# TIPS & TACTICS FOR WILLS & TRUSTS

## I. Personal Information Record Book.

**A.** Allows you to inventory your assets and indicate to your family what and where your assets are.

**B.** Helps you to analyze your debts, obligations and charitable desires and begin the process of achieving your goals.

**C.** Allows you to indicate any funeral preferences.

**D.** Provides a great marketing and potential fund-raising tool.

## II. Living Will OR Advance Care Plan.

**A. Definition of Living Will:** A living will is a written declaration, stating an individual's desires for medical care or noncare, including palliative care, and other related matters such as organ donation and body disposal. The Tennessee legislature determined that every person has a fundamental and inherent right to die naturally and to accept, refuse, withdraw from, or otherwise control decisions relating to the rendering of his or her own medical care, specifically including palliative care and the use of extraordinary procedures and treatments.

Therefore, the living will contains directions regarding health care decisions when an individual has a terminal condition, which means any disease, illness, injury or condition from which there is no reasonable medical expectation of recovery and which, as a medical probability, will result in death, regardless of the use or discontinuance of medical treatment implemented for the purpose of sustaining life, or the life process.

**Who may sign a Living Will?** Any competent adult person may execute a living will, but it must also be signed in the presence of two witnesses and a notary public. The witnesses must not be related to the person signing the document (the principal) by blood or marriage; must not be entitled to any portion of the principal's estate under any will or codicil; must not be the principal's attending physician, an employee of the attending physician, nor an employee of a health facility in which the principal is a patient; and must not have a claim against any portion of the principal's estate.

**What to do with a Living Will?** The living will should be delivered to the principal's attending physician or health care provider, and it will be given effect until revoked either by a written revocation, signed and dated by the

principal, or by an oral statement or revocation made by the principal to his or her attending physician. As to the revocation of the living will, the principal's mental state or competency is irrelevant.

**What legal effect does a Living Will have?** A valid living will must be honored by any attending physician or other health care provider, and if any physician or provider cannot in good conscience comply with the provisions of such living will, then such physician or provider must make every reasonable effort to assist in the transfer of the patient to another physician who will comply with the declaration. If such measures are not taken, the health care provider or attending physician faces civil liability and professional disciplinary action.

**What about nourishment and fluids?** Although a living will generally authorizes the attending physician or health care provider to withhold or withdraw medical treatment implemented for the purpose of sustaining life, or the life processes, it must specifically state that simple nourishment and fluids be withheld or withdrawn; otherwise, such provisions will be implemented despite the living will. The absence of a living will does not create a presumption concerning the intention of an individual regarding the use, withholding or withdrawal of medical care.

The signing of a living will does not affect the sale, procurement or issuance of any policy of life insurance, nor is it deemed to modify the terms of an existing policy of life insurance. No policy of life insurance will be legally impaired or invalidated by the withholding or withdrawal of health care.

**What if a Living Will is signed in another state then the principal moves to Tennessee?** If a living will is executed in another state and then the principal moves to Tennessee, the living will is given effect in Tennessee if the living will is in compliance with either the provisions of Tennessee law or the laws of the state in which the principal was a resident.

**B. Advance Care Plan.** Under the provisions of the Tennessee Health Care Decisions Act passed in 2004, the Tennessee Department of Heath, Board for Licensing Health Care Facilities was given the authority to announce rules and regulations publicly in order to implement the new law, and the law directed the Board to develop and issue appropriate model forms for advance directives consistent with the provisions of the law. The Board for Licensing Health Care Facilities issued new rules in 2004 and adopted model forms in 2005. Those forms are attached.

**Definitions:** In the Act, an **"advance directive"** is defined as "an individual instruction or a written statement relating to the subsequent provision of health care for the individual including, but not limited to, a living will or a durable power of attorney for health care." An **"individual instruction"** is defined as "an individual's direction concerning a health care decision for the

individual." A **"surrogate"** is defined as "an individual, other than a patient's agent or guardian, authorized under this part to make a health care decision for the patient. The terms "principal," "individual" and "patient" are used interchangeably in the Act.

