Durable Power of Attorney will have difficulty accessing information relating to your health care. This includes not only information at a hospital or physician's office, but also with the company that administers your health insurance plan.

At the least, this requires signing a HIPAA authorization document. However, it is highly recommended that your Health Care Durable Power of Attorney and General (legal and financial) Durable Power of Attorney be drafted so that they comply with HIPAA.

- d. **Do Not Rely on Standard Forms:** Your Durable Power of Attorney should clearly list each action your agent can take on your behalf. General grants of authority, such as "My agent can do anything I could do," are usually not accepted. As a result, these documents are usually detailed and long.
- e. **When Terminated:** Upon revocation by you or upon your death.
- f. **How Often to Update:** These should be reviewed every two or three years and kept current so it is clear to others that they are a current expression of your wishes.

2. **Advance Medical Directive - Stopping Life Support (or not):**

Everyone should sign a document that clearly describes whether they prefer to have their life artificially prolonged by medical treatments or machines, or have life support stopped, if they are not capable of communicating their wishes at a time when they are terminal or in a persistent vegetative state. This document is referred to as an "Advance Medical Directive" (sometimes also referred to as an "Advance Directive").

An Advance Medical Directive is a written document that expresses your preferences regarding medical treatment you want if you (i) are going to die in the next few months no matter what health care you receive (*i.e.*, you are "terminal") or (ii) you are in a persistent vegetative state or other irreversible condition where you will never regain consciousness.

Some people prefer to have a Do Not Resuscitate Order (DNR) entered and life support stopped in this situation, while others prefer that every means be taken to keep them alive. This is a very personal decision and there is no right answer. However, no matter how you feel about this, you should have an Advance Medical Directive where your wishes are expressed. Without this, no one confidently knows what you want to have done if this happens to you.

An Advance Medical Directive is only effective if you are NOT able to make or communicate decisions concerning your health care. Even you have an Advance Medical Directive, you can always change your mind and direct your attending physician differently if you are capable of making and communicating your decisions.

There are three types of Advance Medical Directives:

- 1. **Instructional:** The first is "instructional" and specifically enumerates what medical treatments are to be utilized, or stopped, upon certain findings by your treating physician. These documents instruct your physician and family what is to be done when your attending physician determines you are terminal or in a persistent vegetative state. They speak for you and do not empower anyone else to intercede and make decisions on your behalf

The two types of instructional Advance Medical Directives are often referred to as a “Living Will” and a “Health Care Treatment Directive.”

A **Living Will** must comply with local state statutes and are only effective if you are in a terminal condition. They only prohibit the artificial slowing down of your dying process. They are not applicable if you are in a persistent vegetative state, and they will not allow the stopping of artificially supplied nutrition or hydration.

A **Health Care Treatment Directive** is based on common law (constitutional and court decided) and, unlike a Living Will, is also effective if you are in a persistent vegetative state or have some other irreversible mental condition where you will never be conscious again. If desired, they can specifically authorize the stopping of artificially supplied nutrition and/or hydration.

2. Proxy: The second type of Advance Medical Directive appoints someone of your choice as your “**proxy**” or agent to act on your behalf to determine whether your attending physician’s determination of your condition is accurate and what options are available for your medical treatment. Once these are determined, your agent can either (i) enforce your wishes to stop the medical treatment you are receiving and remove the devices that are artificially keeping you alive, or (ii) enforce your wishes to keep providing medical care to keep you alive if the removal of life support is not appropriate for you and not what you would have wanted in that situation. This type of Advance Medical Directive allows you to appoint someone you trust to assess your situation and make the decision you would make if you were capable of doing so. It does not leave your attending physician in charge of deciding when your life support should be continued or stopped.

3. Combined: The third type of Advance Medical Directive is a “**combined directive**” which is a combination of the other two types of Advance Medical Directives. Usually this is a Health Care Durable Power of Attorney that also contains a detailed description of what you prefer the appointed agent do if you are terminal or in a persistent vegetative state or permanent coma. In other words, your Advance Medical Directive becomes part of your Health Care Durable Power of Attorney document. In addition, this will convert to an instructional Advance Medical Directive if all of the people you have appointed to make this decision for you are unable or unwilling to act on your behalf.

3. Revocable Living Trust: This will allow a person or trust company of your choice to quickly step in after your incapacity and manage the property in your Living Trust for your and/or your family's benefit. It is generally easier to use and more readily accepted by financial institutions than a Durable Power of Attorney. However, since the trustee of your Living Trust will only be able to manage the property you transfer into your Trust, Durable Powers of Attorney are still needed so someone can make personal decisions for you not related to the management of your property that is in your Trust.

