A GUIDE TO ESTATE PLANNING

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Table of Contents

INTRODUCTION 1

CHAPTER 1: WHAT IS PROBATE? 4

CHAPTER 2: WILLS 8

CHAPTER 3: DURABLE POWERS OF ATTORNEY 11

CHAPTER 4: ADVANCE DIRECTIVES 14

- Living Wills
- Durable Power of Attorney for Health Care

CHAPTER 5: AVOIDING PROBATE 17

CHAPTER 6: TRUSTS 19

- Introduction
  - Intervivos v. Testamentary
  - Irrevocable v. Revocable
  - Special Needs Trusts
  - Avoiding Probate with Trusts

CHAPTER 7: ESTATE TAX PLANNING 21

- Use of Disclaimer Trusts
- Use of Life Insurance Trusts
- Use of Gifting
- Generation Skipping Transfer Tax
- State Estate Taxes

CHAPTER 8: ASSET PROTECTION 25

- Long Term Nursing Home Care
- Scams
- Unplanned Losses

CHAPTER 9: STORAGE OF DOCUMENTS 29

CHAPTER 10: REVOCATION AND AMENDMENT 30

CHAPTER 11: CYBER SECURITY AND TRANSITION 30

CHAPTER 12: HOW TO SELECT AN ESTATE PLANNING ADVISOR 31

APPENDICES 33
Appendix I: What to Expect of the Probate Process and the Role of Executor/Administrator 33
Appendix II: Asset Protection Devices 35
Irrevocable Trusts
Grantor Retained Interest Trusts
Qualified Personal Residence Trusts
Charitable Remainder Trusts, Charitable Lead Trusts, and Pooled Income Funds
Business Entities
International Trusts and Investments
Appendix III: Glossary of Terms 36
Appendix IV: Estate Planning Check List 42

INTRODUCTION

There are many reasons why people begin to think about estate planning. Having children or nearing retirement often makes people think about protecting their assets and heirs, or perhaps an event in their lives makes them face their own mortality. That event can be as insignificant as a vague anxiety about not returning from an overnight trip, or it can be as terrible and traumatic as being diagnosed with a terminal illness. Suddenly, faced with fear, they want to settle their affairs now. There is probably **no worse time** to prepare an estate plan than during a final illness, but sadly many people wait until then.

The best estate plans are created when anxiety over retirement or fear of imminent death is **not** the sole motivating factor. Estate plans should be created out of a desire to control your affairs, both before and after death, rather than out of **fear**. A well-constructed estate plan will enable you to maintain privacy, minimize costs, and in most cases, lessen the tax burdens and provide some level of asset protection.

There are some major reasons for investing time and money into preparing an estate plan and in this book those reasons are covered and discussed. Some reasons are personal and some are legal. For instance, you may want to control what happens to your children after your death and that desire to control things may result in your choosing a certain person as an executor or guardian. On the other hand, you also need to appoint an executor and a guardian because legally one is required. Minimizing taxes, avoiding probate and other concerns also compel people to do estate planning. In the following pages, this book will address many of these concerns.

Control

Control is one reason to create an estate plan. Many people do not realize that upon death, and in the absence of certain documents, the government will exercise some control over their estate. In fact, if a person should become incompetent, the government may even exercise some control of the estate during their lifetime. These actions are dictated by state law and are sometimes inconsistent with the wishes of the individual. The following chart compares some of the control issues:

	With a Plan	Without a Plan
1.	You can decide who will inherit your assets.	State law will determine who inherits your assets.
2.	You can choose who will manage your estate.	The court will appoint an administrator of your estate.
3.	You can choose who will take care of your children.	The court will appoint a guardian over your children.
4.	You can choose who will look after you if you become incompetent.	The court will appoint a guardian to make decisions on your behalf.
5.	You can choose to die with dignity if you are on life support.	The court or others might determine how long to keep you on life support.
6.	You can decide when your beneficiaries will inherit.	The court will determine when your beneficiaries will inherit.

Although state law protects us as best it can, and the court does its best to administer the system, your affairs may end up in the hands of strangers — however well intentioned.

Privacy

While control is important, and a good reason for creating an estate plan, there is still another problem, and that is protecting your **privacy.**

	With a Plan	Without a Plan
1.	The amount and kind of your assets can be kept confidential.	The court may make asset information public.
2.	Decisions to terminate life support can be kept within your family.	Decisions to terminate life support may involve outsiders and may be a matter of public record.

State law is written to protect the individual, but the system is also designed to be open to public scrutiny. Very few court proceedings are **private**. Many people lead very private lives and do not want their affairs exposed to the public after death.

Asset Protection

In an era of increasing litigation, rising health care costs, and economic uncertainty, most people desire that the assets they've saved over a lifetime be available for their retirement and their heirs. Asset protection devices can provide some security, especially for those most at risk.

The Opportunity — And the Goal

Opportunities to save money and to protect your assets through careful planning are abundant. This guide briefly outlines the most commonly used estate planning documents and describes how they can be used for maximum benefit.

It should be noted, however, that each person has individual needs and, after considering the general issues of estate planning, each person should make an appointment with a legal advisor to discuss exactly which documents should be prepared.

There are many online and computer assisted ways to create documents. In some cases, that will work, but remember that you are paying your legal advisor for advice, not just documents.

No matter what your situation, you and your family can benefit from a well thought out and well executed plan: Do your family a favor—HAVE A PLAN!

CHAPTER 1. WHAT IS PROBATE?

There is so much discussion in books and in the media about avoiding "probate" that it is appropriate to discuss exactly what is meant by probate.

Probate is the system set up by individual states to deal with the administration of estates, guardianships and a host of other issues (including name changes, adoptions, and in some states, divorces). The probate system varies greatly from state to state. Some states have more burdensome and protective probate systems than others. **It is the system of the state in which you are domiciled at the time of your incompetency or death that governs the way in which your affairs will be handled**.

It is not always appropriate to avoid probate. In New Hampshire, the probate system offers a comprehensive and protective environment in which to administer affairs during life and after death. New Hampshire requires that the person(s) handling the affairs of someone incompetent, or who has recently died, answer to the probate court. The system ensures that the wishes of the deceased or incompetent person are properly carried out. The probate court requires that the person(s) handling the affairs (known as the fiduciary) be bonded[1] and that they account to the probate court on a regular basis for the assets they have received and distributed. This protective system is critical for some people. No one would want a person to seek guardianship over him[2] and/or obtain control over his assets without consent. Likewise, no one would want his children taken by an individual in a way contrary to his wishes. Finally, no one would want his assets distributed contrary to his desires or by a person who might treat those assets without care. The probate court provides the protection necessary to minimize those risks. ** **Please note that this book often references New Hampshire law, but the general concepts are applicable to all states.**

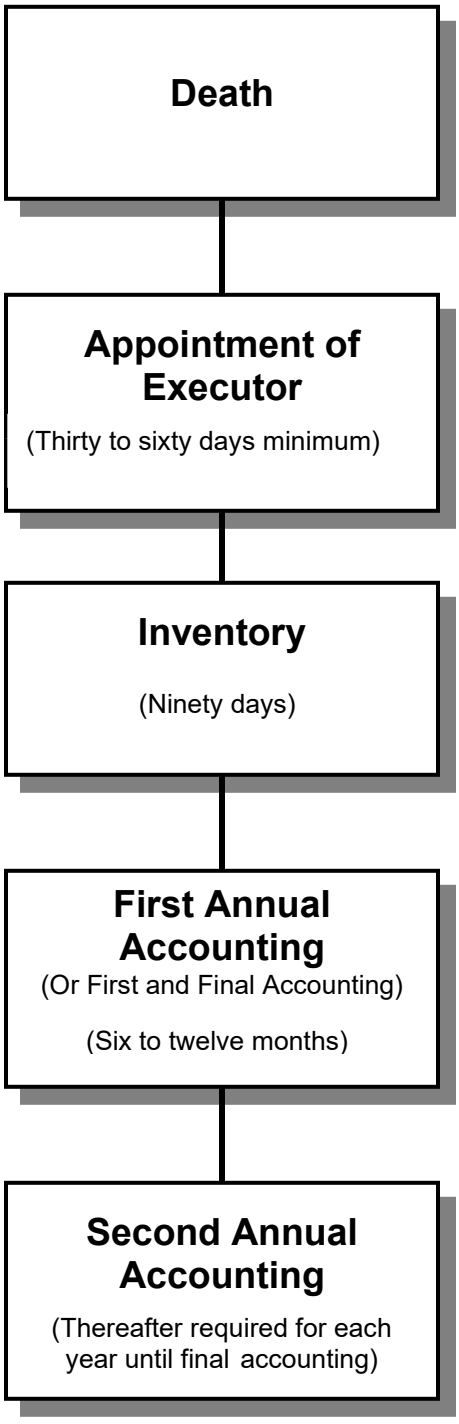
If you choose to set up your estate to permit probate court participation, it is important to understand the elements of probate.[3] In New Hampshire, all actions in the probate court start by filing a petition or request that the court take action. The documents supporting the petitions, such as a will, are also filed with the court. The petition and accompanying documents are public records; and therefore, anyone can go to the probate court and read those documents (and nowadays many can be accessed from anywhere over the internet). Also, these petitions are often published in local papers to give notice to creditors or other interested parties. During the initial filing, the court may order that the petitioner file a bond,[4] in the amount of the value of the estate.

[1]Bonding is generally the purchase of a type of insurance policy that reimburses heirs if the fiduciary acts inappropriately.
[2]All references to him or her are intended as gender neutral.
[3]*See* Appendix I for a more detailed description of the probate process after death.
[4]In New Hampshire, with some exceptions, all estates must be bonded to the full value of all probate assets, especially if the estate is worth more than $10,000. Other states may have more lenient or stringent requirements.

