May Someone With Dementia Sign a Will?

Millions of people are affected by dementia, and unfortunately many of them do not have all their estate planning affairs in order before the symptoms start. If you or a loved one has dementia, it may not be too late to sign a will or other documents, but certain criteria must be met to ensure that the signer is mentally competent.

In order for a will to be valid, the person signing must have "testamentary capacity," which means he or she must understand the implications of what is being signed. Simply because you have a form of mental illness or disease does not mean that you automatically lack the required mental capacity. As long as you have periods of lucidity, you may still be competent to sign a will.

Generally, you are considered mentally competent to sign a will if the following criteria are met:

- You understand the nature and extent of your property, which means you know what you own and how much of it.
- You remember and understand who your relatives and descendants are and are able to articulate who should inherit your property.
- You understand what a will is and how it disposes of property.
- You understand how all these things relate to each other and come together to form a plan.

Family members may contest the will if they are unhappy with the distributions and believe you lacked mental capacity to sign it. If a will is found to be invalid, a prior will may be reinstated or the estate may pass through the state's intestacy laws (as if no will existed). To prevent a will contest, your attorney should help make it as clear as possible that the person signing the will is competent. The attorney may have a series of questions to ask you to assess your competency. In addition, the attorney can have the will signing videotaped or arrange for witnesses to speak to your competency.

For more information about preventing a will contest, [click here.]

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Revocable Trust Myths

Articles constantly appear and seminars proliferate lauding the benefits of "revocable" or "living" trusts and urging all people of sound mind to create them. These articles or seminars **invariably prompt clients to ask me why their estate plan fails to include one of these miraculous devices**. This Memorandum will highlight some of the advantages and disadvantages of Revocable Trusts vis-à-vis Wills in Maryland and the District of Columbia

Revocable (living) trusts are basically plain vanilla revocable trusts established during a person's lifetime. The person retains the right to income and principal and the right to amend or revoke the trust prior to death. The trust becomes irrevocable when the person dies and the trust assets are disposed of according to the trust instrument. The trust instrument at death acts essentially as a **will substitute**.

The claims made for a revocable trust as a will substitute are that it saves taxes, avoids the expenses associated with probate, and avoids delays in distributing assets after death. There is also the claim that it ensures a greater degree of privacy than probating a will. Let's briefly dispel some myths and then highlight situations when a revocable trust may make sense.

***Estate, inheritance, and income taxes*. **The first myth to be dispelled is that a revocable trust is a tax-savings device. The assets in the trust at death are included in the person's estate and subject to estate tax. **There simply are no inheritance or estate tax savings**.

As far as income tax, an estate offers several advantages over the revocable trust, the most important of which is the ability of the estate to elect a fiscal year. While a trust must report on a calendar year basis, the ability of the estate to choose a fiscal year may enable the beneficiaries to postpone payment of tax for a year on post-death income.

Avoiding probate costs and delays. The other major claim made for revocable trusts is that they save probate costs. This is literally true, except that there are important counterbalancing expenses involving revocable trusts. Probate fees themselves tend to be rather reasonable in Maryland, for example. In fact, revocable trusts can involve probate fees because it is frequently necessary to have a "Pour-over" Will for assets not in the trust, in which case there are probate fees.

Of more importance, however, is the fact that the cost of preparing the trust agreement and related documents, such as a pour-over will, and the costs of transferring property to the trust, can be significant. Moreover, transferring assets to the trust can be more than a documentary formality. Permission may be necessary to transfer interest in partnerships, closely held businesses, and cooperative apartments. With respect to real estate, deeds must be prepared.

