Estate planning: What every family needs to know

The TIAA group of companies does not give tax or legal advice. This article provides general information that you should discuss with your personal tax and legal advisors to determine how it may apply to your individual circumstances.

While it can be a difficult topic to discuss, your family needs to know and understand the plan for when you can't take care of your health or financial matters. They also need to know what you want to happen when you die. It's not enough to simply sign legal documents. That's not a plan. So, let's talk—whether by phone, email or text. Better yet, do it live.

Planning for incapacity

Many people think of estate planning as limited to disposing of assets at death. However, it is also advisable to plan for the ongoing management of your affairs in the event of incapacity. Typically, powers of attorney and living wills are used for this purpose.

General power of attorney

What is a power of attorney?
In general, a power of attorney is a document that allows a person, called the principal, to designate another, called an agent, to act on his or her behalf to manage financial or personal affairs. The power of attorney document supplants the need for a guardian or conservator to be appointed by a court to make decisions about a person's care and property.

What does durable mean?
A "durable" power of attorney is one under which the agent's power remains in effect even though the principal has become incapacitated or disabled.

When does the agent's power become effective?
In some states, there are two types of powers: springing and non-springing. A springing power is effective only upon the occurrence of a designated event, such as disability. A non-springing power is effective upon execution. Some states allow only non-springing powers of attorney.

Who may be appointed as your attorney-in-fact?
With some limitations, you may generally choose anyone to be appointed as your agent. Limitations under state law might include a requirement that the party be legally recognized as an adult. You may also designate successor agents to serve if your original designee is unable or unwilling to act.

What are the powers granted to an attorney-in-fact?
Laws in each state allow an attorney-in-fact to perform a number of acts, which could include the ability to sign tax returns, access safe deposit boxes, receive income on the principal's behalf, write checks, pay expenses, access retirement accounts and Social Security information, and handle other financial matters.

How much control does the agent have?
A power of attorney document does not give the agent the authority to override the decision making of the principal. The principal maintains the right to make his or her own decisions—as long as he or she has legal capacity—even if the decisions are not what others believe are good decisions.

Can the power of attorney be revoked?
Yes, the principal may revoke a general durable power of attorney at any time as long as he or she has not become incapacitated. If the principal is incapacitated, generally, only a court can revoke the document.

Family discussion

Do you have a power of attorney?

When do the powers of the agent become effective?

Who is appointed as your agent?

Does your agent know where to locate the document and who to contact for help with legal or financial questions?

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Health care directive—living will—power of attorney

These documents have many different names, but are generally intended for the same purpose.

What is a healthcare directive or living will?
A living will or health care directive provides your general health care instructions to your doctor if you become incapacitated and unable to make health care decisions for yourself. If you have specific wishes with respect to certain medical procedures (e.g., your desire concerning the administration of certain life-sustaining procedures or life support systems if you are terminally ill), you should consider signing a living will or health care directive.

What is a healthcare power of attorney or proxy designation?
This legal document appoints a proxy or surrogate (also called an agent) to discuss your treatment with medical care providers and to make healthcare decisions for you.

Who may be appointed as healthcare proxy or agent?
With some limitations, you may generally choose anyone to be appointed as your agent. Limitations under state law might include a requirement that the party not be your medical provider unless related to you. You may also designate co-agents and/or successor agents to serve if your original designee is unable or unwilling to act.

Talking about end-of-life wishes
The simplest, but not always the easiest way is to talk about end-of-life care before an illness. Discussing thoughts, values and desires help people who are close to you to know what end-of-life care you want.

For example, you could discuss how you feel about using life-prolonging measures or where you would like to be cared for. For some people, it makes sense to bring this up at a small family gathering. As hard as it might be to talk about your end-of-life wishes, knowing your preferences ahead of time can make decision making easier for your family. You may also have some comfort knowing that your family can choose what you want.

Family discussion

Do you have a health care power of attorney?

Does your document incorporate your directives or wishes for your health and physical care?

Who is appointed as your decision maker?

