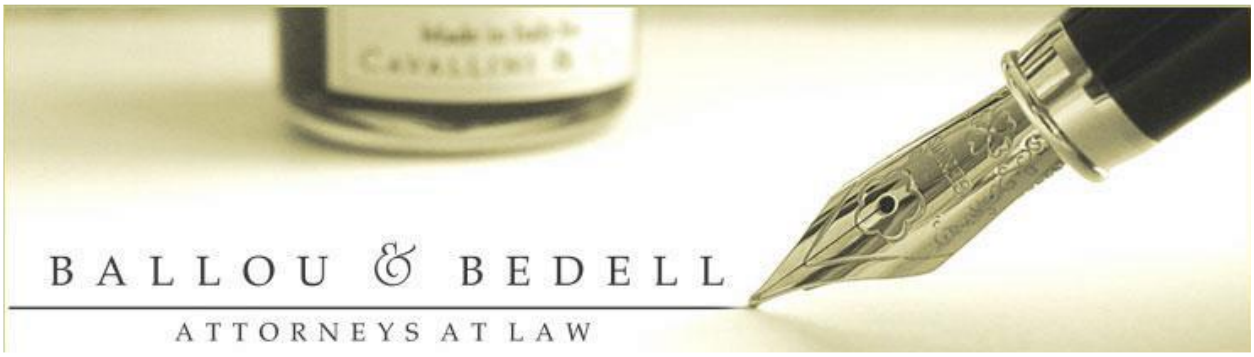

PREPARING A WILL
&
OTHER PROBATE/ESTATE PLANNING ISSUES

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WHAT HAPPENS TO MY ASSETS WHEN I DIE?

What happens to your assets when you die depends upon how those assets are titled while you are alive.

1. **Assets held in Joint Tenancy** If you hold real estate or bank accounts or any other property as joint tenants with another person, say a spouse or child, the property automatically carries with it a right of survivorship to the surviving joint tenant(s). Most married couples will own everything (*even cars*) as joint tenants or designate the spouse as beneficiary (see below) so that there is little disruption at the passing of the first spouse. A simple death certificate presented to the bank or town hall will automatically remove the deceased joint tenant from the asset. The surviving joint tenant(s) is in complete control of that asset immediately upon the passing of the deceased joint tenant.

2. **Designation of Beneficiaries**. If you own an asset in your name alone, like a life insurance policy, an IRA, 401K, annuity or other similar account, you may designate individuals as beneficiaries on these accounts. The designations mean that the assets will automatically pass to your named beneficiary at your death. Always remember to have *contingent* beneficiaries on any pre-tax accounts like traditional IRA's. It is always better for individuals to pay income tax on these accounts, in case anything happens to your primary beneficiary.

3. **T.O.D./P.O.D**. If you own an asset in your name alone, like a bank account, the bank account will allow you to name a beneficiary on that account. Banks call it "Pay on Death" and investment products like stocks and mutual funds accounts call it "Transfer on Death." A joint bank account or stock account could designate children as the P.O.D./T.O.D. beneficiary of the account. As with joint tenancy and beneficiary designations the POD/TOD beneficiary will automatically inherit your assets upon your passing.

4. **Real Property Transfer on Death Deeds**. Under the new probate code, Maine now allows a real estate deed to designate beneficiaries, the same way you would on a bank or stock account. The advantage of the new deed is that the beneficiaries will have absolutely no rights to the real estate and the owner can change the deed at any time before you die, without notice to the beneficiary. This deed will minimize the need for Trusts, especially out-of-state residents with Maine real estate who want to very simply by-pass Maine probate when they die. It will also potentially eliminate probate for Maine residents who have beneficiary designations for all their assets (life insurance, IRA, bank accounts) except the house.

WHAT HAPPENS TO ASSETS THAT ARE IN YOUR NAME ALONE WITH NO SURVIVING JOINT TENANT OR BENEFICIARY

If you die with assets in your name alone and there is no surviving joint tenant or beneficiary then the only person who has control over that asset is your Personal Representative.

1. If you have a Will (you die Testate), your Will names your Personal Representative.

2. If you do not have a Will (you die Intestate), the State of Maine (if that is where you are residing and pay taxes when you die) will dictate who that person is through the laws of intestacy.

Remember, though, your Personal Representative does not have any power over your assets UNTIL your estate (will or no will) is probated and that Personal Representative is officially appointed. The process of appointing a Personal Representative is called PROBATE.

WHY MAKE A WILL?

Selection of Beneficiaries

In making a will, you can select the beneficiaries of your assets. Without a will, the property you own as of your death will be distributed in accordance with the laws of the State of Maine, which may not reflect your desires in many instances. For example, in the common situation where a husband dies, leaving a wife and children by another marriage, the laws of the State of Maine would distribute one-half to the wife and one-half would be distributed equally among his children. In certain situations the husband might have preferred to leave his entire estate to his wife.

