ESTATE PLANNING

THE LIVING AND LEGACY DOCUMENTS©

801-654-3057

An integrated Estate and Asset Protection System™ is more than just the sum of its parts. There i a synergy created by bringing together the appropriate tools and principles. The System functions like a well-oiled machine to minimize the threat of various risks we encounter in business, investing, and in everyday living and dying.

The usual starting point is with an "estate plan" because regardless of your circumstances, everyone over 18 needs this basic set of tools. However, estate planning is more than just deciding who gets your property after you die.

What most people don't realize is that "estate planning" encompasses not only your "legacy' estate – after death – but also your "living" estate. Your living estate includes your body as well as your assets. It deals with issues that may come up while you are still alive but not able to manage your own affairs or make life-and-death medical decisions.

The following commentary will help you understand why we are so passionate about what we do at Affordable Legal Documents and why we like to start building your Estate and Asset Protection System™ with the estate package.

INTRODUCTION

Estate Planning is the process of (1) creating a system for the orderly and efficient transfer of your assets to the people you choose in the most cost-effective way possible, and (2) planning for incapacity while you are still alive.

A complete and properly planned estate begins with two sets of documents called the "*Legacy*" Documents and the "*Living*" Documents. Birth and death are what we all have in common, so we must address both in our planning.

The *Legacy* Documents take effect after death. They typically consist of (1) a Revocable Living Trust, and (2) Last Wills and Testaments.

The *Living* Documents, which could become the most important, consist of (1) the Revocable Living Trust, (2) Durable General Powers of Attorney, (3) Health Care Powers of Attorney and (4) Medical Directives (Living Wills).

Notice that your Revocable Living Trust plays an important role while you are still alive as well as after you are gone. It is the heart of the System.

In a sense, the *Living* Documents deal with your "living" estate - your body and assets while you are alive. The *Legacy* Documents deal with your "non-living" estate after you die.

The following two sections provide an overview of the "Legacy" and "Living" Documents, in that order. At the end of each section is a short quiz to help you explore your understanding of this information.

BASIC ESTATE PLANNING PACKAGE

THE LIVING DOCUMENTS

REVOCABLE LIVING TRUST
- Original Trustee(s)
- Successor Trustees

Husband's **DURABLE**
Wife's **DURABLE GENERAL POWER OF ATTORNEY**
- Agent
- Alternate Agents

Backup to Trust - Agent Managers Non-Trust Assets

Husband's **HEALTH CARE**
Wife's **HEALTH CARE POWER OF ATTORNEY & LIVING WILL**
- **Agent**
- **Alternate Agents**

THE LEGACY DOCUMENTS

Husband's **LAST WILL**
Wife's **LAST WILL AND TESTAMENT**
- Personal Representative
- Alternate PRs

Backup to Trust Guardians Personal Property

GOALS OF ESTATE PLANNING

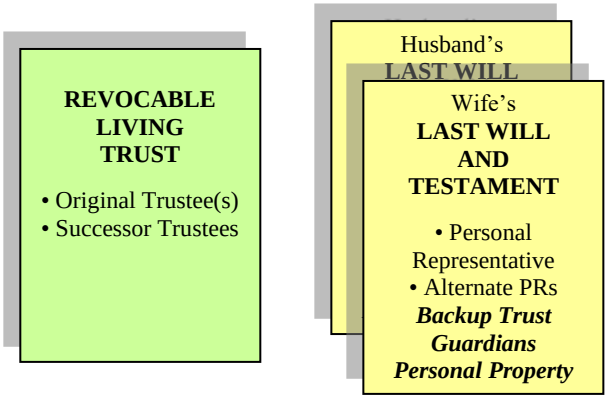
BEFORE DEATH – The "Living" Documents

1. Provide for Asset Management during Incapacity
2. Medical and end-of-life decisions
3. Preserve Family Harmony
4. Control who gets your stuff
5. Name Guardians & Provide Support for Minor Children or Children with Disabilities

AFTER DEATH – The "Legacy" Documents

6. Avoid Probate
7. First Step to Minimizing Estate Taxes

THE LEGACY DOCUMENTS



PURPOSE. Your *Legacy* documents consist of your *Revocable Living Trust* and your *Last wills and Testaments*. When set up properly, they work together to accomplish the following five primary functions. You will likely avoid any court or government interference.
Here are the five reasons, listed in order of priority, why almost everyone needs the *Legacy* Document*s*:

1. **Preserve Family Harmony** – By making as many decisions as possible in advance of your death and documenting them in your Trust and Will, you minimize the risk of your family feuding over your stuff. In fact, we usually insert a clause that disinherits anyone who tries to challenge your instructions.

