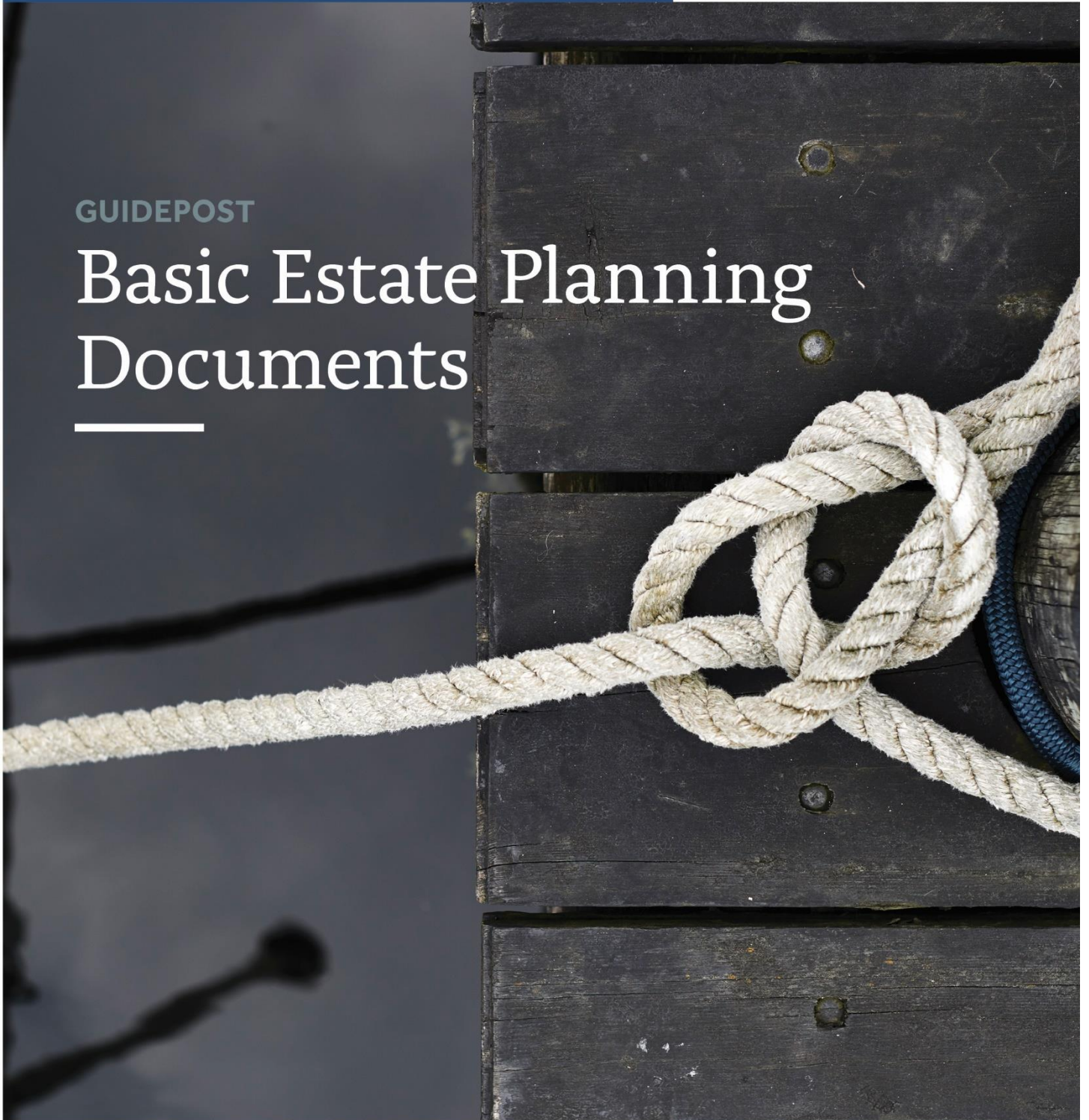




GUIDEPOST

# Basic Estate Planning Documents

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Regardless of an individual's level of wealth, the failure to establish an estate plan can be detrimental to him/her and his/her family. A properly structured estate plan helps to ensure that an individual's family and financial goals are addressed during life, if incapacitated, and after death. The following provides a basic introductory discussion regarding essential planning individuals should consider, as well as an overview of lifetime gifting strategies and long-term trust planning.

