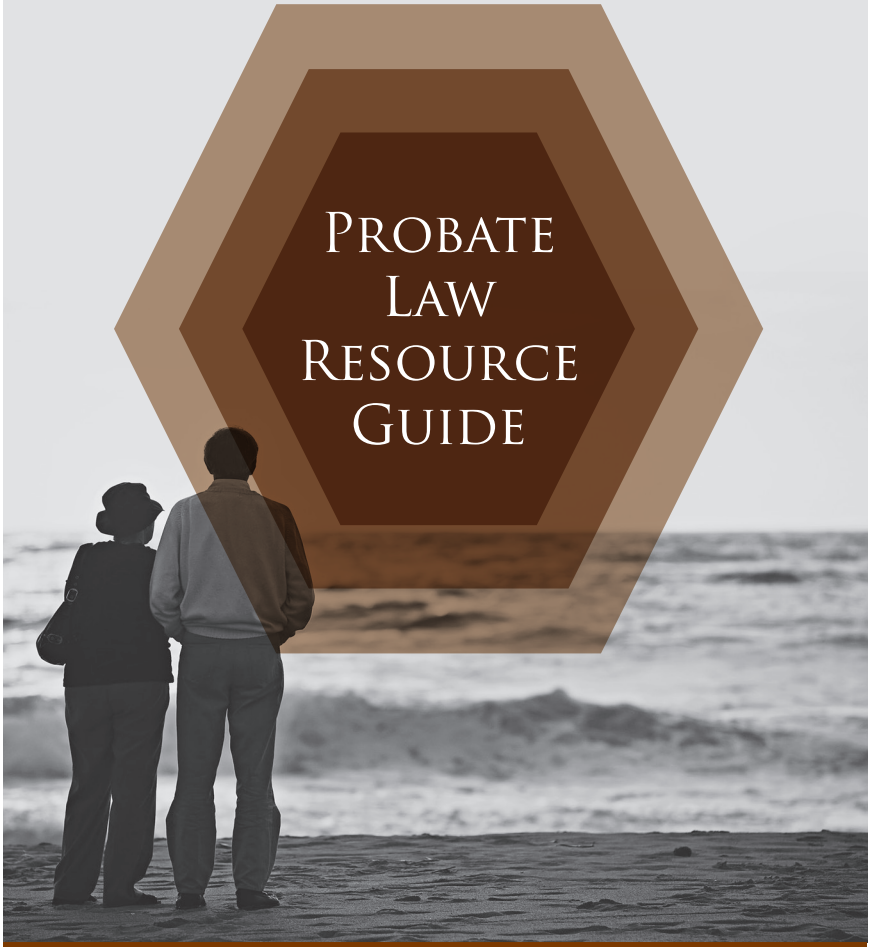
Probate Law Resource Guide



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PROBATE

Decedent's Probate

In this chapter you will find a description of probate procedures to transfer property when a person dies. "Probate" is a court-supervised process of transferring legal title from a person who has died (the "decedent") to the person's distributees.

Probate is necessary to protect the rights to the probate estate of a decedent's heirs, devisees, and creditors. An orderly transfer of property is done after estate property and debts are administered.

What These Terms Mean

Claim – a debt or liability owed by the decedent at the time of death, the funeral expenses, and the costs and expenses of administering the probate estate. A "claimant" is a creditor who files a claim against a probate estate.

Devisee – a distributee that is named in a will to receive certain property. May be a person or an entity such as a charity.

Distributee – person or entity to receive a distribution through probate.

Heir – a distributee, as determined by the Missouri statute of intestate succession, to receive real or personal property of an intestate.

Intestate – a decedent who has died without having made a will.

Letters of Administration – document from the probate court appointing the personal representative of an intestate's estate (i.e., no will).

Letters Testamentary – document from the court appointing the personal representative of a testate's estate (i.e., with a will).

Personal Representative – a person appointed by the court to be in charge of a decedent's probate estate. Also called an executor or administrator.

Probate Estate – real estate and personal property owned by the decedent and subject to administration supervised by the probate court, including any income after death.

Publication – notice published in a newspaper in the county where the decedent resided.

Testate –a decedent who has died leaving a will.

Is Probate Necessary to Transfer Property at Death?

Yes, probate is necessary unless the decedent did not have any property to be transferred at death through probate. A person may take steps with the titles to their property or rules of various agreements to avoid probate while alive, such as the following (some of these techniques are described in other chapters of this booklet):

- Giving away property;
- Putting property in a living trust;
- Setting up joint accounts with right of survivorship;
- Creating pay-on-death (POD) or transfer-on-death (TOD or beneficiary deeds) designations; and
- Naming beneficiaries of life insurance or retirement accounts (IRAs).

How Does Probate Work?

The decedent's property is held and managed by the personal representative during the administration of the estate. The personal representative makes distribution of the estate when the probate court approves the transactions made to pay claims and expenses and the proposed distribution schedule.

The earliest that an estate may be closed and distribution made to the heirs or beneficiaries is approximately six months and 10 days after the date of first publication. However, it often takes a year or more to finish the administration.

The following are steps in probate administration:

- Hire an attorney to represent you.
- Apply for Letters Testamentary if there is a will admitted (or apply for Letters of Administration without a will).
- Publish notice to creditors. The date of first publication starts a six-month period for claimants to submit their claims to the court and the personal representative.
- Inventory and appraise assets.
- Administer the estate and sell property if funds are needed to pay bills.
- Pay debts, claims, taxes, and expenses.
- Prepare a settlement showing income and disbursements.
- Obtain court approval for distribution and close estate.

Rights of Creditors and Collection of Debts

The probate court serves as a forum through which creditors of the deceased can protect their claims and seek payment. Also, the personal representative can collect payment of any debts owed to the decedent, as well as seek the recovery of property owned by the deceased in the possession of others.

Claims and family allowances against an estate shall be paid by the personal representative before the heirs and devisees can receive their distributions. If there are not sufficient assets to pay all claims and allowances, they are paid in proportion by certain priority classifications (for example, the funeral bill must be paid before general claims).

Taxes Payable After Death

An important function of probate is to assure payment of any tax liability. A probate estate must have a federal tax number called an employer identification number. A fiduciary income tax return may have to be filed for the estate. The fiscal

year for tax purposes can start with the decedent's date of death.

The administration of the estate normally may not be closed until taxes (state and federal) have been paid, including the death transfer taxes, the decedent's final income taxes, estate income taxes, and real estate and personal property taxes.

Death-transfer taxes must be paid on probate assets and other assets transferred at death (for example, life insurance) over a minimum amount. That amount is subject to change by Congress each year.

Expenses of Probate

The administration of any probate estate involves the payment of certain expenses. The expenses usually encountered in the average estate fall into four main categories.

(1) Bond Premiums: The probate estate may have to pay for a bond for the personal representative to guarantee the proper handling of the estate. All distributees of the estate or the decedent in the will may waive the necessity of a bond if allowed by the court.

(2) Costs of Publication: A notice to creditors must be published announcing that the estate has been opened. A Notice of Intention to File a Final Settlement or Statement of Account must be published before the estate can be closed unless it is waived in writing by the distributees.

(3) Court Costs: Every estate must pay costs based upon the size of the estate being administered and the services the court is called upon to provide.

(4) Personal Representative's Commission and Attorney's Fees: Missouri statutes provide for a minimum fee schedule for each. Compensation in excess of this scheduled fee may be paid upon an order of the court or upon consent of all distributees. The minimum scheduled fees are based upon a percentage of the amount of money and personal property administered in the estate. This percentage is based upon a graduated scale as follows: 5 percent of the first $5,000; 4 percent of the next $20,000; 3 percent of the next $75,000; 2.75 percent of the next $300,000; 2.5 percent of the next $600,000; and 2 percent of everything more than $1 million. For example, an estate in which $110,000 is administered would generate a personal representative or minimum attorney fee of $3,575 each (6.5 percent of estate for both fees).

