Chapter 5
Your Estate Plan and Estate-Planning Documents

Last Will and Testament
This document gives the probate court instructions on how your estate is to be distributed. It names whom you prefer to serve as Personal Representative (who is appointed by the court) to administer your estate (i.e., collect all your assets, pay your remaining debts, and distribute your assets in accordance with the terms of your Will.) If any beneficiaries are minors, it can also name your preference for who is to serve as Guardian for the person of the minor as well as name a Guardian of the estate of the minor. (They are often the same Guardian.)

IMPORTANT: Not all your assets will necessarily pass to the beneficiaries named in your Will. For example, If you have already named a beneficiary on an account or insurance policy, or if you own an asset in joint tenancy with someone else, that particular asset will most likely pass to that other person automatically, and the provisions of your Will may have no effect on the transfer of the asset, even if your Will names someone else who is to receive the same asset. This is the reason all assets must be carefully scrutinized as to how they are titled and whether or not they have any beneficiary designations. You want to make sure that your wishes will be carried out correctly.

Personal Representative: Often, this is one's spouse, child, good friend, or a bank or trust company named as a corporate Personal Representative. You can have co-representatives (e.g. requiring two children to serve jointly, or a spouse and trust company jointly), but your estate-planning attorney will want to talk with you about potential pitfalls of doing so. It is important that any person you name to serve as Personal Representative has the time, knowledge, and willingness to serve as your Personal Representative. It is the Personal Representative that usually hires the attorney to probate the Will, if probate is required.

NOTE: Under Florida law, most relatives and their spouses can serve as a Personal Representative, regardless of whether they reside in another state. However, if the Personal Representative is not related to you, he or she must be a Florida resident. Different states have different requirements, so if you have moved to Florida, have your Will reviewed by a Florida estate-planning attorney. If you move from Florida to another state, have it reviewed by an attorney in your new state, to make certain that state's requirements don't disqualify the Personal Representative you have designated.

In addition, consider naming at least one or two alternate individuals or a bank or trust company to serve as Personal Representatives. This will save the cost and hassle of having your Will updated if the Personal Representative you have named predeceases you or becomes unable or unwilling to serve.

Some probate judges will allow the Personal Representative to serve without having to post a bond if the Decedent's Will waives the bond requirement. Other judges refuse to allow a waiver because of concerns about protecting estate creditors and beneficiaries from misfeasance or nonfeasance.

Guardians: If you have any children or grandchildren who are minors, a Guardian should be named in your Will to care for their person and to manage their property until they attain 18 years of age in the event of the death of both parents. You may nominate joint Guardians, although complications may arise if they disagree on the handling of the child or the child's assets. You may also nominate separate Guardians for a child, that is, a "Guardian of the person" and a "Guardian of the property," especially if one proposed Guardian is better at financial matters and another proposed Guardian is a better care provider. A corporate Guardian, such as a bank or trust company, can be designated as Guardian of the property or could serve as a Co-Guardian of the property with another individual you name.

NOTE: Under Florida law, if the person you nominate as Guardian is not related to the child, he or she must be a Florida resident to be appointed.

Living Will

If you remember the unfortunate case of Terri Schiavo, a braindead woman who was kept alive during an extremely long and expensive legal battle as to whether to keep her attached to the machines that kept her alive or allow her to be removed from the machines to die, a Living Will is the appropriate document to avoid this situation.

Note: A Living Will must be signed in the presence of two witnesses. At least one of those witnesses cannot be your spouse or a blood relative. In addition, the person designated as the Health Care Surrogate cannot act as a witness to the signing of the document.

Durable Power of Attorney

This is a very powerful document which authorizes another person, your "Attorney in Fact", to control your assets on your behalf and for your benefit. If you become incapacitated, this document may prevent the necessity of having someone appointed by the court to serve as Guardian to handle your personal and/or financial affairs.

IMPORTANT: The date this document becomes effective varies from state to state. Some states allow for a "springing" power of attorney, meaning that the document does not become effective (i.e. "spring into effect") until the occurrence of a particular event, which is usually a doctor's certification that you are no longer capable of handling your own financial affairs.

