



# Essential estate planning

What you should consider



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# Introduction

Whether you're married, widowed, in a committed relationship or single, estate planning is your chance to shape the future for yourself, your loved ones and the causes that are important to you. Planning allows you to change or to opt-out of your state's default rules (known as intestacy). It allows you to make choices about your future placement and care, about how your assets will be managed if you can't manage them yourself, and how your loved ones and preferred charities will be provided for after your death.

In this guide, we'll explore what happens if you don't plan, as well as the elements and options of a plan for you. However, please keep in mind that the TIAA group of companies does not give tax or legal advice.

As Benjamin Franklin said, nothing is certain but death and taxes. Some people need to plan for taxes; all of us need to plan for our eventual death. Even more urgent is the need to plan for the possibility of incapacity—becoming unable to handle your financial and legal matters before you die. If you don't plan, the courts will plan for you.

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### **General durable power of attorney**

A power of attorney is a document that allows you to designate someone to act on your behalf, also called an attorney-in-fact or an agent, to manage your financial or personal affairs. Your agent generally does not have to seek court approval or permission to act.

## **Who inherits: You choose or state law does**

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If you don't plan for the transfer of your assets upon death, each state legislature has a plan that includes both the administrative steps required to transfer assets and to whom they will be transferred; this is the law of "intestacy." State law determines who inherits your assets! The law will also decide who is designated to administer the process by choosing a personal representative or executor if you do not appoint one.

## **You choose: Last will and testament**

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Want to choose your heirs rather than dying intestate? A will is a written declaration of your intentions for the disposition of any probate assets that are owned by you at the time of your death. You choose, not the state.

Note: Probate assets can include any asset that is titled in a decedent's sole name without a co-owner. Probate assets can also include a decedent's one-half interest in tenant-in-common property or community property. Probate assets commonly include bank accounts; investment accounts; stocks; bonds; vehicle, boat and/or airplane titles; business interests; and/or deeds for real estate. Probate assets do not include assets containing beneficiary designations or assets utilizing a pay-on-death or transfer-on-death designation. Also, probate assets do not include property co-owned as joint tenants with right of survivorship.

## **Avoiding probate: Adding a revocable trust**

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If you've decided that you want to choose your own heirs rather than having the state choose for you, you might also choose to transfer those assets without court intervention and oversight. One way to do this is by incorporating a revocable trust in your plan. A revocable trust is a written document that governs how property is administered and distributed, both during the life of the grantor and after the grantor's death. This section discusses reasons to consider a revocable trust.

## **Trusts need a trustee**

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Every trust needs a trustee. It can be an honor to be asked to serve as trustee, but before you designate someone to act (or you accept the appointment by another party), you should understand what a trustee does and the legal consequences of accepting the position. You may then look to the benefits of a professional fiduciary such as a bank or trust company.

## **Preserving your legacy: Trusts for your heirs**

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Whether you have a will or a revocable trust, your plan can look to reduce or avoid estate taxes and to preserve your legacy for the people you choose.

Are you concerned about a child who isn't good with money? Are you married or in a committed relationship and want to support your loved one, yet have different goals or wishes for what happens when both of you are gone? Is your child good at managing money, yet you want to protect her/him from creditors, including the IRS in the form of estate taxes? Do you want to avoid family conflict?

If you have these or other concerns, you might consider holding an inheritance in a trust for your heir(s) instead of a lump-sum distribution. Such trusts can be useful in many situations like the ones on the next page.

**Preserving your legacy: Lifetime trusts**

You may choose to have assets distributed outright to your loved ones as a lump sum or held in a trust. A lump-sum distribution is easy and makes sense in some cases. There are other options such as a continuing trust. Such trusts can be set to continue until a beneficiary attains a specified age or milestone, or can last for his or her lifetime—providing protection from creditors and keeping the assets in your family as well as reducing future estate taxes.

**Preserving your legacy: Trusts for non-U.S. citizen spouses**

For married couples that are U.S. residents, but at least one is not a U.S. citizen, there are special financial and estate planning rules that apply. These include limits on transferring assets to your spouse, whether by changing the name on an account, adding your spouse's name to an asset, or transferring an asset while you are living or when you die.

**Preserving your legacy: Trusts for special beneficiaries**

Disabled children or family members may require special care both during and after your lifetime. To ensure that your loved ones receive appropriate care for their needs, you'll need to carefully consider how much of your estate to allocate toward funding that care, and how to best structure that gift to protect your loved ones and the assets you leave for their benefit.

**Preserving your legacy: First and second beneficiaries**

Are you married or in a committed relationship and want to support your loved one, but have different goals or wishes for what happens when both of you are gone? It's important to understand the impact of the death of a joint owner or a beneficiary and how intestate succession and local laws may apply to certain types of assets, such as your personal residence.

**Bringing it all together: Coordinate asset ownership and beneficiaries**

Now that you've spent the time and resources for the legal documents, don't commit one of the most common estate planning mistakes—failing to coordinate the ownership and beneficiary designations with your plan.

**Choosing an estate planning attorney**

We recommend working with a qualified attorney. This chapter contains basic guidelines to help you make the best decision for your personal circumstances. We can also give you a list of attorneys to consider.

**10 reasons to consider updating your estate plan**

As a general rule, it is a good idea to review your estate plan every five or so years, more often if you've moved or a change has happened to your family or finances.

**Appendix: A summary of the current federal estate and gift tax landscape**

# Incapacity: You choose or the court will

## **Incapacity: What is it?**

An incapacitated person is one who has been judicially determined to lack the capacity to manage at least some of his or her property, or to meet at least some of the essential health and safety requirements of the person. This chapter explores the definition of incapacity and the legal process to appoint another person to care for an incapacitated individual.

Incapacity can strike anyone at any time. Unfortunately, neither youth nor wealth can protect you.

## **Meet Doug**

He lives alone and loves visiting with his grandson. One day, his neighbor calls 911 after finding Doug on the ground in his yard. The emergency medical personnel get him to the hospital, noting that he seems confused. They find he's been living in a dirty home with spoiled food in the kitchen and his medicines in disarray. Hospital tests reveal that Doug is suffering from dementia. He's asking to be discharged and demands to go home. Is he competent? Will he be safe if he returns home? Who is responsible for helping him?

## **Meet Beth**

She's 19 years old, single and going to college, where she majors in biology. Recently, she has started to act strangely, so her roommate calls Ruth (Beth's mother) and says she's worried. After medical testing, Beth is diagnosed with schizophrenia. Can Ruth make decisions for Beth? What if Beth disagrees with the treatment plan or refuses treatment all together? Can Ruth get copies of Beth's medical records without Beth's consent? Can Ruth discuss Beth's medical treatment decisions with Beth's medical provider?

The answers to these questions depend on whether the person is legally incapacitated and if someone is appointed as their guardian.

## **Guardianship**

A guardianship is a legal procedure that appoints someone (called a conservator in some states) to exercise an incapacitated person's legal rights. How it works will vary depending on whether the guardianship is for a minor, a person with developmental disabilities or an incapacitated adult.

A guardian is a court-appointed individual or institution who is charged with overseeing an incapacitated person's (referred to as the "ward") affairs.

## Frequently asked questions

### How is a person determined to be incapacitated?

Any adult can file a petition with the court to determine someone's incapacity, stating the facts upon which they base that belief. The court then appoints a committee, typically including two physicians and someone else who, by knowledge, skill, training or education, can form an expert opinion. The court can also appoint an attorney to represent the allegedly incapacitated person, but that person can use their own attorney instead.

#### The examination of the incapacitated person normally includes:

- A physical examination
- A mental health examination
- A functional assessment

If the majority of the examining committee decides the alleged incapacitated person isn't incapacitated at all, the judge must dismiss the petition. If the committee decides the person is unable to exercise certain rights, the court will schedule a hearing to determine whether the person is totally or partially incapacitated. If the person is found to be incapacitated in any respect, the committee will appoint a guardian (unless there are less restrictive ways to adequately address the person's incapacity).

### What does a guardian do?

A guardian who is given authority over property of the ward must inventory that property, invest it prudently, use it for the ward's support and keep track of it by filing detailed annual reports with the court. The guardian must also get court approval for certain financial transactions.

