WHAT IS ESTATE PLANNING?

(A Primer)

Estate planning is about developing a plan for what happens to you and your assets (including money, accounts, stock, household items and real property) when you are not able to do so. Plans range from simple to complex. Who is able to take care of you, where you will be taken care of, how you will be taken care of and related considerations factor into your plan. The value of your assets, what kind of assets you have, the location of your assets, who gets your assets and similar considerations likewise play a role in the complexity of an estate plan.

PURPOSES

1. Preparing or avoiding probate of your assets.

   The benefits include:

   - Your assets can be distributed to or held for your beneficiaries in a timelier manner.
   - Your estate avoids costly fees of administration (including legal fees).
   - Assets can be held for minor children without Court involvement.
   - Avoids possible public knowledge of and Court approval of your affairs.
   - Your estate is distributed to your intended beneficiaries versus the provisions of Missouri or Illinois statutory law.
   - Avoid the time necessary to complete probate (especially if there is no **WILL**, the time to process a **PROBATE ESTATE INTESTATE**)

2. Maximize estate tax avoidance and legally minimize any applicable estate tax payments.

3. Planning for the rest of your life

   - In the event you can no longer make financial and/or health care decisions, an effective plan can avoid court intervention and allow the individuals you designate to step in and make decisions on your behalf.
   - Express your decisions regarding healthcare decisions involving your care including end of life decisions.

A few terms that relate to estate planning:

- **ATTORNEY IN FACT**. The person authorized to act in the stead of another.
- **CODICIL.** An amendment to a **WILL**.
- **DECEDENT.** A person who has died is known as the **DECEDENT**.
- **DURABLE POWER OF ATTORNEY.** Authority to act on behalf of another which is not extinguished by the incapacity or disability of the individual granting the authority to act.
- **INCAPACITATED/DISABLED.** A person who lacks legal ability to make a contract or their own health care decisions is **INCAPACITATED** and a person who lacks the physical ability to care for themselves or their property is **DISABLED**.
- **HEALTH CARE POWER OF ATTORNEY**
- **INTESTATE**. To die without having a **WILL** is to die **INTESTATE**.
- **LAWS OF INTESTACY**. The state laws which control division and distribution of the assets of a person who dies without a will.
- **LIVING WILL.** Directions for the provision or removal of care by a person who has become disabled or incapacitated.
- **NON-PROBATE TRANSFERS.** Transfers which occur without the necessity of probate.
- **PROBATE.** A noun and a verb. As a noun, it is the official proving of a will, and, as a verb, the process of administering the property of a deceased, disabled or incompetent person.
- **PROBATE ESTATE.** The collection of property which is available for payment of probate administration, final debts and expenses and transfers upon death as directed by the decedent's last will and testament or **LAWS OF INTESTACY**.
- **TESTATE**. To die with a will is to die **TESTATE**.
- **TESTATRIX/TESTATOR.** The woman/man who has died leaving a **WILL**.
- **WILL**. The short form of last will and testament of a decedent.

WHAT IS A WILL?

A **WILL** is a legal document that directs who is to receive your property when you die and how you want that administered. Anyone 18 years or older and of sound mind can make a **WILL**. To be valid under Missouri or Illinois law, a **WILL** generally must be signed before two witnesses, who are not heirs. A will can be revoked a number of ways, including when the **TESTATOR/TESTATRIX** destroys the original and any copies you make. A **WILL** can be changed at any time by a **CODICIL** or replaced by a new **WILL**. **A WILL DOES NOT AVOID PROBATE!** In order for a **WILL** to be a **WILL** after you die, it must be probated. A properly executed **WILL** which is not timely admitted to probate as the **WILL** of a **DECEDENT** is also known as a piece of paper! **WILLS** typically have to be admitted to probate within 1 year of the date of death of the **TESTATOR/ TESTATRIX**.

SO, WHAT HAPPENS TO YOUR PROBATE ESTATE IF YOU DIE WITHOUT A WILL?

If you die without a **WILL** (i.e., **INTESTATE**) different laws may apply to dictate the distribution of your property; however, it is generally the **LAWS OF INTESTACY** for the state of your final residence which direct who is entitled to your **PROBATE ESTATE**. By titling property in different ways, it is possible to avoid **PROBATE** completely, whether or not you have a **WILL**.

If you own land or personal property in joint tenancy with right of survivorship or jointly with your spouse in some states, then the surviving joint tenant or spouse receives your property upon your death (despite what your **WILL** may say). On the other hand, if your interest in property, land or personal, is owned as tenants in common, or in case your solely owned property does not specifically provide for any disposition on death, then it will be distributed according to the terms of your **WILL** and the laws of **INTESTACY**.