**Who may sign an advance directive?** Any competent adult or emancipated minor may execute an advance directive, but it must also be signed in the presence of two witnesses **or** in the presence of a notary public. Both witnesses must be competent adults and neither may be appointed in the document as an agent. At least one of the witnesses must not be related to the person signing the document (the principal) by blood or marriage or adoption; and must not be entitled to any portion of the principal's estate under any will or codicil. Unlike the law applicable to living wills and powers of attorney, the principal's attending physician, an employee of the attending physician, and/or an employee of a health facility in which the principal is a patient are all entitled to sign the document as witnesses.

**What to do with an advance directive?** An advance directive should be delivered to the principal's attending physician or health care provider, and it will be given effect until it is revoked. The designation of an agent for health care decision-making can only be revoked by the principal in a signed writing or by personally informing the supervising health care provider. Any other advance directive may be revoked at any time and in any manner that communicates the principal's intent to revoke. Although as to the revocation of the living will, the principal's mental state or competency is irrelevant, by contrast the Health Care Decisions Act's revocation provisions refer to "an individual having capacity."

**What legal effect does an individual instruction have?** A valid individual instruction must be honored by any health care provider or institution, and if health care provider or institution cannot in good conscience comply with the provisions of such individual instruction, then such provider or institution must immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision. If such measures are not taken, the health care provider or institution faces civil liability for the greater of $2,500 or actual damages, with reasonable attorneys' fees and costs.

**What about nourishment and fluids?** The new Advance Care Plan contains specific and much more detailed choices regarding the withholding or withdrawal of medical treatment in a variety of situations. The absence of an advance directive does not create a presumption concerning the intention of an individual.

The signing of an advance directive does not affect the sale, procurement or issuance of any policy of life insurance, nor is it deemed to

modify the terms of an existing policy of life insurance. No policy of life insurance will be legally impaired or invalidated by the withholding or withdrawal of health care.

**What if an advance directive is signed in another state then the principal moves to Tennessee?** If an advance directive is executed in another state by a nonresident of Tennessee at the time of execution, the advance directive will be given legal effect in Tennessee if the advance directive complies with either the provisions of Tennessee's Health Care Decisions Act or the laws of the state of the principal's residence.

The new **Advance Care Plan** form includes at the outset the appointment of a person to make health care decisions for the principal (a term used interchangeably in the act with the terms "individual" and "patient") "*when I can no longer make those treatment decisions myself*," and also includes the appointment of an alternate agent if the person first named "is unable or unwilling" to make health care decisions for the principal. (This portion of the form will be contrasted with the Appointment of Health Care Agent discussed below.) Three separate sections follow in the form, one exhibiting choices to indicate the individual's desired quality of life, one with options related to "medically appropriate treatment," and one related to "other instructions" with the suggestion of "burial arrangements, hospice care, etc." The form can obviously be signed **either** in the presence of two witnesses **or** in the presence of a notary public, and the requirements for witness qualification are indicated on the form.

## III. Durable Power of Attorney OR Appointment of Health Care Agent.

**A. Definition of Power of Attorney:** "Durable power of attorney for health care" means a durable power of attorney to the extent that it authorizes an attorney-in-fact to make health care decisions for the principal. Health care means any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition.

**What are the requirements of a Power of Attorney for Health Care?** To be enforceable the durable power of attorney for health care must comply with the following statutory requirements: 1) it must specifically authorize the attorney-in-fact to make health care decisions on behalf of the principal; 2) it must set forth the date on which it was signed; and 3) it must be signed by the principal in the presence of a notary public and two witnesses. The witnesses must not be the attorney-in-fact; a health care provider; an employee of a health care provider; the operator of a health care institution; an employee of a health care institution; a relative of the principal's by blood, marriage or adoption; a person who has a claim against the principal's estate; or a person named as a

beneficiary of the principal's estate or an heir by operation of law. Likewise, the attorney-in-fact must not be the principal's treating health care provider, nor an employee of the treating health care provider, nor an operator of a health care institution, nor an employee of an operator of a health care institution except where the employee of the treating health care provider or of an operator of a health care institution is also a relative of the principal's. ***The document should state that it is HIPAA compliant at the top*.**

**What legal effect does the Power of Attorney for Health Care have?** Unless the durable power of attorney for health care provides otherwise, the attorney-in-fact has priority over any other person to act for the principal in all matters of health care decisions including the decision to withhold or withdraw health care permitting the principal to die naturally. If following the signing of a durable power of attorney for health care a court appoints a conservator for the principal, that conservator *does not* have the power to revoke or amend the durable power of attorney for health care nor to replace the attorney-in-fact designated in such durable power of attorney.

