

Introduction. As we age, many of us become infirm and experience loss of perception and memory. Although these circumstances are common, they challenge our friends and members of our families, and frequently result in a stressful environment that complicates the resolution of the underlying difficulties. Legal issues may arise. Ready resolution of these problems is complicated by at least two factors: first, seniors' children are often their caregivers, as well as their heirs; second, the services of attorneys and other professionals with experience in managing and disposing of seniors' assets can be essential.

In these circumstances, family members may try to avoid dealing with—or even recognizing--seniors' declining abilities, increasing health issues, and such intensely private and personal subjects as financial matters. Consequently, family members describe these inevitable aging issues as the most difficult, expensive and contentious they've ever encountered, and would recommend to others that honest discussions occur to surface the legal and social issues that become increasingly important as the aging process continues.

Finding an Attorney. Many caregivers and family members realize that professional assistance is appropriate to assist in resolving seniors' aging issues, and look to seasoned attorneys and other professionals for guidance. Although initially they may seek recommendations for legal counsel from family and friends, they may eventually turn to advertising media to assist them in their search.

For many years, attorney advertising was regarded as unethical, and attorneys who advertised their services were censured and even disbarred. Gradually, however, states loosened these restrictions, recognizing that constitutional issues--particularly freedom of speech--were involved. As a result, attorneys routinely advertise in multiple media, including the Yellow Pages and, especially, the World Wide Web. States continue to regulate the form and contents of such advertising, especially including the content of advertisements by attorneys who are regarded as specialists in particular areas of practice, such as estate planning. Restrictions may include the manner of advertising fees, and especially contingent fees; implications that past successes indicate the likelihood of future success; use of a trade name, particularly a potentially misleading one; use of examples of results or verdicts; inclusion of an endorsement, particularly a paid endorsement, or a testimonial; a comparison of the firm's services or fees with others; and many others.

There are numerous Internet sites that help prospective customers find attorneys, including these websites: www.LegalMatch.com; www.lawyers.com; www.lawyers.findlaw.com; www.Lawyers-Attorneys-USA.com. These sites may be accessed by using search engines with "Attorneys + (Location, that is, the geographic location of interest, such as 'Pendleton Oregon') in the subject line. One of the most respected resources, the Martindale-Hubble legal directory, can be found on the Internet at www.martindale.com. The Martindale resource includes an easy-to-use search engine to find attorneys by jurisdiction, locality, areas of specialization and much more.

Legal Specialization. Just as laws vary from state to state--and even between cities and counties in the same state--some attorneys choose to concentrate their practice in a particular area of the law. The State Bar of California, for example, offers the state's lawyers the opportunity to become certified in 11 areas of law practice, including Admiralty and Maritime Law; Appellate Law; Bankruptcy Law; and Estate Planning, Trust and Probate Law. The requirements for certification as a specialist are rigorous in California, as they are in all states that allow for specialization. For example, in order to be identified as a "certified" specialist in California, attorneys must be certified either by The State Bar of California Board of Legal Specialization, or an organization whose certification program has been accredited by the State Bar, and must pass a written examination in their specialty field, demonstrate a high level of experience in the specialty field, fulfill ongoing education requirements and be favorably evaluated by other attorneys and judges familiar with their work. Because attorneys choose to concentrate their practices in certain areas of the law, it is possible that an attorney who is a certified specialist in the field of "Estate Planning, Trust and Probate Law" deserves consideration.

Whether or not senior caregivers or family members elect to proceed with an attorney, several alternatives can be successfully employed to manage seniors' end-of-life affairs. Here are some of them:

Power of Attorney. The "power of attorney" enables a family member or a trusted friend of the senior to act on the senior's behalf, thereby gaining access to bank accounts and other assets as funds are need for the senior's care, as well as the legal right to sign documents and handle insurance and other matters that arise over time. Because individual states have differing requirements and procedures for obtaining the power of attorney, it is prudent to seek counsel from an attorney who is licensed in the subject state, or seek assistance from AARP or the local state bar association. Other resources are the National Academy of Elder Law Attorneys (NAELLA), at www.naella.org, or the American Academy of Estate Planning Attorneys, www.estateplanforyou.com.