The only way to be certain who will receive property of your **PROBATE ESTATE** is to have more wealth than debt when you die and create a **WILL** and other corresponding estate documents. Because joint property may pass automatically, you must also own your property in ways that are consistent with your **WILL**.

WHAT IS PROBATE?

- Probate is the formal process by which the Court appoints someone to care for a person and the person’s property rights, supervises that care, determines the legal heirs of the person when the person dies, appoints a person to administer the **DECEDENT’S** final affairs and supervises the management and distribution of the **PROBATE ESTATE** to the heirs at law or named in a **WILL**.

- Probate occurs whenever someone dies or becomes incapacitated with no one who has legal authority to care for the person or the person’s property rights.

- A family member typically serves as the "Personal Representative," and administers the **PROBATE ESTATE**. Unless the **WILL** waives the requirement of a will and allows for administration without court approval (i.e. independent administration), the family member is required to be bonded and supervised by the Probate Court. The Personal Representative must account to the Court for every asset brought into the estate and every distribution made out of the estate (by filing forms and copies of all receipts). These documents are all public.

- If an heir is an **INCOMPETENT/DISABLED** person (e.g. a person under 18 is incompetent), the Probate Court may appoint a guardian to care for the person and a conservator to care for the property distributed to that heir until the heir becomes competent (e.g. turns 18) or is no longer disabled. Probate related to an **INCOMPETENT/DISABLED** person requires an annual reports and an accounting to be filed and annual administrative fees to be paid.

- If you do not have a **WILL**, then your property (other than jointly held or which has a designated beneficiary (for example, a "Pay on Death" designation)) will be distributed under the **LAWS OF INTESTACY** in the state in which you resided at the time of your death or where the property is located.

AVOIDING PROBATE

Why do we work so hard to avoid probate? Have I failed my family/beneficiaries if my estate is probated? We typical avoid probate for the reasons listed above. Although there are many reasons to avoid probate, there are times when, because the estate planning process is not yet complete when the **DECEDENT** dies, the family make up (including disputes among family members when there have been divorces and re-marriages), lack of sophistication among the heirs, geography, nature of the **PROBATE ESTATE** or other reasons make **PROBATE** proper, necessary and worthwhile. **PROBATE** may be avoided by using or giving everything away before you die. If you are not expecting to do that, then it can be avoided through the form of ownership, titling assets with beneficiary designations or transferring property to a trustee to hold the property in trust.

FORMS OF OWNERSHIP OF PROPERTY IN MISSOURI

Common forms of ownership of real property (land) and personal property (everything other than land):

- **JOINT TENANTS WITH RIGHT OF SURVIVORSHIP**-Two or more individuals own an asset together with right of survivorship. Upon the death of the first joint tenant, the surviving joint tenant(s) own the property.

- **TENANTS BY THE ENTIRETY**- Any asset owned jointly by a husband and wife. Upon the death of the first spouse, the survivor becomes the sole owner of the asset. This form of ownership offers married couples protection for the jointly owned assets from the creditors of one spouse.

- **<u>TENANTS IN COMMON</u>**- Two or more individuals own an asset together with no provision for survivorship. Upon the death of the first common owner, the share of the asset owned by the decedent becomes part of the decedent's probate estate and is distributed pursuant to the terms of the decedent's **WILL** or is distributed under the laws of intestacy.

- **<u>SOLE OWNERSHIP</u>**-Upon death the asset owned by the decedent becomes part of the decedent's probate estate and is distributed pursuant to the terms of the decedent's **WILL** or is distributed under the laws of intestacy.

- **<u>CONTRACT ASSETS</u>**- Assets which are held by a third party under the terms of a contract. Upon the death of the owner of the asset, the asset is distributed pursuant to the terms of the contract. Contract assets ordinarily provide for designated beneficiaries to receive all or part of the asset. Examples of contract assets are life insurance, individual retirement accounts, retirement plan assets, and annuities.

- **<u>PAY ON DEATH (POD) or TRANSFER ON DEATH (TOD)</u>**- Certain accounts in financial institutions, such as a checking account, savings account, certificate of deposit and other instruments of title such as stock certificates or automobile titles, can provide for a designated beneficiary or beneficiaries to receive the asset upon the owner's death.

- **<u>BENEFICIARY DEED</u>**- By deed, the owner(s) of real property designate a beneficiary or beneficiaries to receive real property upon the death of the owner(s). Until the death of the owner(s) the beneficiary may be changed and the Beneficiary Deed can be revoked. The real property may be mortgaged or sold without the consent of the beneficiary.