**What rights does the attorney-in-fact have?** Under a durable power of attorney for health care, the attorney-in-fact has the same rights as the principal to receive information regarding proposed heath care, to receive and review records, and to give consent to the disclosure of medical records. He or she can consent to the withholding or withdrawal of health care necessary to keep the principal alive; however, such authority does not override any objection made by the principal and can be disregarded by the health care provider without incurring liability.

The signing of a durable power of attorney does not affect the sale, procurement or issuance of any policy of life insurance, nor is it deemed to modify the terms of an existing policy of life insurance. No policy of life insurance will be legally impaired or invalidated by the withholding or withdrawal of health care.

**How is it revoked?** The principal may revoke the power of attorney for health care by notifying the attorney-in-fact orally or in writing or by notifying the principal's health care provider orally or in writing. It is presumed that the principal has the mental capacity to revoke his or her power of attorney for health care; therefore, the burden to prove otherwise falls on anyone opposing the revocation. The dissolution or annulment of the principal's marriage to the person previously appointed automatically revokes any designation of the former spouse to serve under a power of attorney for health care.

**What if the document is signed elsewhere then the principal moves to Tennessee?** Finally, if a durable power of attorney for health care is executed in another state and then the principal moves to Tennessee, the

durable power of attorney will be given effect in Tennessee if that durable power of attorney for health care is in compliance either with the provisions of Tennessee law or the laws of the state where the principal previously resided.

**B. Appointment of Health Care Agent.** This form is much abbreviated compared to the Advance Care Plan: the only decision indicated on the form is the appointment of the individual's health care agent "*if I cannot make decisions for myself*, including any health care decision that I could have made for myself if able." The language used in the appointment section of the form for the designation of an alternate agent is also slightly different from that used in the Advance Care Plan: "If my agent is unavailable or is unable or unwilling to serve . . ." As in the Advance Care Plan, the form may be signed in the presence of two witnesses OR in the presence of a notary public, and the same witness qualifications are clearly indicated on the form itself.

**C. "Universal" DNR or POST Order.** In the past, health care providers were frustrated because DNRs ("Do Not Resuscitate" Orders) were not easily transferred from one institution to another, and they were not universally recognized. Under the new law, all health care providers licensed in Tennessee are required to recognize the "Universal" DNR order. A "Universal" DNR Order is a "*written order that applies regardless of the treatment setting and that is signed by the patient's physician which states that in the event the patient suffers cardiac or respiratory arrest, cardiopulmonary resuscitation should not be attempted*." Existing DNRs are **still valid**.

**D. Physician Orders for Scope of Treatment (POST) Forms:** As of February 2005, *this new form replaces the old in-facility DNR form AND the state EMS DNR order forms*. The form is a physician's order and so must be signed by the attending physician, and it should be signed by the patient or his or her surrogate. Ideally the POST form will reflect any decisions made by the patient using a living will OR an advance care plan.

**E. Surrogate Decision Maker.** Under Tennessee's new law, if a patient (*an adult or an emancipated minor*) has not signed an advance directive nor appointed an agent to make health care decisions on his or her behalf, the designated physician or supervising health care provider may appoint a surrogate to make health care decisions on behalf of the patient. The Act creates a rebuttable presumption that the selection of a surrogate by the physician or supervising health care provider was valid, thereby offering the physician or supervising health care provider protection from liability.

**F. Rules for Appointing a Surrogate:** In the event the supervising health care provider or designated physician must identify a surrogate, the law provides that a "surrogate shall be an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, who is reasonably available, and who is willing to serve." Preference for the

appointment of the surrogate is as follows: (a) the patient's spouse, unless legally separated; (b) the patient's adult child; (c) the patient's parent; (d) the patient's adult sibling; (e) any other adult relative of the patient; or (f) any other adult who satisfies the requirements of subdivision (c)(2) noted above.