The ward's guardian can exercise the rights that have been taken away from the ward, like providing medical, mental and personal care services, and deciding where and how the ward should live. The guardian of a partially incapacitated ward can only perform the specific rights that were taken away from the ward. Every year, the guardian must also present to the court a detailed plan for the ward's care, along with a physician's report.

This annual report will help the court oversee each action a guardian takes. Between reports, the guardian has the authority to pay routine bills, but has to get specific authority from the court to take certain actions, like selling a residence. To make sure they're following the rules correctly, most guardians will need help from legal counsel throughout the relationship.

**The challenges of this process include:**

- Publication of notice to creditors
- Medical records and other testimony become part of the public record
- Court hearings for routine decisions
- Delay caused by the process
- Legal fees incurred to follow the process

**Who can serve as a guardian?**

Any adult can, unless they've been convicted of a felony, can't carry out the duties of a guardian or are disqualified by some other state law. Unless they're closely related to the ward, the guardian must be a resident of the state that has jurisdiction over the ward.

People who are professional or public guardians can also be guardians. Institutions like a bank trust department or nonprofit corporation can be appointed guardian, but a bank trust department can only be guardian of property. The court will take into account the incapacitated person's wishes in a written declaration of "pre-need guardian" or at the hearing.

**Is guardianship the only way to help an incapacitated person?**

No. Most states encourage people to avoid the court system by using an advance healthcare directive and a durable power of attorney or trust.

People who create an advance healthcare directive, durable power of attorney or a trust while they're competent might not actually need a guardian if they become incapacitated. The form and content of each document varies state by state, and although all 50 states recognize these documents, the provisions vary, as well.



# Medical directive and power of attorney

## Medical directives

A medical directive gives general healthcare instructions to your doctor or treating physician if you become incapacitated and can't make those decisions for yourself. If you're terminally ill and have specific preferences about medical issues, like life-sustaining procedures or life support systems, this document is essential.

## Medical power of attorney or durable power of attorney for healthcare

A medical power of attorney lets you name an agent, sometimes called an attorney-in-fact or healthcare proxy. You can and generally should name at least one alternate. This document authorizes your agent to discuss your treatment with medical care providers and to make healthcare decisions for you, including decisions about your custody and personal care.

## Your agent or proxy

Generally, you should choose a person who is either a family member or a close friend and who is familiar with—and will respect—your wishes. Remember, this document is how you choose for yourself the best person(s) to handle these tasks. With a legal guardianship, a judge chooses for you.

## Protecting your privacy

The Health Insurance Portability and Accountability Act (HIPAA) is a federal privacy law that protects your medical records and other health information. Unfortunately, HIPAA rules are complicated and, unless you state otherwise, could prevent healthcare providers from sharing enough information with your attorney-in-fact to make decisions. You can, however, express your wish that your healthcare agent/proxy be treated just like you would when it comes to your rights to use and disclose your health information or other medical records.



# General durable power of attorney

## Durable power of attorney

In general, a power of attorney is a document that lets you choose someone to act on your behalf, called an attorney-in-fact (or an agent). If the power of attorney is described as “durable,” it will stay valid if you become incapacitated or disabled.

## Powers granted to an attorney-in-fact

Your attorney-in-fact is allowed to do a number of things, like signing tax returns, accessing safe deposit boxes, receiving your income, writing checks, paying your expenses, accessing your retirement accounts and Social Security information, and handling other day-to-day financial matters. You can give your attorney-in-fact more powers, but they often have to be specifically authorized.

## Who is eligible for appointment?

Generally, anyone over the age of 18 can be appointed (although some states impose restrictions on parties that have been convicted of certain offenses). Keep in mind that your attorney-in-fact will be involved with your financial and personal matters, so it's important to choose someone with financial acumen and with whom you're comfortable sharing sensitive information. This person could be different from the one you appoint to make your medical treatment decisions (and you should choose at least one alternate agent just in case the original one can't serve).

## Revoking powers of attorney (healthcare and general)

As provided under state law, a power of attorney can be revoked by your own action or by a triggering event in the document's provisions. To avoid confusion about whether the document is still in effect, you might want to revoke it in writing (i.e., Power of Attorney and Healthcare Proxy), and collect and destroy copies of the revoked document. Note that both documents (i.e., Power of Attorney and Healthcare Proxy) become void when you die.

## **Frequently asked questions**

### **What powers can be granted to an attorney-in-fact?**

Attorneys-in-fact are allowed to do a number of things, like signing tax returns, accessing safe deposit boxes, receiving your income, writing checks, paying your expenses, accessing your retirement accounts and Social Security information, and handling other day-to-day financial matters. You can give your attorney-in-fact more powers, but they often have to be specifically authorized.

### **Do I need to specifically list each power that I want to give my attorney-in-fact?**

This depends upon where you live. Some states authorize “general powers” which let you just use certain phrases, like that an attorney-in-fact can act with respect to “all lawful subjects and purposes” or “with respect to one or more express subjects or purposes.” These states might or might not have a limited list of powers that must be specifically listed. Even more states detail the powers that can be given to an attorney-in-fact and let residents use a “short form” by referring to the corresponding state statute.

Financial institutions often demand specifics that aren’t required under state law. There are few, if any, ramifications for refusing to accept a power of attorney, so you should consider listing the specific powers in the document when they are not clearly listed in state law.

### **When does the attorney-in-fact have the authority to act?**

In some states, there are two types of powers: springing and non-springing. A springing power empowers your attorney-in-fact only if a designated event happens, such as you become disabled. A non-springing power is effective on execution, giving your attorney-in-fact the authority to carry out specified powers immediately. Some states only allow non-springing powers of attorney; your attorney can advise you about this. Both types of powers become void and your attorney-in-fact’s authority ends if you revoke the power and/or at your death.

### **Are there laws to protect my privacy about healthcare matters?**

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 is a federal privacy law that generally states that medical and care providers can only talk to you about your diagnosis and care unless you specifically authorize others to receive this information. This law is intended to protect your medical records and other health information, and allows you to obtain and control access to your information. The rules are complex, so medical providers often will decline to release even basic medical information. If you include an authorization that refers to the law in your healthcare power of attorney, or have a separate authorization, providers will be allowed to release this information to your designated parties.

### **Are there any limitations on what my attorney-in-fact can do?**

Yes. Each state prevents you from giving certain abilities to another person, even an attorney-in-fact. Financial and other institutions might have internal policies and procedures that limit the actions that an attorney-in-fact can take, especially if there could be a conflict of interest.

### **What if I don't have anyone I trust to appoint as my agent or proxy?**

Many people don't have a specific person that they want to empower to make medical or legal/financial decisions for them, possibly because they won't be leaving family behind or don't have a family member or friend that they want to trust (or burden) with the responsibility.

If this is the case, your choices are limited. You can not appoint anyone, with the understanding that the court will appoint and oversee a third party. Alternatively, you can look for a professional third party, either an individual or entity, that agrees to act on your behalf if it becomes necessary.

If you choose the latter, you should look for a bonded and insured professional with experience and knowledge.

### **My financial provider has a power of attorney form for my account; do I still need a power of attorney prepared by an attorney?**

Basically, yes. A financial institution's power of attorney forms are account specific and do not grant your agent the power to deal with any assets held by another institution or to carry out the powers we've discussed in this section.



# Who inherits: You choose or state law does

## The law of intestacy

If you don't plan for what happens to your assets when you die, each state legislature has a plan (the law of intestacy) that includes both who will receive them and how. This means that if you don't choose your heirs, state law will choose them for you.

## Meet Sam and Pat

Sam and Pat are married. Sam is the father of two children from a prior marriage and has no will. When he died without a will, Sam left \$300,000 in cash in a bank account in his name and a house that he and Pat own together as joint tenants with the right of survivorship.

Under the intestacy statute applicable in Sam's state, Pat receives the first \$100,000 plus one half of the balance, for a total of \$200,000. Sam's children receive \$50,000 each. Pat, the joint owner, also inherits the house.

Did Sam intend to leave more to Pat to ensure that Pat was adequately supported? Did Sam intend to leave more to one or both of his children? If the above was not the intended result, Sam could have planned better with a will or trust.