EXAMPLE: If an estate consists of a bank account of $10,000 and a piece of real estate worth $200,000, the representative must post a bond totaling $210,000. Certain insurance companies provide bonds for a fee. If the estate has no liquid assets, it might be difficult to pay the estate expenses — such as the annual bond premium. The insurance company may refuse to bond individuals who do not have sufficient good credit. In order to obtain the bond necessary to complete the probate, an individual might need to seek legal counsel, thereby incurring legal fees. Until the task of getting a bond is finalized, the court will not appoint an executor, and accordingly no probate assets will be available for use.

Once the proper documents are filed with the probate court and the fiduciary is appointed and bonded, there may be a series of forms and paperwork that must be filed with the probate court. Thereafter, there is a period of time during which the file remains open and depending upon the nature of the action, it could take from several months to several years before closing. Fiduciaries are required to file documents with regard to the value of all the assets, and then make an accounting as to what they have done with every penny of those assets. The accounting of assets and income is quite extensive and requires the fiduciary to keep good and accurate records. The minimum amount of time before closing an estate in New Hampshire is six (6) months from the date on which the fiduciary is appointed by the probate court. This period of time allows the creditors to file whatever claims they may have against the estate and allows named and unnamed heirs to file objections. Other actions in probate court usually require somewhat less initial time than the minimum six (6) months for an estate, but may last longer if ongoing administration is necessary, as is the case in guardianship matters.

THE PROBATE SYSTEM: "THE PROCESS AND PACE"



Many states have easier rules which apply to the administration of small estates. New Hampshire also has special rules allowing some estates (specifically those in which the spouse, an only child, or a trust is the named executor[5] and sole beneficiary) to follow a less formal procedure. States have differing requirements for probate so you must be aware of the laws in your State. In New Hampshire, all estates are e-filed and it is hoped that this process will speed up the probate administration.

While the oversight of the probate system can be beneficial to an estate, for many people, the probate system is overly protective. They might not want the probate court overseeing a "hand-picked" fiduciary in a way that is overly burdensome. They may not want those whom they have appointed to answer to the probate court on any regular basis or to incur the additional expense of being bonded, or they might not want the publicity of the probate process. Some estate planning documents offer a solution to these concerns and in addition can be kept private, thus ensuring that your affairs will be administered during life and after death without the knowledge or control of the probate court.

Avoidance of probate is not always easy. For instance, upon death, if you own (in your sole name) a piece of real estate (or even just an old car), that asset cannot be passed to another person of your choosing without some order by a court. Simply having a will that directs property to a named beneficiary is not sufficient. **The will must be accepted by the court and administered by the court.** Only through the probate process does the real estate pass from you to your heirs in a way that assures them clear title. Likewise, if you are named in the will as the beneficiary of certain bank accounts, stocks, or other assets, you will not be able to acquire those assets without the appropriate order from the probate court. Often people assume that if they create a will, they'll avoid probate. This is a mistake. **A will identifies your fiduciary and your intended heirs and can make probate easier. It does not eliminate probate.**

There are several ways to avoid probate, among which is owning property as joint tenants with rights of survivorship or putting property into living (revocable) trusts. Also, owning assets such as IRAs, annuities, pensions, and life insurance with **named beneficiaries** can avoid probate. These devices are some of the ways in which your assets can pass to the named beneficiaries **without the participation of the probate court.**

There are also ways to go through an easier and less expensive probate. A surviving spouse or only child can often go through probate with a less complicated procedure and in New Hampshire, if a trust is the beneficiary of the will (a pour over will) the probate is simplified.

In planning your affairs during life and upon death, it is important to weigh the benefits of the probate court against its inherent costs and time delays. Only **you** can decide whether to set up an estate plan which will limit or avoid the probate process. In making that decision, you should discuss the probate process and its advantages and disadvantages with a legal advisor.

[5] This term as well as many others is defined in the Glossary.

CHAPTER 2: WILLS

There are several reasons for having a will:

- To ensure that your property is distributed to heirs whom you choose;
- To appoint the person who will handle the administration of your estate;
- To make the probate of your estate an easier task for your heirs than it would be in the absence of a will;
- To plan in light of the fact that none of us can predict what assets we might acquire at death (for instance, insurance proceeds from an accident claim); and
- To ensure that your minor children have a physical guardian.

A will is the piece of paper that directs the probate court to treat your assets and children in a certain way. **A will can make it easier** for your heirs to proceed through probate in accordance with your wishes and direction.

In the absence of a will, your estate will be probated without any instructions from you. All states have laws (usually known as "intestacy" laws) that **direct** your estate be distributed to certain heirs if you die without a will. Under many states' laws, if you die leaving a spouse and children, your estate is shared between your **spouse and children**. Likewise, if you leave a spouse and parents, your **spouse <u>and</u> parents** inherit your estate. Often people do not want their assets distributed in this manner. You must create a will if you wish **to direct the disposition of your property** in a different way than legally mandated by the State. In most states, you cannot totally exclude your spouse from inheriting from your probate estate, but you can exclude anyone else. It is often required that you specifically name and exclude your children if that is your wish.

Even if you are able to avoid probate by some of the devices discussed later in this guide **you still need a will.**

> **EXAMPLE:** If you should die in an automobile accident — in which you were not at fault — insurance monies could be coming into your estate after death. As you had no expectation of those monies, you would not have provided a way of transferring those settlement monies into joint names or trusts in such a way that they could pass to someone outside of the probate process. Therefore, it is critical that you have a will to direct proceeds such as these to specified people. Even individuals who do not currently have property should consider making a will, because if they die in a way that generates money, they can ensure that their designated heirs will receive it rather than empowering the State to decide who should benefit. If you end up with no probate assets, your will must be filed with the probate court along with a document stating there are no probate assets, but this filing does not require the payment of any fees or any further reporting.

For people with minor children, the most important reason to prepare a will is to **name a guardian for the children**. Minor children need a guardian who will physically care for them in the event their parents die before the children reach the age of eighteen (18) years. If you do not name a guardian for your children, the State could place the children in foster care or name someone as guardian who is unrelated to you. The burden would then be on a family member or friend to petition the probate court to become the children's guardian. Obviously, this solution causes disruption and trauma to the children that is neither appropriate nor necessary. Minor children also need a **trustee,** as they are not able to own assets until they reach eighteen (18) years of age (called "the age of majority").

A trustee is someone who watches over the money or property of minor children until they attain an age of at least eighteen (18) years[6]. The trustee can be a family member, the same person as the guardian, or a professional. Without a will, the court decides who the trustee is and usually requires that distribution be made to the children when they are eighteen (18), rather than postponing it to a later date, which might be more appropriate. Also, keep in mind that in the absence of a will the **court makes all of the decisions** about how the money can be spent, rather than following provisions you could have provided in your will, directing that money be used to support or educate your children.

At most law firms, a simple will is fairly inexpensive. The cost is dependent upon the specifics of your situation and the qualifications of the law firm. You could even create your own will through a "will kit" or some computer software package. However, if you choose to go that route, you must ensure that the will is properly executed, and your choices accurately reflect your intended wishes. In New Hampshire and many states, a will must be witnessed by two independent people and be notarized. The witnesses must be sworn and must witness the signature of the creator.[7] The **witnesses** and the **creator** of the will must all be present together watching each other sign. The notary must watch everyone sign and attest to the fact that the person creating the will is over eighteen (18), of sound mind, and not under any undue influence. Failure to execute (sign) a will properly, can cause the will to be invalid. Unfortunately, we often do not learn about the problems of execution until after the death of the person creating the will, and at that time there is no longer any way to correct it.

If you currently have a will that is not notarized because it was made out-of-state, or created several years ago, it would be a worthwhile investment to have a new will prepared and **notarized**. A notarized and properly witnessed will is known as a "self-proving will," which means that the witnesses to the document do not have to make a routine appearance in probate court. After a person's death it is often difficult to find the witnesses to the will and bring them into the probate court to have them testify. It is also very expensive for the estate especially if the witnesses have to travel a long distance.

[6] Choosing an older age is permitted in the event you determine that eighteen (18) is not the appropriate age at which the child should have complete control over the assets.
[7] Commonly known as the testator or testatrix.

EXAMPLE: Imagine a case in which a wife was to inherit a small sum from her husband. Because her husband's will was not notarized and the attorney who prepared the will had to appear in court to swear he had seen the will signed. Due to scheduling problems, the attorney made two trips to court before accomplishing the task. The bill received from the witness included many hours of time in court and travel expenses. The bill for this probate witness alone represented almost five (5%) percent of the total estate, and the process had just begun. Additionally, there was a significant time delay in finding the witness and arranging for his court appearance. While this situation was expensive and time consuming, at least there was a witness! Sometimes, even that is impossible.

While requirements governing the contents of the will are not as formal as the signing process, the will still needs to contain certain appropriate, **clear**, and **unambiguous** language. You need to be specific about assets if you want certain things going to certain beneficiaries. You also need to provide for what would happen if one of your heirs or the executor predeceases you. Having a will that is vague or doesn't answer contingencies can cause your family difficulties and can result in expensive court hearings.

EXAMPLE: Imagine a case in which a will stated that a woman's farm was to go to her nephew for his use as long as the nephew lived. At the nephew's death, the farm was to go to the woman's surviving siblings. The woman died ten years ago, and the nephew is still alive. All the woman's siblings have died. Who will get the farm when the nephew dies? Good drafting could have avoided a lengthy title dispute that may be necessary to answer the questions presented by this will.

If a will is well drafted, you should not have to routinely update it unless something significant changes in your life. Marriage, divorce, the birth of a child, the death of a major beneficiary, or a significant change in your assets represent the events that most often trigger the creation of a revised will. Your attorney should draft the will carefully and with enough detail to accommodate some likely contingencies, but it is always a good idea to review your will upon major life changes or after an extended period of time. Also, while most states recognize wills signed in other states, if you change your state of domicile (residency), it is important to get an attorney licensed in your new state to review your documents to ensure the will's compliance to all the state's probate rules.