Living Wills. There are occasions when a service provider, often during a medical visit, a meeting with an attorney or an accountant--even while flying on an international air carrier--inquires whether an individual has a "living will." A "living" will, although not a will in the traditional sense because it doesn't dispose of property during a person's lifetime, is nonetheless a binding legal instrument, the purpose of which is to document a person's wishes regarding the potential use of life-sustaining treatment in the event that he or she becomes terminally ill or permanently unconscious and thereby unable to communicate these instructions to a potential caregiver. Family members may use a doctor's visit as a vehicle to discuss a senior's interest in a living will, or even as a tool to initiate a conversation about long-term care preferences, disposition of assets, and other end-of-life matters.

Advance Directive, also sometimes referred to as **Medical Durable Power of Attorney.** The advance directive is similar to, but more flexible than, a living will. Living wills are customarily used in a deathbed situation, while an advance directive can be used to manage a patient's healthcare even when death is not imminent. This document enables seniors to advise their caregivers and family members of their preferences for care if, for example, they become

afflicted with Alzheimer's disease, or if they want to prohibit insertion of a feeding tube that would otherwise prolong their life.

A word of caution is advisable at this point. Professional advice from a reputable attorney is often appropriate in these instances. The use of legal documents purchased from an office supply store or on the Internet is extremely risky: the documents may be too generic or may fail to comply with the legal requirements of a particular state or local community. Conversely, for a reasonable fee, most general practice attorneys will draft these documents that will meet the necessary standards.

Last Will and Testament. The last will and testament is a legal document that a person (legally known as the "testator") uses to govern the disposition of his or her assets following death. The will may also create a trust--a "**testamentary trust**"--that takes effect only after the death of the testator. Any person over the age of majority and of sound mind can draft his or her own will without the aid of an attorney. Additional requirements vary by state, but generally include the following:

- The testator must be identified as the maker of the will, and that he or she intends to make a will by the use of the document. The use of the language "last will and testament" satisfies these requirements.
- The testator must declare that he or she "revokes all previous wills and codicils." Failure to do so revokes only the provisions of previous documents that are inconsistent with the current will.
- The testator has to demonstrate that he or she has the capacity to dispose of the property included in the document, and does so freely and willingly.
- The testator must sign and date the will at the end of the document, usually in the presence of at least two witnesses who are not beneficiaries of the will.

Although there is no requirement that a licensed attorney has to draft a will, it is a preferable way to ensure that the testator's wishes will be effected. A typical error in so-called "homemade" wills is the use of a beneficiary, a spouse or a family member, as a witness to the will, which operates to disinherit that person, and frustrates the testator's intent.

Approximately 20 states recognize "**holographic**" wills. These are wills prepared by the testator by hand, either handwritten or prepared on a computer. A holographic will is effective even if it is not witnessed. The so-called "**nuncupative**" will, which is recognized by a handful of states, is an oral will.

Probate Proceedings. Following the testator's death, probate proceedings are initiated to determine whether the will is legally valid and to appoint an executor to assume responsibility for settling the testator's accounts and disposing of the assets included in the "estate." An "estate" consists of all property that the testator owns at the time of death, and includes real estate; bank accounts; stocks and other securities; life insurance policies; and personal property, such as automobiles, jewelry, and artwork.

Estate Planning. Estate planning is a way to ensure that a person's property, healthcare and intentions are honored, and a comprehensive estate plan can effectively resolve various legal questions that may arise after people die. Here are some of them: What is the state of the testator's legal affairs? Do they own any real or personal property? How should it be disposed and to whom? Is there a need for a personal guardian to be appointed to care for the testator's minor children? What are the tax liabilities on the estate? What funeral arrangements are appropriate?