Choice of Personal Representative/Guardian and Other Fiduciaries

A "fiduciary" is an individual whom your will entrusts with the care of your estate, such as a personal representative, trustee, or a guardian of your minor children, if applicable. The selection of a fiduciary is left entirely to you and you should select an individual (or institution) you trust to make appropriate decisions. Alternate personal representatives, trustees and guardians should also be named in a will in the event the primary appointee is unable or unwilling to serve.

Personal Representative: The personal representative is the person who will be responsible for the administration of your estate should you pass away. They will receive special papers of authority from the Probate Court which will entitle them to gather all

your assets and dispose of them under the terms of your will. The personal representative will often hire an attorney to assist them in the process, but the personal representative will be the person legally vested with authority over your possessions. The choice of a personal representative is entirely a personal decision. In the case of a married couple, the spouse is often chosen as the primary personal representative with an adult child named as the alternate. Many people name siblings or close friends. This person needs to be a good communicator and fair. Although there are obvious logistical advantages to choosing someone close in proximity it is far more important to choose the person you trust, even if they live far away. You can choose more than one person. In blended families or high conflict families with factions sometimes a dual appointment can be useful to balance the different sides

Guardian: As with the personal representative, the choice of a guardian over your minor or incapacitated children is a personal decision, and in many ways a more difficult decision than choosing a personal representative. A guardian is appointed only if both parents have died, or where the parent having sole custody dies. If you name your parent as guardian, I strongly urge you to name at least one alternate in case that parent predeceases you or dies suddenly. Also, you may want to name a relative or sibling who lives far away as guardian, but keep in mind your children may have to move to where that guardian lives if the guardian is unable to move to them. This may mean having your children lose close friends and teachers in addition to losing you. However, being with family is sometimes more important than living in the same town or going to the same school. Again, it is a difficult decision and one that requires a great deal of thought.

By making the will that appointment is automatic and you are in control rather than leaving these positions open for dispute among survivors and family members. For example, if both parents with minor children should perish in a tragic accident without naming a guardian for their children, a guardian would have to be appointed through the Probate Court. In the worst case, this could lead to costly litigation if surviving family members do not agree who the guardian should be. Furthermore, the guardian chosen by the Probate Court may not be the guardian you would choose to raise your children.

Trustee: A trustee is similar to a personal representative but the Trustee's responsibilities concern any trust you may establish through the terms of your will. For example, if you die leaving a beneficiary who is a minor, a trust would be established under your will for their benefit to preserve their interest in the estate until they reach an appropriate age. The trustee would be responsible to administer this trust.

It is perfectly acceptable, and common, for that matter, to select the same person to serve as personal representative, trustee and guardian. It is also perfectly acceptable to choose two or more persons to act as co-personal representative or co-guardian. Obviously, there are advantages and disadvantages to both alternatives, and you must do whatever most appropriately fits your particular situation.

Structure Distribution for the Benefit of Minors/Incapacitated Children

Individuals are often concerned about the disposition of their property to their minor children. Without the appropriate provisions in a will, children would be entitled to receive the estate assets as early as age 18, which many parents would consider too young to manage a significant sum of money. A will is an appropriate vehicle to include conditions under which the assets of the estate would be held in trust for the children until they reach an appropriate age.

Meanwhile, the personal representative or trustee could be permitted to pay out the funds necessary for the children's health, education, maintenance and support.

In addition, if you have an adult child who is mentally or physically handicapped, a will can include provisions that will ensure that the child's inheritance will not jeopardize vital governmental services for that child.

SPECIFIC WILL PROVISIONS

Items of Tangible/Personal Property

Since the effective date of the Maine Probate Code in January 1981, the law has provided that individuals may make a separate written list of items of their tangible personal property (i.e., household furnishings, jewelry, etc.) and the names of those individuals who are to receive the items. The testator must sign the list. Additions and deletions to the list may be made at any time by simply tearing up the prior list or initialing the changes. As long as the list is kept in a place where your personal representative can find it (i.e., next to your will), your personal representative must follow the terms of the written list or memoranda as if it were part of your actual will. This is a particularly advantageous tool for parents who have special heirlooms or possessions they wish to pass to a particular child (i.e., a favorite piece of jewelry or a set of golf clubs). It also helps to avoid disputes between family members over the equitable division of this property.

Specific Gifts or Money or Other Property

There are no limitations on the specific gifts (called "bequests") which may be made under the terms of your will. You should simply keep in mind that if you make bequests to individuals, you should designate whether or not the bequest will be paid only in the event that the individual survives you, or if the bequest should pass to the spouse or children of any deceased beneficiary. You may give a beneficiary specific amounts of cash or even the right to reside in your house after you pass (often seen in blended families).

Residuary Estate

The residuary estate consists of all other property not specifically bequeathed under other items of the will. In many instances, the residuary estate is given to the spouse, if he/she survives, and if not, equally to children. In families with no children charities are often named in the residuary estate.