<u>JOINT TENANCY</u>

You may feel that joint tenancy sounds like a good substitute for a **WILL**. Joint tenancy allows you to pass assets to your spouse or children, for example, by adding the names of the spouse or children to your assets. However, there are several reasons why relying upon joint tenancy is not an adequate substitute for a **WILL**:

- First, there are potential gift tax consequences when you add any person, other than your spouse as a joint owner of property. There are different gift tax consequences to adding a joint tenant to real property and personal property.

- Second, except for joint bank accounts, once you add someone to an asset as a joint owner, they have legal rights to those assets. Exercise of those rights may be inconsistent with your present enjoyment of the asset. For example, if you add a child as a joint owner of real estate, if you wish to later sell the real estate, you need the consent of your child and his or her spouse to sell the property. (This can be extremely awkward in case a rift develops between the owner and the child) In addition, a portion of the proceeds from the sale will go to the child.

- Third, if the joint tenant dies first, you are back to the start.

- Fourth, an asset owned jointly with someone other than your spouse in Missouri may be available to the creditors of the joint tenant.

- Fifth, you and the joint tenant may not agree on how to handle the jointly owned asset.

- Sixth, a jointly owned asset with your child may end up in the hands of the child's spouse.

Basically, by adding a joint tenant, you may lose control over the asset and cannot unilaterally change your mind about the transfer later. In the alternative, a disposition of that asset by **WILL** or a **REVOCABLE TRUST** can always be changed.

WHAT IS A TRUST?

A **TRUST** is an agreement which provides for property to be managed and distributed during a person's life or after his or her death. The assets which make up the **TRUST** are the trust principal. The trust principal generates trust income. A **TRUST** will usually involve three parties:

- **Grantor/Settlor**. The individual who establishes the terms of the **TRUST** and provides the property to be managed and distributed by the **TRUST**.

- **Trustee or Trustees**. The individual, individuals or institution which agrees to manage and distribute the assets of the trust pursuant to the terms of the **TRUST**. The Grantor may be the trustee.

- **Beneficiary or Beneficiaries**. The individual, individuals or organization which receives the benefits of the **TRUST** income and distributions of the trust principal. The Grantor, as well as the Grantor's spouse and descendants can all be beneficiaries of the trust. Upon the occurrence of different events, the beneficiaries of the **TRUST** can be changed.

TRUSTS can be either revocable or **IRREVOCABLE** and testamentary or "living."

- **Revocable (or "Living") Trust**. A **REVOCABLE TRUST** is a trust which the Grantor while living funds and reserves the right to change the terms of the trust or terminate the trust altogether. Living Trusts are also referred to as *Inter Vivos* Trusts, from the Latin for "between the living."

- **IRREVOCABLE TRUST**. An **IRREVOCABLE TRUST** is a trust which the Grantor cannot typically change or terminate.

- **Testamentary Trust**. A trust which is funded upon death by the terms of the decedent's will.

A **REVOCABLE TRUST** typically becomes **IRREVOCABLE** upon the death of the Grantor (and therefore, may not be changed after the Grantor's death).

REVOCABLE LIVING TRUST

Traditionally, most people have used a **WILL** as their primary estate planning instrument. In recent years, however, a strong trend has developed favoring the use of the Revocable Living Trust in estate planning.

The “Revocable Living Trust,” or “**REVOCABLE TRUST**,” is generally described as a trust which may be modified, amended, or revoked by the person establishing the Trust (the “Grantor”). The **REVOCABLE TRUST** serves as a management vehicle for property during the Grantor’s lifetime, and also as a means of management and distribution of the Grantor’s estate following his or her death, oftentimes without the intervention of the probate process. Generally, the **REVOCABLE TRUST** enables the Grantor to (a) control his or her property in a manner similar to his or her control without the Trust, (b) have the benefit of the property during his or her life in the same manner as he or she enjoyed the property without the Trust, (c) maintain a private and orderly administration of his or her property without court intervention upon disability or old age, and (d) maintain a private and orderly disposition of his or her property upon his or her death without intervention of the Courts.

HOW DOES A LIVING TRUST AVOID PROBATE?

Those assets which you own at the time of your death which are not distributed to a designated beneficiary (e.g. life insurance proceeds, **IRA** or other retirement accounts, land controlled by a beneficiary deed or other property with **POD/TOD** designations) or which are not received by a surviving joint owner (**JOINT ACCOUNTS OR JOINTLY OWNED LAND**) or which are not controlled by other non-probate forms of ownership must be transferred through probate by the legal process handled by the Probate Court. Assets which you transfer to a **LIVING TRUST** which is established during your lifetime are not considered to be owned by you. That property is owned by the trustee. The terms of the trust controls what happens to the property upon your death. Therefore, if all of those assets which you own are transferred to a **LIVING TRUST**, the management and distribution of those assets are controlled by the terms of the trust, and no probate is required. With an estate plan that includes a **LIVING TRUST** with proper beneficiary designations for assets like life insurance and retirements accounts, your family can avoid probate for your estate. The ability for your **LIVING TRUST** to keep property out of probate, however, requires that you transfer those assets to the trust and you make sure that new assets that you acquire are also titled to the trustee.