It is true that there is no interruption in trust administration when the person establishing the revocable trust dies, but there are usually only minimal delays in having a will admitted to probate and special procedures are available to expedite the process. As a practical matter, distributions by both trustees and executors are generally delayed until assets are valued, federal and state inheritance taxes are paid, and the appropriate releases secured. The legal fees would be fairly constant whether or not a revocable trust is issued, provided that you retain an attorney who is compensated based upon professional services rendered rather than getting a “cut” or percentage of the size of the probate estate. Although a revocable trust does not have to be filed for probate like a traditional will and has “privacy” advantages, its privacy may be compromised by the requirement of banks and brokerage firms that they review the trust agreement before they will open an account. In addition, the assets in a revocable trust must be reported on an information report in Maryland which needs to be filed.

Avoiding contested wills. Because a “trust” and a “will” are separate legal concepts, a trust is not subject to a will contest. However, trusts are subject to attack on the basis of lack of capacity, undue influence, and fraud. These same grounds can be used to contest a transfer by will.

BUT – there is an additional problem with trusts. When a will is probated, the disposition of the assets come under the supervision of the Court through the Register of Wills, an administrative agency of the court. This includes the auditing of accounts and distributions by the Register of Wills auditor’s office. **Contrary to popular belief, this is a good thing that is – unfortunately – avoided by having a trust.** Recently I spent two years representing – and litigating – a revocable trust set up by a mother for her two adult children. She named only one child as trustee, and unfortunately the two children did not agree on the valuation or method of distribution of the trust. There were considerable legal fees and emotional costs that would have been avoided had the mother simply left the assets in her will, because the executor would have been under the supervision of the court, with prescribed valuation methods and distribution procedures.

Avoiding creditors' claims. During your lifetime, assets in a living trust are subject to the claims of your creditors. After your death, these assets are subject to the claims of your estate's creditors.

Avoiding your spouse's claim to a share of your estate. Most state laws provide that a surviving spouse may claim a share of revocable trust assets.

Avoiding the expense of guardianship. While a living trust may avoid the expense of a guardianship in case of your future incapacity, a durable power of attorney is a simpler and less costly alternative to achieve the same goal.

Avoiding lengthy probate delays. There are rare circumstances where families and others clash for an extended period after a death. Such disputes can cause delays in the administration of either a probate or a living trust (as noted above). In other circumstances, disputes with the Internal Revenue Service can cause more delays. However, in most circumstances the administration of a living trust is no more time efficient that the administration of a will in probate.

The living trust is the only way to avoid probate. If your goal is to avoid probate, there are several ways to do so. Joint tenancy with rights of survivorship, multiple party accounts with financial institutions, and transfer on death or pay on death (TOD or POD) designations of securities and bank accounts are common and inexpensive methods of avoiding probate.

When revocable trusts work. Let me identify a few specific situations as being particularly suited to revocable trusts:

- Where a person has significant real estate holdings in a number of states. Here a revocable trust could avoid the necessity of a probate filing in each locale.
- For a elderly surviving spouse with an uncomplicated asset structure (e.g., one or two brokerage accounts), the revocable trust may be the appropriate instrument. This is because the costs and aggravation encountered with the transfer of the assets to the trust (e.g., re-titling brokerage accounts) is minimal. In these cases, the assets would pass upon death simply and without delay.
- For what might be called Machiavellian estate planning, there are some states, including Maryland, where the revocable trust – unlike a will – may still be used in certain instances to bar the grantor's surviving spouse from obtaining a statutory share of such trust property.
- A revocable trust may be an excellent tool for the orderly management of the affairs of an elderly person or someone otherwise unable or unwilling to manage his or her property. A similar result can usually be achieved through the use of a Durable General Power of Attorney – a document appointing another individual to manage your affairs. Maryland even permits a "springing" power which would not take effect until the incapacity arises. Nonetheless, the revocable trust may be the proper tool in certain situations. It is certainly preferable to a formal guardianship or conservatorship.

There are other situations where the revocable trust may be beneficial. However, the purported advantages of a revocable trust do not seem to stand up to a close comparison with more traditional estate planning vehicles in many situations. In short, the decision to use a will or a revocable trust needs to be evaluated based upon a client's specific circumstances. In this regard, please feel free to contact us to discuss these issues more closely.

