DOCUMENTS AND PROPERTY ARRANGEMENTS TO PREPARE FOR DEATH AND DISABILITY

Take A Stand For Caregivers

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OVERVIEW

Authority to act for another is a threshold issue for all caregivers and realistically for all persons since it is inevitable that at some point most people do need the help of another person to conduct business - if not during their lives, then surely at the time of their death.

Today we will look at documents and property arrangement to consider to prepare for disability and death. This will include:

- Advance Directives
- Wills
- Trusts
- Special Needs Planning

ADVANCE DIRECTIVES FOR LIFE AND DEATH

Advance Directive is a broad term covering multiple documents in Alabama, to include:

- Durable Powers of Attorney
- Advance Directives for Healthcare
- Living Wills
- Do Not Attempt to Resucitate Orders
- Trusts
- Last Will and Testaments
- Affidavits For Disposal of Remains

What these document have in common is they are documents a person can execute to select the individual(s) who will have authority to act for him or her when, or if, he or she becomes unable to make decisions.

ALTERNATE AUTHORITY ARRANGEMENTS DURING LIFE IN THE ABSENCE OF AN ADVANCE DIRECTIVE

If an Advance Directive is not created while a person has capacity to do so to make decisions during disability, there are other ways that caregivers can acquire authority. These ways include:

- Court appointed Guardians and Conservators
- Agency appointed agents such as Social Security Representative Payees
- Industry Appointed agents such as Sponsors in nursing homes
- Self appointed agents through Certification of Health Care Decision Surrogate

What these document and procedures have in common is they are substitute arrangements granting authority by someone other than the individual for whom decisions will be made during the lifetime of the person.

SPECIFIC TYPES OF AUTHORITY NEEDED

The consideration surrounding all advance directives is determining what type of authority another may need in order to act on someone's behalf. There are generally the following areas to consider:

Authority to make financial decisions
Authority to make routine health care decisions
Authority to make end of life decisions
Authority to handle remains at death
Authority to handle property and settle estates at death

POWERS OF ATTORNEY

The most flexible and least expensive way to obtain authority to conduct financial business for another during his or her lifetime is to be named as agent in a durable power of attorney created by the person who will need his or her business conducted by another. In a power of attorney the person making the document (known as the **principal**) may make all the following appointments:

- an **attorney in fact (agent)** to conduct business and handle financial affairs
- a **health care power of attorney (agent)** to make routine health care decisions
- a **health care surrogate (agent)** to make end of life decisions.

These powers can only be given while the principal is still competent to give that authority to another person. In this way powers of attorney require pre-incapacity planning. Once a person is suffering from significant incapacity, a power of attorney cannot be signed, and, if one is, the power given can be challenged by others who may not want the power to be given to the agent.

The capacity needed to create a power of attorney is the same level of capacity needed to sign a contract because the maker of the directive must decide if he or she wants the agent to have highly specific powers.

QUESTIONABLE CAPACITY

When capacity is at issue my office provides the following document to request a medical opinion:

Request for Medical Opinion Concerning Capacity

Due to the complex and comprehensive nature of the Alabama Uniform Power of Attorney and the potential for exploitation through the use of a power of attorney, it is imperative that the person executing the document exhibit a level of capacity as high as that needed for the execution of any contract.

As such, the maker of the document must have the current **ability to receive and evaluate information and make and communicate decisions demonstrating the ability to manage property or business affairs**.

If a doctor familiar with the patient can document that, in his or her opinion, the patient has this level of capacity, it will assist in determining whether this law firm will be able to prepare a power of attorney.

Please present this statement to your doctor and ask if the doctor can provide a letter addressing this specific required standard.

DURABILITY

Originally the durable power of attorney legally required specific language in the document indicating that “this power of attorney shall not be affected by disability, incompetency or incapacity of the principal” or equivalent language (meaning the document was durable enough to survive the incapacity of the person who made the document). This special language remained a requirement in the law until Alabama passed The Alabama Uniform Power of Attorney Act effective January 1, 2012.

That law eliminated the special language requirement by making the presumption of durability for powers of attorney signed on or after January 1, 2012.

Before 2012 the law presumed the power of attorney not to be durable (thus the special language requirement);
After January 1, 2012, the law presumes the power of attorney to be durable.

