THE SCOTT FREE

LEGAL CHECK LIST

IMPORTANT DOCUMENTS EVERY INDIVIDUAL AND FAMILY SHOULD HAVE

FOR ESTATE PLANNING

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DISCLAIMER

This checklist is intended to be a general starting point for those who want to know about estate planning options and documents for themselves and their families. This is **general** legal information and not specific to you or your family. The information in this resource is NOT specific legal advice, and is NOT a replacement for consulting with an estate planning attorney. It is for general information purposes only. Each state has its own requirements for drafting estate planning documents. **You should consult with an estate planning attorney in your state to determine the exact legal requirements for executing estate planning documents.**

ESTATE PLANNING 101

Estate planning is a process. It involves people — your family, other individuals and, in many cases, charitable organizations of your choice. It also involves your assets (your property) and the various forms of ownership and title that those assets may take. It also addresses your future needs in case you ever become unable to care for yourself. Through estate planning, you can determine:

1. How and by whom your assets will be managed for your benefit during your life if you ever become unable to manage them yourself.
2. When and under what circumstances it makes sense to distribute your assets during your lifetime.
3. How and to whom your assets will be distributed after your death.
4. How and by whom your personal care will be managed and how health care decisions will be made during your lifetime if you become unable to care for yourself.

Estate planning can also involve financial, tax, medical and business planning. Most people think that all they need is a will. A will s part of the planning process, but you will need other documents as well to fully address your estate planning needs.

EVERYONE needs an estate plan, whether your estate is small or large. You may be a point where you don't own too many assets, but you should still designate someone to manage your assets and make health care and personal care decisions for you if you ever become unable to do so for yourself.

THE WILL

A will is a traditional legal document that:

1. Names individuals (or charitable organizations) who will receive your assets after your death, either by outright gift or in a trust.
2. Nominates an executor who will be appointed and supervised by the probate court to manage your estate; pay your debts, expenses and taxes; and distribute your estate according to the instructions in your will.*
3. May include nominations of guardians for your minor children.

Most assets in your name alone at your death will be subject to your will. Some exceptions may apply as there are non probate transfers**, which can include things such as securities accounts and bank accounts that have designated beneficiaries, life insurance policies, IRAs and other tax-deferred retirement plans, and some annuities. Such assets would pass directly to the beneficiaries and would not be governed by the terms of your will.

*Be sure to check your state law on whether a will alone is enough to avoid probate, as in some states, like California, a will alone is not enough.

** Non probate transfers are discussed below.

It is so important ensure that your will has been properly executed. Execution of your will means that it has been properly signed and is therefore legally enforceable. Across the board, a person who creates a will must have the mental capacity (i.e. be in their right mind) to create a will. They must also sign the will. There may be other legal requirements, such as having a certain number of witnesses. This is why it is important to consult with an estate planning attorney in your state to ensure that your will is not only properly drafted, but properly executed. You do not want a document that ends up lacking legal validity!

Additionally, in some instances, just having a will by itself is not enough to avoid what is called Probate of an Estate. Probate is a court supervised process where a judge oversees the distribution of your estate to your heirs. In some states, such as California, simply having a will does not keep an estate from having to go through the Probate process. This process can be both lengthy and costly. Be sure to consult with an estate planning attorney for further information on whether a will is the best estate planning device for you.

THE POWER OF ATTORNEY

The power of attorney is a legal document that grants certain powers of agency to another person you choose. It is a very powerful document that can be as broad or as narrow as you want it to be. POA documents can allow another person to do simple things such as banking and financial transactions, family and personal maintenance decisions, to retirement planning, business, lawsuit and tax decisions. A Power of Attorney can be drafted to go into effect immediately, or when a certain event occurs. A person can choose to limit the authority to specific powers they want to grant to their chosen agent, or choose to grant all authority.

It is important to choose an agent who is trustworthy, good with stewarding finances, and able to make good decisions; as they will be your agent until you either choose to revoke the document, or you die.

Clearly, there are a lot of options, and a lot of power comes with this type of document. It is important to choose the best agent, and level of authority for your personal situation and needs.

THE ADVANCE HEALTHCARE DIRECTIVE

You have the right to give instructions about your own health care. You also have the right to name someone else to make health care decisions for you. An Advance Healthcare Directive, sometimes called a Living Will or Healthcare Power of Attorney is the legal document that lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of your primary physician.

