Wills, Trusts & Estates in South Carolina

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Why Plan?

Much toil goes into the accumulation and preservation of wealth during your lifetime. But, too often, little attention is given to controlling and transferring that wealth in the event of incapacity or at death. You want to see that your loved ones receive your property after your death. You want to minimize unnecessary administration expenses and wealth transfer taxes which could easily be avoided. But what do you do about it? "Estate planning" is the process of determining how your estate will be managed and distributed. The emphasis is on ***planning***. Now is the time to face the potential problems and implement the techniques available for solving those problems. Without proper planning, your estate will be unnecessarily eroded, and the potential for friction among family members will be increased.

Decide today to leave your house in order!

What is a last will and testament?

A Last Will and Testament, in simplest terms, is a document directing the transfer of your property to your heirs. As in all states, South Carolina has specific requirements for a Will to be valid and enforceable. Unfortunately, there is a common misconception that any form of statement, written or verbal, regarding your desires for the disposition of your property will suffice to distribute your property among your family members. This is clearly not the case.

There are certain ***legal requirements*** for your Will to be binding:

- The testator (person making the Will) must be at least **18 years of age**;
- The Will must be **in writing**. The written instrument can be handwritten or typed. The important point is that your statement of wishes is permanently preserved so that it can be reviewed in detail and construed as necessary;
- The Will must be **signed by the testator and two independent witnesses** who are together when the Will is signed or acknowledged by the testator;
- The testator must be mentally **competent**, meaning that he understands what property he has, who the natural objects of his affection are, and who he wants to give the property to; and
- The testator must **voluntarily** sign the Will, without any form of duress or undue influence by another person.

Note: These five requirements are ***all*** of the legal requirements for a valid Will in South Carolina. There is no requirement that the Will be notarized by a Notary Public, although a Notary is frequently used in the execution of a sworn statement known as a "proof of will" or "self-proving affidavit." It is a common practice

among South Carolina estate planners to routinely execute a Proof of Will every time a Will is signed but, again, this is not a legal necessity for the enforceability of the Will.

Note also that the requirements for a valid Will do not include the drafting or review by a lawyer. It is advisable, however, from the practical standpoint, to at least ask a lawyer to review your Will for compliance with applicable state laws. The failure to do so is risky because of the complexities of the state probate laws and federal and state tax laws affecting the transfer of property. Self help is not recommended!

What property does the will control?

Different types of property are divided into one of two categories known as "probate" property and "non-probate" property. ***Probate property*** is any type of asset which is controlled by your Last Will and Testament or, if you have no Will, by state laws of intestate secession. ***Non-probate property***, on the other hand, is any kind of asset which is subject to a contract between the owner and a third party which controls the property's ultimate disposition and therefore passes outside of the Will. The following list gives examples of the most common types of probate and non-probate property:

Probate Assets:

- tangible personal property (clothing, furniture, autos, silver, jewelry, etc.)
- real estate (unless jointly owned, with clear rights of survivorship set forth in the deed)
- intangible personal property titled in the decedent's name alone (checking or savings accounts, stocks, bonds, CD's, etc.)

Non-probate Assets:

- intangible personal property titled in the decedent's name and another person's name (joint bank accounts, joint stocks and bonds, etc.)
- life insurance and retirement benefits payable to a named beneficiary
- property held in a trust.

Example:

To illustrate the effect of probate and non-probate property, let's look at an example. Assume that a man dies, survived by his wife and one son. His Will directs that all of his property will go to his son. Finally, assume that his assets are as follows:

Personal effects: (furniture, clothing, jewelry, guns, automobiles, etc.)	$25,000
Undivided 1/2 interest in house (tenancy in common)	250,000

Checking account in husband's name only	25,000
Checking account in joint names of husband and wife	60,000
Life insurance on the husband's life, with wife as beneficiary	500,000
Individual Retirement Account, with wife as beneficiary	400,000
Charitable trust created by husband for the benefit of himself and his wife for life - balance to go to a charity upon their deaths	100,000

How much property does the son receive from his father's estate? He receives the personal effects, the 1/2 interest in the house, and the bank account which was titled in his father's name alone (a total value of $300,000). The charity receives nothing until the wife passes away, then will receive the balance of the charitable trust. The rest of the property (totaling $960,000) and the future income from the charitable trust passes to the surviving spouse, even though the Will said "give everything to my son." Why? The non-probate property is not controlled by the terms of the Will.

The point of this illustration is that you must carefully coordinate how you hold title to property and how you plan to distribute your property under your Will.

What to cover in your will.

Your desire for a "simple" will is understandable. Unfortunately, there is much to cover and a one-pager is usually too simplistic. A properly drawn Will should address most, if not all, of the following areas:

1. Obviously, you must name the beneficiaries of your property, and give a clear statement of what each is to receive. Provide for alternate beneficiaries in case the primary beneficiaries do not survive you.

2. Your Will should name a personal representative (known as an "executor" in some states), and an alternate personal representative, just in case your first choice cannot serve. The personal representative is the person who carries out your instructions. The person or bank who serves in this position has a great deal of responsibility, and should therefore be capable and trustworthy.

3. If you have custody of minor children, you should appoint a guardian to take

care of the minor until he or she reaches age 18.

4. You should consider the creation of a trust for the management and control of property passing to a minor or to any person who cannot adequately manage his own property. See the discussion below concerning the common uses of trusts in estate planning.

5. The dispositive portion of the Will should always contain a catch-all provision, known as a residue clause, disposing of all property not otherwise specifically mentioned in the Will.