## Let's change the facts

Sam and Pat are retired with no children or living parents, and neither of them has a will. They have accumulated \$300,000 in assets, all held in joint names "with right of survivorship." Sam dies on January 1. Then, Pat dies one month later.

Under the intestacy law in her state, Pat's sisters and brothers inherit the entire \$300,000. Sam's family receives nothing, even though Sam's brother lived next door and frequently helped Sam and Pat with errands, and rides to the grocery store and medical appointments. This is because Sam's relatives aren't considered Pat's relatives under the law of intestacy.

Sam and Pat probably didn't want either of these things to happen and could have avoided them with a will or trust instead of dying "intestate."

## Your intestate heirs

Whether you are single or married, have children or not, if you die without a will, the state in which you live has a will substitute for you: intestate succession. Intestate succession applies to any assets that transfer under the probate process; it doesn't apply to assets held jointly (with right of survivorship) with another person or to assets for which you have a completed beneficiary designation on file, including life insurance and retirement accounts for which beneficiary forms are readily available.

## **Your intestate representative**

The person appointed to settle your estate can be a relative, a creditor or even a court-appointed attorney. Remember, the person the court selects may not be the one you would have chosen. More than one applicant can request appointment. In that case, the probate court generally conducts a hearing to figure out which applicant is best suited to be your executor (sometimes called “administrator” or “personal representative”).

If you don't have a will, the court typically will require that the executor get a surety bond to protect the estate, which can be costly. The court will also typically require them to follow a more regimented path through probate and to get more frequent approval to initiate transactions. Your executor will probably need to retain legal counsel to help with the court's annual reporting requirements.



# You choose: Last will and testament

## Last will and testament

A will is a written declaration of your intentions for what happens to the assets you own (either titled in your name alone or titled as tenants in common or community property with another person) when you die.

### A will allows you to:

- 1 Choose an executor to handle your affairs when you die in a way that waives surety bond requirements and allows for independent (rather than supervised) administration
- 2 Direct where your assets go
- 3 Designate a guardian for a loved one who is a minor
- 4 Make provisions for the causes and people who are important to you

Once you decide who is to get what when you die, you need to consider how those assets will be distributed. You can direct your executor to distribute all, or part, of your assets to your loved ones outright as a lump sum. This makes sense in some cases, yet people often choose it without much thought because it seems like the easiest option. An alternative strategy is to create trust provisions to give one or more of your loved ones additional protections with respect to all, or part, of their inheritance. A trust can last until the person turns a specified age or reaches a milestone, or it can last for their lifetime. You can also do the same for charities, either by leaving a gift to the charity outright or creating restrictions, like scholarships for nursing students, endowing a chair for the engineering department, or to research a specific disease, etc.

Keep in mind your will and the probate process only affects what happens to your individually owned assets, the ones subject to probate. Assets you own with someone else, as joint tenants with right of survivorship, automatically become the legal property of your surviving joint owner after you die. The terms of your will do not affect the disposition of these assets. Likewise, assets that are transferred by beneficiary designation, such as retirement plan assets or life insurance, will be transferred according to the terms of the designation, not by the terms of your will (unless, of course, your beneficiary designation directs these assets to your “estate”).

## Capacity to make a will

To make a will, you have to be of sound mind and of a certain age (which depends upon the state where you live). If a will is contested, it's usually after a person dies, and because someone has medical evidence and eyewitness testimony that proves the will-maker lacked capacity, or was under undue influence or coercion when they made the will. A court will attempt to decide whether the person, when they made the will, could understand, know or recognize:

- 1 That a will was being made
- 2 The extent of their estate or property
- 3 The estate's potential heirs (beneficiaries), and whether or not psychiatric or medical conditions impaired the testator's ability to recognize or identify close relatives and friends
- 4 The way they made the will and how it distributes their property

## Probate administration

Probate establishes clear title to, or ownership of, an asset. Think about it this way: When you die, before title to your assets can pass to your heirs, everyone who has a claim to those assets must be satisfied or eliminated. Probate is simply the court-supervised process of accounting for your individually owned assets after you die, settling your debts and expenses, and making final distribution of your remaining assets to the ultimate beneficiaries of your estate. Your estate is subject to probate regardless of whether or not you have a will.

Upon opening your estate, the court usually requires the person requesting appointment as your executor to notify all interested parties (not just your closest blood relations), those identified in your will and, of course, your creditors. This person, however, doesn't have to notify your stepchildren, other extended family, or neighbors and friends, even if they helped care for you.

### Consider

- Where and when was your will written?
- Is it consistent with your current wishes?
- Is your executor (aka "personal representative") still the best choice?
- What has changed since the time your will was executed?
  - Have children or other loved ones grown older or more responsible?
  - Has your choice of charitable causes changed?
  - Has a parent become dependent upon you?

### **Probate's disadvantages**

Historically, probate is criticized for time delays, costs and unwanted publicity. We've all heard stories about how long the courts can tie up an estate in probate, or the potential for high costs and professional fees.

There has been a significant trend recently for states to simplify the probate process, but people still want to avoid it, often with a revocable trust. Look to your attorney to advise you about state and county law.





## Avoiding probate: Adding a revocable trust

If you wish to simplify administration of your estate or if you are concerned with privacy, you might want to incorporate a revocable trust into your plan.

A revocable trust is a written document that governs how property is administered and distributed both before and after you die, avoiding state intestacy laws and probate. The person who creates and funds the document is called the “grantor.” The grantor can change or remove the trust’s terms at any time, and add or remove property from trust ownership when they want, usually tax free. A trust is a binding contract between the grantor and the trustee.

Just like with a will, the terms of your trust determines who gets your assets, and how and when (immediately or delayed).



## Frequently asked questions

### Should you have a trust?

Revocable trusts may not be for everyone. You should consider one if:

#### You have real property in multiple states

Real property requires a probate proceeding to be opened in the county in which it's located. If the property is outside the county you live, there will be a probate proceeding in each location, unless it's owned by a trust.

#### Privacy is important to you

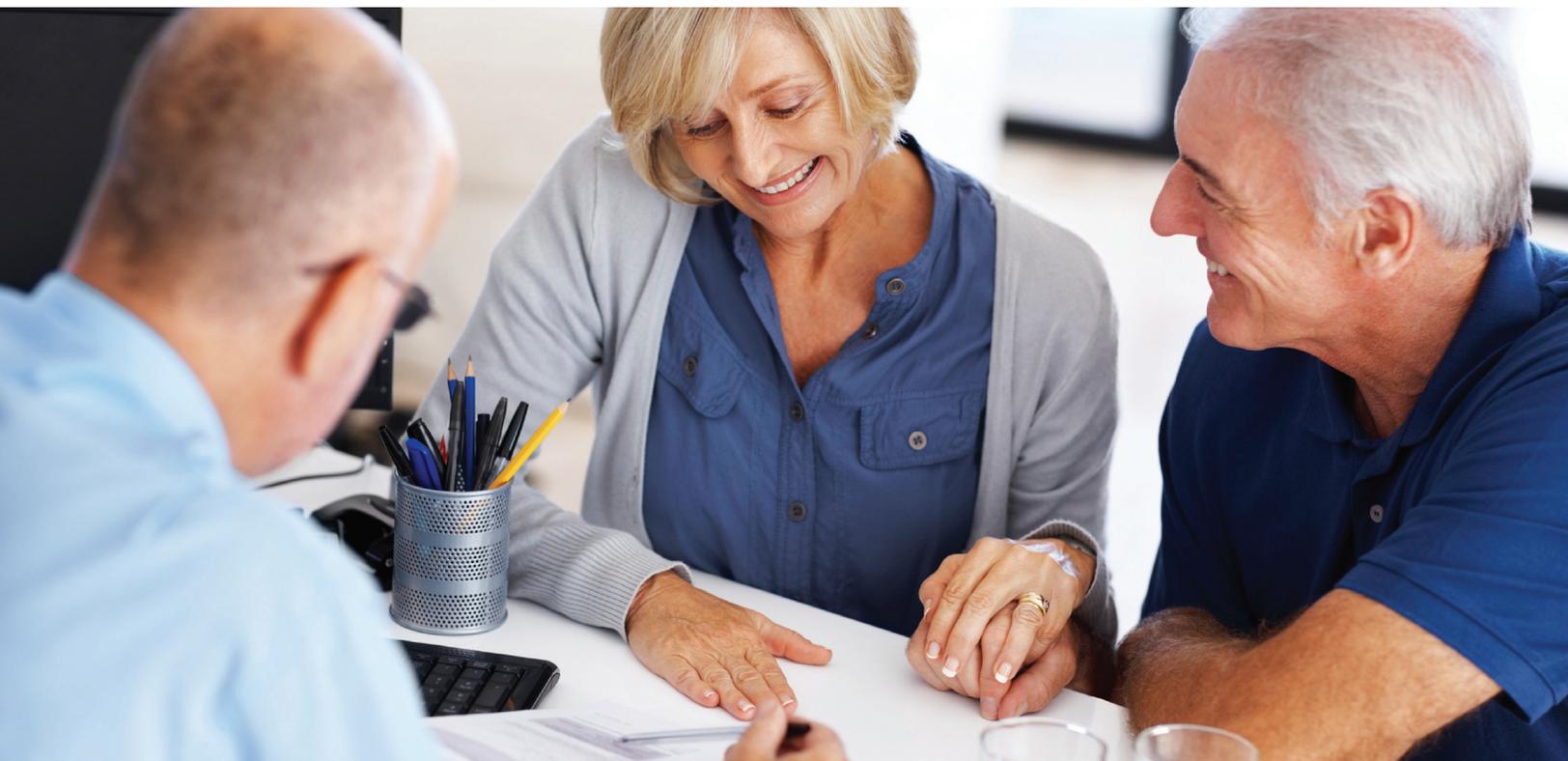
In many states, the public can have a copy of your will and an inventory of what's in probate. In these states, anyone interested in your estate (for business or creditor reasons, or just out of curiosity) can find out what's in your estate and who will receive what. Assets held in your trust bypass the probate process and are generally private information.