2. **Control Who Gets Your Stuff** – If you do nothing, the State in which you live has written your Will for you. There must be an orderly method for transferring a deceased person's property to the new owners. The default instructions are found in the Laws of Intestate Succession. The judges of the Probate Courts enforce these laws. You would probably rather decide who gets your stuff than rely on your State's statutes.

3. **Asset Management during Incapacity** – Your Trust is the controlling document after your death. It is also a key component of your Living Documents. For a myriad of reasons, you may become incapacitated. This means you are not able to manage you financial affairs or make your own medical decisions. The Successor Trustee steps in to take charge of the Trust assets and manages them for you until you either regain your capacity or pass away. The Agent you appoint in your financial Power of Attorney manages your non-trust assets. The person you appoint as your agent under your Health Care Power of Attorney makes medical decisions on your behalf when you are not capable yourself. (See "The Living Documents" below.)

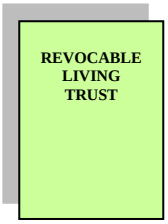
4. **Avoid Probate** – Even though you can direct who gets what, your Last Will and Testament must "go through Probate". A Will is nothing more than instructions to a Probate Judge. The following problems make it worth avoiding probate if at all possible:
   (a) *Time delays*. In my seminars I ask, "Who has been involved in the probate process of an estate and how long did it take?" The shortest time I have ever heard is 3 months in very simple cases. Nine months is more typical. Frequently, the answer is 1, 2, 3, 5, 7 years, or we are still in the process.
   (b) *Cost*. There are probate court fees, but the real cost is the attorney's fees. I had one client who's son lived and died intestate in California. After more than two years in probate, she finally ended up with $90,000 of his $350,000 estate.

(c) *Multiple Probates*. You will be required to have probate in every state you own property. Dealing with attorneys and courts in other state significantly compounds the cost and delays as noted in the case reported above.
(d) *Public Event*. Probate is a public process. Anyone can look up and examine the court records and see all your assets and liabilities and who inherited all your possessions. Sales people frequently use probate records as prospecting lists. There are even national seminars that teach how to do it.
(e) *Additional Hassles*. The one who ends up doing all the work of managing your estate is your Personal Representative (formerly called an Executor). They usually end up working without pay on their own time. You can minimize their work with proper planning.

All these problems can be easily eliminated with a Trust-based estate plan. Probate is mostly about changing title of a deceased person's property into the name of the new rightful owner. With a Trust, there is no need to change title since the Trust survives your death, it does not die. The need for probate is completely done away with. Your appointed Successor Trustee takes over immediately upon your death without court or governmental interference.

5. **Personal Property to Individuals**: Personal property is property that does not have a title like your wedding rings, china, or guns. An "assignment" is used to transfer personal property from you, as individuals, to you, as Trustees of your Trust. At the same time you sign your Trust, you will also sign an "assignment" granting all your personal property to you, as Trustees of your Trust. You can also attach to your Trust a letter leaving specific items of personal property to specific individuals. Your personal effects are likely to be the source of the most disagreements. You can prevent much of the fighting by using this important opportunity available through this letter attached to your Trust. The Successor Trustee will handle the distribution of the rest of the personal property.

6. **Minimize Estate Taxes** – For married couples with large estates, the Trust may be the first step in minimizing estate taxes. This is currently not an issue for most people. If you are single, your estate must be worth over $11 million before you would pay any estate taxes, $22 million for married couples. The problem is that we have no idea what Congress will do after 2024 when the current estate tax schedule is due to expire. Further discussion is beyond the scope of this article. If you expect your estate to be greater than $11 million or $22 million, Affordable Legal Documents has the experience to help you with more advanced planning.



