



Basic Estate Planning Documents

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CHAPTER 2



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BASIC DOCUMENTS IN AN ESTATE PLAN

- Wills
- Side Letters of Instruction
- Powers of Attorney for Property
- Durable Powers of Attorney for Health Care
- Living Wills or Advance Medical Directives
- Do Not Resuscitate Orders (DNRs)



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WILLS

- A legal document providing the testator (will-maker) the opportunity to control the distribution of their property at death
 - A will avoids the state's intestacy law distribution scheme.
- A will may be revoked or amended at any time by the testator as long as the testator has legal capacity.
- A will is effective only upon the death of the testator.

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INTESTACY

- Intestacy succession is a legal distribution procedure provided by the state legislature for a decedent who dies without a valid or complete will.
 - Dying without a valid will, or
 - Dying with a will that does not dispose of all of the decedent's probate property.
- A decedent who has a valid will is said to die "testate."

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UNIFORM PROBATE CODE (UPC) / STATE LAWS

- Intestacy laws are created by the state's legislature.
- Uniform Probate Code (UPC) is a model code that may be adopted, in whole or in part, by any state.
 - See Exhibit 2.1, Sample State Intestate Succession Law.
- Exercise: What are your state's probate laws?

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RISKS TO DYING INTESTATE

- A surviving spouse may receive the same share of the decedent's probate estate as a child.
 - 1 child vs. 10 children
- A spouse may share assets with in-laws.
- The decedent's children are usually treated equally in intestacy.
 - May not be equitable
- Court-appointed administrator must post a surety bond.
 - The decedent with a valid will can appoint an executor to serve (and without bond).

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ADVANTAGES OF A PROPERLY PREPARED AND VALID WILL (1 OF 2)

- Permits the selection of an executor/executrix as the decedent's personal representative to administer the estate
- Provides for the orderly transfer of assets that are not automatically transferred at death by some other means
- Permits the designation of guardian for minors and/or dependents
- Permits the transfer of assets to charity (which is not possible in intestacy)



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ADVANTAGES OF A PROPERLY PREPARED AND VALID WILL (2 OF 2)

- A will can provide for the utilization of the unlimited marital deduction.
- A will can provide for disinheritance of selected heirs.
- A will can help to minimize the estate tax burden.
- A will can direct the estate's share of any tax burden to be paid as well as sources of funds to be used to pay such taxes.



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LIMITATIONS OF WILLS

- A will does not prevent disinherited parties from contesting the will.
- Courts can invalidate certain restrictions or sections of a will.
- A will does not supersede automatic transfers upon testator's death.
- A poorly drafted will may be found to be invalid, or the testator's wishes may not be clearly understood.



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TYPES OF WILLS (1 OF 2)

Three Basic Types

- Holographic Wills
- Nuncupative Wills
- Statutory Wills



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TYPES OF WILLS (2 OF 2)

Other Types

- Mutual or Reciprocal Wills
- Joint Wills
- Electronic Wills

LEGAL CAPACITY TO EXECUTE A WILL

- Mental Capacity to Make a Will is “Sound Mind”
 - The party making the will must:
 - Understand what is being done by the writing of the will
 - Recognize and recollect the property being disposed by the will
 - Recognize the relationships of those friends and relatives who have any claim to the testator’s assets

HEIR vs. LEGATEE vs. DEVISEE

- Heir
- Legatee
- Devisee

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COMMON CLAUSES (PROVISIONS) IN A WILL (1 OF 2)

- Introductory Clause
- Declaration Clause
- Bequests Clause (Specific Legacy)
- Residuary Clause

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COMMON CLAUSES (PROVISIONS) IN A WILL (2 OF 2)

- Appointment of Executor Clause
- Guardianship Clause
- Tax-Apportionment Clause
- Attestation Clause
- Self-Proving Clause

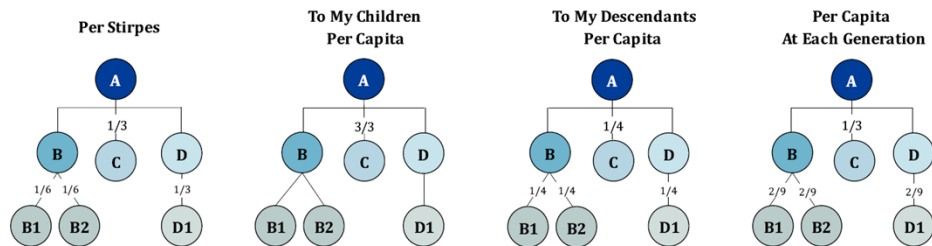
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OTHER CLAUSES IN A WILL

