

**Estate Planning Summary  
for Missouri Residents**  
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This is a memorandum for estate planning clients who are Missouri residents. It is intended to explain the major areas of decision-making and some of the strategies for making decisions. The focus will be on ways to achieve both time and money savings for clients and for their intended beneficiaries. I favor the simplest and least costly methods for achieving clients' goals. Other assumptions used in this summary are that the client wishes to achieve peace of mind and achieve or encourage peace within the family. These are common but not universal goals. Deviation from some of what is described will be necessary to deal with specific circumstances or goals.

**Recent changes in the law**

Both federal and state laws have changed within the past few years in dramatic ways that affect estate planning. The original version of this memo was written in 2003, and it was revised in 2005, 2007, 2009, and early in 2010. Additional major changes are now being considered at both the federal and state levels, so you should ask about significant changes if you're reading this much later than early 2010. Only the most sweeping and important changes will be discussed here. The net effect of these changes is to simplify estate planning for many people, but in cases of considerable wealth to greatly complicate estate planning.

**Federal law** is what primarily regulates the field of estate taxes. Missouri also has an estate tax, but it is small in comparison to the federal one, and it is what is sometimes called a "piggy-back" tax; it comes into play only if your estate is big enough to worry about the federal estate tax and the federal estate tax actually applies to your situation. Here's a brief summary of the major changes in the last few years in the federal law. In 2001 Congress provided for much larger amounts, on an increasing schedule over several years, to pass free of estate taxes. For 2002 and 2003, One Million Dollars in assets could pass from someone to children or other individual beneficiaries without any estate taxes being incurred. That amount went up to \$1.5 Million for 2004 and 2005, to \$2.0 Million for 2006, 2007, and 2008, and to \$3.5 million for 2009. Almost no one expected Congress to allow January 1, 2010 to arrive without altering what was scheduled by the 2001 law to take effect then. They did allow that to happen, however. Current law therefore provides that for anyone dying in 2010, no estate tax will apply, regardless of wealth. It also provides that on January 1, 2011, the estate tax is to be resurrected, but back at the level and with the rates that applied in 2000 (only One Million dollars escapes the tax and the highest rate for the excess is 55% rather than the 45% in effect in 2009). In addition, a related income tax rule is changed as of January 1, 2010, with much of the "stepped-up basis" previously available for all inherited property disappearing and being replaced by a "carry-over basis" from the deceased person. Thus, under this rule much of the revenue lost from the estate tax is recouped by the government by way of the income tax. The House of Representatives, in late 2009, passed a bill that would have frozen everything under the rules that existed in 2009, but the Senate failed to pass a similar measure. Many in Congress are predicting that both houses will pass some form of estate tax law changes during 2010 and make those changes

retroactive for all persons dying during 2010. Many are predicting that any such law will be subject to a constitutional challenge because of the anticipated retroactivity provision. Some are now predicting that Congress, in its current polarized and partisan condition, will fail to act at all with respect to estate taxes, allowing the resurrection of the estate tax, with taxes on all inherited wealth above \$1.0 Million, to take effect as now scheduled on January 1, 2011.

It is fair to say that now, in early 2010, it is very difficult for anyone with assets over \$1.0 Million to know how best to do their estate planning.

**Missouri law** controls wills, trusts, and inheritance. A few years ago, Missouri was among the leaders in developing a new way of passing property at death, called non-probate transfers. This is encountered most often in the form of POD (“pay on death”) or TOD (“transfer on death”) designations on documents of title. Under this law, the owner (or the last to die of joint owners) can designate beneficiaries to become the owners by operation of law at the instant the last present owner dies. This is accomplished for real estate by recording what is called a Beneficiary Deed, which takes effect on the death of the last surviving joint owner, but has no effect until then in restricting the owner’s ability to sell or give away the property. Missouri law is now clear, after revisions, that virtually everything may have beneficiaries designated to become owners at death in this way. Any property as to which this law is properly used jumps to the beneficiary on the death of the owner, without regard to anything the owner’s will or other estate planning documents say.