#### Continuity of management upon incapacity and death

If you become incapacitated or die, assets owned by your revocable trust can be managed by the trustee for your benefit or the benefit of your heirs—with little or no delay.

### If you have a revocable trust, do you need a will?

Even with a revocable trust, it is critical that you still have a will to distribute any assets you did not transfer to the trust during your lifetime, as well as for designating an executor (or personal representative) and a guardian for any loved one who is a minor. In this case, your will can add non-trust assets to your revocable trust after your death and distribute them according to the trust's provisions. This kind of will is sometimes called a "pour-over" will.



# Trusts need a trustee

If you've decided to incorporate a trust into your estate plan, you'll need to choose a trustee. You can be the trustee of your revocable trust, but if you become incapacitated or die, you'll need a successor. This could be your spouse or a family member, relative, friend, business associate, professional advisor or corporate fiduciary, such as a bank or trust company, or a combination.

## When you're choosing a trustee, you want to know that:

- Your wishes and desires will be carried out
- You can rely on your trustee's responsibility, judgment, common sense, good organizational skills and willingness to seek professional guidance
- The trustee is available and willing to serve

## Your choice could depend upon your trust's:

- Nature and value
- Expected duration
- Assets' nature
- Complexity
- Age, physical location and any special needs or circumstances of your beneficiaries
- Other factors

## Frequently asked questions

### What does a trustee do?

A trustee has both administrative tasks and legal obligations.

#### The administrative tasks include:

- Preserving and protecting the estate assets (including investing)
- Keeping records of income and principal, and not mingling trust assets with non-trust assets
- Exercising discretionary authority in a reasonable manner
- Filing state and federal tax returns
- Collecting all trust receipts and determining whether each receipt belongs to principal or income—or both
- Paying all expenses and deciding if each expense is principal or income, or allocable between them
- Providing accountings and communicating with the beneficiaries

**A trustee has to act as a fiduciary. Fiduciary duties include:**

**Exercising skill and care**

In most states, the trustee must administer the trust with the care, skill, prudence and diligence that a person familiar with the job of acting as trustee would, even if they're unfamiliar with the role. They'll still be held to a high standard of performance.

**Acting with impartiality**

The trustee must treat all beneficiaries impartially, unless the trust says otherwise. For example, the trustee shouldn't let one beneficiary use trust property to the exclusion of other beneficiaries without obtaining their approval or operating in the best interest of the whole group. For example, if the trust has real estate holdings, one of the beneficiaries is only allowed to live in one of the properties if he or she pays rent, or if the others agree to allow the beneficiary to live there.

**Being loyal**

The trustee must be loyal and avoid conflicts of interest. The trustee must administer the trust in the sole interest of the trust beneficiaries, and can't use the trust property for personal gain or any other purpose **unconnected** with the trust—even if there is no loss to the trust. They must keep trust property separate from their personal property at all times. They might also be called upon to enforce or defend claims involving the trust. The trustee must keep the terms of the trust confidential, and information regarding the assets of the trust and its beneficiaries private.



## **Should you choose a family member or professional trustee?**

You might want to choose a family member because family members are familiar with you, your situation and your values. They're also often willing to take on the role of trustee for little pay or for free. They might even be honored and think it's a great idea.

**Keep in mind, though, that the family member might:**

- Not have specialized knowledge or experience to manage the trust
- Have to deal with other family members' anger, jealousy and resentment of their power
- Be unable to act unemotionally and with true impartiality
- Not have the financial resources to cover mistakes
- Die or become disabled
- Be exposed to unforeseen liability, like an aggressive charity, spouses of deceased children or jealous siblings

## **What should you look for in a trustee?**

**Consider the following:**

### **Personal characteristics**

The trustee should be fundamentally honest, able to handle significant responsibility, and act decisively, fairly and with integrity. The trustee should communicate openly with the beneficiaries while still keeping appropriate confidentiality.

### **Judgment**

You're choosing a trustee to make decisions on your behalf, so he or she should share your values, virtues, spending habits and faith. If the person you have in mind doesn't have accounting or investment experience, would they be able to be honest about it and, thus, work with an appropriate qualified professional?

### **Interpersonal skills**

A good trustee needs to be able to work calmly and well with everyone. If this person you are nominating is easily intimidated or particularly headstrong, this can strain relations between the beneficiaries of your trust.

### **Impartiality**

The trustee shouldn't have any bias about any of the beneficiaries or have adverse interests to the trust as a whole. They have to act in a way that's totally consistent with your intent and the best interests of all of the beneficiaries.

**Time**

Administering the trust might involve a significant time commitment. The trustee has to understand this and have enough time to carry out the duties.

**Specialized knowledge and experience**

Being an effective custodian requires knowledge and expertise—or hiring advisors that are familiar with estate, trust and tax laws, accounting principles and investments. If the trustee hires outside experts, he or she should be able to evaluate the skills of such advisors.

**Investment experience**

A trustee doesn't need to have investment experience, but it can definitely be helpful. If not, he or she should be willing and able to hire professional counsel to help manage the trust's investments.

**Administrative capabilities**

Trustees undertake serious duties and are held accountable for their actions as fiduciaries. A well-organized trustee who can maintain good records is less likely to get into trouble if his or her authority is challenged. They need to have the resources to handle the responsibilities of the office, including maintaining records and safeguarding trust assets, or the knowledge and the ability under the trust document to retain assistants.

**Longevity**

How long will the trustee be needed? Many grantors are most comfortable with friends who share their values and have wisdom from life experiences, but someone near your age may not live long enough to complete the job.

**Your trustee and state income taxes**

The trustee you choose can impact how much tax your beneficiaries pay. Each state has its own rules for deciding if trusts are taxed. This tax is called the fiduciary income tax and it ranges from 3% to more than 10%, and when the trust tax is imposed varies. The basis for taxation can include where the trustee lives and where the trust is administered, no matter where you lived when you died. For example, states like Kansas, New York and North Dakota tax trusts just because the trustee is a resident. So, if you've named your child or sibling as a trustee or successor trustee, and they are a resident of one of those states, your heirs could be paying as much as double the state income tax on trust earnings.

# Preserving your legacy: Trusts for your heirs

Whether you have a will or a revocable trust, you can plan to reduce or avoid estate taxes and preserve your legacy for the people you choose.

