RESPECTING YOUR WISHES, PROTECTING YOUR ASSETS, AND ACCOMPLISHING YOUR GOALS – WHY EVERYONE NEEDS AN ESTATE PLAN

You may have heard that the Federal estate tax exemption amount is now $15,000,000[1] per person, and wondered, why bother to do estate planning now? Regardless of your net worth, it's important to have an estate plan in place to ensure that your health care and financial wishes are met during your lifetime and that your assets go where you want after you die. If you plan ahead, it will be reassuring to your loved ones that when incapacitation or death strikes, they can understand and carry out your wishes. Absent proper planning, your family and heirs will be subject to time consuming and expensive court proceedings. Better to take matters into your own hands!

To help demystify "estate planning," below is a breakdown of the core documents that comprise a typical estate plan, how they are used and what may happen if you do not have them.

I. ESTATE PLANNING DOCUMENTS- DURING YOUR LIFETIME

A. Advance Directive

Whenever we talk with clients about estate planning, we always emphasize one of the most important documents to execute is an Advance Directive, also known in other states as a Health Care Proxy, by which you authorize others to make health care decisions for you, if you cannot, and to express your end-of-life care wishes.

An Advance Directive is a two-part document comprising (1) a "Durable Power of Attorney for Health Care," in which you as the "principal" appoint someone that you trust as your "agent" to handle medical decisions should you be incapacitated or unable to communicate your wishes, and (2) a "Living Will," by which you may provide written guidance to your agent(s) and/or medical practitioners in making decisions about life sustaining medical treatment should you be incapacitated or unable to communicate your wishes.

The Advance Directive does not kick in unless a physician, physician assistant or nurse practitioner determines that you do not have the capacity to make health care decisions or to communicate. Once the Advance Directive has been activated, the agent takes over and makes medical decisions that you would have made if you had capacity based on the guidance in your Living Will.

[1]The "One Big Beautiful Bill" of 2025 increased the lifetime federal estate and gift tax exemption to $15 million per person, and $30 million for a married couple, corrected for inflation going forward. .

Why is it so important to give someone this authority? The general rule is that physicians and nurses must treat unless told otherwise. There may be situations in which you would not want to be kept alive. An agent, if authorized, may agree to a "Do Not Resuscitate" Order. If the patient is near death or in a persistent vegetative state, an agent may, if authorized, decline artificial feeding and hydration, can make decisions not to start medical treatment or, if it has been started, to discontinue it. We explain to our clients that the agent will have all of the powers that the client has to make medical decisions, including continuing care, if that is appropriate.

Effective July 1, 2021, the New Hampshire advance directive statute changed. If you do not have an advance directive, or if you have not updated your health care advance directive since prior to July 1, 2021, this is the perfect time to execute the updated form.

We also generally recommend clients sign a "HIPAA Release," named after the 1996 Health Insurance Portability and Accountability Act. The HIPAA Release allows you to list individuals who you would want your medical professionals to be able to speak with about your care before the Advance Directive kicks in, which can be very helpful.

B. **Power of Attorney for Financial Purposes**

A power of attorney for financial purposes lets you as the "principal" authorize someone that you trust as your "agent" to handle your financial affairs when you are no longer able to do so on your own.

Although no longer called "durable" under New Hampshire law, these "powers" remain in effect, even if the principal becomes incapacitated. New Hampshire laws are very specific, and any person living in this State should have a Power of Attorney that complies with New Hampshire law.

Generally, unless a client has a very specific task for which they need an agent to act, such as purchasing or selling a house and signing the paperwork at a closing, we draft Powers of Attorney that are very broad. This allows your agent to make any decisions concerning your property that you would be able to make - paying bills, opening/closing bank accounts, dealing with employment benefits, selling real property, etc. The important thing to remember is that your agent is acting as a "fiduciary." That means the agent is acting for your benefit, not for him or herself. New Hampshire requires that the agent sign a document acknowledging that.

An up-to-date Power of Attorney is important. Without it, your family would need to go to court to get a guardianship over you to handle your financial affairs. That is very costly! One document can prevent the need for that.

II. ESTATE PLANNING DOCUMENTS- AFTER YOUR DEATH

A. **Will**

Despite its simple purpose, there is a lot of confusion about what a Will is and why people need one. Simply put, a Will is a way for you to say how you would like your assets in

your individual name to be distributed upon your death. In order for the Will to operate, it must be approved by the Probate Court and an executor or administrator appointed. There are some important limitations to Wills. First, Wills only govern assets solely in the name of the deceased person. Assets held jointly, assets in trust, assets with designated beneficiaries, like IRAs, 401(k)s, etc., are not subject to a Will, unless you name no beneficiary. Those assets pass automatically on death to the joint owner or designated beneficiary. Second, Wills, and the assets they govern, fall within the jurisdiction of the Probate Court. When people say that they want to "avoid probate," a simple Will is typically not sufficient.

