

GLOSSARY TO ASSIST IN COMPLETING THE ESTATE PLANNING WORKSHEET

ACCOUNTING: A report of all items of property, income, and expenses prepared by an executor, trustee, or guardian and provided to heirs, beneficiaries, and the probate court.

ADMINISTRATION OF THE ESTATE: The process of carrying out the provisions of the will under supervision of a probate court, often referred to as “probating.” It determines the validity of the will, appoints and supervises the personal representative, and approves the final settlement. The administration process will vary slightly from state to state.

Every estate administration involves some degree of court supervision, but the amount of supervision may be limited by the terms of the will. “Informal” proceedings for the probate of a will involve administrative (rather than judicial) procedures. An informal proceeding may administer the estate without continual court involvement and will mature into final settlement of the estate after the passage of a specified time. “Formal” proceedings are initiated by a petition to a court, and the administration becomes effective only after notice to interested persons, a hearing, and an order of court. “Supervised” administration is a single continuous proceeding requiring formal procedures and frequent court involvement.

Whenever possible and appropriate, it is best to use informal administration and to allow the personal representative to serve without bond. Since the informal administration allows the personal representative to act independently of court supervision, it is less cumbersome and time consuming. That also makes it less expensive, preserving more of your assets for the intended beneficiaries. Factors to consider when determining whether to employ informal, formal, or supervised administration are the value of your estate subject to administration, the degree of trust, cooperation, and agreement among the beneficiaries and creditors of your estate, your express wishes regarding administration as stated in your will, the complexities involved with the administration, the degree of protection from liability needed by the successors or by the personal representative or both, and proof of title to property.

BENEFICIARY: The person or persons who will inherit your estate when you die. The first, or primary, beneficiary (or beneficiaries) will receive everything. The secondary beneficiaries only inherit if all people identified as primary beneficiaries die before you do. Most clients list the spouse as the primary beneficiary and the children as secondary beneficiaries. Therefore, it is important in most wills to determine who would receive the estate if both the spouse and the children predecease you.

BEQUEST: Property given to a beneficiary in a will.

BOND: A written promise to pay money if actions of the bonded person cause loss or damage to the estate. Many states require an executor, trustee, or guardian to file a bond in order to protect the estate’s assets, unless the terms of the will specifically waive the requirement. The purpose of the bond is to ensure a faithful performance by the person under bond. If you choose people you trust to administer your estate, a bond ordinarily is not necessary, and you may find waiver appropriate. As always, select a trusted individual who is willing to serve before you make the nomination in the will.

CHILDREN: Can include adopted children, your children born after your death if you die while your wife is pregnant, and stepchildren, whether the biological or adopted children of your spouse. A relationship by legal adoption is treated the same as a relationship by blood for purposes of taking property under a will; a step-parent relationship normally is not. If you want to treat your spouse’s children equally to your own, it must be specifically stated in the will.

CODICIL: A supplement or addition to a will, not necessarily disposing of the entire estate but modifying, explaining or otherwise qualifying the will in some way. When admitted to probate, the codicil becomes part of the will. Because of potential issues related to proving the codicil, we generally do not recommend a codicil as a means of changing a will. If you need to change or update your will, it is best to complete an entirely new will, even if just for a few minor changes.

DOMICILE/STATE OF LEGAL RESIDENCE: A place where you have been and which you consider your permanent home. Your domicile is important to the preparation of your will, because it is the state whose laws

will control the administration of your estate and the interpretation and implementation of your will, or the distribution of your property if you do not have a will.

EXECUTOR/PERSONAL REPRESENTATIVE/ADMINISTRATOR (used interchangeably, depending on the state): Think of this as the Executive Officer, carrying out the directions in your will. The executor will collect the estate's assets, pay its liabilities, and distribute the assets to the beneficiaries or heirs in accord with the terms of the will. You should name an executor who is willing to accept the responsibility. If you do not name an executor, the court will appoint one. Because this person often will be required to file in your local probate court, it is preferable that the executor live in or near the state where the bulk of your property is located. Most people appoint the spouse as the primary executor and name a secondary executor to serve if the spouse dies first. You should consider whether a parent(s) is the best choice, depending on their age.

HEIR: A person designated by state law to take your property if no will exists at your death, also called an "heir at law." It is a myth that the state takes your property if you do not have a will.

ISSUE: These are your descendants (by birth or adoption). In most cases, your issue is your children and your children's children.

JOINT TENANCY WITH RIGHT OF SURVIVORSHIP: Ownership by two or more co-owners who take identical interests simultaneously by the same instrument and with the same right of possession, and in which each owner has a right to survivorship of the other's share upon his or her death. It is one example of how to pass property outside the probate estate.