Establishing Title to Real Estate

The administration of a decedent's probate estate serves to establish clear title to any real estate which the deceased may have owned at the time of death. Real property passes directly to one's heirs or to one's devisee if a will is admitted to probate. The personal representative will have to obtain a court order to take possession of or sell the real estate unless the will gives the personal representative that authority. It does not technically form a part of the probate estate unless it is necessary to sell the property to pay debts or for other reasons as set out in Missouri law.

It is impossible for the heirs or devisees to sell or receive clear title to the property subject to probate for one year after death unless it goes through probate. In

Missouri, probate may be opened and administered and a will may be filed within one year after the decedent's death.

Similarly, creditors **may** take actions to enforce claims which could force the sale of real property within a year of the date of death. However, if an estate is probated, the period of time in which the title to the real property can be so affected is reduced to approximately six months after the first publication of letters.

The Surviving Spouse's Rights (If No Will)

In Missouri, the spouse of a decedent is entitled to receive one-half of the estate of an intestate decedent. If the decedent is survived by children and the spouse of the intestate is also a parent of those children, the spouse receives an additional $20,000. This is in addition to certain exempt property and other statutory allowances for the spouse.

Exempt property is that which the spouse or the unmarried minor children are entitled to receive absolutely, without regard to any provisions the deceased might have made for the disposition of other assets. The exempt property includes the family Bible, books, clothing, household appliances, furniture, one automobile, and the like.

The support allowance is an award made to the surviving spouse for his or her maintenance (and that of the unmarried minor children) for a period of one year after the decedent's death. The amount of the award is judged by the family's previous standard of living.

The Surviving Spouse's Rights (If There Is A Will)

If the decedent leaves a will giving the spouse less than the spousal share, the spouse may, within a limited time, elect to "take against the will." The spouse can then receive the statutory share rather than what was provided in the will. The probate court is required to notify the surviving spouse of this right of election shortly after the will is probated.

A spouse cannot be completely disinherited under a will unless some form of contractual arrangement (e.g., prenuptial or postnuptial agreement) has been made before death. A spouse is entitled to receive either one-half of the deceased's property if there are no children or grandchildren of the decedent, or one-third of the property if the decedent was survived by children or grandchildren.

This election for a spousal distribution is subject to the claims of creditors and estate expenses, and is in addition to the survivor's statutory allowances and exempt property. Other property received by the survivor outside of probate from decedent (such as life insurance, joint property and trust assets) serves to offset against the spousal share.

"Omitted" spouses, or those who were married after the deceased's will was executed, may claim an intestate share of the estate. In certain cases, similar provisions are also included for any children who might have been born after the will was executed.

Types of Probate Administration

Two types of probate administration are permitted by Missouri probate law – "**supervised"** or **"independent."**

A **supervised** administration is closely monitored by the probate court. The court must approve many actions of the personal representative, who must also file annual settlements that are fully reviewed and audited by the probate division.

Independent administration is more informal and eliminates the need for supervision by the probate division and annual settlements. An estate may be "independently" administered if so designated in the deceased's will, or if the distributees all agree.

Streamlined Probate Alternatives

If a decedent's estate is valued at less than $40,000, a small estate certificate may be obtained 30 days after the decedent's death by a distributee without going through the full probate process. The distributee, called an "affiant," must file an affidavit promising to use the decedent's assets to pay debts and distribute the property according to law. Publication is required unless the estate is valued at less than $15,000.

Surviving spouses and the decedent's minor children can file what are called "refusals of letters" to have their statutory allowances paid from a decedent's estate if the estate is valued at a lesser amount than the allowances. Creditors can also reach certain assets, such as bank accounts, to pay their bills by filing creditor refusals of letters if the estate value does not exceed $15,000.

Determination of heirship can be accomplished if, within a year of the date of death, no probate estate was opened and no will presented for probate. A petition may be filed to obtain a judgment determining heirship. Another alternative is an affidavit of heirship if acceptable to a title company insuring the title.

Is An Attorney Necessary in Probate?

Yes, when a regular decedent's probate is undertaken. An attorney is required to represent the personal representative in both supervised and independent administrations in Missouri. A lawyer can assure that all deadlines are met and avoid mistakes and delays. A lawyer can sometimes help explain the process to family members to prevent disagreements among them over various issues.

Some people may file small estate affidavits and letters of refusal for spouses, minor children, or creditors without attorneys. But using an attorney can avoid costly mistakes, especially if real estate is involved.

You should find an attorney who practices probate law. If you need help finding a lawyer in an outstate area or the Kansas City area, call The Missouri Bar Lawyer Referral Service at 573/636-3635; in the St. Louis area, call 314/621-6681; and in Greene County, call 417/831-2783.

WILLS

What These Words Mean

Estate – the property you own in your name alone when you die.

Personal Representative – the person in charge of your estate, usually nominated in your will. May also be referred to as "executor."

Trust – property set apart, sometimes in a will, for a certain purpose.

What Is a Will?

A will is a legal paper that states who receives your property when you die. Each state has its own laws about wills.

A will does not avoid the necessity of probate and must be "probated" to have legal effect. You may title your property in other ways so that probate is not necessary.

Who Can Make a Will?

Any person who is at least 18 years old and of sound mind can make a will.

When is a Will Legal in Missouri?

In Missouri, a will is legal when it is signed and the signature was witnessed by two people.

A will can be changed through a codicil with the same formalities as when the will was signed. For that reason, it is usually easier to replace with a new will.

A will is self-proving if a special clause is used when the witnesses sign and the maker's signature is acknowledged by a notary public.

An earlier will may be canceled by properly executing a newer will.

You can cancel your own will by destroying the original and any copies you may have made.

Missouri courts recognize wills executed in other states if properly done under their laws.

What If You Die Without a Will?

Property that you owned alone goes to your close relatives and sometimes to more distant relatives. If no relatives are found, a highly unusual circumstance, your property goes to the state. Without a will to indicate your choice, a decision as to who receives your property is set by law.

To Whom Can You Give Your Property?

You may give your property to any person or organization you choose, in any manner you choose.

Some laws limit what you can do in a will, and you should seek the advice of a lawyer to assure that what you want to do will work.

Your spouse can choose a certain amount, specified in a state statute, from your estate if he or she does not like your will.

Why is It Better to Have a Will?

- You can save some costs by waiving bond and providing for independent administration.
- You can say whom you want to receive your valued personal belongings in a list referred to in the will. You can change the list without changing your will.
- Only you decide who receives your property.
- You can nominate a guardian for your minor children.
- You can say whether or not you want to make anatomical gifts.
- You can provide for minor or disabled children in a trust without the court having to supervise by appointing a conservator to take care of what they would receive.
- You can set up a trust for your family.
- You can save on some death taxes.
- You can say what you want done with the damages you receive if you die in an accident caused by another person.
- You will know that you have planned for your family.

How Long is a Will Legal?

- Until changed or canceled by you.
- A will benefitting a spouse will not be enforceable if you get a divorce.

When Should You Think About Changing Your Will?

- Your family changes through marriage, divorce, birth or adoption of children, or death or disability of a member of your immediate family.
- Your family, property, money, or other assets change in value or nature.
- You move to another state.

What Can Take the Place of a Will?

- Property or bank accounts titled jointly with another(s).
- Life insurance policies and some annuities are ways to own property and provide for their transfer upon your death to named beneficiaries.
- Non-probate transfers such as beneficiary deeds for real estate, pay-on-death provisions on bank accounts and certain other assets, and transfer-on-death provisions on motor vehicle titles, stock certificates, and brokerage accounts.
- Individual retirement accounts (IRAs) and employer retirement plans with

employee contributions are ways to provide for their transfer to named beneficiaries upon your death.

• Property held by a revocable living trust (but you should still have a "pour-over" will).