Understanding this significant legal distinction, it is obvious that in order to determine whether a person has authority to act under a power of attorney for a person who does not have capacity to act for himself, it is essential to look at the date the document was signed. While older powers of attorney are still recognized as valid documents, if signed before January 1, 2012, the special language needs to be recited in the power of attorney to make it durable. If the document was signed on or after January 1, 2012, it is presumed to be durable with or without the special language.

POWERS INCLUDED IN POA

The Alabama Uniform Power of Attorney Act allows the principal to give general types of power to the agent that do not require an express grant in the document. In the statutory form these powers are listed, and the principal has the right to grant all these powers or choose those he wants to exclude. These powers include:

- real property;
- tangible personal property;
- stocks and bonds; commodities and options;
- banks and other financial institutions;
- operation of entity or business;
- insurance and annuities;
- estates, trusts, and other beneficial interests;
- claims and litigation;
- personal and family maintenance;
- benefits from governmental programs or civil or military service;
- retirement plans.

The Act further allows the principal to give specific authority for an agent to do specific things including:

- create, amend, revoke or terminate an inter vivos trust (a living trust created during life rather than a
  testamentary trust created in a will);
- create or change rights of survivorship;
- create or change a beneficiary designation;
- delegate authority granted under a power of attorney (name a successor financial agent upon his or her resignation or while temporarily unable to act);
- waive the principal's right to be a beneficiary of a joint and survivor annuity including a survivor benefit under a retirement plan; or
- exercise fiduciary powers that the principal has authority to delegate.

REAL PROPERTY

A critical distinction between the older and newer powers of attorney needs to be understood concerning whether an agent may sell real property belonging to the principal.

For powers of attorney signed before January 1, 2012, an agent would not have the authority to convey the principal's real property unless the power of attorney clearly granted the authority.

For powers of attorney signed on or after January 1, 2012, the agent does not need express authority to convey the principal's real property. In fact, the agent can even convey the property to the agent himself/herself with just a general grant of authority to handle real property.

OTHER POWERS NEEDED NOT INCLUDED IN STATUTORY FORM

Special powers not included in the statutory DPOA may be needed for recipients of needs-based benefits and in long-term care situations.

The Uniform Power of Attorney Act does not automatically allow an agent to create specifc types of trusts, even though trusts are generally addressed in the form document. As such it is a better practice for a DPOA to have language allowing the agent specifically to create a special needs trusts (SNT) or a Medicaid Qualifying Income Trust (MQIT). This is particularly important when dealing with a bank to open an account for a MQIT or The Alabama Family Trust to accept a SNT.

If a SNT is needed, and the power of attorney does not grant that authority, permission must be gained through a Probate Court single transaction proceeding which is why it is is beneficial to have a power of attorney addressing this potential long-term care need.

There is no HIPPA personal representative to access medical records named in the standard form, so that should also be added.

TECHNICAL REQUIREMENTS

The Act states that “a power of attorney must be signed by the principal or in the principal’s conscious presence by another individual directed by the principal to sign the principal’s name on the power of attorney.”

While the power of attorney can be signed in this manner, it is not recommended. It is better for the principal to make a mark, even with the help of another.

When any legal document is signed, the witnesses and/or notary should not be interested parties (caregivers, family members, heirs, etc.).

Powers created on or after January 1, 2012, should be notarized to be considered valid.

SPRINGING POA

A power of attorney is effective the day it is signed unless it is a springing power of attorney that “springs” into effect only after the principal becomes incapacitated. While some people like the idea of a springing power of attorney because they fear the agent may take over their business before it is necessary, in practice the springing power of attorney can create some definite problems.

The document must define who decides when incapacity has happened, and that is usually, but not always, a doctor or psychologist. Obtaining a doctor’s opinion can cause delay, and with state and federal privacy laws, particularly Health Insurance Portability and Accountability Act (HIPAA), the patient’s medical records may be protected and unobtainable. Signing a HIPAA release for your doctor’s file prior to incapacity may resolve that problem, defining incapacity can still be a potential bureaucratic problem.

Another negative related to the springing power of attorney is the fact that many people want help prior to becoming completely incapacitated. The nature of incapacity is that of a person being able to perform some activities while being unable to perform others, or, perhaps, wanting help with certain activities. For maximum flexibility the principal would want a document that enables a trusted agent to act only when necessary or at the will of the principal.