Preventing a Will Contest

Emotions can run high at the death of a family member. If a family member is unhappy with the amount they received (or didn't receive) under a will, he or she may contest the will. Will contests can drag out for years, keeping all the heirs from getting what they are entitled to. It may be impossible to prevent relatives from fighting over your will entirely, but there are steps you can take to try to minimize squabbles and ensure your intentions are carried out.

Your will can be contested if a family member believes you did not have the requisite mental capacity to execute the will, someone exerted undue influence over you, someone committed fraud, or the will was not executed properly.

The following are some steps that may make a will contest less likely to succeed:

- **Make sure your will is properly executed**. The best way to do this is to have an experienced elder law or estate planning attorney assist you in drafting and executing the will. Wills need to be signed and witnessed, usually by two independent witnesses.
- **Explain your decision**. If family members understand the reasoning behind the decisions in your will, they may be less likely to contest the will. It is a good idea to talk to family members at the time you draft the will and explain why someone is getting left out of the will or getting a reduced share. If you don't discuss it in person, state the reason in the will. You may also want to include a letter with the will.
- **Use a no-contest clause**. One of the most effective ways of preventing a

challenge to your will is to include a no-contest clause (also called an "in terrorem clause") in the will. This will only work if you are willing to leave something of value to the potentially disgruntled family member. A no-contest clause provides that if an heir challenges the will and loses, then he or she will get nothing. You must leave the heir enough so that a challenge is not worth the risk of losing the inheritance. Some states, however, either do not honor no-contest clauses or have limitations upon them.

- **Prove competency**. One common way of challenging a will is to argue that the deceased family member was not mentally competent at the time he or she signed the will. You can try to avoid this by making sure the attorney drafting the will tests you for competency. This could involve seeing a doctor or answering a series of questions.
- **Video record the will signing**. A video recording of the will signing allows your family members and the court to see that you are freely signing the will and makes it more difficult to argue that you did not have the requisite mental capacity to agree to the will.
- **Remove the appearance of undue influence**. Another common method of challenging a will is to argue that someone exerted undue influence over the deceased family member. For example, if you are planning on leaving everything to your daughter who is also your primary caregiver, your other children may argue that your daughter took advantage of her position to influence you. To avoid the appearance of undue influence, do not involve any family members who are inheriting under your will in drafting your will. Family members should not be present when you discuss the will with your attorney or when you sign it. To be totally safe, family members shouldn't even drive you to the attorney.

Bear in mind that some of these strategies may not be advisable in certain states. Talk to your attorney about the best strategy for you.

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Estate Taxation

Lions and tigers and bears . . .
Ever since the estate tax was instituted in 1916, whatever an

individual owns has been subject to the federal estate tax upon his or her death – until 2010, that is. The estates of those dying during that year were entirely free from federal taxation because Congress could not reach an agreement extending the federal estate tax in some form. An agreement was finally reached at the end of 2010 that cemented the federal estate tax rules for 2011 and 2012. If Congress fails to act before the end of 2012, the rules for 2013 will revert to the provisions prevailing in 2001. For 2011 and 2012, the tax rate on estates is 35 percent (see chart below).

That said, not all estates will be taxed. First, spouses can leave any amount of property to their spouses, if the spouses are U.S. citizens, free of federal estate tax. Second, the estate tax applies only to individual estates valued at more than $5.12 million ($10.24 million for couples) in 2012 (see chart). The federal government allows you this tax credit for gifts made during your life or for your estate upon your death. Third, gifts to charities are not taxed.