LEGAL GUARDIAN: The person you name to take care of your children until the child reaches the age of majority if both you and the child's other parent have died. **You may not use an appointment of a guardian in a will to circumvent the legal parenting rights of your child's other parent, if it is not your spouse.** You may name "co-guardians" in your will, but they must agree on decisions regarding your child(ren). The guardian should be the person who will best take care of the children, not necessarily the wealthiest. In most cases, your life insurance will provide for the children, and those funds will be managed by your trustee. Make sure the person(s) you name is willing to assume the responsibility. You should consider whether a parent(s) is the best choice; they may already be done raising children.

NON-PROBATE ESTATE: The assets that pass outside of a will, through such tools as lifetime gifts, beneficiary designations, joint ownership with rights of survivorship, and "pay on death" accounts. These assets avoid the probate administration process and pass immediately to the designated beneficiary or surviving co-owner upon your death. However, they are included in the gross estate of very large estates for estate tax purposes.

PER STIRPES and PER CAPITA: The two common ways to distribute property to generations beyond your children. "Per stirpes" literally means "per branch," as opposed to "per capita" distribution, which means "by the head." Per stirpes is the most common way to distribute property, as per capita distribution often has the effect of cutting off the children of your child who predeceased (i.e., died before) you.

The best definition is by example: Assume you have three children. If all three of your children survive you (i.e., live longer than you), each would receive one-third of your property. In a per stirpes distribution, if a child has predeceased you, that child's share is divided among his or her children rather than your other primary beneficiaries. In a per capita distribution, the property is distributed only among the children who are living when you die. The result if your will calls for per capita distribution is that if you had three children and one of your children predeceases you, each of the remaining two children would receive a one-half share of your estate, and your deceased child's children would receive nothing. In this example, the only way grandchildren will receive anything at all is if all of your children have died with you or before you.

Please indicate on your questionnaire whether you want per stirpes or per capita distribution. If you do not indicate either, we will assume you intend per stirpes, as this is the most common.

PROBATE ESTATE: This is "orphaned property" for which you have not designated a home when you die—the property that passes under the instructions in your will.

SPECIFIC BEQUEST: A special gift of a particular item to a certain person, charity, or corporation. Because specific bequests sometimes add a burden and expense to the executor, it is best to limit these only to the most precious or sentimental items.

TENANCY BY THE ENTIRETY: A joint tenancy that arises between spouses when a single instrument conveys realty to both of them without specifying the character of the ownership. It may exist only between spouses and grants each spouse a 100% interest in the property, so that the entire interest passes to the other upon the death of the first spouse. It is one example of how to pass property outside the probate estate.

TESTATE: Having left a will at death. A person who dies with a will is said to have died testate, and property is distributed in accord with the terms of the will. A person who dies without a will is said to have died intestate, and property is distributed in accord with the state laws of intestate succession.

TESTATOR/TESTATRIX: The person who made the will. A male who makes a will is called a Testator, and a female who makes a will is called a Testatrix.

TRUST: A property interest held by one person (“trustee”) at the request of another (“settlor”) for the benefit of a third (“beneficiary”). A trust created by a will is called a testamentary trust. It does not become effective until the settlor’s death and is a common means of providing for minor children and preserving their assets.

Testamentary trusts are common in the wills drafted by the Legal Assistance Office. However, legal assistance is not available for the creation of revocable or irrevocable *inter vivos* or “living” trusts, which take effect during the settlor’s lifetime. Those trusts are beyond the scope of legal assistance, but we will be happy to refer you to an attorney who can assist.

A trust can be designed to produce almost any result desired by the client, provided the client gives the trustee sufficient funds with which to work. It also can allow the children’s money to be held beyond the 18th or 21st birthday, or to be released to the child in phases—options that are not available without an express trust. We usually recommend trustees be given very broad authority and adaptable powers to provide flexibility for future events. Consider that the source of the money that will fund the trust likely is life insurance, intended to replace the financial provisions you no longer are able to provide.

TRUSTEE: One who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary. The trustee’s duties are to protect and preserve the trust property and to ensure it is employed solely for the beneficiary, in accord with the directions contained in the trust instrument. The trustee should be empowered to do what is best for the beneficiary, without being hampered by inappropriate or unnecessary restrictions, just as you would do if you were still alive. Make sure the person you name is willing to assume the responsibility

UNIFORM TRANSFERS TO MINORS ACT/UNIFORM GIFTS TO MINORS ACT: A uniform law—adopted by most states—providing for the transfer of property to a minor, permitting a custodian acting in a fiduciary capacity to manage investments and apply the income from the property to the minor’s support. This is an alternative to the creation of an express testamentary trust.

WILL: A document that directs how your property will be distributed upon your death. It does not distribute non-probate assets such as SGLI or other life insurance benefits, IRA accounts, or other assets that name a beneficiary to receive the asset upon the owner’s death. A will can be changed or revoked by the individual at any time by executing a new will and physically destroying the old document, but not by pen-and-ink changes. Always preserve the original will, and never make marks on it, as any marks may invalidate the entire will. If you want to change your will, see an attorney.