CHAPTER 3: DURABLE POWERS OF ATTORNEY

Durable powers of attorney have become important devices in recent years. These documents avoid the need for guardianship and they can provide for one individual[8] to give to another individual (or more than one) the power to make financial decisions on his behalf. Even spouses need powers of attorney for each other. While some joint assets may be accessible to spouses, other things are not. Without a power of attorney, a spouse cannot register a car, sell a car, sign a tax return, sell real estate, etc. Most durable powers of attorney are **effective upon signing,** and specifically make reference to the fact that the documents will remain in force should the person signing the document become incompetent or incapacitated. Other powers of attorney are called "springing" powers and become effective only upon the principal's incapacity. These powers can be problematic, however, as incapacity may be difficult to prove. All powers of attorney are revocable at any time. The durable powers of attorney must be entered into with full deliberation and careful selection of your agent because **you are giving to that other person the power to take care of your assets and financial affairs**. Recent years have revealed abuses of these documents so your advisor should make you mindful of ways to avoid this potential abuse by limiting the accessibility to the documents or restricting the powers conferred by the document. Effective 2015, New Hampshire has enacted legislation imposing criminal penalties for misuse of a power of attorney. **As of January 1, 2018, New Hampshire adopted the Uniform Powers of Attorney Act, meaning it is important to update the powers of attorney for all people whose documents predate 2018.**

While powers of attorney remain in force until revoked, many organizations such as banks and brokerage companies require new documents. It is recommended that you update your durable power of attorney every couple of years. As you get older you may also want to appoint successor agents in the event that the first person you appoint cannot act for you due to their own illness, death or for any other reason. Due to abuses regarding these documents, many states have enacted legislation controlling these documents in recent years so it is very important that the documents are up to date and comply with current law.[9]

If you choose to avoid guardianship through a power of attorney, the power of attorney should be drafted by an attorney who has worked carefully and closely on the document and devotes a considerable amount of his or her time to estate planning. The language and drafting of the document is critical to its effectiveness. For instance, the Internal Revenue Service requires that the power of attorney document contain **certain specific language** before the IRS will recognize that someone can act on your behalf. Additionally, the law requires language permitting your agent to make gifts if you want the agent to have such power, and other granted powers need to be very specifically set out in the document. Powers of attorney are rarely expensive, and what you spend will benefit you in the long run. Additionally, regular review and updating of the documents will ensure their effectiveness for the future.

[8] Known as the "Principal"
[9] NH enacted legislation in 2018; Maine enacted legislation in 2019.

If there is a person you trust who can act on your behalf, the durable power of attorney is probably one of the most important documents that you can create. It is also important to consider a back up so if the person you appoint cannot do it, someone is ready to take over.

EXAMPLE: Imagine a case in which a husband sought a power of attorney for his wife. He needed to sell a certain amount of their joint assets to pay for her care and it was determined his wife was not competent. At that point, no one could do a power of attorney for the wife because she did not have the capacity to sign such a power of attorney. The only recourse was to seek guardianship over the wife. A guardianship proceeding required the husband to file certain petitions with the probate court. The probate court appointed an attorney to represent the wife and visit with her. The husband had to appear in the probate court (with his wife) to testify to her incompetency. Thereafter, on a continual basis, the husband had to account to the probate court as to what assets he had, how much money he spent, and on what he had spent it. He was obliged to post a bond and zealously guard the assets of his wife. If his wife had done a power of attorney, the entire probate proceeding would have been unnecessary.

EXAMPLE: Imagine a case of a guardianship for a person with vast stock holdings and a family business. After all the interested parties (children, creditors, wife, ex-wife, etc.) appeared, there were over ten attorneys involved in the case. Many of their fees were ultimately paid from the man's assets (fees totaling $100,000 were incurred in two years). At the same time, the court denied his right to pay for a live-in housekeeper, stating that he didn't need to be "pampered." Such an example reveals that a guardianship is not only expensive, but also controlling.

Guardianship

There are times when the protection of the probate court is desirable. If you do not have a valid power of attorney or if you choose the protection of the probate court, a guardianship will be necessary upon an incapacity. If you choose guardianship or want to plan in the event of a guardianship, you can pre-appoint a guardian of your choice through a document known as a nomination of guardian.

Guardianship starts with a petition filed with the probate court in the county where your loved one (the "ward") resides. The petition must state the reasons why guardianship is necessary and what assets are owned by the ward. The court will then appoint an attorney to represent the ward. The attorney will visit the ward and file a report as to the need for guardianship. Then the court will schedule a hearing at which you must prove the ward's incapacity. These hearings can be very difficult for families. Assuming guardianship is granted, the guardian must post a bond and report to the court as to the assets of the ward, and then continue to report to the court in most instances until the death of the ward. The court may be regularly involved if there are questions as

to how the assets are to be used or how the ward's medical care should be carried out. The decisions may not always reflect the ward's wishes, as it may then be impossible to determine those wishes.

CHAPTER 4: ADVANCE DIRECTIVES

ADVANCE DIRECTIVES CONSIST OF LIVING WILLS AND DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Living Wills

A Living Will is a document in which you direct health care providers or others to disconnect life support systems or to treat you in a certain fashion during a final or terminal illness. This document is used in conjunction with a durable power of attorney for health care, and the living will guides the person making decisions under the health care proxy.

EXAMPLE: Imagine a situation in which a man had signed a Living Will, but the form had not been witnessed correctly. As a result, when the man had a stroke and was placed on life support in the emergency room, the family could not convince the hospital to remove the life support until they had obtained a court order. The court proceedings took four months, cost several thousand dollars, divided family members, and subjected the man to strangers hovering at his death bed. Obviously, this kind of procedure should be avoided in almost all circumstances. Accordingly, whatever your wishes are, expressing them in a health care directive avoids a costly court procedure and ensures that your wishes are carried out.

Most states allow individuals to elect to have life support removed in the event they are permanently unconscious (a permanent vegetative state) or terminally ill and to request the discontinuing of intravenous hydration or feeding by tube so that a person may be allowed to die.

Anyone who is deciding to make a Living Will should discuss the document with family members, physicians, other health care providers, religious clergy, insurance agents, and an attorney. Because the documents must be signed in a certain way — with witnesses and a notary -- it is important that guidance be given so that the documents are executed correctly.

Living Will forms are available in the lobbies of most hospitals and are available in some doctors' offices. While the signing of Living Wills is a common procedure during admission to a hospital, do not wait until that time. Most people entering the hospital are not in the condition or frame of mind to discuss a Living Will, and some are not competent enough to execute such a document. Rather, long before the document is needed, everyone should consider what his particular wishes would be with regard to life support, and have his Living Will executed while he is able to analyze the various circumstances

Durable Powers of Attorney for Health Care

Most states recognize health care proxies or health care powers of attorney.

Unlike a Living Will, a Durable Power of Attorney for Health Care is not a directive to health care providers, but rather grants authority to your "agent" to make medical decisions in your stead. The importance of these forms is easily recognized especially by those trying to place an elderly relative in a nursing home facility. Without the existence of a Durable Power of Attorney for Health Care, most nursing home facilities require that a guardian be appointed, thus ensuring that someone will be available to assist the facility with all health care decisions -- from the administration of antibiotics to the cessation of extraordinary measures for prolonging life.

In New Hampshire, there is a law that presumes that family members have some authority to make medical decisions for their loved ones. The law sets out who in the family is the decision maker and in the event someone has not signed a durable power of attorney for health care, the law provides a way for families to make decisions. The law does not work well, however, when there is any disagreement among family members.

The Durable Power of Attorney for Health Care allows an individual to appoint another person, **of his own choosing,** to make decisions on a wide range of health care questions, including whether a certain surgical procedure should be done or whether certain medications should be administered (and by whom), as well as which medical facility should furnish the treatment. In addition, the document can grant the agent the authority to decide whether certain life support or other devices should be utilized. The Durable Power of Attorney for Health Care also allows you to choose an alternate agent in the event that your original health care agent, for some reason, is unable to act. Like the Living Will, the document takes effect only upon the individual's incompetency or incapacity. Therefore, up until such incapacity, the individual continues to make her own medical care decisions. If there is a conflict between a Living Will and Health Care Power of Attorney, the Health Care Power of Attorney prevails. Therefore, your agent should be someone you can rely on and trust.

Some people choose to do additional terminal care documents with their physicians. Those documents might include a Do Not Resuscitate form or a form known as a "POLST". Both of these must be signed by the patient and physician and set forth specific treatment objectives for people approaching end of life. States are increasingly enacting so called right to die laws allowing assisted suicide in cases in which people are terminally ill. Making sure your family is aware of your wishes in this area is important.

In addition to health care decisions, a Living Will or Durable Power of Attorney for Health Care might be the appropriate document in which to set forth burial instructions, requests regarding organ donations,[10] or other requests surrounding a final illness and death. It is inappropriate to put such instructions in an ordinary will, as that document might not be found or looked at until

[10] You can also place such instructions in a uniform anatomical gift document. You should always state that organ donations should not result in any charges to your heirs.

sometime after death. Obviously, important directions regarding burial or organ donations need to be accessible to the family at a time when they are making those decisions.

Because state law differs and each state has its own forms, you must consult an attorney licensed in the state of your residence (or where you spend considerable time) to ensure your health care documents comply with that state's law. You also need to make sure that your documents will be recognized by other states where you may receive regular medical treatment and may need a health care document. These documents are revocable and amendable at any time.

New Hampshire enacted a new health care proxy in 2021. While older forms are not invalid, it is important to make sure your documents are up to date as much as possible.

> **EXAMPLE:** A man lives in New Hampshire, but goes to a doctor at a Massachusetts' hospital on a regular a basis for a recurring medical issue. He would be well advised to have a Durable Power of Attorney for Health Care for New Hampshire and a Health Care Proxy for Massachusetts.

