# ESTATE PLANNING

Frequently Asked Questions

**1. What is estate planning?**

The term *estate planning* can encompass a wide range of different types of planning. For purposes of this guide, we are limiting ourselves to one of the basic goals of estate planning, that of managing your health care and managing the things you own.

An individual has the right to make his or her own health care decisions. The owner of an asset has the right to manage that asset. While you are in good health you do not need assistance. Estate planning deals with the questions of who manages your assets at your incapacity or death and how are those assets managed.

## HEALTH CARE

**2. If I become incapacitated, who makes health care decisions for me?**

If you become incapacitated, your health care decisions will be made by one of the following persons:

1. The person you previously appointed through a signed Advance Directive for health care; or

2. The person the Court appoints, called a guardian, through a proceeding called guardianship.

**3. What is a health care Advance Directive?**

A health care Advance Directive is a document adopted under Oregon law that allows you to name the person you want to make health care decisions for you if you become incapacitated. The person you name (called your Health Care Representative) does not have to go to Court for the authority to act.

You can also give written instructions about your health care in your Advance Directive.

Be aware that the Advance Directive that is provided at no charge at health care facilities is based strictly on the Oregon Statutes and therefore will not include provisions that address federal law that governs the privacy of your medical records.



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**4. What is involved in a guardianship?**

The person seeking to be appointed by the Court to make health care decisions for you files a written petition with the Court. The petition must be provided to a number of different people and must be served on you by a process server.

The Court must cause an investigation by a Court appointed investigator called a visitor. The cost of the visitor's investigation is charged to you.

The person appointed to make health care decisions for you is called your guardian. Your guardian must file an annual report to the Court. All court filings are public record.

## MANAGING YOUR ASSETS UPON INCAPACITY

**5. What happens if I become incapacitated (who signs my name)?**

If you become incapacitated, there are four possibilities:

1. If the asset is owned jointly with another, it is possible that your signature is not needed and the healthy joint owner can merely sign his or her own name. Most joint bank account are set up so that only one joint owner need sign. Some joint assets, however, require the signature of ALL joint owners. For example, all joint owners must sign to sell or borrow against real property (your house).

2. You have previously authorized someone to manage your assets by signing a durable power of attorney.

3. You have previously authorized someone to manage your assets by establishing and funding a revocable living trust.

4. If you none of the above applies, the Court authorizes someone through a proceeding called conservatorship.



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**6. What does a conservatorship involve?**

The person seeking to be appointed by the Court to manage your assets for you files a written petition with the Court. The petition must be provided to a number of different people and must be served on you by a process server.

The Court may, but is not required to, initiate an investigation by a Court appointed investigator called a visitor. The cost of the visitor's investigation is charged to you.

The person appointed to manage your assets is called your conservator. Your conservator must file a listing of all your assets (called an inventory) and must file an annual accounting of all receipts and disbursements. All court filings are public record.

Your conservator only manages your assets. If you need someone to make health care decisions, the Court may also appoint the same person (or another) to make health care decisions. This person is called a guardian.

**7. What are the potential problems in creating joint accounts so that someone can pay my bills?**

The following are some potential problems with creating joint account with someone other than spouse:

1. Establishing a joint account may be a gift for gift tax purposes. If the gift exceeds the annual exclusion amount, a gift tax return must be filed.

2. Certain joint assets require the signature of all joint owners (for example your house).

   Your joint owner can prevent you from managing this type of asset by refusing to sign.

   If your joint owner becomes incapacitated, you will have problems dealing with your assets. You may have be dealing with the joint owner's conservator or the person he/she named as durable power of attorney.

3. If your joint owner has creditor problems, your joint assets may be in jeopardy.

4. See below for issues involving joint accounts after death.



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**8. What is a durable power of attorney?**

A durable power of attorney is a document in which authorizes someone to manage the assets you own. It allows a person you name to sign your name.

1. A power of attorney is durable if it remains effective even though you have become incapacitated.

2. A power of attorney can be limited in time or to a specific purpose. A general power or attorney is not limited and the person can do what you can do to manage your assets.

3. The power of attorney does NOT give the person named authority to make health care decisions.

4. A power of attorney can grant the authority to act on your behalf on the date it is signed or upon the occurrence of a later event, for example your incapacity.

**9. Must a power of attorney go to court to be able to act?**

No. A durable power of attorney is an effective way to avoid the need to establish a conservatorship in the event you become incapacitated.

**10. Can there be problems in using my power of attorney?**

Yes. A power of attorney is a very effective tool; however, problems can still arise in its use. Others cannot be forced to honor your power of attorney. Your best strategy is to give others no reason to reject it.