• Missouri's law of intestate succession.

These and other methods not mentioned should be used in place of a will only after you have talked to a lawyer.

You should always have a will in addition to these other techniques as a safety net to cover those items that are not "titled" assets.

These techniques, if used correctly and under the right circumstances, may enable you to totally avoid probate.

Who Can Write a Will?

Any capable adult can by law, but there are many pitfalls and, if proper technical language is not used, certain bequests or the entire will may become unenforceable.

Only a lawyer can write a will that you can be sure will be legal.

You should find a lawyer who practices estate planning law. Ask the lawyer how much the fee will be to write the will.

If you need help finding a lawyer in an outstate area or the Kansas City area, call The Missouri Bar Lawyer Referral Service at 573/636-3635; in the St. Louis area, call 314/621-6681; and in Greene County, call 417/831-2783.

WHAT IS A REVOCABLE LIVING TRUST?

What is a Revocable Living Trust?

A trust is an agreement that determines how a person's property is to be managed and distributed during his or her lifetime and also upon death.

A revocable living trust normally involves three parties:

The Settlor – Also called grantor or trustor, this is the person who creates the trust, and usually the only person who provides funding for the trust. More than one person can be a settlor of a trust, such as when a husband and wife join together to create a family trust.

The Trustee – This is the person who holds title to the trust property and manages it according to the terms of the trust. The settlor often serves as trustee during his or her lifetime, and another person or a corporate trust company is named to serve as successor trustee after the settlor's death or if the settlor is unable to continue serving for any reason.

The Beneficiary – This is the person or entity that will receive the income or principal from the trust. This can be the settlor (and the settlor's spouse) during his or her lifetime and the settlor's children (or anyone else or a charity the settlor chooses to name) after the settlor's death.

A trust is classified as a "living" trust when it is established during the settlor's lifetime and as a "revocable" trust when the settlor has reserved the right to amend or revoke the trust during his or her lifetime.

How is a Revocable Living Trust Created?

There are two basic steps in creating a revocable living trust. First, an attorney prepares a legal document called a "trust agreement" or a "declaration of trust" or an "indenture of trust" which is signed by the settlor and the trustee. Secondly, the settlor transfers property to the trustee to be held for the benefit of the beneficiary named in the trust document.

Can a Revocable Living Trust be Changed or Revoked?

Yes. The settlor ordinarily reserves the right in the trust document to amend or revoke the trust at any time during his or her lifetime. This enables the settlor to revise the trust (or even terminate the trust) to take into account any change of circumstances such as marriage, divorce, death, disability or even a "change of mind." It also gives the settlor the peace of mind that he can "undo" what he has done. Upon the death of the settlor, most revocable living trusts become irrevocable and no changes are then allowed (with some exceptions) to save taxes or

improve administration. Sometimes the trust becomes irrevocable after the death of a spouse if the trust was jointly created by a married couple.

Is a Revocable Living Trust an Adequate Substitute for a Will?

No! A revocable living trust may be considered the principal document in an estate plan, but a will should accompany a revocable living trust. This type of will, referred to as a "pour over" will, names the revocable living trust as the principal beneficiary. Thus, any property which the settlor failed to transfer to the trust during his or her lifetime is added to the trust upon the settlor's death and distributed to (or held for the benefit of) the beneficiary according to the trust instructions.

The settlor may not be able to transfer all desired property to a revocable living trust during the settlor's lifetime. For example, the probate estate of a person who dies as a result of an auto accident may be entitled to any insurance settlement proceeds. These settlement proceeds can only be transferred from the estate to the trust pursuant to the terms of a will. Without a will, the proceeds would be distributed to the heirs under the Missouri laws of descent and distribution.

Also, a parent cannot nominate a guardian for minor children in a revocable living trust. This can be accomplished only in a will.

Will a Revocable Living Trust Avoid Probate Expenses?

Property held in a revocable living trust at the time of the settlor's death is not subject to probate administration. Thus, the value of the property is not considered when computing the statutory fee for the personal representative or the estate attorney. Also, the amount of any required bond for the personal representative will be reduced to the extent the property is held in the trust and not subject to probate administration.

Nevertheless, certain expenses associated with the death of a person are not eliminated. Trustees are paid for their work unless they waive their fees. Deeds to real estate transferring the property from the trust to the beneficiaries must be prepared. Estate tax returns must be filed when the total value of the property owned at death (including assets in a revocable living trust) exceeds a certain value. The decedent's final income tax returns must still be filed and income tax returns for the trust must also be filed. Trustees often seek assistance and advice from attorneys who charge fees.

What Are Some of the Advantages of a Revocable Living Trust?

In addition to the savings in probate expenses, the avoidance of probate administration has other advantages. The administration of a revocable living trust at the settlor's death is normally a private matter between the trustee and the beneficiaries. Unlike probate, there are few public records to reveal the nature or amount of assets

or the identity of any beneficiary.

Property can often be distributed to the beneficiaries shortly after the settlor's death, avoiding much of the delay encountered with probate administration. Also, probate court approval is not necessary to sell an asset in a trust, thus avoiding further delay.

In addition to the avoidance of probate administration in Missouri, "ancillary" probate administration in other states where real estate is owned can be avoided by transferring the out-of-state real estate to a revocable living trust. For those owning real estate in several states, this can be a significant advantage.

Real estate, businesses, and other assets can continue to be actively managed by a successor trustee in central administration in much the same way as a settlor would have done before the settlor died or became incapacitated. For example, a trustee can use trust assets to pay utility bills to keep the pipes from freezing, property maintenance expenses, and real estate taxes until real estate is sold or distributed. The trustee might work out property distribution issues, such as some beneficiaries wanting the real estate while others want money.

What Are Some of the Disadvantages of a Revocable Living Trust?

Since a revocable living trust is a more complex legal document that must be funded by changing property titles while the settlor is alive, it is more costly to establish than a will, which can have higher expenses after death. Also, accounts need to be retitled, deeds and other transfer documents must be prepared transferring the settlor's assets to the trust, and beneficiary designations need to be changed to the trust—all processes which can require a substantial investment of the settlor's time.

The use of a revocable living trust requires more ongoing monitoring to ensure that assets remain in the trust and that newly-purchased assets are titled in the trust. For example, a settlor who moves a certificate of deposit (perhaps to obtain a better interest rate) must remember to advise the new institution to title the new account in the trust.

After the settlor's death, some of the income tax rules applicable to a trust are not as liberal as those available to a probate estate. For example, a probate estate may elect to use a fiscal year as its tax year, while a trust is restricted to the calendar year. Trusts must pay estimated income tax payments while a probate estate is exempt from this requirement for the first two years. Trusts are also subject to other tax rules that do not apply to probate estates.

Who Can Serve as Trustee?

If the settlor becomes physically or mentally incapacitated, property held in this trust remains available to the settlor without the requirement of a court-supervised conservatorship. The successor trustee named in the trust document takes charge to manage the assets in the trust and pay the settlor's bills.

The successor trustee can be a trusted relative or friend, or can be a professional trustee such as a trust company or the trust department of a bank. Missouri law does not require an individual serving as successor trustee to be a Missouri resident. However, certain restrictions apply to banks or trust companies whose principal place of business is located outside the state of Missouri. Since the activities of the successor trustee are not ordinarily supervised by a court or other independent third party, the selection of the successor trustee should be carefully considered.

The settlor is not limited to naming only one trustee. Two or more individuals may be named to serve as co-trustees or a combination of individuals and a corporate trustee may be named. If more than one is named, care should be taken to designate who can pay the usual, ordinary expenses without having to take the time and expense of requiring more than one signature.

If an individual is to serve as successor trustee, the settlor should consider whether the trustee is to be bonded. The settlor's decision should be clearly stated in the trust document. If a bond is required, the bond premium is normally paid by the trustee from the assets in the trust.

