SUPERNUS
BUSINESS AND LAW CENTER

THE BASIC ESTATE PLAN AND BEYOND

Your Guide to the BASIC DOCUMENTS
Every Estate Plan ***Must*** Have

and the SUPPLEMENTAL DOCUMENTS
Every Plan ***Should*** Have

Despite a global pandemic and a surging awareness of estate planning and family preparedness, only one out of three Americans has a Will, and less than half have any estate planning documents at all. A major reason people are not prepared in this area of life is because, for many of us, talking about death is uncomfortable. We don't want to think about our time with loved ones coming to an end or how to fairly divide our most cherished possessions in a way that makes everyone happy. The last thing any of us want is to have our kids fighting with each other or feeling offended because one sibling got more than another.

But estate planning isn't just about making funeral arrangements and deciding who gets your stuff, it's about making your personal wishes known and ensuring they will be followed after your death. Even more important, a proper estate plan also serves to take care of you *during your lifetime* by helping family members carry out your wishes if you are no longer able to do it on your own. A proper estate plan lets you appoint and instruct representatives on how to make decisions about your care, access your accounts to pay your bills, and celebrate your existence in exactly the way you want.

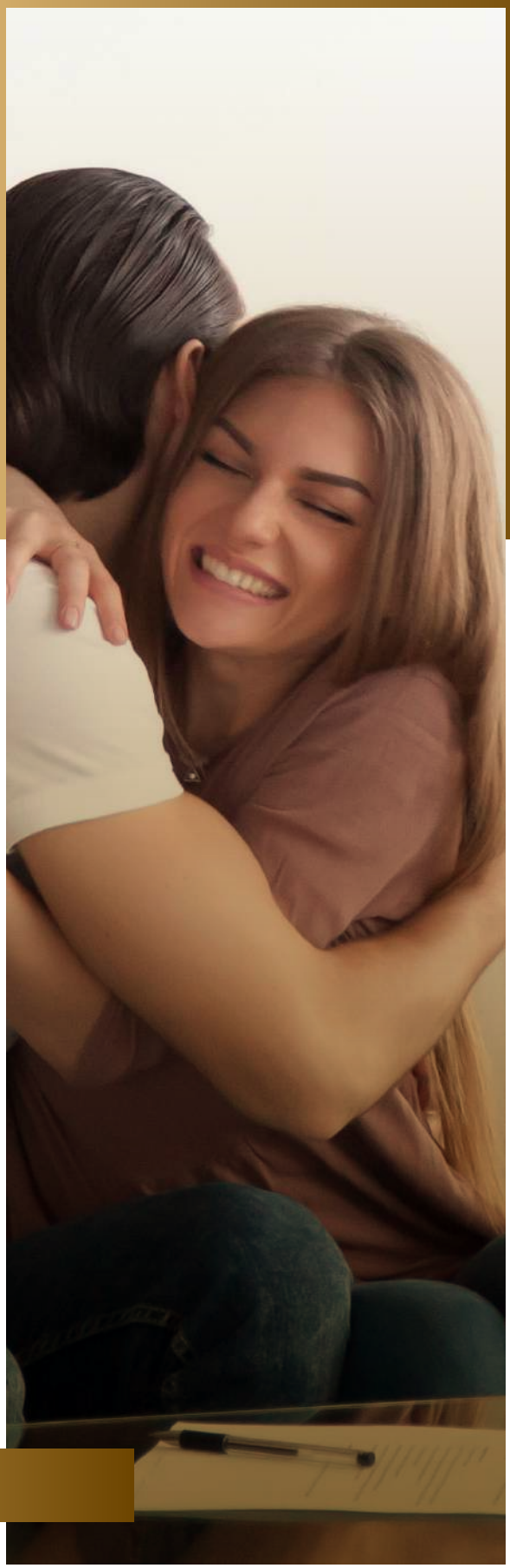
No matter where you are at in life, whether an eighteen-year-old just heading out to school, a thirty-something stay-at-home-parent juggling three kids, a career-focused workaholic, or if you are coming to the end of your journey and checking off those last bucket-list items, everyone should have the following documents for an effective, conflict-free estate plan:

1 A WILL OR A REVOCABLE LIVING TRUST

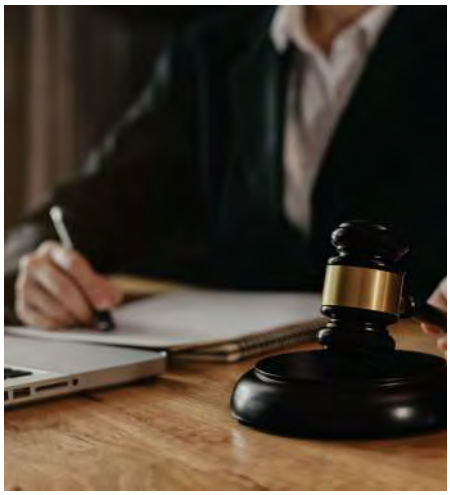
I have a Will. Why would I want a Living Trust?

A *Last Will & Testament,* commonly referred to simply as a Will, is the traditional standard document in most estate plans. A Will establishes who will manage your affairs after your death, who will distribute your property and family heirlooms (your personal property), who will get your property and family heirlooms, and it can even include your funeral and burial wishes (assuming the Will is read before the funeral). And, if you have minor children, a Will can also designate guardians for your children (in the event both parents pass away) and provide those guardians the legal right to look after your children's inheritance until they are adults (but there are more effective ways to ensure that your kids are raised by the people you choose– see #5 below). In other words, the basic function of a Will is to ensure that your property is distributed to the people you want to have it, and that it doesn't go to people you don't want to have it. But, if you don't have a Will, then your property will be distributed – *through the court* – according to the specific laws of the state where you live, and that means you have no control over who gets your property.

So, create a Will and you're done, right? Well, it's not that simple. In fact, while a Will is the most well-known document in estate planning, a Will may not be the most advantageous, efficient, or cost effective plan for you and your family's needs. Most significantly, a Will has almost no authority while you are alive, and it must be validated by a judge after your death before it can be enforced (through a process called *probate).* That means it provides no protection for you, your family, or your property if you become physically or mentally incapacitated and can't make decisions on your own. Further, Probate is an expensive legal process through which the court oversees the distribution of your property, ensuring that all your debts are paid before your property is distributed according to your Will. If you have a Will, you almost certainly guarantee your family will have to go through probate.



The probate process can be good for resolving disputes between family members and heirs or for creditors who are owed money, but there are several drawbacks as well. For starters, the probate process can take a lot of time and cost a lot of money. An estate with no problems and no conflicts will usually take 10 to 18 months to complete probate and will cost $4,000-$5,000. But, if your kids or other family members are fighting over their inheritance, probate can take years and costs can quickly get into the tens of thousands! Even in the best-case scenario your kids may be forced to wait a year or longer before receiving their inheritance and will have to pay a lot of money to get it! Additionally, probate is a public process, so your personal finances and property will be a public record anyone can see – which is a nightmare for those of us who value privacy.



Fortunately, there is a simple and proven alternative to a Will – the *Revocable Living Trust.* The *Revocable Living Trust* avoids probate and lets you keep control of your property while you are living – even if you become incapacitated – as well as after your death. It is also a valuable tool for people who want to keep their affairs private, avoid a drawn-out probate, transfer ownership in a business, or discretely disinherit a family member.

Here's how it works: To create a *Revocable Living Trust,* there are three important steps. First, you must appoint yourself as the *Trustee.* The Trustee has legal authority to control the property in the Trust. You will also appoint a Successor Trustee; this is the person who will control the Trust property if you are unable to do act – such as in the case of mental incapacity or death. The Successor Trustee has absolutely no authority until you are no longer able to act, so you don't have to worry about that person interfering with your property in unwanted ways). Think of the Successor Trustee as the substitute or backup pitcher in the baseball game; they only come onto the field to pitch if the main pitcher is injured or removed from the game.

