

# Transfer of Assets and Proper Titling

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# Disclaimer

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# Introduction

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- **What is Estate Planning?**

- Estate Planning is the process by which an individual determines to whom she wishes her property to pass at her death in order to provide security to her loved ones, and the process by which an individual provides for her own security during her lifetime. With the assistance of competent professionals, the individual designs and executes documents to effectuate these objectives.



# Beneficiaries

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- **Who do you want your beneficiaries to be?**
  - Individuals
  - Charitable organizations
- **When do you want the beneficiaries to receive the assets?**
  - During your lifetime
  - At your death



# Assets



- **What assets do you have?**

- Bank Accounts
- Qualified Retirement Plans
- Annuities
- Investment Accounts
- Real Estate
- Life Insurance Policies
- Interests in Business Organizations, such as LLCs or Corporations
- Vacation Properties
- Collections, such as antiques, cars, jewelry, guns, or coins

# Assets

- **How are the assets titled?**
  - Joint owners with rights of survivorship
  - Joint owners as tenants in common
  - Individually owned



# Probate vs. Non-Probate Property

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- **Probate Property**

- Personal and real property titled in the name of the individual without survivorship provisions or beneficiary designations. This property will be transferred under the terms of the will, or under the laws of intestacy if there is no will.



# Probate vs. Non-Probate Property

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- **Non-probate Property**

- Personal and real property titled in the name of the individual or in which the individual has an interest. This property will be transferred outside the terms of the will. Non-probate property includes:
  - Property held as joint tenants with right of survivorship
  - Property payable/transferable on death to others
  - Property held by the individual as a life tenant
  - Life insurance to named beneficiaries
  - Powers of appointment
  - Annuities or qualified retirement plans with beneficiary designations
  - Property held in a trust

# What Tools are Available?

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- Some of the tools used to design an estate plan that meets the individuals needs and objectives are:
  - Last Will and Testament
  - Living Trust
  - Lifetime Gifts
  - Beneficiary Designations
  - Financial Power of Attorney



# Tax Considerations for Transferring Assets

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- **What is Estate Tax Planning?**

- Estate tax planning is the process by which an individual facilitates the transfer of her property to her loved ones during her lifetime and at her death at the smallest possible estate and gift tax cost.
  - 2023 Applicable Exclusion Amount is \$12,920,000.00
  - Amount over Applicable Exclusion Amount is taxed at 40%
  - The Applicable Exclusion Amount applies to transfers during lifetime (gifts) and at death

# Tax Considerations for Transferring Assets

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- Lifetime gifts, excluding the annual exclusion, are deducted from the Applicable Exclusion Amount available at death
- A husband and wife may combine their Applicable Exclusion Amounts by filing an estate tax return at the death of the first spouse to port the deceased spousal unused exclusion amount to the surviving spouse
- Annual Exclusion Amount of \$17,000 per donor per donee. Gift tax return is not required to be filed unless the husband and wife split the gift to apply their individual annual exclusion to the gift.



# Tax Considerations for Transferring Assets

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- **Lifetime vs. Death**

- An individual may transfer assets to her beneficiary either during her lifetime or at her death. For the individual, the timing of the transfer may depend on the estate and gift tax in effect or anticipated in the future. But for the beneficiary or donee of the transfer, the basis in the property being transferred is more of a concern.



# Tax Considerations for Transferring Assets

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- **Lifetime Transfers**

- The amount of the gift that the individual makes is the fair market value of the property on the date of the gift. This will determine whether a gift tax return is required to be filed.
- For the donee, the basis in the property received is the basis that the individual had in the property. This is known as “carry-over basis.” The effect of the carry-over basis is that when the donee sells the property, the gain on the sale is determined by the basis the individual had in the property, not the fair market value of the property on the date of gift.
- This is not a concern for gifts of cash.



