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Estate Planning Documents to Consider

Life Planning

There are several estate planning documents which can be used in connection with your personal and financial well-being during your lifetime.

- **DECLARATION OF TRUST** (sometimes also called a "Living Trust" or "inter vivos Trust") is a document with a settlor (the person who creates the trust), a trustee (the person who administers and manages the trust), trust property (the property held in the name of the trust), and a beneficiary. In a declaration of trust the settlor, trustee and beneficiary usually are all the same person. The trust takes effect during the lifetime of the settlor/beneficiary, and becomes the titleholder of trust property. A Declaration of Trust is very useful in the event the settlor becomes disabled: the Trust continues without interruption for the benefit of the settlor, with the nominated successor trustee stepping in to act for the settlor.

- **POWERS OF ATTORNEY AND LIVING WILL**

The Durable Power of Attorney for Property is a document which appoints an agent, or attorney-in-fact, to act for you with respect to your property. Your agent has the power to make decisions for you regarding your assets and liabilities; the power of the agent does not, however, extend to assets in a living trust (if you are unable to act, your designated successor trustee will administer those assets held in your trust). Even with a living trust, however, assets not yet transferred to the trust may have to be dealt with, or there may be other actions which a trustee cannot take (for example, dealing with the IRS regarding your tax returns). If you are unable to act with respect to the management of your financial affairs, it is generally preferable that a person you name under a Power of Attorney act for you, as opposed to having a court-appointed guardian named to take over your affairs. Successor agents may also be named. The existence of a Durable Power of Attorney for Property plus a revocable living trust can allow for probate avoidance as to all of your assets in the event of disability or death.

The Living Will is a statutory form that directs that "death-delaying procedures" be withheld or withdrawn when death is imminent. The Living Will is of limited usefulness, and specifically does not permit withholding of nutrition and hydration; it is familiar to many people is useful primarily in indicating the wishes of the person who signs it.

The Durable Power of Attorney for Health Care is a document through which the principal appoints an agent to make health care decisions for the principal. The Health Care Power of Attorney is much broader and more useful than the statutory Living Will. The Principal may indicate which of three levels of intervention he or she wishes used in the event of disability, and the agent must follow those directions. The agent can also direct that food and water be withheld, can permit all types of medical care, and inspect medical records. The Health Care Power of Attorney can save the expenses of a court-supervised guardianship. Federal legislation (including "HIPAA", the Health Insurance Portability and Accountability Act) requires specific provisions to be included in the Health Care Power; without these provisions, health care providers may refuse to disclose needed information on a timely basis.

Why Both Documents Are Necessary. The Living Will is effective only if you are in a terminal condition. In most of the cases that come to the attention of the courts, the patient is not in a terminal condition, and will not die unless a respirator, IV's, etc. are removed. In these cases the Living Will is not effective. It is important to note that in most cases a Living Will is <u>not</u> sufficient to authorize the removal of the medical support which the patient is currently receiving. The Health Care Power of Attorney is the broader and more flexible document, and specifically deals with the issues of withholding <u>or continuing</u> food and water when a patient is in an irreversible coma, etc. The Health Care Power of Attorney gives the agent medical and health powers as broad as those of the patient. Obviously, this power should only be given to an agent whom you trust with regard to such matters (such as a spouse or other close family member). Both the Living Will and the Durable Power may be necessary in order to deal fully with the entire range of medical issues.

- **GUARDIANSHIP DESIGNATIONS** for oneself and for minor children, must be made in the form of a Will (with witnesses, etc.). If validly executed, the court will in almost all circumstances honor the designation. The Designation does not replace guardianship hearings, although it may reduce their expense. The Designation also does not relieve the guardian of the burden of annual accountings or the expense of a bond.

- **IRREVOCABLE TRUSTS FOR INSURANCE**, as well as other types of irrevocable trusts, may be implemented to "remove" assets from an estate (and thus avoid estate tax), while at the same time making sure those assets are being managed for the family's benefit in the future, and are not dissipated or lost.

Death Planning

The following is a description of some documents or methods of holding title that you may want to us to pass title to property only after you die.

- **JOINT TENANCY** property passes by operation of law to the surviving joint tenant(s). (Between husband and wife, Illinois recognizes "tenancy by the entirety", which has the same effect of passing title to the survivor at the death of the first to die, but which has greater creditor-protection features during the life.) Joint tenancy does have some problems, however. Will the order of deaths be as expected, and what will happen at the second death? There may then be no surviving joint tenant, and a probate of the property would then be necessary. Unless the survivor is going to do some serious (and immediate) estate planning at the death of the first to die, joint tenancy addresses only a few of many concerns. Further, joint tenancy between non-spouses may expose property to creditor claims of the joint tenant who did not contribute the property.

- **WILL** becomes operative only at death. A Will operates only on probate property - that is, property titled in the decedent's name alone. A Will has no effect on: (a) joint tenancy property, (b) contract property (*e.g.*, life insurance, retirement benefits, etc.), or (c) property titled during the decedent's lifetime into his or her Declaration of Trust. Probate is a streamlined court procedure in Illinois (if there is a Will); nevertheless, probate proceedings still require surviving family members to deal with the downside factors of (i) additional expense, (ii) delay, (iii) aggravation in being required to comply with fixed court rules and procedures, and (iv) loss of privacy regarding the nature and extent of assets, and the distribution provisions set up by the decedent.

- **CONTRACT PROPERTY** describes certain types of benefits and property that pass pursuant to contract following death. The classic examples of contract property are **Insurance** and **Retirement** beneficiary designations. Each of these types of property call for the insured (or plan participant) to sign a contract (beneficiary designation) with the insurance company (or the retirement plan administrator), indicating who will receive the benefits after death. Unless no beneficiary is designated, the insurance company or plan administrator will, once presented with a death certificate and directions on how to pay the assets over, will pay out the benefits without need for court intervention or other documentation. Some other examples of these types of assets are annuities or pay-on-death accounts. A will and trust have no effect on these assets - the beneficiary designation or the contract provisions control the assets.

- **DECLARATION OF TRUST** contains provisions that take effect after the settlor's death (as well as containing directions on how to deal with the property during the settlor's life): this is the only document that really is effective both during lifetime and after death. The trust is a blueprint for what will happen to the settlor's assets during all time periods that the settlor specifies: during the life of the settlor, after the settlor's death but during the life of specified survivors, and if the trust so provides, for some time after death as additional trusts are created to hold title to assets for the benefit of identified beneficiaries (a spouse, children, grandchildren, aged parents, a charity, etc.). A Trust is the only estate planning tool that can incorporate provisions which can be either very simple, or as complex, flexible, and all-inclusive as the estate planning client cares to make them.

PLEASE NOTE that the only document to appear on both the Life Planning and the Death Planning lists is the **Declaration of Trust**.

THE DECLARATION OF TRUST, WHICH YOU CREATE AND MANAGE FOR YOUR OWN BENEFIT, IS THE MOST POWERFUL AND FLEXIBLE FINANCIAL TOOL AVAILABLE TO YOU.