6. It is a common practice to provide that a separate, written list of specific items of tangible personal property (such as jewelry, silver, furnishings, etc.), is to be treated as part of the Will. This separate list, or memorandum as it may be known, is binding so long as it is signed by the testator. It is not necessary that it be formally signed in the presence of witnesses, and it can be updated periodically without the necessity of revising the Will itself.

7. The Will should include a self-proving affidavit, signed by the testator and at least one of the witnesses. The self-proving affidavit is an affidavit signed by the testator and at least one of the witnesses, indicating that all of the requisite formalities were observed in the execution of the Will. The purpose of the Affidavit is to preserve the testimony of the witnesses so that if questions later arise as to the validity of the Will or the manner of its execution, a sworn statement by the actual witnesses has already been taken.

8. If estate taxes may be incurred at your death, the Will should specify which beneficiaries are to bear the burden of such taxes. This is known as a tax apportionment clause.

9. You may want to specify that a beneficiary must survive you by a period of time, such as 30 days, in order to inherit any property. The purpose of such a survivorship provision is to avoid the loss of control over the disposition of property if the beneficiary does not survive long enough to enjoy the use of such property.

10. It is often helpful to define terms used in the Will, such as "per stirpes" or even "my children."

Where to keep your will.

It is important to understand that only an original Will is enforceable. The original Will is the actual document which the testator signed, as opposed to carbon copies, photocopies or conformed copies of that document. For all practical purposes, only the original Will can be probated. If you do not know where your original Will is located, you do not have a Last Will and Testament. For this reason, it is imperative that the original Will be kept in the safest possible place.

A fireproof and theft-proof safe at home or a bank safe deposit box ("lock box") is

the best place to keep your Will. Many fear that a safe deposit box will be closed upon the death of the holder of the box, making it difficult or impossible for the Will to be retrieved. In South Carolina, however, the law specifically provides that a family member can go into the box after your death, in the presence of a bank officer, to withdraw a Will, life insurance policies, and any burial instructions. After such documents have been removed, the box will be re-closed until a complete inventory of the contents of the box can be sent to the taxing authorities.

How long is your will valid?

Theoretically, a Will is valid for the life of the testator once it has been properly executed. As a practical matter, however, you should review your Will every three to five years to determine whether a change of circumstances may have triggered the need to change its terms. For example, marriages, divorces, deaths, births, changes in financial condition, changes of location and changes in health (your own or that of your family members, personal representatives, guardians or trustees) may necessitate major revisions in your Will. Also, the federal and state tax laws and probate laws change from time to time. You should certainly have your Will reviewed if it has not been updated since the federal estate tax laws have changed tremendously in the last ten years.

Intestacy

If a person dies without a Will, state law determines who will inherit his probate property. Remember that non-probate property will pass to the surviving joint tenant or the named beneficiary regardless of whether there is a valid Will. The probate property, however, will pass to the decedent's heirs in the following order:

The class of heirs with highest priority is the surviving spouse and issue of the decedent (50% to spouse and 50% to be divided equally among the children). If a child predeceases the decedent, the child's children will take their parent's share of the estate. If there are no children surviving, the spouse receives the entire probate estate. If there is no spouse surviving, the children divide the entire probate estate equally among themselves.

If there is no spouse or child who survives the decedent, then the probate property passes to the decedent's parents. If neither parent is surviving, then the property passes to his brothers and sisters, with the children of a pre-deceased brother or sister (i.e. nephews or nieces) receiving the share that would have gone to their parents. There are several additional categories of family members who would inherit property in the extent of intestacy, based on degree of relationship to the decedent. In almost all cases, there will be surviving heirs who come forward to inherit the probate property. If there are no living heirs, however, the last two categories of intestate heirs include stepchildren and, finally, the State of South Carolina.

You may feel that the intestacy provisions are not so bad because they basically would leave your property to the same people you would name in your Will. There are nonetheless very good reasons to have a valid Last Will and Testament, some of which are as follows:

(a) To exercise your right to appoint a Personal Representative. If you do not appoint a Personal Representative in a valid Will, the Probate Court must appoint one for you. Such court-appointed Personal Representatives are required to post a surety bond guaranteeing the faithful performance of their duties. This bond is expensive and will typically, by itself, exceed the cost of having a Will prepared.

(b) If any of your beneficiaries are minors, a Conservator will have to be appointed by the Probate Court to manage and control the property for the minor. The conservator will have to post a surety bond and render annual accountings to the Probate Court. Worse yet, when the minor reaches age 18, the property held by the Conservator will pass to him or her with no strings attached, and will probably be wasted.

(c) If property passes jointly to a surviving spouse and minor children, the spouse will not have the ability to sell assets and cannot freely manage his or her own property without the consent of the children's Conservator.

(d) Finally, the spouse cannot use the minors' property to meet ordinary living expenses such as food, clothing, shelter, education, etc.

In summary, it is unnecessarily expensive and, for practical reasons, very inefficient to allow property to pass by intestacy rather than taking the time and effort to have a valid Last Will and Testament prepared. In fact, the smaller your estate, the less room you have for unnecessary waste which inevitably occurs for intestate estates.

Wealth Transfer Taxes

History of the Wealth Transfer Taxes.

