

# Estate Planning Terms

We've covered a number of points in our discussion of estate planning with you, and we want to provide you with the following document as a refresher of what the different terms and phrases mean in an estate planning context. This document is broken up into two sections: the first deals with incapacity planning, and the second section deals with death planning.

Estate planning can be a very complicated area of law, and this document is not intended to explain *everything* to you, but instead it is provided here to refresh your memory on the most important and frequently used terms.

Remember that Estate Planning is like life insurance, it's not going to provide you with any tangible benefit, but it will help your loved ones a significant amount after you pass away or become incapacitated. You don't know when you will die or become incapacitated and that is why it is so important to have planning in place sooner than later. The more flexible your planning can be, the more likely the plan will withstand the test of time and changes of circumstances.

## INCAPACITY, GUARDIANSHIP, & INCAPACITY PLANNING DEFINITIONS

### DIFFERENCE BETWEEN GUARDIANSHIP & POWERS OF ATTORNEY

Guardianships are only possible through Court proceedings which are costly, time consuming, and potentially adversarial. They are a last resort when the individual that is incapacitated has no proper planning in place to meet their needs. Guardianships are expensive, stressful, and produce uncertain results.

Powers of Attorney are forms of advanced planning in which a person specifically chooses who they want to act for them if certain situations arise, and what actions that person may take. Powers of Attorney are relatively inexpensive, easy to complete, and allows an individual to make decisions for their future self.

### INCAPACITY

An inability to effectively receive and evaluate information or to make or communicate a decision with respect to the exercise of a right or power.

### GUARDIANSHIP

Legal proceedings by which rights of an individual (Ward) are removed and transferred to a Court appointed Guardian to care for the Ward. The Ward must be deemed incapacitated (or be under 18) by the Court. In Wisconsin, there is a Guardian of the Estate that handles all financial matters, and a Guardian of the Person which is responsible for the care and comfort of the Ward. A Guardian may serve as either or both a Guardian of the Person and/or the Estate.

Guardianships are typically costly, time consuming, and should be avoided wherever possible.

## WARD

An individual who is deemed incapacitated by a Court, or is a minor under 18, and for whom a guardian is appointed to care for the Ward.

## GUARDIAN OF THE PERSON

A Guardian charged with caring for the needs of an individual. They are responsible for providing the necessary care to the Ward as well as providing comfort to the Ward. Think of the Guardian of the Person as a parent and the Ward being a young child. The Guardian of the Person must file an Annual Report with the Court.

## GUARDIAN OF THE ESTATE

A Guardian charged with managing the financial and legal matters associated with the Ward. The Guardian of the Estate must act as a fiduciary and in the Ward's best interests, not their own. The Guardian of the Estate must file an annual accounting with the Court that shows where every penny of the Ward's has gone for the prior year. This is a particularly daunting task.

## POWER OF ATTORNEY

A document that permits an Agent to act on behalf of a Principal during the Principal's life and at the pleasure of the Principal. The Agent may only act according to the terms of the granting document and must act as a fiduciary. Powers of Attorney are permissive documents, they do not place an obligation for an Agent to act, but if they do act, they act as a fiduciary of the Principal.

## FINANCIAL POWER OF ATTORNEY

Legal document that permits an Agent to act on behalf of the Principal in relation to financial and legal matters. Most Financial Powers of Attorney are effective immediately upon signing and do not require a finding of incapacity.

## HEALTH CARE POWER OF ATTORNEY

Legal document that permits an Agent to make medical decisions on behalf of the Principal, but only if the Principal is unwilling or unable to make those decisions on their own. Many Health Care Powers of Attorney require a finding of incapacity in order for the document to become activated and permit the Agent to act according to the terms of the Health Care Power of Attorney.

## PARENTAL POWER OF ATTORNEY

Legal document that permits an Agent to make custodial decisions regarding minor children of Principal when Principal is unavailable to care for the children on their own. Only effective if both parents exercising custody are unavailable and sign Parental Power of Attorney. In Wisconsin, the Agent must be a family member, or the document is only valid for one year since the date of execution.

## STATEMENT OF INCAPACITY

Many Health Care Powers of Attorney require a Statement of Incapacity be signed by two independent physicians or psychologists in order for the Agent to be able to take action on behalf of the Principal. The physicians must determine that the Principal is incapacitated in their medical opinion to sign the document.

