

# FALCON & SINGER P.C.

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## ELEMENTS OF ESTATE PROTECTION

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## ELEMENTS OF ESTATE PROTECTION

The process of planning for the protection of your assets and the orderly disposition of your estate upon death can range from the relatively simple to the very complex. Complete treatment of all aspects and tools of sophisticated planning is well beyond the scope of this presentation. Much depends on your specific goals and circumstances. However, there are three essential elements that you should consider: (1) a Will, (2) a Durable Power of Attorney, and (3) a Health Care Proxy.

### 1. *The Will*

This is the most basic planning tool. The Will determines how your property will be distributed after your death.<sup>1</sup> There are a number of basic advantages to having a Will.

**A. Property Disposition.** With a Will, you determine how much of your estate goes to whom after your death. This way you can give more to particularly needy children, make gifts to charity, or, on a more negative note, cut someone out. In the absence of the Will, the property will be distributed in accordance with the State law governing intestacy (dying without a Will). While in some cases the manner of intestate distribution may be acceptable, in other cases, the intestate distribution may be totally different from what you prefer. It is better to meet your wishes rather than leave it to statute.

**B. Selecting Your Representative.** You select your executor, who is the person who will see that your wishes are carried out. In intestacy, a *judge* appoints the representative (called the "administrator"), who may not be someone to whom you would have entrusted your affairs.

**C. Choosing a Guardian.** If you have minor children, you can identify the person or persons you wish to act as guardian of the children. While such a selection is not binding on a court, judges give great deference to wishes expressed in a Will.

**D. Making Specific Gifts.** If you have a particular item of property that you want to go to a special person, you can make a specific bequest of that property in the Will. Otherwise, all property will probably be put into a pot, to be divided by the executor or administrator, or sold and the cash distributed.

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<sup>1</sup> Note that a Will only affects disposition of property interests that are owned *solely* by the person making the Will. The Will does *not* affect property that passes by operation of law or by contract, such as jointly held property and life insurance policies or deferred compensation plans with designated beneficiaries. In many cases, assets must be retitled as part of an effective estate plan. Assets that pass by operation of law or by contract are, however, still part of the estate for estate tax purposes

**E. Testamentary Trusts.** If you have children or other young beneficiaries, you may wish that the property that you leave to each child be put into a trust and distributed in accordance with a particular schedule. For example, you might want 1/3rd to go to each child at age 25, ½ of the balance at age 30 and the rest at age 35. You can specify this in the Will. You can also select the Trustee to manage the trust, someone in whom you have confidence and with whom you share similar values and a life view.

**F. Tax Planning.** The Will can be part of a carefully architected estate plan which is designed to achieve your property disposition wishes in a way that minimizes estate taxes. Specific methods of estate planning and tax minimization are beyond the scope of this overview.

## ***2. Durable Power of Attorney***

A Durable Power of Attorney is essentially a document that grants to another person the right to manage and dispose of your property in the same manner as you could. The recipient of the Power is called the "attorney-in-fact." The Power can be limited only to specific areas, such as real estate or securities transactions (a "limited power"). It can also be very comprehensive, granting the attorney-in-fact power to do anything you could (a "general power").

You grant the Power to another person during your lifetime. The Power is a useful document to have if you become incapacitated or unable to manage your own financial affairs, since the Durable Power remains in effect during your incapacity. This way, the attorney-in-fact can pay your bills, handle your checking account, protect your investments and provide for your needs. The alternative would be a conservatorship proceeding seeking a conservator appointed by the court to manage your affairs. This can be drawn out and expensive.

If there is concern that a Power would be abused by the attorney-in-fact while you are still capable of managing your affairs, the Power can be made "springing." A Springing Power only comes into (*i.e.* "springs" into) effect when you are found to be incapable of managing your affairs or upon some other future event. That determination is usually made by one or more specified persons, such as your doctor.

Although the Power is **very** useful, it is also **very** powerful. Consequently, it should not be given lightly or without thought.

## ***3. Health Care Proxy Directive / Instruction Directive***

The Health Care Proxy Directive is similar in concept to the Durable Power of Attorney, except that it relates solely to your health care. The Proxy is granted to another person during your lifetime. That other person is sometimes called the "health care representative" or "health care proxy." If you become incapable

of making decisions concerning your health care, your health care proxy may make those decisions for you. Such decisions can include withholding life support, giving informed consent to medical treatments and consenting to orders not to resuscitate if you have a cardiac arrest.

Obviously, the Proxy Directive literally gives control over life and death decisions. It is critical that you understand fully the impact of this document. You should select as your agent someone who shares your beliefs on the dignity of life and matters of religion and personal faith. The ideal agent is someone who shares your value system and would make the same decisions you would if you could.

The Proxy allows you to preserve dignity in sickness and death. It also has the secondary effect of avoiding needless and expensive continuation of unnecessary treatment and life support measures.

In addition, you can make some of the most difficult medical decisions ahead of time, thereby relieving your health care proxy from the most difficult choices. As you can imagine, these decisions can be very painful and difficult for a loved one to make.

You do this by executing an Instruction Directive (formerly called "Living Will"). With an Instruction Directive you can decide, for example, whether you want life support or feeding tubes should you have a terminal illness or should you enter into a permanent coma (sometimes called "persistent vegetative state").

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Finally, although this may sound like a commercial for the legal profession, these documents should be discussed with and prepared only by an attorney. It is easy to make a mistake if you do not know the intricacies. With documents as powerful as a Will, Durable Power or Proxy, an ounce of prevention is definitely worth a pound of cure.