**11. What is a revocable living trust?**

A revocable living trust is a legal entity recognized under the law. Another example of a legal entity is a corporation. BEWARE: there are many differences between revocable living trusts and corporations.

**12. Who can own assets?**

A *person* can own assets. Asset you own would be "titled" in your name. You would manage those assets by signing your name.

Assets can also be owned by a *legal entity* such as a revocable living trust. If you establish a revocable living trust, you would transfer the ownership of your assets (with a few exceptions) to your trust. Your assets would be titled in the name of your trust, not your name. Technically, you would not own any of the assets owned by the trust.



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**13. If I establish a revocable living trust, what do I own?**

You own the trust. When you establish and fund a revocable living trust, you do not technically own the assets titled in the name of your trust.

**14. Who manages my revocable living trust?**

All legal entities are managed through officers. The only managing officer of a revocable living trust is the Trustee.

Since this is your revocable living trust, you would name yourself as the original Trustee.

**15. Who manages my revocable living trust if I become incapacitated?**

You may name others to step in and manage your trust in the event you become incapacitated. The persons you name are referred to as successor trustees. While you are able to serve as Trustee, your nominated successors have NO authority to act.

**16. How is my incapacity shown?**

The determination of your incapacity is defined in the trust agreement. One mechanism is to require your doctor's statement as proof of your incapacity.

**17. Does my successor Trustee have to go to Court before he or she can act?**

No.

**18. Can I make changes to my revocable living trust after it is established?**

Yes. You can amend or revoke your living trust as long as you know what you are doing.

**19. What steps would I need to take to establish a revocable living trust?**

The first step is to sign the documents that bring the trust into existence.

The second step is to transfer title to the assets you own from your name into the name of your trust. This process is called *funding* the trust.

There are incidental costs associated with funding your trust.

**20. If I establish a trust, do I need a durable power of attorney?**

Yes. If you become incapacitated, your successor Trustee may only manage assets owned by your trust. Your successor Trustee has no authority to manage an asset that is owned by you, individually. Any asset <u>you</u> own can only be managed using your durable power of attorney.



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**21. Since I do not own assets owned by my trust, are my trust assets protected from my creditors?**

No. Assets owned by your revocable living trust are reachable by your creditor just as if you owned the asset.

**22. Does a revocable living trust help me to qualify to receive Medicaid?**

No. Medicaid is the program that pays for long term nursing care. You must spend down your assets before you qualify to receive Medicaid. Assets owned by your revocable living trust are deemed to be owned by you for Medicaid qualification purposes.

**23. Is there anything a trust cannot own?**

All Individual Retirement Accounts, pensions, 401k accounts, deferred compensation accounts, employee stock option account, annuities, and other similar income tax deferred employee benefit accounts must remain in the name of the employee.

**24. Who are the persons involved in a revocable living trust?**

There are three persons involved in a revocable living trust and you are all three of those persons.

First there is the person who sets up the trust. This person can be referred to by a number of different names including Settlor, Grantor, Trustor and Donor. The Settlor of the trust is the equivalent of the owner of the trust.

The second person is the manager of the trust, called the Trustee. You would normally name yourself as Trustee of your Trust.

Lastly, there is the person for whom the Trustee is managing the trust assets. This person is called the Beneficiary. Again, you would normally name yourself as the beneficiary. You can also name others, if any, who could receive benefits from your trust during your lifetime (for example: spouse and minor children).

You also provide how trust assets will be distributed or administered after your death. This portion of the trust is a substitute to your Last Will and Testament.



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**25. How does a revocable living trust report income during my lifetime?**

As long as you are Trustee, your trust can use your social security number for tax reporting. You will be treated as owning the assets for income tax reporting, filing and payment.

There are special rules if you are not the Trustee of your trust.

## ADMINISTERING YOUR ESTATE AFTER YOUR DEATH

**26. What is probate?**

Probate is the Court process of administering a decedent's estate.

Probate applies to anything and everything a decedent owns at death. The first step in the process is the payment of valid claims. The Court will only authorize distribution of the estate to the heirs after the process for the payment of claims has been completed.

There are specific procedures for the payment of claims and the distribution of the decedent's estate.

**27. Can my power of attorney be used to avoid probate?**

No. Your power of attorney automatically terminates at your death. After your death, your Last Will nominates the person to manage your estate. This person is called the personal representative.

**28. Does my Last Will go through probate?**

Yes. Your will and probate both apply to assets you own at your death.

Unlike a power of attorney, the person you nominate under your will as your personal representative (executor) must first go to court (probate) for the power to act.

**29. How do I avoid probate?**

Own nothing. Anything and everything you own at your death must go through probate.



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**30. Can't I use joint ownership to avoid probate?**

Yes. If you own an asset jointly with one or more persons and you die first, you own nothing and your surviving joint owner owns the entire asset.

