

Estate Planning Checklist

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I. Wills.

A. Why Should I Have A Will?

1. Wisconsin Statutes Determine Beneficiaries. If you do not have a Will, the Wisconsin Statutes will determine the beneficiaries who receive your property (the Laws of Intestacy). You may not want one or more of those beneficiaries to receive your property, or you may want to distribute your property to those beneficiaries in different amounts or proportions.
2. Personal Representative. You may select a Personal Representative in your Will to administer and manage your estate.
3. Guardian. You may select a guardian in your Will to care for your children who are under the age of 18 and to manage their assets.
4. Trust and Trustee. You may want to set up a trust in your Will for the benefit of your children if you do not want your children to receive their share of the assets they are inheriting from you prior to reaching a certain age. The trustee you select would administer and manage the trust assets.
5. Estate Tax Savings. If your estate is large, a Will may be used to save a substantial amount of Wisconsin or federal estate taxes.
6. Specific Bequest. In your Will you may make a specific bequest of money, other assets, or a valuable family heirloom to a relative, friend or charitable organization.
7. Special Provisions for a Child. In your Will you may make a special provision or allowance for a child such as the following:
 - Special provisions for a physically or mentally disabled child;
 - Special provisions for a child who is taking over the family business or farm;
 - Special provisions for children of a prior marriage; or
 - You may disinherit or exclude a child.

B. What Are The Common Types Of Wills?

1. Simple Wills. Example: Everything to your spouse, and if he or she predeceases you, then to your children equally.
2. Children Trust Wills. Example: Everything to your spouse, and if he or she predeceases you, then to a trust established in the Will (testamentary trust) for the benefit of your children. The testamentary trust would describe how the assets are to be invested and distributed, and the ages at which the assets are required to be distributed to your children.
3. Marital Deduction Wills. Example: Part of your estate would pass to your spouse, and another part of your estate would pass to a “family trust” established in the Will for the benefit of your spouse and children. This Will should be considered when the size of a couple’s combined estates may be subject to Wisconsin or federal estate taxes. (See chart of estate tax exclusions located at the end of this outline.)
4. Disclaimer Wills. Example: Everything to your spouse, but he or she may disclaim any or all of the property into a “family trust” for the benefit of the spouse and children.
5. Pour-Over Wills. Example: Everything passes to a revocable trust which you have established during your lifetime. The trust would then direct how the assets are to be distributed to your spouse or children upon death.

II. Taking Inventory Of Your Assets.

- A. **Help For The Personal Representative.** Having a list of assets which is available and updated for one's personal representative and beneficiaries is extremely helpful.
- B. **What Should Be Included.** While all assets and liabilities should be described on the list, it is particularly important that the list describe those assets which are not evidenced by readily available documentation. Thus, the ownership of a lot in another state may not be evidenced by the deed at the decedent’s residence in this state. Many times safe deposit boxes are taken out in more than one location, and it may require substantial search to determine the location of all of the safe deposit boxes. All bank and security accounts, and especially bank accounts in other states, should be listed.
- C. **Communication Of List And Location.** The list and documentation for the assets and liabilities should be readily available to the personal representative or whoever goes through the house after death. Place the list in a location where it

will be found, and give it or its location to the named personal representative or some trusted person. Lawyers receive such lists for inclusion in the client's estate planning files, but the list or its location should be given to relatives as well.

D. Updating. This list should be updated regularly. Computer spreadsheet programs make updating almost painless, but keep a hard copy.

E. Tangible Personal Property.

1. Any tangible personal property of substantial value should be noted and the basis for the determination of value given. Appraisals of such property, if available, should be attached or their location given. The children or the personal representative may not realize that grandma's rocker is 150 years old and has substantial value. Your tangible personal property can be documented by a video recording, and the recording should be placed in a location other than the residence. This is important for insurance purposes as well as assisting the court and the personal representative following death.
2. Wisconsin law allows a list of the tangible personal property to be used to transfer that property to one's beneficiaries, provided appropriate language is included in the Will. This document is valid even though it is signed after the date of the execution of the Will. It must describe the property and the distributees with reasonable certainty and be signed and dated by the decedent. Witnesses are not required but would be desirable.

F. Safe Deposit Box. The best place for the Will and other important documents is in a bank safe deposit box. This is appropriate even if a secure location is available at the residence or the business. Safes or secure locations other than a bank are really not intended to survive fire damage. Entry into the safe deposit box can be accomplished by a joint/surviving owner obtaining entry, or with an Order for Entry signed by the judge or the probate registrar and allows entry into the safe deposit box for the removal of important documents needed for probate. A list of the contents of the box is prepared on entry, so the court readily executes these orders to allow the proceeding to be commenced, the assets to be known and the Will to be filed with the court.