**G. Living Will and Health Care Powers Preserved.** When the Tennessee Health Care Decisions Act was first introduced, the draftsmen proposed to amend the current Living Will sections and the current Durable Power of Attorney for Health Care sections by *deleting these sections in their entirety*. However, due to concerns of the legal community, the House Judiciary Committee adopted the Tennessee Bar Association's amendment which called for the parallel application of the Tennessee Health Care Decisions Act and the current Living Will

A properly executed Living Will and Durable Power of Attorney for Health Care already in place will not need to be rescinded or changed in most situations, and each of these documents is clearly still valid and operative. If an individual chooses to use the new forms, *all documents should be consistent with one another*. Any person facing long-term residence in a nursing home or extensive medical care should consider working with his or her physician to place a POST order in the patient's file.

**H. Where can I get more information?** More information is available at the following web site:
**www2.state.tn.us/health/boards/advancedirectives/faq.htm**

**I. Durable Power of Attorney for Finances.** This is <u>usually</u> a separate document appointing another person (and normally a successor) to take care of financial and business matters for the individual who signs the Power of Attorney.

## IV. Last Will and Testament.

**A.** Provides a statement (preferably prepared for you by an attorney) of the disposition of your property upon your death.

**B.** Can be handwritten or attested (with two witnesses in most states).

**C.** Requires that you be of sound mind, usually eighteen (18) years of age or older.

**D.** Can include an affidavit of the witnesses so that they do not have to be located upon your death (called a **"self-proving will"** and recognized in many states).

**E.** Allows you to name an executor to handle your assets at your death.

**F.** Allows you to name a guardian for the care of your minor children.

**G.** Furnishes you with an opportunity to reduce the costs of probate by eliminating such expenses as the posting of a bond, filing of an inventory and preparation of accountings for your estate.

**H.** Can be drafted to save substantial amounts of death taxes and to include gifts to charity, either outright in fixed dollar amounts or in percentages of the value of the estate, or in trust, first for your loved ones and then, after their deaths, to the charity.

## V. Trust.

**A.** Can be established during your lifetime or in your will.

**B.** Allows you to provide for a handicapped child/parent/friend.

**C.** Furnishes you with an opportunity to provide for your spouse during his or her lifetime, but to leave the remainder of your property to your children (perhaps by a prior marriage) upon your spouse's death, or to your chosen charity.

**D.** Can be used to avoid probate, keep your financial matters private, retain control of a family business, provide for a surviving spouse and then for children upon the spouse's death, prevent the loss of your children's inheritance if surviving spouse remarries, save substantially on death taxes and pass significant amounts to charity.

## VI. Gift, Estate and Inheritance Taxes

**A.** What is a gift and when is a federal (IRS) **gift tax return** required?

**(1)** A gift is any transfer of property for less than an adequate payment in money or money's worth requiring:

**(a)** Capacity of the donor (the person making the gift)
**(b)** Completed delivery to the donee (the person receiving the gift)
**(c)** Acceptance by the donee

**(2)** Any outright gift of more than $12,000 in value per person per year must be reported on a federal gift tax return Form 709; however, there is a full "marital deduction" for federal gift tax purposes for most gifts between husband and wife

**(3)** Any gift of a **future interest** must be reported, no matter what the value; the most common types of future interests are created in trusts, and by making a deed of property with a life estate retained by the person making the gift

**B.** What property is taxed in your estate and when is a federal **estate tax return** required?

**(1)** All property owned in your name alone: real estate, stocks, bonds, bank accounts, notes receivable, cash, **life insurance,** miscellaneous property like jewelry, silver, guns, antiques, artwork, partnership interests, etc.

