# Estate Planning Essentials

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Estate planning is for everyone. We all will leave behind some type of legacy – whether property, belongings or dependents – and estate planning allows us to remain in control of what that legacy is. Having a plan also:

- Prevents disputes and eases decision-making for family members.
- Reduces stress for your family at a difficult time.
- Minimizes or eliminates estate taxes.
- We know putting a plan together can seem daunting, so we have laid out the basic documents you will need to create your legacy.

We know putting a plan together can seem daunting, so we have laid out the basic documents you will need to create your legacy.

**You need an estate plan if you:**

- Have children and or grandchildren.
- Have an elderly parent or family member with special needs.
- Own property, such as a house or a car.
- Have assets in investments, bank accounts or retirement plans.
- Own a business.
- Have family heirlooms.

# Health Care Power of Attorney

This document appoints a person (usually referred to as your "**agent**") to make health care decisions for you when you are incapable of making them. How **incapacity** is determined varies by state, but typically an attending physician certifies that the patient lacks capacity. Once you are again capable of making health care decisions for yourself, your present statements will override any decision of your agent.

**agent: Person authorized to act for another through a contract.**

**incapacity: Lacking the physical or mental abilities to manage one's own personal care, property or finances.**

### Who cannot be an agent?

Practically all states have laws that disqualify certain people from being your agent, such as:

Anyone under the age of 18.

Your health care provider.

Anyone who is an operator, administrator, employee or agent of any residential care facility or health care facility where you are receiving care.

Your spouse once you are divorced or, in some states, once you file for legal separation, annulment or divorce.

**Health care powers of attorney may also be known as:**

- Advance directives.
- Appointments of agent for health care.
- Durable powers of attorney for health care.
- Appointments of health care representative.
- Designations of health care surrogate.
- Appointments of health care proxy.
- Medical powers of attorney.
- Designations of patient advocate.
- Proxy directives.

How much authority you grant your agent can vary and is up to your discretion. For example, you can add instructions that limit specific treatments or procedures you definitely do not want performed. You can also give your agent authority over end-of-life health care decisions for you, including whether to provide, withhold or withdraw life-prolonging treatments.

Many state laws also permit you to use your health care power of attorney document to direct decisions unrelated to health care, such as naming your guardian in the event guardianship proceedings are started. States may also allow you to grant your health care agent the authority to make certain post-death decisions, such as the authority to consent to your autopsy, anatomical donations or for disposition of your bodily remains.

Health care power of attorney documents can be revoked or amended as needed. Check with your state for laws regarding qualifications of who can be an agent and what decisions can be covered within the document.

# Appointment of HIPAA Representative

This document gives someone the authority to review and discuss your health information with your health care providers. HIPAA is a federal law that protects privacy of medical information of patients, but you can expressly permit named representatives (spouse, family, friends) access to your information.

Either you or your representatives can provide the document to your health care providers. The document informs your health care providers of the appointment and what, if any, limitations on the information have been made.

### How is the appointment of HIPAA representative document different from a health care power of attorney?

If you have a health care power of attorney, your named agent is automatically deemed a HIPAA representative; however, some state laws limit the effectiveness of a health care power of attorney to a period of incapacity, so you should also appoint a HIPAA representative if you want someone to be able to access your records and help you at times when you are not incapacitated.

# Living Will

This document expresses your directions about the provision, withholding or withdrawal of life-sustaining treatments, including artificially provided food and water, when you are in a "**qualified condition**" and incapable of expressing your directions.

Qualifying conditions vary by state, but typically exist when you are in a terminal condition where your death is imminent or you are permanently unconscious. State laws specify how a qualified condition is determined, but typically it involves a physician's certification. If you are capable of making a health care decision for yourself, your decisions can override what is in the living will

**qualified condition: when a person is in a terminal condition and death is imminent, or is permanently unconscious. State laws will specify how a qualified condition is determined, but typically involves a physician's certification.**

### Who cannot be an agent?

Check with your state for laws regarding qualifications of who can be an agent. Many states have laws that disqualify certain people from being your agent, such as:

People who may inherit from you.

Medical providers.

Your spouse once you are divorced or, in some states, once you file for legal separation, annulment or divorce.

**Depending on the state, a living will may be known as:**

- An advance directive.
- Individual health care instructions.
- A health care directive.
- Treatment preferences declarations.

# Durable Power of Attorney

With this document, you appoint an agent to act for you according to the powers and matters you list in the document. You have the flexibility to specify greater or lesser authority and power to your agent. You can also specify if and when you want the durable power of attorney to expire. Keep in mind, all powers of attorney automatically expire upon your death, although some states do allow you to use the document to name whom you wish to be appointed if guardianship or conservatorship proceedings are started.