## **Estate taxes**

***Do you have a concern?*** First, you must determine whether estate taxes are a worry. If they apply, they will siphon off 45% or more of some portion of your assets, with both the percentage and the amount depending on the size of your taxable estate and the year of your death. Under the current law, there is an increased focus on analyzing statistics and life expectancies for those with taxable estates in excess of \$1.0 Million. The mess Congress has made of the law currently is described above. It remains true that if you (or even just one of two spouses) is very likely to outlive the application of the estate tax to estates of the size you control, it might be wisest to assume that will happen and not engage in the more complex and more expensive estate planning commonly used to minimize estate taxes. Knowing whether the estate tax will apply in individual situations is currently more difficult to determine than it has ever been. Engaging in complicated and expensive estate planning to accommodate the current law or some of the likely changes in that law (usually involving setting up trusts) and then having the tax not apply at the time of your death, either because of the present schedule or because of the changes being contemplated, would be to waste money and unnecessarily complicate your own life and the lives of your heirs. On the other hand, of course, no one ever knows when he or she will die, and predicting what Congress will do is always a chancy proposition and currently is more difficult than ever. The degree of certainty one wishes to achieve on the tax savings issue is a personal decision. Everyone with taxable assets in the millions should watch the news carefully.

***Which assets generate estate taxes?*** Assets includable in the estate tax calculation involve more than the things that most people think of as their available wealth. Under the law as it existed for many years, the IRS required that all assets controlled by a decedent be part of the tally to see whether a tax was due. All real estate wherever located (including time shares,

oil and gas interests, etc.), all bank accounts, CDs, stocks, bonds, furniture, clothing, books, art, tools, vehicles, livestock, life insurance, retirement funds, trusts you created and many you did not create if they involve you, all non-exempt gifts made during lifetime, and everything in which you share an interest or over which you have control without owning it, all this had to be reported on an estate tax return if the total exceeded the magic number in effect for the year of a person's death. Presumably, if the estate tax is resurrected, either during 2010 or as currently planned for 2011, all these rules will again apply.

Note that there also is an income tax consideration for retirement funds, especially if those retirement funds consist of deferred compensation or re-directed salary or IRAs (money set aside without first paying income taxes on it). Whoever draws the funds out after your death will pay income tax on them, and such funds also will be included in your taxable estate if the estate tax exists. Sometimes, depending on circumstances, these retirement funds generate so much in both income and estate taxes that considerably less than half and sometimes less than a quarter of what you think is there survives to benefit your heirs.

If you make a complete list of all assets you own, have an interest in, or control, following the guidelines given above, and determine that you do not have an estate tax concern, you can skip the rest of this section, all the way to the heading "Probate and its Avoidance under Missouri Law" on page 5. Be aware, however, that nearly always people are surprised by the total value of assets subject to the potential estate tax when diligence is used in listing the assets.

***How have estate taxes been calculated when they applied?*** The estate tax calculation, if a return is required, in previous years went like this. All of the assets owned or controlled were listed at their fair market value. Deductions were then taken for all that went to a surviving spouse if there was one and for all that went to qualified charities. Those deductions were unlimited. If the remainder exceeded the amount that generated a tax in the year of the death, the tax was, very roughly, 45% or so of the excess over that magic number.

***Danger of using the marital deduction to achieve zero tax liability.*** A simple and effective method for a wealthy person to avoid estate taxes has always been to have a spouse survive and leave everything to him or her. This was accomplished, for example, by having all assets owned by both spouses jointly. The problem with this approach was that on the second death, if the estate tax still applied, the net result was higher, perhaps even much higher, taxes. This is because by this strategy, only one spouse's estate was subjected to the tax rather than two; the first spouse, by using the marital deduction, failed to use his or her own right to pass \$3.5 Million (in 2009) to heirs, and all of the couple's assets were taxed as the taxable estate of the second spouse to die. If the bill that passed the House in late 2009 also passes the Senate, which is what has been pushed by the Obama administration since it came into office, the rules will revert to the way they were in 2009, so I will describe that in rough detail. If total assets were \$5 Million and they were all owned jointly, and both spouses died, one at a time, in 2009, approximately \$450,000 in estate taxes were incurred, whereas if the property had been split up into separate taxable estates and trusts were used that made effective use of the estate tax exemption available for each taxpayer, two deaths in 2009 generated zero estate taxes. Note, however, that with joint ownership of taxable assets worth up to \$3.5 Million, they all could pass without estate taxes taking a bite during 2009. If you or you and your spouse control assets in excess of the amount that escaped estate taxes in 2009, it's a high-stakes decision whether to engage in complex estate planning. For that matter, it's a high-stakes decision about how to

approach estate planning if you or you and your spouse control assets in excess of \$1.0 Million now. Joint ownership of everything and survival of one spouse beyond the application of the estate tax to your assets, however, is a simple and entirely effective plan, if the survival and prediction parts work out.