An estate plan can accomplish the following objectives:

- Identifying family members and others whom the testator wishes to receive particular items of property after death;
- Ensuring that this property will be transferred consistent with the testator's wishes, as quickly and with as few legal hurdles as possible;
- Minimizing the amount of taxes to be paid in order for the property to be appropriately distributed;
- Avoiding the time and costs associated with the probate process by utilizing such estate planning devices as living trusts;
- Prescribing the type of life-prolonging medical care that the testator wishes to receive, if unable to express these preferences;
- Detailing how expenses are to be paid; and
- Describing preferred funeral arrangements.

Choosing from among the various estate planning alternatives that are available can be difficult. Fortunately, there are Internet resources that provide useful guidance. These include www.ameriprise.com, www.estate.findlaw.com/estate-planning. FindLaw's estate planning center is a particularly comprehensive way to identify estate planning needs, recognize potential solutions, and locate an estate planning attorney to facilitate the process.

The essential foundation of an estate plan is the identification of principal objectives. Following is a list of typical estate planning goals and strategies for accomplishing them:

- **Providing for the testator's immediate family.** Husbands and wives want to make sure that there are sufficient resources for the surviving spouse, which often requires an income stream provided by life insurance. Couples with children want to assure that funds are available for their education and upbringing. For those with children under age 18, the couple should have a provision nominating personal guardian(s) for the children in their wills; absent this provision, a court will be without direction as it makes decisions about minor children's welfare.
- **Providing for other relatives needing help.** Testators who have family members whose lives can be difficult in their absence--an elderly parent or a disabled child, for example--should consider establishing a special trust fund to provide necessary support.
- **Getting assets to beneficiaries quickly.** Testators want their beneficiaries to have access to the assets that have been bequeathed to them. Strategies include insurance proceeds paid directly to beneficiaries; joint tenancies; living trusts; and other means that will use simplified or expedited probate that is available in many states.

- **Planning for incapacity.** One component of many estate planning processes is planning for possible mental or physical incapacity, which is especially important for single people. Living wills and durable health-care powers of attorney enable testators to decide in advance about life support options and selection of a personal guardian to make decisions about end-of-life medical treatment. Moreover, disability insurance can provide protection for testators and their families should the testator becomes disabled and unable to work.
- **Minimizing expenses.** Everyone wants to minimize the costs of transferring assets to their beneficiaries and good estate planning can reduce these expenses significantly.
- **Selecting competent executors/trustees** and giving them the necessary authority saves money, reduces the burden on the testator's survivors, simplifies the administration of the estate, and can reduce the probate court's involvement.
- **Easing the strain on the testator's family.** Estate planning provides an opportunity for the testator to plan for their funeral arrangements, reduce the costs of burial, or select cremation or other options.
- **Helping a favorite cause.** An estate plan can direct financial support for religious, educational, and other charitable causes, either during or after the testator's lifetime, while taking advantage of tax laws that encourage private philanthropy.
- **Reducing estate taxes.** A good estate plan will deliver the maximum assets to the testator's beneficiaries and the minimum to the government, an especially important goal as the estate approaches one million dollars in value, the figure that currently triggers the federal estate tax.
- **Ensuring that the testator's business will continue after death.** A small business can be thrown into chaos upon a principal's death or incapacity. The estate plan can direct its succession and continuation of its activities.

Personal and Family Information. It is extremely important to collect information to get prepared to meet with an attorney to begin the estate planning process. Here are some examples:

- The exact names and dates of birth of the testator and spouse to appear in the Last Will and Testament.
- Home address and telephone number of the testator and spouse.
- Country of nationality of testator and spouse.
- Names and dates of birth of children of testator and spouse or testator or spouse.
- Names and dates of birth of adopted children of testator and spouse or testator or spouse.
- Names and dates of birth for any deceased children.
- Names and dates of birth of any grandchildren of testator and spouse.
- Names of any previous spouses of testator and spouse; divorce decree.
- Significant personal information affecting testator, spouse or children/grandchildren (e.g., serious medical or physical condition requiring special care).
- Personal and family assets:
 - Common stocks.
 - Real estate assets, including location, type of property, legal description and how the asset(s) is held (e.g., joint tenancy with right of survivorship, land trust) and estimate of fair market value.
 - Insurance policy details