- Simultaneous Death Clause (SDC)
- Survivorship Clause (SC) – not to exceed six months
- Disclaimer Clause
 - Qualified disclaimer requirements:
 - Received no benefit
 - In writing within nine months
 - Cannot direct disposition
- Contingent Legatee Clause
- No-Contest Clause – In Terrorem Clause
 - Need something to lose

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PER STIRPES vs. PER CAPITA



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EXAMPLES OF WILLS

- Warren Burger (15th Chief Justice of the U.S. Supreme Court, 1969 - 1986)
 - Exhibit 2.7
- Elvis Presley (American singer and actor (a.k.a. the “King of Rock and Roll”))
 - Exhibit 2.8

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REVOKING A WILL

- To revoke a will the testator can:
 - Destroy the old will by shredding or burning it
 - Create a new will specifically revoking the old one

CODICILS

- Must meet all the legal requirements of a will
 - Modifies, explains, or amends will
- Testator must be competent each time a codicil is written.
- Sample Codicil – Exhibit 2.9

STATUTES AFFECTING WILLS (1 OF 2)

- Forced Heirship
- Marital Share
- Felonious Homicide Statutes



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STATUTES AFFECTING WILLS (2 OF 2)

- Divorce Statutes
- Anti-Lapse Statutes



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AVOIDING WILL CONTESTS

- Will contests often occur in nontraditional relationships (e.g., non-married or cohabitating couples).
- Being open with legatees before death may alleviate some of the conflict.
- Well-drafted wills can often discourage will contests.
- Alternative to wills may be more appropriate.
 - Lifetime gifts
 - Trusts
 - Property titling

SIDE INSTRUCTION LETTER

- Generally, details the testator's wishes to the executor regarding the disposition of specific tangible possessions as well as the funeral and burial wishes of the decedent.
 - Not part of the will
- While the letter has no legal standing, the executor will generally carry out the wishes of the testator.

POWERS OF ATTORNEY & POWERS OF APPOINTMENT (1 OF 3)

- Legal document authorizing a trusted person (agent) to act on one's (principal) behalf
- General Power of Attorney (broad)
- Limited Power of Attorney (more specific)
- Power of Attorney does not survive the death of the principal
- Power of Attorney vs. Power of Appointment

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POWERS OF ATTORNEY & POWERS OF APPOINTMENT (2 OF 3)

Power of Appointment

- A power, usually included in a trust or power of attorney, allowing the power holder to direct assets to another
- Power to transfer assets
- May survive the death of the grantor
- May be general or limited
- May be revoked at any time by the principal

Power of Attorney

- A stand-alone document that allows an agent to act for the principal and may include the power to appoint assets
- Power to act
- Ends at the death of the principal
- May be general or limited
- May be revoked at any time by the principal

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POWERS OF ATTORNEY & POWERS OF APPOINTMENT (3 OF 3)

- Durable Power of Attorney
 - Power remains in effect even if the principal becomes incapacitated or disabled
- Springing Power of Attorney
 - A power that “springs” into existence upon some defined event or determination (e.g., the principal is unconscious or leaves the country)
- Example of a Power of Attorney