Is a General Durable Power of Attorney or an Advance Directive Still Needed?

Although the function of a general durable power of attorney is beyond the scope of this brochure, a settlor of a revocable living trust should also consider establishing a general durable power of attorney to accomplish objectives which cannot be attained with a trust and to complement what is accomplished by a trust.

An "advance directive," usually used with a durable power of attorney for health care, has an entirely different function from a revocable living trust and the two should not be confused. Whether a person has a trust ordinarily has no bearing on the decision to have (or not to have) an advance directive. Care should be taken, however, to require the trustee to pay for medical expenses for an incapacitated settlor if necessary.

Does the Revocable Living Trust Reduce Income Taxes or Estate Taxes?

During the settlor's lifetime, the revocable living trust usually has **no** effect on the income tax which the settlor will owe. In fact, if the settlor is the trustee or a co-trustee, all income earned on assets held in the revocable trust is reported directly on the settlor's income tax return using the settlor's Social Security number, and the trust is not required to file a return. After the death of one or both settlors, the trust must have its own separate tax identification number and is taxed at the same rate as a probate estate.

Regarding the estate tax, proper planning can often reduce the amount of tax payable upon the settlor's death. For the most part, estate tax planning can be equally accomplished through proper drafting in a will, a revocable living trust, or through the use of other legal devices such as disclaimers. However, there are

minor differences. For instance, under current tax rules, a lifetime gift of an amount over the annual exclusion amount directly from a living trust to a donee may be subject to estate tax if the settlor dies within three years of making the gift. This three-year rule does not apply to gifts made directly from an individual to a donee.

Who Can Be the Trustee?

A settlor who desires to manage his or her own financial affairs and who is physically and mentally able can (and ordinarily should) serve initially as trustee. But provisions should be made in the trust for a successor trustee to take charge if the settlor becomes unable to continue for any reason and when the settlor dies. Or, the settlor may simply desire to make someone else responsible for managing assets, whether temporarily or permanently, by resigning or naming another initial trustee.

The Trustee's Duty to Inform

The trustee of a revocable trust does not have to tell future beneficiaries about the trust, what is in it, or how it is administered.

If a trust is irrevocable or when a revocable trust becomes irrevocable, usually because the settlor dies or becomes incapacitated, beneficiaries have certain rights based upon their beneficial interests set out in the trust. The trustee of an irrevocable trust must give the current and future beneficiaries information for them to protect their interests. They must be told about the existence of the trust, the name and address of the beneficiary, and that a copy of the trust will be given to a beneficiary who requests a copy. The trustee must report the property in the trust at the time the trust became irrevocable, as well as the income and disbursements from it and the balance, at least once per year.

Who Can Advise You About a Revocable Living Trust?

You should never sign a revocable living trust document without the advice of a Missouri attorney who practices in this field of law. He or she will be able to advise if a revocable living trust is right for you.

Who Can Draft a Trust to Meet Your Needs?

Only a lawyer can write a trust that you can be sure will be legal. There are many pitfalls and, if proper technical language is not used, certain distributions or the entire trust may become unenforceable. What you put in the trust should be carefully thought out with your attorney's help because it may too late to change it after you die or become incapacitated.

You should find a lawyer who practices estate planning law. Ask the lawyer how much the fee will be to write the trust.

If you need help finding a lawyer in an outstate area or the Kansas City area, call The Missouri Bar Lawyer Referral Service at 573/636-3635; in the St. Louis area, call 314/621-6681; and in Greene County, call 417/831-2783.

JOINT TENANCY

What is a Joint Tenancy?

Joint tenancy is a form of ownership by two or more individuals together. It differs from other types of co-ownership in that the surviving joint tenant immediately becomes the owner of the whole property upon the death of the other joint tenant. This is called a "right of survivorship."

A joint tenancy between a husband and wife is generally known as a tenancy by the entirety. Tenancy by the entirety has some different characteristics than other joint tenancies, such as the inability of one joint tenant to sever the ownership.

What is a Tenancy in Common?

A tenancy in common is another form of co-ownership. It is the ownership of an asset by two or more individuals together, but without the rights of survivorship that are found in a joint tenancy. Thus, on the death of one co-owner, his or her interest will not pass to the surviving owner or owners but will pass as an individual share according to his or her will or, if there is no will, by the law determining heirs.

How is a Joint Tenancy Created, and What Property Can Be So Held?

State law controls the creation of a joint tenancy in both real and personal property (real property is land and attachments to the land, personal property is generally all other types of property). For transfers to two or more persons who are not husband and wife, the deed or conveyance must expressly state an intention to create a joint tenancy by noting that the property will be held not as tenants in common but as joint tenants with rights of survivorship. For transfers of personal property, such as stock certificates, the simple letters "JTWRS" may be used to designate a joint tenancy with right of survivorship.

A joint tenancy can be created in almost any type of property. Different types of jointly held property have different characteristics. Either joint tenant of a bank account usually may withdraw the whole amount on deposit, depending upon the account agreement. The signatures of all joint tenants are generally required in order to transfer or sell bonds and corporate stocks. All joint tenants, and their spouses, must sign deeds and contracts to transfer or sell real estate.

Is a Joint Tenancy an Adequate Substitute for a Will?

No! Only with a will can a person be certain that his or her assets will pass as intended. A will, properly written and executed, applies to all of the property of the maker for which he or she has not otherwise provided. Almost everyone should have a will, even though he or she may have provided for property to pass by other methods.

A joint tenancy is not a comprehensive method of transfer and applies only to the specific property described in the instrument creating the joint tenancy. Furthermore, while a joint tenancy does provide for the surviving owner to own the property upon the death of one of the joint tenants, no provisions are included for the disposition of the property upon the death of the survivor. In addition, the joint tenant who is intended to be the survivor may die first, frustrating the intent of the parties. A properly structured will would address these and many other of life's uncertainties.

A joint tenancy is a present transfer of an actual interest in the property. Except for joint bank accounts, it cannot be revoked or reversed without the joint tenant's cooperation, and for real property the cooperation of the joint tenant's spouse is also required. Creating a joint tenancy with someone other than your spouse may result in a gift being subject to gift tax.

A will is revocable and may be changed as circumstances change. It is the cornerstone of an effective estate plan.

Will a Joint Tenancy Avoid Probate Expenses?

Joint holdings may reduce probate involvement and expenses. However, while joint assets may avoid the formal estate administration that is required when property passes under a will, other costs may occur. Steps must be taken to reregister the assets in the survivor's name and to comply with the various state and federal tax requirements. The process can be time-consuming and expensive. In addition, placing assets in joint names with another, especially someone other than a spouse, creates uncertainties and exposes the assets to the disadvantages discussed below.

What Are Some Advantages of Joint Tenancy?

Some of the advantages are:

- Property passes to the survivor without the need for probate administration. Generally, only a death certificate is needed to establish the survivor's ownership in the property.
- Where the first to die wishes all of his or her property to pass outright to a surviving spouse, joint ownership may afford a convenient and economical way to pass title to the particular property so owned. For example, it may be advantageous for a summer home located in another state to be owned in joint names with the right of survivorship. This way, upon the death of either joint tenant, the survivor will own the home

outright and the need for probate administration in the other state will be avoided.

- The family residence is often held in joint names, especially where the surviving spouse is likely to continue to use the property as his or her home. In that case, joint ownership may be an appropriate method of ensuring continuity of ownership.
- A joint household checking or savings account can offer a married couple both convenience and flexibility, as it makes funds immediately available in the event one spouse dies or becomes incapacitated.

What Are Some Disadvantages of Joint Tenancy?

