WILLS

A ***will*** is a document that disposes of one's assets after that person passes away. In order for a will to be binding it must express a present desire to dispose of a person's assets at death. The will must be a declaration in legal form as to the disposition of property, the appointment of an executor, or the nomination of a guardian for a person's children. A will by its very nature takes effect only upon a person's death. This is what distinguishes a will from a power of attorney, which is a legal document that is binding only while a person is still alive.

A will is necessary because it can dispose of property that might not otherwise be transferred automatically as a result of a person's death. For example if a house is owned jointly with rights of survivorship, ownership of the decedent's share of the house will automatically transfer to the surviving owners. If a house is owned individually or jointly without rights of survivorship, then a person should have a will prepared to indicate whom he or she wants to own the house when he or she dies.

Another reason a will is necessary is to address matters such as naming an executor or a guardian. Also, a will may be necessary to designate the source for payment of certain taxes. A will can be used in conjunction with other estate planning documents such as trusts, to reduce the tax liability of a person's estate. The bottom line is that a will is the cornerstone of most estate plans. It directs how your property is to be distributed and it names a personal representative to administer the estate. If a person passes away without having prepared a will, then Pennsylvania law determines who the beneficiaries of that person's estate are. Pennsylvania law will also determine who will administer the estate. In order to avoid this and ensure that <u>your</u> wishes are carried out, it is best to plan ahead and prepare a will.

All properly prepared wills should contain certain clauses. For example, a will should have an opening clause which:

1. Identifies the testator (person making the will);
2. Establishes his or her domicile (place of residence);
3. Declares the instrument to be a will; and
4. Revokes all other wills.

A will should also have a ***tangible personal property clause*** which defines and separates tangible personal property (all property other than real estate) and provides specifically for its distribution. Wills should also have specific and general bequest clauses. These separate clauses are used to make a special legacy of cash or bequests of personal property to persons and organizations of the testator's choice. A similar clause can be used for real estate.

If the situation warrants, a will should contain a ***guardianship clause***. That clause may be used to nominate a guardian of the person and/or the estate of a minor child (under the age of 18). The will can only nominate a guardian for minor children.

A will should also have ***clause directing how the debts and the expenses*** of the decedent are to be paid and how all appropriate tax liabilities are to be paid. For example, a person making his or her will can declare that all inheritance taxes are to be paid out of the estate assets, as opposed to making the beneficiaries responsible for paying the inheritance taxes.

A will should also have an ***appointment of executor and trustee clause***. This provision designates the individual(s) or corporation(s) that will administer the estate and any trusts created by the will. The executor collects the estate assets, pays the estate debts and makes distributions to the beneficiaries designated in the will.

Finally, a will should contain an ***attestation clause*** which raises the presumption that all of the facts of execution recited in the will were accomplished. It discourages possible hostile

testimony of an attesting witness at the time the will is probated, and ensures that the witnesses are aware of the formalities of signing the will. If the will contains a ***self-proving certificate***, it permits proof of the will at probate without a requirement that the witnesses be accounted for. It is always a good idea to have a self-proving certificate so that the executor does not have to locate the witnesses when the will is probated.

If you have a will, it is a good idea to take it out and re-read at least once every five years. Make sure that you understand what it says and that you agree with all of the provisions you made in the will.

A will should be updated if your circumstances change, such as:

1. Marriage;
2. Death of a spouse or beneficiary;
3. Divorce;
4. Birth of a potential heir;
5. Asset growth;
6. A move to a different state;
7. Changes in estate tax laws.

It is a good idea to keep your will in a fire-proof box (preferably in your house if you have one) or a safe deposit box at your bank. You can also have your attorney keep the original will, but ask your lawyer if the will is being held in a fire-proof filing cabinet or other protected location.

FINANCIAL POWER OF ATTORNEY

A ***power of attorney*** is a written document in which an individual (the "principal") gives another person (the "agent") the authority to act for the principal on the terms and conditions specified in the document.

Powers of attorney have several advantages. One is that they help ensure that a person's desired decisions will be made by the desired people at the desired time. Powers of attorney can help preserve assets and protect a family's financial security. Furthermore, powers of attorney avoid guardianship hearings which can be intrusive, inflexible, embarrassing, and costly.

Unfortunately, powers of attorney also have significant disadvantages. One major disadvantage is that they can be used as a tool for elder abuse. Unscrupulous agents can use the powers conveyed to them in a power of attorney to unjustly enrich themselves at the principal's expense. Also, a power of attorney can be used to thwart a person's established estate plan. **That is why it is so important to choose a trustworthy and responsible person as your agent. <u>This point cannot be emphasized enough.</u>**

In order for a power of attorney to be binding the principal must have "adequate intellectual capacity" at the time the document is executed. Unfortunately, there is no real standard as to what "adequate intellectual capacity" means.

