

ESTATE PLANNING CONSIDERATIONS IN MAKING A WILL OR TRUST

FORM REV 7-07

The following headings describe the decisions you may want to make prior to seeing an attorney to draft your estate plan. A good estate plan for each person consists of a Durable Health Care Power of Attorney, a Durable Financial Power of Attorney, and a Will or Revocable Living Trust with a Pourover Will. Considering the following information before your appointment will make the estate planning appointment more expedient, and will provide more time that can be used to ask questions.

- A. **CHOICE OF PERSONAL REPRESENTATIVE(S) OR TRUSTEE(S):** Your Will should nominate a Personal Representative (PR) to handle the probate administration after your death and your Trust, if you choose that type of plan, nominates a Trustee to handle the trust administration after your death. Between spouses, they usually elect each other, and nominate a second or third alternate. The PR used to be called “executor” or “administrator” of the estate. PR’s or Trustees can be spouses, adult children, relatives, close friends, or corporate trustees (ex: a bank with a trust department). The Trustee or Personal Representative pays bills of the estate, sells real estate, signs tax returns, and so forth. Whether you establish a Will-based estate plan where probate may occur, or a Trust-based estate plan, there will be administrative duties after death. The difference is that with a Will-based plan, the duties are overseen by the Register in Probate of the County of domicile at death, or a Judge, and with a Trust-based plan, there is more privacy (but more room for not following procedures with as much scrutiny).

TRUSTEE(S): If you have a Will-based estate plan and testamentary trust provisions within your Will, meaning one or more trusts created under the terms of your Will, you need to select a Trustee, and one or two alternates. If you have minors or children with special needs (See ** below), or if you want grandchildren to ultimately receive a share of your estate, you will need trust provisions which will allow the Trustee to hold, invest, administer and distribute funds to the beneficiaries of the trust according to the directions given in the Will. The Trustee is one of the most important people you will nominate under the terms of the Will, and you should select someone who manages money well and who can make decisions in the best interest of the beneficiaries. Trusts can provide for education, support and other things, so that when your children reach the age of majority, they won’t automatically be entitled to their share(s). Distributions from the trust must follow the directions of the Will and the Trustee must file annual accountings for the Court while the Trust is in existence. Trust funds are available to pay for your children’s necessary expenses so that your Guardian need not pay for these expenses out of his or her own funds. Once you have established a trust in your Will, you should change the contingent beneficiary designation on any assets having a beneficiary designation (ex: Life Insurance Policies). That way, those funds will automatically be placed into the Trust and will become part of your Estate. Naming minor children as beneficiaries will allow those children to have access to all funds upon attaining majority age, and there is no longer any control over the assets. A Trustee can be a relative, trusted friend, or bank with a trust department. In a Trust-based estate plan, the Trustee is typically the creator

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of the original Trust (the client) and named alternate(s) to take over administrative functions after disability or death.

** NOTE: If you have a child with special needs or developmental disabilities who receives medical or economic assistance, special provisions can be inserted in the trust to provide that the assets in the trust are not available if economic assistance would be threatened or challenged in any way. This Trust also gives the Trustee the option to terminate the Trust if the funds are threatened, so as not to interfere with governmental assistance.

- B. GUARDIAN(S): In either type of estate plan, if you have minor children or children with special needs, such as a child with a developmental disability, you must appoint a Guardian (with alternates) under your Will or a Court with jurisdiction at the time of your death will decide who will raise your children. Naming a married couple is not advisable, since divorce is so prevalent these days and could create an awkward situation. Your Guardian(s) would be the person(s) who raise and "parent" the child, and who must work with the Trustee for funding issues for the benefit of the children. The Guardian does NOT need to pay for your children's expenses out of the Guardian's own funds, as this is the purpose of the Trust(s) created under your estate planning documents. Guardians are typically adult siblings, close relatives or friends, or an adult child who have similar parenting philosophies and the emotional maturity to raise your minor children.
- C. SPECIFIC GIFTS: Under either type of estate plan, if you wish to make any specific bequest(s) to any person or organization, charitable or otherwise, this should be done in a separate Article in your document as a dollar amount or a percentage of your estate. Typically such gifts are made before any other distributions after death, ahead of the rest of the beneficiaries but after payment of debts, bills, and last illness expenses.
- D. TRUST DISTRIBUTIONS: In either type of estate plan, you should consider whether you want separate trusts under your document for each individual beneficiary (ex: child or grandchild) or one large trust held for all of your children until the youngest child reaches a certain age. Depending upon the age range of your children, and their personalities and maturity levels, you should consider the ages at which you would want distributions to be made (ex: 1/4 at age 22; 1/2 the balance at age 25; and the balance remaining at age 30.) You select the ages of distribution and how many separate distributions there should be. You also decide whether the trust can pay out income from the investments, and whether distributions can be made for any other purpose, whether the principal should be reinvested for post-high school education, and so for
- E. ULTIMATE DISTRIBUTION (CATASTROPHE CLAUSE): Your estate

planning document should set forth where you want your assets to go if your entire nuclear family (ex: husband, wife, and children) are not living at your death (ex: accident, fire, etc.). Often, people then select to divide their estate among siblings, family members, godchildren, friends, or charitable organizations. Even if your children are adults, or if you only have one adult child, if you travel together, it is wise to consider this and include this provision in your documents.

- F. **CONSIDERATIONS FOR DISTRIBUTIONS OF PREDECEASED CHILD:**
Consider, if a child predeceases you, where that child's share should ultimately be distributed: to the balance of your children (that child's siblings) or to his or her children in equal shares.
- G. **PROBATE, TAX ISSUES AND DIFFERENCE BETWEEN CHOOSING WILL-BASED OR TRUST-BASED PLAN:** Tax minimizing or avoidance language can be drafted in either Wills or Trusts. The primary difference is this: If you die with a Will-based plan (or with spouses, at the second death assuming everything is owned jointly between you and there are no death tax issues), there will be a probate administration when you die if your assets exceed \$50,000.00 in your sole name (and assuming these assets are not designated as payable on death (POD) or transferrable on death (TOD) or jointly owned with another person at death). Probate is determined by the value of property owned at your death, not whether or not you have a Will or heirs or not. If you die with a Trust-based plan, assuming you have, prior to death, transferred all assets into your Trust or naming your Trust as a contingent beneficiary, there should not be a probate after death but there will be administrative steps to follow, especially if there are death tax issues. In calendar year 2007, Wisconsin Estate Tax is paid by children or beneficiaries, within 9 months after death, on estates valued at higher than \$675,000.00, and Federal Estate Tax is paid on estates exceeding \$2 million dollars (also within 9 months of death).
- H. **COSTS:** A Trust-based plan is more expensive to draft than a Will-based plan, especially if there is tax planning language included, and assistance with the transfer of assets into the Trust as part of the estate planning package.