# Tax Considerations for Transferring Assets

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- **Transfers at Death**

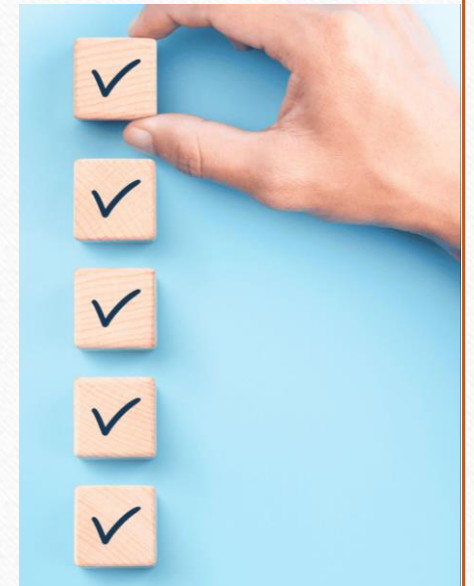
- The amount of the transfer at death that the individual makes is the fair market value of the property on the date of death. This will determine whether an estate tax return is required to be filed.
- For the beneficiary, the basis in the property received is the fair market value of the property on the date of death. This is known as “stepped-up basis.” The effect of the stepped-up basis is that when the beneficiary sells the property, the gain on the sale is determined by the fair market value of the property on the date of death.



# Other Considerations

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- **There are many other considerations for when and how a transfer should be made to the beneficiary, such as:**
  - What is the age of your beneficiary?
  - Is your beneficiary a spendthrift?
  - Is your beneficiary disabled or receiving asset-based government benefits?
  - Is your beneficiary a Charity?
  - Is Long Term Care in your future or the future of your beneficiary?



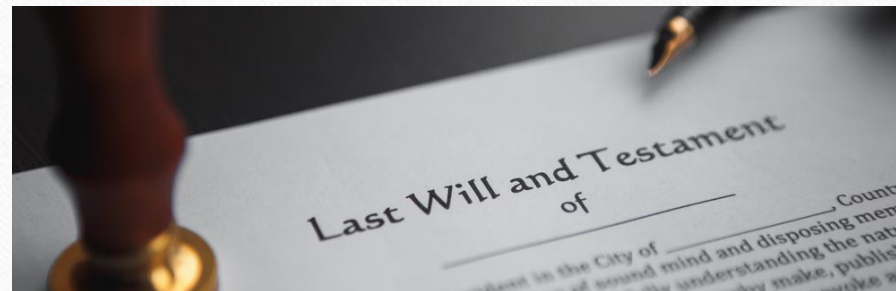
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# Tools to Effectuate the Transfer of Assets

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- **Last Will and Testament**

- A will is a document that when properly designed and executed by an individual will govern the distribution of her probate estate to her loved ones at the time of her death.
- A will may be changed at any time during a person's life as long as that person remains competent.
- A will generally has no legal effect until the person passes away.



# Last Will and Testament



## 1. Capacity to make a will

- Any person of sound mind and at least 18 years old may make a will. “Sound mind” is generally measured by whether a person is knowledgeable of her assets and natural objects of bounty.

## 2. Requisites of a will

- A will must be in writing and signed by the testator, and if not wholly in the handwriting of the testator, the testator’s signature must be made in the presence of at least two witnesses. The witness must be competent. If a witness, or his or her spouse, is a beneficiary in the will, and that witness is necessary to prove the will, then the witness will be competent but the devise will be void.

# Last Will and Testament

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- 3. Desired disposition of probate estate.** (No effect on non-probate estate.)
- 4. Appointment of executor or executrix, guardian of minor children, and trustee** of any necessary trusts, and alternates for same.
- 5. Self-Proving Affidavit.** A will in West Virginia should have a self-proving affidavit, which is a sworn statement by the witness that the testator signed the Last Will and at the time of signing it was competent to do so. The Affidavit must be notarized.

# Last Will and Testament

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6. Execution and safeguarding of will.
7. No change of circumstances, except divorce or annulment, revokes any part of will. But, birth of child after execution of will, child gets intestate share. If there is language in the Last Will that includes afterborn children, the afterborn child shares in the estate the same as the children then living when the will was executed.



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# Last Will and Testament

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8. **To effectively revoke a Last Will**, you must do so by stating revocation in a new Last Will or physically destroy the Last Will.
9. **Wills made pursuant to other state's laws are typically honored, as long as they were properly drafted and executed in the state in which they were made.** If you have a Last Will that was drafted and executed in another state under another state's law, it is recommended that you take it to an estate planner in your current state to review.

# Last Will and Testament

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## 10. Special Considerations for Appointing the Executor/ Executrix / Personal Representative.