III. Beneficiary Designations. Assets that have beneficiary designations transfer property to the named beneficiaries regardless of the terms of the decedent's Will. This is sometimes called a "non-probate" transfer.

A. Common Types Of Designations.

1. Contract and Policy Payments. These types of payments pass outside the provisions or your Will in accordance with the policy or contract, and are paid directly to the beneficiary identified in your beneficiary designation form. However, if you designate your “estate” as the beneficiary (or use similar wording), or fail to name a beneficiary, then the proceeds may become subject to probate procedures and are payable according to your Will. Most commonly, life insurance proceeds, retirement accounts, IRA’s and annuities will be made payable to a designated beneficiary.
2. “Payable on Death” (POD) and “Transfer on Death” (TOD) Accounts. Similar to a contract or policy payment, the POD or TOD is a separate written agreement with the financial institution or mutual fund to pay the account to the designated beneficiary following the death of the account owner.

B. Coordination With Estate Plan. Remember that your estate plan does not only include your Will or Trust. It also includes defining and putting into effect your beneficiary designations so that they coordinate with your estate plan.

1. Trusts for Minor Beneficiaries. If your Will establishes a Trust for minor or disabled beneficiaries, or if your assets are passing to your beneficiaries via your Revocable Trust, you must name the Trust as the recipient of the proceeds on the beneficiary designation form.
2. “Convenience” Accounts. Be careful about naming an adult child, sibling, parent, etc., as a joint owner on a bank account or fund if your Will provides for that asset being distributed to someone else upon your death.
3. Special Needs/Public Benefits. Do not designate someone who is receiving public benefits, such as Medical Assistance or SSI, as a beneficiary if you are not sure how the receipt of the funds will affect their future eligibility for those benefits. If you have already established a Special Needs Trust for someone who is receiving public benefits, name the Trust.
4. Retirement Assets - Special Rules. The determination of the appropriate beneficiary designation for these types of plans and investments can be very complex, and you should consult with an attorney about how to best coordinate these with your estate plan. There are special rules about distribution of the plan proceeds when made payable to an Estate or Trust, sometimes requiring that your Will or Trust contain language about the retirement plan payment.

5. Update. When you amend or update your Will or Trust, always review your beneficiary designations also. Also be sure to update your designations if your circumstances change due to death or divorce.

IV. Probate Avoidance.

- A. **What is Probate?** Probate is a process governed by State Statutes to ensure that the liabilities and assets of a deceased are properly administered. It is a systematic means to make sure that the decedent's debts, taxes and claims are properly paid and that assets of the deceased are properly inventoried, collected and distributed to the beneficiaries.
- B. **Formal and Informal Probate.** If the estate has more than \$50,000 of assets, the estate must be administered under formal or informal administration.
 1. Formal Probate. Although the forms and procedures are similar to informal probate, formal probate requires at a minimum two formal hearings in the probate court in the county of the deceased. (Initial hearing to commence estate administration and a hearing on the final account.) Typically, formal probate is used when: (i) there are questions about the validity of the Will, or (ii) certain provisions in the Will must be interpreted by the Court, or (iii) there are conflicts among beneficiaries or between beneficiaries and the personal representative.
 2. Informal Probate. Many estates in Wisconsin are settled by informal administration. Informal probates are generally administered by the Register in Probate in the county of the decedent's residence.
- C. **Planning To Avoid Probate – Non-Probate Transfers.** The essence of a non-probate transfer is that the terms of the governing instrument determine who will obtain the property, *regardless of the terms of the decedent's will*.
 1. Survivorship Marital Property. Survivorship marital property, like all forms of marital property, is a form of holding property limited to married persons. Upon the death of the first spouse, his or her interest in survivorship marital property is extinguished, leaving the surviving spouse with sole ownership.
 2. Joint Tenancies. A joint tenancy is a form of shared ownership, with the key feature being the "right of survivorship." This means that while the joint tenants equally share ownership during their lifetimes, when one joint tenant dies, his or her interest is extinguished, leaving the surviving joint tenant(s) with sole ownership.

For non-spouses, the intent to create a joint tenancy must be expressed in the document of title, instrument of transfer or bill of sale. In the absence of such

an expression, the law presumes that the property is held as tenants in common. (Unlike a joint tenancy, a holder of an interest as a “tenant in common” has a partial interest in the property which he or she can transfer at death.)