NAMING AGENTS

Selecting an agent who will honor the wishes of the principal and act with care with finances is of utmost importance. Frank discussion needs to be had so that the principal is assured that the agent named will follow his or her wishes.

Alternate Agents may be designated. For instance a man may select his wife as his agent but designate a child or children to act for him if the wife should become unable to serve. It is always a good idea to name alternate agents.

Multiple Agents may be named. If so, and unless otherwise provided, each agent may act independently, and each agent may be liable for a breach of fiduciary duty committed by the other agent if the agent participates in or conceals the breach of fiduciary duty or has actual knowledge of a breach and fails to notify the principal or take action to safeguard the principal’s best interest.

AGENT'S DUTY

An agent under a power of attorney must act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest; in good faith; and only within the scope of authority granted in the power of attorney.

An agent who breaches a fiduciary duty is liable to the principal or the principal's successors in interest (e.g. heirs) for the amount required to restore the value of the principal's property to what it would have been had the violation not occurred.

Further, the violating agent is liable for the amount required to reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid by the principal in recovering the estate.

REVOKING A POWER OF ATTORNEY

Powers of attorney stay in effect until revoked, or at the death of the principal, or when the agent dies, becomes incapacitated or resigns and no successor agent has been appointed. Powers of attorney do not expire over time unless the power contains instructions concerning a given date of expiration.

While the law does not require the revocation of the power of attorney to be in writing, as a practical matter, the document needs to be revoked by written instrument in order to put on notice the agent and all places (banks, financial institutions, etc.) where the document has been used so that there is documentation to prove that notice was given for the former attorney-in-fact and institution(s) to cease relying on the now revoked power of attorney.

An important issue to keep in mind is the capacity requirement applies not only to making a power of attorney, but to revoking a power of attorney. If a person should lose the capacity to make informed decisions, he or she will be legally unqualified to revoke a power of attorney.

A power of attorney is null and void at the time of the principal's death. At that time a personal representative appointed by will, estate administrator, or trustee takes over handling the business for the deceased.

LIVING WILLS AND ADVANCE DIRECTIVES FOR HEALTHCARE

Living Wills do not name an agent. The Alabama's Living Will introduced into law in 1981 only allows a patient to give the physician instructions concerning artificial life sustaining procedures that should be used if the patient should be terminal. Originally there was no document authorized by Alabama law that would allow the patient to give instructions should he or she be in a persistent vegetative state. Even though Alabama law advanced over the years to provide agent designation and authority to act when the principal is in a persistent vegetative state, the old living wills were grandfathered in, and many people still rely on only this very limited document that is basically a direction made to a doctor.

Advance Directive for Health is the 1997 amendment of the Living Will that indicates the treatment and food and hydration preferences a person has if he or she should be terminal or permanently unconscious. An agent called the health care proxy may also be named with a designation that they should follow

- only your wishes expressed on the form,
- address issues not mentioned on the form, or
- to make the final decision when stated wishes disagree with what the agent thinks is best, even though it could mean doing something different from what is listed on the form.

When using this form a separate power of attorney is needed to address financial decision-making.

DO NOT ATTEMPT RESUSCITATION ORDER

A Do Not Resuscitate Order (DNR) or Do Not Attempt Resuscitation Order (DNAR) can be signed by a doctor instructing that resuscitative measures not be provided to a person under a physician's care in the event the person is found with cardiopulmonary cessation. DNARs can be issued either:

- with the consent of the patient, if competent; or
- pursuant to instructions in an advance directive if the patient is not competent or is no longer able to understand, appreciate and direct his or her medical treatment and has no hope of regaining that ability; or
- with the consent of a health care proxy designated under the Natural Death Act; or
- at the instructions of an attorney-in-fact under a durable power of attorney that grants the agent the power to make end-of-life decisions in accordance with the Natural Death Act.

For many years DNAR orders have been used in health care facilities, but those orders were valid only in the facility where ordered. If the patient left one facility and entered another, a new order had to be signed. In 2016 Alabama law addressed DNAR orders and provided for a "Portable DNAR" that will be valid across multiple health care settings. A form that meets the requirements of law to make it portable is provided at the State Board of Health Administrative Code 420-5-19 Appendix 2.