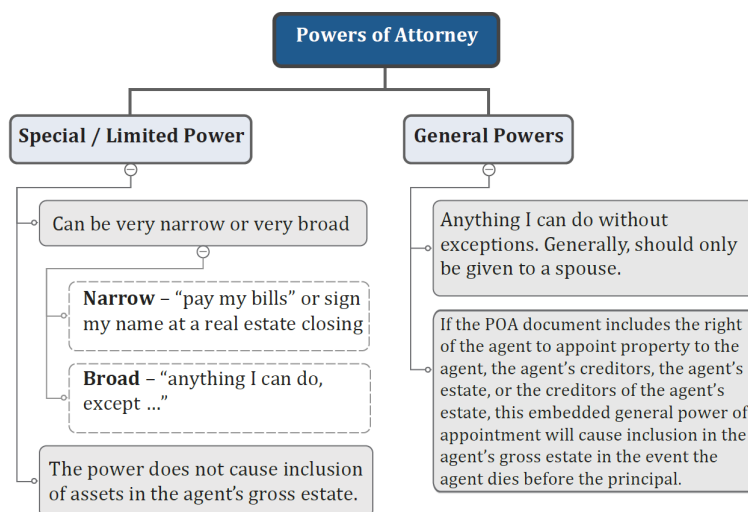


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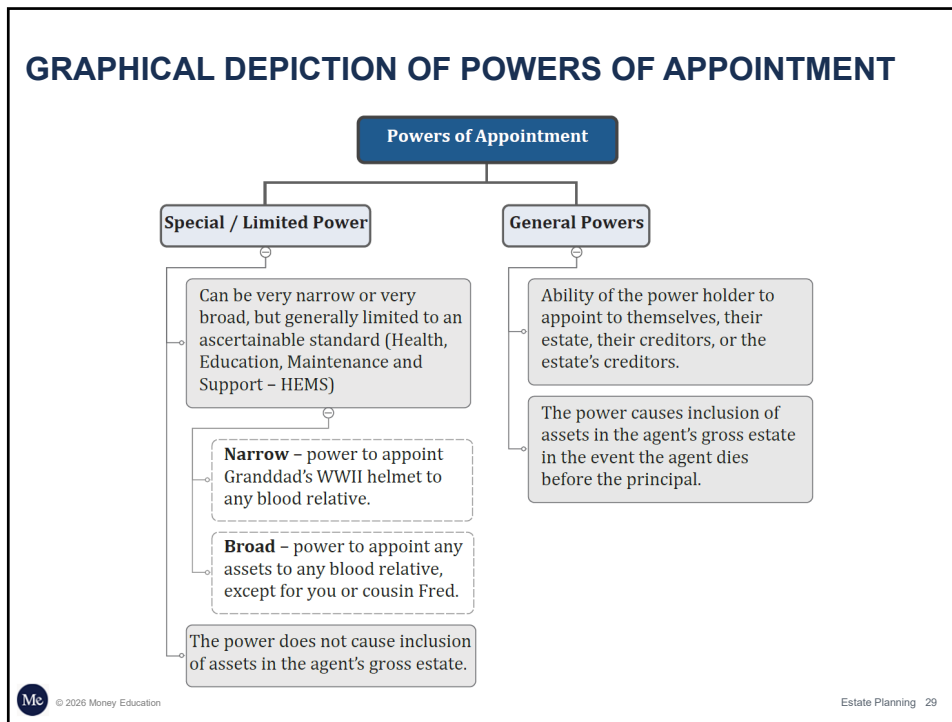
GRAPHICAL DEPICTION OF POWERS OF ATTORNEY



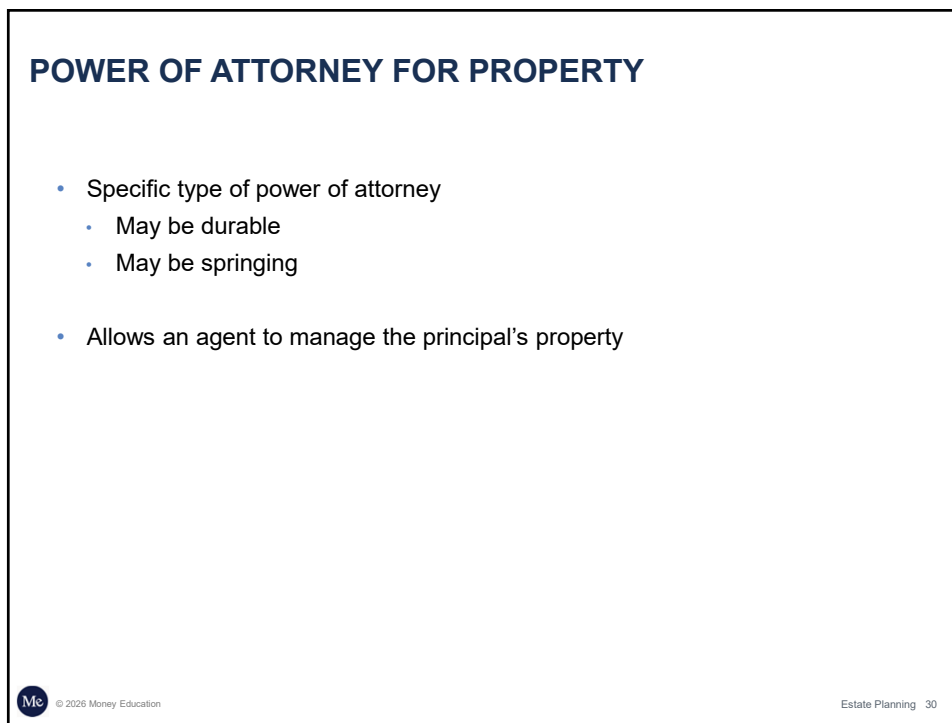
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ADVANTAGES / DISADVANTAGES OF POWERS OF ATTORNEY

Advantages

- Eliminates need to go to court to appoint a guardian of the estate
- Allows agent to sell or manage property if needed

Disadvantages

- Agent could abuse the power
- If agent holds a general power of appointment, then the assets will be included in the agent's gross estate if the agent predeceases the principal.