REVOCABLE LIVING TRUST

Each document identifies the people (or entities) involved and their duties and responsibilities. Therefore, an important key to understanding your documents is knowing the title and duties of the people you pick to fill each role and what they are supposed to do.

In order for us to properly customize your Trust, you must decide who will fill the following positions in your Revocable Living Trust:

1. **Settlor(s)** means the person or persons (you, or you and your spouse) who actually set up your Trust with the help of Affordable Legal Documents. **Settlors setup the Trust.** Once the Trust document is signed by you (the Settlors), you will transfer your property and assets to the Trust. For example, if you and your spouse own a home, you will sign a Warranty Deed transferring the ownership of your home from you (as "joint tenants,") to

yourselves as Trustees of your Trust. This is called "funding" the Trust. Now you, as the Trustees of your Trust (rather than as individuals,) own your house. You never give up any rights or control of your property. Remember, the Trust is "revocable". This means that you, and only you, as the Settlors of your Trust can add property to or remove property from your Trust at any time. The only thing that changes is the way you hold title.

Plain English: You, as the Settlors, set up your Trust and transfer your property to yourselves, as Trustees of your Trust. It sounds a little crazy, but, please, read on.

2. **Trustee(s)** means the person or persons (you, or you and your spouse) in charge of managing the Trust property that has been transferred to the Trust. **Trustees manager the Trust property.** So, you, as Settlors, transfer your property to you, as Trustees of your Trust. If you are single, you are the "original" Trustee. If you are married, you and your spouse are "original" Trustees, and the one who survives will continue as the sole Trustee. The Trustees are the ones who are in control of the assets of the Trust. They manage the assets for the benefit of the Beneficiaries. They (you) still have all the control.

   Plain English: You, as the Trustees of your Trust, now own and manage the assets that you transferred to your Trust.

I know this sounds a little silly – transferring your property to yourself. But stay with me. It will all make sense in just a minute.

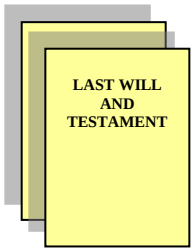
3. **Successor Trustee(s*)*** means the person who takes over the management of the Trust assets under one of two circumstances:
   (a) **Death** - Once the Settlors of your Trust (you, who are also the original Trustees) have passed away, the Successor Trustee takes over the management of the Trust assets for the new Beneficiaries, (your heirs.)
   (b) **Incapacity** - If the current Trustee(s), (you), - become <u>incapacitated</u> and unable to function as Trustee, the Successor Trustee will step in to manage your Trust assets for "your" benefit until you either recover and take over again or die.

   Plain English: In your Trust, you name the Successor Trustee(s) to take over for you as Trustee of your Trust in the event that you become incapacitated or die.

4. **Beneficiary(ies)** means person or persons who are to receive benefits from the Trust assets being managed by the Trustees. **Beneficiaries enjoy the benefits of Trust property.** The Settlors are usually the Beneficiaries of their own Trust while they are alive. Their heirs (who they have named in their Trust) are the "remainder" Beneficiaries. That means that they get whatever is left after the Settlors die.

   Plain English: The Settlors are the owners of the Trust property. They have transferred it to the Trustees to be managed for their benefit as Beneficiaries. If you are a married couple, while both or one of are still alive, you are the Beneficiaries. Upon the second death (your death if you are single), your heirs (say, your children) become the Beneficiaries. The Successor Trustee then distributes what is left to them according to the instruction in the Trust.

Therefore, "you" as Settlors set up your Trust and appoint "yourselves" to be the Trustees to manage "your" asset for "your" benefit. It may sound like double speak right now but read on.



LAST WILL AND TESTAMENT

Before we can draft your Last Will and Testament, you should understand the following terms:

1. **Personal Representative** means the person who "administers" the estate of a deceased person. The old name for a Personal Representative is "executor". Your Personal Representative will be the one to shepherd your estate through Probate, if Probate is necessary. There are two way a personal representatives is appointed:
   (a) **Intestate** means you die without doing anything. You die without doing a Will (without a "testament"). In this case, the Probate judge will appoint a Personal Representative for you.
   (b) **Last Will and Testament** means your Last Will and Testament. In it, you, not a judge, name someone to be your Personal Representative.