3. Beneficiary Designations: Life Insurance, Retirement Accounts, IRAs and Annuities. Most of these policies or contract payments pass outside of the provisions of your Will directly to the named beneficiary identified in the beneficiary designation form. However, if you designate your “estate” as the beneficiary (or use similar wording), then the proceeds may become subject to probate procedures.
4. “Payable on Death” (POD) and “Transfer on Death” (TOD) Accounts. The POD or TOD is a separate written agreement with the financial institution or mutual fund to pay the account to the designated beneficiary following your death. Many financial institutions and funds offer this option. The POD or TOD account creates a survivorship right in the designated beneficiary. Unlike the joint tenant, the POD or TOD beneficiary has no rights to or interest in the property during the owner’s life. Instead, the rights of the beneficiary come into being only upon the owner’s death.
5. Life Estate in Real Estate. You can convey real estate by deed and reserve a life estate. The life estate owner has the right to use the property during his or her lifetime. Upon the death of life estate owner, his or her rights cease, and the property passes to the remainder beneficiaries designated in the deed.
6. Transfer On Death Deed. The transfer on death deed is a separate deed recorded with the Register of Deeds Office to transfer the real estate property to the designated beneficiary listed on the deed following your death. Unlike the life estate procedure, the transfer on death beneficiary has no rights to or interest in the property during the owner’s life. The owner retains full control and ownership in fee simple during his or her lifetime, including the right to sell and convey the real property in any manner. Ownership of the real estate property only passes to the beneficiary upon the owner’s death.
7. Establish Revocable Trust. You may establish a revocable trust and fund the trust. A funded revocable trust will avoid probate administration.
 - (a) Revocable Trust. A revocable trust is a trust created by an individual while living that may be revoked or modified by the individual, acting without the consent of any other person. The trust may provide for the investment and management of the individual’s funds and property during his or her lifetime, for distribution of assets upon the individual’s death, for continued management of assets for others (beneficiaries) after the individual’s death, or a combination of the above. A revocable trust is also sometimes referred to as a “living trust.”

- (b) Joint Revocable Trust. Two individuals (for example, a husband and wife) may establish a joint revocable trust. This is the most common type of revocable trust created by a husband and wife in Wisconsin because of Wisconsin's marital property law.

V. Planning For Incapacity – Powers Of Attorney.

- A. Who needs a Power of Attorney?** Powers of Attorney are often overlooked when thinking of your general estate plan. Everyone over the age of 18 who is competent to make one should have one.
- B. What are we planning for?** The event that you become incapacitated and are not able to make decisions by yourself, for yourself.
- C. What is a Power of Attorney?** A Power of Attorney is a legal document which authorizes a person to act on behalf of another person. The person who gives and grants the Power of Attorney is generally called the “Grantor” or the “Principal.” The person receiving or being granted the Power of Attorney is called an “Agent” or an “Attorney-in-Fact.”
- D. What happens if I do not have a Power of Attorney?** Nothing, until you become incapacitated such that you can no longer make your own decisions. At that point, a court-appointed Guardianship will be required. A court-appointed Guardian of your estate would handle your financial matters while a court-appointed Guardian of your person would handle decisions related to your health and general well being. This may or may not be the same person and this may or may not be the person you would have selected.
- E. Types of Powers Of Attorney.**
 - 1. Durable Power of Attorney. A Durable Power of Attorney (also called a Financial Power of Attorney) is a legal document which authorizes an Agent to act on behalf of an incapacitated Grantor with respect to financial decisions without direct court supervision. For a Power of Attorney to have the “durable” characteristics, the document must be in writing, must designate an Agent, and must contain the words, “this Power of Attorney shall not be affected by subsequent disability or incapacity of the Principal,” or similar language.
 - (a) What is the difference between a Specific and a General Power of Attorney? A Power of Attorney can be strictly limited to cover specific items or a specified act by the Agent on behalf of the Grantor. This is called a Limited Power of Attorney or Specific Power of Attorney. A Limited Power of Attorney is often used to effectuate a single transaction or limited series of transactions. The powers granted to an Agent can also be broad and cover a various number of items affecting the property

of the Grantor. This is called a General Power of Attorney. Most Durable Powers of Attorney in estate plans are General Powers of Attorney.

- (b) When should my Durable Power of Attorney become effective? The Power of Attorney can become effective immediately upon execution of the document or can become effective at the time the Grantor or Principal becomes incapacitated. The Power of Attorney which becomes effective at incapacity is called a Springing Power of Attorney. If you opt for the Springing version, you may also have it “spring” into effect upon a written directive from you to your Agent.