As with all documents it is important that you know where the original papers are stored, and access to copies of advance directives are often crucial. You might want to give a copy to your doctor, your family members, or a local hospital. It may also be a good idea to store the documents "online" so that you, your family, and your healthcare provider can have immediate access to your healthcare directives. **(See Chapter 9 for information concerning online storage.)**

You should also sign a HIPAA Waiver. That is a form which gives up your privacy rights and allows people you have selected to speak with your healthcare providers and see your medical records. Without such a waiver, it is difficult for your representatives to assist with your care. Often, you will include additional people on the HIPAA waiver. For instance, you may decide that your daughter will be your health care agent but you would still want your son to be able to speak with the hospital and doctor and obtain information about your medical condition.

Finally, you should consider naming someone as your agent for making funeral decisions as in the absence of an appointed agent, various members of the family have to agree. Finding family members on a timely basis and getting everyone to agree is often difficult. Setting out your wishes about your funeral is very helpful as family members usually want to do what you wished.

Often, estate planning is something we do only as we get older, but anyone over eighteen (18) years of age needs to think about doing at least the healthcare directives as parents lose the right to act for their children when the children turn eighteen (18).

CHAPTER 5: AVOIDING PROBATE

If you make the decision to avoid probate, there are three major ways to accomplish that: (1) jointly held property; (2) named beneficiaries on assets such as life insurance; and (3) the use of living ("revocable") trusts.

Jointly held property is property owned by two or more people. The asset passes to the survivor upon the death of the other joint owner ("tenant"). The survivorship language must be part of the joint ownership ("tenancy") wording to ensure that the device works as probate avoidance. Otherwise, you own the property as tenants in common and **do not** avoid probate. Most property can be owned jointly, including stocks, bonds, bank accounts, and real estate. While there are many instances when jointly held property is appropriate, creating such a tenancy should be undertaken only after careful considerations.

For the purposes of estate tax and Medicaid qualification, jointly owned property will often be deemed wholly owned by the decedent or Medicaid applicant unless the other owner can prove actual contribution.

Adding a joint tenant to your property may also make that property vulnerable to that person's creditors in divorce, bankruptcy, or litigation. Another problem with joint tenancy may be that it doesn't reflect your intentions. For instance, your will may leave property equally to all of your children, but you might own assets with only one child as a joint tenant. Because that joint tenancy asset will pass directly to that one child, and avoids probate, it will not pass equally to all your children as the will instructs.

Naming beneficiaries on assets like life insurance, annuities, and retirement plans is another way to avoid probate. One risk with this device is naming minor children as beneficiaries. Since children cannot inherit until the age of eighteen (18), the money must be handled by the probate court until that time. Naming your estate or trust through which you have provided for the children is a better alternative when the children are still minors. The choice of beneficiaries to an IRA or other retirement plan is also difficult, as you must consider the income tax consequences to the beneficiaries upon receipt. Only spouses can "roll over" an IRA, thereby continuing tax deferral. All other beneficiaries must pay income taxes on the IRA distributions although the methods of distribution provide some choice and flexibility. Adult recipients can sometimes "stretch" out payments if they choose to do that and postpone tax payments longer. In 2020, the SECURE Act was passed by Congress. That act allows a delay of required minimum distributions from an IRA until age 72, but limits the ability of most people to "stretch" the IRA beyond a ten (10) year period. The stretch previously allowed the delay of taxes and stretched taxes over the recipient’s life expectancy.

Another consideration when naming beneficiaries is understanding that the recipient does not have to use the distribution in any particular way.

EXAMPLE: A gentleman left some stock to his children in his will. He named his wife (who isn't the mother of the gentleman's children) as the beneficiary of his life insurance policy. He had told his children that his wife would pay for the funeral with the life insurance proceeds. After the gentleman's death, his wife refused to pay for the funeral and the children were required to pay for those expenses out of their inheritance.

Another issue to consider when naming beneficiaries on assets is what will happen if the named beneficiary dies before you. It is important to have a contingent beneficiary named.

Some states, including Maine, permit "Transfer on Death" deeds. It is very similar to naming a beneficiary but it must be a written document recorded with the registry of deeds.

The last major way of avoiding probate is through the use of living trusts. If the trust owns your assets (even if you retain control) there are no assets of **yours** to probate upon your death. The assets then pass to your beneficiaries without the need for a probate. A more detailed discussion of trusts follows in the next chapter.

CHAPTER 6: TRUSTS

Introduction

A trust is an instrument in which an individual transfers ownership of certain assets to another person who is called a trustee. The trustee holds and manages the assets for the benefit of persons called beneficiaries. In some trusts, it is possible for the creator of the trust (also known as the "grantor", "settlor", or "trustor") to be both the trustee and the beneficiary. Obviously, this arrangement gives the grantor the maximum amount of control over his assets. This type of trust gives very few tax benefits during lifetime or protection from creditors, but it does avoid probate.

Intervivos v. Testamentary

Some trusts are created during a person's lifetime. Those trusts are known as intervivos or living trusts. These trusts are not regularly administered by the probate court. Trusts can also be created through wills and they are called testamentary trusts. Many people who have minor children have a trust in their wills to provide for those minor children should they die before their children attain the age of eighteen (18) years. Testamentary trusts are administered by the probate court after an individual's death until termination of the trust provisions under the will. When parents and others don't want probate court involvement, however, they can choose to create a living trust.

Irrevocable v. Revocable

Trusts can be irrevocable or revocable. Generally, irrevocable trusts require that the grantor of the trust give up control over the assets of the trust and give up the right to revoke or change the trust. Therefore, irrevocable trusts are like making a gift of your assets, except that the assets will be held for a period of time for the continued benefit of certain beneficiaries. The maximum amount of benefits with regard to creditors, income tax, and sometimes estate tax come from irrevocable trusts. Revocable trusts, on the other hand, remain fully revocable and amendable up until the death of the Grantor. These kinds of trusts offer the most flexibility for creators of trusts during their lifetime and become irrevocable upon the Grantor’s death.

Special Needs Trusts

If any of your family members or heirs have special needs, it is imperative that the trusts created to benefit those beneficiaries are carefully drafted to avoid causing the beneficiary to lose certain government benefits he or she may be receiving or may be entitled to receive. There are many ways to create trusts to supplement care rather than replace other sources of support, but the trusts must be tailored to those goals. Parents of special needs children can provide for those children without causing the children to be disqualified from assistance like Social Security and Medicaid. A special needs trust permits a chosen trustee to hold assets for special needs beneficiaries and use those assets to help the beneficiaries while the beneficiaries retain the government benefits they had been receiving.

People receiving benefits can also set up their own special needs trusts. Often parents have not done planning and leave assets to a special needs child. To avoid losing benefits, people can place those acquired assets in a special needs trust for themselves. There are rules about those trusts that often require a pay back to the government which has supplied benefits. The paybacks are usually limited to what is left in the trust after the benefit recipient's death.

Recently, a law has been passed allowing people to open ABLE accounts. These accounts can be used instead of special needs trusts, but provide many of the same benefits.

Avoiding Probate with Trusts

One reason to create a trust is to avoid probate. If you create an intervivos trust and transfer assets into that trust **during your lifetime,** upon your death, the assets pass from the trustee to the named beneficiaries of the trust without the need to go through probate. Avoiding probate allows your beneficiaries to obtain your assets without the probate filing fees, bond fees, and delay.

Creation of the trust alone does not avoid probate. After creating the trust, all assets must be transferred into the trust by appropriate documents. Those documents might include deeds for real estate, bills of sale for personal property or change of beneficiary forms for life insurance policies. It is important that you work with your attorney and/or your financial planner to ensure that all assets are properly transferred into trust. Any assets not transferred into trust (and not owned jointly and with no beneficiary) will continue to be probate assets upon your death and require an estate administration through the probate court.

Some people are not as concerned about a probate after their death but don’t want the continued involvement of the probate court in administering a testamentary trust. These people can use "pour over" wills to fund their living trusts after their deaths. Often parents with young children use this method of estate planning. They don't want to go through the effort and the expense of transferring assets into a trust, but they want to insure that if their children inherit before they are eighteen (18) years of age, the assets are administered for the children without constant probate court oversight. Such a trust also allows more flexibility in managing assets for children even until ages considerably older than eighteen (18).

This method of planning provides a trust when needed, and allows you to set the trust up as a beneficiary of a life insurance policy or retirement benefits, but doesn't require you to fund the trust immediately.

CHAPTER 7: ESTATE TAX PLANNING

Under Federal law, estate taxes are imposed on estates that exceed certain amounts. At death, all assets are valued and the tax is paid before assets are paid to the beneficiaries

Each person has an exemption from estate taxes for assets totaling $15,000,000.00. For a married couple, the exemption is $30,000,000.00 (under current estate tax law).[11] Under current law, even without a trust, that amount can be protected through "portability". If one spouse does not use all of his or her exemption, the surviving spouse can use it. You **must** file an estate tax return (706) to preserve the exemption, however. The estate tax exemption is also increasing annually to adjust for inflation. The rate of tax will remain at approximately 40% graduated. The big beautiful bill in 2025 made this tax permanent so if Congress fails to pass any other change, this law will stay in effect.

