

Estate Planning Documents

1. Estate Planning Documents Without a Revocable Living Trust

Will. Provides instructions for distributing your assets after you die, including who will be responsible for this distribution (i.e., the executor). The Will can also be used to name guardians for minor children, although a Declaration of Guardianship is a better document for that purpose. A Will avoids intestacy, but must be probated.

Durable Power of Attorney for Financial Decisions. Authorization for an agent to make property and financial decisions for you if you are physically or mentally incapable of managing your own financial affairs. The authorization generally becomes effective only on incapacity (as determined by a physician), but may instead become effective immediately on signing.

Power of Attorney for Medical Decisions. Authorization for an agent to make healthcare and personal care decisions for you if you are physically or mentally incapable of making these decisions for yourself.

Advanced Health Care Directive “Directive to Physicians and Family or Surrogates”. Directive specifying health care preferences regarding life-sustaining treatment if you become unable to make medical decisions on your own behalf because of illness or injury and you suffer from either a terminal or irreversible condition.

HIPAA Release. Authorization under federal law to allow medical providers to share your medical records and discuss medical issues with designated persons. The medical power of attorney is governed by Texas law and the HIPAA release is governed under federal privacy laws.

Declaration of Guardianship for Minor Children. Designates the person(s) who will exercise parental authority on behalf of your minor children if both parents die or become incapacitated before their children reach the age of majority (18). Historically, testators have included a provision in their Wills naming the persons they wish to serve as guardians of their minor children should they pass. While this is still common practice, there are reasons to prepare a Declaration of Guardian as a separate document instead. A guardianship must be established by a court. A Will

may not be found or submitted to a court for several weeks or even months after the death of a parent (or never if you have properly prepared to avoid probate). Your minor children will need to have a temporary guardian appointed almost immediately. With a Declaration of Guardian, you can provide the named guardian with a copy of the Declaration which they can submit to the court immediately for appointment. Also, a Declaration can be used if you become sufficiently disabled that you are unable to care for your minor children, either temporarily or permanently. A Will is intended only for after you pass.

Transfer on Death Deed (TODD). Deed that provides for your real property to be transferred to the beneficiaries you wish without probate, often to the surviving spouse on the death of the first spouse and to named beneficiaries when both pass. (Real property transferred by a TODD is not probate property for purposes of Texas's Medicaid Estate Recovery Program.) However, a “transfer on death deed transfers real property without covenant of warranty.” This lack of warranty protection creates uncertainty about whether the grantor’s title insurance policy will extend coverage to the TODD beneficiary. While TODD’s are an excellent method for avoiding probate, this lack of warranty protection makes transferring the property to a revocable living trust a better solution.

Lady Bird Deed. Also referred to as an enhanced life estate deed or revocable life estate deed, this deed allows you to transfer your interest in real property, but retain a life estate with the ability to occupy and use the property for your lifetime. The most common use is for Medicaid planning.

Rights of Survivorship Ownership Agreement for Motor Vehicle (Form VTR-122) & Beneficiary Designation for a Motor Vehicle (Form 121). Used to transfer automobiles outside of probate.

2. Additional/Alternate Documents With a Revocable Living Trust

Revocable Living Trust. Revocable Living Trusts are primarily used to 1) avoid probate and the related costs, delays, and loss of privacy, 2) provide for the management of assets while temporarily or permanently incapacitated, and 3) provide for the management and/or distribution of assets upon death. It is created with a legal agreement or declaration where you transfer your assets to trustee(s) to manage those assets while you are living. You will usually serve as the initial trustee(s). After your death, the named alternate trustee will distribute those assets to those beneficiaries named in the document, or manage those assets for the beneficiaries until they reach the age specified by you in the document. (See separate e-booklet regarding Revocable Living Trusts.)

Certificate of Trust. To protect your privacy, rather than providing a copy of a trust instrument to a person other than a beneficiary, the trustee may provide a trust certificate containing the information provided in Texas Property Code Section 114.086. This is commonly used to establish bank accounts in the name of the trustee as trustee of the trust and to similarly change ownership of investment accounts. Non-titled personal property that is purchased from that bank account is considered owned by the trustee as the assets were purchased with a trust asset, i.e., the trust bank account.

General Assignment and Bill of Sale. Used to transfer non-titled personal property existing at the time the assignment is signed to the trustee of the trust.

Special Warranty Deed. Used to transfer real property to the trustee of the trust.

Affidavit of Motor Vehicle Gift Transfer (Form 14-317) and Application for Texas Title and/or Registration (Form 130-U). Used to transfer automobiles to the trustee of a trust and to obtain registration as a trustee of the trust without being subject to any sales tax. (Transfers of automobiles to revocable living trusts are not subject to sales tax.)

Pourover Will. Even with a Trust, a Will is required that will include property that may have been recently received just prior to death or which was overlooked and not managed under the trust. This Will can also be used to name guardians for minor children, although a Declaration of Guardianship is a better document for that purpose.

3. Other Estate Planning Documents

Firearms Trust. A revocable trust where the firearms are owned by the Settlers (contributors) and managed by the trustees on behalf of the beneficiaries. These are critical for National Firearms Act (“NFA”) firearms, but also recommended for all firearms to avoid probate and loss of privacy, simplify the process of managing and distributing firearms on incapacity or death, providing guidance to trustees to ensure legal compliance with firearm laws, and creating a legal mechanism to protect firearms from permanent confiscation in cases of restraining orders or red-flag laws.

Certificate of Trust for Firearms Trust. To protect your privacy, rather than providing a copy of a trust instrument to a person other than a beneficiary, the trustee may provide a trust certificate containing the information provided in Texas Property Code Section 114.086. This is commonly used to establish bank accounts in the name of the trustee as trustee of the trust. Firearms that are purchased from that bank account that are not NFA firearms are owned by the trustee as the firearms were purchased with a trust asset, i.e., the trust bank account. That bank

account is also used to pay any taxes, fees repairs, maintenance, etc. related to the firearms.

General Assignment and Bill of Sale for Firearms Trust. Used to transfer non-NFA firearms to the trustee of the trust.

(Out-of-Hospital) Do Not Resuscitate Order. Instructions not to perform emergency procedures to restart the heart or breathing.

Appointment for Disposition of Remains. Names an agent to make decisions regarding the disposition of your remains after death and provides your preferences.

Affidavit of Heirship. An affidavit designed to transfer a decedent's interest in real property to the heirs of a decedent who died without a Will or if the Will has not been or is not required to otherwise be probated. The affidavit identifies the decedent's heirs and is filed with the county property records, whereupon the heirs are identified in the property records as the new owners of the property. These are generally prepared only because of inadequate estate planning. If a Special Warranty Deed for a trust or a Transfer on Death Deed or Lady Bird Deed is prepared without a trust, the interests are handled and this document is unnecessary. The most common mistake is owning real property as husband and wife and assuming the property will automatically be transferred to the surviving spouse. It does not. The deceased spouse can leave the property to anyone they wish. If they do nothing, the options are generally probating the Will or preparing and filing an Affidavit of Heirship. Neither is a good choice in light of the better options listed above.