2. **Last Will and Testament** means you have a Will but not a Trust

3. **"Pour Over" Will** means, if you have a Trust, your Personal Representative will handle the part of your estate that you did not transfer to your Trust while you were alive. A Pour-Over Will leaves everything to your Trust rather than to your individual heirs. This is called a "Pouring Over" Will because it "pours over" whatever is left in your estate outside your Trust into your Trust. The Trust becomes the central point of distribution.

Questions: If I have a Trust and it avoids probate, then why do I need a Last Will and Testament since a Will requires probate?

Your Last Will and Testament serves some very important functions:

1. **Backup to the Trust**. If you forget to transfer all your property to your Trust, the Pour Over Will serves as a backup and directs all non-Trust assets to the Trust.

2. **Guardian & Conservator.** In your Will, you appoint a Guardian and a Conservator for your minor Children who has custody of their body.

   Guardian(s) means an individual(s) who, by legal appointment or by the effect of a written law, is given custody of the person ("their body") who is unable to manage their own affairs, such as a child or someone who is incapacitated or mentally disabled.

   Plain English: In your Will, you appoint a Guardian for your orphaned minor children. **A Guardian has custody of the body of the child**.

3. **Conservator** means that, in your Will, you appoint a person(s) to manage your minor children's assets. If you have a Trust, your Pour-Over Will leave everything to your Trust and the Trustee will manage their financial affairs. Conservator means an individual who, by legal appointment or by the effect of a written law, is given custody of "the property" of one who is unable to manage his or her own affairs, such as a child or someone who is incapacitated or mentally disabled.

   Plain English: In your Will, you appoint a Conservator for the assets you have left to take care of your orphaned minor children. The Conservator is the custodian of the

assets and makes sure that those assets are used exclusively for the benefit or your minor children. **The Conservator has custody of the assets.** The Conservator can be the same person as Guardian, the Successor Trustee and Personal Representative.

Heir(s) means a person who succeeds, by the rules of law, to an estate upon the death of his ancestor, by right of descent and right of relationship.

Plain English: Your heirs are usually associated with your Last Will and Testament. If you leave some of your stuff in your Will to non-relatives, they are called "beneficiaries."

Beneficiary(ies) means someone who is named to receive property or benefits in a Will or Trust.

Plain English: The Trustee of your Trust, (you while you are alive, or your Successor if you are incompetent), manages the assets of your Trust for your benefit as Beneficiaries until you die. After your deaths, the Beneficiaries change to your children, (and/or others you may chose to leave something to), and your leftover stuff is distributed according to your instructions in your Trust.

LEGACY DOCUMENT QUIZ

One of the best ways to remember something is to teach it to someone else. Another way is have to recall it just after studying. This is a closed book test. Without peeking, answer the following questions. (The key is at the end of this article.)

Q1: The Legacy Documents consist of two documents. They are:

a _ and your _ _ _ _ _ _ _ _ _ _ _ _ .

Q2: True or False. By preparing and signing a Last Will and Testament my estate will avoid probate.

Q3: Name as many reasons as you can why you should avoid probate.

1. ____

2. ____

3. ____

4. ____

5. ____

Q4: A Guardian has custody of your orphaned child's _____________.

Q5: Who takes over the Trust once the Settlors / Original Trustees are dead?