In 1916, Congress imposed an estate tax to provide revenue for the support of World War I. Public hostility toward the accumulation of great wealth had begun to manifest itself in the late 1800's after enormous family fortunes had been amassed by Rockefeller, Vanderbilt, Morgan and others. President Theodore Roosevelt soon after the turn of the century proposed a steeply graduated inheritance tax on "swollen fortunes which it is certainly of no benefit to this country to perpetuate." Einstein, "The Rise and Decline of the Estate Tax," 11 Tax Law Review 229 (1956). With the Franklin D. Roosevelt administration, the redistribution of great inherited fortunes, rather than the mere generation of revenue, became the primary purpose of the estate tax. In a message to Congress, Roosevelt declared: "The desire to provide security for one's self and one's family is natural and wholesome, but it is adequately served by a reasonable inheritance. Great accumulations of wealth cannot be justified on the basis of personal and family security. In the last analysis such accumulations amount to the perpetuation of great and undesirable concentration of control in a relatively few individuals over the employment and welfare of many, many others." In other words, "inherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our Government." H.R. Report No. 1681, 74th Congress, 1st Session 2 (1935), 1931-1 (Part 2) 643.

Since World War II, Congress has continued to adjust the estate tax system. Today we have a "unified transfer tax system." The same tax rate schedule is applied to both lifetime transfers (i.e., the gift tax) and testamentary transfers (i.e., the estate tax). Up until 1977, a dual transfer tax system existed under federal law. The gift tax and the estate tax were separate. The gift tax rates were much lower than the estate tax rates, therefore providing tax incentive for making lifetime gifts. **The Tax Reform Act of 1976** unified these taxes for the first time, replacing the separate gift tax and estate tax rate tables with a single unified rate schedule for both taxes. The rates are progressive on the basis of cumulative lifetime and death time transfers.

Recent Developments.

The past two decades brought significant changes to the estate and gift tax system. In 2001, Congress passed and President George Bush signed the **Economic Growth and Tax Relief Reconciliation Act ("EGTRRA")**, which phased out the estate tax over a period of ten years by slowly increasing the exemption amount and decreasing the tax rate, culminating in the repeal of the estate tax for decedents dying after December 31, 2009. The period of repeal, however, would only last for the calendar year 2010, then the "Bush tax cuts" would sunset after December 31, 2010. The result of the "sunset" of the tax cuts meant that for decedents dying on or after January 1, 2011, the estate tax would come back into existence at the 2001 levels, with a $1,000,000 exemption amount and a tax rate of 55% on all assets in excess of the exemption amount.

In December 2010, Congress passed the **"Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010."** On December 17, 2010, the

Act was signed into law by President Obama. The changes to the estate, gift and generation-skipping transfer taxes were only applicable for two years (2011 and 2012), after which the tax cuts were again scheduled to sunset. This set up a huge policy debate in anticipation of the presidential election year of 2012.

On January 2, 2013, President Obama signed the **American Taxpayer Relief Act** of 2012, making "permanent" estate and gift tax rules for the first time since 2001. The law established the basic exclusion amount at $5 million, indexed annually for inflation.

In 2015, Congress added a new reporting requirement (Section 6035) to the Internal Revenue Code, requiring the executor of a decedent's estate that is required to file a federal estate tax return to also file a "valuation statement" on Form 8971. The purpose of the new form is to report to the IRS the income tax basis of property received by a beneficiary from a decedent. The new form is required for any estate for which an estate tax return is filed after July 31, 2015. This valuation statement applies to estates even if they have no estate tax liability because of the marital or charitable deductions. Thus, all executors required to file an estate tax return, other than those required to file merely to elect portability, must also file the required valuation statements. For more information, contact your estate attorney or accountant.

Finally, on December 22, 2017, President Trump signed the **Tax Cuts and Jobs Act**, which includes the most significant tax changes in three decades. In addition to making significant changes in individual and corporate tax rates and many other modifications in the deductibility of various types of expenses, the new law contains profound changes in the area of wealth transfer taxes. Those changes to the federal estate, gift and generation-skipping transfer taxes, which are described in more detail below, will remain in effect until the end of 2025, at which time the new law will "sunset" and revert to the law as it existed in 2017 (adjusted for inflation). Due to the significantly larger exemptions between 2018 and 2025, the new law effectively repeals the wealth transfer tax for most people. Because of these significant changes, it is highly recommended that you meet with your estate planner to review existing documents and consider possible modifications or simplifications to take advantage of the larger exemptions.

The gift tax. The gift tax is a tax imposed on the lifetime transfer of property from one person (the "donor") to another person (the "donee"). The first $18,000 worth of property transferred by one donor to each donee in each year is excluded. Hence, each donor can transfer up to $18,000 worth of property each year to as many donees as he may desire, without incurring gift tax. If the donor is married, his spouse can also transfer up to $18,000 worth of property annually to each donee. Gifts in excess of the annual exclusion amount must be reported by the donor on a gift tax return filed by April 15 following each calendar year. The donor is liable for payment of the gift tax. Under current law, the annual exclusion will continue to be adjusted annually for inflation.

Annual Gift Tax Exclusion:

2010	$13,000
2011	$13,000
2012	$13,000
2013	$14,000
2014	$14,000
2015	$14,000
2016	$14,000
2017	$14,000
2018	$15,000
2019	$15,000
2020	$15,000
2021	$15,000
2022	$16,000
2023	$17,000
2024	$18,000

A lifetime exemption is also available for gifts that exceed the annual exclusion as shown below, but requires careful planning to determine whether large lifetime gifts are advisable.