2. Health Care Power Of Attorney.

- (a) Why are we planning? Wisconsin is one of a minority of states that does not have a “family consent” law. This means that unlike other states, if you become incapacitated, no one in your family (including your spouse, parents, adult children, or anyone else) has the legal right to make health care decisions for you. In this scenario, a legal Guardianship, as described below, typically must be established. However, a court-appointed Guardian is more restricted than an Agent under a Health Care Power of Attorney.
- (d) When does the Health Care Power of Attorney become effective? A Health Care Power of Attorney becomes effective upon the finding of incapacity of the Grantor, similar to a “springing” Durable Power of Attorney, discussed above. “Incapacity” is defined as the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions. Incapacity must be determined by two physicians or one physician and one psychologist who have personally examined the Grantor.
- (e) What powers will my Health Care Agent have while I am incapacitated? If the Grantor is incapacitated, the Health Care Agent has priority over any other individual to make health care decisions for the Grantor. Often included is the authority to consent to admission of the Grantor to the following:
- A nursing home for recuperative care, not to exceed three months, if admitted directly from the hospital, on an in-patient basis.
 - If the Grantor lives with the Health Care Agent, to a nursing home for a period of not more than thirty days, to provide for family emergencies.

- If the Grantor is not diagnosed as mentally ill, to a nursing home or community based residential facility, for other than recuperative respite care, if so authorized by the Grantor.

Consent to withholding or withdrawal of a feeding tube, unless the physician advises that such will cause pain or reduce the level of comfort. Such authority must be granted to the Health Care Agent in the Power of Attorney.

- If the Grantor is pregnant, the Health Care Agent may make health care decisions for the Grantor. Such authority must be granted to the Health Care Agent in the Power of Attorney.

(f) What limits are there on my Health Care Agent's authority? The Health Care Agent may not consent to the following:

VI. Estate Tax.

A. Deaths in 2011 and 2012.

1. Estate tax is back.
 - (a) Exclusion amount – \$5,000,000.
 - (b) Top rate – 35%.
2. Tax basis for inherited assets will be the new basis equal to the fair market value on the date of death.
3. Reporting requirements – Same as existed in 2001, which required the decedent's representative to file a United States Estate Tax Return, Form 709, and pay applicable estate taxes within nine months of decedent's date of death if the decedent's estate is in excess of \$1 Million.
4. Portability – The new exemption amount is portable as between spouses. In other words, if a spouse dies and does not use all of his or her \$5,000,000 estate tax exemption, the balance can be transferred to the surviving spouse to be used upon his or her death.

B. Gift Tax.

1. For gifts made after December 31, 2010, the gift tax will be reunified with the estate tax, which means that the \$5 million estate tax exemption will also be available for gifts. Under prior law, the estate and gift tax were not unified so while the estate tax exemption rose to \$3.5 million, the gift tax exemption remained at \$1 million.

2. The gift tax rate under the new law is 35% for 2011. In addition, the generation skipping tax (GST) exemption will also rise to \$5 million with a tax rate of 35%.
- C. Expiration in 2013. It is important to keep in mind that the new law is only a two year “patch” and that the estate and gift tax exemptions are scheduled to return to \$1,000,000 on January 1, 2013.

VII. Planning For Long-Term Care.

- A. **Private Pay.** Individuals with assets greater than \$2,000 and couples with assets greater than the spousal allowance (generally between \$50,000 to \$109,560) are expected to privately pay for assisted living or nursing home care at the standard private pay rates. The *average* cost of nursing home care in Wisconsin for 2011 is \$6,216 per month.
- B. **Long Term Care Insurance.** Long-term care insurance is a type of insurance developed specifically to cover the costs of long-term care services, most of which are not covered by traditional health insurance or Medicare.
1. **Types of Services.** In addition to institutional care, coverage may be provided for services in your home such as assistance with Activities of Daily Living as well as care in a variety of facility and community settings, including assisted living facilities.
 2. **Cost.** There is generally a lot of flexibility with these policies and the cost will depend upon the age at which you apply, the amount of benefit coverage, the length of the coverage and the options chosen, such as inflation protection.
 3. **Long-Term Care Partnership Policies.** These policies allow individuals who have exhausted benefits of private long-term care insurance to access Medicaid without the same asset limits as other applicants. Wisconsin’s Partnership Plan was effective January 1, 2009. What it means for Medical Assistance applicants is that in determining eligibility for Medical Assistance, and in determining the amount recoverable under estate recovery, an amount equal to the benefits paid under the long-term care policy are disregarded.
- C. **Medicare.** In general, Medicare does not pay for long-term care at home or in various types of facilities, including nursing homes and assisted living facilities.
1. **Custodial Care.** Most long-term care is considered to be “custodial care,” and includes non-skilled, personal care, such as help with activities of daily living like bathing, dressing, eating, getting in or out of bed or chair, moving around, and using the bathroom. It may also include care that most people do for themselves. Medicare does not pay for custodial care.