A durable power of attorney needs to clearly and fully state what authority and power have been granted so that the reasonable expectations of third parties (such as banks, insurers or investment managers) are met. Third parties will generally want to photocopy the signed original for their records before permitting the agent to act for you. You can revoke or amend the document at any time; however, changes must be communicated to third parties (such as banks, insurers or investment managers) that have honored the durable power of attorney.

Generally, if you have named a spouse as your agent, the spouse's authority is terminated upon a divorce, and in some states upon the filing of a case for legal separation, annulment or divorce. You can direct in the document, however, that a former spouse's appointment would be unaffected by such proceedings.

### Limits to durable power of attorney

Many states do not allow agents of the durable power of attorney to:

- Make gifts of your property to themselves or their family.
- Change beneficiaries on your insurance policies.
- Create, amend or revoke your will or trusts.

### Variations of durable power of attorney

Depending on the laws of your state, the document can be written to become effective:

- **Immediately:** Your agent's authority to act begins as soon as the document is properly executed.
- **When you become incapacitated:** Your agent's authority is said to be a "springing power" and is effective only while you are incapacitated. If you choose to make your durable power of attorney a "springing power," then your agent will need to obtain an affidavit or certificate of your incapacity from your medical provider and present a copy to the third party being asked to honor the durable power of attorney. Since your condition can change, it is just as likely that the medical provider's affidavit or certificate will have to be updated periodically.
- **On a certain date or when a specific event happens:** Your agent's authority is restricted to a specific time period or during events, such as an active duty deployment.

# Will (or "Last Will and Testament")

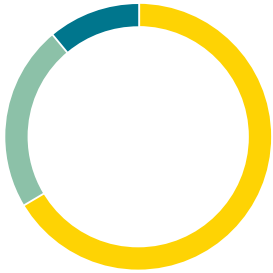
This document sets out specific directions on who receives your property after your death. A will also names who you want to carry out your directives and who you want to care for your dependents. Wills have no legal effect until you die. They can be changed as long as you are competent and aware of what you are doing. You are the only one who can make or change your will.

### Probate procedures

After your death, the person in possession of your will is required to file the original in the proper court for possible probate. Probate is the term for:

- Legal proceedings that prove the authenticity of your will.
- Payment of legally enforceable claims such as debts and taxes.
- Distribution of property.

All states have simplified or expedited probate procedures for small estates and many states have unsupervised processing of estates (i.e., the personal representative or executor can follow these unsupervised procedures without court orders or oversight unless it is requested).



*Only 36 percent of Americans have a will. Of those, nearly 1/3 of them have updates that need to be made.*

## *Did you know?*

*If you die without a will or revocable living trust, the state decides who receives your estate.*

### The officers in your will

Within your will, you will delegate different responsibilities to various people, or officers. All of these officers are "fiduciaries," which means that they must act in accordance with legal duties appropriate to their particular role and not act out of their own self-interest. Key officer delegations for a will include:

Personal representatives or executors, who are charged with overseeing the implementation of your will.

Guardians or conservators, who will care for your dependents and any property of your dependents.

Trustees, who will manage any property you direct to be held in trust.

When deciding who to make a gift to, you have several options. You can make an outright gift to named people, known as your beneficiaries, legatees or devisees. You can include conditions for the gift, such as that the beneficiary must be alive or a certain age at the time of your death. You can also make a gift to a beneficiary "in trust," meaning a trustee will manage the gift for the beneficiary and distribute it according to the terms you specify in the trust. Finally, you can name alternative beneficiaries in the event that the initial beneficiaries fail to meet the conditions of your gifts.

### What a will *doesn't* cover

A will, while essential, doesn't necessarily distribute all assets that a person may have. A will controls only the property or property interests that are in your name, or that are payable to your estate upon your death. Jointly held property, property in a trust and investments or instruments where a beneficiary is named (such as life insurance policies, retirement plans and bank accounts) are not controlled by your will.

If the person named as beneficiary on any of these accounts' beneficiary designation forms and the person named as beneficiary in your will don't match, the beneficiary designation form overrides the will. Because of this, it's critical that your beneficiary designation forms for all assets are up-to-date. Beneficiary designations can be updated as often as you wish.

### How to make a gift through your will

There are a variety of ways to make a gift through your will. You can:

Give specific property.

Make a gift of all of a particular kind of property (e.g., all baseball cards).


Give only a percentage of the property to someone.


Give the "**residue or remainder**" of the estate, which is what is left after the deduction of all other gifts, taxes and debts.

**residue or remainder: the assets of the estate that are left after all specific gifts have been made according to the will.**

## Changing your will

Once you create your will, be sure you review it regularly (every few years) to make sure that it stays updated to reflect your current wishes. Events that may require an update to your plans include:

- Marriage.
- Births or adoption of children or grandchildren.
- Divorce.
- Moving to a new state.
- Death of a spouse or another beneficiary.
- Retirement.
- Significant change in size of your estate (increase or decrease).
- Changes in tax laws.
- Buying additional property or selling property.