In other states, including Florida, the document is effective **immediately**, even if you are not incapacitated. So, the person you name must be someone whom you completely trust to act on your behalf, as that person will have access to all your assets and the legal authority to dispose of them.

Keep in mind that this is a fiduciary relationship, meaning it is a relationship of total trust, good faith, and honesty. Whomever you appoint is expected to use the power you have granted for your benefit, or to do what you would have wanted that person to do on your behalf.

Designation of Health Care Surrogate

In the event you are unable to make decisions about your medical treatment or health care, perhaps due to being incapacitated, unconscious, or disoriented, this document will designate the person who will have the legal authority to make medical decisions for you. In Florida, a doctor must declare you to be incapable of making your own medical decisions before your surrogate can make the decision on your behalf.

Declaration Designating Pre-Need Guardian

Even though a power of attorney and/or revocable living trust should help to avoid the necessity of your designated representative being required to go to court to be appointed as your own Guardian, circumstances sometimes arise requiring a court-appointed Guardian to watch over you and your assets. While it is not binding on the court, this document informs the court whom you would like to serve in this capacity for you.

The Guardian of the Estate is the representative who will watch over your assets, pay your bills, and make sure your property is properly managed. The Guardian of the Person is the representative who will be responsible for taking care of you, your health, and your personal needs. They do not have to be the same person, so if you feel one is better suited to dealing with financial issues and a different person is better suited to your personal wellbeing, it is acceptable to name different people to serve in these positions. Keep in mind, however, that they must be able to work with one another to make sure all your needs, both financial and personal, are satisfied.

Revocable Living Trust

A revocable living trust is a legal document that enables you to put money and assets into the care of a qualified person (usually yourself, while you are alive) or financial institution that will invest and distribute the money and assets according to your wishes while you are alive, and will continue to do so long after you have died. It controls how your assets and income will be managed, and under what circumstances income and/or principal can or must be distributed to you and/or anyone else you may specify. It is sometimes called "controlling your assets from the grave."

There are far too many different uses and benefits of using trusts to list here. You do not need to be wealthy to benefit from a Trust. It is something for us to discuss in detail to see whether you might benefit from creating of a Trust. For example, probably the most common use of a Trust is the ability to avoid the costs and hassles of probate, as well as to avoid the delay caused by probate in getting your assets into the hands of your loved ones. Both are valid reasons to consider a Trust.

Unlike a testamentary Trust, which is created in your Will, and does not become effective until you die and your Will is probated, a living Trust (sometimes called an *inter vivos* Trust) is created while you are alive, and can be created and used for your own benefit and/or the benefit of others while you are still alive.

A **revocable** living trust is a living trust that can be changed or revoked while you are still alive.

An **irrevocable** living trust, on the other hand, is a living trust created in such a manner that cannot be changed, even by you. Such trusts, if appropriate for you and your financial circumstances, may be used to reduce inheritance and estate taxes, help you qualify for Medicaid under limited circumstances, and sometimes is useful for asset protection purposes. Irrevocable living trusts are highly complex documents and should be prepared by experienced estate-planning attorneys.

Trusts can also be used to protect your loved ones, even from themselves, if necessary. For example, if you don't believe a child is financially responsible and might squander his or her inheritance, you can specify that only income earned by the Trust be paid to the child, but allow access to the trust assets for medical and educational purposes. It can also contain a provision known as a "spendthrift clause," which is designed to protect your beneficiaries from the claims of creditors.

Separate Writings Regarding Tangible Personal Property a/k/a Personal Property Memorandum

This convenient document, recognized in most states, permits an individual to dispose of tangible personal property outside of the Last Will and Testament. In other words, if you want to leave a family heirloom—an antique grandfather's clock, your pocket watch, or any other item of tangible personal property to a particular person or persons—the item does not need to be specified in the Will. This document specifies who is to receive it.

However, to be effective, the Testator's Last Will and Testament must contain a statement referring to the separate writing disposing of tangible personal property.

What is particularly convenient about this document is that, unlike a Will, which needs to be signed, witnessed, notarized, and requires any changes to be made by a new Will or codicil to the existing Will, which must also be signed with the same formality as the original Will (and usually subject to an additional attorney's fee), the Separate Writing is signed and dated by the Testator only. No witnesses or notary are required. Anytime the Testator changes his or her mind, all that is required is to merely prepare a new Separate Writing document, sign and date it, and attach it to the Will. There is no other formality required for it to be effective. It can even be written on a napkin, so long as it is signed and dated.