Are you concerned about a child who isn't good with money? Are you married or in a committed relationship and want to support your loved one, yet have different goals or wishes for what happens when both of you are gone? Is your child good at managing money, yet you want to protect them from creditors, including the IRS? Do you want to avoid family conflict?

If you have concerns like these, you might consider holding an inheritance in a trust for your heir(s) instead of a lump-sum distribution.

## **These trusts can include:**

- Spendthrift trusts
- A trust for a spouse or other loved one
- A trust for a spouse who is not a U.S. citizen
- A trust for someone with special needs

# Preserving your legacy: Lifetime trusts

You may choose to have assets distributed outright to your loved ones as a lump sum or held in a trust. A lump-sum distribution is easy and makes sense in some cases. There are other options such as a continuing trust. Such trusts can be set to continue until a beneficiary attains a specified age or milestone, or can last for their lifetime—providing protection from creditors and keeping the assets in your family.

## Such trusts can help you:

### Avoid family conflict

Unfortunately, money can bring out the worst in people, even in the best families. One of the most important reasons to have a plan is to keep your family out of conflict. A trust can help you express your wishes, choose a party to carry them out, and direct the immediate and future use of the assets.

**Example:** You want to make sure your spouse is well provided for, yet you understand that he or she might remarry after you die. Instead of giving all assets to your spouse upon your death, you can set them aside in a trust. The trustee can use the income and principal to benefit your spouse during their lifetime and pay the rest to your children—and not a new spouse or stepchildren.





### **Keep the assets in your family**

Instead of having assets distributed according to your loved one's will (or lack thereof), you can have them held in trust for your spouse or child, with the remainder to your grandchildren (instead of in-laws or others who may not be related to you).

### **Provide help and education on managing money**

A trustee is responsible for managing and distributing trust funds. If your child or another person is inexperienced or irresponsible, choosing a third party as a trustee can make it so you don't have to worry that your funds will be mismanaged or spent unwisely. Your trustee can also work to educate your beneficiary until they are older and wiser.

### **Minimize future estate taxes**

Most estates won't pay a generation-skipping transfer tax because they are valued at less than the estate tax credit. Yet does that mean you shouldn't bother with creating a generation-skipping transfer tax trust for your children? Not necessarily. When a child's own wealth is (or will be) larger than the exemption, creating a generation-skipping transfer tax trust might increase your grandchildren's inheritance. Plus, your child or grandchild might live in a state that has its own death tax. If you choose to start a lifetime trust for the benefit of your spouse or other loved one(s), consider TIAA Trust, N.A. as your trustee. We can be a neutral decision maker adhering to your intent as set out in your trust document.

### **Through lifetime trusts coupled with a spendthrift clause, you can also:**

#### **Protect assets from an heir's creditors**

Most state trust laws allow the creator to include a "spendthrift clause" which says that trust assets may not be voluntarily or involuntarily transferred to most creditors. In most states, this means that a creditor of a trust beneficiary can only try to collect directly from the trust beneficiary after they are paid. The creditor can't collect against the trustee or the assets held in the trust. Your child can still be a beneficiary of the trust, and in many states can be the trustee of the trust for their benefit, and still have the built-in creditor protection.

# Preserving your legacy: Trusts for non-U.S. citizen spouses

A different set of estate tax rules apply to non-U.S. citizens. These include limits on transferring assets to your spouse whether by changing the name on an account, adding your spouse's name to an asset, or transferring an asset while you are living or when you die.

## **Lifetime transfer and gifts of property**

As a U.S. resident, you can give any person up to \$17,000 per year. As long as your gift doesn't exceed this amount, it won't trigger a gift tax or a requirement to file a gift tax return that uses up some of your lifetime gift and estate tax exemption. As a U.S. citizen, you can also give (either by an outright transfer or by adding a name and creating a joint account) unlimited assets to your spouse who is also a citizen (this is known as the "unlimited marital deduction").

If your spouse is not a U.S. citizen, the gift is currently limited to an annual maximum of \$175,000 (the amount is pegged to inflation and rises annually). Transfers above this amount will generally trigger a gift tax.



## Transfers at death

The unlimited marital deduction can be applied to most gifts between spouses at death. However, if the spouse receiving the gift isn't a U.S. citizen, estate taxes will affect gifts over the deceased spouse's available estate tax exemption if they're not structured properly.

One way to structure a gift is with a qualified domestic trust (QDOT), a trust for your spouse created upon your death. Since it's a more restrictive trust, it'll require a U.S. trustee. In addition, any principal distributions made from the QDOT are subject to estate tax.

If, after you die, the transfer to your non-U.S. citizen spouse will exceed the available federal or (any applicable) state estate tax exemption, it's best to meet with a qualified estate planning attorney.



# Preserving your legacy: Trusts for special beneficiaries

If you have disabled children or family members, they might need special care after you're gone. To ensure these loved ones always get the care they deserve, carefully consider how much of your estate goes toward funding that care, and how much of it will be your assets. The choices you make here are vital, as your gift will help protect and benefit your loved ones after you die.

## Key factors that determine level of care:

- The nature and severity of your loved one's disability or medical needs
- If they're self-sufficient and can make a reasonable living
- Whether they're mildly disabled (therefore ineligible for government disability) and need long-term living arrangements, like subsidized housing
- Whether they're severely disabled (yet could count on government assistance) and living arrangements would probably be taken care of

## Supplemental needs trusts

If your disabled loved one is (or will be) eligible for government assistance or benefits, figure out if that eligibility is "need based" or based solely on their disability.

## Eligibility

Eligibility for need-based programs such as Supplemental Security Income (SSI) and Medicaid takes into account your loved one's assets. As a general rule, they can't have more than \$1,000-\$2,000, and a larger inheritance will most likely delay government assistance temporarily or permanently.

In some states, through specific trust terms, an inheritance can benefit your heir, but not be considered an "available resource" for the purpose of determining their eligibility.

## This type of trust gives your trustee the authority and flexibility to access funds to pay for your disabled loved one's:

- Medical treatments and equipment not covered by government benefits
- Advocacy to help them access and continue receiving vital services
- Residential expenses like repairs, maintenance, real estate taxes and utilities
- Computer equipment, Internet and cable television
- Vacations, social events and other entertainment
- Funerals and burial costs

For a detailed look at special needs trusts, TIAA clients can read our whitepaper "Setting up a special needs trust for a disabled loved one."

# Preserving your legacy: First and second beneficiaries

Are you married or in a relationship and want to support your significant other in their estate plan, yet your goals or wishes differ on what happens when either of you are gone? It's important to think about this and understand the effect intestate succession and local laws might have on certain assets (like your home) for your joint owner or beneficiary.

## **This is Kris and Pat**

They jointly own a house. Kris has an IRA and lists Pat, his partner, as his primary beneficiary and Jeffrey, his child with Pat, as his contingent beneficiary. Kris has an investment account, but it doesn't list a "payee upon death."

Pat also has kids from a previous relationship, and neither Kris nor Pat have a will or trust. Sadly, while traveling, the two get in a serious accident. Kris dies, and Pat never regains consciousness, passing away a week later. Since Pat survived Kris, Pat inherits Kris' IRA, and because Pat didn't have a will and trust that said otherwise, Jeffrey and the children from the earlier relationship are Pat's legal heirs and now share Kris' IRA and the house. What happened: A contingent beneficiary (generally) only applies if the primary beneficiary didn't survive the owner of the IRA.

## **What if Kris decides to share the house, yet wants his IRA to go solely to Jeffrey? Is this possible?**

**Absolutely.** Kris and Pat meet with an attorney and create wills. However, each will says that the testator's own children are to inherit the property owned by Kris and Pat, respectively. Due to the survival rules and terms of their wills, the same thing will occur: because Pat survived Kris, Pat inherits the IRA, and since the will says that all of Pat's children are his heirs, the result is the same, as if Kris and Pat didn't have wills.

