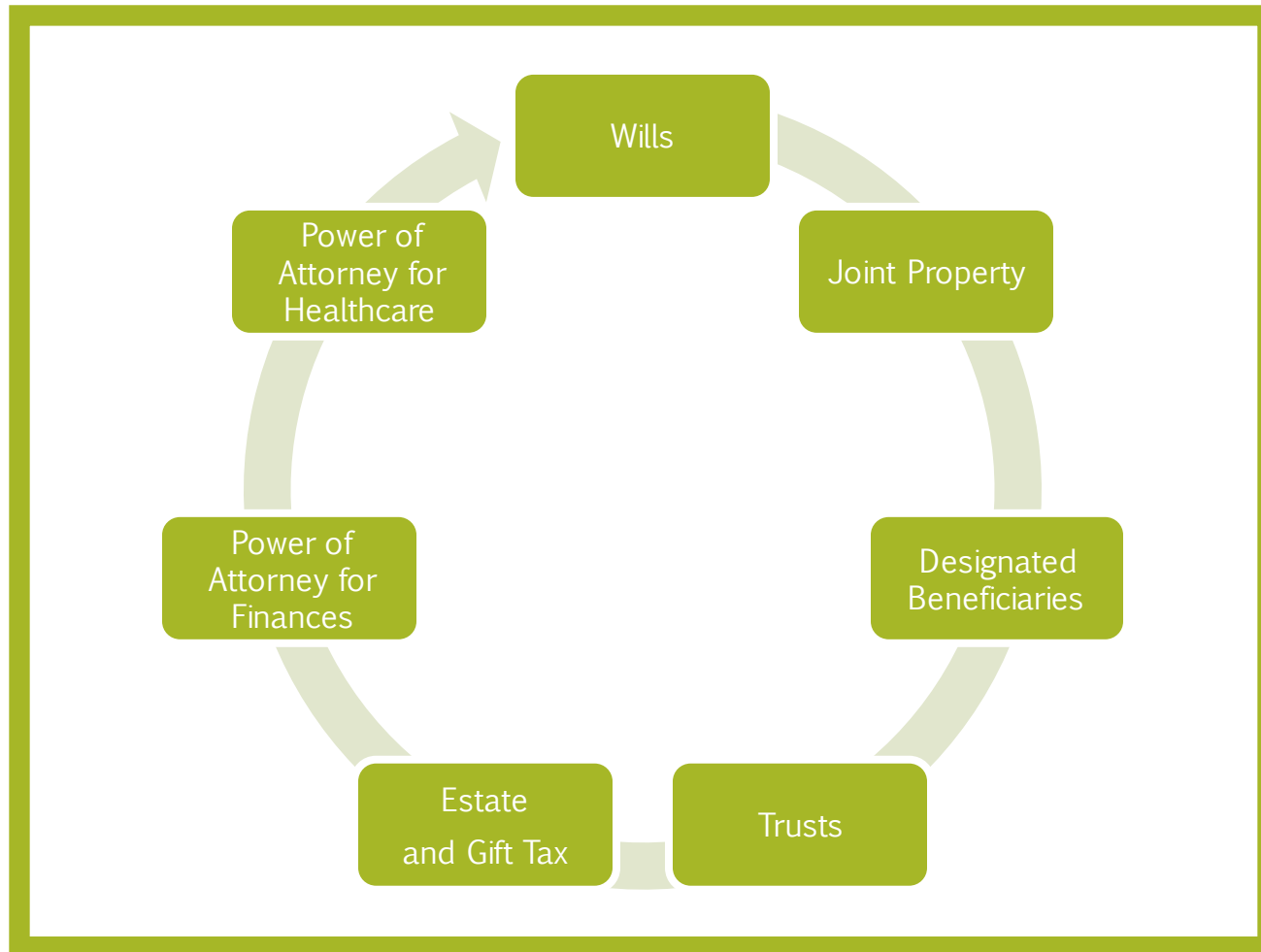


# Wills, Trusts and Advance Planning

Planning for Incapacity — Planning to Avoid Probate — Planning for Death

# What can I do to plan?

Expecting the unexpected...



## Elements of Estate Planning

Planning for Incapacity

Different Types of Powers of Attorney

Power of Attorney for Finances /Power of Attorney for Healthcare

Principal = Person who makes the Power of Attorney (POA)



Principal appoints an agent

Attorney in Fact (AIF)



Agent = Person appointed to act in the Principal's best interests

Terminology  
Common in all  
Powers of Attorney

Not all Power of Attorney  
Documents are alike!

