

Law Offices of
Spadea & Associates, LLC
204 East Chester Pike, Suite 3
P.O. Box 122
Ridley Park, PA 19078

Gregory J. Spadea, Esquire
Telephone: (610) 521-0604
Fax: (610) 521-4515

Pennsylvania & New Jersey Bars
Website: SpadeaLawFirm.com
Email: Gregory@SpadeaLawFirm.com

Pennsylvania Estate Planning Handout

I. What is Estate Planning?

Estate planning is an arrangement for the use, conservation and transfer of property during lifetime and on death.

II. Why is Estate Planning Important?

- A. Provide for lifetime needs such as children's education, retirement income, replacement of income in the event of disability, and management of property in the event of incapacity.
- B. Provide for the disposition of assets on death in such a way that your property is maximized and is left in accordance with your wishes and the needs of your family.
- C. Designate a guardian for minor children in the event of your death or for yourself in the event of your incapacity.

III. Why Should I have a Will?

A will is the starting point of any good estate plan. A will is a legal document that directs how your estate is administered and allows distribution of your assets to your named beneficiaries and contingent beneficiaries after your death. A properly drafted will protects your family by helping them meet their future financial needs after your death. A will minimizes your taxes by reducing the size of your taxable estate. Having a will also avoids intestacy proceedings to determine how your estate should be distributed. Having a will also avoids your beneficiaries from posting a bond to probate your estate. It is very important to name an executor who is responsible for settling the estate, filing all the inheritance tax, estate tax and income tax returns and carrying out the provisions of the Will.

It also enables you and your spouse to set up a testamentary trust for your children if you both were to die at the same time. You would also name a trustee that would watch over the trust assets and distribute them to pay for support, education and maintenance of your children until they reach twenty five or any age you and your spouse deem appropriate.

A will allows you to name a guardian to raise minor children, which avoids having the Orphans Court appoint a guardian based on the information it can gather after you and your spouse die.

You can state in your will that you may leave a memorandum suggesting the distribution of certain personal items that you want distributed after your death such as jewelry, china, coin collections, memorabilia, tools or golf clubs etc. You can avoid potential conflict by leaving a signed and dated list with your will explaining who should get these personal items.

However, a will only covers assets in your name only. It does not cover jointly owned assets or assets with named beneficiaries such as retirement or brokerage accounts. Therefore, you should regularly update your beneficiary designations on those types of accounts.

Some Important Terms

- A. Decedent is the person who has died.
- B. Beneficiary is the one named in a Will, Trust, life insurance policy, retirement plan, etc to receive all or a portion of another's property.
- C. Bequest is a gift of money or personal property made in a Will. Devise is a gift of real property.
- D. Codicil is an amendment to a Will.
- E. Executor or Executrix is the person named in a Will who is responsible for settling the estate and carrying out the provisions of the Will. If there is no Will or the person named in the Will cannot carry out these duties, then the same duties are done by an Administrator or Administratrix. If the Executor is not a named beneficiary they can choose to receive an executor fee based on the LaRocca and Johnson Estate fee schedule.
- F. Gross Estate is everything which the Decedent owned or had an interest in at the time of his or her death, including life insurance, joint property, and certain transfers made during the Decedent's lifetime.
- G. Guardian is the one named to manage the personal affairs or property, or both, of a minor child or incapacitated person.
- H. Intestacy is the distribution of property according to state law when a person dies without a Will. (It does not mean that the Decedent's property automatically goes to the State if a person dies without a Will.)
- I. Probate Property is property owned by a person in his or her own name.

- J. **Non-probate property is property passing to another by operation of law (e.g., joint property held with a right of survivorship) or by a beneficiary designation (e.g., life insurance and retirement plans).** However if the estate is a beneficiary of a life insurance policy then that would turn the policy into probate property and subject it to Federal Estate Tax if your estate exceeds \$11.7 million in 2021. However, life insurance proceeds are never subject to federal or state income tax or Pennsylvania inheritance tax.
- K. Testator or Testatrix is the person who has made a Will.
- L. Trust is a method of holding property where one person (a trustee) owns and manages property for the benefit of others (the beneficiaries). The rights of the beneficiaries are established by the terms of the trust. A trust can be established in a Will or can be established during the lifetime of the person creating the trust.
- M. Probate is the Process of clearing title or removing the decedent's name from the probate property and retitling the property into the heir's name.