While health care providers may continue to make facility specific DNARs, to create a portable DNAR, the state prescribed form needs to be used.

COURT APPOINTED GUARDIANS

When a person fails to make an advance directive, and action needs to be taken, the family or the state (via The Department of Human Resources [DHR]) has no option other than to have a legal representative appointed by the court.

The Probate Court can appoint a person known as the guardian to have authority over the body of an "incapacitated person" defined in the Alabama Uniform Guardianship and Protective Proceedings Act as:

"any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions."

The law provides a priority list of those the court should first appoint as guardian. They include:

- a person named in a durable power of attorney,
- spouse or spouse's nominee,
- adult child,
- parent or parent's nominee,
- relative with whom the person has lived the prior six months, and
- nominee of the caretaker of the person.

COURT APPOINTED CONSERVATORS

The Court can appoint a conservator to manage the estate (finances) of a person in need of protection who is found to be:

"unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic intoxication, confinement, detention by a foreign power, or disappearance;" and whose "property will be wasted or dissipated unless property management is provided" or for whom "funds are needed for the health, support, education, or maintenance of the person or of those entitled to the person's support and that protection is necessary or desirable to obtain or provide the funds."

The law provides a priority list of those the court should first appoint as conservator. They include:

- conservator appointed in another jurisdiction,
- person selected by incapacitated person,
- person designated by incapacitated person's power of attorney,
- spouse,
- adult child,
- parent,
- relative with whom ward has lived the last six months,
- nominee of person caring for the incapacitated person,
- general guardian or sheriff.

Besides attorney's fees and filing fees, the petitioner must pay the expense of a guardian ad litem. The court is required to appoint a different lawyer to serve as guardian ad litem to represent the person who may need a guardian or conservator. If appointed, these expenses can be reimbursed from the estate.

Obtaining a court appointed guardian and conservator can take some time although there is a procedure that allows appointment on an emergency basis or for a limited duration or for limited transactions.

The conservator must be bonded based on the value of the estate and account to the court at least every three years for all income and expenditures. As such, this can be an expensive alternative for acquiring authority to act for another.

CERTIFICATION OF HEALTH CARE DECISION SURROGATE

Certification of Healthcare Decision Surrogate (Self Appointed Agent)

There is a procedure under Alabama law that permits a self-appointed surrogate (agent) to make end-of-life decisions when the patient failed to make an advance directive. This is The Certification of Healthcare Decision Surrogate (CHCDS). Under the law there are people named in a line of priority who may serve as the self-appointed surrogate.

The line of priority for appointment is:

- a court appointed guardian,
- the spouse,
- adult child,
- parent,
- sibling,
- other next of kin, or
- the ethics committee for the facility.

The person or committee can create the self appointing document certifying that:

- no advance directive exists of which he, she, or they are aware;
- contact either was made with one or more of the persons who are higher in priority, and they consented or expressed no objection; or
- no contact was made because the person or persons in higher priority could not be reached because their whereabouts are unknown or they are in a remote location and cannot be contacted, or the person in higher priority has been adjudged incompetent.

It is not likely that end of life decisions will be made with this document without court approval.

SIX WAYS TO PASS PROPERTY AT DEATH

We normally only think of wills or trusts as a way to pass property at death, but there are actually multiple ways, and all of those arrangements need to be considered and integrated into the estate plan when creating a will or trust. These transfer methods include:

- By contract property may be left to beneficiaries (e.g. insurance, payable on death [POD] bank accounts beneficiary of an investment account or IRA, Transfer on Death [TOD] registration for securities)*
- Types of joint ownership (joint owners on a bank account or real estate owned as joint tenants with right of survivorship
- Life estate deeds
- A trust funded during life
- Through the estate by probate of will, administration of estate when no will exists or small estate summary distribution for probate property (see slide 32 below)
- By affidavit of car title to next of kin when probate is not necessary (Alabama Department of Revenue MVT 5-6)

* note that If you are married, federal law automatically makes your spouse the beneficiary of your 401k. To name a beneficiary other than the spouse, the spouse must sign a waiver.

ESTATES GONE BAD FOR FAILURE TO PLAN

As an example of an estate plan ruined by failure to consider beneficiary designations for non-probate property, consider Ann.

