LAW&STEIN LLP

2601 Main Street, Irvine, CA 92614
(949) 501-4800 | info@lawandsteinllp.com

Estate Planning Roll Call: Important Legal Tools You Should Have

As with any roll call, it is important to make sure that everyone is present and accounted for. Similarly, when assessing an estate plan, several legal tools, or documents, should be in attendance to accomplish the goal of a complete and comprehensive plan. You have likely heard the term estate planning, but you may not be familiar with which legal tools typically comprise a complete estate plan. We want to teach you about the legal tools that should be included in your plan and what benefits and protections each legal tool can provide.

Will or Revocable Living Trust

As with many other structures, a well-rounded estate plan must be built on a solid foundation. To establish a foundation for an estate plan, the use of either a will or a revocable living trust (trust) is necessary. Wills and trusts are legal tools designed to direct and control the distribution of money and property that you own. While a will can only provide direction at death, a trust has the added benefit of providing direction in the event of your incapacity during your lifetime, as well as upon your death. Consequently, there are multiple considerations that go into whether using a will or trust as a foundational tool makes the most sense for your situation.

Will

A will as a foundational legal tool often requires that your property go through the probate process upon your death, although certain accounts and property can be transferred outside of probate through the use of beneficiary designations or if the account or property is jointly owned with a right of survivorship. Probate is the courtsupervised process in which everything you own is transferred to your loved ones (also known as beneficiaries, or heirs if you do not have a will) at your death. In your will, you elect an individual to be in control of carrying out your wishes and state who gets your accounts and property at your death. This person is commonly known as the executor, executrix, or personal representative. Prior to being able to carry out your wishes, they must be formally appointed by the probate court. It should be noted that some states have restrictions on who can serve in the role of executor, executrix, or personal representative. It is very important that you meet with an experienced estate planning attorney to understand who to elect to serve in this role, as choosing the wrong individual can result in unnecessary delays.

Trust

Alternatively, the use of a trust as a foundational estate planning tool can allow you to avoid the probate process. However, a trust can only avoid probate when bank accounts and property that you own are retitled (also called funded) into the trust prior to your death or transferred to your trust at your death. Additionally, trusts have the added benefit of protecting your accounts and property that are part of the trust if you become unable to manage your own affairs.

You may be surprised to find out that even when utilizing a trust as a foundational legal tool, you still need a will. The type of will used in conjunction with a trust differs from a standalone will. Instead, a pour-over will is used, which essentially "pours" into the trust any accounts or property that were not titled in the trust at the time of your death. While a pour-over will ensures that accounts and property not funded into your trust during your lifetime are funded at your death, it also provides other essential benefits. A will allows you to nominate a guardian for your minor children and pets and direct your funeral arrangements (in some states).

A testamentary trust is another tool that may be appropriate for you in certain circumstances. The terms of the trust are stated in a will during your lifetime and the trust is created upon your death. Like with a revocable living trust, you can customize the provisions that control the distribution of money and property through the trusts. However, this type of trust is created during the probate process.

There are a variety of considerations that go into whether a will or trust is the right foundational tool, which is why it is best to speak with an experienced estate planning attorney to help ensure you choose the right one for your unique situation.

Financial Power of Attorney

You have likely heard the term power of attorney before. However, you may not realize that each financial power of attorney and the level and type of authority granted within it varies based on its contents. These legal tools can often be customized to accomplish specific goals, but may have some limitations depending on state law. It is helpful to first understand the roles within a financial power of attorney. The person who creates it is known as the principal, and the person who receives the authority through it is the agent. An agent's role is to act as a fiduciary and on behalf of the principal for a variety of purposes.

Under a limited power of attorney, the agent is limited to performing very specific duties, such as executing a deed for a real estate transaction or transferring a vehicle. On the contrary, a general power of attorney allows the agent to step into the principal's shoes and manage almost all aspects of their finances and property ownership to the extent of what is allowable under state law.

A financial power of attorney can take effect immediately (or as soon as the agent has officially accepted the role) or it can be springing. A springing power of attorney requires that a certain event occur before the agent can exercise their power. This is usually upon the declaration that the principal can no longer act for themselves. It is important to note that not all states allow for a springing power of attorney.

Lastly, there is a durable power of attorney. A durable power of attorney lasts through the principal's incapacity, making it crucial for being able to grant someone authority to act for you if you cannot act for yourself.

Medical Power of Attorney

Our health and the way we manage it is largely dependent on our own beliefs and preferences. If you are unable to make your own medical decisions, you would likely want to make sure that the person making them for you is someone that you trust and who would follow your wishes. To have this control, your estate plan should include a medical power of attorney. A medical power of attorney is known by several names depending on what state you are in, such as a healthcare power of attorney or a designation of health care surrogate. You will designate an agent and several backup agents in your medical power of

attorney to act on your behalf if your first choice is unavailable. You may be able to choose to delay the effect of the authority granted until incapacity if your state's law allows.

Advance Directive

A comprehensive estate plan will also include an advance healthcare directive, also commonly known as a living will. An advance directive serves the important purpose of allowing you to decide what forms of end-of-life care you would like. Within this legal tool, you can memorialize your wishes as it relates to being placed on life support if you are in a persistent vegetative state or diagnosed with a terminal illness with no probable chance of recovery. This legal tool is commonly confused with a do not resuscitate order, which is not part of an estate plan and instead is typically filled out at the hospital and applies specifically to resuscitation.

HIPAA

A Health Insurance and Accountability Act of 1996 (HIPAA) authorizations allow an individual to designate who the hospital or medical facilities can provide medical records and information to. These authorization forms became necessary following the enactment of the federal Health Insurance and Accountability Act of 1996, which provides guidelines to the healthcare industry for the protection of patient information. This is an important legal tool to have if you have multiple individuals who are not nominated under your medical power of attorney that you would like to have access to your medical information in the event of illness or injury. While these individuals will not have decision-making authority, they will be able to stay informed about your medical condition.

Appointment of Guardian

Planning for children is a high priority for parents. There are some states that have a separate legal tool for naming guardians of minor children. While a lot of states allow you to include this information in your will, it is important for you to meet with an estate planning attorney who can create a standalone tool if it is appropriate within your state of residence.

Temporary Guardianship or Delegation of Parental Powers

There are circumstances in which you may not be able to be with your children, commonly due to extended travel. This can be an appropriate circumstance for you to name a temporary legal guardian to make decisions on behalf of your minor child while you are unable to do so. There are state-specific guidelines for the length of temporary guardianships in addition to other limitations as to how and what decisions can be delegated to another individual. Roll call complete! Now that you have learned more about what tools should be present in your estate plan, you can ensure that you have all of the essentials in attendance when you begin the estate planning process.