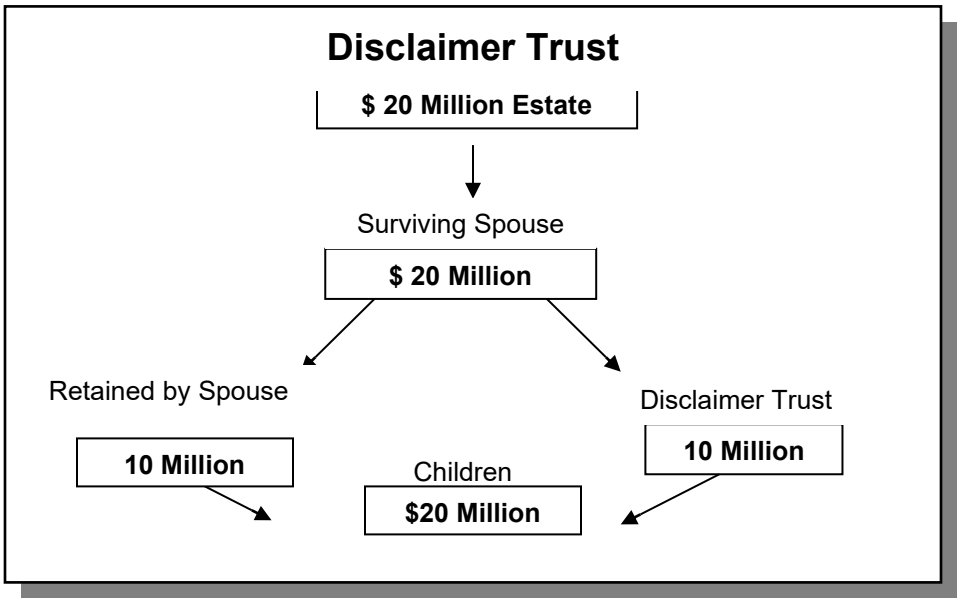
Even without portability, estate tax trusts (sometimes known as AB trusts or credit shelter trusts) for married couples will protect double the estate tax exemption, whatever that is, upon the first spouse's death. There are many different names for this trust including an A-B trust, a marital deduction trust, a credit shelter trust, a Q-tip[12] arrangement, among others. It is important to know how an estate planning trust works. Assuming an estate of $20 million dollars, this kind of trust arrangement divides the estate into two approximately equal portions. While both spouses are alive, both can retain control and ownership over all the assets. At the death of a spouse, however, the two trusts are administered differently. During the lifetime of the surviving spouse, one portion is administered exclusively and solely for the benefit of the surviving spouse and those monies are freely available to the spouse. The other portion can also be administered for the benefit of the spouse, but in a more restrictive way. The spouse does not have complete control over the second trust, but can use the income from the trust, and in some cases, its principal. Upon the surviving spouse's death, the second trust is distributed to the beneficiary or beneficiaries named in the original trust instrument. In this way, the two estates pass to the children or other beneficiaries without taxation. Trusts of this kind can realize considerable estate tax savings. The arrangement is often favored by married couples for the additional purpose of protecting children in the event of the surviving spouse's remarriage. A trust arrangement such as this is also helpful in blended families in which spouses want to protect each other and care for each other but also want to ensure that their respective children or families eventually inherit.

While the current estate tax law provides protection for married couples without the need for trusts, some states still have estate taxes that tax much smaller estates. In those states, the use of estate tax trusts continues to be beneficial.

[11] This arrangement works only if both spouses are United States Citizens; otherwise a Qualified Domestic Trust has to be utilized to take advantage of the marital deduction.
[12] Qualified Terminable Interest Property.

Use of Disclaimer Trusts

The estate tax exemption can always change and the government's future plans are always unclear. Given the uncertainty in the estate tax, it is difficult to decide how to create documents to minimize the tax. It is possible to create trusts that provide estate tax protection only if it is needed at the time of someone's death. Such a plan might include a "stand by" or "disclaimer" trust. The plan includes a trust that has estate tax protection language, but you leave that trust unfunded during your lifetime. After one spouse dies, the surviving spouse can disclaim any or all assets that he or she stands to inherit. The estate plan directs those disclaimed assets to the trust. Accordingly, the decision of whether to disclaim assets can be made based on the tax laws and circumstances at the time of the death of the first spouse, rather than having to commit to a plan.



Use of Life Insurance Trusts

One way to provide funds to pay estate taxes and to also avoid paying taxes on life insurance is an irrevocable life insurance trust. Many people own term life insurance policies which have very little value to them during their lifetime. Term life insurance policies, however, often provide a large death benefit. The death benefit, if allowed to remain in an individual's estate, will be included in the taxable estate upon that individual's death. If the individual transfers the life insurance into an irrevocable trust, the individual does not own that policy upon his death, and those proceeds will not be taxable in his estate.[13] The transfer of a term life insurance policy is not usually taxable because the term life insurance policy has little value to the individual during his lifetime. Whole life policies can also fund irrevocable trusts, but unless the trust purchase the policy, the transfer of the policy into the trust may be a taxable gift. The proceeds from the life

[13] There are many rules regarding when the transfer must occur (at least three years before death) and how the trust must be created and administered.

insurance can be used to pay taxes at death or fund an inheritance. These trusts are very complex and must be administered very carefully. It is generally a good idea to name a trustee who is not a beneficiary. Also the trustee must notify the beneficiaries annually of the contributions into the trust.

Use of Gifting

Gifting can also reduce your federal estate tax liability. The government currently allows individuals to give away $19,000.00 per year (will be indexed for inflation) to any number of people without tax in addition to your $15,000,000.00 lifetime exemption[14]. (Remember no amount of gift is exempt from Medicaid lookback rules). You can also pay for someone's tuition or medical expenses without a gift tax. Gifting and other tax saving devices are plans that individuals should discuss with their accountants and attorneys to ensure that they choose the right plan for them.

You can make gifts to minors, but because of their limited ability to own assets, you must make those gifts carefully. You can use Custodian Accounts, 529 plans or trusts and you should talk with your advisors to choose the right method for you.

One caveat of gifting is the effect on income tax issues. The current rule is that if you inherit an asset from someone, you receive that asset on a "stepped up" basis. In other words, the asset is valued at the death of the original owner and consequently if the beneficiary sells the asset upon receipt, the capital gains tax is minimal or non-existent because the capital gains tax compares the value at receipt with the value of the sale price. (there has been some political discussion around modifying this rule). On the other hand, if an asset is gifted during the donor's lifetime, the recipient receives the basis of the donor. If a person gave a house to his children during his lifetime and then the children sell it, the children must pay a capital gains tax on the difference between the sale price and the price at which the donor bought the house.

It is also important to understand that the federal law is a unified gift and estate tax. Lifetime gifts in excess of $19,000.00 per year per beneficiary count as part of your $15,000,000.00 lifetime exemption. For that reason, it is critical that you know the value of what you are giving. Interests in a family business and certain real estate interests are difficult to value, and you should make sure you obtain appraisals to ensure that you know the tax consequences of that gift.

Before gifting, carefully consider all the consequences.

[14] If spouses join in the gift, the married couple can give away $38,000 per beneficiary.

EXAMPLE: Mom gave her house to her children and kept the right to live there forever. A couple of years later, Mom wanted to sell the house. There were several problems that arose. First, as Mom no longer owned the house, her children have to undertake the sale instead of her. Second, Mom no longer had her exemption from capital gains associated with the ownership in a principal residence. Finally some portion of the proceeds was due to the children and that caused a myriad of problems: both tax issues and issues of Mom's need for money.

Remember that for estate tax purposes, all assets count in calculating the value of your estate, including retirement accounts and life insurance.

GENERATION SKIPPING TRANSFER TAX

The generation skipping transfer tax taxes distributions to generations beyond your children's generation. It is a penalty tax and must be considered when contemplating such transfers.

STATE ESTATE TAXES

New Hampshire still has no estate tax. While proposals for an estate tax in New Hampshire have failed to pass the legislature when proposed, it is not out of the question that an estate tax will be revisited in future legislative sessions. Massachusetts recently increased its estate tax exemption. Massachusetts now has an exemption of $2 million and the maximum rate of taxation for estates above the exemption is 16%. Maine adopted the federal exemption for taxpayers who die in 2016 and beyond. Maine did not, however, adopt the newest version of the federal estate tax exemption, so the exemption in Maine is currently at about 6.8 million dollars but there is a pending bill that would reduce that to 1 million so we will have to watch that. The rate of taxation is 8%-12% graduated. Neither Massachusetts nor Maine recognizes spousal portability so it is important to plan for estate taxes with tax protection trusts.

Other states have various exemptions and taxes and it is important that you consider any state in which you own assets. Even if you are a New Hampshire resident, if you own assets in another state that has an estate tax, you need to be aware of what's going on in that state as most state estate taxes consider the worth of all your assets, not just the worth of assets in their state. The tax is then imposed on the asset located in a state that has a tax, even if the value of that asset(s) is significantly less than the estate tax exemption. For instance, if you have a total of $2.5 million dollars of assets and among those assets is a home on Cape Cod, you will have to deal with Massachusetts taxes even if the Cape Cod home is worth considerably less than the $2 million dollar Massachusetts exemption. State estate tax rates tend to be lower than federal rates and average about 10%.

CHAPTER 8: ASSET PROTECTION

In addition to protecting estates from taxes and probate fees, people may want to preserve their estates from the claims of creditors. Long nursing home stays, catastrophic illness, and serious lawsuits, among other things, can threaten a person's ability to preserve his estate for his heirs or even for his own use.

Long Term Nursing Home Care

The system in this country for long-term nursing home care relies primarily on people's ability to pay for their own care. Although Medicare and private insurance pay for medical care, those benefits don't pay for much, if any, of a long-term nursing home stay. Medicare and supplemental policies pay only for rehabilitative care and even that, is limited to payment for one hundred (100) days. At approximately $12,000/month,[15] the burden to pay for this care is enormous. Medicaid, the government assistance program, pays for such care only in cases of poverty.

Medicaid is a Welfare program. Accordingly, a person can have only limited assets when attempting to receive benefits, and eligibility is carefully scrutinized.

A single person can have no more than $2,500.00 in "countable assets" (in New Hampshire – other states vary slightly). (Countable assets include stocks, bonds, cash, CDs, IRAs, certain life insurance policies, and annuities, among others. Non-countable assets include real estate (either the home (for a period of time) or self-sustaining rental property), prepaid funeral contracts, ordinary personal assets such as clothing and furniture, and a vehicle. Non-countable assets can be attached, however, by lien, after the death of the person who received Medicaid benefits.

