Wills, Trusts, and Estate Plans

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There are several common questions about wills and trusts. This article aims to address these common questions and provide basic information about wills, trusts, and estate plans.

What is an "estate plan"?

"Estate planning" usually refers to a plan to transfer your assets to your heirs and beneficiaries. When a person dies, everything he or she owns at death is referred to as his or her "estate." Estate plans usually involve creating a trust, transferring assets from you as an individual to you as trustee of the trust, making a will, power of attorney, and a power of attorney for health care and advance directive. What these documents are, and what they do, is discussed below.

What happens if I do not have an estate plan, or will?

What happens with no estate plan (no will, or trust agreement), is the Probate Court would distribute your estate pursuant to the intestacy statute (NH RSA 561:1 et seq, and 553:2, and MGLA § 190B:2-101 et seq.).

Last Will and Testament

What is a will, and what does a will do?

A will involves the following people:
Testator – makes the will
Executor – administers the estate
Beneficiaries – receive something from the deceased
Guardians – for deceased's children under 18 years old

A will is a written document, signed by the testator, and two witnesses, and a notary public, and it expresses the testator's intention for the disposition of his or her estate (RSA 551).[2] Also, if you have any minor children, you can appoint a guardian for them in the will.

After the testator is deceased, the executor files the will with the probate court, along with a petition for estate administration, death certificate, and other documents. If the probate court grants estate administration, the probate court appoints the executor, and requires the executor to obtain a bond, and to file an inventory, motion for order of distribution, receipts, and an accounting. The executor then administers the estate, in accordance with the terms of the will, probate court rules, and the applicable statutes.

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[2] *See e.g.* Lane v. Hill, 44 A. 597, 68 N.H. 398 (N.H. 1895). Written legal documents such as wills and deeds are also referred to as instruments.

Trust Agreement

What is a trust agreement? A trust agreement (or declaration of trust) involves the following people:

Grantor – creates the trust agreement, and funds the trust estate
Trustee – administers the trust estate
Beneficiaries – receive some or all of the trust estate

A trust agreement is an agreement between the grantor and trustee, in which the grantor gives the trustee something to hold in trust for the benefit of the beneficiaries, pursuant to the terms of the trust agreement (RSA 564-B).

A common form of a trust agreement is that the grantor is the trustee and primary beneficiary, and then, when the grantor is deceased, there are successor trustees and successor beneficiaries.

Trusts can be revocable or irrevocable. Revocable trusts can be changed or dissolved; irrevocable trusts cannot be changed.

Trusts can have one "pot" that the trustee uses for all beneficiaries, or separate shares for each beneficiary. Usually, most people choose to have separate shares.

Usually, the trustee uses the trust assets, "…for the health, education, maintenance, and support…" of the beneficiaries.

If a beneficiary dies, his or her interest can descend to his or her heirs "per stirpes" or "per capita." In a per stirpes distribution, if a beneficiary dies, his or her heirs receive the beneficiary's share. In a per capita distribution, all surviving beneficiaries receive equal shares. See the example at the end for more information.

The trust agreement should provide an age when a beneficiary receives his or her share free of trust. Common ages for disbursements are:

18;
21;
25;
30;
50% at 21, remainder at 25;
33% at 21, 33% at 25, remainder at 30;
33% at 25, 33% at 30, remainder at 35.

New Hampshire is one of a few states that have special protections for trusts. See RSA 564-B:5-505A, etc.

Once you create the trust agreement, you then need to transfer real estate, accounts, and other assets from you as an individual to the trustee of the trust. For example, if you own real

estate, you would need to sign a deed from you as an individual to you as trustee of the trust, and record the deed in the registry of deeds.

The advantage to a trust is that the transfer from the initial trustee to the successor trustee, and from a trustee to a beneficiary, can occur without having to go to Probate Court. With a will (or with no will), an Executor needs to be appointed by the Probate Court, and to have the Probate Court approve transfers.

A will is often used in conjunction with a trust agreement. In case you forget to transfer something to yourself as trustee, you can leave a will, directing all assets that you own as an individual upon your death to transfer to the successor trustee of your trust, to hold and distribute in accordance with the terms of the trust agreement. Also, if you have any minor children, you can appoint a guardian for them in the will.

Alternatives

Alternatives to wills and trusts include:

Holding real estate, accounts, or vehicles with more than one person as "joint tenants with rights of survivorship" (in which case, when one joint owner is deceased, the other joint owner(s) receive his or her share);

Deeds reserving a life estate to the grantor;

Transfer on Death ("TOD") (RSA 563-C);

Life insurance;

Gifts.

Power of Attorney

A power of attorney involves the following people:
Principal; and
Agent.

A power of attorney is a written document, signed by the principal, and a notary public, and appoints an agent, and says what agent can and cannot do on behalf of the principal (RSA 564-E). A power of attorney is only effective so long as the principal is alive.

Power of Attorney for Health Care and Advance Directive

With a Power of Attorney for Health Care (RSA 137-J:19) and Advance Directive (RSA 137-J:20), the principal appoints an agent to make health care decisions for the principal, states whether or not he or she would like to receive "life support" treatment.

Example of "per stirpes" and "per capita"

Mr. Lear has three daughters, Goneril, Regan, and Cordelia. Goneril has three daughters, Alba, Addy, and Annie. Regan has two daughters, Beatrice and Betty, Cordelia has one daughter, Corina.

Lear creates a trust, with himself as the primary beneficiary, and his daughters as the successor beneficiaries, in equal shares, and then his granddaughters as the remaining beneficiaries.

Unfortunately, Goneril, Regan, and Cordelia die before Lear. Lear then dies.

If Lear had made his disbursement "per capita," then each granddaughter receives an equal share – 1/6.

If Lear had made his disbursement "per stirpes," then each granddaughter receives a portion of her mother's share. So, Alba, Addy, and Annie would each receive 1/9 (each receives a third of their mother's third); Beatrice and Betty would each receive 1/6 (each receives a half of their mother's third); and Corina receives 1/3 (all of her mother's third).

To change the example slightly, let's say that only Goneril died before Lear. If the disbursement were "per capita," then Alba, Addy, Annie, Regan, and Cordelia would each receive 1/5. If the disbursement were "per stirpes," then Alba, Addy, and Annie would each receive 1/9 (a third of a third), and Regan and Cordelia would each receive a third.

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