a. Personal Representative

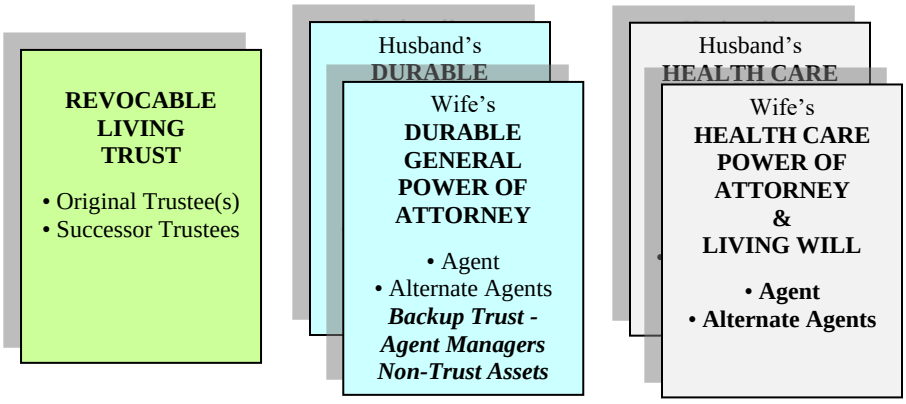
b. Conservator

c. Successor Trustee

d. Remainder Beneficiary

Q6: If you have a Trust to avoid Probate, WHY do you still need Wills?

THE LIVING DOCUMENTS



PURPOSE. Your *Living Documents* may prove to be the *most important* because they are effective while you are still alive but unable to manage your own affairs. There are several words that described this state such as incapacitated, incompetent, disabled and insane. The word most often used is *incapacitated*.

1. **Incapacity** means to lack the ability; the quality or state of being incapable; the lack of legal, physical or intellectual power; inability.

   Plain English: Incapacity can be physical, mental/emotional or legal. A minor is, by definition, legally incapacitated and by law needs a Guardian and a Conservator (e.g. parents) to act for them. You would be incapacitated if you were not able to adequately manage your financial affairs or make your own medical decisions.

2. **Power of Attorney** means an instrument in writing by which one person, as Principal, appoints another as his Agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The primary purpose of a power of attorney is not to define the authority of the agent as between himself and the principal, but to evidence the authority of the agent to a third party with whom the agent deals.

   Plain English: If you are incapacitated, someone must take care of you. To avoid a court process called a custody hearing and having a judge decide, you name someone in advance "just in case."

3. ***Agent*** means one who, by mutual agreement, acts for the benefit of another; one authorized by a party to act in that party's behalf. Someone named to receive property or benefits in a will or trust.

   Plain English: In your Last Will and Testament you appointed a Guardian (agent of the body) and a Conservator (agent of the assets) for your minor children. You must do the same for yourself in case you become incapacitated and, like minor children, cannot act for yourself under the law in matters either of the body or of property. This is a contingency plan if things do not go as planned.

If you become incapacitated, someone will need to take over the management of your affairs until you either regain your capacity or pass away. If you have not made provisions in advance, a judge will decide for you and appoint a guardian and a conservator. Someone desiring to step in

and take care of you will get an attorney and sue you for custody of your assets and your body. A trial called a "custody hearing" is held and the judge will decide who gets the job.

Each of your documents identifies who the people (or entities) involved in that document are and their duties and responsibilities. So, an important key to understanding your documents is to know the title of the people you pick to fill each role and what they are supposed to do. (The parties to your revocable living trust were discussed above.)

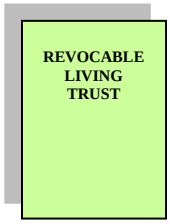
POWERS OF ATTORNEY

You also need a contingency plan for you if you become incapacitated, i.e. you can't make financial or medical decision because you are injured, too ill physically, or mentally unable to manage your affairs. There has to be a mechanism, as with minor children, to have someone make them for you. If you have not taken steps on your own in advance then, as with minor children, the courts will decide who gets to decide for you.

> **NOTE**: These are the very documents that Terri Schiavo did NOT have when she was suddenly stricken. The result was the high-profile battle between her husband and her parents. If she and her husband had planned ahead and created the proper power of attorney, you would likely have never known her name.

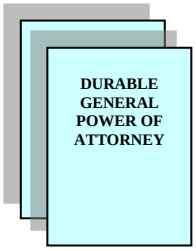
MANAGEMENT OF YOUR PROPERTY DURING INCAPACITY

Under a properly planned estate system, custody of your property in the event of incapacity is handled in two ways.