Does your decision maker understand the choices that you've made or that you would choose?

Is your decision maker willing to carry out your instructions?

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Considering a trust?

Every situation is different. In some states probate is a costly and lengthy court process. In other states it is a simple matter.

This consideration, along with the nature of assets, where the assets are located, whether you need to plan for federal or state estate/inheritance taxes and whether your family would benefit by having assets held in trust for a period of time or indefinitely, impacts the choice.

Wills and revocable trusts

Last will and testament
A central part of any estate plan is a document that disposes of assets at death. Traditionally, that document has been a will. A will is a legal document that sets forth your wishes regarding the distribution of your property and the care of any minor children.

Everyone needs a will
Everyone should have a will, even someone with a limited number of assets to transfer. Without a will, the laws of your state determine how your assets are distributed and who administers your estate. This is called "intestate succession." A will allows you to name your beneficiaries and to designate a person to handle the transfers.

Wills direct the disposition of your estate
Generally, your will is enforced via the probate process to dispose of assets held in your individual name. Your will does not dispose of any assets that pass at your death by operation of law. For example, your retirement plan assets pass to the person(s) named on your beneficiary designation. Any property you own with another as "joint tenants with right of survivorship" passes automatically to the surviving owner.

What is probate?
Probate is simply the court-supervised process of accounting for your individually owned assets following your death, settling your debts and expenses, and making final distribution of your remaining assets to the ultimate beneficiaries of your estate. Because the probate process can be complex, it is important for your personal representative or executor to be experienced in these matters or authorized to hire an experienced professional.

The personal representative may be an individual, a corporate fiduciary or a combination of both.

Your personal representative or executor
Through the will, the party nominates a personal representative. Your personal representative or executor is legally responsible to manage your estate through probate.

Family discussion

Do you have a will?

What assets will be distributed under the terms of the will?

Where is the original kept?

Who is appointed as the personal representative/executor?

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Revocable trusts

A trust is an arrangement under which one person, called a trustee, holds legal title to property for another person, called a beneficiary.

Trusts date back to about ancient Egypt, circa 4000 B.C., when the equivalent of today's trustees were charged with holding, managing and caring for other people's property. Various prototypes of trust institutions were later developed in second-century Rome, some of which involved the use of property for charitable purposes.

It's quite simply a contractual agreement between the grantor (also called settlor) who is the person that initiates the trust and the trustee, the person or entity that agrees to be bound by the terms of the document. The general purpose is to transfer the ownership of property, whether cash, real estate or other assets, to the trustee to hold in the name of the trust.

A revocable trust is one that the grantor can change or revoke at any time during life.

Avoiding probate

The primary purpose of a revocable trust is to avoid the necessity of the legal process called probate to transfer the assets of a deceased person.

Unlike a will, any assets transferred to a revocable trust during the grantor's lifetime are not required to go through probate at death. The trustee holds or distributes trust assets according to the terms of the trust agreement. By avoiding probate, assets may be available for beneficiaries quicker and the assets will not be subject to the publicity or costs normally associated with the probate process.

A trust may be particularly useful if a grantor owns property in multiple states. This is because unlike personal property (your things and other assets such as stocks and bank accounts), non-trust owned property falls under the jurisdiction of the local court regardless of where the owner lives. In other words, heirs may have to look to the probate court in multiple states (requiring multiple attorneys, and filing fees and costs) to transfer real estate.

Factors in whether a trust might be useful

- The complexity of the probate process in the home state
- The desire for privacy following death
- The nature of assets and how they will pass to intended beneficiaries following death

Family discussion

What is the name of the trust?

Who is designated as the primary trustee?

Who is the successor trustee?

If there are co-trustees how many signatures are required?

What is the structure of the trust? How are assets distributed?

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Trustees
Each trust must have a trustee. The trustee is the party that holds legal title to property for the benefit of another person. Although it may be an honor to be asked to be a trustee, there are legal and financial risks involved. By accepting an appointment as trustee, a party agrees to act as a fiduciary, and is subject to the duties and responsibilities set out in the law.