## Essential Documents

The following planning documents should be considered regardless of whether an individual is married or single.

### **Last Will and Testament**

A will directs how an individual wants his/her assets to be distributed after death. Without a will, an individual's property would pass as required under such individual's state intestacy statutes. State law may not provide the inheritance arrangement an individual would choose for an individual's family and could also increase an individual's exposure to federal and state estate, inheritance, and other death taxes.

In addition to directing the disposition of an individual's property, a will enables an individual to:

- Name an executor/personal representative, thereby avoiding the expense and hassle of a court-appointed administrator.
- Name a guardian for minor children, substantially eliminating the likelihood of a court-appointed guardianship.
- Shield children's inheritances in the event an individual's surviving spouse should remarry.
- Retain assets in trust if distributions to heirs at an individual's death would be inadvisable.
- Avoid annual reporting/accounting to the probate court, and bonding costs for the executor/personal representative.

For high net worth married couples, a will, if structured properly, also can help assure federal estate tax benefits are preserved for the couple's estate. Estate tax-efficient wills allow a married couple to take full advantage of the unlimited marital deduction and the federal estate tax exclusion (\$11.4 million per individual in 2019, as adjusted annually for inflation) of both spouses. Allocation of the first-to-die spouse's exclusion amount to a trust may reduce estate tax for the couple's combined estate, provide asset protection and allow control and management by a trustee, while still benefitting the surviving spouse and children.

For couples with more modest estates, estate tax-efficient wills may not be as advantageous from a total federal tax perspective as an "all-to-spouse" will, taking into consideration the unlimited marital deduction, the potential portability of a deceased spouse's unused exclusion, and the opportunity to have appreciated assets receive a step-up in tax basis at each spouse's death (which may help reduce the heirs' capital gains tax exposure).

### **Revocable Living Trust**

A revocable living trust (RLT) is an arrangement by which a person (the grantor) transfers ownership of property during lifetime into a trust. An RLT can be used as a substitute for a will in many respects by providing for the distribution of assets upon the grantor's death.

Unlike a will, a revocable living trust can be established to govern the distribution and use of the trust assets during the grantor's lifetime, which can make it a useful planning tool in the event the grantor becomes incapacitated. In essence, the trust is like a rulebook (which can be modified or revoked by the grantor during lifetime) for how the grantor's assets are to be handled while alive and after death.

Establishing an RLT may provide the following benefits:

- **Avoidance of Probate.** Probate is the legal process for transferring property upon death. Assets owned in an RLT do not pass through the probate process, potentially enabling a faster and less costly method for transferring assets upon death than by a will, which would require probate and sometimes court supervision. An RLT also can be especially useful in avoiding multiple probate proceedings when an individual owns real estate or other property in multiple states.
- **Privacy Preservation.** At an individual's death, when assets are passed to the heirs through probate under a will, probate may expose details of an estate to the public through public probate court filings. In contrast, trusts allow the transfer of assets to remain private within the constraints of the trust document.
- **Segregation of Assets.** An RLT may be useful for married couples with substantial separate property acquired prior to the marriage. In community property states, the trust can help segregate those assets from their community property assets.
- **Estate Tax Minimization.** An RLT does nothing to save estate or income taxes during life, but provisions can be included in the trust, as with estate tax-efficient wills, to take advantage of estate tax exclusion amounts at death.

### **Durable General Power of Attorney**

A power of attorney is a document that allows a person (known as the "principal") to appoint another person or organization to handle affairs while the principal is unavailable or unable to do so. The person or organization the principal appoints is referred to as an "attorney-in-fact" or "agent."