REVOCABLE LIVING TRUST

Your Trust is part of both the *Legacy* and the *Living* Documents and therefore serves two functions. If you are married, your spouse usually continues as the sole Trustee if you are incapacitated. If your spouse has predeceased you or otherwise cannot serve as Trustee, then in advance in your trust you have appointed a Successor Trustee. This is usually the same Successor Trustee that will take over the Trust assets after you die. That same Successor Trustee takes over the management of the Trust property for you for your benefit while you are still alive but unable to take care of it yourself. Your spouse or Successor Trustee essentially serves as the Conservator of your living estate.



DURABLE GENERAL POWER OF ATTORNEY

The Agent you appoint in your General Durable Power of Attorney will manage your NON-Trust assets in the event of your incapacity. The best protection is to have all your assets in your Trust. Hence, the Agent is only a back up to your Trust much like your Will is only a back-up to your Trust at death.

Generally, the Successor Trustee and the Agent is the same person because they are basically doing the same work. Married couples generally appoint their spouse as the primary Agent and one or two backups in case the spouse is unable to serve.

IMPORTANT POINT: **Trustee vs. Agent (Power of Attorney)**. Many people and legal professionals wonder if you really need a Trust. The answer is "Yes". Here is why. An agent under a power of attorney is a much weaker position than a trustee. No one is required to recognize your Agent as your legal representative, whereas, your Successor Trustee is effectively the "owner" of the assets and therefore must be honored as the owner.

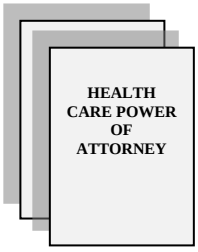
Why is this so? A trust is a contract between you and yourself. The Settlors of the Trust (you) contracts with the Trustees (you) to manage the Trust assets (your assets) for the benefit of the Beneficiaries (you). *You, as the Settlors, transfer title of the assets to you as Trustees of your Trust.* In the contract (the trust), the Trustees (you) are required to follow the Settlors' (your) instructions that they (you) spell out in the trust. Until the Settlors either die or become incapacitated, they can change anything in the trust they want. They can even completely "revoke" the trust.

In the event of incapacity, the Successor Trustee, according to the instructions in the trust, steps into the place of the original Trustee(s) as the *owner* to manage the trust assets for the *Settlors' benefit* while they are still alive.

Since a Trustee is essentially the owner / title holder of the property in the Trust, the Trustee's power is much more binding on others than an *appointee / agent*, someone you have appointed to represent you but to whom you have not granted title. Therefore, virtually everyone over 18 with any assets should have a Trust and a Pour-Over Will.

MANAGEMENT OF YOUR BODY DURING INCAPACITY

The other *Living* Documents deal with custody of your body in the event you become incapacitated and cannot make your own medical and health care decisions**.**

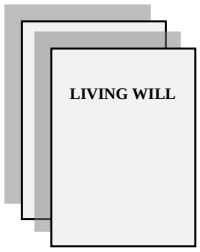


HEALTH CARE POWER OF ATTORNEY

When you are incapacitated, you usually can't make decisions regarding your medical care. Again, to avoid a custody hearing, you should appoint someone in advance to be your Agent under your Health Care Power of Attorney. That person would make health care decisions for you. Most states have enacted a prescribed Advanced Health Care Directive format as a guide. Your health care Agent is your Guardian of your body, just as the person you appoint in your Last Will and Testament is the Guardian of the "bodies" of your minor children. Again, this will likely allow you to avoid a custody hearing.

If Terri Schaivo had executed a Health Care Power of Attorney appointing her husband as her Agent in advance of her incapacity, her parents would most likely not have had any say in her care.

Married couples usually appoint their spouse as their primary Agent, but it can be anyone you desire. One or two backups are usually named.



LIVING WILL

Often combined with the Health Care Power of Attorney into the same document, it gives you the opportunity to express your desires with regard to your treatment in the event of an irreversible terminal illness or injury.