- Personal residence; address; how held (e.g., single-family, condominium, similar); how title is held; fair market value; mortgage balance; mortgage life insurance (if any)
- Other residences, vacation homes (same information as above).
- Personal and household effects (e.g., automobiles, furniture, furnishings, books, pictures, valuable jewelry/antiques/art/coins/stamps/gold), including descriptions, estimated value and insurance information.
- Cash, cash deposits, and cash equivalents, with the name and address of the bank(s) or institution(s), ownership of each item.
- Checking, ordinary saving accounts, short-term U. S. obligations (e.g., treasury bills), certificates of deposit, money market accounts, pension and profit-sharing plans, IRAs, ESOPs, or other tax-favored employee-benefit plans, with the owner(s) name(s).
- Insurance.
 - Life insurance: company, name, address, and policy number; face amount (i.e., proceeds) of policies; beneficiaries; cash value; loans, if any, against the policy; amount of accidental death benefits, if any.
 - Term/group term insurance: company, name, address, and policy number; face amount of policies (proceeds); owner's beneficiaries; accidental death benefits.
 - Similar information with respect to other life insurance or other insurance having life insurance features.
 - Life insurance on the testator's spouse's life. Company, name, address, and policy number; face amount of ordinary life insurance; owner; beneficiaries; cash value; loans, if any; accidental death benefits.
 - Term/Group life insurance. List company, name, address, policy number.
 - Face amount of term/group term insurance; owner; beneficiaries; cash value; loans (if any); accidental death benefits.
 - Other insurance on spouse's life.
- Closely held business interests.
 - Nature of the business
 - Form of organization (e.g., corporation, partnership, or the like)
 - Estimated value.
 - If a corporation, is an "S election" in force with respect to federal taxation?
 - Belief that the business would continue to operate successfully in the event of testator's permanent absence or the permanent absence of some other key person.
- Investment assets. How title is held and approximate value of the following:
 - Publicly traded stocks and corporate bonds.
 - Municipal bonds.
 - Long-term U.S. Treasury Notes and Bonds.
 - Limited partnership interests.
 - Other investments: general nature and value.
- Other interests of current or future value
 - Interests in trusts.
 - Anticipated inheritances.
 - Other assets or interests of value.

- Liabilities: substantial financial liabilities not reflected in the above information. If secured, indicate the nature of the security. Substantial contingent liabilities, including personal guarantees. Insurance against any of these obligations?

Personal Estate Planning Objectives

- How would the testator dispose of the estate if there were no such thing as estate or inheritance taxes?
- In the event of the testator's death, would the spouse or children be likely to receive income from sources other than the estate, e.g., resumption or initiation of employment?
- Testator's personal objectives for family and the estate that override possible adverse tax consequences arising from trying to achieve them?

Guardians, Executors, and Trustees

- Guardians for minor children to be designated in the will in the event of death of testator and spouse.
- Guardian/substitute guardian of the person: name/contact information.
- Guardian/substitute guardian of the estate, if different: name/contact information.
- Principal/substitute executor: name/contact information.
- Principal/substitute trustees: name/contact information.

Other Matters

- Other factors. Facts or matters that do not seem to be covered by the other sections of this questionnaire?
- Community property. Property or any residency in a community property state (i.e., Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin).
- Powers of attorney given to any person? Name/contact information.
- Living will? Previously executed or currently desirable?
- Health care power? Previously executed or currently desirable?

