

PREPARING FOR THE END OF LIFE

Bethesda Lutheran Church of Malmo

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- 1. DIFFERENCES BETWEEN WILLS AND TRUSTS**
- 2. POWERS OF ATTORNEY**
- 3. CONSIDERATIONS WHEN MAKING GIFTS TO CHILDREN**

NOTE:

Everyone's situation is different. You should consult with an attorney who is experienced in the areas of wills and trusts, estate planning and elder law to clarify your own specific situation. You should also consult with your bank and financial advisor to obtain appropriate financial and investment advice for your specific situation. Further, you should consult with your CPA or accountant for appropriate tax advice for your specific situation.

1. DIFFERENCES BETWEEN WILLS AND TRUSTS

A. WILLS.

A Will is a legal document that specifies how certain assets are to be distributed after the person making the Will dies. Wills generally list specific beneficiaries such as family members that are designated to receive these assets or the proceeds from the sale of these assets. Wills also list one or more personal representatives to handle the administration of the estate.

Wills dispose of “probate assets”, which are assets that are owned solely by a decedent and that do not designate any beneficiaries. Non-probate assets pass directly to others because of how they are titled or because they designate beneficiaries. For example, Joint Tenancy with Right Of Survivorship (JTROS), Transfer On Death Deed (TODD), Payable On Death (POD) or Transfer On Death (TOD), etc.

Whether or not a Will needs to be probated depends on several factors including the type and value of the probate assets. In Minnesota, **probate is required if someone dies with any interest in real estate that is owned solely by them and/or dies with financial assets owned solely by them (i.e., no joint owner and no beneficiaries) if those probate assets exceed \$75,000 in value.**

Wills should be kept up-to-date and should be reviewed if circumstances change (e.g. death, divorce, remarriage). Both married spouses should have a will prepared. Wills should be stored in a safe but accessible place.

Any person who is 18 years of age or older and of sound mind can make a will. There are statutory requirements that must be followed in order for a will to be valid such as signing the Will before two witnesses who also sign.

If a person has a valid will, then they can designate how they wish for their personal property items to pass after their death in a separate writing or “gift list” that only needs to be dated and signed. A gift list can be changed in the future without the need to revise the will itself.

If someone dies without a will, then they are said to have died “intestate.” In that case, the probate code determines who will receive the probate assets.

B. TRUSTS (3 MAIN TYPES)

(1) Testamentary Trusts

A Testamentary Trust is defined in a person's will and comes into being after a person's death. The person creating a Testamentary Trust retains full control over the assets during his or her lifetime.

An example of the use of a testamentary trust is a trust for children or grandchildren that specifies that their needs are met until they reach a certain age. Typically, they would receive multiple distributions at various ages, rather than a single lump sum distribution at the age of 18.

(2) Revocable Trusts

A Revocable Trust enables a person to retain full control of assets until he or she dies or until he or she is incapacitated and can no longer do so.

Revocable Trusts are commonly used to avoid probate. They do this by ensuring that assets are not individually owned by a decedent at the time of their death. Revocable Trusts are more private than a probate proceeding because generally no court filings are required to administer the trust after the person making the trust dies. Revocable Trusts can also be used by married couples to avoid or minimize possible estate tax liability. This can be accomplished by splitting assets between each spouse's trust and by using each spouse's state or federal estate tax exclusion at their death.

(3) Irrevocable Trusts

An Irrevocable Trust allows the person making the trust to specify the terms, but he or she cannot change the terms or revoke the trust. Instead, a designated trustee controls the assets and administers the irrevocable trust.

Irrevocable Trusts are usually used for estate tax planning purposes. Sometimes, revocable trusts are not sufficient to avoid or eliminate these estate taxes. In those cases, irrevocable trusts may be used to place assets outside of a person's estate for estate tax purposes and to provide cash to a person's loved ones so that they can easily pay any estate taxes.

2. POWERS OF ATTORNEY

A Power of Attorney is a legal document by which a person delegates authority to perform certain financial acts to another person. The person who receives these powers usually acts when the person who delegated the authority is incapacitated or is unable to perform the acts themselves.

The most common type of Power of Attorney in Minnesota is the Statutory Short Form Power of Attorney, which is authorized by Minnesota Statute § 523.23, et seq. This form was revised and updated in 2014.

A Power of Attorney is usually drafted in such a way that it is “**durable**”, i.e. that it continues to be effective even if the person granting the power of attorney becomes incapacitated or incompetent.

The person making a Power of Attorney is called the “**Principal**” and the person who is granted the powers under the Power of Attorney is called the “**Attorney-in-Fact**”. An Attorney-in-Fact is legally bound to act in the best interest of the Principal and must be able to account for their actions.

Under a durable Power of Attorney, the Attorney-in-Fact can make legal and financial decisions on the Principal’s behalf *for as long as the Principal is unable to do so*. If the Principal becomes incapacitated and *never recovers*, the Attorney-in-Fact would be able to handle virtually all matters that the Principal would have been able to handle if he or she could. **The authority to act under a Power of Attorney terminates upon the Principal’s death.**

Common examples of the use of a Power of Attorney include: (1) signing a deed on behalf of a principal; (2) handling stock transactions for a principal; (3) banking for a principal; (4) handling insurance transactions for a principal; and (5) receiving records, reports and statements for a principal.

If a person becomes incapacitated and has not signed a durable Power of Attorney, then someone may need to be named to act on his or her behalf. This is done in an action that requires a court to appoint an individual as a conservator for that person. When a conservator is appointed, the person loses certain rights. Conservatorship proceedings can be cumbersome and expensive and involve ongoing accounting and reporting obligations.

3. CONSIDERATIONS WHEN MAKING GIFTS TO CHILDREN

A. TAX CONSIDERATIONS

The current federal annual gift tax exclusion amount is **\$16,000 (\$32,000 for a married couple)**. This exclusion allows any individual to give up to \$16,000 per recipient, in any given year, without having it count against their federal gift tax exemption. If a gift to an individual exceeds the annual exclusion amount, then a federal gift tax return must be filed and the federal exemption available at the time of death will be reduced.

The current Minnesota estate tax exemption amount is **\$3.0 million**. Under current law, the estate tax rates range from 13% to 16%.

The current federal estate tax exemption amount is **\$12.06 million**. Under current law, the top marginal federal estate tax rate is 40%.

B. LEGAL CONSIDERATIONS

Whenever a gift is made, that gift can make the person making the gift ineligible for Medical Assistance for long term care such as a nursing home. Currently, for every \$8,781 that is given away, there would be a one (1) month period of ineligibility (or penalty period) for Medical Assistance if the person making the gift applied for Medical Assistance within five (5) years of making the gift (the "look back" period). As a result, the possible impact on future Medical Assistance eligibility should be considered before making a gift, especially for large gifts.

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