It's not one size fits all

- **Limited**

To a certain time period or event

- **Immediately Effective**

Opposite of a springing power of attorney

- **Durable**

Power of Attorney documents terminate when the principal becomes incapacitated unless durable

## Different Types of Powers of Attorney





# Springing Power of Attorney

One or Two Physicians Certify the Principal's Incapacity



# Power of Attorney for Finances

Allows the Principal to appoint an Agent or Attorney in Fact to act on his/her behalf

Authorizes Agent to act on his/her behalf in *managing property* and *financial affairs*

# The Language in the Power of Attorney document controls

The Actions of the Agent

# What Powers are Included?

- Manage property and business affairs
- Apply for government benefits
- Manage all bank accounts
  - Retirement, saving, checking, investment accounts
- Hire a lawyer
- Enter a contract
- Buy/sell real estate
- Change beneficiaries

# What Are the Agent's Legal Duties?

- Duty to maintain contact with the principal
- Duty to communicate with the principal
- Duty to maintain records
- Be accountable to the principal
- Duty to avoid self dealing
- Considered to be a “fiduciary”

# Power of Attorney for Healthcare

Health Care Directive/Advance Directive/Living Will

Allows appointment of an agent to act on his/her behalf and authorizes the agent to act for him/her in making *healthcare decisions*

## What is Included

- Part I: Appointment of a Surrogate Decision – maker
- Part II: Healthcare Directive
- Specifically indicate the life-prolonging procedures the person wants withheld or withdrawn
- Authorizes physician to treat “for a reasonable period of time” if can lead to recovery
- Allows body to be maintained if necessary for organ or tissue removal

## Part III: Witness and Notarization

- General Information and provisions
  - A copy is as effective as the original
  - Third persons can rely on this document
- Part I **must be signed** in the presence of 2 witnesses and a notary
- Witnesses and notary also sign the form
- Required for Part I to be effective and valid
- If only Part II, the Health Care Directive is completed, then the Principal signs and it **does not need** to be witnessed or notarized

# Appointing an Agent

- Must be 18 or older
- Someone who can communicate the person's wishes and choices to your healthcare providers
- Cannot be:
  - Your physician (unless related)
  - An employee of your physician
  - Owner/operator of the healthcare facility in which you are a resident (unless related)
- Possible Issues with Co - Agents



## Agent's Duties

- Agent shall seek and consider information concerning the person's *medical diagnosis, the prognosis* and the *benefits and burdens* of the proposed treatment
- To the extent possible

Imagine you are in a hospital, and you can't speak,  
who will speak for you?

We all hope to be able to communicate until the end . . . but it doesn't always happen that way . . . so plan accordingly.

Without a plan,  
how will your healthcare providers know your  
wishes?

# Why is this type planning so important?

Allows greater control over decision – making  
Prevents unnecessary confusion in critical times

# Planning for Death

And what happens when we don't plan!

# The Unplanned Estate

If you don't have a plan, the state of Missouri has one for you!

## Missouri Intestate Law – Without a Will

- If a person dies without a spouse or children:
  - Property will go in equal shares to father, mother and siblings
- If a person dies survived by a spouse and
  - Parents (no children): Spouse gets entire estate
  - Children (of both decedent and surviving spouse):
    - Spouse gets \$20,000 plus  $\frac{1}{2}$  of balance of the estate and their mutual children get other  $\frac{1}{2}$
- Children (of decedent, but not of surviving spouse):
  - Spouse gets  $\frac{1}{2}$  and children share the other  $\frac{1}{2}$