One of the questions often overlooked is how the share of a child should be distributed should a child predecease you. Usually, the share of predeceased child may either be distributed to that child's own children (your grandchildren), or to your surviving children. This is simply a personal choice, and there is no "right" or "wrong" decision.

There is no requirement that a child receive a portion of a parent's estate – not even a token dollar. But it is advisable to at least mention by name any child who is omitted from receiving a portion of the estate.

"PROBATE AVOIDANCE"

You may have read several articles suggesting that probate should be avoided. Many of those articles are written in states where the probate procedures are much more complex than those in Maine. Before you try to avoid probate you should carefully weigh the advantages and disadvantages.

The most common criticisms of the probate process are the time delay and the cost. Under the Maine Probate Code, both of these concerns are largely eliminated. First, there is an informal probate system in Maine so that an individual may be appointed personal representative within a week or two of application to the court. From that point on, the personal representative can manage the estate without any additional court intervention, so long as the beneficiaries of the will are in basic agreement regarding the settlement of the estate.

A second concern in probating the estate is usually the attorney's fees. Attorneys' fees were of greater concern prior to 1981, when some attorneys charged a percentage of the gross value of the estate as a fee. Under the new probate code, percentage fees are not permitted, and you will find that most attorneys charge for estate work as they do for many other types of legal work, on an hourly basis. In addition, the personal representative of the estate is free to consult any attorney he or she wishes with respect to probating the estate, and is not bound to employ the attorney who prepared the decedent's will.

Often an individual will try to "avoid probate" by placing all of his or her assets in joint name, relying on the surviving joint tenant to divide the proceeds equitably. This plan does not always work. For example, there have been situations where a surviving joint tenant, who was supposed to have divided the property equally among his siblings, argued to the other children that he took care of his parent for years before the death, and that the parent intended that he have the entire account after his death. Furthermore, placing certain assets in joint tenancy may cause that child to incur excessive and completely avoidable capital gain taxes when that child sells the property.

However, there are certain situations in which probate avoidance is very desirable. For example, if you own real estate or property in another state, want to ensure your privacy or expect a contentious family situation at your death you will probably want to avoid probate.

If you feel strongly about probate avoidance, I refer you to the handout "Trusts – Are They Right for Me?"

Durable Power of Attorney for Financial Matters

A "Durable Power of Attorney" is a document which gives your agent the power to do everything that you can do personally, including paying your bills, selling your assets and filing your tax returns.

Statistically, you are more likely to become disabled than you are to die unexpectedly. Many people incorrectly assume that if they become disabled their spouse or children will be able to act in their stead. This is not always the case. Your spouse, for example, has no authority to act concerning jointly owned or solely-owned property. If you were ever to become unable to function on your own, whether through an accident or illness, the Probate Court would have to appoint a conservator to act as guardian over your affairs. However, if you have already appointed an attorney-in-fact to act in your stead, no conservator would have to be appointed.

Unfortunately, the durable power of attorney is basically a blank check authority given to another person and should only be granted to those you trust implicitly, and whom you know will act at all times in your best interest. If you do not have such a person in your life, you may want to consider having co-agents that would act as a check and balance on one another.

General Health Care Power of Attorney/Advance Health Care Directive

A health care power of attorney (often referred to as an "Advance Health Care Directive") gives your agent the power to make medical decisions, should you become incapable of doing so yourself. These decisions include consenting to surgery and deciding which treatments will be used. Like the durable power of attorney, you should choose an agent that you trust implicitly to carry out your exact wishes. A health care power of attorney or Advance Health Care Directive also contains a living will. This instrument allows your medical agent to know your intentions should you be in a terminal condition or persistent vegetative state and will also serve as an open dictate to an attending physician should your agent be unavailable to make decisions for you.

Why do I need both a Durable Power of Attorney for Financial Matters and a Health Care Power of Attorney?

First, these documents are generally separate to allow you to appoint one person to make all your business and personal decisions, and another person to be in charge of your medical decisions. Also, the health care power of attorney is kept on file by your physician, whereas the durable power of attorney for financial matters is shown to financial institutions, and may need to be filed publicly, for example, at the Registry of Deeds.

It is important to note that like a will, both these documents can be revoked or amended at any time by you, the principal.

ESTATE TAX ISSUES

Who is eligible to pay Federal Estate Tax

When an individual or a married couple has a high net worth there are significant estate tax consequences which may be applicable. The exemption equivalent for federal estate taxes for the year 2021 is $11,700,000 ($23,400,000 for a married couple). The 2021 Maine rate is currently $5,900,000, plus an annual adjustment for inflation.

How do I know if I need to worry about estate taxes?

In order to help you determine whether you need to be concerned about estate taxes, I have included in the packet of information you have received a document entitled "Determining Your Net Worth." This questionnaire will help you to give me a thumbnail sketch of your total taxable net worth and allow me to determine whether you need to be concerned about estate taxes or not. If you are uncomfortable sharing financial information with me, please indicate on the questionnaire that you are well below the Federal or Maine exemption amount, and therefore not concerned about estate tax.