## PROBATE, DEATH PLANNING, AND TRUST DEFINITIONS

### PROBATE

The archaic default process we have in place to transfer a decedent's property to their living beneficiaries. This process is supervised by the Court, and as a result is public record. In addition, it can also be costly and time consuming to resolve all matters. In a nutshell, the Court appoints a Personal Representative to act on behalf of the estate. The Personal Representative takes control and inventories all of the estate assets. Creditors of the estate must be notified of the decedent's death, and their claims paid. The Personal Representative distributes any specific gifts of the Decedent's Will and liquidates all other assets to be distributed according to the terms of the Will. Taxes are filed and paid as needed. The Personal Representative provides the Court with a Final Account showing where all of the assets have gone or are proposed to go, makes final distributions, and receives an order from the Court to close the estate. That is, if there aren't any disputes over anything...

To avoid probate, a person needs to die with less than \$50,000 in their estate. This can be done by titling things to a Trust (see below), using beneficiary designations, or making lifetime gifts. Trusts offer the most protection and generally provide the best outcomes for most individuals.

### INTESTACY

The legal scheme in which property passes after the death of an individual that does not have an estate plan in place. The statutes currently pass property to a spouse (provided the decedent has no children from other relationships), If no spouse, then to descendants (children, grandchildren, great grandchildren). If no spouse or descendants, then to parents, then to siblings, then to grandparents, then to uncles/aunts, then to cousins, etc.

## WILL

Legal document that distributes an individual's property upon their death, nominates a Personal Representative, and may nominate a Guardian for any minor children of the person making the Will. Property passing through a Will is subject to Probate proceedings in most instances.

## PERSONAL REPRESENTATIVE

Typically, an individual appointed by the Court to act on behalf of the Estate of a deceased person. The Personal Representative has a fiduciary duty to act in the best interests of all creditors and beneficiaries of an estate.

## BENEFICIARY

Person or entity entitled to receive a benefit under the terms of a Will or Trust.

## TRUST

A fiduciary relationship where a Trustmaker grants the Trustee the right to hold title to property or assets for the benefit of the Beneficiaries. The Trustee is bound to act based on the terms and conditions of the Trust document.

**Example:** Tom Trustmaker gives her home to a Trust so that his disabled friend, Ben Beneficiary can live in the home. Title of the home is transferred from Tom to the Trust. Trudy Trustee is responsible for maintaining the home.

## REVOCABLE LIVING TRUST

A type of trust where the Trustmaker is also the initial Trustee and the initial Beneficiary. The Trust remains revocable during the Trustmaker's life, meaning the terms of the Trust may change, the Successor Trustees may change, and the Beneficiaries of the Trust may change prior to the Trust becoming irrevocable. Upon the Trustmaker's death, the Trust cannot be changed, and the Trustee is bound by its terms. Utilizing a Revocable Living Trust is the most effective way of avoiding probate and ensuring your estate is administered as you intend.

With Revocable Living Trusts, you provide your Trustees with discretion and flexibility to carry out your wishes as you would see fit if you were able to make the decisions for yourself. We accomplish this by discussing common issues we see with you (substance abuse, immaturity, creditor issues, spendthrifts, and special needs being the most common). Then you tell us how you would want your trustee to deal with any of the issues that concern you. The Trustee is always required to provide for your beneficiaries Health, Education, Maintenance, and Support after your death. These standards are set forth by the IRS but provide

you with the peace of mind that your beneficiaries basic needs will be met without “wasting” your estate.

If your granddaughter is too immature at 22 to receive her inheritance, your trustee can withhold her full share. If you son develops a drinking problem, the Trustee will not distribute his money to him to get drunk. If the laws change and your estate would now owe a large tax bill, the Trustee has discretion to make the Trust more efficient.

## TRUSTEE

The Trustee is the manager of the Trust. They are fiduciarily bound to act in the best interests of the Beneficiaries of the Trust. In most instances, the Trustee is given great discretion to interpret the terms of the Trust and meet the objectives set forth in the Trust by the Trustmaker.

## SPECIAL NEEDS TRUST

A legal entity that holds and distributes assets to a beneficiary that receives public benefits like Social Security Disability. Assets held within a Special Needs Trust are exempt from counting rules typically associated with most public benefits, and as a result can be a crucial planning tool for families with individuals with special needs.

## SURVIVORSHIP MARITAL PROPERTY

A way of holding title only available to spouses that transfers property to the surviving spouse upon the first spouse’s death. This is a non-probate transfer.

## BENEFICIARY DESIGNATIONS & TRANSFER ON DEATH DEEDS

For many accounts and life insurance policies it is possible to designate a beneficiary or multiple beneficiaries to receive the account or their share of the account upon the account holder’s death. Likewise, with real estate you may designate the beneficiaries you would like to inherit the real estate. All of these are non-probate transfers. However, this is not a good planning strategy because it does not adequately take into account changes in your circumstances, the circumstances of your beneficiaries, or of the law. They operate under a rigid structure. May be appropriate for deathbed planning.