- a. A Will should appoint an Executor. An Executor is the person that the Testator (the person making the Last Will) appoints to administer the estate after the Testator is deceased. At the time a Will is designed and executed, the manner in which an estate must be administered should be considered when selecting the Executor. The Executor can be:
- An individual – no residency requirement. If choosing an individual, you should choose a person who is well organized and will be diligent in his or her duties.
  - A financial institution with trust powers authorized to do business in the State of West Virginia, such as a bank with a trust department.



# Last Will and Testament

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- b. The duties of the personal representative consist basically of:
- Collecting the assets of the decedent;
  - Paying the debts of the decedent;
  - Distributing the decedent's assets as directed by his will;
  - Probating the decedent's will;
  - Preparing and filing an appraisal and inventory of the decedent's estate; and
  - Preparing and filing a final settlement of the decedent's estate.

# Last Will and Testament

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- c. A will may waive any bond required of the personal representative. The will should grant the personal representative necessary powers. For example, power to sell real estate or to operate a business.

## 11. Special Considerations for Husband and Wife

- a. Elective Share - The surviving spouse of a decedent may elect to be entitled to an “elective share” of the “augmented estate” of the decedent. The amount of the augmented estate is determined by a complex set of rules, and the amount of the augmented estate which the surviving spouse is entitled to receive is dependent in part on the number of years of marriage.



# Last Will and Testament

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- b. Marriage does not revoke will. If you have a Last Will and it does not provide for your new spouse and you wish to provide for the spouse, more than the elective share of the augmented estate, you should draft a new will stating your wishes toward providing for your spouse at your death.
- c. Divorce only revokes will with respect to former spouse. The former spouse is deemed predeceased. If you would remarry your previous spouse, the provisions in your Last Will in favor of your spouse are revived.
- d. No common-law marriage in West Virginia.



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# Last Will and Testament

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- e. On October 9, 2014, the Attorney General and Governor of the State of West Virginia announced that West Virginia will no longer prohibit same-sex marriage, implementing a ruling of the United States Court of Appeals for the Fourth Circuit (the federal appeals court that encompasses West Virginia, Virginia, North Carolina, South Carolina and Maryland), which found a similar ban in Virginia to be unconstitutional. Because the United States Supreme Court recently refused to accept an appeal of the Fourth Circuit decision, the matter is settled for now in West Virginia.



# Tools to Effectuate the Transfer of Assets

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- **Living Trust**

- A Living Trust is a document that when properly designed and executed by an individual will govern the distribution of the assets held by the trust to the person's loved ones at the time of her death.
- A Living Trust may be changed at any time during a person's life as long as that person remains competent.
- A Living Trust generally has no legal effect until the person passes away.



# Living Trust

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1. If funded during the lifetime of the decedent, it avoids probate of those assets.
2. Accomplishes dispositive goals the same as a Will – but not a substitute. You still need a Will. The will is typically a “Pour Over Will,” or a will that “pours” the assets of the estate into the Living Trust.
3. If properly funded, a Living Trust achieves privacy during the probate proceedings

# Living Trust

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4. A Living Trust, properly funded and administered, can result in a more orderly and efficient administration of the estate after death.
5. The Grantor or Grantors (or the person(s) creating the Living Trust) should appoint a Trustee to administer the Trust. During the Grantor or Grantor's lifetime he or she, or both, may serve as the Trustee(s). The Grantor(s) should appoint a successor Trustee to administer the Trust if the Grantor(s) become incapacitated or decease.



# Tools to Effectuate the Transfer of Assets

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- **Beneficiary Designations**

- A designated beneficiary is a person who has been named to receive an asset after the death of an asset's owner.



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# Beneficiary Designations

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1. Assets that commonly have a designated beneficiary are:
  - Life Insurance Policies
  - Qualified Retirement Plans, such as an IRA or 401(k)
  - Annuities
  - Transfer on Death Deeds



# Beneficiary Designations

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## 2. SECURE Act Considerations with Qualified Retirement Plans

- a. Stretch Provisions Pre-SECURE vs. Post-SECURE – the 10 Year Rule. – The remaining balance held by the inherited account must be withdrawn by Dec. 31 of the 10th year from the date of death of the deceased owner's death, unless the beneficiary qualifies as an Eligible Designated Beneficiary (EDB).



# Beneficiary Designations

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- b. Established Eligible Designated Beneficiaries (EDB)
- Surviving spouse;
  - A child who is younger than 18 years of age;
  - A disabled individual;
  - A chronically ill individual;
  - A person not more than 10 years younger than the deceased asset owner.