A few of the disadvantages are:

- The original owner of the property who subsequently placed it in a joint tenancy is no longer the sole owner.
- If the original owner later desires to dispose of the property, in many cases he or she cannot sell his or her partial interest unless the other joint tenants agree and cooperate.
- If both joint owners die in a common accident or disaster, and it cannot be determined who died first, the legal ownership of the property may be uncertain, resulting in additional legal costs.
- If a conservator is appointed for the original owner, the probate court's authority may be required to use the asset for that owner, increasing the cost of the conservatorship.
- If minors or legally disabled adults are involved, costly and cumbersome conservatorship proceedings may be necessary.
- An always present danger in joint tenancy arrangements is that the co-owners may disagree. If the co-owners do disagree, a costly and time consuming lawsuit may be required for the original owner to exercise his or her rights regarding the asset.
- If an asset is owned jointly prior to marriage, the original owner may lose part of the asset in a divorce.
- A jointly owned asset will be subject to judgments against every owner and may be lost in the bankruptcy of any owner.
- The financial management advantages of trusts are eliminated, especially where aged parents or minor children are involved, as are the possible tax savings available to trusts and estates.
- Assets may not be available to the executor of a deceased joint owner's estate. In such a situation, it may then be necessary to sell other assets in order to meet tax payments or other cash needs in order to settle the affairs of the decedent.

What Tax Consequences Could Result From the Creation of a Joint Tenancy?

Serious tax disadvantages may result from the use of property held as a joint tenancy. If all the property owned at death – including joint property, life insurance and employee benefits – exceeds a certain exemption limit, the estate may be subject to federal and state estate taxes. Estate taxes are not avoided by joint tenancy. In many instances, all or part of jointly held property may be includable in the estate of the first joint tenant to die.

An asset owned jointly may retain part of its original cost basis. Upon the sale of the asset after the death of one owner, the capital gains taxes may be significantly increased.

Transferring property into joint tenancy may also result in a gift tax. While recent changes in federal tax laws have to a large extent minimized the gift tax consequences of joint ownership, especially between spouses, effective tax planning for large estates can be greatly complicated by the use of joint property arrangements.

May Safe Deposit Boxes Be Jointly Held?

Under Missouri statutes, safe deposit boxes may be jointly rented. This type of registration must be specifically noted in the rental agreement with the bank or safe deposit box company. With a jointly rented safe deposit box, the surviving joint tenant will have immediate access to the box upon the death of the other joint tenant. However, even though a safe deposit box is rented in joint names, that alone does not mean that all of the assets contained in the box are also jointly owned. As a result, joint ownership of a safe deposit box may complicate matters rather than making them simpler.

Should I Use a Joint Account for Help in Writing Checks?

No. Some people will place a child or someone else on a checking account as a joint tenant to help them write checks to assure that bills are paid in the event the original owner is unable to do so. Upon the original owner's death, the entire account will belong to the other person; other heirs will not share in it. Oral understandings about what is to be done with the account balance upon death are frequently misunderstood and often forgotten. Furthermore, the surviving joint tenant may be subject to gift tax liability if he or she attempts to share the funds in the account with other intended heirs after the original owner's death. Anyone with a concern or needing help in this area should see their lawyer about a durable power of attorney or place a trusted person on the account as "agent."

Alternatives to Joint Tenancy That Also Avoid Probate

Missouri's Pay On Death ("POD"), Transfer On Death ("TOD") and Beneficiary Deed statutes provide for the disposition of many types of property at the time of

death without probate proceedings and without some of the disadvantages of joint tenancies. Under these statutes, the persons who are to receive the property on the death of the original owner may be designated as beneficiaries for accounts in financial institutions, securities, real estate and other instruments of title.

POD and TOD beneficiary designations and beneficiary deeds are revocable by the owner, the account or property passes outside of probate, and consent of the beneficiary to mortgage or sell the property is not required. As no present interest is transferred, no gift tax liability is incurred. The arrangement is preferable to joint tenancy in these respects. However, these designations are subject to some of the same disadvantages as jointly owned property; they are not intended to be an adequate substitute for a will or trust, since succession among intended beneficiaries usually cannot be adequately described in detail. A person should not open POD accounts or execute transfer on death instructions or beneficiary deeds without first consulting an estate planning attorney.

How Can I Tell Whether or Not a Joint Tenancy is Advisable for Me?

Your lawyer can advise you after he or she has been made aware of all of the facts concerning both your property and your family situation. The cost of such advice is usually quite small compared to the savings that may result and the pitfalls that can be avoided. Due to continual changes in the tax laws, the need for legal counsel is essential in estate planning.

Your lawyer can help you determine what property should be owned as joint tenants or as tenants by the entireties, when POD or TOD beneficiary designations might be useful for specific gifts, when a trust might be an appropriate part of your estate plan, and what property should pass under a will and be administered in your estate. If a gift to a minor is involved, your lawyer also can tell you about the Missouri Transfers to Minors Law.

In 2011, the Missouri Legislature created a trust specifically for tenancy by the entirety property called a Qualified Spousal Trust. Please talk to your legal advisor about the benefits of such a trust.

LIVING WILLS AND OTHER ADVANCE DIRECTIVES

What is a Living Will?

A living will is a brief declaration or statement that a person may make indicating their desire that certain medical treatment be either withheld or withdrawn under certain circumstances. The Missouri statute authorizing the creation of living wills specifies that the statement or declaration be in substantially the following form:

"I have the primary right to make my own decisions concerning treatment that might unduly prolong the dying process. By this declaration I express to my physician, family and friends my intent. If I should have a terminal condition, it is my desire that my dying not be prolonged by administration of death-prolonging procedures. If my condition is terminal and I am unable to participate in decisions regarding my medical treatment, I direct my attending physician to withhold or withdraw medical procedures that merely prolong the dying process and are not necessary to my comfort or to alleviate pain. It is not my intent to authorize affirmative or deliberate acts or omissions to shorten my life, rather only to permit the natural process of dying."

How is a Living Will Made?

Any competent person 18 years of age or older can make a living will by signing and dating a statement similar to that shown above before two witnesses. These witnesses must be at least 18 years old, and should not be related to the person signing the declaration, a beneficiary of his or her estate, or financially responsible for his or her medical care. The statement can be typed or handwritten. It is recommended that a living will or any other advance directives be considered and prepared in advance of any hospitalization or impending surgery — it is not something anyone should feel pressured to decide in a short period of time, if that can be avoided.

Limitations of Living Wills

While most people have heard of living wills, many are unaware of the significant limitations of the living will as defined by Missouri statutes. The terms "death-prolonging procedure" and "terminal condition" are used in the statute to specify the circumstances to which a living will applies. The statute defines both of those terms as relating to a condition where death will occur within a short period of time, regardless of whether or not certain treatment is provided. In other words, the patient will die shortly with or without artificial resuscitation, use of a ventilator, artificially supplied nutrition and hydration, or other invasive surgical procedures.

By definition, then, a living will only avoids treatment when death is imminent and the treatment is ineffective to avoid or significantly delay death. Furthermore, the statute prohibits a living will from withholding or withdrawing artificially supplied nutrition and hydration, which is sustenance supplied through a feeding tube or IV.

Alternatives to Living Wills

For patients who desire to give instructions for their health care that exceed the limitations of the living will statute, there is an alternative, commonly referred to as "advance directives." An advance directive is an instruction by a patient as to the withholding or withdrawing of certain medical treatment in advance of the patient suffering a condition rendering the patient unable to refuse such treatment. A competent patient always has the right to refuse treatment for himself or herself or direct that such treatment be discontinued. Without an advance directive, once a patient becomes incapacitated, he or she may well lose that right. A living will is simply one type of advance directive. Recent court cases have made it clear that people have the right to make other types of advance directives that exceed the limitations of the living will statute. Those directives need to be "clear and convincing," and may include instructions to withhold or withdraw artificially supplied nutrition and hydration or other treatment or machinery which may maintain a patient in a persistent vegetative state. These expanded advance directives can be tailored to meet the needs and desires of each individual patient, and need not be in any standard form. For example, they can specify that certain procedures are to be used for a reasonable period of time and then discontinued if they do not prove to be effective. Generally, additional advance directives should be signed, dated and witnessed in the same manner as living wills.