***Reducing your taxable estate by giving it away.*** Spending or giving away your assets until you are under the amount likely to cause an estate tax are strategies that have been used for years. You should never give away or waste what you might need to maintain your desired standard of living. For all kinds of psychological and other reasons, some of which could adversely affect life span, it is unwise to make yourself dependent on anyone else. If the Obama administration's proposal about estate taxes is passed by Congress, as still seems likely, it would seem that aggressive gift-giving should not be pursued, except for those with very large estates and short life expectancies. If you wish to pursue such gift-giving, however, the federal gift tax law remains in force and must be considered. For both 2009 and 2010 annual gifts of \$13,000 to each of any number of recipients are permitted without you or the recipient incurring any tax obligation. Married couples may give \$26,000 to each recipient annually, and a married couple may give \$52,000 to a married child or grandchild and his or her spouse annually. These are not absolute limits on gift-giving, they are limits on tax-free gift-giving. Gifts that qualify as tax-exempt must have no strings attached. They cannot be limited, for example, to education purposes, and they cannot be left in a trust so the beneficiary gets full access to the funds only at a later time, unless the trust fits within very narrow rules. Exceptions to these rules are a "Section 529 Plan" for funding a beneficiary's education, and direct payment for children's or grandchildren's medical or educational expenses, which is not subject to the \$13,000 per year tax-exempt limitation.

***Caution about tax basis when lifetime gifts are used.*** When lifetime giving is used to reduce a person's taxable estate, it must be remembered that the recipient takes the giver's tax basis. For example, if mother wishes to give adult son stock now worth \$13,000, but for which she paid \$1,000 several years ago, she may do so without either of them incurring tax liability this year. If son later sells the stock for \$11,000 (which might seem like a substantial loss), he incurs a long-term capital gain of \$10,000, upon which he will have to pay 15%, or \$1,500, as federal tax, and he may also owe state capital gain tax. By contrast, if mother retained the stock until her death and if under the rules in effect at mother's death the stock qualified for a "step up" in basis to fair market value as of the date of her death, son could inherit the same stock from mother and no estate taxes were incurred, then sold it for \$13,000 or less, he would pay no tax. If an estate tax applies at mother's death, however, the first dollar above the amount that can pass at death without incurring estate taxes is likely to be taxed at 45% or more, so in the context of estate taxes taxpayers with large estates still generally can pass more wealth to their children by life-time giving than by passing it at death, even if what is given away has a zero basis. In 2010, however, simultaneously with repeal of the estate tax, present law calls for loss of the "step-up" in tax basis rule that now applies to inherited property, except that there is a fairly generous amount of over \$1.0 Million of stepped-up basis available. Unless this limited step-up in basis is available for an asset, one who receives property from another either by gift or by inheritance will take the giver's tax basis. Note, however, that there is considerable unhappiness with this current situation, and there is strong motivation by some in Congress to remove the loss of stepped-up basis for inherited property from current law.

***Removing assets from the taxable estate or reducing their taxable value without giving them away.*** Other methods for reducing the size of your taxable estate are available. Virtually all of them involve things that cannot easily be undone. Examples include irrevocable trusts or establishing business entities such as limited partnerships as to which arm's length business dealing is required. Some of these methods don't actually give up control of the assets, but instead change the character of the assets so that they qualify for discounts in the valuation process because of becoming minority interests or because they are converted into something not readily marketable. Given the present state of the estate tax law and the contemplated changes, as well as recent court cases, one must have strong reasons for engaging in such complex and expensive steps, and the chances of gaining anything from them are fairly small except in the unlikely event that someone can guess correctly about when deaths will occur and what Congress will do.

***Using deductions to reduce tax.*** If the estate tax does apply at the time of one's death, it is possible, of course, to use the marital deduction for property passing to a surviving spouse or to use the charitable deduction for property passing to qualified charities to reduce the estate taxes owed. Verbal formulas can be used to require that all above the amount that can pass free of estate taxes is to go to a spouse or to a charity. One way of thinking about the charitable aspect of this is that if you are sufficiently wealthy (and the estate tax law is in force at your death), some will go to charity. The estate tax law, when in effect, has always allowed one to choose a different charity, but if you make no choice, the IRS is the default charity. Taxpayers with very large estates, when the estate tax law applies, if they direct a portion to charity, are funding that charity's share approximately 45% or more from the share that would otherwise go to the IRS and 55% or less by what would otherwise go to the other heirs.