There is another important role for a Will if you have minor children: you can nominate a guardian to handle their personal and financial affairs in the event you die before they turn 18. Even if you do not have assets in your own name, if you have young children, you should have a Will so that you can name a person(s) that you trust and respect to look after your young children if both parents of the children die.

So what happens if you die without a Will? If you die leaving minor children without another parent, after an expensive and time consuming process, a judge will eventually appoint someone to be a guardian of your children, although that person may not be someone you would want to raise your children. Your assets will be distributed pursuant to statutory rules (called "intestate distribution"), which are based on State law, not your wishes.

For example, if you die without a Will, survived by a spouse and have no living children or parents, your spouse will receive your entire estate.

If you die without a Will, survived by a spouse and children, your spouse will receive the first $250,000, plus one-half of the balance of your estate, and your children will receive the remaining one-half of the balance in equal shares. The intestacy statute contains a long list of anticipated situations like those just described that may or may not reflect your wishes. By executing a Will, you are in charge of how your assets will be distributed.

Key takeaways about Wills are: 1) Wills only govern assets in the deceased person's name alone; 2) assets that pass via Wills are subject to probate; 3) you can name guardians for minor children in Wills; and 4) a Will avoids the statutory default rules related to the distribution of estates.

B. **Trust**

A trust is an arrangement whereby you appoint a trustee to hold assets for your beneficiaries pursuant to certain terms and conditions stated in the trust agreement. You can create a revocable trust and, during your lifetime, be the trustee and the primary beneficiary. Better yet, for tax purposes, your trust will be treated as "a disregarded entity" during your lifetime, meaning that all income generated by the assets in the trust will be taxed to you individually (or jointly if you are married and have a joint trust), so you will not need to file an additional tax return or pay higher tax rates. With respect to control of your assets and the imposition of taxes, revocable trusts are your friends, not your enemies.

A "trust" sounds like something reserved only for the very rich, and with the unified federal gift and estate tax exemption at $15 million per person in 2026, you may be wondering why trusts remain relevant. If you want to avoid probate, centralize ownership of your assets in one place, and control how such assets are distributed immediately and long after you pass away, you may want to consider having a trust. Trusts are also still useful for very high net worth couples, with over $15 million each, to avoid paying more estate tax than necessary. Below are a couple of the many important reasons why trusts still play a critical role in many people's estate plans.

1. **Avoiding Probate**

New Hampshire is one of the most death-friendly states in America. Not only does New Hampshire not impose a state estate tax, its probate laws make the process less onerous than in some other states. That being said, probating an estate is still a time consuming, expensive and a public process that you may want your family to avoid.

The probate court has jurisdiction over the assets of people who die owning assets in New Hampshire in their name alone, as opposed to holding assets jointly or in a trust. Anything that goes through probate is public. Accordingly, if you die having only a Will, the public can see not only the size of your probate estate, but also the names of your heirs. Arguably the most dreaded aspect of probate is the delay and expense. If you die with only a Will, your probate estate will remain open for at least six (6) months, and likely closer to a year, before your heirs can receive their inheritances. In addition, the probate court imposes hundreds of dollars in filing fees in addition to requiring, in most estates, a surety bond to be posted. With all your assets tucked into a Trust or listed with beneficiaries, your beneficiaries can receive their inheritances more quickly, (subject to paying your debts), privately, and less expensively.

2. **Protection from Creditors – Keeping Money in the Family**

If your child is getting divorced, do you want his or her spouse to receive a portion of your assets after your die? Do you want your child's creditors to be able to take a chunk of out your child's inheritance? A properly drafted trust can protect against these common situations. A trust allows you to appoint a successor Trustee to manage your assets upon your death and distribute them in accordance with your wishes. If one of your children is having marital or creditor problems, you can include language in your trust instructing your Trustee not to make distributions until such issues are resolved. If any of your loved ones are disabled, too young to handle significant assets or otherwise not a good choice to receive assets outright on your death, a Trust can hold those assets, for their benefit until they are ready to manage them on their own.

3. **Avoiding Federal Estate Tax**

Setting up separate trusts for high net worth married couples is still the simplest way to reduce the Federal estate tax owed when the second spouse dies. By splitting up the couple's assets and "sheltering" up to the amount of the Federal estate tax exemption

(currently $15 million per person), couples with over the exemption amount can reduce the Federal estate taxes owed. We would be happy to discuss this option with interested clients.

III. CONCLUSION

As you can see, failing to have a proper estate plan can subject your family and loved ones to unnecessary expense, delay, uncertainty and frustration. At DTC Lawyers, we have experienced estate planning attorneys to help guide you through the estate planning process so that upon your death or incapacity, your wishes are respected, your assets go where you want and your goals are accomplished.