

BURNS & LEVINSON LLP

The Basics of Estate Planning

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ABOUT THE SPEAKER



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Rules of Intestacy MUPC 2-101 thru 2-114

Distribution depends on family situation of decedent:

- Spouse and children – no non-marital children
→ All to spouse
- Spouse and children with non-marital children
→ \$100,000 and ½ of balance to spouse
→ ½ of balance to children of decedent
- Parents (or issue of parents) but no spouse or children
→ All to parents (or their issue)

Will

Will

A will is a legal document that takes effect at death and should indicate who is to administer the decedent's estate and how the estate is to be distributed.

A will allows the decedent to:

- Name the person or institution to handle the decedent's affairs.
- Indicate whom should receive the decedent's assets.
- Control the terms under which the assets are to be distributed.
- Indicate who should care for any minor children.
- Take advantage of estate-tax-saving strategies.

Will

Will

A will disposes of probate property owned by the decedent at the time of death, including:

- Tangible personal property
- Real estate, if owned in individual name or as tenants-in-common
- Financial accounts, if owned in individual name and no designated beneficiary
- Interests in corporate entities, partnerships, LLCs, etc.
- Intellectual property

Will

Will

A will does NOT dispose of the following types of property:

- Jointly owned property
- Property with a beneficiary designation, such as life insurance or retirement accounts (unless payable to estate)
- Transfer on death accounts; payable on death accounts
- Assets held in trust
- Intellectual property

Will – Execution Requirements

Requirements for Will or Codicil

- **Testamentary capacity:** MUPC Section 2-501
 - Must be 18 or older
 - Sound mind
- **Execution Formalities:** MUPC Section 2-502
 - In writing
 - Signed by testator or at testator's direction
 - Signed by two witnesses who witnessed testator's signing or testator's acknowledgement of signature

Will

Will – Self-Proving Affidavit

Self-Proving Affidavit

- Notarized statement at the end of the will
- Affirms that will was duly executed
- Obviates need for in-court testimony of witnesses
- Form statements found in MUPC Section 2-504

Will

Will – Provisions of Will

Outline of Will

- Tangible personal property
- Digital asset provision
- Exercise of power of appointment, if exercised
- Distribution of residue
- Tax apportionment clause
- Powers of Personal Representative

Will

Will – Provisions of Will

Outline of Will, cont.

- Nomination of Personal Representative
- Nomination of Guardian
- Waiver of bond
- Limitation of liability
- Direction that administration should be unsupervised

Will – Provisions of Will

Outline of Will, cont.

- Direction to PR if Marital Trust
- Statement regarding intentionally omission of issue
- Simultaneous death provision
- Definitions
- Signature block for testator and witnesses
- Self-proving affidavit

Will – Tangibles Provision

Distribution of Tangible Personal Property

- Distribution of specific items
- Provision for distribution if to more than one person
- Minor clause if minor beneficiaries
- Separate written statement allowed under MUPC Section 2-513

Will – Distribution of Real Estate

Distribution of Real Estate

- Specific distribution of real estate, including type of ownership
- Direction to sell real estate in will allows PR to deduct sale expenses
- Include provision in powers clause so that PR does not need license to sell

Will – Distribution of Residue

Distribution of Residue

- **Simple Will**
 - Simple, outright distributions (generally)
- **Pour-over Will**
 - Assets “pour” into revocable trust

Will – Tax Apportionment Clause

Apportionment of Taxes

- Directions regarding payment of taxes
- **MA Rule:** MUPC Section 3-916
 - Each beneficiary pays pro-rata share of taxes
 - Opposite of common law
- **Common Law:**
 - Estate taxes paid from residue, unless otherwise directed
- Important to coordinate with trust if pour-over will

Will – Appointment of Personal Representative

Duties of Personal Representative

- Probate will
- Collect (or marshal) assets
- Pay debts, funeral and administration expenses
- Appraise assets
- Tax returns (i.e. estate tax, final individual income tax and fiduciary income tax)
- Tax elections and allocations (i.e. QTIP, DSUE, GST)
- Distribution of Assets

Will – Appointment of Personal Representative

Nominating Personal Representative

Whom to Name:

- One or more person
- Family member, friend vs. professional

Important Provisions re PR duties and powers:

- Expansive powers to reduce court oversight
- Waiver of bond and sureties
- Dispense with guardian ad litem and court supervision of administration

Will – Appointment of Guardian/Conservator

Nominating Guardian/Conservator

Whom to Name:

- One or more person
- Specify effect of divorce on nomination
- Surviving parent entitled to custody of child

Can name separate guardian and conservator

Will – Revocation of Will

Revocation

- Executing a subsequent will
 - MUPC Section 2-507
- Revoking by physical action (i.e. burning, tearing, etc.)
 - MUPC Section 2-507

Will – Revocation of Will

Revocation

- Divorce – revokes any disposition to prior spouse
 - MUPC Section 2-804
- Marriage – For premarital will, surviving spouse receives intestate share of estate not going to testator's issue
 - MUPC Section 2-301

Will

Will should be reviewed and revised every few years, or when certain events happen:

- Move to a different state.
- Change in marital status.
- Children grow up.
- Want or need to name a different personal representative or guardian for minor children.
- Change in the distribution of assets.
- Congress changes laws that affect estate tax laws.
- Significant change in the value of client's estate.

Trusts

Trusts are legal documents that often are used to control the management and transfer of specific assets.

Donor	Trustee	Beneficiaries
The Donor transfers ownership of assets to the trust.	As the legal owner of the assets, the trustee must follow the Donor's instructions in the trust document and manage the assets for the benefit of the beneficiaries.	The beneficiaries receive income or proceeds under the terms of the trust document.

Trusts

Testamentary trusts

Trusts established as part of will are called testamentary trusts.

Living trusts

Trusts that take effect during lifetime are called living, or “inter vivos,” trusts.

Trusts

Revocable trusts

Trusts that allow the Donor to cancel or change them are called revocable trusts.

Irrevocable trusts

Trusts that cannot be cancelled or changed are called irrevocable trusts. The most common irrevocable trust is the irrevocable life insurance trust (ILIT).

Trusts

Considerations for trusts:

- They govern only assets owned by the trust.
- Update trustee information each time there is a change in the office of trustee.
- They are not public record.
- They are more difficult to challenge.
- They generally are not subject to court supervision.
- They may avoid some of the costs and delays of probate.

Planning for Incapacity

Durable Power of Attorney

A durable power of attorney gives one or more people (the agent) the power to manage the principal's finances. This legal document should name the agent and indicate what the agent can do on the principal's behalf.

- Name one or more agent
 - If more than one, specify whether they can act alone or if they must act together
- Name alternate agent

Planning for Incapacity

Durable Power of Attorney

Considerations

- Effective immediately vs. springing
- Powers granted to agent (i.e. gifting powers)
- Limitation on powers

Planning for Incapacity

Health Care Proxy

A health care proxy allows one agent to authorize a variety of medical treatments if the principal cannot provide authorization.

A health care proxy offers direction, but is non-binding.

Recommend that copy be provided to primary care physician.

HIPAA Waiver