A married person whose spouse needs Medicaid, may keep on half of the marital assets (all assets no matter who owns them) at a minimum of approximately $32,532.00 to a maximum of $162,660.00, (indexed annually), in addition to certain amounts of monthly income. The income protection for the stay at home spouse is a minimum of $2,643.75 and a maximum of $4,066.50. Any income earned by the stay at home spouse, as opposed to the nursing home spouse's income, is protected. The stay-at-home spouse may also keep the home (up to $730,000.00 equity) and various personal property. All of these numbers vary slightly state to state and are adjusted annually by the federal government.

A plan to qualify for Medicaid might include some of the following techniques:

1. Change countable assets into non-countable assets, i.e., buy a home, buy a car, prepay your funeral, pay off a mortgage or debts, and improve your home.

2. Purchase an annuity, but the rules must be followed very closely.

[15] This amount has increased dramatically in the last ten (10) years, and continues to rise.

3. Maximize income allowances by seeking additional sums for fixed expenses such as housing.

4. Ask for an assessment and then spend down the Medicaid recipient's share of the assets on non-countable assets or care.

5. Execute changes to existing estate plans or titles to assets to insure the Medicaid recipient's long-term qualification.

6. Gifting is a way to "spend down" assets for Medicaid qualification. There are risks to this procedure, however. The gifts must have been made at least sixty (60) months (this time period could continue to change) before applying for Medicaid or the gifts will result in a potentially unlimited period of disqualification. Also, gifting relinquishes control of the assets to another person. The assets are not only beyond your control but may be accessible to the recipient's creditors, spouse, or heirs. Finally, a gift of appreciated assets may result in adverse capital gains tax consequences to the recipient that could have been avoided at death.

7. The only kind of trust that provides any Medicaid benefit is an irrevocable trust. Revocable trusts, joint assets and Totten[16] trusts generally accomplish nothing to assist in Medicaid qualification, and all assets in such accounts are reachable by the nursing homes to pay for care. Irrevocable Trusts will result in disqualification if transfer of assets into the irrevocable trusts occurs less than five (5) years before a Medicaid application. Irrevocable trusts require the grantor to relinquish control of the assets, but the assets are not as vulnerable to the creditors of the trust's beneficiaries as they are in the case of an outright gift. Several recent cases decided by the New Hampshire Supreme Court suggest that irrevocable trusts may not work very well in New Hampshire for protection of assets in a Medicaid situation. Other states have had similar cases.

8. Transferring real estate with a retained life estate results in a disqualification period but little protection as the value of the life estate remains a countable asset. The adverse tax consequences of an outright gift of appreciated property are avoided by the use of a retained life estate, however.

9. Entering into an Elder Care contract, in which an older person pays family members to provide care is allowable, but it must be in writing and the caregivers must pay income tax on the payments.

10. A home can be transferred to a spouse, a minor child, a sibling who lives with you, a disabled child, or an adult child who resides with you and has provided care to you for at least two (2) years prior to your admission to a nursing home. A

[16] Totten trusts are arrangements that pay an asset to a beneficiary at your death like a TOD/POD bank account.

doctor must provide an affidavit proving that the care allowed the applicant to stay home longer than if there had been no care. There is no need to transfer the home until you enter the nursing home.

11. Insurance companies offer policies which pay some or all of nursing home expenses. Depending on your age, your health and your benefits, the premium charges vary, but exploring the possibility of purchasing this insurance is always valuable. Federal law permits the deductibility of certain premiums for long-term care insurance. The policies are varied in the protection they supply, so you must seek expert assistance when purchasing these policies. Many states also have "partner" programs that gives you credit for long term care policies by granting additional asset protection.

12. Some long term care facilities promise to provide care and in that way, you can avoid Medicaid. You enter those facilities with a buy in and pay monthly fees. If, and when, you need additional care, the facility provides it.

Statistically, you still have a better chance of avoiding a nursing home than being institutionalized, and the average stay is only about two (2) years. Nevertheless, the financial consequences are serious. You need to explore how to plan to provide for your long-term care. Seeking assistance from insurance agents and elder law attorneys can insure a well thought out plan.

Scams

Increasingly, we hear about people losing money to various scams. The people and companies perpetrating these scams become more sophisticated all the time. Make sure that if you get an email, get a mailing, get a phone call asking for any personal information, you hang up and report it to someone. Never give your social security number to a caller. If you have any suspicions, hang up and try to ascertain the legitimacy of the call. Do not feel embarrassed. We are all victims of this.

Unplanned Losses

Catastrophic lawsuits also put life savings at risk. There are a number of devices that can offer some protection from such lawsuits.

Protection from business risk through the creation of a corporation or other business entity still provides a good level of protection provided the business is adequately capitalized and operated with the requisite formalities. Limited Liability Companies and Family Limited Partnerships can also provide protection from creditors as well as having potential for use in minimizing estate taxes.

Sometimes simple techniques like having your spouse own assets rather than having assets owned by the person at risk is a good idea. The transfer to the spouse, however, must not be for the purpose of defrauding creditors.

The homestead exemption (different from state to state) protects $400,000.00 (in New Hampshire as of January 1, 2026) of equity for each person in the person’s principal residence but

there is a maximum protection of $550,000.00 for multiple owners. The 2026 law imposes certain conditions and exemptions. In addition to the homestead exemption, there are federal and state protections of certain assets form the claims of creditors. In Massachusetts, if you file your homestead, you can get a $1,000,000.00 exemption per household (without filing, you get an automatic $250,000.00 exemption). In Maine and Florida, homestead is a reduction of property taxes. Most states have some reductions available for veterans, older people and disabled people. For instance in New Hampshire, people over age 65 can receive a reduction of property taxes if they qualify financially. It is important that everyone look at these exemptions to take advantage of what is available.

The purchase of insurance should always be considered when trying to protect your assets. Liability policies, umbrella policies, and other insurance should be your first line of defense.

For those who are particularly concerned about preserving their assets from potential creditors, offshore trusts and international corporations are worth considering. There are several countries in the world that have no income or estate taxes and provide a somewhat better level of protection from creditors[17] than exist in the United States. Some states, like Alaska, also permit creditor protection trusts. New Hampshire has recently adopted a law allowing these kinds of trusts as well. Careful explanation and deliberation is necessary before deciding how to protect your assets.

Increasingly, parents are concerned that their children might lose inherited assets in a divorce. There are a variety of ways to address this risk. The use of continued trusts for your children may protect assets. There have been recent cases suggesting that if one sibling is the trustee for the other and has the power to distribute (or not), the trust assets can be protected in the event of a divorce. Careful planning is crucial as family relationships among the siblings need to be preserved as well. Another interesting development is the use of post nuptial contracts. In both New Hampshire and Massachusetts, the courts have recognized the validity of such contracts. With proper planning, a person who inherits from a parent could enter into a contract with their spouse which would protect that inheritance from divorce or protect it at the death of the recipient.

[17] Review of the fraudulent conveyance laws is critical because no transfer is permitted for purposes of avoiding existing creditors.

CHAPTER 9: STORAGE OF DOCUMENTS

A strong box in your home, your attorney's office or a safe deposit box (under certain circumstances) are all appropriate places to store your **original** estate planning documents. It is critical that your originals be safe from accidental loss or destruction and be available to your heirs when needed. **Copies** of medical powers of attorney and living wills should be given to your family doctor to become part of your medical record. **Copies** of trusts and wills should be given to named representatives such as executors and trustees.

Online or digital storage can be important if the documents are needed in an emergency and in cases where medical conditions, medications and other information needs to be available to family and health care providers.

Passwords and access to digital data is also important. Along with leaving information about assets, their location, etc., you should leave password information. Choosing safe passwords is critical, but remembering them and getting them to your heirs is equally important. Store the list of passwords (absent the one piece) somewhere where you and your heirs can access it. There are other techniques but the goal should be to make sure that your heirs or executor eventually can access the required passwords. Companies are beginning to offer storage of this information and looking into that may be valuable. At our office, we have a booklet that we give to clients in which they can record all important information for their heirs. Many versions of this book are available online for purchase.

CHAPTER 10: REVOCATION AND AMENDMENT

Most estate planning documents are revocable or amendable except for irrevocable trusts. Many events might cause you to revoke or amend your documents, including family changes or changes in the law.

You can tear or shred your documents to revoke them, but it is a far better practice to modify them to assure that you have documents that accurately reflect your wishes. Your legal advisor should oversee changes so that you can take advantage of and plan for changes in the law. Also, changes must be made in writing and must be signed in front of witnesses and a notary in order to be valid.

CHAPTER 11: CYBER SECURITY AND TRANSITION

Everyone has online accounts. Some have websites and other valuable online assets and some have email, Facebook, and a variety of passwords for shopping sites. For everyone, it is important that passwords and access to online data be preserved and transitioned at death. Companies like Apple and Google will not give out means to access a deceased person's data. Even if the only data is pictures, those mean a lot to the decedent's family. Choosing safe passwords is critical, but remembering them and getting them to your heirs is equally important. However you choose to transfer digital assets and information, make sure you leave your family with the information necessary to access data and then ensure that your information and identity cannot be used illegally after your death.

CHAPTER 12: HOW TO SELECT AN ESTATE PLANNING TEAM

There is a lot of information available to people with regard to estate planning. There are also a lot of people who are involved in the field in a variety of roles. Given the amount of material, it is very difficult for people to choose a person to be their estate planning advisor. Often in fact, the estate planning process requires several advisors. For instance it might be appropriate for a person to have a financial planner to assist with setting up IRAs, investments, life insurance, and other financial planning issues. It is also important for a person to have an accountant. The accountant can assist an individual with income tax planning, as well as working with an attorney on estate tax planning. Finally, it is appropriate for people to have an attorney. Only an attorney can give advice as to the legal effect of certain documents. Therefore, only an attorney should prepare those documents.

Using forms purchased through stationery suppliers, using forms off the Internet, or using forms supplied by other non-lawyers, is dangerous. While many of the estate planning documents become form-like in their use, only a person who is well studied with regard to the importance of each paragraph, sentence, and word should be preparing a form for your use. Before signing a form, it is critical that an attorney explain the importance and significance of each provision in the document, as well as outlining alternatives to you.