Second, you transfer your property (your home and other real estate, your accounts, and your personal property) to the Trust. Essentially, the Trust becomes the owner of your property. You still control your property, but the Trust owns it. Because you created the Trust and you are the Trustee, you can remove your property from the Trust at any time and for any reason. The property is still technically yours, but a transfer to the Trust will keep your property out of probate.

Third, after appointing the Trustees (you and a Successor Trustee), and transferring ownership of your property to the Trust, you will create specific instructions directing what the Trustees *must* do with your property. This Trust Agreement is much more flexible than a Will because you can control not just *who* gets your property, but *when* and *how* they get your property. The Trustees are required by law to follow those exact instructions. As the creator of the Trust, you can change the Trust instructions at any time.

In general, if you own real estate solely in your own name or if the total value of all your property exceeds $100,000 (this amount varies from state to state), your property (estate) must go through probate when you die. But by transferring title of your property to a *Revocable Living Trust* and naming yourself as Trustee, you retain control over the property during your lifetime and upon your death the property controlled by the Trust will go directly to the people you designated and in the way you directed. The result? No probate, no fees, no public airing of your personal details, and you retain control both during your lifetime and after your death.

In a Trust you can control when and how your heirs receive their inheritance by creating:

- **Conditions for inheritance (such as requiring your heirs to graduate from college or be drug-free).**
- **Requirements for how the money is to be used (the money can only to be used for education, for a wedding, to start a business, etc.).**
- **Instructions for long-term investments (directing the Trustee to invest in real estate, stocks, or other investments).**
- **Structured payments (heirs receive a portion of their inheritance annually, bi-annual, or at specific ages or milestones).**
- **Asset protection mechanisms to protect your heirs' inheritance from creditors (or to protect irresponsible heirs from themselves).**

A *Revocable Living Trust* is a valuable tool for people who want to avoid probate and keep their affairs private, but the arrangement requires meticulous attention to detail. Failure to transfer your major assets to the Trust could land your estate in probate, defeating the entire purpose for creating the Trust. An experienced attorney can ensure that your Trust is created properly and addresses every detail of your estate plan.

Think of a *Revocable Living Trust* as a portable storage pod. In anticipation of moving, you put all of your belongings into the storage pod with specific instructions for where your belongings are to go. When it comes time to move, the mover simply picks up your pod and everything in it and moves it to the new location. The process is fast and efficient. But if some things are left out of the storage pod, such as your couch, your tools, and your TV, when the mover picks up the pod those things will be left behind. Because they were not in the storage pod, you must now hire someone else to pick those things up separately. You, or your family, will have to pay a fee for the additional movers and it'll take longer for those things to be delivered to the new location.

Similarly, when you put your property into a *Revocable Living Trust* with specific instructions on what to do with that property, when you die the Trust does not go through probate. Instead, your property is distributed immediately according to your instructions. But any important items you leave out of the Trust might have to go through probate, and a judge would then have to approve any distributions of that property to your heirs. As a result, your family will incur additional expenses for probate (averaging $4,000 - $5,000) and they must wait until the process is complete (at least a year).

In order to avoid accidental probate in case you forget to transfer some of your minor property to the Trust, you should also have a *Pour-Over Will.* A *Pour-Over Will* is a legal document that acts as a safety net by ensuring that any property you neglected to add to your Trust will be transferred to the Trust after your death, thus avoiding probate or any family conflicts over minor property.

Minor property refers to all of your personal property (your furniture, jewelry, electronics, etc.) so long as the cumulative value of the all the property left out of the Trust is less than $100,000. Minor property does not include real estate.

Thus, a Will allows you to dictate how your property is distributed after your death, but a Will requires probate and a court's permission in order to make those distributions. *A Revocable Living Trust* avoids the probate process, keeps your personal information private, and allows you to control *how* and *when* your property is distributed. Property that is left out of the Trust would ordinarily be subject to probate. However, a *Pour-Over Will* sweeps up any minor property that was accidentally left out and transfers it to the Trust after your death.