**(2)** Joint property held with spouse and held with others

**(3)** Transfers of property made with ***strings*** attached (life estates retained, certain trust transfers, etc.)

**(4)** Pension plans, certain annuities, and powers of appointment

**(5)** All gifts made in prior years since January 1, 1977, if those gifts were reportable on gift tax returns

**(6)** A federal estate tax return is required to be filed, on Form 706, if the **fair market value** of all the property listed above equals or exceeds the following amounts (depending on the year of death):

(a) Before January 1, 1977, $60,000 in fair market value of all property

(b) After 6-7-01, as follows:

| | | | |
|---|---|---|---|
| **1977 -** | $120,000 | **1986 -** | $500,000 |
| **1978 -** | $134,000 | **1987 - 1997:** | $600,000 |
| **1979 -** | $147,000 | **1998 -** | $625,000 |
| **1980 -** | $161,000 | **1999 -** | $650,000 |
| **1981 -** | $175,000 | **2000 - 2001:** | $675,000 |
| **1982 -** | $225,000 | **2002 - 2003:** | $1,000,000 |
| **1983 -** | $275,000 | **2004 - 2005:** | $1,500,000 |
| **1984 -** | $325,000 | **2006 - 2008:** | $2,000,000 |

**1985 -** $400,000 **2009 -** $3,500,000
**2010 - UNLIMITED: ESTATE TAX IS REPEALED**
**2011 - ESTATE TAX IS REINSTATED;**
**$1,000,000 tax-free.**

**C.** If your estate is large enough that you must file an estate tax return, what property may be **deducted** before any tax is figured?

**(1)** Funeral and administration expenses
**(2)** Debts of the decedent, including mortgages
**(3)** All property transferred in certain ways to the surviving spouse
**(4)** All property transferred in certain ways to eligible charities

**D.** What is the **rate** of the federal estate tax?

**(1)** First, the exact rate of the estate tax varies, depending upon the year in which he person dies

**(2)** For the estates of persons who die in 1987 and thereafter, the rate of the tax begins at 46% on amounts over $2,000,000; the maximum rate of estate tax applied is now 46%

**(3)** Certain credits are usually allowable against the estate tax

**(4)** From 1977 to 1982, the top rate of estate tax was **70%** on amounts over $5,000,000; this highest rate of 70% has been gradually reduced to the current maximum rate of 46%, and that rate is scheduled to be reduced further

**E.** Is there a **gift** and/or **inheritance tax** imposed by the **State of Tennessee** in addition to the federal tax?

Yes, the State of Tennessee also imposes a tax upon the transfer of property by any gift greater than $12,000 per person per year to Class A beneficiaries (husband, wife, son, daughter, lineal ancestor or descendant, brother, sister, son-in-law, daughter-in-law, or step-child), although there is a full "marital deduction" available for Tennessee gift tax purposes for most gifts between husband and wife. Tennessee taxes certain gifts to all other persons (Class B) if such individual gifts exceed $3,000 per person per year, and if the total of all such gifts exceeds $5,000 in the aggregate. The rate of Tennessee's gift tax can range from 5.5% to 16%. [If you have no children, then nieces and nephews are treated as Class A and you may give them each $12,000/yr.]

Tennessee's inheritance tax ranges from 5.5% to 9.5% on property greater than $1,000,000 left to Class A beneficiaries. [For Class B heirs, the rates of tax and amounts of property subject to tax varied until 1990, when both the rate of tax and the threshold amount matched those of Class A bequests.]

**F.** If you and your spouse own everything jointly and you do **no estate planning,** and if the combined **fair market value** of all of your assets **(including life insurance proceeds on your lives)** equals as much as **$4 million** right now, your children or other heirs could pay **more than $900,000** (based on year 2006 rates) in **unnecessary inheritance and estate taxes** after you and your spouse have died. **MORAL:** If you are worth more (including the face amounts of your life insurance policies) than the tax-free amounts (see Paragraph B(6) above for the year of death), **get thee to an estate planner!**

## VII. Executors and Administrators

**A. Who can serve in Tennessee as your Executor/ Administrator?** Generally, anyone may serve alone as your Executor without being a resident of Tennessee. You may also name an out-of-state Bank to serve alone as your Executor if you choose. If you die without a will, the person who handles the property in your probate estate is called your "Administrator," and Tennessee law provides a list of the persons who are entitled to serve as administrator in order of preference as follows: your surviving spouse; your next of kin; or your largest creditor.