The attorney you choose should have enough expertise in the area of estate planning so that he or she can suggest certain documents that might benefit you. In the end, you should make the decision as to which documents to sign, but before you can make an informed decision, your attorney should present the alternatives to you. Also, the attorney should ask you appropriate questions about your assets, your family, and your wishes. You may not believe you have an estate tax problem, but it is up to the attorney to ascertain whether that is true. Likewise, you may not have thought about contingencies such as who would receive your assets in the event that your children predecease you, but it is up to the attorney to ask those questions and help you plan for those contingencies.

You should use the initial meeting with your attorney to ask questions about costs of preparing various documents and follow through once documents are signed and in effect. If the attorney is going to create a will, a trust, or any estate planning document for you, find out how the attorney will follow through in the future as you fund your trust, and ask him or her how you will find out about future changes in the law that are necessary or critical for you to know.

The costs of estate planning vary widely depending upon the advisor you choose. In selecting an attorney or other advisor, you must ascertain the cost. There are law firms that charge exorbitant prices for estate planning, and there are document preparation services that charge little, but do not give you quality documents or advice. You want to ensure that you get the most reasonable costs, but at the same time, ensure that you get good and well-prepared documents. You also want to make sure that there are no hidden costs or fees.

Executors, trustees, and agents are also important members of your estate planning team. You may choose any adult to be the executor of your will. Some states require the executor to be a resident of that state. Often, a local executor is preferable anyway as it is easier for a local executor to manage your affairs and get to the probate court. An executor can be a family member or beneficiary and can also be a friend or professional such as a lawyer or bank. Two or more people can serve together, but too many executors can be a logistical problem, as they all need to sign the probate paperwork together. Executors are allowed a fee that can often range between one percent and five percent of the assets of the estate.

A trustee handles the assets of a trust. Multiple trustees are easier to manage than multiple executors. It is also not as important that the trustee(s) live locally as trustees do not have to report to the probate court. Trustees are also allowed a fee as designated by the language of the trust. Trustees often serve longer than executors as trusts may operate over a period of years for certain beneficiaries.

In choosing executors and trustees, choose a person (or persons) who is meticulous, a good record keeper, and not afraid of paperwork or the legal system. Honesty is also a critical characteristic. Those same qualities apply to a person selected as a power of attorney. This person, like an executor, must be readily available, as your incapacity may be an ongoing issue. A key difference between your power of attorney and executors (as well as some trustees) is that they are responsible for your assets while you are living.

Unlike the other agents outlined above, health care proxies cannot handle any of your finances; the person appointed as your health care proxy, however, must be easily accessible and comfortable with difficult medical decisions. The person must be compassionate, as well as a strong advocate.

Finding the right estate planning team can be difficult. Your existing advisors may be able to refer you to others. For instance, if you have a financial planner with whom you have a good relationship, perhaps the financial planner could give you the name of an attorney or an accountant. Likewise, your attorney could supply you with the names of accountants or financial advisors. Word of mouth among friends and colleagues is also a good way to select an estate planning advisor. If you have an existing attorney whom you trust, but who is not an expert with regard to estate planning, that attorney may be able to give you the name of a good estate planning attorney. The State Bar Association might also be available to give you a referral in the event that you call upon them. Do not be fooled by an attorney affiliation with any national organizations as some of the membership designations are available to attorneys for a fee and these organizations do not always qualify their members. Acquiring good estate planning services often requires seeing a number of different professionals until you find a team or individual with whom you feel confident. Choosing executors, trustees and agents must also be done carefully. Talk to your friends, family members, and advisors to make sure you've picked the right people for the right jobs.

APPENDICES

Appendix I: What to Expect of the Probate Process and the Role of Executor/Administrator

When a person dies and there is a will, one of the initial steps is to file the original will with the probate court. If the will has been properly witnessed and notarized, it will be accepted by the probate court within a month or two. If the will is not notarized, you will have to seek out at least one of the witnesses to the will and ask that they make an appearance in the probate court to prove that the will was properly signed, which will cause a delay in the executor's appointment. As the will is submitted to the probate court, or if there is no will, the fiduciary will submit a petition for probate. Depending upon the size of the estate, the forms may vary. In the initial petition, the executor/administrator estimates the assets of the estate, so initially a guess as to the total value of the probate assets is made. When defining assets, everything must be included: real estate, cash, personal property (like furnishings), stocks, bonds, automobiles, bank accounts and any other things of value that are owned solely by the decedent on the date of death. The executor/administrator must also identify all of those assets, including joint bank accounts, which were owned by the decedent with another person even though they are not reported to the probate court. The executor must disclose the existence of those assets and their value as of the date of death to the IRS, as necessary. Likewise, the executor/administrator needs to identify all assets which were gifted or transferred prior to death. Finally, in the initial filing, the executor/administrator must identify the heirs and beneficiaries of the deceased person. That requires that the addresses and names of all of the beneficiaries, children, and in some cases, grandchildren, parents and spouses are obtained.

The executor/administrator must also post a bond, as nearly all estates are required to be bonded. The bond company, in exchange for a premium, protects the estate should something happen that causes the estate to fail to properly distribute the assets first to creditors and then to the beneficiaries. The executor/administrator of the estate is responsible for that bond, and the insurance company will come after the executor/administrator if assets of the estate have been lost due to mismanagement or misappropriation.

Although the probate court does not seek information with regard to the creditors, it is critical that the executor/administrator begin to identify the creditors as early as possible, so that he or she can determine whether the estate has sufficient assets with which to pay those creditors. If a creditor files a claim against the estate, the probate court will verify that the claim was settled before it will allow the closure of the estate.

After the appointment from the probate court, the executor/administrator can gather the assets of the estate and begin the actual administration. The estate must obtain a tax identification number and open an estate checking account. All estate income, rent, interest, and dividends must be deposited into the estate checking account and all bills (once determined valid and of priority) should be paid from that same account.

The next step in the probate process is to notify all of the beneficiaries and heirs at law of the estate that the will has been filed, and that the executor/administrator has been appointed. The court will send those notices in some states.

The next step is to file the Inventory. The Inventory is due ninety (90) days from the date of appointment and must list with specificity all of the assets of the estate and the exact value of each asset on the date of death.

The First and Final account can be prepared no sooner than 6 months from the date of appointment, with the actual due date assigned as one year from date of appointment. If the estate needs to remain open past one year (i.e., due to a litigation, difficulty in distributing assets, or a dispute with creditors), the estate must file a first account and then will do another account for year two or any year thereafter that the estate remains open. As the process of filing the final account begins, some decisions must be made as to which bills should be paid, whether the estate has sufficient assets with which to pay all bills, and which assets will be passed out to which beneficiaries. The law and the provisions of the will govern the way in which this is done. Finally, the executor/administrator files the accounting form, reporting to the court all of the assets gathered, all of the income received, all of the debts that were paid, and the balance that will be distributed to the beneficiaries. As soon as the court approves that account, the estate closes, and the bond is discharged. If additional time is required to settle the estate, the bond must be renewed each year until the estate closes.

In most estates, there is no need for any court appearances, although court policy differs in each County and each State. There are situations, however, that could arise that would require a probate court appearance. For instance, if the will were not properly notarized, a witness would have to make an appearance in the probate court. Although rare, the executor/administrator might need to appear before the probate court to ask permission to sell certain assets of the estate, to ask the court for permission to make uneven distributions, or to distribute assets on an interim basis. Finally, the court might require an appearance for the final accounting before it will close the estate.

The critical thing to consider when going through this process is that **good decision making and good record keeping are musts.**

Appendix II: Asset Protection and Tax Saving Devices

Irrevocable Trusts

There are trusts into which you convey assets **irrevocably** and retain virtually **no control.** They are beyond the reach of creditors provided the creation and funding of the trust does not violate the Uniform Fraudulent Conveyance Act. That act prohibits the conveyance of assets with the intent to defraud creditors.

Grantor Retained Interest Trusts and Qualified Personal Residence Trusts

These trusts are set up for a specified number of years selected by you. You retain the use of the asset or the interest/income for those years. After the term of years, the asset passes to the named remaindermen/beneficiaries. The effect of these trusts is not only asset protection but also reduction of estate and gift taxes. Grantor Retained Uni Trusts (GRUTS) and Grantor Retained Annuity Trusts (GRATS) are two examples of such trusts. Qualified personal residence trusts (QPRT) can use a similar technique to transfer a home to beneficiaries. These trusts work like Grantor Retained Interest Trusts. For example, the asset you give away is a personal residence but you live there rent-free for a specified number of years. After that period of years, your beneficiaries own the home. The major benefit to these trusts is the reduction in estate and/or gift taxation if you live for the term of years specified.

Charitable Remainder Trusts, Charitable Lead Trusts, and Pooled Income Funds

These devices benefit a charity but maintain either income or ownership with you. These arrangements protect assets as well and result in tax savings.

Business Entities

Certain business entities like LLCs can provide a level of asset protection.

International Trusts and Investments

Through the use of offshore trusts or investments, you may be able to protect the offshore assets from your future creditors.

Appendix III: Glossary of Terms

Advance Directives	Documents which set forth the way in which your health care decisions, including terminal care decisions, will be conducted.
Annuity	A contract sold by an insurance company that pays a fixed or variable payment at some time in the future or regularly over time. The growth that remains inside the annuity accumulates tax-deferred.
Beneficiaries	Those people named in a Will or other document as people who are to receive property (real or personal).
Bequeath	To give real or personal property by will to another.
Bond	1) Any interest bearing or discounted government, corporate or municipal security that obligates the issuer to pay the bondholder a specified sum of money at specific intervals, and to repay the principal amount of the "loan" at maturity. 2) A surety bond, as ordered by probate court, bonds the fiduciary during estate administration. The purpose is to protect heirs from loss or mismanagement of funds.
Buy/Sell Agreement	An agreement whereby shareholders agree to sell to one another before offering the stock to a third party. The agreement can become effective on death, disability, or any number of other triggering events. These agreements are sometimes known as a Shareholders Agreements or Stock Purchase Agreements. They can be used with LLCs as well as corporations.
Cash Surrender Value of Life Insurance	This is the amount of money that would be available if the life insurance policy were cashed in.
Certificate of Deposit (CD)	Instrument usually issued by a bank that pays interest and repays principal at maturity.
Charitable Remainder Trust	The transfer of an asset to a charity with the retention of some income from that asset during your lifetime and sometimes the lifetime of another beneficiary.
Charitable Lead Trust	The giving away of the income earned on an asset for a period of time but retaining the ultimate ownership of the asset for yourself or another.

