

## Foundational Estate Planning 101

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### What Happens if I Don't Have an Estate Plan?

Without a personalized estate plan many things can go wrong. Assets may be transferred in a way that is not according to your wishes, but rather as directed by the state. Surviving spouses may not have control over all of your assets. Minor children could be placed under the guardianship and care of unfamiliar people appointed by the government. Those that you trust could be left without the ability to direct the end-of-life healthcare provided to you by doctors or hospitals. Banks may be unwilling to cooperate with family members who are trying to pay bills for someone who is in a coma or showing signs of dementia. A spouse from a second marriage could disinherit one of your biological children. More taxes might be paid, reducing children's inheritance, and making Uncle Sam a larger-than-necessary beneficiary of your wealth. Administrative and legal hassles from multistate probates could create complexity for surviving family at a time when things are already emotionally difficult enough. There are many problems that can arise if even a basic estate plan is not implemented.

### What Can an Estate Plan Do for Me?

A comprehensive estate plan may accomplish several objectives including: the efficient transfer of property upon death, naming guardians for minor children, identifying important fiduciaries to act on your behalf in the event you become incapacitated, creation of privacy for family, empowering family and professionals to manage assets and administer property distribution, providing future heirs and beneficiaries with asset protection against creditors and future divorcing spouses, strategizing to minimize the impact of taxes, and much more. Below is a general overview of key terms and definitions that are important parts of the foundational estate planning landscape.

### Key Definitions, Documents, and People

**Testator:** The person who creates a will ("testament"). **Intestacy** or being **intestate** is when someone does not have a will, and when state law must decide how property is distributed.

**Will (or Last Will and Testament):** This document changes ownership of property from you to named beneficiaries at the time of your death. Gifts in your will are called **bequests**.

Following death, **probate** is the court process that verifies the validity of a will, and oversees property distribution under the will.

- I. **Executor:** Person named to carry out property distribution under a will. This person often hires an attorney to help with the probate procedure.
- II. **Guardians:** Person appointed by your will to take charge of providing care for minor children upon the passing of their parents. The court would authorize this. Sometimes a separate document from the will may be used to appoint guardians.

### **Power of Attorney for Property (or Durable**

**Power of Attorney):** This document authorizes an **agent** to act in your place with property and financial transactions—managing property, accessing accounts, buying, selling, paying bills with your funds, etc.). This is useful if you are away, or if you are still living but have become incapacitated and unable to make decisions for yourself (unconscious, mentally impaired, etc.). This document can be immediately active or it can be “springing” (becomes active only upon being declared incapacitated). This agent is in a major position of trust and has as much power as you do to act in whatever transactions they are approved to perform.

### **Power of Attorney for Healthcare (also called**

**Medical Power of Attorney):** This document authorizes an **agent** to make healthcare decisions on your behalf (medications, surgical procedures, etc.) in the event that you become incapacitated. This is also a major position of trust.

**HIPAA Release:** Healthcare providers are required to keep personal information private

under the Health Insurance Portability and Accountability Act (HIPAA). This document provides legal permission to release medical information to the person you appoint. Generally, you would want your agent who has Medical Power of Attorney to also have permission to receive the medical information that will enable them to make important medical decisions for you.

**Advance Directive (also called a Living Will or Medical Directive):** This document sets forth your preferences and desires for end-of-life care (use of machines to keep you alive, procedures to treat health under adverse circumstances, etc.). This guides your healthcare agent and doctors in making life-sustaining or end-of-life care decisions.

**Fiduciaries:** The key people named by these documents are often referred to as a **fiduciaries**. This includes executors, guardians, agents, and any trustees that might be named in your will, etc. If they accept the appointment to serve on your behalf, they have a legal responsibility to act in your best interest and to follow the instructions in your documents. Usually you should name multiple alternate fiduciaries (so that if one of them is unable or unwilling to act, others can do so).

**Trust:** A document that establishes a legal relationship where a trustee is obligated to manage property owned by the trustee (legally in the trustee’s name) for the benefit of beneficiaries. Sometimes the trust document is also called the **trust agreement**.

**Grantor (or Trustor or Settlor):** One who creates a trust.

**Trustee:** One who is appointed to a trust and to manage its assets.

**Beneficiary:** One who is named under a will or various accounts and assets (such as life trust as the recipient of property, income, benefits, insurance).  
etc. Also one who is named as successor to

## Is There an Alternative to “Just” a Will?

Yes, instead of relying on a will and the probate process to distribute your property, a client may use a **living trust (also called a Revocable Living Trust)** to distribute their property. As noted above, a trust is a document that creates a legal relationship between the person appointed to manage property, the **trustee**, and the beneficiaries who are identified in the trust. Trustees hold legal title to property, and they must use that property for the benefit of the beneficiaries (through income and principal distributions that are described in the document).

Because probate of a will is a public proceeding, personal property information may be searchable by others in public records. Property that is owned by a living trust automatically avoids the probate process. Some people use a living trust in order to create more privacy for their family. Use of a properly funded living trust may also save costs for clients in some states where probate can be quite expensive. Furthermore, a trust can save time with property distribution because, immediately upon death, new beneficiaries can receive the benefits, and a new trustee may immediately manage trust property.

If a living trust is used as the primary property distribution document instead of a comprehensive will, a simplified will, often called a **Pour Over Will**, is still created to capture any property that should have been owned by the trust, but that was not transferred to the trust during live, and to put it into the trust at death through the probate process. However, the goal with a living trust would be to change property ownership to the trust during life, so that it can avoid probate.

## Other Trusts

A will can be used to create trusts at death (often called **Testamentary Trusts** because they are created within and by the last will and “testament” of an individual). These trusts may serve many purposes: asset protection for family members, professional management, and estate tax reduction. Depending on the arrangement, these trusts are often called the survivor’s trust, the marital trust, the bypass trust (or credit shelter trust), and the QTIP trust. Sometimes these trusts are established by living trusts (rather than in the will) and may be referred to as “A / B trusts” (where a joint trust for spouses divides at death into an A Trust for the survivor, and a B Trust holding the deceased spouse’s property), or “A / B / C trusts” (where A is the survivor’s, B is the deceased spouse’s, and C holds property providing lifetime benefits for the surviving spouse, with the remainder to children from a prior marriage at the time of the survivor’s death – sometimes also called a QTIP trust).

There are many other kinds of trusts, often considered to be **irrevocable lifetime (or *inter vivos*) trusts**. An irrevocable trust cannot be terminated by the grantor. These may be used as a way to create asset protection, to gift assets out of your estate, to provide separate ownership for gifted or sold assets (while maintaining or granting control to desired people as **trustees**), and to set up complex estate tax, special needs, charitable, and other special planning strategies. These trusts are often classified as “grantor” or “non-grantor” trusts (which impacts who must pay trust income taxes). Much of this planning pertains to specialized, complex situations, and goes beyond the scope of this “Foundational Estate Planning” discussion.

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