Please note that this document may be used only for **tangible** person property. So, it cannot be used to bequeath cash, stocks, bonds, or other financial instruments (intangibles), or property used in a trade or business. Automobiles, boats, jewelry, and pretty much anything else can be disposed of in this manner.

Pre-Nuptial & Post-Nuptial Agreements

Even though these are not your typical estate-planning documents, in the context of marriage, these documents can be used to bypass statutory requirements that a surviving spouse be entitled to inherit a portion of the deceased spouse's estate.

Both the pre-nuptial and post-nuptial agreements are documents in which one or both spouses relinquish certain rights to alimony, division of assets, and inheritance rights in the event of a divorce and/or death.

They are both frequently used in second-marriage situations, especially when there are children from the first marriage. They are also often used when there is a wide disparity in the net worth of the bride and groom, to protect the wealthier spouse-to-be.

The Pre-Nuptial Agreement (also known as an Antenuptial Agreement) is signed **before** the marriage, preferably several months before the marriage, to avoid a challenge to its validity due to undue influence (e.g. The day before the marriage, the groom warns the bride, "unless you sign this, I won't marry you.")

The Post-Nuptial Agreement, on the other hand, is signed **after** the parties are married.

For example, most states frown on disinheriting a spouse, so they have "forced-share" statutes which require a surviving spouse to receive a certain percentage of the deceased spouse's estate, even if everything was left to someone else (e.g. children from a prior marriage) by naming them as beneficiary, through a trust, or owning the assets in joint tenancy with rights of survivorship. The forced-share statutes require a certain percentage (e.g., thirty percent of the estate) be given to the surviving spouse.

To be valid and enforced by the courts, there are numerous requirements, some of which are closely scrutinized, as the courts do not like to disinherit widows or widowers.

1. Both parties must **voluntarily** execute the agreement. There must be no force, threats, pressure, or coercion. And it must be in writing.

2. Both parties must provide **full disclosure** of their respective financial situations at the time the document is signed.

3. Both parties must sign the document in the presence of a notary public.

Since the courts are not particularly fond of these types of agreements, especially if the surviving spouse is relinquishing significant rights, my office policy is to require both spouses to have their own attorneys review and approve the agreements, or at least for the agreement to contain a clause acknowledging that both parties had the opportunity to have their own attorney review the agreement.

In addition, for pre-nuptial agreements, we recommend the document be negotiated, reviewed, and signed as far in advance of the wedding as possible, to avoid the undue influence or coercion challenge mentioned above. The closer to the wedding night the document is signed, the less likely it is that a judge will enforce it.

A Financial Firm's Proprietary Authorization Documents

These are not really estate-planning documents. But while the Durable Power of Attorney should be legally sufficient to authorize a bank or investment company to rely on the signature of the attorney-in-fact named and authorized in the document to disburse funds, make investments, or otherwise control the assets in the account, some banks and investment companies require their own proprietary forms be used, which I encourage clients to sign.

While some banks will honor the power of attorney as a sufficient grant of authority, some banks may require the use of their own proprietary forms to grant another person **signing authority** on an account. Some banks will require you to make the co-signer a co-owner of the account, which I discourage.

Similarly, some investment companies will honor the power of attorney, but some investment companies may require you to sign their own **limited trading authority** form, which allows your named representative to discuss the account with the financial advisor and make changes in your investments on your behalf. However, the limited trading authority form does not grant them the authority to withdraw money from the account, even for your benefit. This additional power is granted through the **full trading authority** form.

Since the whole idea of granting authority is to enable your named representative to direct your accounts on your behalf when you are incapacitated, whether the firm is right or wrong in requiring their forms to be used in addition to, or in place of, the Durable Power of Attorney is irrelevant. It makes sense to cooperate with their requirements to make sure there are no issues when the time comes for decisions regarding the accounts need to be made on your behalf.

Please note that, like the Durable Power of Attorney, the grant of authority in either a limited or full trading authorization form dies with the owner of the account. After the account owner dies, the named representative has no authority to direct any activity regarding the account.