Effective estate plans can use either a *Last Will & Testament* or a *Revocable Living Trust,* and both options will help you to determine how your property is distributed. A Trust is initially more expensive to set up, but it's worth the extra initial expensive because it will make the transition and distribution of your property after your death much quicker and more efficient and will save your family thousands of dollars by avoiding the probate process. Dealing with the death of a loved one is hard enough, having a Trust properly created and in place will ease the burden on your loved ones.

2 POWERS OF ATTORNEY

What happens if I am unable to make decisions about my own health or finances?

A *Power of Attorney* (POA) is a legal document that lets you appoint one or more people to help you make decisions or to make specific types of decisions on your behalf if you are unable to make those decisions on your own. You control the terms of the POA and define the specific events that would trigger when the POA becomes effective. You also control the types of decisions that your appointed person, your agent, can make.

There are two types of POAs: a *Healthcare POA* and a *Financial POA*. A *Healthcare POA,* also called a *Medical POA,* deals with health and care decisions, including medical treatment, where you live, or whether you should receive life sustaining treatment. The *Financial POA,* also called a *Durable POA* or *POA for Property,* deals with financial decisions, such as making payments from your bank account, managing your investments, or selling your property. In general, decisions about your health and care, financial accounts, and property can only be made by your agent when you are unable to do so yourself.

A POA can only be created while you still have mental capacity. Capacity is not always linked to age or ill health. In reality, many of us may lose this ability at some point in our life. Although dementia is a common cause of incapacity among the elderly, you may suffer from an accident at any time, leaving you unable to make or communicate decisions on your own.

When you create a POA, you will decide when your agent's authority will become effective and when it will end. You can place limits on your agent's authority, and you can also direct your agent to make specific decisions on your behalf (such as prohibiting the use of certain medications or types of treatment, limiting the use of your money only for specific bills, or instructions to sell certain properties or investments you own). A POA can be as extensive and specific as you want it to be so that decisions about your property or health care are made based on your own wishes and not left up to the court or family member to decide.

If you do not have a both a *Healthcare POA* and a *Financial POA,* a costly and time-consuming court application may be needed to appoint someone to make decisions for you. In the meantime, your loved ones may be unable to make important decisions about your urgent health and financial needs or they may not be able to access your accounts to pay for your care or to maintain your home. Having the proper POAs will significantly reduce the emotional and financial toll on your loved ones and provide them with the ability to make important decisions on your behalf.

3 LIVING WILL OR ADVANCED HEALTHCARE DIRECTIVES

If I have a Healthcare Power of Attorney, what's the point of a Living Will?

A *Living Will,* also known as an *Advanced Healthcare directive* or *advanced directive,* is a legal document that lets you direct your end-of-life medical care. If you are in an unconscious and incurable state, such as a coma, and are unable to communicate your own decisions about end-of-life treatment, family members and doctors are left to guess what you would prefer. This could result in painful disputes, delayed treatments, and potential court intervention. A *Living Will* communicates your wishes about end-of-life medical care such as whether to use "palliative care" (administering medications designed to decrease pain and suffering), whether you wish to be resuscitated under certain circumstances, or if you want to be artificially kept alive. You can also provide instructions regarding organ donation, autopsy, and whether you want to live out your last days at home or in a hospital. A *Living Will* should be used in conjunction with the *Healthcare POA.*

4 SCHEDULE OF GIFTS

Quite often the most emotional disputes are not over money or valuables, but over sentimental items. Who gets grandma's favorite brooch or dad's prized wristwatch? These items may not have much financial value, but disputes over sentimental items can create resentment and be a long-lasting wedge between family members. If you are leaving specific items to your heirs, make a detailed list of those items, who should get those items, and explain why you are giving those specific items to the recipients. This will make your wishes clear when it comes to sentimental items, and it will help your heirs understand your reasoning and intentions.