DURABLE POWER OF ATTORNEY FOR HEALTH CARE

- Appoints agent to make health care decisions in case of principal's incapacity or disability
- Power of agent does not expire with person's incapacity or disability; only at death.
- Possible to use a springing power
- Power always revocable by principal during their competency
- Example of Power of Attorney for Health Care
 - Exhibit 2.18

LIVING WILLS / ADVANCE MEDICAL DIRECTIVES

- Legal document expressing an individual's last wishes regarding sustainment of their life under specific circumstances
- Some states have an electronic registry so the document can be filed and easily retrieved.
- Example of a Living Will
 - Exhibit 2.19

DO NOT RESUSCITATE ORDER

- Declares the principal's wish to avoid having CPR performed in the event the heart stops beating
 - Typically used when principal is already terminally ill
- Filed with medical records and a state electronic registry, if available

PHYSICIAN ORDERS FOR LIFE SUSTAINING TREATMENT (POLST)

- A supplement to a living will and health care power of attorney specifically addressing using or not using various treatment options
 - Used when principal has a serious illness
- Executed by maker and physician

OTHER IMPORTANT DOCUMENTS FOR ESTATE PLANNING

- Prenuptial (or antenuptial) agreements
 - Provides for disposition of assets in the event of divorce, separation or death.
- Digital asset planning
 - Cryptocurrency
 - Social media accounts
 - Streaming services
 - Information stored in the cloud, cell phone, etc.

NEED FOR DOCUMENTS (1 OF 2)

Example 2.23

- Walter (age 42) and Skyler
 - 3 small children + 1 child from Walter's first marriage
 - Walter's Liquid Net Worth = \$200,000
 - No estate planning documents
 - Walter is in a serious accident, leaving him comatose.
 - Experimental procedure has a small chance of saving him, but insurance will not pay for it.
 - Hospital costs are between \$5,000 and \$25,000 per day.

NEED FOR DOCUMENTS (2 OF 2)

- Discuss the issues presented in this situation.
 - No Living Will or Advance Medical Directive
 - His net worth may be substantially reduced if they try the experimental procedure.
 - Who will make the decision?
 - No Power of Attorney for Health Care or Property – Need to go to court to get things sold/done
 - What if Skyler has no assets?
 - No will – His assets may not be distributed according to Walter's wishes, particularly with his blended family.

SELECTING FIDUCIARIES

- Fiduciary Duties
 - Often involve significant time commitment and expertise
 - May appoint co-fiduciaries
- Factors to Consider When Selecting Fiduciaries
 - Education and experience
 - Age, mental capacity, emotional capacity
 - Location
 - Trustworthiness
 - Potential for financial abuse

FINANCIAL ELDER ABUSE

- At least one in ten community-dwelling adults experience some form of abuse every year.
- Warning signs of financial exploitation
 - Sudden changes in financial account balances
 - Large unexplained withdrawals
 - Abrupt changes to the will or other financial documents
 - Unpaid bills
- Financial elder abuse often found within close relationships
 - Often parent/child

THE NEED FOR TRANSPARENCY

- Between the Client and Their Fiduciaries
 - The POA and executor need information in order to fulfil their duties:
 - Principal or decedent's goals
 - Assets and liabilities
 - Location of important documents
- Between the Client and Their Spouse or Partner
 - Conflicting goals must be addressed and resolved to the satisfaction of both spouses/partners.
- Between the Client and Their Family
 - Family harmony may be preserved when all stakeholders know what to expect and have been able to provide input.

CLIENTS EXPERIENCING DIMINISHING CAPACITY

- Financial planner may be first to notice signs of diminishing capacity
 - Exercise caution not to prematurely assume diminishing capacity.
 - Stress, lack of sleep, illness or medication can cause unusual behavior.
- Steps a planner can take to see if further steps are needed:
 - Speak with the client at different times of the day.
 - Discuss current events such as weather, local or national news.
 - Monitor for drastic or uncharacteristic changes in their estate plan or confusion around current plans.
- Client confidentiality
 - Clients should have pre-selected family members or other trusted advisors on file in the event of any concerns.