Using joint ownership to avoid probate can cause problems and unintended results, especially between a parent and child:

1. If you have more than one child and you make one of them a joint owner on your assets, on your death the named child owns all the joint property. That child does not have a legal obligation to divide the joint assets with your other children. If the child does divided the joint asset, he or she will be making a gift. If that gift exceeds the annual gift tax exclusion amount a gift tax return may need to be filed and gift taxes may be owed.

2. See above for issues caused during lifetime.

**31. Can I use beneficiary designations to avoid probate?**

Yes. Life insurance is an example of an asset for which you can name a beneficiary. At your death, the life insurance become payable to the named beneficiary or beneficiaries. HOWEVER:

1. It is not possible to name a beneficiary on all assets.

2. Assets passing by beneficiary designation go directly to each named beneficiary. The asset is not available to the person you name in your will or trust for use to pay bills.

3. The death of a beneficiary can cause some assets to be distributed to the only surviving beneficiaries while in other cases the deceased beneficiary's share will be distributed to the deceased beneficiary's heirs.

4. If you change your distribution scheme, you must change each beneficiary designation.

**32. What is a revocable living trust and who is involved?**

See questions 12 through 26 above.

**33. Why does a revocable living trust avoid probate?**

Probate applies to assets you own at your death. For probate purposes, you do not own assets owned by your trust.

**34. Will a revocable living trust shelter assets from creditors?**

No. The first job of the Trustee after your death is to pay valid bills.



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**35. Is the trust created in a Will the same as a living trust?**

A trust created in a Last Will is a testamentary trust and is not a living trust. It is a account that is set up to manage assets after a death and does not avoid probate.

The most common testamentary trusts are those which postpone the distribution of an inheritance until a minor child is old enough to receive it, to provide for a child's special needs or to minimize estate taxes.

**36. Are assets owned by my revocable living trust exempt from federal estate and Oregon inheritance taxes?**

No. Assets owned by your revocable living trust will be included in your estate for both federal estate tax and Oregon inheritance tax purposes just as if you owned the assets.

## ESTATE TAXES

**37. How much can I leave death tax (federal estate and Oregon inheritance) free when I die?**

Everyone can transfer property, death tax free. How much you can leave depends on who receives it.

1. You can leave an unlimited amount to your spouse (called the marital deduction).
2. You can leave an unlimited amount to charity.
3. You can leave the following amounts exempt from federal and Oregon estate tax to anyone you want:

   Federal Exempt: $5,490,000

   Oregon Exempt: $1,000,000

These exemption amounts are subject to change by Congress and the State legislature.

**38. If I am married do my spouse and I automatically each shelter the exempt amount available at each death?**

No.

If one spouse leaves everything to the surviving spouse then only the surviving spouse’s exempt amount will be sheltered.



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**39. How do my spouse and I each make use of the exempt amount available on the date of each death?**

It is possible for each spouse to shelter his or her exempt amount by establishing a trust for the surviving spouse (usually called a credit shelter trust or a bypass trust) **INSTEAD** of giving everything to the survivor. This plan must be in place **BEFORE** the first death.

This plan may be established either through trusts or by wills. If wills are used, there must be a probate at each spouse's death.

**40. What is included in my estate of federal estate and Oregon inheritance tax purposes?**

Federal estate tax and Oregon inheritance tax is based upon the value of assets and property you **own or have too much control over** at your death. For this reason assets owned by your revocable living trust, asset owned jointly with another and assets passing by beneficiary designation are all included in your estate when calculating estate and inheritance taxes. Life insurance and retirement accounts are included at the death benefit value.

**41. Is avoiding probate the same as avoiding estate taxes?**

Many people confuse probate avoidance with estate tax avoidance. Probate is the process of administering a decedent's estate to pay creditors and distribute the remaining assets to the decedent's heirs. Estate taxes (federal and Oregon) are taxes on the transfer of assets, whether that transfer occurs in probate or otherwise..

## ESTATE PLANNING OPTIONS

**42. What are my estate planning options?**

There are several levels of estate planning options you can use. Each level depends upon your current circumstances, including the size of your estate and the type of property you own. You will likely find that over your lifetime your estate will grow in size and complexity and your personal needs and goals will change. Therefore, your legal documents will likely need to be changed over time to accommodate these different circumstances.



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**COURT (DEFAULT) PLAN:**

**Guardianship, Conservatorship and Probate**

Guardianships are the court-supervised process of managing the health care and related matters of an incapacitated person or minor.

Conservatorships are the court-supervised process of managing the assets and business affairs of an incapacitated person or minor.

Probate is the court-supervised process of settling a decedent's estate, either with or without a will. When a decedent does not have a will, the state presumes how the decedent would want his/her estate distributed.