Just like with a Power of Attorney, and Advance Healthcare Directive lets you choose an agent to make decisions on your behalf for your healthcare, in the event you are not able to do so for yourself. The powers can be broad, or limited to specific decisions. In this document, you can even state your wishes on the type of life maintenance you wish to have in the event of emergency surgery.

This is a very important document that often gets overlooked until a medical emergency arises. It is something everyone should have, not matter what stage of life they are in, since medical emergencies happen all the time without warning. In some cases, you may be able to find an AHCD at your doctor's office, since many doctors prefer to have one on file for their patients. An Advance Healthcare Directive is is an important part of any estate plan.

THE TRUST

A trust is a legal document under which one person, called a trustee, holds legal title to property for another person, called a beneficiary. You can be the trustee of your own living trust, keeping full control over all property held in trust. A "living trust" is simply a trust you create while you're alive, rather than one that is created at your death under the terms of your will. The living trust is valid in each state and in all commonwealth nations, since the Trust came specifically from English law. The living trust should also be valid in most nations that have a civil code.

In your trust agreement, you will also name a successor trustee (a person or institution) who will take over as the trustee and manage the trust’s assets if you should ever become unable to do so. Your successor trustee would also take over the management and distribution of your assets when you die.

Different kinds of living trusts can help you avoid probate, reduce estate taxes, or set up long-term property management. A trust can be written to be revocable or irrevocable; this means a trust can be written in a way that allows for change or amendment later on, or can be written in a way that does not allow for any change.

Revocable Trusts

With a revocable living trust (also known as a revocable inter vivos trust or grantor trust), your assets are put into the trust, administered for your benefit during your lifetime and transferred to your beneficiaries when you die — all without the need for court involvement. Most people name themselves as the trustee in charge of managing their living trust's assets. By naming yourself as trustee, you can remain in control of the assets during your lifetime. In addition, you can revoke or change any terms of the trust at any time as long as you are still competent. Many people choose this type of trust because it gives them more control over any assets they place in the trust, and to change it when certain life changes (such as new kids, marriages, or acquiring new property) occur.

Irrevocable Trusts

An irrevocable trust is one that generally cannot be amended, changed, or revoked unless certain conditions are met. Once an irrevocable trust is created, it is set in stone, and because of this these types of trusts are used less. Some benefits to choosing an irrevocable trust over a revocable one include shielding assets from creditors. An irrevocable trust is essentially a separate entity and anything placed in this trust is retitled in the name of the trust, not the person who placed the property in the trust. Since the trust owns the property, creditors don't have access to it. Additionally, irrevocable trusts require their own tax returns.

It is important to speak with an estate planning attorney to determine if a trust is a good option for your estate as well as which type of trust is a good option for your estate. A living trust does not, however, remove all need for a will. Generally, you would still need a will — known as a pour over will — to cover any assets that have not been transferred to the trust.

Additionally, just creating a trust document and signing it does not mean that your assets are automatically placed in the trust. You must be sure to retitle any assets you place into a trust by a process called "funding." The process for funding a trust depends heavily on the type of asset. Be sure to hire an estate planning attorney to ensure that your trust is properly drafted and funded.

TRUST AMENDMENT

It is a good idea to review your living trust at least once a year with the professional that set it up for you. As a general rule, you should change your trust anytime it is no longer what you want. Any major changes in your family, such as marriage, divorce, death, birth, etc., could justify a change in your trust. If your Successor Trustees or Guardians can no longer fulfill their responsibilities, you should make changes accordingly. You retain the power to make changes at any time to the heirs or successors of your Living Trust by simply entering an amendment to your trust.

NON PROBATE ASSETS

There are some types of property in your estate are characterized in a way that allows them to pass to your heirs without the need to go through Probate. These are known as Non Probate Transfers/Assets. They are set up in a way that a beneficiary is specifically named, and the asset will automatically pass to the named beneficiary upon your death. These assets include the following:

- Assets such as property you own jointly with someone else
- Assets that have a payable on death or transfer on death designation
- Life Insurance Policies
- Individual Retirement Accounts
- 401Ks
- Annuities

And there you have it! These are the essential legal documents you should have in place for your estate. A good estate plan is a great way to ensure your final wishes are fulfilled, and that your legacy gets passed on to your loved ones. If you need assistance, Law Office of Sharyna Scott is here to help.

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