## **The solution: A trust for Pat**

**Both of these unintentional outcomes could have been avoided with a well-thought-out estate plan, which might include a trust for the benefit of Pat or the kids. What's smart about using a trust is:**

- Your spouse can get trust income at least annually
- Your trustee has the choice to use the trust principal to benefit your spouse
- Your kids and other loved ones know the trust assets are safe from your spouse's creditors and from inheritance claims made by your spouse's family
- Your kids and other loved ones know they will get the trust assets after your spouse dies

If you choose to start a lifetime trust for the benefit of your spouse or other loved one(s), consider TIAA Trust, N.A. as your trustee. We can be a neutral decision maker, always balancing the needs of your spouse and your other loved ones.

Baby boomers say personal keepsakes, family stories and last wishes are a far more important bequest than money. 64% of boomers and 58% of elders say family mementos and heirlooms are an important inheritance. Just 9% of boomers said they're eager to inherit money, while 14% of elders said financial assets are a vital legacy to leave.

### **Common residence**

There's always the chance that, after you die, your home could become a source of friction between your spouse and children, or other loved ones. Something to think about is how you want everything to play out—who will own the house, who can live there and how will the space be divided up?

### **Antenuptial or postnuptial agreement**

An antenuptial agreement is a contract between soon-to-be spouses. A postnuptial agreement is a contract between a married couple. While there are major differences between the two agreements—related to timing and legal obligations within marriage—you need both for one reason: To sort out your spouse's property, support and inheritance rights if there's a divorce or one (or both) of you die. It's important to make sure your estate plan is consistent with the terms spelled out in these agreements.

### **Tangible personal property**

Tangible personal property, like jewelry, artwork, collections, family photos and family memorabilia, can cause a rift between your spouse, your kids and other loved ones. When you create your estate plan, ask each person what financial and/or sentimental value these items have to them; then figure out who you want to get each item.

Along with this legally binding list of personal items in your will, some states let you put in writing a separate listing of who gets what. This is easy to do, and you can change it at any time.

For those states that don't recognize these lists as legally binding, you can still use them, but they're only morally binding for your executor or those who inherit your property. To guarantee specific items go to certain people, it's best to have them as bequests.

### **Joint property and beneficiary designations**

If you want to create a trust for your first beneficiary and a second beneficiary, make sure you understand the dynamic between the ownership of your assets and both beneficiaries.

Please refer to the next section to learn more.

# Bringing it all together: Coordinate asset ownership and beneficiaries

Now that you've put in the time and effort to create your legal documents, make sure you avoid the second most common estate planning mistake—forgetting to coordinate ownership and beneficiary designations. To better understand how this works, let's look at how assets transfer when you die.

## Sole ownership

This type of ownership happens when you have complete title to the property. When you die, the property is often given through a beneficiary designation, a pay-on-death designation or in probate court based on your instructions in the will or state law if you don't have a will.

Assets like retirement accounts have to be owned (only) by you throughout your life. Many of these accounts let you use a beneficiary form to choose the next owner, whether it's your trust or someone else. It's also best to check your beneficiary designations regularly to make sure they're up-to-date and match your wishes.

## Tenancy in common

Two or more owners, including you and your spouse, can own property concurrently without a survivorship feature, and with the same or different percentages of ownership. This type of ownership is like sole ownership in that when one owner dies, his or her property interest doesn't automatically pass to the other. Instead, the deceased person's share of the property passes either by beneficiary designation, the deceased owner's will or state intestacy law.



### **Joint tenancy with right of survivorship**

Two or more people—who don't have to be related—can create a joint tenancy with right of survivorship for many kinds of property, including real estate. Each person, with an equal ownership stake, has full rights of survivorship. When one dies, by state law, property ownership automatically shifts to the surviving owner. In general, joint ownership offers the benefits of survivorship without probate court and cash access right away. If you don't want the surviving owner to have the entire account (as seen with Sam and Pat in an earlier example), or you don't want separate heirs of a surviving owner to get the entire balance, think about changing ownership.

**Example:** Pat has two sons, Paul and Richard. Pat puts \$200,000 in joint tenancy with right of survivorship with Paul “for convenience.” Pat's will distributes the estate equally to Paul and Richard. Not long after, Pat dies, so Paul gets \$200,000, while Richard doesn't get anything. In most states, the account goes to Paul by law, regardless of the will provisions.

### **Beneficiary designations of transfer- and pay-on-death**

A beneficiary designation of pay-on-death (POD) and transfer-on-death (TOD) are two types of “nonprobate” transfer. The beneficiaries you choose are controlling, and unless the beneficiary is your “estate” or your revocable trust, neither your will nor trust will direct how the account is disposed.

If your wishes are laid out in the trust, but the beneficiary designated on the form is not the trust, the trust terms don't apply (e.g., the creation of a creditor-protected trust for your child or to hold assets in trust for your spouse for life, and then to your chosen beneficiaries, not the ones your spouse might choose).

It's important to understand how your beneficiary forms, your will and trust, and the property ownership form all work together. So it's a good idea to talk with a tax or legal advisor before making changes since there might be income tax penalties on retirement account minimum payout requirements, which depend on who your beneficiary is.

### **Revocable trust**

If you've chosen a trust, its terms only apply to assets owned by the trust. If you don't transfer the ownership of assets while you are alive or specify a “nonprobate” transfer upon your death, the main reason for the revocable trust—avoiding probate—can't happen.

What's more, a beneficiary designation that lists one or more people trumps the provisions of your will and trust. Understanding how these choices, as well as how the order of death of joint owners or beneficiaries affects inheritance, is critical to your whole plan.

### **Plan default rules**

Just like the laws of intestacy—a “default plan” in the event you die without a will and/or trust—a retirement plan might have default terms. You'll want to understand those rules and your right to choose different beneficiaries.



**Example:** Sam dies with \$25,000 in his bank account and \$100,000 in his retirement account. Pat is his widow, and Paul and Richard are his two sons from his first marriage. Sam's will says that 50% of his property goes to Pat and 25% each to Paul and Richard. However, Sam didn't choose a beneficiary for his retirement account. So under the plan rules, the entire account goes to Pat alone. Pat gets \$112,500, Paul gets \$6,250 and Richard gets \$6,250, which is 25% of the only asset: the bank account that transferred by Sam's will.

### **How does the order of death affect inheritance?**

Let's take a look. For example, you and your spouse state in your will that you want your spouse to inherit your property, and if your spouse doesn't survive you, your children should inherit it. Plus, on your beneficiary forms, you list your spouse as primary beneficiary and your kids as contingent beneficiaries. That's great, right?

Wait. Your kids are not your spouse's children. This means if your spouse survives you (in some states, survivorship requires only a few minutes; in others, several days), your spouse's heirs, as listed in her will, may inherit all of your assets. Your kids won't get anything.

**Example:** John and Jane jointly own a house. John has an IRA and listed Jane as his primary beneficiary, with his children as the contingent beneficiaries. Jane has an investment account which doesn't list a "payee upon death." She also has children of her own. Both Jane and John's will says that their jointly owned property will be divided equally amongst all of their kids, and that Jane and John's separate property will go to their respective children.

While traveling, John and Jane are involved in a serious accident. John dies, and Jane never regains consciousness, passing away a week later. Since Jane survives John, she inherits his IRA, and because her will specifies that her kids inherit her property, they get John's IRA, and 100% of the house. This happens because a contingent beneficiary generally only applies if the primary beneficiary didn't survive the owner. The house was no longer jointly owned because Jane was the surviving owner.

This might not have happened if both wills had very specific instructions, including for potential beneficiary scenarios like the ones above.

#### **Consider**

- When's the last time that you looked over the titling of your real estate?
- What about the titling and beneficiary designations for your other assets?
- Are you comfortable that your asset titling and beneficiary designations match your wishes?
- Are you comfortable that your asset titling and beneficiary designations are organized to minimize income and transfer taxes?
- How are your safe deposit box, automobile and/or U.S. savings bonds titled, and have you designated beneficiaries for these assets yet?

# Choosing an estate planning attorney

You have lots of options available to start preparing your estate plan today. You'll find many websites and software options that offer estate planning guidance or the chance to create your own documents, and for much less than it costs to work with an attorney.

While these technology-driven options are pretty good bargains, partnering with an attorney for your estate plan can prove invaluable.