IV. Fundamental Estate Planning

A. Transfer of Assets at Death

1. Life insurance and other assets with beneficiary designations (such as retirement accounts) pass to the named beneficiary.
2. Jointly held assets with right of survivorship become the property of the co-owner or co-owners. However, property held as a tenant in common will pass to the beneficiary named in the tenant in common's will.
3. Before adding your children's names to the deed of your primary residence consider what they are going to do with the house after you die. If they are going to sell it, you should not add them to the deed but instead leave them the house in your will so they get the step up in basis which is the FMV on the date of your death and pay no federal capital gains tax or PA income tax when they sell it. However, if you have a child that will continue living in the house after you die, then you should consider adding their name to the deed as a joint tenant.
4. Assets held "in trust for" another person go to the designated beneficiary.
5. Only probate property passes in accordance with the decedent's Last Will and Testament. If the Decedent did not leave a Will, the other property passes in accordance with the Pennsylvania intestacy laws which are covered in paragraph C.

- B. The basic instrument for transferring property at death is the Will.
1. Any person who is at least 18 years old and who has a clear idea of his or her assets may make a Will.
 2. A Will must be signed by the person making the Will at the end of the document. Any writing appearing after the signature of the person making the Will is not valid.
 3. A Will can be handwritten in Pennsylvania so long as the entire Will is written and signed by the person making the Will.
 4. The person signing a Will must sign in the presence of two witnesses. A Will is “self-proving” if the Will is signed and witnessed in the presence of a notary.
 5. The Will accomplishes a variety of functions to facilitate the transfer of probate property from the decedent to the named beneficiaries. It allows an individual to control who gets what and how much, when and how and on what terms and conditions and for how long, and takes care of other details such as administration, fees and other matters like the appointment of a guardian for minor children.
 6. Although the decedent’s wishes as expressed in a Will generally must be honored, a surviving spouse cannot be disinherited in the absence of an agreement to the contrary, such as a premarital agreement. A surviving spouse is entitled to elect against the Will and receive a share of the decedent’s assets, which share is determined by law. If a spouse elects to take against the Will, he or she must give up other assets, so the election must be made with care.
 7. If the decedent owned property as a Tenant in Common his share would pass according to his will.

C. What happens if a person dies without a Will?

1. If a person dies without a Will, or without an effective Will, this is known as an “intestacy.” The person’s property then will pass under the state laws of descent and distribution, which take family relationships into consideration.
2. In Pennsylvania the laws of intestacy generally provide that the decedent’s property passes to the decedent’s spouse and children, first, then parents, then siblings. If there is no spouse, children, parents or siblings, property is distributed to other more distant relatives. If relatives cannot be found, the property will pass to the state.

- a. **If you die with children from your surviving spouse.** Your surviving spouse inherits the first \$30,000 of your intestate property, plus half the balance. Your children with that spouse inherit the remaining half.
- b. **If you die with children who are not the descendants of your surviving spouse.** Your spouse inherits 1/2 of your intestate property, and your children inherit the other half.

D. PA INHERITANCE TAX AND FEDERAL INCOME TAX

Pennsylvania Inheritance Tax is assessed at four and a half percent (4.5%) on property passing to children age 22 or older or grandchildren of the decedent. Pennsylvania Inheritance tax is 12% for property passing to siblings of the decedent, and 15% to everyone else. After January 1, 2020 there is no inheritance tax on property passing to children age 21 or younger. There is no income tax on inheritances except to the extent that such items represent tax deferred items such as pension plans, annuities and IRA's

- E. An estate plan also might provide for the creation of trusts.
 1. A trust can be created in a Will or can be created during a person's lifetime. If created by a Will, it is called a "Testamentary Trust." If created during a person's lifetime, it is sometimes called a "Living Trust."
 2. A trust can do almost anything its creator can do and some things he or she might not be able to do because of a lack of a required skill, sickness, disability, distance from the scene, or death.
 3. Proponents of Living Trusts argue that they can be used to avoid the costs of administering an estate. In exchange, there may be trustees' compensation.