Year of Gift	Lifetime Exemption	Tax Rate
2010	$1,000,000	35%
2011	$5,000,000	35%
2012	$5,120,000	35%
2013	$5,250,000	40%
2014	$5,340,000	40%
2015	$5,430,000	40%
2016	$5,450,000	40%
2017	$5,490,000	40%
2018	$11,200,000	40%
2019	$11,400,000	40%
2020	$11,580,000	40%
2021	$11,700,000	40%
2022	$12,060,000	40%
2023	$12,920,000	40%
2024	$13,610,000	40%

The estate tax.

The estate tax is a tax imposed on the transfer of all property owned or controlled by a decedent at the time of his death. The tax is assessed against and paid by the estate of the decedent, as opposed to an "inheritance tax," which is assessed against the recipients of the property.

The first step in calculating the estate tax is to determine the "gross estate." The

gross estate encompasses all property owned or controlled by a person at the time of his death, including both probate and non-probate assets. Examples include:

- all property titled in the name of the deceased person, including items such as checking or savings accounts, stocks, bonds, boats, automobiles, real estate, or any tangible personal property such as personal or household goods which belong to the decedent.

- property owned jointly with another, to the extent purchased with assets of the decedent. It is presumed that the decedent furnished all of the purchase price unless the survivors can show to the contrary, or unless the joint ownership is between husband and wife, in which case only 1/2 of such property is included in the estate for tax purposes;

- proceeds of life insurance policies. The full face value of a policy is included in the gross estate if the decedent had any "incidents of ownership" in the policy at the time of his death. An incident of ownership is any right over the policy such as the right to change the beneficiary, the right to change the form of payment of proceeds or the right to borrow against the policy;

- property given away before death, if the decedent retained substantial rights over the use or enjoyment of the property. Such retained powers are tantamount to continued ownership of the asset. Examples of such rights would be the right to use the property or to receive the income from the property during life, the right to revoke the gift, or the power to designate the person who is to get the property.

Once the value of the gross estate is determined, certain deductions are allowed. Expenses paid by the personal representative in the course of administering the estate are generally deductible. These include funeral expenses, expenses of the decedent's last illness, executors fees, accounting fees, attorneys fees, probate court costs, etc. Also deductible are any debts or expenses owed by the decedent at the time of death.

Three main components of our transfer tax system are the "**marital deduction**," the "**charitable deduction**" and the "**unified credit**."

Marital Deduction

Congress has adopted the view that a married couple should not be taxed upon the death of one spouse or upon lifetime transfers of property between spouses. Therefore, as part of the Economic Recovery Tax Act of 1981, Congress created the so-called "unlimited marital deduction." All gifts or bequests to your spouse are effectively exempt from estate or gift tax, without limitation.

Charitable Deduction

Our wealth transfer tax system favors private philanthropy. Any property given to a qualified charity (religious, artistic, educational, scientific, etc.) is fully deducted from the gross estate. Many attractive forms of charitable transfers are available, including outright gifts of cash or other assets, gifts of life insurance policies, charitable remainder trusts, charitable lead trusts, etc. The so-called "split-interest" trusts further enable the donor to deduct the fits against current ordinary income. Why not support your favorite charity and possibly receive a current deduction rather than pay estate tax?

Unified Credit

Each individual, whether married or single, is also allowed a credit which can be used to offset liability for the payment of federal gift tax or estate tax. The amount of property exempted by the "unified credit" changes from year to year. Since the Economic Growth and Tax Relief Reconciliation Act of 2001, the amount of the "exclusion equivalent" has increased as follows:

Year of Death	Unified Credit Exclusion Equivalent
2002-2003	$1,000,000
2004-2005	$1,500,000
2006-2008	$2,000,000
2009	$3,500,000
2010	$5,000,000*
2011	$5,000,000
2012	$5,120,000
2013	$5,250,000
2014	$5,340,000
2015	$5,430,000
2016	$5,450,000
2017	$5,490,000
2018	$11,180,000
2019	$11,400,000
2020	$11,580,000
2021	$11,700,000
2022	$12,060,000
2023	$12,920,000
2024	$13,610,000

* unless the executor elected to use unlimited exemption with modified carry over basis

Because of this large credit, many individuals are entirely exempt from the federal estate tax at their death. Nevertheless, for those estates which exceed the exemption the potential estate tax liability is large. The federal estate tax rates have fluctuated from year to year as follows:

Year of Death	Maximum Estate Tax Rate
2002	50%
2003	49%
2004	48%
2005	47%
2006	46%
2007, 2008, or 2009	45%
2010	35%*
2011-2012	35%
2013-2024	40%

* unless executor elects 0% rate with modified carried over basis

Portability

For the first time, TRA of 2010 provided for "portability" of the unified credit between spouses. Any applicable exclusion amount that remains unused as of the death of a spouse who dies after December 31, 2010, generally is available for use by the surviving spouse, and the Tax Cuts and Jobs Act of 2017 maintains it. In other words, a surviving spouse may use the predeceased spousal carryover amount in addition to such surviving spouse's own $13,610,000 exclusion. Portability is only available if an election is made on a timely filed estate tax return (including extensions) of the predeceased spouse on which the amount is computed. For example, if a husband dies in 2024 with a taxable estate of $3,000,000 and an election is made on his estate tax return to permit the wife to use his unused exclusion amount, the wife's applicable exclusion amount would be $24,220,000, consisting of her $13,610,000 exclusion amount plus $10,610,000 of her deceased spouse's unused exclusion. This is a significant and beneficial development in the law, but will require married couples to more carefully coordinate their estate plans.