***The two-trust approach for a married couple.*** For years, while the estate tax law has been in effect, perhaps the most common strategy for reducing the overall estate tax bite for a wealthy married couple has been dividing up the assets into two taxable piles, with each pile controlled by one of the spouses. Each spouse created a trust and made his or her pile subject to the terms of the trust. Each trust said that if that spouse were the first to die, enough was to be retained in the deceased spouse's trust to fully use his or her tax-exempt amount, and the rest, if any, was given outright to the surviving spouse. The income, and, for limited needs, the principal of the assets retained in trust were also available for the surviving spouse. Each trust also typically said that all of the assets then in the trust—all of them if the creator was the second to die and all of what's left on the other spouse's death if the creator was the first to die—went to the children or other beneficiaries immediately, and the trust terminated. By this simple method, a very wealthy married couple got two taxable estates instead of one, thereby saving several hundred thousand dollars or more, depending on the total of the wealth involved and the calendar years of the deaths.

What has just been described remains a viable approach if one assumes the estate tax will apply at one's death. Given uncertainty about the future of the estate tax law, however, if one is anxious to have estate planning in place before Congress acts, this relatively costly approach could turn out to be of no actual eventual benefit.

## **Probate and its Avoidance under Missouri Law**

Besides saving estate taxes, the other way in which informed estate planning sometimes can significantly reduce the cost and work involved in transferring wealth at death is by avoiding or minimizing the costs of a probate proceeding.

***Avoiding probate generally.*** A probate estate involves appointment by the court of an executor or personal representative, who then collects all the assets, lists them for the probate court, pays all of the decedent's bills and taxes and the costs and fees of the probate estate, and then distributes the assets to the heirs. The probate administration of an estate takes at least six or seven months, sometimes as long as a year or more. Fees for both the personal representative and for the estate's lawyer are set by statute, and often overcompensate for the work actually required. For example, by law the personal representative and the attorney are each entitled to a fee of approximately \$26,000 for a probate estate of \$1 million. The fee is a percentage of the assets administered, with larger percentages for smaller estates. In addition, probate records are public records, in contrast to other methods of passing wealth at death. Expense, delay, and the public character of records are reasons some wish to avoid probate.

***What assets will or will not pass through a probate process?*** The probate process involves only those assets owned by the decedent alone, not those owned jointly, and not those that have valid non-probate beneficiary designations. Note that "tenancy in common" refers to separate ownership of a share of an asset such as stock or real estate. That kind **is** a probate asset. "Joint tenancy" or "tenancy by the entirety" are kinds of ownership that evaporate at the death of one owner if one or more other owners survive, and assets owned in these ways thus do not pass through a probate estate. Assets owned in a trust will not pass through a probate estate unless the trust document gives this instruction, which is exceedingly rare. Non-probate transfers, with beneficiary designations, are like life insurance: the assets go directly to the beneficiary and not through the decedent's probate estate. One's probate estate consists of everything he or she owned at death, unless it passes by operation of law to someone else because a non-probate beneficiary was designated in some document of ownership, or the ownership expired at death, as in the case of property that was jointly owned with someone who survives.

***Small probate estates.*** If the assets subject to the probate laws and process have a value of less than \$40,000, a small estate proceeding, which is **usually** less expensive and onerous than full administration of an estate, is available.

***Possible disruption of plan by incomplete probate avoidance.*** It often happens that someone employs probate-avoidance techniques in his or her estate planning, but then overlooks something as time goes by. This scenario sometimes produces both a probate estate and transfers directly to beneficiaries of many other assets by other means. This can defeat a person's intention, especially if there was an effort to give each of a group of people exactly equal shares. This situation also can actually create greater complexity in dealing with the decedent's affairs instead of the reduced complexity intended.

***What a will does.*** Wills control **only** those assets that pass through a probate estate. Wills sometimes have other roles, such as appointing a guardian or conservator for minor children, but the only assets they control are the ones subject to the probate process. This means that you cannot accomplish division of all your assets according to the terms of your will if you also have joint ownership with someone who survives you or if you have used non-probate

beneficiary designations on assets or established trusts with some of your assets. All those other arrangements take precedence over the will and the probate estate it controls.