Ann had an estate valued at approximately $750,000. She wanted to give $10,000 to each of her five cousins and included that in her will. She wanted the rest of her estate to go to her daughter and son who lived nearby and provided care to her. She excluded a son from her will because he had moved away three years earlier and had no contact with her after the move. Ann wrote a will providing specific bequests for the cousins and giving the rest residue and remainer of her estate to the local son and daughter. She specifically omitted the son who moved away.

However, Ann did not consider the titling of her assets. Years ago she designated her three children as beneficiaries on her IRA and investment account. These accounts were valued at $550,000. These assets do not pass pursuant to Ann's will since they are non-probate assets, thereby passing directly to the named beneficiaries.

This leaves only $200,000 to pass pursuant to her will. The will also states that all taxes, funeral expenses, legal fees, executor fees, and debt are to be paid from her probate estate.

Ann owes roughly $20,000 on credit cards. The expenses of the estate (including debt and funeral expenses and taxes) are $25,000. This will leave only $175,000 to be distributed through her Will. The cousins will receive $10,000 each, for a total of $50,000, and her son and daughter get $62,500 each of her probate estate. The $550,000 with account beneficiaries is split between the three children so that ultimately the omitted son receives $183,333.33 (though Ann wanted him to take nothing), and the caregiver children receive $245,833.33 each (though she wanted them to receive $337,499.83 each).

Another example of failure to properly plan may occur in a second marriage when a person transfers his property to a trust prior to the marriage despite the existence of a will. When the later married (omitted) spouse thinks she will be entitled to the intestate share she learns that property removed to the trust is not part of the probate estate, and there is nothing from which to claim her omitted spouse share.

A terrible outcome can occur when a man who owns non-home property in only his name fails to make a will. In our example the 80 year old testator had a child when he was married early in life at age 20. He never had contact with the child over the years after he and the child's mother divorced on bad terms, the ex-wife remarried, and ex-wife's new husband (the step-father) raised the child. At 25 our testator married a second time and had four children with his second wife. When he died at 80 he had been married to his second wife for 55 years, and their four children looked forward to keeping their father 's land in the family. Without a will the estate is administered, and the son he does not know will inherit a sizeable portion of the land. If it is valued at $500,000, his wife will take $250,000 worth of the land, and the estranged son will inherit $250,000 of the value of the land. The four children of the second marriage inherit nothing until their mother dies. (See slide 30)

WHAT IS PROBATE PROPERTY?

In planning to dispose of property at death it is important to understand what is included in a probate estate and subject to court involvement and what is non-probate property and not subject to court intervention.

In today's financial world many types of property can completely escape court intervention by proper titling and beneficiary designations, but some property is inevitably included in a probate estate. This would include:

- assets titled to the deceased person (decedent) alone;
- assets the decedent owned as a tenant in common with one or more other persons where the deed does not specify that the property is held with right of survivorship;
- assets with the estate designated as beneficiary or with no beneficiary or payable on death designation at all; and
- money owed to the deceased person that will be paid after death (e.g. lawsuit proceeds, last paycheck, refunded deposits, etc.).

NO PLAN IS A PLAN: INTESTATE SUCCESSION

Without a will probate property will pass as follows in Alabama:

- If there are no children and no parents, all to the spouse;
- If there are no children, but there are parents, the first $100,000 plus 1/2 of balance over $100,000 to the spouse and 1/2 of the balance over $100,000 to the parent or parents;
- If there is a spouse and a child or children by a previous relationship, 1/2 to the spouse and 1/2 to the child or children by the previous relationship (note that children of the marriage existing at the time of death take nothing);
- If there is a spouse and a child or children by the surviving spouse, the first $50,000 to the spouse plus 1/2 of the balance over $50,000 to the spouse and 1/2 of the balance over $50,000 to the child or children by the surviving spouse.

if there is no surviving spouse, then distribution will be in the following order:

- all to the child or children;
- all to the parent or parents;
- all to the siblings;
- all to the grandparents;
- all to the aunts and uncles;
- all to the cousins.

Without a will, if there is probate property, the estate must be administered to pass property by Intestate succession.

The persons who have priority to file a petition to Administer an Estate and be appointed as personal representative (formerly referred to as administrator of the estate) are the following:

- the spouse;
- the next of kin entitled to a share of the estate;
- the largest creditor of the estate residing in Alabama;
- the county or general administrator in counties having a population of 400,000 or more;
- such other person the court shall name.