Along similar lines, if you intend to disinherit an heir, you should provide a written statement identifying the heir you are disinheriting and the reasons for it. Disinheriting an heir is one of the leading causes for conflict and estate lawsuits after a family member's death. The disinherited heir often claims that the disinheritance was accidental or that the deceased parent lacked mental capacity when he or she made that decision. By providing a clear and unambiguous written statement about who you are disinheriting and why, you decrease the chances of your estate ending up in court or a heated family conflict.

5 GUARDIAN NOMINATION

A Guardian Nomination is absolutely vital if you have minor kids at home who count on you for their well-being and care. A *Guardian Nomination* is a legal document that allows you to choose who will become the guardians of your minor children if you die or are incapacitated and no longer able to provide for their care. If you are in an accident, a *Guardian Nomination* will make sure your children are never taken into the custody of Child Protective Services or the State. It also ensures that the court will have clear instructions from you so that your children will be raised by people you choose, not someone chosen by the State.

You can create your own Guardian Nomination online at www.SupernusLaw.com/guardian-nomination

In addition to a *Guardian Nomination,* we at the Supernus Business & Law Center have developed the ***Leave a Legacy Protection Plan*** for your kids. In addition to the long-term *Guardian Nomination,* this unique program also includes a *Temporary Guardian Nomination* (in case your chosen guardian is out-of-state or cannot take custody immediately), temporary Medical Power of Attorney (when your child travels or stays overnight with a friend), parenting instructions for your kids' care, a statement of the personal values you want your kids to be raised with, emergency contact cards, a confidential exclusion (to discretely exclude specific family members from becoming guardians), a diary of personal stories, insights, and experiences, and a template for personal letters to your children. Through our ***Leave a Legacy Protection Plan*** you can be assured that your children will be raised with your values, insights, stories, and experiences, even if you can't be there.

Leave a Legacy Protection Plan

- Temporary Guardian Nomination
- Medical Power of Attorney
- Parenting Instructions
- Statement of Personal Values
- Emergency Contact Cards
- Confidential Exclusion
- Family Legacy Journal
- Legacy Letter for children

LEGACY PLANNING

A proper estate plan will let you make important decisions about your health and property at the end of your life, but it shouldn't end there. Your life is so much more than the things you accumulated or the money you pass on to others. It is about preserving your experiences, your insights, your values, your wishes, and desires for your loved ones. Your life is about your Legacy. Our unique ***Living Legacy Planning*** program will help you establish the financial tools to provide for your loved ones after you are gone. ***Living Legacy Planning*** is much more than designating a guardian for loved ones or distributing your possessions, it is providing the means and opportunity for your loved ones to thrive despite your absence. The ***Living Legacy Planning*** program helps you establish and fund support Trusts and other financial tools that can continue to support and sustain your loved ones after you are gone.

The ***Living Legacy Planning*** program will also help you preserve and share your most personal insights, wisdom, values, and dreams with those you love. Through our unique combination of personal videos, pictures, and written "notes," our ***Living Legacy Planning*** program will help safeguard your unique legacy for your posterity so although you may be gone, you will not be forgotten.

The ***Living Legacy Planning*** program will also establish a Trusted Advisor who will help your loved ones navigate legal requirements, ensure that important details are not missed, and properly manage the transfer of your assets so your loved ones won't have to. Dealing with the death of a loved one is a very difficult time for any family. Having a Trusted Advisor who is intimately familiar with your situation and wishes and who can assist your loved ones throughout the process will help avoid frustration, family disputes, and legal issues.

FINAL THOUGHTS

When creating your estate plan, seek the guidance of a competent legal professional at our office. Each of the above documents has strict legal requirements and failure to meet the requirements could invalidate the document, jeopardize your estate plan, and cost your loved ones' unnecessary pain and expense. If you would like to discuss your estate plan options with an experienced estate planning attorney, please contact our office via phone or email to schedule a consultation.

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DISCLAIMER: This article should not be regarded as constituting legal advice in relation to particular circumstances. This article is merely a general comment on the relevant topic.