Fiduciary responsibility
As a fiduciary, the trustee now has a responsibility to the beneficiaries of the trust, both current beneficiaries and future, called "remaindermen." The fiduciary standard requires that the trustee place the interest of the trust beneficiaries above his own. The trustee may also have to "take better care of" the trust assets than he or she may of his or her own affairs.

Trustee's liability
Generally, a trustee administers a trust according to law and in accordance with the trust agreement. A trustee should immediately carefully read the trust document. The trust is the road map and the directions must be followed

Generally, the terms of a trust document control its administration, management of the assets and distribution. These terms are the primary guidance for a trustee. However, when the law and the terms of a trust are in conflict, the trustee must ensure that the action or inaction directed by the trust can be overridden.

The laws
There are several sets of laws that apply to the administration of the trust and the trustee's duty.

- **The Trust Code**
  Each state has laws that govern the administration of a trust. The trustee must be aware of and be sure to follow these laws.
- **Internal Revenue Code**
  The Internal Revenue Code is the main body of domestic statutory tax law of the United States organized topically, including laws covering the income tax, payroll taxes, gift taxes, estate taxes and statutory excise taxes.
- **Prudent Investor Act**
  The Uniform Prudent Investor Act is codified in ten states. The Act governs the criteria for the investing of trust assets.

Trustee duties
Upon acceptance of a trusteeship, the trustee is required to administer the trust in good faith in accordance with its terms and purposes, and the interests of the beneficiaries, in accordance with the law. In addition to acting in good faith, a trustee has the duty of:

Loyalty
A trustee shall administer the trust consistent with the terms of the trust and solely in the interests of the beneficiaries.

Impartiality
If a trust has two or more beneficiaries, the trustee must act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries, whether the beneficiaries are simultaneously or successively entitled to interests in the trust property.

When there are multiple beneficiaries, tax issues may be a consideration. For example, when the group of beneficiaries consists of a surviving spouse and descendants, it may make sense to give little or no principal distributions to the surviving spouse and make principal distributions to a child or grandchild.

Prudent administration
A trustee shall administer the trust as a prudent person would by considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.

Organizing and taking control
A trustee must take reasonable steps to take control of and protect the trust property.

Keeping records
A trustee must keep adequate records of the administration of the trust and keep trust property separate from the trustee's own property. Generally, the trustee must cause the trust property to be designated so that the interest of the trust appears in records maintained by a party other than a trustee or beneficiary.

Communicating
A trustee is obligated to keep the beneficiaries of a trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Each state prescribes a method for complying with this duty through.

Compensation
Under early English law, the executor of an estate was considered an honorary position, so the services were performed without compensation. In the United States, that process quickly changed. Absent a provision to the contrary, executors and trustees are entitled to "reasonable compensation" for the services they render.

Family discussion

Does your trustee know about the appointment?

Does the trustee understand the obligations imposed by the trust?

Does your trustee have the time and other resources to be able to accept and carry out the duties?

Does the trustee know where to get help?

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Delegating Duties: May or must a trustee get help?
Yes! A trustee must personally perform the responsibilities of the trusteeship except when delegating those responsibilities to others would be in the best interest of the trust, i.e., delegating duties to an accountant or a tax advisor, or the investment of assets. When deciding whether and how to delegate duties, the trustee must exercise fiduciary discretion and act as a prudent person would act in similar circumstances.

Under modern trust law a trustee may delegate most or all of its duties as long as the trustee acts in good faith and takes care when selecting and supervising agents to whom to delegate his duties. If a trust function requires "knowledge and experience greater than that of an individual of ordinary intelligence" the trustee may be reckless if he does not obtain sufficient assistance.

What to do now
Whether you are the principal of a power of attorney, the maker of a will or the grantor of a trust, you should talk to your designated decision makers and ensure that they know about the appointment, understand the duties and obligations, and are willing and able to carry them out.

They also need to know that they can get help and where to get it.

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