Common Stock	Units of ownership of a public corporation.
Crummey Powers	Powers built into certain trusts (usually irrevocable life insurance trusts) to ensure that contributions to those trusts qualify for the annual gift tax exclusion.
Death Benefit on a Life Insurance Policy	This is the amount of money that will be received by the beneficiary upon the insured's death.
Domicile	The place that you intend as your home. You can have many residences but only one domicile.
Donee	The person receiving a gift.
Donor	The person giving a gift, or the creator of a trust.
Durable Power of Attorney	A document in which you appoint a person who is authorized to transact all of the financial affairs described within this document on your behalf anytime including after your disability.
Executor/Executrix	The person named by the maker of the will to be the manager/fiduciary of the decedent's estate, to collect assets, pay bills and carry out the provisions of the will.
Face Value of Life Insurance Policy	This is the amount of a death benefit that was originally purchased with the life insurance policy.
Fair Market Value	The value that an informed buyer would pay for assets. This is the valuation method applied by the IRS.
Federal Estate and Gift Tax	The provisions of the Internal Revenue Code which impose taxation on gifts or inheritances that exceed the amount of your credit (with the exception of a fifteen thousand dollar annual exclusion per person, per donee). Any transfer in excess of that amount will be taxed.
Fiduciary	Someone who handles assets for another person.
529 Plan	A plan under which money is gifted and set aside for a person’s education.
Fraudulent Conveyance	A conveyance which does not comply with the provisions of the Uniform Fraudulent Conveyance Act and results in the transfer of assets being invalidated.
Goodwill	Intangible asset of a business comprised of the value of the name, reputation, history, or expertise developed. It can be described as the difference in the actual value of tangible assets and the price to be paid for those assets.

Grantor Retained Interest Trusts (Grat And Grut)	Trusts in which the donor gives away an asset which will pass to the beneficiary after a certain period of years but retains for himself or herself the income or interest from that asset for that same period of years.
Grantor	The creator of a trust. The grantor is also known as trustor, settlor, or donor.
Guardian	The person named or appointed to take care of a minor, incapacitated, or incompetent person.
Health Care Power of Attorney	A document appointing someone to make any and all health care decisions for you. This document becomes effective when you are unable to make your own health care decisions.
Heirs	Those people determined under state law to be entitled to a decedent's estate when the decedent has not left a valid will.
Intestate	Dying without a valid Will.
Irrevocable Trust	A Trust over which you retain little control and do not have the right to revoke or amend.
Irrevocable Life Insurance Trust (ILIT)	A Trust set up to own a life insurance policy which may exclude the proceeds of the life insurance policy from the insured's estate upon his or her death.
IRA (Individual Retirement Account)	Limited to a certain tax-deductible contribution (or earned income whichever is less) per year. Deductibility is phased out for taxpayers earning certain income per year or who are covered by an employer sponsored retirement plan.
Issue	All of your lineal descendants including children and grandchildren.
Issue per stirpes	The issue of your children.
Joint Property	Property you own with another person.
Joint Property with Rights of Survivorship (JTWROS)	Property that you own with another and that upon one person’s death automatically passes to the other person.
Keogh	Self-employed retirement account. Annual contributions are limited based on current tax laws.

Legacy and Succession Tax	The New Hampshire inheritance tax which imposed an 18% percent tax on all inheritances to non-exempt relatives (generally non lineal descendants). Repealed as of January 1, 2003.
Life Estate	The right to use and enjoy property for the duration of your life.
Living Trust	A trust which is created and at least minimally funded while you are living and is generally amendable and revocable during the grantor's lifetime.
Living Will	This document directs physicians to withhold life-sustaining procedures in the event you have an incurable injury or disease, an illness certified to be a terminal condition, or you are in a permanently unconscious condition. You can also decide whether you want artificial nutrition and hydration.
Mutual Fund	An investment company that pools money from shareholders and invests in stocks, bonds and money market securities, offering investors the advantages of diversification and professional management.
Per Capita	This means that the property you are leaving will be split up equally among all of your Beneficiaries.
Per Stirpes	This means that if one of your Beneficiaries predeceases you, his or her children will take his or her share.
Preferred Stock	Class of stock that pays dividends at a specific rate and that has preference over common stock in the payment of dividends. This stock usually carries a redemption value.
Primary Beneficiary	The person selected by the maker of the Will (or life insurance policy) to receive first claim to the benefits over any other beneficiaries.
Probate	The process through which your financial affairs are dealt with after your death or during incapacity unless you have taken other steps to avoid such a process. The probate court having control over your assets is the Court in the County in which you are domiciled at the time of your death or incapacity.
Qualified Domestic Trust	A Trust utilized to take advantage of the marital deduction for a non- citizen spouse. The Trust requires a United States citizen as a Trustee and some restrictions on principal distributions.
Qualified Sub-S Trust	A Trust that by its terms is a qualified owner of Sub-S Stock.

Qualified Terminable Interest Property (Qtip)	Property which qualifies for the marital deduction but restricts your spouse's interest in the property to an income interest during lifetime.
Revocable Trust	A Trust over which you retain the right to amend or terminate the trust.
Roth IRA	This is an account into which you can place money to save for retirement. Although contributions are not tax deductible, the money grows tax free provided you withdraw when permitted.
Rule Against Perpetuities	The rule requires that trusts terminate within a specified amount of time after your death.
Secondary Beneficiary/ Contingent/Successor	The person selected by the maker of a Will, or owner of a life insurance policy, IRA, etc., to be the successor to the benefits, if the proceeds cannot be paid to the primary beneficiary.
Self-Proving Will	A Will that through its language and execution (i.e., being notarized) dispenses with the need to produce the witnesses to the Will in Probate Court to swear that they saw the testator sign the Will.
Tenancy in Common	Property owned with another person which does not pass automatically to the survivor upon the death of the first, but rather passes through the deceased person's Will or through his intestate estate.
Testator/Testatrix	A person who creates a Will.
Testamentary Trust	A Trust created within your Will, which will be administered in the probate court until termination.
Trust	By executing a trust, you relinquish title to the property transferred into your trust. You may retain the control of those assets, however, as trustee or beneficiary, depending on the kind of trust.
Trustee	The person in a trust relationship who holds the legal title to the property for the benefit of the beneficiaries subject to certain duties imposed by the terms of the trust, principles of equity, or statutory provisions.
Uniform Gift to Minors Act (UGMA)	This law permits accounts under a minor’s social security number with an adult custodian. While the account legally belongs to the minor and may be a problem in college financing, it may count as an asset of the custodian for estate tax purposes.

Uniform Trustees Powers Act/Uniform Trust Code	The law which regulates the powers that Trustees have in dealing with trust property including buying, selling and otherwise managing assets and controls trust law.
Will	A formal document signed by two witnesses and a notary public (in New Hampshire) directing the disposition of someone's property upon his or her death.

Appendix IV: Estate Planning Check List

QUESTION	YES	NO
1. Do you have a will?		
2. Is your will notarized?		

3. When was it last reviewed by you?	**DATE:**
4. When was it last reviewed by a professional?	**DATE:**

5. Does your will name a Guardian for your children?		
6. Are you satisfied with the Executor(s) and Trustee(s) you have appointed?		
7. Have you considered a Living Trust to avoid Probate?		
8. If you have a living trust, have you titled your assets in the name of the trust?		
9. Is your estate plan designed to take advantage of the federal estate tax credit $13,900,000.00?		
10. Have you considered the impact of State inheritance or estate tax issues?		
11. Have you utilized any irrevocable trusts to minimize estate taxes?		
12. Are you taking advantage of the $19,000.00 annual gift tax exclusion?		
13. Have you considered a charitable remainder trust to provide income to you and/or your beneficiaries with the principal eventually passing to your chosen charity?		
14. Do you have a management succession plan for your business?		
15. Have you appointed someone as your agent in a durable power of attorney?		
16. Have you executed a health care power of attorney and/or living will?		

17. Where are you storing your estate planning documents?_____

*If you answered no to any of these questions or your documents are older than three (3) years, you should see your attorney.

About the Firm

Kathryn S. Williams has been an estate planning and elder law attorney throughout her lengthy career. She maintains an office in Epping, New Hampshire. She has a JD degree as well as an MBA. In addition to practicing law, she taught at Southern New Hampshire University in its graduate business school for over twenty years. She is a frequent speaker on topics of estate planning throughout southern Maine, New Hampshire, and Massachusetts.

Attorney Williams provides estate planning services to the Professional Firefighters Association and provides free or discounted services to police officers, active duty military and teachers. Attorney Williams' goal is to provide services at a reasonable cost so that estate planning is available to all people.

James W. Hardy graduated from University of New Hampshire Law School with honors in 2016. He was part of the prestigious Daniel Webster Scholars program and was admitted to the New Hampshire Bar upon graduation. He was selected to serve as a Law Clerk to the New Hampshire Superior Court and served in that position for three (3) years. In 2019, he joined Attorney Williams at KSW LAW. In addition to estate planning and probate, Attorney Hardy handles some real estate and business matters.

Disclaimer

Note: These materials are for guidance and reference purposes only. They are of a general and informational nature and should not be construed or relied upon as legal advice. Individuals and families facing decisions about legal issues and questions regarding estate planning and probate law should consult directly with an attorney.

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