***Choosing to have a probate estate still can make sense.*** In some circumstances, despite what has been said, intentionally choosing to have all your assets go through probate at death and choosing to have a will as your only estate planning document still makes sense. During your lifetime, as a practical matter, it's often easier to keep a will private than it is to keep private a trust or other non-probate arrangements. If you don't want even your kids to know what you have until you're gone, and if you don't care about the costs and delay and public character of probate proceedings, doing your estate planning in the form of a will may make the most sense. Also, if you have minor or disabled children or want all of your estate planning in a single document to guarantee equal treatment or want to cause a trust to spring into existence if certain facts persist at your death, doing your estate planning by will rather than creating a trust now still might make the most sense.

***Caution about joint ownership with anyone not your spouse.*** People often think they should add their adult children to their bank accounts, homes, stock, etc., to give them access to the assets if they're needed while the parent is still alive but unable to manage things, or to make bill-paying easy at death. Sometimes the only thought behind this is avoiding probate and lawyers. These are potentially **serious** mistakes. Joint ownership by spouses provides protection from the creditors of either spouse alone, but joint ownership by non-spouses does not provide such protection. Adding your adult child as an owner, for what you and she think is convenience and ease of transition, may have disastrous consequences. If your child incurs a large uninsured liability, goes through a nasty divorce, becomes disabled, or takes bankruptcy, the understanding about this being for your convenience will not prevail. What you and your child agree is really yours isn't in the eyes of the law or in the eyes of your child's creditors. If she becomes disabled or bankrupt, someone will even have the legally enforceable duty to take some or all of your assets to pay your child's bills. Furthermore, adding a joint owner amounts under gift tax law to making a gift, and the recipient of a gift gets your tax basis rather than the stepped up tax basis that might be available if you retained the asset as your own exclusively until death.

To the extent that access to assets while you are alive and immediately effective transfers at death without probate court or lawyer involvement are good ideas for you and your children, and they often are, it is far better to accomplish these things with a good Durable Power of Attorney (access while you're alive, without ownership) and with non-probate transfers.

#### ***Summary of Probate Avoidance Techniques.***

**Joint ownership** with someone who survives means that after your death the other is the sole owner of the entire asset. There is nothing to go through probate, and your will and your other estate planning arrangements do not affect such property. Generally, only spouses should own things jointly.

**Trusts** are similar in some ways to corporations. They are fictitious legal entities that you create by signing documents. They do not die when you die. While able to do so, you may be the trustee. Trusts, by their trustees, own assets, and when the trustee job is vacant because of death, resignation, or disability, there is a mechanism prescribed by the creator of the trust for filling the vacancy with someone else. The trust typically has provisions about who is to receive the income generated by trust property and who is to have access to the assets while it

is in existence, and about when the trust is to terminate and how distribution is to be made of the assets remaining at that time. To the extent that you make arrangements for the trust to own property during your lifetime or to become the owner by non-probate transfers to take effect at your death, such assets do not go through a probate estate, and are not subject to the terms of your will.

**Non-probate transfers** are beneficiary designations such as “POD” (“pay on death”) or “TOD” (“transfer on death”), and may be used for any kind of property you own, including real estate, tangible personal property, intangible personal property, stocks, bank accounts, motor vehicles, livestock, etc. Note, however, that passage of real estate at death is controlled by the laws of the state where it is located. Thus if you own real estate in Missouri or in any of the few other states with laws similar to Missouri’s non-probate transfers law, this method of passing the real estate will work, but it still will not work for real estate interests located in most states. Documents of ownership with written beneficiary designations are required for all property that you desire to pass this way. It’s a bigger hassle now, and requires diligence, but to the extent it succeeds, it is virtually no hassle for your named beneficiaries after your death.

**Note about debts.** None of these probate avoidance techniques will allow escape from your debts. Missouri law provides that if a deceased person’s debts are not paid and no probate estate is opened, an unpaid creditor can force an estate to be opened, and enough of the property transferred by non-probate means will be brought in to pay the debts. This usually means that those receiving assets by any of the non-probate methods will need to see to it that the debts of the decedent are paid before a creditor forces the opening of an estate.