**B. What are the Executor/Administrator's duties?** To apply for the job and post a bond (unless the bond requirement is excused in your will or waived by your heirs); to determine and collect together what you owned in your name alone and what assets are directed to be paid to your estate at your death; to prepare and file with the court a listing of all of those assets ("inventory") unless this requirement is excused in your will or waived by your heirs; to notify your creditors of your death and to make sure that their just debts are paid; to hire attorneys, accountants and/or any other professionals required to assist in fulfilling these duties; to file tax returns and pay all taxes that are due by your estate; to file annual accountings of all the funds received and spent on behalf of the estate unless this requirement is excused in your will or waived by your heirs; and to distribute your property as you have directed in your will or under Tennessee law if you died without a will.

**C. When does probate have to begin?** Interestingly enough, there is no requirement or time limit in which one must begin a probate in Tennessee, although a person named as Executor is supposed to act with diligence in beginning this process.

**D. Where is probate required to be handled?** Probate is properly conducted in the county in which the decedent resided at the time of his or her death.

**E. How can you get rid of an Executor or Administrator who isn't doing a good job?** If you are not happy with the performance of an Executor or Administrator of an estate in which you are a beneficiary, you have the right to ask questions and to get answers about how the assets are being handled. If the answers you get show that the Executor or Administrator is not doing a good job, you will probably need to hire your own attorney to get him, her or it removed, but this should not be an impossible task if there has been mishandling or wrongdoing in the estate's administration.

## VIII. Probate

**A.** If there is enough cash, stocks, bonds, and other personal property in the estate to pay all debts and expenses, **the Executor/ Administrator does not normally have control over the real property owned by the decedent.** In other words, if you are one of five children who are the equal heirs of your widowed Mother's estate, and if the funeral bill and all other expenses are adequately covered by the cash in your Mother's name alone at her death, each of you and your siblings is automatically an equal owner of your Mother's real property. (This is true unless your Mother's will says that her Executor is in charge of the real estate.) Each of you has the right and/or the responsibility to maintain, rent, repair, and otherwise manage the property from the moment of your Mother's death. **So don't wait for the Executor to decide what to do about the real estate!**

**B.** If you die without a will, Tennessee law has a plan laid out for you:

**(1)** If you have a surviving spouse but no children, all of your property passes to your surviving spouse.

**(2)** If you have a surviving spouse and only one child, your property will pass in equal shares to your surviving spouse and your child.

**(3)** If you have a surviving spouse and two or more children, your property will pass one-third to your surviving spouse

and two-thirds will be divided among your children (whether you have two, three or ten children).

**(4)** If you have no surviving spouse, your property will be divided equally among your children.

**(5)** If you have no surviving spouse and no children, your property will pass to your parents equally. If one of your parents is deceased, all of your property will pass to your other parent.

**(6)** If you have no surviving spouse, no children and no living parents, your property will pass to your brothers and sisters in equal shares.

**(7)** If you have no surviving spouse, no children, no living parents and no brothers and sisters, your property will pass in two equal shares: one share to the descendants of your Father's parents; and one share to the descendants of your Mother's parents.

**(8)** If there are NO descendants of either your Father's parents or your Mother's parents, your property will be distributed to the State of Tennessee. Your property is said to "escheat" to the State in this situation.

**(9)** In all examples above, if a relative (other than your spouse) is deceased, with children who survived him or her, the children will take their parent's share.

**C.** Most of the trouble among family members going through probate comes from the failure of the Executor or Administrator of the estate to keep the other family members who are heirs informed about what is going on.

## IX. Avoiding Probate With Revocable Living Trusts

**A. To avoid probate, especially if you should become disabled at some point in the future and you have no one who lives nearby who can be trusted to carry out a power of attorney**

**B. To avoid two or three or more probates if you own property in other state(s)**

**C. To avoid (perhaps) the claims of a second spouse if no premarital agreement was signed**

**D.** **To reduce (or hopefully eliminate) probate and attorneys' fees and expenses and (perhaps) reduce death taxes**

**E.** **To maintain privacy as to your estate plan**

**F.** **To make things easier on the kids and/or your other heirs**

**G.** **To discourage a will contest and other bickering among your heirs**

**H.** **Right of Survivorship, Life Insurance, Pension Benefits, IRAs, 401(k)s, and irrevocable Trusts also avoid probate**