**For example, the fact that a document is signed and dated doesn't automatically mean it's valid. Courts can look beyond the document to determine:**

- Whether its maker has "capacity"
- Whether its maker acted freely
- Whether the document was done according to applicable state law

If a court finds otherwise, it can set aside the document or even take charge of its maker's personal and financial affairs, sometimes at significant emotional (and administrative) cost to the family.

We recommend working with an attorney. You might have to do some initial legwork, but the time and effort you put toward getting yourself the right estate planning attorney is something you simply can't put a price on. Plus, you'll have the peace of mind you deserve.

**Here are guidelines to help you make the best decision for your circumstances:**

## **Knowledge and experience**

With tax law constantly changing, it's key that you pick an estate planning attorney who knows the tax laws inside and out, and how they might affect your plan.

## **Your comfort level**

Working on an estate plan is not a one-time task. It's the start of a long-term relationship where you place your confidence in a professional to guide you, now and into the future, with the solutions that fit you best. Since you'll be revealing sensitive confidential information to this person, you need to feel confident that they've completely earned your trust.

Your attorney's knowledge and experience as an estate planner is also key, but your comfort level with this person is just as important, if not more so. Do they truly listen to and understand any concerns you have, and do they genuinely want to be of service, explaining all your options simply and clearly? Or does the attorney seem put off by your questions, making you feel like you're getting a stock answer or solution?

### **Expense**

When you hire an attorney, make sure you get the most for your money. Don't sacrifice quality just to save a few dollars, especially when it comes to something as important as your estate plan.

To maximize the value of service and support you get in return, don't hesitate to ask them questions about billing:

- Do you bill by the hour or a flat fee?
- If you bill at an hourly rate, how much is it and roughly how many hours do you think you'll need to complete my estate plan?
- If you charge a flat fee, what services does it include?
- Do you charge extra for a basic consult (answering questions I have up front)?

### **Timeliness and responsiveness**

A good attorney will always get back to you quickly, so be sure to ask how long it takes to have a draft(s) for you to review and how much time they'll need to make any changes you request.

### **Location**

Think about how important where you live is to you. Can you—or are you willing to—potentially work with the attorney at their office, out of town? Does traveling that distance pose a major challenge? Take your time to consider how or if these things might factor into deciding who to hire.

#### **Important to note:**

Delays could have a major impact on you and your heirs. For example: Let's say your attorney promises your will is going to be done before you have your surgery. However, if your estate plan isn't finished and you die on the operating table, your estate is then considered intestate and your assets will go to the state, according to state law, rather than according to your wishes and instructions. Therefore, it's highly recommended, and a good idea in general, to check the attorney's references and ask questions about their responsiveness ahead of time.

### **Retainer agreement**

Earning your trust is essential to the client/attorney relationship. When it comes to the written retainer agreement, your attorney should provide you with one that details their responsibilities, as well as what part you'll play. You'll want to make sure the agreement breaks down every aspect of the fee structure in laymen's terms and is clear about when you're expected to pay. The more specific your written agreement, the more you reduce the chance of any misunderstanding between the two of you.

### **What's next?**

Now that you know you want to start an estate plan or need to update your plan, what else do you need to think about before you visit with an attorney?

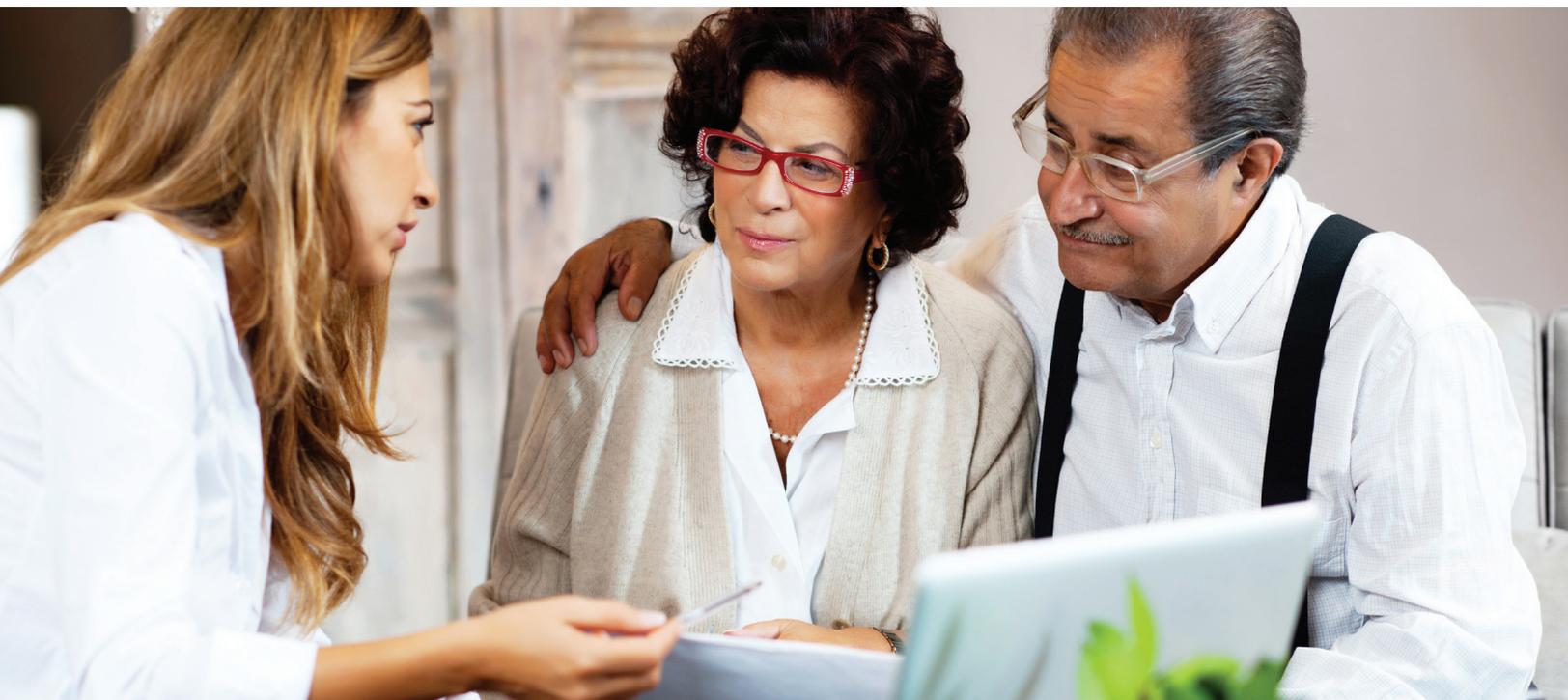
**It's as easy as who, what, when and how. Here are some ideas:**

- Who would you choose to be your healthcare decision maker?
  - Who would you pick to take care of legal and financial matters while you're alive, yet unable to do it yourself?
- Who do you want to receive your inheritance?
- What do you want them to inherit?
- What are your goals?
- How do you want your inheritance managed?
  - Who will take care of gathering and dividing assets according to your wishes?
- Who will take care of managing the wealth for your beneficiary?

### **The TIAA attorney referral list**

TIAA created a process to help you choose the attorney who may be right for you. Look to your TIAA advisor to give you a list of local attorneys who have experience in estate planning.

The attorneys contained in the list have represented that they have experience with estate planning. This list is provided to assist our clients in identifying estate planning attorneys in certain geographic locations, but it should not be used as a substitute for determining whether a particular attorney is qualified to meet your needs. TIAA and its affiliates do not specifically recommend, endorse or sponsor the individual attorney, law firm and/or services provided. Moreover, TIAA and its affiliates will not be liable for any damages, losses or causes of action of any nature that may arise from any legal services provided by the attorneys or law firms contained in the estate planning attorneys list.



# 10 reasons to consider updating your estate plan

As a rule, it's a good idea to look over your estate plan every five years to give you peace of mind in knowing your estate plan is done right, and it gives your attorney the chance to review your plan and let you know of any changes in estate planning law.