A Financial Power of Attorney must meet with the following requirements:

1. It must be signed and dated by the principal;
2. Witness signatures are not necessarily required, but are recommended;
3. It must contain a statutory notice in capital letters at the beginning of the document, signed by the principal which
    a. Acknowledges an understanding of the powers and duties being conveyed to the agent and
    b. States that the power of attorney has been read and understood
4. An acknowledgment must be signed by the agent that he or she has read the power of attorney, understands it, and that he or she is to exercise the powers

given to him or her for the benefit of the principal only. The agent can delay signing the acknowledgment until he or she is required to act.

There are some very important issues that must be addressed in preparing a Financial Power of Attorney. For example, it is critical to determine what kind of restrictions are to be made on the agent's power to transfer (gift) assets. Gifting powers can be a very important tool in estate or asset protection planning; however, an agent can use these gifting powers to unjustly transfer assets to him or herself. The extent of the gifting power given to an agent depends on the trustworthiness of that person.

Another issue involves naming successor and multiple agents. It is always advisable to name at least one successor agent in case the primary agent is not able to perform his or her duties. It is not, however, generally recommended to name multiple agents, i.e., co-agents. If the agents disagree it could delay the implementation of important financial decisions. Furthermore, there are some financial institutions that will not accept powers of attorney that name multiple agents.

One very important decision that needs to be made is to determine when the financial power of attorney becomes effective. A ***springing power of attorney*** becomes effective upon the occurrence of a specific event, such as a medical determination that the principal can no longer manage his or her finances. An ***immediate power of attorney*** becomes effective when it is signed. This decision often comes down to the proposed agent's trustworthiness. The less an agent can be trusted the longer the delay in implementation should be. Other issues to be decided include:

1. Limiting the liability of a third-party relying on the power of attorney;
2. Making sure that the agent still has the powers granted in the document regardless of where the principal resides;

3. Making sure the power of attorney is effective until it is expressly revoked (this is often called a "***durable power of attorney***");
4. Ensuring that any and all previous powers of attorney are revoked;
5. Including a clause that deems all copies to have the same force and effect as the original.

Examples of powers give to an agent in a Financial Power of Attorney are:

1. Power to pursue tax matters;
2. Power to create a trust;
3. Power to receive government benefits;
4. Power to engage in real property transactions;
5. Power to engage in stock, bond, and other securities transactions;
6. Power to borrow money;
7. Power to enter safe deposit boxes;
8. Power to engage in insurance transactions (for example, changing the beneficiaries on a policy);
9. Power to engage in retirement plan transactions (which may also include the power to change beneficiaries).

HEALTH CARE POWER OF ATTORNEY/LIVING WILLS

In a ***Living Will*** an individual provides treatment instructions regarding the types of medical treatment and care he or she wants to receive or refuse at the end of life. A ***Health Care Power of Attorney*** is a document that provides instructions regarding health care in the event of a person's incapacity. The person appointed in a Health Care Power of Attorney can be authorized to make **ANY** health-care decision, including those concerning end-of-life treatment. A properly drafted Health Care Power of Attorney is preferable to just a living will. In fact, a Health Care Power of Attorney can include a Living Will.

A properly drafted Health Care Power of Attorney will contain the following terms:

1. **Name of attending physician** - the physician who has primary responsibility for the health care of the principal or patient;
2. **End Stage Medical Condition** - an incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness that will, in the opinion of the attending physician, to a reasonable degree of medical certainty, result in death, despite the introduction or continuation of medical treatment;
3. **Permanently unconscious** - a medical condition that has been diagnosed in accordance with currently accepted medical standards and with reasonable medical certainty, as total and irreversible loss of consciousness and capacity for interaction with the environment. The term includes an irreversible vegetative state or irreversible coma

A Health Care Power of Attorney contains a number of important provisions. One provision defines the principal. Another indicates that the agent's powers go into effect when the principal lacks the ability to understand, make, or communicate a choice regarding health or personal care decisions, as verified by the attending physician. A Health Care Power of Attorney should specify what powers the agent has. It should, of course, appoint an agent. Like the Financial Power of Attorney, it should name at least one alternate agent.

A Living Will should indicate that it goes into effect if the principal has an end-stage medical condition or is permanently unconscious. The Living Will should list those procedures

that the principal does not wish to have if he or she is in that condition, such as:

1. Heart-lung resuscitation;
2. Breathing machine;
3. Dialysis;
4. Chemotherapy;
5. Radiation treatment;
6. Antibiotics

The Living Will should indicate whether tube feedings are to be continued. It should also contain a clause protecting the health care agent and any health care providers from legal liability for the good faith actions in following the provisions of the Living Will.

The Health Care Power of Attorney and Living Will must be signed and witnessed by two people who are at least 18 years old. It does not need to be notarized; however, it is still a good idea to have that done.

Pennsylvania recently passed a law which allows a designated "health care representative" to make the health care decisions of incapacitated people even without a Health Care Power of Attorney or Living Will. While the actions of the legislature in passing this statute are commendable, it is always advisable to prepare a Health Care Power of Attorney and Living Will so YOU get to choose who makes the decisions and specifically what decisions they can make.