LeBlanc & Young

Four Canal Plaza, Portland, Maine 04101
fax (207) 772-2822 · phone (207) 772-2800
leblancyoung.com · info@leblancyoung.com

# Memorandum

TO: LeBlanc & Young Clients

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SUBJECT: Basic Estate Planning Concepts

Estate planning documents cover a host of needs that may arise during someone's lifetime as well as pass assets upon death. Most plans include a will, power of attorney and health care document, and many include a revocable trust. These documents appoint individuals to serve as agents to assist the principal during their lifetime when they cannot act on their own to manage assets or make health care decisions. These documents arrange how and by whom financial affairs will be managed after someone has died and until they are distributed as the decedent has provided.

## I. Power of Attorney

A power of attorney allows someone to appoint another individual, known as the "agent" or "attorney-in-fact," to act in financial and business matters on the principal's behalf if the principal is unable to act on his or her own. For example, a power of attorney can be used to pay bills and manage the principal's financial affairs during a short illness or absence to assist in the smooth management of the principal's affairs.

A power of attorney might also facilitate the agent completing tax returns and, on occasion, making gifts. An agent under a power of attorney typically has comprehensive powers and thus the selection of an agent is an important decision that turns on a tremendous level of trust; the agent is charged under the law to act in the principal's best interest and for his or her benefit. The principal can keep the power of attorney and provide that it is only delivered for the agent to use if the principal so instructs, is incapacitated, or is otherwise completely unavailable. However, a copy of a power of attorney is now sufficient for the agent to exercise authority and it is important to keep that in mind if the principal wants to keep the power of attorney in reserve, only to be used when absolutely necessary. A durable power of attorney is effective throughout the principal's incapacity, and it terminates on the principal's death or upon revocation by the principal.

## II. Health Care Power of Attorney, Advanced Health Care Directive, and Other Health Care Documents

Maine has long had a comprehensive law that permits an individual to designate someone to act as his or her agent to make health care decisions if he or she is incapable of making such decisions on their own. An advanced directive not only appoints the agent, but gives the agent some guidance about the principal's feelings about such things as end of life choices, medication, guardianship, and organ donation. The advanced directive would also typically permit the agent to have access to all information under the HIPAA privacy laws. If an individual does not want to provide any guidance but would prefer to rely entirely on the judgment of the agent, he or she can sign a simple health

care power of attorney that names an agent to make all health care decisions, and it can include a living will component for health care providers in the event the agent is not available. An agent under any of these documents can also execute a "do not resuscitate" order (often referred to as a DNR and arranged in conjunction with a physician) if the principal becomes unconscious. Even if an individual has an advanced health care directive, it may be helpful to also have a simple health care power of attorney if the principal is traveling or will stay for long periods of time in a place that might be unfamiliar with an advanced directive (such as a college student). A living will is a third document that indicates how an individual feels about life-sustaining treatment if they cannot communicate themselves; advanced directives typically contain living will provisions and thus those documents are often redundant.

## III. Will

A will is a document that provides instruction as to how an individual's assets are to be distributed at the time of his or her death and appoints someone who will administer the estate, known as a "Personal Representative" or, in other states, an "Executor." The person for whom the will is created and who signs it is called the testator or testatrix. A will can provide that assets are distributed directly to someone, or added to a separate revocable trust or held in a trust that might be set forth within the provisions of the will itself. The provisions of the will are given effect only after the testator has died and the will is admitted to probate. If a testator has minor children, a will would also name a guardian to be appointed to care for the minor children upon his or her death. If the will holds assets in a continuing trust the provisions of which are included in the will, the will also names a Trustee to administer that trust. A trust in a will might be for the benefit of minor children, in which case the assets might stay in trust until the children are all at least a certain age, and in the interim, their living expenses may be paid by the Trustee from the trust assets. Alternatively, a trust in a will might be for the benefit of a spouse or even for a spouse and children combined. Each will and any trust it contains will be a uniquely drafted document, tailored to the needs of the testator or testatrix.

## IV. Revocable Trust

A revocable trust is a separate written agreement between the Donor (person who is creating the trust) and the Trustee, who will administer the trust. A trust can hold assets (a "funded trust") during the Donor's lifetime, and may serve as a vehicle to manage the assets of the Donor either as a matter of convenience or as a matter of necessity if the Donor becomes incapable of managing the assets. If assets are held in a trust during the Donor's lifetime, trusts often provide that income and principal can be used to support the Donor and his or her family during the Donor's lifetime, which can be very helpful if the Donor should become incapacitated. A revocable trust is typically completely amendable, which means it can be modified or revoked in full while the Donor is alive and has his or her capacity. Upon the Donor's death, the trust becomes irrevocable and might receive additional assets transferred to it from the Donor's estate. The trust then would typically describe how assets are either to be distributed to beneficiaries free of trust, or retained in further trust for the benefit of the beneficiaries named in the trust. Because a trust is an agreement between each Donor and the Trustee(s), every trust is different and sets out the unique wishes and directives of the Donor as well as the role of the Trustee. Selection of the Trustee(s) is an important choice and the trust might have different Trustees at different times. For example, it is not uncommon for a husband and wife to be initial Co-Trustees during the lifetime of both of them, but upon the death of one of them, the survivor can continue to serve as Trustee, either with a child, an advisor, an

institution or sometimes as sole Trustee. After the death of the Donor and his or her spouse, the Trustees typically will be different, at least in part, from those who served during the Donor's lifetime. Most trust documents give someone, either beneficiaries or advisors, the ability to appoint, remove and replace an Independent Trustee if that becomes advisable. Trusts can accomplish many simple goals, such as holding assets until a child is old enough to manage them, as well as more complicated goals, including tax planning, special needs planning, and extensive asset management, all of which are more thoroughly covered in other areas of our website.