In the Administration of an Estate Alabama law will not permit the court to appoint a non-resident of the state as personal representative unless the non-resident is, at the time, executor or administrator of the same estate in some other state and duly qualified under the laws of that jurisdiction.

A non-resident, however, may be appointed as the personal representative if nominated in a will.

SMALL ESTATE ADMINISTRATION

When there is an estate to pass and the value of the property does not exceed $30,245 (in 2020) and no real property, a process known as Small Estate Summary Distribution may be used to close out the estate.

The amount allowed to use a Small Estate Summary Distribution is adjusted every March. The process is much faster and less expensive than a full probate or administration of an estate.

You see this procedure used when someone has a bank account under $30,245 with no joint owner or payable on death designation for the account.

CREDITORS AND FINANCING PROBATE

Debt plays a major roll in the probate of an estate. It is important to realize that an estate can be insolvent if a person dies owing more money than he or she has estate property. In that event there is nothing for the heirs to inherit. All creditors of the estate must be put on notice so that they can file claims against the estate. Those valid claims must be paid from the estate property before any estate asset can be transferred to an heir.

When an estate is being settled in Alabama, it will take six months or longer before the assets in the probate estate can be distributed. Therefore it is important to plan for that wait and provide money to cover expenses during that time. Some people will designate a bank account jointly titled to themselves and the person they have named to be the personal representative of their will so that funds will be available for any immediate cash needs (such as upkeep of property, property tax, probate costs, etc.). Another source of cash may be life insurance with the beneficiary designated as the person who will be responsible for the estate

PRIORITY DEBTS AGAINST AN ESTATE

Certain debts of the estate have priority and are payable in the following order:

- The funeral expenses;
- The fees and charges of administration;
- Expenses of the last illness;
- Taxes assessed on the estate of the decedent prior to his or her death;
- Debts due to employees for services rendered the year of the death of the decedent;
- Other debts of the decedent.

Medicaid is now a special creditor of an estate due to Medicaid Estate Recovery. In 2019 a law passed in Alabama requiring The Alabama Medicaid Agency to be notified of every probate filed in the state to allow the agency an opportunity to check agency records to see if the deceased ever received Medicaid benefits subject to estate recovery.

TESTAMENTARY RESTRICTIONS ON FREEDOM

A spouse may be written out of a will, but he or she will have the right to refuse the will and claim the spouses' elective share. That share is the lesser of the following:

the testator's estate minus the living spouse’s estate or one-third.

The spouse is also entitled to:
Homestead allowance of $15,000
Personal property exemption of $7500
Family allowance of $15,000.

These numbers are adjusted every three years (due to be adjusted at the end of 2020) based on the Consumer Price Index published by the U.S. Department of Labor.

A spouse married after the will was written is entitled to the same share of the estate which he or she would receive if the testator died without a will (the intestate share) unless it appears intentional from the will or the spouse was provided for outside the will and it can be proven that the provision was in lieu of a testamentary provision.

LEAVING GUARDIANS AND PROPERTY TO MINOR AND DISABLED PERSONS

A guardian may be named in a will for minor children, an unmarried incapacitated adult child, or an incapacitated spouse.

Specific items may be given in a will, or a particular person(s) can be named to disburse property. Property for minors is given pursuant to the Uniform Transfers to Minors Act with a custodian appointed to protect the property until the child turns 19 (or may be delayed until age 21).

When planning for a child or relative with a disability consider special needs planning to avoid resulting in loss of public benefits those persons may be drawing (see slide 43 below).

LIFE ESTATES FOR LATER IN LIFE MARRIAGES

When there are blended families or later in life marriages, a life estate is a tool that will allow the protection of the later in life spouse while providing for the ultimate transfer of the property to children by a previous marriage.

Still, it is important to recognize that the spouse may elect to exercise his or her elective share and claim the homestead, personal property and family allowance. This could result in the property having to be sold to satisfy the spousal claims. Therefore it is a good idea to arrange probate property to satisfy such claim or consider a pre-nuptial agreement before entering into later in life marriages.