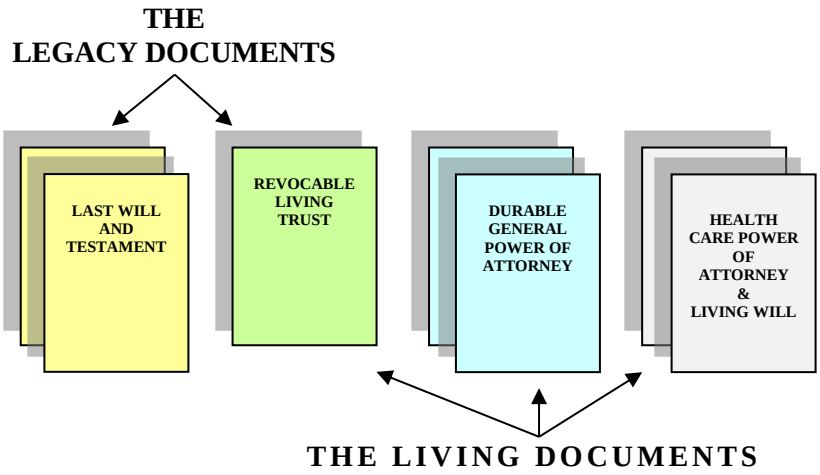
In one respect, the Living Will has to do with medical care that would unnecessarily prolong your pain and suffering. It may also provide an asset protection function by preventing prolonging hopeless and undesired treatment that could further sap the family's financial resources. Following the Karen Ann Quinlin case in the 1970s, each state legislated the wording of this declaration and any options for customization.

SUMMARY

Now you can see why your *Living* **and** *Legacy* Documents are the foundation of your Estate and Asset Protection System. They deal with some of the "worst case scenarios". Once you have signed (executed) them, you must implement them completely and review them periodically. (Other articles by this author address how to implement and maintain your system.)

You can let go of a whole lot of guilt and concern and relax knowing you have taken the first big step in "Protecting what matters most."

Do not forget. As important as your estate plan is, it is only the beginning. Because your Trust does not "protect" your assets from personal or business risk, additional asset protection measures must be taken. And one other thing, YOU CAN understand and do this stuff. We are there for you. So, just do the right thing - just do it now.



THE "LIVING" DOCUMENTS QUIZ

This is a closed book test. Without peeking, answer the following questions. (The key is at the end of this article.)

Q1: What two very important documents did Terri Schiavo NOT have?

1. _____

2. _____

Q2: True or False. My Last Will and Testament allows me to express my desires with respect to dying.

Q3: True or False. My Health Care Power of Attorney allows my doctors to accept instructions from my appointed Agent.

Q4: True or False. The Agent I appoint in my Durable General Power of Attorney has more authority over my non-trust assets than the Trustee of my Trust has over assets I have transferred to my Trust.

Q5: Under my Living Will, the person I appointed to act on my behalf is called my

a. Personal Representative

b. Agent

c. Trustee

d. Remainder Beneficiary

e. None of the above

Q6: When is the most appropriate time to get a Health Care Power of Attorney and a Living Will? _____

Answer Key: The Legacy Documents Quiz on Page 8

A1: **a** Revocable Living Trust and your Pour Over Will

A2: **False**. A Revocable Living Trust is used to avoid probate. A Will requires probate.

A3:
1. Time delay
2. Cost
3. Multiple state probates
4. Public event
5. Hassle for Personal Representative

A4: body

A5: **c** Successor Trustee

A6: **a** Will is still necessary for the following reasons (see page 5):
1. Backup to your Trust
2. Appoint Guardians
3. Appoint Conservators
4. Transfer gifts of Tangible Personal Property

Answer Key: The Living Documents Quiz on page 13

A1: **a** Health Care Power of Attorney & a Living Will.

A2: **False**. Your Living Will allows you to express your desires with respect to dying.

A3: **True**.

A4: **False**. A Trustee is in a much strong position as an 'owner' versus just an "agent".

A5: **e**. None of the above. A Living Will is a declaration of your desires. You do not appoint anyone to do anything in a Living Will. The Health Care Power of Attorney is where you appoint your Agent for health care. Many states have combined these two documents in to one, so it can be a little confusing. A Living Will and a Will (Last Will and Testament) are completely unrelated.

A6: Have them prepared in advance so they can be signed the morning of one's 18th birthday.

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