What Should I Do With My Living Will?

The most important part of having a living will or other advance directives after they are signed is to be certain that they are accessible. They should be kept close at hand – not in a safe deposit box – because they may be needed at a moment's notice. Many people travel with them. Some even keep them in their purse or billfold. At a minimum, it is recommended that you deliver a copy to your attending physician and at least make your close relatives aware that you have one. Giving a copy of your living will or other advance directives to your physician gives you an opportunity to discuss your desires and ask any questions you may have about any procedure and also to ask your physician if he or she will follow your directions. If you have appointed an attorney-in-fact to make health care decisions in case of your incapacity, he or she should have a copy. If you are hospitalized, a copy should go into your medical records. For these reasons, it is often wise to sign more than one copy of your living will or other advance directives.

Revoking a Living Will

Once made, a living will or other advance directives are easily revoked or cancelled. They can be revoked either orally or in writing. If possible, it is advisable to gather and destroy all copies of the advance directives if you desire to revoke them. By statute, health care providers are required to note a revocation of a living will in the medical records of the patient.

Durable Power of Attorney

If you have a durable power of attorney that appoints someone to make health care decisions for you, do you still need a living will or other advance directives? The answer is "yes." Whether or not you have a power of attorney does not affect the need or desire for a living will or other advance directives. If you do not have a power of attorney, your advance directives will be very helpful to instruct your physician and the hospital as to the care you desire. If you do have a power of attorney, your advance directives will give very important guidance to your attorney-in-fact as to how he or she should act. In fact, you may want to combine your power of attorney, your living will, and your other advance directives into one document.

Why Give Advance Directives?

You accomplish at least two things by completing advance directives, regardless of whether they direct all possible treatment, no treatment or only some treatment. First, you ensure that the treatment you receive is the treatment you desire – no more and no less. Second, you take the burden off of your family and friends to make those decisions for you at a time when they will most likely be emotionally upset by your critical condition. Finally, you may be avoiding litigation to determine what treatment you really desired or intended. In any event, it is time well spent.

Advance directives should address each person's health care concerns. Accordingly, at a minimum, a properly drafted directive should clearly specify the following:

1. Who should be making treatment decisions based on a physician's opinion;
2. Who may release medical information under HIPAA;
3. Who has the vested right to make funeral arrangements under the right of sepulcher;
4. Who may make anatomical gifts and organ donations, if any; and
5. Whether artificial nutrition and hydration are to be withheld.

DURABLE POWER OF ATTORNEY

What is a Power of Attorney?

A power of attorney is a document by which you appoint a person to act as your agent. An agent is one who has authorization to act for another person. The person who appoints the agent is the principal; the agent is also called the attorney-in-fact. If you have appointed an agent by a power of attorney, acts of the agent within the authority spelled out in the power of attorney are legally binding on you, just as though you performed the acts yourself. The power of attorney can authorize the attorney-in-fact to perform a single act or a multitude of acts repeatedly.

Who May Be Appointed Under a Power of Attorney?

The agent appointed by power of attorney may be any adult, and is often a close relative, lawyer or other trusted individual. The person appointed does not have to be a resident of the state of Missouri. However, under Missouri law, the following persons may **not** serve as attorney-in-fact:

1. No one connected with a facility licensed by the Missouri Department of Mental Health or Missouri Department of Social Services in which the principal resides, unless such person is closely related to the principal.
2. No full time judge and no clerk of court, unless closely related.
3. No one under 18, no person judicially determined to be incapacitated or disabled, and no habitual drunkard.
4. For a health care provider, no one who is the attending physician of the principal and no one who is connected with the health care facility in which the principal is a patient, unless such a person is closely related to the principal.

What is a "Durable" Power of Attorney?

Many people are unaware that an ordinary power of attorney is revoked, and the agent's power to act for the principal automatically stops, if the principal becomes incapacitated.

Under Missouri law, and the law of many other states, a power of attorney with proper wording may be made "durable." This means that the power of the agent to act on the principal's behalf continues despite the principal's incapacity, whether or not a court decrees the principal to be incapacitated.

Through a durable power of attorney, an agent may continue to act on your behalf even after you have had a stroke or other incapacitating illness or accident. If the power of attorney so provides, the agent can use your funds to pay your bills, can contract for nursing home services for your benefit, and can make basic health care decisions for you.

An aging parent may wish to give a durable power of attorney to a responsible adult child so that the child can act on the parent's behalf and carry on routine matters in the event the parent is disabled or incapacitated. In many instances, this arrangement is far better than making the child the joint owner of the parent's bank accounts and other property and assets.

To create a durable power of attorney in Missouri, the document must state: "This is a durable power of attorney and the authority of my attorney-in-fact shall not terminate if I become disabled or incapacitated or in the event of later uncertainty as to whether I am dead or alive." In many other states, the document must state in substance that "this power of attorney shall not be affected by subsequent disability or incapacity."

It is possible to create a durable power of attorney so that it will only go into effect when the principal is incapacitated or when some other stipulated event or condition occurs. This is ordinarily called a springing durable power of attorney.

Revocation of Durable Power of Attorney

The death of the principal revokes even a durable power of attorney, except for a third person relying on the power of attorney who does not know of the death. Also, a durable power of attorney may be revoked by the principal at any time, either orally or in writing. It is recommended that, when possible, the revocation be written.

Powers Granted by General Powers of Attorney

Prior to 1989, a valid power of attorney had to spell out in detail all of the authorizations granted to the agent. However, under a new Missouri law adopted in August 1989, it is possible to have a "general" power of attorney which authorizes the agent to act for the principal on every kind of subject or matter which may legally be handled through an agent, with certain specific exceptions mentioned below. However, it is still recommended that the power of attorney include as much detail as possible.

Powers Which Must Be Specifically Listed

In Missouri, certain powers must be specifically stated in the power of attorney in order for the attorney-in-fact to be authorized to perform such acts.

Those powers are:

(1) To execute, amend or revoke any trust agreement;

(2) To fund with the principal's assets any trust not created by the principal;

(3) To make or revoke a gift of the principal's property in trust or otherwise;

(4) To disclaim a gift or devise of property to or for the benefit of the principal;

(5) To create or change survivorship interests in the principal's property or in property in which the principal may have an interest; provided, however, that the inclusion of the authority set out in this paragraph shall not be necessary in order

to grant to an attorney-in-fact acting under a power of attorney granting general powers with respect to all lawful subjects and purposes the authority to withdraw funds or other property from any account, contract or other similar arrangement held in the names of the principal and one or more other persons with any financial institution, brokerage company or other depository to the same extent that the principal would be authorized to do if the principal were present, not disabled or incapacitated, and seeking to act in the principal's own behalf;

(6) To designate or change the designation of beneficiaries to receive any property, benefit or contract right on the principal's death;

(7) To give or withhold consent to an autopsy or postmortem examination;

(8) To make a gift of, or decline to make a gift of, the principal's body parts under the Uniform Anatomical Gift Act;

(9) To nominate a guardian or conservator for the principal; and if so stated in the power of attorney, the attorney-in-fact may nominate himself as such;

(10) To give consent to or prohibit any type of health care, medical care, treatment or procedure; or

(11) To designate one or more substitute or successor or additional attorneys-in-fact.

Powers Which May Not Be Granted by a Power of Attorney

No power of attorney governed by the Missouri law may grant power to an agent to carry out any of the following actions for the principal:

(1) To make, publish, declare, amend or revoke a will for the principal;

(2) To make, execute, modify or revoke a living will declaration for the principal;

(3) To require the principal, against his or her will, to take any action or to refrain from taking any action; or

(4) To carry out any actions specifically forbidden by the principal while not under any disability or incapacity.

Must I Sign a Power, and If I Do, Will It Be Followed?