# Some Property Passes By Operation of Law

Regardless of whether person has a Will or a Trust

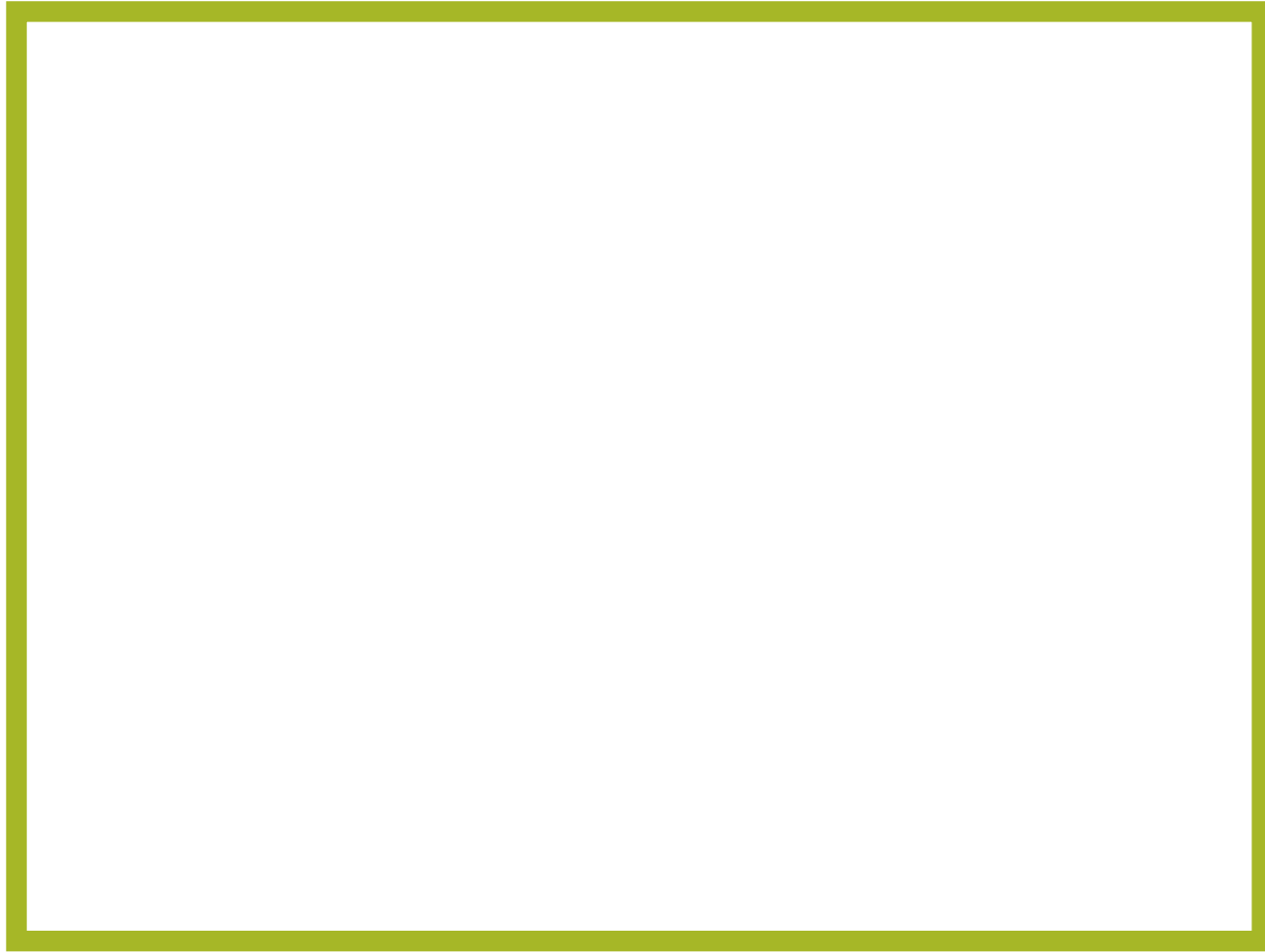
## Joint Property

- Joint property *automatically* passes by title *at death*
- Joint property *is not a part* of your probate estate
- Provisions in Will or Trust are ineffective as to joint property, *if* the other joint tenant survives
  - Assets pass outside of the estate plan

# Payable on Death Transfer on Death Designations

Pros and Cons for Estate Planning

# Beneficiary Designations



## Beneficiary Deed

# Probate

What is it? Why are we trying to avoid it?

# What is Probate?

- Court supervised process
  - Validating a Will (if one exists)
  - Paying debts and expenses of an estate
  - Resolving any challenges to a Will
  - Distributing property to beneficiaries
- Personal Representative
  - Collects property
  - Pays debts
  - Transfer property to heirs
- Small Estate - \$40,000 maximum

## More Problems with Probate

- Expense – legal fees and court costs
- Delay
  - Most estate transactions must be approved by a judge
  - Increase time and cost because personal representative must seek court permission
- Public
  - Matter of public record
- Bond Required





# Will

- Allows you to name:
  - Beneficiaries: Persons entitled to receive distributions of property from the estate
  - Personal Representative/Executor: Person or bank who collects the assets upon your death, pays claims and expenses, and distributes remaining assets to your beneficiaries
  - Guardian: Person who will care for your minor children (under 18)
  - Custodian: Person who will act as a successor custodian for transfer to account for minors

# A Common Myth about Wills

Having a Will does not mean you will avoid probate

# How do you Avoid Probate?

Establish **and** fund a Trust

Ensure all assets have beneficiary designations

# Trusts

- Property is transferred to Trustee of the trust and governed by the terms of the Trust Agreement
- Trust is a legal entity
- Types of Trusts
  - Testamentary – created upon death
  - Revocable – created during lifetime
  - Irrevocable – created during lifetime

# Revocable Trust - Advantages

- May be revoked or amended at any time
- Retain control over all property during lifetime
- Avoids Probate
- Provides management of assets in event of incapacity
- Passes property at death according to your wishes
- Third parties are more willing to deal with a trustee than a Power of Attorney

- “Pours” balance of assets into revocable trust
- Provides for assets not in revocable trust
- Names personal representative or Executor
- Names guardian for minor children

## **Pour Over Will**



# Testamentary Trust

- A trust created at your death to hold assets for your beneficiaries
- Not funded until after your death
- May be used to control **when and how property** is distributed, to **protect beneficiaries from creditors** or in the event of divorce, **to direct future dispositions** of property and to **minimize estate taxes**
- May be created in a Will, Revocable Trust or Irrevocable Trust



# Questions?



**FERNANDEZ**  
ELDER LAW LLC

# Thank You!

M. Brigid Fernandez

Licensed Attorney

Licensed Clinical Social Worker

Fernandez Elder Law, LLC

13205 Manchester Rd. Suite 210

St. Louis, MO 63131

314-328-0700

[www.fernandezelderlaw.com](http://www.fernandezelderlaw.com)