Revising old plans

Traditional estate planning for married couples from the 1980's through at least 2010 usually included the creation of a "credit shelter trust" or "bypass trust" at the death of the first spouse. This fully protected or utilized the exemption equivalent amount for both spouses. For the majority of families, this is no longer necessary. The larger exemptions ($27,220,000 in 2024 for husband and wife combined) and the new portability of unused exemption at the first spouse's death require estate planners to reconsider the use of credit shelter trusts for most families. There may still be significant non-tax reasons to utilize such trusts, but your existing plan should be reviewed on a case-by-case basis to consider all options. In many instances, the wills can now be simplified.

Gifting to reduce your estate

Another very effective way to minimize estate taxes is to reduce your gross estate by making gifts during your lifetime. Ideally, property to be given away should be property on which you do not depend for income. For example, undeveloped real estate which does not produce income could be given to your children and reduce your gross estate painlessly. Likewise, assets which will appreciate greatly in future

years, unnecessarily adding to the size of your gross estate, should be given away before the appreciation takes place. As explained above, each individual can give up to $18,000 for 2024 worth of property per person on an annual basis. Therefore, together a husband and wife can give up to $36,000 (indexed) per person on an annual basis. As long as the aggregate amount of gifts per person annually stays within the exclusion amount, no gift tax is incurred and you effectively reduce the size of your gross estate. Not only does this make good tax sense, but from a practical standpoint it affords you the opportunity to observe how your children, grandchildren or other beneficiaries will handle the property a little at a time, rather than allowing them to blow it all at once after your death. Gifts of property can be made outright or in trust. Gifts in trust are particularly common for minors who are incapable of wisely managing and holding on to property for themselves.

The Generation-Skipping Transfer Tax.

The generation-skipping transfer tax (GST) is an ***additional*** tax imposed on gifts or bequests of more than the exclusion amount ($13,610,000 in 2024) to grandchildren or other persons who are 2 or more generations younger than the person making the transfer. The GST is applied at a flat rate equal to the maximum federal estate tax rate (currently 40%), making it the highest effective tax in our entire tax system. If you contemplate substantial gifts or bequests to grandchildren, you cannot afford to ignore the potential havoc created by the GST!

Uses Of Trusts

What is a Trust.

The concept of a trust is quite simple. It is giving legal title to property to one individual (the "trustee") to use the property for the benefit of another individual (the "beneficiary"). Trusts are useful to provide management capability when a beneficiary is too young, too old or simply too unsophisticated to wisely manage, invest and use the property in the best manner for their own benefit. Trusts can also be used to maintain control over the ultimate use and disposition of property. Rather than permitting a spendthrift child or your spouse's second husband to ultimately waste your hard-earned assets, a trust arrangement can provide the needed constraint on their ability to waste or divert assets. Finally, a trust can be used to save estate taxes, even in a situation where management ability or control are not necessarily strong objectives. As illustrated above, setting aside a certain amount of property in trust for the benefit of your spouse for life with the provision that the trust property remaining at the time of their death will pass on to other beneficiaries can avoid a great deal of estate tax liability.

Types of Trusts.

A trust created during the lifetime of the grantor is known as an "**inter vivos**" **trust** or "**living**" **trust**. Living trusts can be revocable or irrevocable, depending upon the intended use of the trust. Frequently, living trusts are used to transfer assets out of the grantor's estate, for the benefit of a minor child or grandchild. Whether intended to be merely an education fund which lasts until age 18 or 21, or whether intended to be a spendthrift trust which lasts until later in the beneficiary's life (in hopes of protecting the minor's assets from the minor himself), such trusts must be irrevocable to effectively remove the assets from the grantor's estate. In either event, this living trust is set up with a view toward controlling the use and disposition of the trust property.

Another reason for creating a living trust would be to provide skilled management in the investment and administration of wealth. Putting the assets into the hands of a qualified trustee frees the grantor from concerns of how to invest the funds and can allow the administrative burdens of collecting dividends, paying bills, filing tax returns, etc., to pass to the trustee. Typically such trusts remain completely revocable by the grantor during his lifetime.

A trust created by Will upon the death of an individual is known as a "**testamentary**" trust. Testamentary trusts are funded only upon the death of the person creating the trust, therefore they do not in any way reduce the gross estate. Testamentary trusts are useful for the same management or control purposes as described above, but differ from inter vivos trusts in that actual title to property is never transferred to the trustee while the grantor is living.

Estate planning for married persons typically involves trying to minimize the tax which will be imposed on the aggregate assets of the married couple. As explained on page 11, a traditional plan commonly divided the estate of the first spouse to die into two separate shares. One of the shares (typically including assets such as the

marital residence and personal property) was given either outright or in trust for the surviving spouse. This "marital share" was designed to meet the requirements of the marital deduction so that it passed estate tax free to the surviving spouse. The second share was given either outright or in trust to non-spousal beneficiaries (such as your children) or in a trust which provided benefits to the surviving spouse for life. The amount of property going into the second trust was carefully calculated to be offset by the available unified credit of the decedent spouse (i.e. $11,200,000), so that the marital deduction and the unified credit combined offset all estate tax for the first to die. As noted above, this type of trust may no longer be needed for most families.

If the "marital share" goes into trust for the surviving spouse, what trust terms are typically provided? The two most common types of marital trust are (i) the "general power of appointment trust," and (ii) the "qualified terminable interest property trust," called QTIP for short. A general power of appointment trust provides the surviving spouse with a life interest in trust assets, with the power to designate during her lifetime or at her death who will be the ultimate beneficiaries of the property. Hence, the surviving spouse is given the ultimate control over the trust. A QTIP trust provides the surviving spouse with a life interest in trust assets but also designates who will be the recipients of the trust property after the spouse's death. This ability to provide for one's spouse for life, yet retain ultimate control over the disposition of the assets, has made the QTIP trust a popular estate planning tool, especially for couples with children from prior marriages.