WHAT TO INCLUDE IN A WILL

A will can be a fairly flexible document tailored to meet the specific concerns of the person making the will, however there are some general issues most wills need to address:

- who will be the beneficiary and alternate beneficiary of each probate asset (if joint gift, how should the beneficiaries own the property?);
- if gift to children, if one predeceases, do the deceased child's children take his or her share?
- whether gifts are outright or paid into a testamentary trust or to a custodian under the Uniform Gift to Minors Act (UGMA);
- specific identification of real property (Book and Page where deed is filed);
- if property is to be sold, whether it can be sold pending probate of the will and proceeds held until creditor claims satisfied;
- who receives anything not specifically named (referred to as rest, residue and remainder [RRR]);
- specific burial plots owned by the maker of the will (if not specified, plots do not pass by the will's RRR at all, rather to the heirs at law);
- person who will serve as personal representative and alternate;
- who, if any next of kin, is to be specifically omitted;
- waiver of bond and inventory;
- self proving (specific declaration before two witnesses and a notary).

Additional considerations include:

- affidavit concerning disposition of remains;
- arrangements for pets;
- digital assets.

TRANSFERING TITLE TO A VEHICLE

Sometimes the only property not jointly titled when a spouse dies is a vehicle. To solve that problem and to keep from having to open a formal estate administration, if the vehicle is paid off, the next of kin may file an Affidavit for Assignment of Title for a Vehicle from a Deceased Owner Whose Estate Does Not Require Probate (Alabama Department of Revenue MVT 5-6). Title can be transferred by filing the affidavit at the tag and title office of the local probate court.

The Alabama Department of Revenue MVT 5-6 can be obtained at the probate court or found online at:

https://revenue.alabama.gov/wp-content/uploads/2017/05/mvt5_6.pdf

If the vehicle is not paid off it will likely need to be refinanced, and the lender needs to be put on notice of the death.

REVOCABLE LIVING TRUSTS

Living Trusts are created by the grantor (aka donor) to hold property in the name of the person creating the trust and designates who will receive the assets held in the trust at the death of the grantor.

Property must be titled to the trust for the trust to have any authority over the property. This is called funding the trust. One would typically title his or her home, cars, and perhaps some investment or bank accounts to the trust. All too often attorneys draw up estate-planning documents, advise clients to fund their trusts, and then nothing happens. Since trusts have no relation to assets that are not retitled, the person may die without a will and an unfunded trust which, ultimately, is the same as dying intestate with no enforceable instruction provided concerning distribution of property.

To place bank and investment accounts into a trust, those accounts need to be retitled as follows: “[your name and co-trustee’s name] as Trustees of [trust name] Revocable Trust created by agreement dated [date].” Some institutions may allow the retitling of an existing account, but it may be necessary to open a new account in the name of the trust and then transfer the funds. The financial institution will require a copy of the trust.

You will need to execute a deed titling real property to the trust. One drawback to placing real property in the trust is the fact that you will likely have to remove it from the trust if you want to refinance or take out a line of credit, because in many instances banks and other lenders require that you remove the property from the trust and put it back in your name before signing any new mortgage papers. You also need to reclaim homestead exemptions after transferring property into a revocable trust.

While it is permissible by federal law to put mortgaged property into a living trust, it is the best practice to let the lender know of plans to do this since the property is being retitled to the trust.

Tax deferred accounts, such as IRAs, cannot be titled to a trust, but a trust can be named as the beneficiary of the account funds.

Some people execute a “pour-over” will along with the trust, designating that at death all assets will be distributed to the trust so that his or her wishes, as stated in the trust, will control the ultimate distribution of the estate, and any remaining probate property not titled to the trust will be picked up by the trust. In this case probate will not be avoided, but all bases will be covered, and no loose pieces of property will be unaddressed.

A living trust can be revocable, meaning it can be changed or even eliminated, or irrevocable, meaning it cannot be amended or eliminated. Most living trusts are created as revocable to allow the grantor flexibility to make changes over time. At the time the grantor dies, the trust becomes irrevocable.

A living trust can be beneficial for multiple reasons. When property is owned in different states a trust can make passing that property at death easier. No probate proceeding is required in one state and then an ancillary probate required in another jurisdiction. Many people like the idea of avoiding probate, keeping their affairs private and envisioning less confusion and expense for heirs after their death. That should be weighed against the additional time and expense required to set up the living trust. Debts of the grantor do have to be satisfied.