Here are 10 things that signal it's time to take a look at your plan:

- 1 A new family member:** Many people who create an estate plan have a new child or other descendants come into the family after the plan is completed. If this is the case for you, review and update your plan soon after they become part of your family, while it's fresh in your mind.
- 2 Someone passes away:** If you're a surviving spouse, child or successor trustee, don't hesitate to reach out to an attorney (or other tax and financial advisors) for help. They can prove invaluable on what to do in light of your loved one's death, and can review and update your plan accordingly.
- 3 You and/or a family member get married:** If you or one of your beneficiaries plan to get or were recently married, make sure you understand the effect the marriage has on your estate plan. A surviving spouse and the spouses of your kids might then have rights to your wealth, no matter what your existing plan says. Understanding your rights in these cases is important.
- 4 You or a family member separate or divorce:** In most states, there are laws that don't allow your ex-spouse to have certain fiduciary positions, which often kick in when the divorce is final. In the meantime, you might not want your spouse making any decisions (including about healthcare) for you. It's also a good idea to update your estate plan right away.
- 5 Financial trouble:** If you haven't already included "spendthrift" trusts for your heirs—especially if they're in financial trouble or bankruptcy—you might want to find out if you can set up a plan to protect their inheritance.
- 6 You start or close a business:** Opening and running a business can be quite rewarding. To keep it going and profitable in the event you become incapacitated or die, make sure to have a plan in place. Whether that's with a will or a trust, take the necessary steps to make sure your business will be managed by the person you want and/or passes to the beneficiary you choose.
- 7 You add assets:** Your estate plan accounts for the assets you included when you first created the plan. In some cases, adding new assets or converting old ones might alter your estate plan in a way that no longer serves your needs the way you pictured them.

If that's the case, contact your estate planning attorney every time you buy a new home or other property. They'll make sure this new asset gets added to your estate plan. If you have a revocable trust, they can help move the new property to your trust. If your new property is in a different state, you might want to bypass a simple will and go with a revocable trust instead.

- 8 Changes in federal or state law:** While many laws are permanent, a change can happen at any time, with such changes usually well publicized. If you hear of one, contact your attorney right away to find out if it affects your estate plan.
- 9 It's been a long time since your last update:** If it's been more than five years, consider (at least) reviewing your estate plan to make sure it still reflects your wishes.
- 10 You move:** If you move for a job, loved one or even for better weather, and you're wondering if you need to redo or update your legal documents, talk to your attorney. Like many, you've invested a great deal of time, effort and money to create your estate plan, and chances are you really don't want to have to start over.

In general, if your plan is valid in your previous home state, it's also valid in your new one. In fact, most state laws confirm this. Sometimes, however, state laws and requirements differ. So it's a good idea to have a fresh set of documents that meet the laws of your new home state.

If you move to a state that doesn't tax earned income, list your residency in new legal documents to prove to officials in your previous home state that you're no longer a resident subject to taxes.

## **What's moving got to do with it?**

No two states have the same laws, which includes the trust code. So a trust that says it has to be governed under the laws of another state might create confusion and disagreements that end up costing your heirs time and money. There also might be certain elements of your trust that are no longer enforceable under the new state's laws, in which case you might want to just cancel it and start over.

### **Marital property rules**

If you marry and then move from a community property state to a noncommunity property state—called a “common law” state—or vice versa, the rules about what you and your spouse own and who you can pass those assets on to in your will or trust are going to change.

In common law states, property belongs to whoever's titled on the asset, such as a deed or account holder. If both you and your spouse are listed as asset owners, then your property is owned by both of you. However, 10 states treat these assets as “community property,” where both spouses share equal ownership of the property or earnings. So it's important to understand if your move affects the ownership of your properties.

### **Homestead**

A few states have creditor protection for your home so that it can't be sold to satisfy debts, like Florida, which has unlimited protection. Often, there's also a property tax break for homeowners (benefits vary by state). There also may be restrictions on to whom you can devise your property, such as a requirement that it be devised to your spouse, that isn't addressed in your existing plan. If your plan doesn't address homestead rules in your state, it may have unintended consequences.



**Formalities**

In almost every state, your trusts, wills and general powers of attorney have to be notarized. Some require all of your documents to be witnessed; in others, you'll need one or two witnesses; and in a few states, you don't need any. While your out-of-state documents might be valid, some local financial institutions won't recognize the documents if they don't comply with local laws. Plus, no matter what state law says, your family might have an easier time with a healthcare directive and living will if it's in a format that's familiar to local medical providers.

**Probate: wills vs. trusts**

State and local procedures in probate matters varies. In some jurisdictions, probate is a relatively simple matter and wills are the norm. In others, probate is more complex, costly or time consuming, and you'll find that attorneys generally recommend revocable trusts. Your local expert can help you decide.

**Your personal representative**

In many states, a person who's not a resident might not qualify as a personal representative, also called an executor, unless he or she's a relative. So you might have to change this in your will.





# Appendix:

## A summary of the current federal estate and gift tax landscape

### Federal estate taxes

As a U.S. citizen or resident, your estate and assets are subject to an estate tax before they go to your heirs. Estates valued at more than \$12,920,000 for 2023 may be subject to federal estate tax. This amount is indexed for inflation through December 31, 2025. In 2026, the amount will revert to the \$5,000,000 amount set in 2013 (also indexed for inflation). The tax rate on estates greater than this amount is 40%. This increased federal estate tax exemption between 2018 and 2025 may present planning opportunities for some clients.

The tax exemption is per estate, so if you're married, you may each be able to transfer this amount.

Another important exemption, the "unlimited marital deduction," applies to transfers made to your spouse. This deduction lets you transfer any and all property to them, free of estate taxes, as long as your spouse is a U.S. citizen.

### What's included in your estate?

In general, everything you own when you die is in your "taxable estate." This includes property that'll be transferred under your will and/or revocable trust and property that transfers by law, like jointly held property with right of survivorship or property that transfers by beneficiary designation, like life insurance and your retirement assets.

**This means your total estate includes assets such as:**

- Property in your name
- Half of all property you hold jointly with your spouse
- The death benefit of life insurance on your life and the cash value of life insurance that you own on another's life
- IRAs, pensions and annuities, etc.

Liabilities like your funeral expenses, debts and charitable bequests are deducted from your gross estate before figuring out any estate taxes.

### Gift tax

What if you just start giving it all away while you're still here? If you don't own it when you pass away, it won't be part of your taxable estate. Unfortunately, the government knows you just might consider doing this, so there's potentially a tax (there is an exception) on any transfers/gifts you make while you're alive.

**That said, there are generally four exemptions or exceptions to protect those gifts:**

- The unlimited marital exemption on gifts to your U.S. citizen spouse
- Gifts that don't exceed the annual exclusion, which you can make to anyone—plus, your spouse may join you to double the gift
- Part or all of your \$12,920,000 lifetime gift tax exemption (indexed for inflation each year)
- Qualified transfers in any amount, free of gift tax, that you make on behalf of another (though not an exemption, they're an exception to the rule) directly to:
  - An educational organization for tuition payments (can't include dormitory fees, books, supplies or other expenses)
  - A person or organization that offers medical services, including insurance (can't include medical expenses where the individual gets an insurance reimbursement)

### **State gift, inheritance and estate taxes**

Beyond federal estate taxes, many U.S. states have their own taxes. Estate taxes will come from your estate no matter who gets your assets. Inheritance taxes will be collected on the transfer of those assets to your heirs, depending on your relationship to them.

Currently, 17 states and Washington, D.C., will levy an estate tax or inheritance tax. Maryland is the only state with both levies in 2023.

New Jersey repealed the estate tax but retained the inheritance tax on non-lineal heirs, such as siblings and nieces or nephews.

That said, these tax rules have constantly changed in recent years, so make sure you confirm those listed here with your tax advisor.

**Please note:** This is especially important, as the top rate has been as high as 20% in some states, which can have a substantial effect on your heirs if you live in one of these states.

### **Generation-skipping transfer tax**

Finally, there's the generation-skipping transfer (GST) tax, a tax on transfers to your grandchildren or great-grandchildren. It's a flat tax at the rate of 40% for federal purposes. As with most other taxes, there's an exemption, just like your other federal estate tax exemption.

A woman with long brown hair, wearing a dark green sleeveless top and a pearl necklace, is sitting on a set of concrete stairs. She is smiling and looking towards the camera. The background shows the steps of the stairs and a metal handrail on the left side.

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GGN-2727977PR-Y0124P  
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