Intestacy: Death without an Estate Plan

When a person dies without having executed a valid will, his or her property is distributed by "intestate succession" to persons according to state law. All 50 states have provisions governing intestacy, which distribute the decedent's wealth according to the way that the average person would presumably choose. It is very important to recognize that intestate succession can differ substantially from what the decedent really would have wanted. No exceptions are recognized, nor are there any exceptions based on need or special circumstances.

Estate Planning and Probate Dictionary

Following is an explanation of commonly used words and phrases related to estate planning and probate.

AB trust. A trust designed to make sure the personal estate tax exemption of each spouse (currently \$1.5 million) is used to the fullest extent possible, while allowing the surviving spouse to have use of the assets of the deceased spouse during the remainder of the surviving spouse's lifetime.

Administrator. A court-appointed person who manages the estate of a deceased person who has died without a will.

Attorney-in-fact. An individual designated in a power of attorney to act as the agent of the person who executed the document.

Basic will. A will that distributes everything to your spouse, if living, otherwise to your children when they reach the age of majority (18 years old).

Beneficiary. A person who receives funds, property, or other benefits from a will, contract, or insurance policy.

Durable power of attorney for health care. A written document in which an individual designates another person to make health care and health-related decisions in the event that the individual becomes incapacitated.

Durable power of attorney for property. A written document in which an individual designates another person to make his or her property and property-related decisions in the event that the individual becomes incapacitated and is unable to do so.

Estate tax. A tax that is imposed at a person's death, on the transfers of some types of property from their estate to heirs and beneficiaries.

Fiduciary. A person or institution that is legally responsible for the management, investment, and distribution of funds; i.e. the trustee identified in a trust.

Grantor. A person who transfers assets to another, usually into a trust.

Guardian. An individual with the legal authority to care for another, usually a minor child.

Incapacity. A person's inability to act on his or her own behalf, i.e., the "sound mind" requirement for drafting a valid will. A court makes a finding of incapacity.

Inter vivos trust. A trust that is created during a person's lifetime, which holds property for the benefit of another.

Intestate. A term used when a person dies without a will.

Joint tenancy with right of survivorship. A title that is often placed on co-owned property. At the death of one owner, the other owner will be legally entitled to sole possession of the property, regardless of what provisions are made in a will. A husband and wife often use this form of ownership.

Living trust. A revocable trust established during a grantor's lifetime that is used for the placement of some or all of the grantor's property. In a situation involving a married couple, a basic living trust does not effectively use the personal estate tax exemption of either spouse (the amount of a deceased person's estate that may pass to his or her heirs without estate taxes, currently \$1.5 million). Because of this deficiency of a basic living trust, an AB Trust (discussed above) is often recommended instead to married couples with substantial assets.

Marital deduction. A federal tax deduction that allows one spouse to pass his or her estate to the other spouse without having to pay estate or gift taxes.

No will. A decedent dies without a valid will, so that his or her estate passes to heirs based on the laws of descent and distribution of his or her state.

Power of appointment. A legal right given to a person in order to allow him or her to decide how to distribute a deceased person's property. A "general" power of appointment places no restrictions on the named person, while a "limited" or "special" power of appointment places restrictions on who may receive distributions.

Probate. A process whereby a court reviews a will to make sure that it is authentic, and allows others to make legal challenges to the will.

QTIP Trust. A trust designed to permit a spouse to transfer assets to his/her trust while still maintaining control over the ultimate disposition of those assets at the spouse's death. QTIP Trusts are particularly popular in situations where a person is married for a second time but has children from a first marriage for whom he/she wants to reserve assets.

State death or inheritance taxes. Taxes that may be imposed by the state where a deceased person lived, or where his or her property is located after death.

Trust. A written document providing that property be held by one (the "trustee") for the benefit of another (the "beneficiary"). A trust may be created during the grantor's lifetime or after his or her death.

Trustee. A person named in a trust document who will manage property owned by the trust, and who will distribute the trust income or property according to the terms of the trust document. A trustee may be an individual or a business.

Will. A document that directs how property shall be distributed upon a deceased person's death