What Is Probate?

"Probate" is a mandatory legal process for the orderly disposition of a decedent's property. In South Carolina we have 46 probate courts, one for each county. The probate court for the county in which a decedent resided has complete authority over the orderly inventorying and valuing of a decedent's assets, the payment of any debts and taxes, and ultimately the distribution of the remaining property to the proper beneficiaries. If the decedent had a valid Last Will and Testament, that instrument controls who the ultimate beneficiaries will be after the payment of debts and taxes. If the decedent did not have a Will, state law directs who the heirs of the estate will be.

The first step in the administration of a decedent's estate is the appointment of a "personal representative." The personal representative is the person designated in the Will or, if there is no Will, appointed by the probate court, who has authority to settle the decedent's affairs.

When should the personal representative first contact the court to begin administration of the estate? Within 30 days after the date of death, the probate process should begin. The surviving spouse or other family member who has possession of the Will or who is designated as the personal representative should present the Will to the probate court. At that time, a death certificate, a check for the court costs, and a form known as "Application for Probate and Appointment" should also be presented. This Application form should be obtained in advance and properly filled out, or at least the personal representative should be prepared to give to the court detailed information about the decedent and the surviving family members as indicated on the attached checklist. If all of the paperwork is complete, the court will then appoint or "qualify" the personal representative.

After qualification, the personal representative's first task is to notify all family members that he has been appointed. This is done using the form known as "Information to Heirs and Devisees" which must be sent out within 30 days after the date of qualification. Another task to be done shortly after qualification is to notify all creditors by way of newspaper advertisements to file any claims for debts they may be owed by the decedent. In many counties the probate court itself will handle the advertisement for creditors, so be sure to ask the probate court how that step will be handled.

After the immediate steps of notifying family members and creditors of the beginning of the probate process, the next broad phase of the probate process is to inventory the assets of the decedent. This involves identifying the various personal and household goods, bank accounts, investments, real estate and other types of assets that the decedent may have owned, and valuing them at their fair market value as of the date of death. At the same time a comprehensive list of debts and expenses which the decedent owed must be compiled. The assets, together with the various debts, must be listed on the form known as "Inventory and Appraisement" and

submitted to the probate court within 90 days after the personal representative qualified.

The next phase of the probate process is known as the claims period. Creditors have eight months from the date of the first newspaper advertisement to file their claims with the personal representative and the probate court. During this time the personal representative generally cannot distribute property to the beneficiaries. After the eight months have passed, the personal representative must pay all valid, outstanding claims and then, based on whether or not an estate tax return must be filed with the state or federal government, he is able to distribute the remaining property to the beneficiaries.

This is an oversimplified outline of the phases of the probate process: the collection and valuing of assets, the payment of creditors' claims, and finally the distribution of remaining assets to the proper beneficiaries. There are actually many steps to be taken and many decisions to be made along the way. The following is a more detailed list of many of these steps. The probate court personnel are always very helpful in walking you through the probate process. Likewise, it is also reasonable to seek the advice of a competent attorney or accountant with respect to the various legal and tax matters which must be resolved.

The following is a list of some of the major tasks of a Personal Representative:

1. Take care of funeral and burial arrangements.

2. Open the estate in the probate court.

3. Locate estate assets and take steps to protect them.

4. Publish notice to creditors, directing them to file their claims.

5. Collect all debts owed to the decedent.

6. Prepare an inventory and appraisal of all property owned by the decedent, for purposes of distribution and taxes.

7. Change registration of stocks, bonds and other assets.

8. Pay all valid claims and obtain proper receipts.

9. Gather information necessary for federal and state estate tax returns.

10. File federal and state estate and income tax returns and pay taxes due.

11. Analyze the cash needs of the estate and arrange orderly liquidation, if necessary, to meet debts, taxes and other expenses.
12. Distribute the estate in accordance with terms of the Will or of state law.

13. Account to the beneficiaries and the probate court for each step taken in the administration of the estate with supporting vouchers, paid receipts and other appropriate evidence.

Planning For Incapacity

In the same way that you can plan for the disposition of property in an orderly fashion upon your death, you can also provide for the orderly control and management of property during any period of incapacity which may occur prior to your death. Specifically, South Carolina provides that an individual can delegate to another person, known as an agent or an "Attorney-in-Fact," the power to make decisions and to handle transactions on his or her behalf if, due to physical or mental disability, the person is incapable of managing his own affairs.

Requirements for a durable power of attorney.

The Durable Power of Attorney is a legal document which must meet certain requirements:

1. Formality of Execution – The Durable Power of Attorney must meet the same five requirements discussed above with respect to a Last Will and Testament. The principal (the person granting the Durable Power of Attorney) must be over 18, the grant of authority must be in writing, the document must be signed by the principal and two (2) independent witnesses, the principal must be competent, and must sign the instrument voluntarily.

2. Recordation – The Durable Power of Attorney must be recorded in the Clerk of Court's office or Register of Mesne Conveyances, in the same manner as a deed. The purpose of recordation is to put the world on notice that authority has been given to the agent to act on your behalf.

3. Statutory Language – The Durable Power of Attorney must contain specific wording set forth in the South Carolina Code of Laws, stating that it is the principal's intention that the power granted to the agent will continue to be effective if the principal becomes incompetent.