No person can be forced to sign a power of attorney, especially one for health care decisions, which cannot be required for admission to a hospital. Once created, your directions must be followed. If a physician or other health care provider declines to follow your instructions due to religious beliefs or moral convictions, such health care provider must transfer the care of the patient to another physician or facility that will honor the patient's instructions. For this reason, it is always advisable to discuss these issues with your physician in advance of any hospitalization or extensive treatment.

Caution in Preparing and Granting Powers of Attorney

A durable power of attorney, and especially a springing durable power of attorney, needs to be very carefully worded and you should seek the assistance of a Missouri lawyer who practices in this area. Furthermore, you should use great care in the selection of your attorney-in-fact. Remember, you are trusting not only your property, but perhaps your life, to the person you appoint.

An effective durable power of attorney should contain broad and detailed powers that financial institutions can identify and specifically rely on in granting the attorney-in-fact access and control of the principal's assets. The attorney-in-fact should have the ability under the document to conduct every financial affair the principal may have had in order to correct any and all issues which may arise in the principal's estate.

Although Missouri law sets no limits on the duration of a DPOA, the best practice would be to maintain "fresh" documents that coordinate with other areas of the law and are up-to-date with current financial transactions.

REVISED ANATOMICAL GIFT ACT

What is an "Anatomical Gift"?

An "anatomical gift" is a donation of all or part of a human body, after death, for the purpose of transplantation, therapy, research, or education. You may also donate some of your organs or tissue while you are alive by making arrangements with certain medical providers; however, that process is not covered in the anatomical gift law.

Can I Be a Donor?

Anyone can decide to become a donor. Your medical condition at the time of death determines what organs and tissues can be donated, not age or chronic illness. Medical professionals evaluate the potential for organ and tissue donation on a case-by-case basis at the time of death.

Why is a Donation Important?

Thousands of people die or suffer needlessly each year due to a lack of organ and tissue donors. A transplant is often the only hope. A single donor can save the lives of up to eight people and enhance the lives of up to 50 others.

What Organs and Tissue Can I Donate?

Vital organs and tissues can be donated for transplantation. Organ donation is an option for people who have been declared legally dead by brain death criteria. Tissue donation is an option for people who have been declared legally dead by brain or cardiac criteria.

- **Organs –** heart, kidneys, pancreas, lungs, liver, and small intestine.
- **Tissue –** cornea, skin, bone, bone marrow, heart valves, blood vessels, and tendons. Tissue donation, such as skin for burn victims or eye donations for sight-restoring cornea transplants, gives people a chance to lead full, productive lives.

May I Donate My Body for Science, Education, or Research Purposes?

Yes, and to assure that your body will be accepted, you should make arrangements in advance for such a donation with a scientific, educational, or research institution.

What is Brain Death?

Brain death results from a severe, irreversible injury to the brain. All areas of the brain are damaged and no longer function. In situations of brain death, a person cannot sustain life, but vital body functions may be maintained in an intensive care unit for a short period of time. This maintains circulation to the vital organs long enough to facilitate organ donation. People who experience brain death can also donate tissue.

What is Cardiac Death?

Cardiac death results when the heart and breathing cease to function. All organs and tissue in the body suffer from a lack of oxygen circulation and die. People who experience cardiac death are able to donate tissue after their deaths but not organs.

Will My Decision to Donate Affect the Quality of My Medical Care?

No. Organ, eye and tissue recovery takes place only after **all** efforts to save your life have been exhausted and death legally declared. The doctors working to save your life are entirely separate from the medical team involved in recovering organs and tissues after your death.

Can a Person Be Too Old or Sick to Donate?

- **Perhaps.** People of all ages may be an organ and tissue donor.
- Your medical condition at the time of death will determine what organs and tissue can be donated.
- A physician will decide whether your organs and tissue can be transplanted.

What Medical Conditions Prohibit Donation?

Each potential donor is evaluated for the presence of conditions or illnesses that might put the transplant recipients at risk. The only contraindications to donation are the presence of HIV infection and/or active hepatitis infection. All other medical conditions are evaluated individually at the time of donation. Many people with chronic medical problems have safely donated vital organs and tissue.

Will Donation Disfigure my Body?

- **No**. Donation does not disfigure the body or change the way it looks in a casket.
- It does not delay funeral arrangements.

Will Donation Affect Memorial or Funeral Arrangements?

- **No**. Generally, donation does not delay funeral or memorial services.
- Donation does not prevent an open casket funeral.

Will My Family Be Charged If My Organs Are Donated? Are There Any Costs for Donation?

- **No.** Donation costs nothing to the donor's family or estate. Organ and tissue donation is a gift. The family of a donor does not pay any hospital or physician fees associated with the organ and tissue donation.
- The family is responsible for funeral and burial costs.
- Organ and tissue recovery costs are the responsibility of the organ or tissue recipient.

Does the Family Receive Any Money for Donation?

- **No.** It is illegal to buy or sell human organs or tissue.
- Organ and tissue donation is a gift.
- The family receives **no** payment or reimbursement for donation.

Does My Religion Approve of Donation?

- Most religions approve of organ and tissue donation and consider it a gift, an act of charity. Visit www.organdonor.gov/donation/religious_views.htm.
- If you have any questions, speak to your religious advisor.

What Happens to My Donated Organs and Tissue?

- Patients receive organs and tissues based upon blood type, length of time on the waiting list, severity of illness and other medical criteria.
- Age, race, gender, ethnicity, income, or celebrity status is not considered when determining who receives an organ or tissues.
- Buying and selling organs is against the law!
- Organs, eyes and tissues are given to people who need them the most:
    a. at the local level,
    b. the region, and
    c. all over the country.

Can I Direct a Donation?

- It is permissible to specify an individual to receive a donated organ. If the organ is a suitable match for a person who is waiting for a transplant, he or she can receive the transplant as a gift.
- You cannot specify a donation on the basis of age, gender, race or ethnicity.
-

How Can I Become an Organ, Eye and Tissue Donor?

Consider yourself a potential organ and tissue donor. Your medical condition and circumstances of your death will determine what organs and tissues can be donated. Once you make the decision to be a donor, record your decision. There are several ways you can document your decision to give an anatomical gift:

- Register your decision in Missouri's registry online at www.missourior-

gandonor.com.

- Enroll in the registry when you obtain or renew an instruction permit or driver's/non-driver's license.
- Complete and mail in a registration form by calling toll-free to 888-497-4564 to obtain a copy of the form.
- Sign the back of your driver/non-driver license with a permanent marker.
- List your decision in a will or living will (please note that if only done in your will, the will may not be found in time for the donation).
- Include your decision in an advance health care directive.
- Sign and carry a donor card or other signed record.
- Provide any communication witnessed by two adults during a terminal illness or injury (one witness must be a disinterested witness).

Do I Have to Sign a Donor Card or My Driver's License?

No. You do not have to sign a donor card or your driver's license. It is just one way to document or record your decision.

How Do I Make My Decision Known?

- Record your decision in Missouri's organ and tissue donor registry.
- Tell your family. Your family will be notified of your decision to donate at the time of your death and that your decision to donate is being honored. Inform them early so it will not be a surprise to them at a very difficult time.
- Talk to your faith leader, friends, and physician about your desire to be a donor.
- Sign your driver's license with a permanent marker every time you renew your license. Be sure to have it witnessed.
- Include organ and tissue donation in your advance health care directive, will, and living will.

What is the Organ and Tissue Donor Registry?

The Organ and Tissue Donor Registry is a statewide voluntary, confidential registry of potential organ and tissue donors that was established by legislation in 2008. It is a first-person consent registry, making your decision final unless revoked in a manner provided by law. Family consent is no longer required.

What if I Joined the Registry Years Ago?