The heirs of those dying in 2010 will have a choice between applying the new rules for 2011 and 2012 or electing to be covered under the rules that applied in 2010 – no estate tax but only a limited step-up in the cost basis of inherited assets. The law for 2011 and 2012 also makes the estate tax exemption “portable” between spouses. This means that if the first spouse to die does not use all of his or her $5 million or $5.12 million exemption, the estate of the surviving spouse may use it. So, for example, John dies in 2011 and passes on $3 million. He has no taxable estate and his wife, Mary, can pass on $7 million (her own $5 million exclusion plus her husband’s unused $2 million exclusion) free of federal tax. (However, to take advantage of this Mary must make an “election” on John’s estate tax return. Check with your attorney.)

Tax Year	Tax Rate	Exemption Equivalent

2009	45%	$3,500,000
2010	N/A or 35%	N/A or $5,000,000
2011	35%	$5,000,000
2012	35%	$5,120,000
2013	55%	$1,000,000

The currently high federal estate tax exemption, coupled with the portability feature, might suggest that "credit shelter trusts" (also called bypass or AB trusts) and other forms of estate tax planning are needless for other than multi-millionaires, but there are still reasons for those of more modest means to do planning, and one of the main ones is *state* taxes. Nearly half the states also have an estate or inheritance tax and in many cases the thresholds are far lower than the current federal one. Many states used to take advantage of what was known as a "sponge" tax, which ultimately didn't cost your estate. The way this worked was that the states took advantage of a provision in the federal estate tax law permitting a deduction for taxes paid to the state up to certain limits. The states simply took the full amount of what you were allowed to deduct off the federal taxes. However, the allowable state deduction was phased out under the Bush tax cuts enacted in 2001, and it disappeared entirely in 2005. This means that many states are changing their estate tax laws to make up the difference, and more changes at the state level can be expected as state politicians react to the new federal estate tax landscape. These changes may call for a restructuring of your estate plan; check with your attorney.

Making Gifts: The $13,000 Rule

One simple way you can reduce estate taxes or shelter assets in order to achieve Medicaid eligibility is to give some or all of your estate to your children (or anyone else) during their lives in the form of gifts. Certain rules apply, however. There is no actual limit on how much you may give during your lifetime. But if you give any individual more than $13,000 (in 2012), you must file a gift tax return reporting the gift to the IRS. Also, the amount above $13,000 will be counted against a $5 million lifetime tax exclusion for gifts. (This exclusion was $1 million for many years but was raised to $5 million in 2011 and $5.12 million in 2012.) Each dollar of gift above that threshold reduces the amount that can be transferred tax-free in your estate.

The $13,000 figure is an exclusion from the gift tax reporting requirement. You may give $13,000 to each of your children, their spouses, and your grandchildren (or to anyone else you choose) each year without reporting these gifts to the IRS. In addition, if you're married, your spouse can duplicate these gifts. For example, a married couple with four children can give away up to $104,000 in 2012 with no gift tax implications. In addition, the gifts will not count as taxable income to your children (although the earnings on the gifts if they are invested will be taxed).

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Estate Planning Fees

How much do you charge for estate planning documents?" or "How much does a will cost?" These are the most asked questions of estate planning attorneys. Fees generally are less than you fear but more than you wish to pay – but hey, you're not buying a flat screen tv here. It really IS about your family's security, and estate planning costs are a significant financial commitment for most clients.

Wherever possible, however, we try to charge a predetermined or "flat" fee that takes into account the time spent in an initial conference with you as well as later conferences, whether in person or by phone, and the necessary time to draft and revise all documents. But note that I said “whenever possible.” In many years of experience I have encountered a wide variety of situations: Clients are both old and young; married to the same person for many years, or divorced three times; wealthy and very poor; come from dysfunctional families or have a close-knit family, etc. Estate planning is the process of evaluating your specific financial and family circumstances and preparing appropriate documents that will comply with your dispositive wishes and minimize taxes.

Because of the variety of persons and situations, I tell clients that after the initial consultation, I will be able to evaluate their needs and answer the question “How much will it cost.” Although we have standard estate planning fees, situations that do not fit neatly into these “Plans” will require a different fee quote.