# Beneficiary Designations

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## c. Trusts and Beneficiaries

- Properly drafted trusts can be beneficiaries, must still abide by the 10-year rule. If not properly drafted as a see through trust, the assets must be distributed within 5 years from the death of the original asset owner.
- If the Trust beneficiary qualifies as an EDB they still qualify for the lifetime stretch, but the beneficiary designation form must list the trust for their benefit specifically.



# Beneficiary Designations

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## c. Charities as Beneficiaries

- i. If you name a qualified charity as a beneficiary of a pretax qualified retirement that distribution will occur without tax imposed.
- ii. If you name a charity as a beneficiary of a Trust this can get complicated, there are several issues to consider:
  - Is the trust an accumulation trust or a conduit trust?
  - Is the charity the remainder beneficiary of a Special Needs Trust?
  - Had the deceased owner of the asset reached the Required Beginning Date (RBD) for the required minimum distributions (RMDs)?



# Beneficiary Designations

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## 3. Transfer on Death Deed

a. A deed that upon the death of the Grantor transfers ownership of the real property to the named beneficiary in the Deed. Enacted in West Virginia in 2014, W. Va. Code §36-12-1 et seq.

b. Advantages of the Transfer on Death Deed:

- Avoids probate of the real property.
- Grantor retains ownership and control of the property until the Grantor's death.
- Can keep the real property out of the probate estate allowing for protection from Medicaid Estate Recovery.



# Tools to Effectuate the Transfer of Assets

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- **Financial Power of Attorney**

- The West Virginia Legislature adopted the Uniform Power of Attorney Act, set forth in the West Virginia Code § 39B-1-101 et seq., effective June 8, 2012, and amended March 10, 2016, effective June 8, 2016 and amended effective June 8, 2018.



# Financial Power of Attorney

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1. A power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself unless provided otherwise in Special Instructions.
2. A power of attorney does not authorize the agent to make health-care decisions for you.



# Financial Power of Attorney

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3. You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.
4. Your agent is entitled to reasonable compensation unless you state otherwise in the special instructions. A family member who is acting as an agent is not entitled to compensation, unless specifically authorized compensation in the document.



# Financial Power of Attorney

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5. Typically, you designate one agent. However, you may name more than one agent to serve as co-agents. Co-agents are not required to act together unless you include that requirement in the Special Instructions. If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.
6. The power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.



# Financial Power of Attorney

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7. Revocation of the Statutory Power of Attorney is not effective until agent has actual knowledge of the revocation.
8. If you do not have a Statutory Power of Attorney and you are deemed incompetent and cannot handle your financial affairs on your own, a loved one, or other person, may file a Petition in the Court for Conservatorship over you to handle your financial affairs. If the person appointed Conservator needs to sell real estate that you own, they must get that sale of real estate approved by the Court. This can be a lengthy and costly process.



# What if you do nothing?

- **What is Intestacy?**

- In the event an individual passes away without a legally effective will, the person dies intestate. In such an event, state law governs to whom the decedent's probate estate is distributed.
- Under current law, there is no distinction between personal property and real property.



# What if you do nothing?

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1. If the decedent leaves a surviving spouse and surviving children, all of which are products of his marriage to the surviving spouse, the surviving spouse would be entitled to 100% of the decedent's probate property.
2. However, if the surviving spouse has children that are not children of the decedent, the surviving spouse would be entitled to only 60% of the decedent's probate property, and the decedent's children, who are the product of such marriage, would be entitled to 40%.



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# What if you do nothing?

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3. If the decedent leaves a surviving spouse, and surviving children that are not the product of such marriage, the surviving spouse would be entitled to 50%, and the surviving children would be entitled to 50%.
4. In very rare circumstances if the decedent has no surviving descendants and the decedent's maternal and paternal grandparents have no surviving descendants, the entire probate estate passes to the state.



# What if you do nothing?

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- **Appointment of Personal Representative of Estate**

- Since the decedent did not leave a will, the decedent did not appoint an executor or executrix of his estate. Therefore, an administrator or administratrix must be appointed.
- Within thirty days of the decedent's death, the preferred personal representative is the surviving spouse of the decedent, or if there be none, others entitled to the decedent's property under the above rules.
- If no such preferred personal representative qualifies as administrator or administratrix within thirty days of the decedent's death, anyone may be appointed, including creditors of the decedent.



Any Questions?



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# Thank You!

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