## **Planning for Disability**

All of the discussion so far relates to planning for transfer of assets and management of assets at the time of your death and thereafter. Sensible estate planning these days also includes advance planning for management of assets and care decisions during lifetime if you become unable to manage such things. Insurance people say that regardless of your age, in any given year you are more likely to become disabled than you are to die.

***History.*** For centuries the law has identified certain circumstances under which a person is not permitted to take legally effective action. Being a married woman used to be such a circumstance, but no longer is. Being a minor (Missouri law treats people as minors only until attaining age 18) and being disabled or incapacitated as defined in the statutes are the major areas under current law where people cannot make legally binding decisions about themselves or their property. Any attempt to act under these circumstances can be declared invalid by a court or may be invalid even without a court declaration.

***Guardianships and Conservatorships.*** Just as the law for centuries has disallowed legally effective action by minors and disabled persons, it has for centuries provided ways for other persons to be authorized to take legally effective action for them. Current Missouri law calls those appointed by a court to make health care and living arrangements with respect to a minor or disabled person “**guardians.**” Those appointed by a court to manage the assets of a minor or disabled person are called “**conservators.**” Often, if both personal care decisions and asset management are needed, the same person will be appointed as both the guardian and the conservator. Only a court, not an individual, can appoint someone as guardian or conservator for

someone, and those who have been appointed are subject to elaborate rules about how to fulfill their duties and how to report to the court about how they have done so. The court in question is the local probate court for the county of residence of the minor or disabled person. For minors, but not for adult disabled persons, the law provides that the minor's parents are his or her "natural guardians" and thus are legally empowered to make health care and living arrangement decisions, etc. for the minor without any formal court appointment. No such power exists for management of assets belonging to a minor; they can be managed only by a court-appointed conservator (with some exceptions).

***Avoiding probate during lifetime.*** Just as it's a good idea under many circumstances to avoid having the probate court be involved in your affairs after death, the same is true while you're still alive. All the same reasons apply: it often costs too much (much of the cost is attorney's fees); it takes up more time than is really necessary to get the job done; and it makes many things a matter of public record that many people would rather not have be public knowledge. Missouri these days allows, even facilitates by its statutes, different ways of handling these issues and circumstances without requiring involvement of the probate courts through guardianships and conservatorships. The following discussion will cover the most commonly used but not all of the alternatives.

***Trusts*** were among the early methods developed by attorneys for providing an alternative to conservatorships. Like conservatorships, they deal only with asset management and financial matters. It is possible for a trust to avoid the necessity for creating a conservatorship for a minor or a disabled person. The trustee, not the minor or disabled person, owns the assets and does as the trust document and trust law require, possibly paying all the living expenses of the minor/disabled beneficiary. As the beneficiary doesn't own anything, no conservator is required. Trustees are not empowered to make decisions about placement or health care, although they often are in a position to influence such decisions. If you are establishing a trust for other reasons or your circumstances are such that you wish to have a trustee manage all of your assets for you, the trust can go a long way toward establishing a mechanism for handling your affairs that will minimize the chance of needing probate court involvement if you become disabled.

Trusts also can be created by provisions in your estate planning documents such as wills to facilitate management of assets you wish to leave for the benefit of someone who is a minor or disabled or simply because you don't trust the beneficiary not to waste the assets. If you left assets directly to someone who is a minor or disabled, that alone would create the need for a conservator to be appointed for that person. Leaving things in trust for someone rather than outright to him or her thus could avoid expense, delay, and public character problems for such a bequest, and the terms of the trust could provide for termination of the trust and payment to the beneficiary of all trust assets upon the happening of any event you choose, such as attaining a certain age. If carefully drafted, certain trusts can benefit disabled persons without disrupting government benefits such as Medicaid.

***Custodianships*** are the rough equivalent of trusts, but all the terms are set by state statutes. They are especially useful for relatively small amounts someone wishes to give to a minor or disabled person. The gift is actually made to an adult as custodian for the beneficiary. The custodian manages the property but for most purposes the minor or disabled person for whom it is held is considered the owner. If the beneficiary is a minor, when he or she turns 21, the custodian must turn over the property and fully account for its management.