As long as the grantor serves as his own trustee or co-trustee, he can use his Social Security number for the trust and will be taxed on all of the earnings from the trust during his lifetime as though no trust exists. The trust will pay no separate tax. When he dies the trust becomes irrevocable and the trustee will need to acquire a tax ID for the trust.

While an excellent tool for many reasons, revocable living trusts will not remove property from the reach of creditors or counting as assets for Medicaid purposes.

SPECIAL NEEDS TRUST (SNT)

Special Needs Trusts are created for disabled persons to supplement means-tested benefits (SSI and Medicaid) without the loss of benefits, solving the problem of resources being too high for public benefits. Transfer of money into the SNT does not incur a penalty with means-tested benefits. A will may permit an inheritance to pass into a SNT.

First Party vs Third Party SNT (whose money in the trust determines Medicaid payback). Medicaid payback is required for a first party trust (money belonging to the disabled person); no payback is required for a third party trust (money belonging to someone other than the disabled person). Beneficiaries are named for funds remaining after death (and, if applicable, after Medicaid payback)

Persons over 65 can establish Pooled Trusts through The Alabama Family Trust, and transfers of assets into the trust after age 65 to accomplish the Medicaid spend down will not be subject to a transfer penalty.

Examples of uses for SNT:

- A person on SSI and Medicaid inherits $50,000 (first party)
- Grandparents want to provide an equal gift to all grandchildren, but one child is disabled (third party)
- A person needs to spend down $100,000 before qualifying for Medicaid in the nursing home (pooled first party if over 65)

Either the individual creates the trust or the attorney in fact under a power of attorney if the power of attorney grants this power. If not, the probate court has to grant the power in a single transaction conservatorship. Money in the trust can only be used for special needs.

HOW FUNDS IN SNT CAN BE USED

- Pre-need funeral/burial contracts limited to $5,000 for Medicaid cases and $1,500 for SSI cases for non-space items unless the contract is irrevocable. Space items include casket, vault, plot, monument, and open/close grave. These items must be purchased before death.
- Medical, dental care, vision not paid for by public benefits
- Sitter services for the beneficiary allowed by Medicaid and SSI in the beneficiary's particular case (SITTER MUST comply with AFT requirements)
- Education, including tuition, books and supplies
- Electronic equipment such as computers, television, video games
- Hobby supplies
- Telephone, cell phone service
- Cable service
- Clothing
- Personal hygiene products such as shampoo, lotion, adult diapers
- Differential for private room in nursing home
- Magazines/newspaper subscription, furniture, household goods, bedding, curtains
- Mileage for representative visits to the beneficiary: (1) to perform tasks specifically associated with the beneficiary's care; or (2) trips made with the beneficiary in the vehicle, for example, for treatments; or (3) trips to purchase/pick-up medication or supplies for the beneficiary.
- Mileage is not reimbursable for general visitation. Mileage is compensated at the Federal IRS rate in force at the time
- For SSI recipients funds cannot be used for food, shelter and utilities

DISPOSAL OF REMAINS

Alabama law permits a person to make a document known as Affidavit Concerning Disposition of my Remains pursuant to Code of Alabama § 34-13-11(a) naming a particular person to handle funeral arrangements.

Specific instructions can be provided such as the desire to be buried or cremated, the location of burial or ashes distributed, etc. For persons who want to be cremated it is particularly important to have these instructions since some funeral homes will not allow a non-next-of-kin to arrange for cremation without officially being named to make that decision.

Another situation that compels people to sign an affidavit is the desire to be buried beside a first (or second) spouse when he or she is not sure what the children will want to do. Making your desires known is a good idea leaving nothing for debate.

As previously mentioned, this instruction may be given in a will, or by separate affidavit, but it is a best practice to have a separate affidavit in case the funeral home requires a document with an original signature to be kept on file. Since your personal representative will need your original will for probate, you may want the affidavit as well. In some law offices two original wills are signed with one retained in the file, so this prevents the problems that can be associated with the need for two originals as well as loss of the will by the person who took the original home.

WHERE TO ACCESS THE MATERIALS FROM THIS PRESENTATION

This PowerPoint will be available at Slideshare, and will also be posted on The PANDA Project Facebook page and the Jan Neal Law Firm Facebook Page following this presentation.