### How your state laws may affect your will

A will made in one state is still valid if you move to another state; however, the laws of your new home state may affect the property gifts and officer selections made in your existing will. State laws will specify how old you must be to make a will and who qualifies as the "natural objects of your bounty" (that is, your family).

Some state laws limit your ability to gift some of your property. For example, in a community property state you could not give a community property share to someone other than your surviving spouse. In some states, a homestead cannot be gifted if you are survived by a spouse or minor children.

A will must be signed as required by the law of your state in order to be recognized as a valid will. This typically requires that you sign the will in the presence of at least two disinterested witnesses who also sign the will as witnesses. A "disinterested witness" is someone who is not also a beneficiary or spouse of a beneficiary of your will. In fact, the law of many states voids the gifts to a witness who is also a beneficiary.

One way to update your will is to add a document known as a "codicil." A codicil amends only certain parts of your will. Together, this document and the original will then become your "last will and testament." Generally, unless your will is long and complicated and the amendment is minor, it is better to redo the entire will so that each part is carefully considered in light of your current situation.

# Revocable Living Trust

This document is an agreement that creates an entity (the trust) to handle the assets put into the trust. The written trust agreement identifies:

Who receives the benefits of the trust assets.

Who will manage the trust assets.

What the terms are for distributing and managing the trust assets.

A revocable living trust can be changed or revoked at any time during your lifetime. If you create a revocable living trust for yourself and want the trust for incapacity planning or death planning to avoid probate, you will need to transfer assets to it during your lifetime. While a trust is effective as soon as it is properly executed, until property is actually transferred to the trust, the trustee has nothing to work with.

If you have created a durable power of attorney you can grant your agent power to transfer property to the trust.

If you only want to use the trust as a death planning vehicle, a revocable living trust can be funded with assets only at the time of your death or funded with assets that pass to the trust only at the time of your death.

## *Did you know?*

***Couples can make a joint revocable living trust, but it is usually better to have individual trusts since it can be complicated determining whether a trust is revocable or amendable after the first of the couple dies.***

# Next Steps

Now that you understand the basics of these documents and what they are designed to do, think about which documents you will want prepared. You may only want to draft incapacity documents, you may only want a will or you may want to do all of them. Your attorney can help you decide which ones make the most sense for your situation.

Before meeting with an attorney to create your estate plans, think about what type of legacy you want to leave your family and community. If you know of specific people you'd like to designate as gift recipients or name as an agent, gather their personal information (proper legal names).

- Are there any state laws that would disqualify your appointee from performing the role?
- Does this person have the skills, time and commitment to do the tasks involved?
- Will this person follow my plans, regardless of any conflicting personal beliefs?
- Have I discussed this role with the people involved and are they willing to take on these tasks if needed?
- Is the information and are the appointees consistent among my health care power of attorney, durable power of attorney, living will and appointment of HIPAA representative?
- Do I trust the person with access to my health care information to be discrete with my information as well as loyal to the actions I request?
- If I am limiting the type or amount of health care information provided, have I used a form with limited disclosures?
- Have I given copies of the forms to either my health care providers or my representatives? (Or, have I put the forms in a safe place and let my representative know where and how to get them?
- If I revoke the document or change the named agent, have I gotten the forms back from the agent?
- Are the people acting as agents different from the witnesses who are signing the documents?

## Take Control with ARAG

*If you're not sure how to get started with your plans or don't have an attorney to help you through the process, ARAG Legal can help. Visit ARAGlegal.com to learn more about how ARAG legal coverage gives you an affordable way to manage legal matters and the freedom to live the life you dream of.*

**Also bring details of all property and assets that make up your estate. Your attorney will help guide you through the rest of the process to ensure you create the legacy you want. Once your documents are in place, use this checklist to make sure your plans are in order:**

- ☐ Review all documents periodically to make sure they still reflect current law, your current thinking, and the appropriate agent designation.
- ☐ Discuss your preferences with your agents and make sure they know their responsibilities and what you want to have happen.
- ☐ Review your financial records periodically and make sure your agent can access them when necessary.
- ☐ Review beneficiaries on life insurance, retirement plans, and jointly-held property. Make sure they are accurate, or if necessary, directed to your trust for distribution.
- ☐ Periodically review the situations of those named in your Will and/or trust.
- ☐ If someone receives Medicaid, seek professional advice on how the gift may affect eligibility. Also, when deciding how long the gift may be held in trust before given, consider the burden on the trustee and the impact of additional costs to manage the trust.



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