Effect of durable power of attorney.

The Durable Power of Attorney grants authority to the agent to act on behalf of the principal. It is as though the agent stands in the shoes of the principal and can have authority to make decisions on behalf of the principal with respect to two key areas:

1. the principal's property.

2. the principal's health care.

Note that the signing of a Durable Power of Attorney does not relinquish authority on behalf of the principal to make his own decisions. Rather, it creates a second person who has the power to make decisions on behalf of the principal when the principal is unable to do so for himself. Likewise, the creation of a Durable Power of Attorney does not mean that the principal is giving his property to the agent. The agent is merely a fiduciary who must act solely in the best interests of the principal in dealing with the principal's property.

Authorization for the agent to make health care decisions can be made by way of a Durable Power of Attorney which covers both asset management and health care, or can be made by way of a "Health Care Power of Attorney" which grants to the agent power to make health care decisions only (no asset management powers). See the discussion below of Advance Health Care Directives.

When durable power of attorney becomes effective.

In South Carolina, a Durable Power of Attorney can be effective immediately upon its creation, or can be drafted to become effective only after the principal becomes incapacitated. There are advantages and disadvantages to each type which you should discuss with your lawyer.

Revocation of durable power of attorney.

A Durable Power of Attorney, once signed and recorded, remains effective until one of the following events occurs:

1. The death of the principal.

2. Revocation by the principal. Note that the revocation must be in writing and must be recorded in order to put the world on notice that the authority originally granted has been revoked.

3. Revocation by the probate court in the county where the principal is domiciled. The probate court always has jurisdiction over incapacitated persons and their property.

What happens without a durable power of attorney?

If a person becomes incapacitated without having signed a Durable Power of Attorney, it will be necessary for family members of the incapacitated person to seek the appointment of a "conservator" by the probate court in the domiciliary county. The conservatorship process is time-consuming, expensive and inflexible, and necessarily involves doctors and lawyers in what could otherwise be kept as a private family matter. The advantages of a Durable Power of Attorney substantially outweigh the potential risks of such a broad grant of authority for most individuals. Most people have a spouse, child or other close family member or friend whom they fully trust and should consider appointing under a Durable Power of Attorney.

Advance Health Care Directives

An advance health care directive is an expression of a person's wishes (signed in advance) for the administration or termination of medical treatment under certain circumstances. South Carolina law gives an individual two basic choices for making advance health care directives: the "Declaration of a Desire for a Natural Death" (commonly called a "Living Will") and the "Health Care Power of Attorney." Both are statements regarding a person's desire for health care decisions to be made by someone else if the person is for any reason unable to make and communicate such decisions on his own behalf.

The following chart describes the key elements of the two types of advance health care directives:

	LIVING WILL	**HEALTH CARE POWER OF ATTORNEY**
Who is the appointed decision maker?	Attending physician	Designated Family Member or Friend
Essence of Statement.	If my condition is terminal or if I am in a persistent vegetative state, withdraw life sustaining procedures, (including food and water?). The withdrawal of food and water is an option to be specified on the form.	The appointed decision maker is to exercise his or her discretion in consenting or withdrawing consent for medical procedures, acting on the advice of physicians and other counselors as the agent deems to be in the best interest of the patient.
Scope of Situations Covered	Only applicable if patient is in a terminal condition or persistent vegetative state	Applicable in all situations (life-threatening or not) when the patient is unable to communicate his or her own desires.

The underlying principle of both documents is the constitutional right to privacy. Generally, an individual has the right to exercise informed consent to refuse or to stop treatment if he so desires. A competent individual can sign an advance statement of his wishes and, after the onset of incapacity, those wishes can be carried out. It is permissible to have both a living will and a health care power of attorney, in which case the health care power of attorney will be applicable in all non-terminal

situations, but will be superseded by the living will if the individual's condition becomes terminal.

Conclusion

You face a perplexing array of decisions to be made, and the legal jargon seems overwhelming. Additionally, there is an abundance of misinformation floating around, telling you what to do and how to do it in order to take care of your family. Yet, the worst decision is to simply do nothing. There are relatively simple tools available to adequately plan for the disposition of your property after your death and for its control and management during your lifetime. Additionally, you can seek competent advice from a number of reliable sources to help you work through the estate planning process.

Planning your estate necessarily requires you to take stock of your current financial condition and to come to grips with your own philosophy for the proper use of wealth. It involves asking yourself difficult questions. How much insurance do you need? How much property should you leave your spouse? Should you leave it outright or in trust? How much should you leave your children? Your grandchildren? Your favorite charity? Only one opinion is widely-held: don't leave it unnecessarily to Uncle Sam!

The "Estate Information Summary" found in the Appendix is provided for several purposes. First, to help you assess your current net worth and liquidity. Second, to provide vital information to your estate planner. Finally, and most importantly, to provide your family and advisors a complete guide to gathering assets, paying debts, and wrapping up your affairs in a timely and efficient manner if you die or become incapacitated. We recommend that you print the Estate Information Summary, fill in the requested information as completely as possible, and place the original in your safe deposit box or provide a copy to key family members or advisors for safekeeping. The information should be reviewed and updated annually.

Take the necessary steps, before it is too late, to set your house in order.

NOTE: THE FOLLOWING INFORMATION MAY BE PROVIDED TO YOUR ATTORNEY OR KEPT IN YOUR PRIVATE RECORDS TO ASSIST YOUR FAMILY.