2. Medically Necessary Skilled Nursing Facility (SNF) Care. Medicare pays only for medically necessary skilled nursing facility (SNF) care. Skilled care is available only for a short time after a hospitalization, generally 100 days. Skilled care is health care given when you need skilled nursing or rehabilitation staff to manage, observe, and evaluate your care.

D. Medicaid. Medicaid is a State and Federal program that will pay most nursing home costs for people with limited income and assets. Eligibility varies by State. The recipient is usually required to pay a portion of their own care with Medicaid covering the balance of the Medicaid rate. In Wisconsin, the current assets limits are as indicated above. Certain assets are not included in determining an individual or couple's countable assets, such as a vehicle, personal property, funeral and burial trusts, life insurance if the death benefit is less than \$1,500, retirement assets of the community spouse, and the residence, if occupied by the spouse. Transferring assets to children or others are considered divestments for medical assistance purposes. If an applicant for medical assistance has divested assets, a disqualification period results based on the value of the assets transferred.

VIII. Funeral Arrangements And Burial Directives.

- A. Advantages Of Pre-Arrangement.** There are substantial advantages in going to see the funeral director prior to the time of death, not only in terms of expressing one's desires and putting them down in writing, but also to negotiate burial arrangements which reflect one's desired cost level. Such negotiations do not work well after death, and especially so when the next of kin are not aware of the desires of the deceased.
- B. Burial Trusts.** One can enter into an agreement with a funeral home to provide pre-arranged specifics of burial. A funeral trust agreement should be signed which sets forth in detail the amount to be deposited and the instructions concerning its use. Usually a statement is attached detailing the funeral goods and services selected. Some funeral homes will "guaranty" a certain type of burial as long as prepaid. The funds provided for the burial may be funded by life insurance or invested in a certificate of deposit, and thus will be available at death, plus interest. If there are any excess funds, they are paid to the grantor's estate.
- C. Will.** Stating burial intentions in a Will is generally not recommended because the Will may not be located for some time after the funeral arrangements are well underway or completed.
- D. Authorizing Final Disposition.** Wis. Stat. § 154.30 governs the control of final disposition of human remains in most cases and provides the order for which individuals will have control over the final disposition of a decedent. The statute further provides that this order may be altered by executing an Authorization For

Final Disposition of my body document in the form and substance required by the statute.

E. Who May Control Final Disposition? The statute provides that the following individuals in the following order of succession will have the control over the final disposition of a decedent:

1. A representative or successor representative of the decedent acting under the decedent's Authorization for Final Disposition of My Body.
2. The surviving spouse of the decedent.
3. The surviving child of the decedent, unless more than one child of the decedent survives. In such a case, the majority of the surviving children have control of the final disposition, except that fewer than the majority of the surviving children may control the final disposition, if that minority has used reasonable efforts to satisfy all other surviving children and is not aware of opposition by the majority to the minority's intended final disposition.
4. The surviving parent or parents of the decedent.
5. The surviving sibling of the decedent, unless more than one sibling of the decedent survives. In such a case, the majority of the surviving siblings have control of the final disposition, except that fewer than the majority of the surviving siblings may control the final disposition, if that minority has used reasonable efforts to satisfy all other surviving siblings and is not aware of opposition by the majority to the minority's intended final disposition.
6. The next of kin of the decedent in descending order as provided in Wis. Stat. § 990.001(6).

F. Who May Not Act As A Representative? Unless they are related to the decedent by blood, marriage, or adoption, the following individuals who have a direct professional relationship with or provides professional services directly to, cannot be a representative under an Authorization for Final Disposition of My Body form:

1. A funeral director.
2. A crematory authority.
3. A cemetery authority.
4. An employee of a funeral director, crematory authority, or cemetery authority.

5. A health care provider.
6. A social worker.

G. Types Of Instructions That Can Be Given. An Authorization for Final Disposition of My Body form may contain special instructions concerning religious observances, as well as suggestions concerning any of the following:

1. Arrangements for a viewing.
2. A funeral ceremony, memorial service, grave-side service, or other last rite.
3. Burial, cremation and burial, or other disposition, or donation of the decedent's body after death.

The Wisconsin Department of Health and Human Services has created a form to comply with the requirements of the statute. A copy of this form is attached to this outline for your reference.



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