A general power of attorney can grant the agent limited or broad powers, as specified in the document, to manage the principal's financial affairs and property. Some of the powers that may be granted include:

- Handling banking transactions and transactions involving U.S. securities.
- Entering safety deposit boxes.
- Buying and selling property.
- Purchasing life insurance.
- Settling claims.
- Entering into contracts.
- Buying, managing or selling real estate.
- Filing tax returns.
- Handling matters related to government benefits.
- Maintaining and operating business interests.
- Making gifts and consenting to splitting gifts made by the principal's spouse.
- Making transfers to RLTs.

### **Health Care Power of Attorney**

A health care power of attorney (also known as a health care proxy or health care surrogate in some states) allows the principal to designate an agent who will have the authority to make health care decisions on the principal's behalf in the event the principal is rendered unconscious, mentally incompetent, or is otherwise unable to make such decisions.

## HIPAA Authorization

A HIPAA (Health Insurance Portability and Accountability Act of 1996) authorization also is advisable. It allows medical providers to release a person's protected medical information to another person. Individuals may include the HIPAA language in the health care power of attorney or may use a freestanding document. For states with a HIPAA authorization form that has been published or approved by a state regulatory agency, it may be prudent to use the approved form since medical professionals in that state will be more likely to recognize the form and release the information when requested.

## Living Will / Advance Directive

A living will (also known as an advance directive) is a legal document that a person uses to make known his/her wishes regarding life prolonging medical treatments. The person creating the living will (the declarant) indicates which treatments he/she does or does not want applied in the event the declarant suffers from a terminal illness or is in a permanent vegetative state. A living will does not become effective unless the declarant is incapacitated. Until then, the declarant will be able to direct his/her own treatments.

## Outright Gifts and Bequests vs. Long-Term Trusts

Rather than making an outright gift (during life) or bequest (upon death), many individuals choose to place assets in long-term trusts for the donee's benefit. Assets held in trust are distributed according to the trust terms. As long as the trust remains in effect, assets can generally be protected from creditors, litigation and divorce, as well as from mismanagement by the recipient. If incorporated into the terms of the trust, distributions can be structured to either encourage or discourage certain behavior. For example, the grantor of a trust could provide that distributions be made upon a beneficiary graduating from college or after holding a job for a certain number of years. A grantor also could require distributions be withheld in the event of a beneficiary's impending bankruptcy or for proven or suspected use of an abusive substance.

If desired, a beneficiary of a trust can serve as a trustee (or co-trustee) of that trust; however, if a beneficiary/trustee will be granted powers to make discretionary distributions of trust assets to oneself, such powers should be limited to an ascertainable standard, more specifically for their health, education, maintenance, or support, to keep the trust's assets out of the beneficiary's taxable estate. From an asset protection standpoint, a trustee/beneficiary with rights to make discretionary distributions to him/her self may expose the beneficiary's rights to claims of creditors. In contrast, if rights are granted to an independent third-party trustee to make discretionary distributions to the trust beneficiaries, trust assets may be more effectively protected from the claims of the beneficiaries' creditors. Moreover, unlike a trustee/beneficiary, an independent trustee can be granted unlimited discretion to distribute assets to a beneficiary without causing the trust's assets to be includible in the beneficiary's taxable estate.

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As a result of the Tax Cuts and Jobs Act of 2017 (TCJA) it is expected that the estate, gift and generation skipping transfer (GST) tax exemption amounts will increase to approximately \$11.18 million per person (approximately \$22.36 million for a married couple), effective in 2018. For assets transfers in excess of the applicable exemption amount and otherwise subject to such taxes, the highest applicable federal tax rate remains at 40 percent. While the exemption amounts are indexed for inflation, current law provides for an automatic sunset of these increased exemption amounts after 2025. As a result, the exemption amounts available in 2026 and beyond could be reduced to a level provided under prior law (\$5.49 million/single and \$10.98 million/couple in 2017, indexed for inflation) absent further action by Congress. In addition, under different rates, rules and exemption amounts (if any), there may be state and local estate, inheritance or gift taxes that apply in your circumstances. Please consult your own tax or legal advisor for advice pertaining to your specific situation.

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