**LEVEL 1 PLAN**

**The Advance Directive, Power of Attorney and Last Will**

An Advance Directive identifies the person you want to make health care decisions for you (called your health care representative) when you are unable to make those decisions yourself. You can express your personal desires regarding the use or withdrawal of tube feeding and life support procedures.

The Power of Attorney allows a person you identify (called your attorney in fact) to sign your name for the purpose of managing your property when you are unable to make those decisions yourself. Your power of attorney terminates, by law, at your death.

The Last Will identifies the person you want to administer your estate through the probate process (called the personal representative and commonly known as the executor). It specifies who will receive your property and when it is to be distributed. It can establish a testamentary trust and name guardians for your minor children.

**LEVEL 2 PLAN**

**(which includes all elements of a Level 1 Plan):**

**The Revocable Living Trust**

The revocable living trust is added to a Level 1 Plan to identify and authorize a manager (called a Trustee) to manage assets owned by the trust when you can no longer do so. Assets owned by a trustee of a trust do not go through a Conservatorship or a Probate. This trust will only shelter the exempt amount for the single person or the surviving spouse from estate taxes.



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**LEVEL 3 PLAN** **Estate Tax Planning: Separate Revocable Trusts**

The third level of planning is to incorporate estate tax planning provisions in a revocable trust. Each spouse would set up a separate trust. Each spouse can be a trustee of both trusts. Each trust would create one or more estate tax sheltered accounts for the other spouse (Credit Shelter - Bypass , Special Marital and Marital Trusts). The use of these trusts allows a married couple to shelter more than just the surviving spouse's estate tax exempt amount.

**LEVEL 4 PLAN:** **Irrevocable Trusts**

Irrevocable trusts are used to maximize your ability to make annual gifts to reduce your estate *and* create a cash fund from which debts are paid (including estate taxes). Used in combination with other techniques, your assets are preserved without increasing the size of your taxable estate. Irrevocable trusts are particularly useful in the following situations:

1. The estate suffers from poor liquidity (i.e. estates composed mostly of real estate),

2. The estate has assets which have high debt,

3. The estate has assets with low income tax basis (including IRA and other high value retirement accounts),

4. Married couples with a combined estate more than $2,000,000.

5. Single persons with an estate more than $1,000,000.

Trusts to consider include:

1. Grantor Retained Annuity Trusts

2. Intentionally Defective Grantor Trusts

3. Charitable Trusts

4. Personal Residence Trusts


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**LEVEL 5 PLAN**

**Other**

Level 5 planning is designed to maximize estate tax discounts available to business owners as well as other techniques that further reduce the size of your taxable estate

Items to consider include:

1. Use of Business entities such as a corporation, limited liability company, family limited partnership
2. Private Foundations
3. Self-Canceling Installment Notes

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## ESTATE PLANNING CONSIDERATIONS

**43. What are some of the factors I should consider in deciding which plan is right for me?**

Some of the factors you should consider or balance in deciding which plan is right for you are:

1. The cost of the plan. Setting up a Level 1 plan (a will, power of attorney and advance directive) cost less than setting up a revocable living trust. A trust will usually cost less to administer at death.

2. If you are a professional such as a physician. You may wish to probate *a portion of your estate* to settle potential claims for errors and omissions and place your remaining assets into a trust.

3. Lenders generally require that title to real property be taken in the name of an individual or individuals. As a result real property must usually be acquired in your name, then transferred to your trust. If you have frequent real estate purchases, this can become cumbersome.

4. If the fair market value (what you could sell it for) of your house is $200,000 or less and your other assets are $75,000 or less, you can go through an abbreviated (shorter) version of probate and you probably do not need to establish a revocable living trust.

5. If you own real property in more than one state you should probably establish a trust. If you do not establish a trust a probate will be necessary in each state you own real property.



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**44. Why use a bank or other professional trustee?**

Many people object to a bank (or another professional corporate trustee) because of the fees they may charge. In reality corporate trustee fees closely match fees charged by investment advisors. A bank will charge a fee only when it does the work. Whether it is a bank or someone else, the person helping you is entitled to compensation. The better question to ask is: "Am I getting value for these charges?"

A corporate trustee is a good choice when:

1. The estate is very complex because, for example, it involves a business or a farm operation.
2. The estate has assets that require special attention.
3. The estate has a value too great or complex to be managed properly by a family member.
4. When family members are too inexperienced.
5. When family members are too distant to manage it properly or efficiently.
6. If you have no family members to assist you.
7. If potential disunity exists within the family members who will ultimately receive an inheritance from you.
8. You have created trust funds for your children or grandchildren that are intended to last for an extended period of time.



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