CONTROLLING DECISIONS ABOUT YOUR HEALTH CARE AND YOUR FINANCIAL AFFAIRS IF YOU BECOME DISABLED

Another aspect of estate planning deals with your ability to control what happens to you and your belongings if you are **INCOMPETENT/DISABLED**.

If you become disabled, there are two aspects of your life which must be managed: your health and your finances. If you do not properly designate someone who will make health care decisions for you or who will control your finances in the event of incapacity, the probate process will be used to appoint a guardian to be responsible for your care and a conservator to manage your property. You have the ability to designate, in a written document witnessed by two

individuals, your preferences for your guardian and your conservator in the event of incapacity. A guardianship proceeding, however, is ordinarily extremely difficult for the family. There are substantially more costs to proceed through a guardianship hearing to appoint a guardian and conservator for you, than to make arrangements for your health care decisions and finances before you become disabled. The biggest advantage is that you make the decisions.

The Revocable Living Trust is a very effective tool for someone whom you have chosen to take over your financial affairs when you are no longer able to handle these matters yourself. With a Revocable Living Trust, you choose the individual or individuals or institution which will take over management and control of your trust assets if you become disabled and/or die. The successor trustee whom you have chosen will manage and distribute your assets as you have instructed.

POWERS OF ATTORNEY

DURABLE POWER OF ATTORNEY FOR PROPERTY

A Durable Power of Attorney for Property and a Revocable Living Trust operating together provide for a smooth transition for the handling of your affairs in the event of incapacity. A Durable Power of Attorney for Property in conjunction with your Revocable Living Trust will provide for the control of all of your assets by someone you have chosen, on terms that you have provided. (In Illinois, there is a statutory form; Missouri does not have an approved form.)

A. HEALTH CARE DURABLE POWER OF ATTORNEY AND LIVING WILL

You also have the power to determine how you wish to be cared for in the future. In most states, there are certain decisions only you can make while you have capacity to do so. Otherwise, only a court could do so. These decisions, like whether to have heroic measures withheld which may keep you alive or to withdraw treatment, including food and water, which may hasten death, are made in your **LIVING WILL**.

If you are injured in an accident, or if you become seriously ill and cannot make your own health care decisions, family, friends and your physicians will be called upon to make decisions for you. Without your instruction, however, you can not be certain that your wishes are taken into consideration. The most important of these decisions is whether to withhold or withdraw artificial feeding and hydration.

A Health Care Power of Attorney allows for you to designate who will make health care decisions for you at a time when you are unable. Unless otherwise stated in the power of attorney, Missouri law requires two doctors to say that you are incapacitated triggering your agents authority to act on your behalf. You can provide very specific powers for your agent in this document, including the power to withhold or withdraw food or water. If you do not have a health care power of attorney, you may still execute a **LIVING WILL** and advance directives to provide guidance for your physicians and family to make health care choices for you. (In Illinois, there is a statutory form; Missouri does not have an approved “Statutory” Form.)

B. POWER OF ATTORNEY FOR RIGHT OF SEPULCHER

Your **LIVING WILL** and Powers of Attorney typically terminate at death. Nonetheless, certain directives and powers may be given effect after death without the need for probate. At common law and by statute, these rights are known as the right of sepulcher (in Missouri, the "right of sepulcher" means specifically the right to choose and control the burial, cremation, or other final disposition of a dead human body). This right is sometimes incorporated into the **WILL** and Powers of Attorney for health care and for general purposes. A separate document, a Durable Power of Attorney Over Body, can also be part of an estate plan and provides directions to a family as to what the decedent wants to happen to his/her body, answering such questions such as who is responsible for the body, whether the decedent wants the body buried, cremated or donated to science. The document can provide directions as to use of a funeral home, the type of casket (if any), the burial site or cremains resting site (including distributing ashes in a particular place or location). It can also provide information as to whether a visitation or religious service is desired by the decedent, and if so where. It can also provide information as to any pre-need burial services or insurance that the decedent may have purchased or arranged. While some attorneys put such information/directions in a **WILL**, it may be prudent to set out all pertinent information in a short document that can be readily accessed upon the decedent's death.

CAVEAT

This document is not meant to provide advice as to any individual's specific situation, but is only meant to provide some basic information points about estate planning. No attorney/client relationship is meant to be created by this document, and readers are advised to contact an attorney of their choice.

If you need any additional information, please contact a member of the Estate Planning Group at Evans & Dixon, L.L.C.

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