***Durable Powers of Attorney.*** The word “attorney” simply means “agent.” I am an “attorney at law” and thus authorized by clients to speak on their behalf, as their agent, in the legal arena, the courts and elsewhere. The legal system requires education, training, and licensure to act in this capacity. You may, however, choose anyone you wish, without regard to training and licensure, to do many other things on your behalf as your “attorney” or agent. Someone who is functioning as your officially designated agent in a context outside the courts, etc., is called your “attorney in fact.” Checking boxes and filling in names so that you give someone else authority to sign checks on your bank account without making that person an owner of the account is a common way of designating someone as your attorney in fact or agent with respect to that one asset, even though the signature card form where you do so may not use either term. For centuries, by operation of law each attorney in fact designation or “power of attorney” expired when the person who signed it either became disabled or died. Just in the last 20 years or so, this has changed. Now, if a power of attorney document specifies that it is “durable” and does so in the proper way under Missouri law, the disability of the signer does not affect the validity of the appointment of the agent. It is still true that death of the signer causes the authority under a power of attorney, even a “durable” one, to expire.

Powers of attorney, that is appointments of people as your agents, may be made for personal matters, such as health care, making living arrangements, etc., and they may also be made for property management, bill paying, etc. A single simple document may appoint someone to have all powers it is possible to give another person. Doing so makes it unnecessary to go around and fill out lots of different signature cards, “health care directives,” or other forms. If it’s done right under Missouri law, all your agent needs to do if he or she needs to sign checks on your account, sell your real estate, sue somebody on your behalf, or anything else, is produce an original of the simple document giving him or her such powers, and without your agent’s name on the signature card or other records, the bank or whomever your agent is dealing with is required to allow your chosen agent to act for you.

Powers of attorney may be created only by adult, non-disabled persons. Their effect often is to make appointment of either a guardian or a conservator unnecessary.

***Legal limitations on powers of attorney.*** Durable General Powers of Attorney are extremely powerful documents. For this reason, you should not give such powers to anyone unless you have near-total trust in him or her. Missouri law allows someone named in a broad “general” durable power of attorney to do everything the person who signed it could do, with certain limitations. No agent may ever make or revoke a will for another. No agent may ever make or revoke a “living will” for another. No agent may ever legally do something that is not in the best interests of the person who gave the power. No agent may ever legally do something contrary to the explicit instructions of the person who gave the power. Unless the power of attorney document itself lists them, the agent does not get a certain list of powers that the legislature thought were especially sensitive. That list includes such things as making or revoking gifts of the person’s property, creating trusts with the person’s property, amending trusts the person had created, changing beneficiaries on life insurance or other kinds of property, adding or deleting joint owners for property, making gifts of anatomical parts, authorizing autopsies, appointing guardians or conservators, etc. My general thinking about this is that if you have the near-total trust you should have in persons to whom you are giving such powers, you should include nearly all of these powers, make the document immediately effective, and

distribute copies to the persons you name so that if a situation arises where it needs to be used, that use can be accomplished without fuss or delay.

***Planning for the possible need for nursing home care.*** Beyond the planning represented by granting a durable power of attorney, this is a very complex topic, with an easily stated bottom-line conclusion. If you worry a lot about paying for nursing home care while still preserving some assets for heirs and can afford long-term care insurance, you might want to buy such insurance, but otherwise you probably shouldn't shape your decision-making about titling of property or its disposition at death based upon this worry. If you'd like a full discussion of this topic, I can provide it.

### **A Simple Starting Point**

A simple estate plan for a Missouri resident designed to use the above concepts might consist of a will for disposition of any probate assets at death and a broad durable power of attorney authorizing someone else to deal with everything during your lifetime in the event you can't. You also may want to take the additional step of avoiding probate at death, and could do so using non-probate beneficiary designations for all your property, to take effect at death. If your circumstances make such a plan appropriate, even the minor hassles of you, your spouse, or your heirs living with a trust are avoided, and the hassles and expense of probate court involvement are avoided, both during your lifetime and after your death. Even with a plan in place to avoid probate, it is wise to have a will as a backup, in case at your death there turn out to be some assets subject to the probate process.

Among the many reasons to deviate from such a simple plan are a realistic worry about estate taxes, having a close family member who is disabled, having children who are still minors, having a spendthrift child or other person you want to look after, not having anyone you trust completely, having an unusually strong desire for privacy, owning real estate in states other than Missouri, a desire to have a professional trustee such as a bank manage your assets, or having a prenuptial agreement.

Let me know how I may help you achieve your version of simplicity, peace of mind, and family harmony, or whatever your other estate planning goals may be.

William Jay Powell