F. Powers of Attorney

1. Governed by Chapter 56 of the PEF Code (20 P.S.)
2. Powers of Attorney are important estate planning tools for clients who are concerned about becoming incapacitated and unable to act independently. A Power of Attorney permits a designated individual, called the "agent", to act on behalf of an individual, called the "principal," during the principal's lifetime. A Power-of-Attorney expires upon the death of the principal.
3. Section 5601.1 provides that all powers of attorney are presumed to be durable unless the power of attorney provides otherwise.
4. Section 5604 authorizes the use of a "Springing Power-of-Attorney," which is effective only when the principal becomes incapacitated.

Pursuant to Section 5606, the agent's affidavit stating that the contingency has occurred is conclusive proof.

5. Pursuant to Section 5606, a third party can rely upon an affidavit by the agent stating that, at the time of the exercise of the power, the agent did not have actual knowledge of the termination of the power.
6. Powers of Attorney usually are drafted as "general" powers, giving the agent the power to transact all and any business on behalf of the principal as if the principal were acting. Section 5602 itemizes powers that may be granted in a Power of Attorney, and many drafters also include the itemized list. If you use the itemized list of powers, the statutory definitions control.
7. Special thought should be given to the authority of the agent to make gifts. Compare Section 5603(a)(1), which gives the agent the power to make gifts to any person in any amount, to Section 5603(a)(2), which gives the agent the power to makes gives up to the annual exclusion amount to the spouse and issue of the principal.
8. Section 5604(c) defines the relationship of agent to court-appointed guardian and gives the principal the right to nominate a guardian in incapacity proceedings are brought against the principal. While it is generally accepted that durable financial powers, pursuant to a Power of Attorney, are preferred to a guardianship proceeding which can take several months and a court hearing and cost over \$3,000 in legal fees. However, there may be circumstances where guardianship is preferred.

G. Health Care Directive (Living Wills)

1. Health Care Directive (called Living Wills in most states), allow competent adults to control their medical care decisions even if they later become incompetent to make or communicate these decisions.
2. Living Will controls when patient is incompetent and either in a terminal condition or permanently unconscious.
 - a. Terminal condition - an incurable and irreversible medical condition in an advanced state which will result in death regardless of the continued application of life-sustaining treatment. ("advanced state" not defined in Act).
 - b. Permanent unconsciousness. Includes a persistent vegetative state, an irreversible coma or "any other irreversible loss of consciousness and capacity for interaction with the environment".

3. Living Will can be signed by an individual of sound mind who is either at least 18 years old, married, or a high school graduate.
4. Living Will must be signed by declarant, or by another on behalf of and at direction of declarant, and witnessed by two persons 18 or older (not one who signed declaration for declarant).
5. Declaration becomes operative when copy (original not required) provided to attending physician and attending physician determines declarant is incompetent to make medical decisions and either in a terminal condition or permanently unconscious.
6. When operative, health care providers shall act in accordance with Living Will or make “every reasonable effort” to assist in transfer to another physician or provider who will honor it.
7. Living will can be revoked at any time and in any manner “... without regard to the declarant’s mental or physical condition.” Revocation must be included in medical record.
8. Special rules for emergency medical services. Living Will only applies to EMS personnel if EMS personnel are given an original Living Will signed by declarant, or if “Medical Command Physician” (under EMS Act) had prior notification that valid and operative declaration exists and directs EMS personnel to comply. In case of uncertainty, ordinary protocols should be followed, that is, treatment should be rendered.
9. Because the Act only covers terminal illness or permanent unconsciousness (not Alzheimer’s for instance), attorneys-in-fact under a Power of Attorney containing health care powers still may be needed.