Estate Information Summary

Date: _____

FAMILY INFORMATION

Full Legal Name: _____

Other names by which you are known: _____

Address: _____

_____

Home Phone: _____

Work Phone: _____

Cell Phone: _____

Email: _____

Date of Birth: _____

Birthplace: _____

Social Security Number: _____

Marital Status: ☐ Single ☐ Divorced ☐ Married ☐ Separated ☐ Widowed

Information on any previous marriages: _____

_____

Full Legal Name of Spouse: _____

Other names by which you are known: _____

Address: _____

_____

Home Phone: _____

Work Phone: _____

Cell Phone: _____

Email: _____

Date of Birth: _____

Birthplace: _____

Social Security Number: _____

Marital Status: ☐ Single ☐ Divorced ☐ Married ☐ Separated ☐ Widowed

Information on any previous marriages: _____

_____

CHILDREN AND/OR OTHER DEPENDENTS

Full Legal Name: _____

Address: _____

_____

Home Phone: _____

Work Phone: _____

Cell Phone: _____

Email: _____

Full Legal Name: _____

Address: _____

_____

Home Phone: _____

Work Phone: _____

Cell Phone: _____

Email: _____

Full Legal Name: _____

Address: _____

_____

Home Phone: _____

Work Phone: _____

Cell Phone: _____

Email: _____

Full Legal Name: _____

Address: _____

_____

Home Phone: _____

Work Phone: _____

Cell Phone: _____

Email: _____

Full Legal Name: _____

Address: _____

_____

Home Phone: _____

Work Phone: _____

Cell Phone: _____

Email: _____

FINANCIAL INFORMATION

Real Estate

DESCRIPTION	LOCATION	TITLED IN NAME OF	DATE OF PURCHASE	COST	APPROXIMATE VALUE
				TOTAL	$

Bank & Investment Accounts

TYPE (Checking or Savings)	ACCOUNT NUMBER	TITLED IN NAME OF	NAME OF INSTITUTION	APPROXIMATE BALANCE
			TOTAL	$

Stocks, Bonds, Notes Receivable, Etc.

COMPANY	NUMBER OF SHARES OR FACE AMOUNT	DATE OF PURCHASE	COST	APPROXIMATE VALUE
			TOTAL	$

Retirement Plans (IRS's, 401(k)'s, etc.)

COMPANY	OWNER	BENEFICIARY	APPROXIMATE BALANCE
		TOTAL	$

Personal Property (Automobiles, Personal Effects, Jewelry, Art, Furniture, Etc.)

DESCRIPTION	LOCATION	DATE OF PURCHASE	COST	APPROXIMATE VALUE
			TOTAL	$

Life Insurance Policies

COMPANY	TYPE OF POLICY	POLICY NUMBER	OWNER	BENEFICIARY	FACE VALUE	LOANS	CASH VALUE
				TOTALS	$	$	$

Other Assets (Describe partnerships, closely held businesses, etc.)

Secured Debts (Autos, Liens, Mortgages, Etc.)

DESCRIPTION	TERMS	PRESENT BALANCE
	TOTAL	$

Unsecured Debts (Credit cards, personal notes, etc.)

DESCRIPTION	TERMS	PRESENT BALANCE
	TOTAL	$

Summary of Assets & Liabilities

Real Estate	$
Bank & Investment Accounts	$
Stocks, Bonds, Notes Receivable Etc.	$
Retirement Plans	$
Personal Property	$
Life Insurance Policies	$
Other Assets	$
Less: Secured Debts	$
Less: Unsecured Debts	$
Net Worth	$

Do you expect to receive an inheritance? Explain: _____

_____

_____

Safe-deposit box location: _____
Where is the key? _____

LAST WILL AND TESTAMENT

Date: _____

Where kept? _____

Prepared by: _____

Beneficiary Information
(Persons or Charitable Organizations named in Will, other than Spouse and Children, to Receive Property)

NAME	ADDRESS	DESCRIPTION OF BEQUEST

PERSONAL REPRESENTATIVE named in your Last Will and Testament

Primary: _____
Address: _____
_____
Phone: _____
Email: _____

Alternate: _____
Address: _____
_____
Phone: _____
Email: _____

TRUSTEE named in your Last Will and Testament

Primary: _____
Address: _____
_____
Phone: _____
Email: _____

Alternate: _____
Address: _____
_____
Phone: _____
Email: _____

GUARDIAN named in your Last Will and Testament

Primary: _____
Address: _____
_____
Phone: _____
Email: _____

Alternate: _____
Address: _____
_____
Phone: _____
Email: _____

KEY ADVISORS

Attorney
Name: _____
Company: _____
Address: _____
_____
Phone: _____
Email: _____

Accountant
Name: _____
Company: _____
Address: _____
_____
Phone: _____
Email: _____

Life Insurance Agent
Name: _____
Company: _____
Address: _____
_____
Phone: _____
Email: _____

Home Insurance Agent
Name: _____
Company: _____
Address: _____
_____
Phone: _____
Email: _____

Stock Broker or Financial Advisor
Name: _____
Company: _____
Address: _____
_____
Phone: _____
Email: _____

Banker
Name: _____
Company: _____
Address: _____
_____
Phone: _____
Email: _____

Funeral and Burial Instructions:

Memorial Gifts/Donations Instructions:

Online Accounts:

Website or Domain:
Username:
Password or PIN:

Website or Domain:
Username:
Password or PIN:

Website or Domain:
Username:
Password or PIN:

Website or Domain:
Username:
Password or PIN:

Website or Domain:
Username:
Password or PIN:

Website or Domain:
Username:
Password or PIN: