MINES & ASSOCIATES
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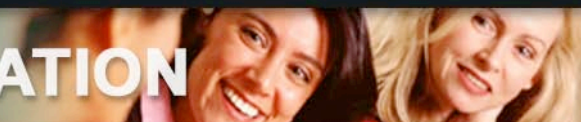
WEEKLY COMMUNICATION

Health Psychology Division
Organizational Psychology Division



Legal Tools

Wills

A will (last will and testament) is a legal document that directs how your money and other property will be distributed after you die. The person making the will is called a testator (male) or a testatrix (female). The person who is responsible for settling the estate is known as the executor/executrix or personal representative, and the people who receive your money or property after you die are the beneficiaries.

In addition to distributing property, a will can name the guardian of minor children. There are three types of wills:

Formal. A formal will is drawn up by an attorney and is executed according to certain guidelines. Therefore, there is less chance that the will may be challenged or considered invalid.

Handwritten. A handwritten will should be written, dated, and signed. You should be aware that a handwritten will is considered legal in some states and not legal in others. The person writing the will must check the law in the state in which he or she lives to determine the legal status of a handwritten will.

Oral. An oral will is rare. It is usually used only by those on active military duty. Again, you must check state law to see if an oral will is legal.

Wills can be changed, revoked, or rewritten at any time, as long as the testator/testatrix is competent.

A note on living wills: there is a big difference between a will and a living will. These documents are used for different purposes and are used under different circumstances. A will describes the distribution of your assets after you die. A living will clarifies your wishes regarding medical treatment you receive while you are alive.

Durable Power of Attorney

A durable power of attorney gives a specified person (the agent) the legal authority to act on behalf of an individual (the principal). The agent can manage any or all of the principal's affairs, including making financial arrangements such as buying or selling a home or other property, and making personal decisions concerning, for example, funeral plans or burial arrangements. The principal can provide any instructions, guidelines, or limitations he or she feels appropriate.

The document should state that it is durable (continues in effect) regardless of the onset of mental incapacity. However, it must be signed while the person is still legally competent. This document should be used only if there is someone trustworthy to act as agent. When executing a durable power of attorney, you or the principal should be explicit regarding the following:

- How much authority is being granted to the agent
- When the authority becomes effective
- How long the authority lasts
- What the specific rights and duties are of the person you appoint

The authority of the durable power of attorney ceases when the principal dies. Keep in mind, however, that the authority can be revoked at any time by either the principal or the agent.

Trust

A trust refers to a legal relationship in which a person gives title to money or other property to a separate entity called a trust. The trust has its own tax identification number and pays its own income taxes. The trust is managed for the benefit of another person. The grantor or trustor is the person who grants or creates the trust. The trustee is the person who manages the trust (the trustee can also be a financial institution), and the beneficiary is the person for whose benefit the property is held in trust. Trust property can comprise any number of assets, including real estate, stocks, a business, cash, and other personal property.

Setting up a trust can avoid probate (a process by which a court ensures the authenticity of the last will of someone who has died) and allow for someone else to manage the person's assets.

The two most common types of trusts are living trusts (also called inter vivos trusts) and testamentary trusts. Living trusts are created by the trustor while he or she is still alive to use during his or her lifetime. These trusts can end at death or continue after death. A testamentary trust is created by a will and goes into effect only after the person who made the will dies.

A living trust can be used to help manage the financial assets of people who may want to continue to control their affairs while still competent, but provide for someone else to manage their assets if they become incapacitated. Since a living trust can remain in effect after death, it can provide for an orderly means of managing an estate without the interruption, delays, and expense of probate.

A testamentary trust is used to conserve estate assets and/or to provide for the ongoing care of survivors, such as a spouse, children, or grandchildren, after the trustor's death. In addition, it may provide survivors considerable tax savings. Trusts can also be revoked (revocable) or permanent (irrevocable).

Trusts are complex legal instruments that can be created to accomplish many different purposes, and expert advice is generally needed to set them up.

Guardianship and Conservatorship

Guardianship results from a court proceeding in which a judge or jury determines that an individual:

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- Is no longer capable of managing his or her own affairs
- Has not authorized another person to act on his or her behalf
- Needs a substitute decision-maker

A guardian is the person appointed by the court to act on behalf of the incapacitated person. A ward is the incapacitated person for whom the guardian is appointed.

A guardian can be appointed for the person, the estate, or both. In some cases, the guardian of the estate is referred to as the conservator. In this context, the term "guardian" refers to the court-appointed, substitute decision-maker of either person or estate.

The appointment of a guardian results in a significant loss of rights and should only be considered an option if a less restrictive alternative is not available. For example, upon becoming a ward, an individual may lose the right to vote, to buy or sell property, to provide consent for medical treatment, to enter into contracts, or to otherwise make routine decisions that would affect his or her life.

The court may appoint a guardian if the person has one of the following impairments:

- Mental illness
- Mental retardation
- Physical disability
- Alcohol or drug addiction
- Advanced age or senility

Medical evidence, in addition to testimony from others such as social workers, family members, and friends, is usually required in order to prove the necessity for guardianship

In order to be appointed as a guardian, a person must be a competent adult. If there is no one within the family who meets this requirement, the court often will appoint a friend or an attorney as guardian. In the event that no appropriate individual can be found, some state laws permit public or private agencies to serve as guardians.

The duties and responsibilities of a guardian depend on the authority granted by state laws and in the guardianship order itself. Many states provide for the appointment of a "limited" guardian to act only in those areas in which the ward clearly lacks the capacity to act. If a limited guardian is appointed, the ward retains all rights not specifically granted to the guardian. In keeping with the goal of enabling a ward to retain maximum control over his or her life, limited guardianship should be considered whenever possible.

Advance Health Care Directive

An advance health care directive addresses concerns about health care decision-making.

There are two different kinds of advance directives in current use:

- Those that enable you to empower someone to make medical decisions for you if you are not able to do so
- Those that specify, ahead of time, treatments you may or may not want

Health Care Proxy

A health care proxy is a variation of the durable power of attorney and focuses exclusively on medical decision-making issues. In this case, an agent is appointed to make any and all health care decisions for you if you become incapacitated. Because a health care proxy concerns very serious medical decisions, careful thought should be given to your choice of an agent.

Depending on the state in which you live, a health care proxy also can be called a medical power of attorney, a durable power of attorney for health care, or a health care power of attorney.

It is important that the person you appoint knows your values, wishes, and preferences. You also should discuss your wishes with your doctor. This document should be included with your medical record. A health care proxy also can be used in conjunction with a living will.

Living Will

A living will is a document that allows an individual to state his or her wishes regarding the use of various medical treatments if he or she loses capacity and is in a seriously deteriorating condition. In many states, it is used only in the case of terminal illness.

In most cases, people who sign living wills want to be certain that they will not receive unwanted or unwarranted treatment if death is near and there is no reasonable expectation of recovery. In other cases, however, people may want to request all death-delaying treatments. Some may wish to make clear that they want to be at home when death is imminent or that they want to donate their organs after death. The most frequently mentioned treatments and procedures are:

- CPR (cardio-pulmonary resuscitation)
- Respirator
- Feeding tubes
- Intravenous therapy (IV)
- Do not resuscitate (DNR)

Discuss your wishes with your physician to be sure he or she understands them and will respect them. Because of the narrowness of the living will's application, you should leave the document with your health care proxy agent so it doesn't create a conflict with your agent's decisions.

PLAN NOW!

The use of legal tools will help ensure in advance that your wishes are being followed, whether for financial, personal, or health-related decisions. A person who sets up these tools before becoming incapacitated is assured of an important role in controlling WHICH decisions are made and WHO makes them.

Source: AARP. (n.d.). Organizing your future: A guide to decision making in your later years.

About MINES & Associates

For over 25 years MINES & Associates has been a nationally recognized business psychology firm that provides a variety of services to corporate employers including employee assistance programs (EAP), managed mental healthcare, organizational development and psychology services, wellness programs, behavioral risk management, disease management, PPO services, and a number of other technology based services. MINES & Associates is divided into two main divisions, Organizational Psychology and Health

Psychology, and currently serves a diverse portfolio of clients in all 50 states, Canada, Mexico, and the UK. Please log on to http://www.minesandassociates.com for the latest news and information on MINES & Associates.