X. INFORMATION TO BRING TO AN ATTORNEY

You will save time and attorney's fees if you are prepared when you meet with your estate planning attorney to discuss your estate plan. Before your first meeting, you should compile the following information, which is divided into four categories:

1. Family Information:

- a. Your complete legal name, nickname, how you normally sign your name, birth date, Social Security number, telephone numbers, home address, and email address; and also for your spouse, if you are married.
- b. The complete legal name, birth date, Social Security number, address, telephone numbers, and email addresses of each of your children, if you have any.
- c. The complete legal name, address, and telephone numbers of your parents, brothers and sisters (and your spouse's, if you are married), along with other people or charities you want to leave property to, or who will fill any of the roles listed below.
- d. Any special needs: disabilities, elderly parents, support obligations, etc.

2. Financial Information:

- a. **Assets:** A general list of all assets owned by you (and your spouse, if you are married), along with the fair market value of each asset, how it is titled (who is the owner), and whether or not it is payable upon death to a beneficiary (and if so, to whom). This should include real estate, bank accounts, stocks, bonds, and other investments, employee benefits, IRAs, annuities, personal property, vehicles, death benefits of life insurance, and all other property.
- b. **Liabilities:** A list of all liabilities, whether the debt is secured against any property, and who owes the obligation.
- c. **Current Estate Planning Documents:** Your current Will, Living Trust, Durable Power of Attorney, Durable Power of Attorney for Health Care Decisions, and Living Will or Health Care Treatment Directive, if you have them.
- d. **Deeds and Titles:** The Warranty Deed for any real estate you own, and the titles to all of your vehicles, such as automobiles, boats, motors, trailers, etc.

3. Distribution Information: Please think about how you would like your property distributed in each of the following scenarios:

a. Scenarios If You Have Children:

- 1) You are not alive, and you are survived by your spouse (if you are married) and your children and/or grandchildren.
- 2) If you are married, your spouse dies first and is survived by you, your children and/or grandchildren.
- 3) You are not alive and are not survived by a spouse, but are survived by your children and/or grandchildren.
- 4) Neither you, your spouse, nor any of your children or grandchildren are alive.
- 5) **Trusts for Children:** If you are not comfortable with distributing your property in one lump sum to all of your children, or if any of them are under 18 years of age or have a disability, then you need to consider placing some or all of this property into a trust for the benefit of those children. If you wish to establish such a trust, then please think about the uses and ultimate distribution of the property in the trust. Often a trust for a child who does not have a disability will provide for the support, maintenance, health care, and education of the child, and the remaining principal is ultimately distributed equally to the child at various ages. For example, 25% at ages 25, 30, 35 and 40. Any property left for a child who has a disability should only be left in a carefully drafted supplemental care (special needs) trust so the trust will not disqualify your child from any needs-based government benefit programs such as Medicaid and SSI.

b. Scenarios If You Do Not Have Children:

- 1) You are not alive and you are survived by your spouse (if you are married).
- 2) If you are married, your spouse dies first.
- 3) You are not alive and are not survived by a spouse. Normally you would list family members, friends, and/or charities.

4. Key People: Please think of people or a trust company that you wish to fill the following roles. If you name individuals, you should also consider naming additional people or a trust company to succeed them in case they are unable or unwilling to serve.

a. Trustee: This person or trust company manages any property placed in trust for your benefit if you are ever incapacitated, and for the benefit of your other beneficiaries after your death.

b. Durable Power of Attorney For Health Care Agent: This person (it should not be a trust company) will make health care decisions for you if you are ever incapacitated and not capable of making them for yourself.

c. Durable Power of Attorney For Legal and Financial Matters Agent: This person will make legal and financial decisions for you if you are ever incapacitated and not capable of making them for yourself.

d. Personal Representative/Executor: If any assets need to be probated at your death, this person or trust company will handle this responsibility. This is usually the same person or entity as the trustee.

e. Guardian: If you have children, this person (it should not be a trust company) is charged with the responsibility of raising your children until they are 18 years of age. If all of your children are over 18 years of age, this person is normally not needed unless you have a child who has an intellectual disability and needs assistance.

f. Note: It is recommended that the guardian for your children who are minors not be the same person as the trustee of any trust established for the benefit of these children. If the same person fills both of these roles, they will have a conflict of interest that may make it difficult for them to properly perform these jobs.

AND IN CONCLUSION: CONGRATULATIONS!

Estate planning is a very important subject, but one many people want to avoid. You are to be congratulated for making it this far. Now all you have to do is follow through and contact an estate planning attorney to help you complete your estate plan.