To achieve first-person consent status, you must enroll in the registry again. You can do this in several ways. Complete the online application form that will automatically update your record. Submit a complete paper registration form to the Department of Health and Human Services and the department will update your record for you. And, lastly, be sure to say "yes" when asked if you want to be in the registry every time you renew or change information on your instruction permit or driver's/non-driver's license so that your record will be updated.

What Happens When I Enroll in Missouri's Organ and Tissue Donor Registry?

By enrolling in Missouri's Organ and Tissue Donor Registry, you are giving legal consent for the recovery of your organs, eyes and tissues for the purpose of transplantation, therapy, research and/or education at the time of your death. Registry information is kept strictly confidential and can only be accessed by:

a. Federally regulated organ procurement organizations, and
b. Missouri licensed tissue and eye banks.

Such access is limited and for the sole purpose of identifying potential organ and tissue donors at or near the time of death. The Department of Health and Senior Services employees or their representative has access to the registry when required for the performance of their official duties as it relates to the registry and the donation process.

Do I Need to Have Special Language in an Advanced Directive or Living Will?

Yes, if you plan to be a vital organ and tissue donor, the document must specify that intensive care interventions are only authorized for the purpose of organ and tissue donation.

Is There Any Age Restriction on Joining the Registry?

Yes. If you are not an emancipated minor, you must be 16 years of age or older to register directly through the local driver's license office, online, or by using a paper enrollment form. If you are 16 or 17 years of age, you are required to provide parent/guardian contact information. However, if you are under the age of 16 and not emancipated, please discuss the issue of organ and tissue donation with your parents/legal guardians. They may complete a registration form for you.

How Can I Refuse to Make an Anatomical Gift and Bar Others From Doing So On My Behalf?

If you want to refuse to make an anatomical gift and bar others from doing so on your behalf, you will need to execute a refusal by completing one of the steps below. Be sure to provide copies of your documentation to family, friends, or others who may be making end-of-life decisions for you.

- A refusal in your will (although if only done in your will, the refusal may be found too late to prevent donation).
- If you are physically unable to sign a refusal in a record or writing, have that writing signed by another person at your direction. This should be witnessed by at least two adults – one of whom must be a disinterested party – who also sign the document at your request and attest to your decision.
- A communication made by you in any form during your terminal illness or injury, addressed to at least two adults, one of whom is a disinterested witness.

What Will the Symbol on My License Look Like?

The symbol is a red heart with a green ribbon going through it with the word "donor" above the heart. It will be on the front of your driver's/non-driver's license.

May I Later Withdraw or Revoke My Consent to be Listed on the Organ and Tissue Donor Registry?

Yes. You may withdraw or revoke your consent to be listed on the registry. This action does not mean a refusal to make an anatomical gift. Your agent, next of kin, guardian, or other public official could still act on your behalf and make the gift. Other authorized persons may make such a gift for you despite your revocation unless you take steps to prevent them from doing so and execute a refusal.

What Happens to My Decision to Make an Anatomical Gift if I Lose my Instruction Permit or Driver's/Non-Driver's License?

Suspension, expiration or loss of your instruction permit or driver's/non-driver's license does not invalidate your gift.

How Can an Attorney Assist Me with An Anatomical Gift or Refusal?

Attorneys who practice in the areas of estate planning and elder law can help you clarify and implement your wishes concerning anatomical gifts. They can help you reinforce your intent by putting your wishes in your will and durable powers of attorney in addition to registering on the Missouri Organ and Tissue Registry.

If you need help finding a lawyer in an outstate area or the Kansas City area, call The Missouri Bar Lawyer Referral Service at 573/636-3635; in the St. Louis area, call 314/621-6681; and in Greene County, call 417/831-2783.

GUARDIANS AND CONSERVATORS UNDER MISSOURI LAW

What is a Guardian?

A guardian is a person who has heen appointed by a court (usually the probate division of the circuit court) to have the care and custody of a minor or of an adult person who has been legally determined to be **incapacitated**.

What is a Conservator?

A conservator is a person or a corporation, such as a bank or trust company, appointed by a court (again, usually the probate division of the circuit court) to manage the property of a minor or of an adult person who has been legally determined to be **disabled**.

Who May Be Appointed Guardian and Conservator?

The same person is usually appointed both guardian and conservator, although it is possible for different persons to be appointed with respect to the same minor or incapacitated and disabled adult. Parents have the first priority for appointment as conservators for the estates of their minor children, although such appointment is necessary only if the minor will receive property from some source other than his or her parents, such as the settlement of a personal injury action, an inheritance from a decedent's estate or some other source of property or income. Parents are the natural guardians for their children and need not be appointed as such by a court. However, if a minor has no parents, then the court may consider a guardian and conservator chosen by the minor if the minor is over the age of 14 years. The court may also consider a person named in the will of the last parent to die. In any event, the person appointed by the court must be suitable and qualified. If the minor is unable to choose a guardian and conservator and if the last surviving parent failed to designate a guardian and conservator in his or her will, then the court will appoint the most suitable person, usually an adult brother or sister or other close adult relative who is willing to serve.

An incapacitated or disabled person may designate his or her own guardian or conservator if, at the time of the hearing, the person is able to communicate a reasonable choice to the court. In addition, any competent adult person may designate a suitable person to serve as guardian or a suitable person or eligible corporation to serve as conservator, if done in writing and witnessed by at least two witnesses within five years before the date of the hearing. (Frequently such designations are made in

Durable Powers of Attorney, which are discussed elsewhere in this publication.) If no suitable person has been nominated by the incapacitated or disabled person, the court will consider appointing, in order: the spouse, parents, adult children, adult brothers and sisters and other close adult relatives. If there are no relatives willing or able to serve, the court may appoint any suitable person (such as a close friend) or, if no one steps forward, the public administrator. A person need not be a resident of the state of Missouri to qualify for appointment as a guardian or conservator. However, the court may consider the fact of non-residency when determining who may be suitable for appointment as a guardian or conservator.

What Does it Mean to Be Incapacitated or Disabled?

As defined by Missouri law, "an incapacitated person is one who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he [or she] lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness, or disease is likely to occur." Similarly, a disabled person is one who is "unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that the person lacks ability to manage his [or her] financial resources." Under certain circumstances, a conservator may be appointed by the court for a person who has disappeared or is detained against his or her will.

What is the Legal Effect of a Judicial Determination of Incapacity or Disability?

The answer depends upon whether the court has made a finding of **total** disability and incapacity or only **partial** disability and incapacity. If the court finds that a person is only partially disabled and partially incapacitated, the person is still presumed competent and loses only those rights specified in the order. A person who has disappeared or is being detained does not lose any rights. On the other hand, if the court finds a person totally incapacitated or totally disabled (or both), the person is presumed to be incompetent for all legal purposes. A person who has been determined by a court to be disabled is referred to as a "protectee" and a person who has been determined by a court to be incapacitated is referred to as a "ward."

How Are Guardianship and Conservatorship Proceedings Commenced?

Proceedings are commenced when a "petitioner" files an application for the appointment of a guardian and/or conservator in the probate division of the circuit court in the county in which the minor or alleged incapacitated or disabled person (the "respondent") resides. The petitioner and the respondent must be represented by attorneys. After an application is filed, the court will set a date for a hearing. In

the case of a minor, notice of the application must be served before the hearing: upon the minor (if over the age of 14 years); his or her parents and spouse, if any; anyone having care and custody of the minor; and any agency charged with supervision, control or custody. In the case of an alleged incapacitated or disabled person, notice of the application must be served: upon the respondent; his or her spouse, parents, children or other close relative over the age of 18 years; any person acting in a representative capacity with respect to any of the respondent's financial resources; and any person having care and custody of the respondent.

What Are the Duties of a Guardian and a Conservator?

A guardian must always act in the best interest of the ward. The guardian of a minor is charged with responsibility for the minor's custody and control, and must act and make decisions relative to the minor's education, support and maintenance. A guardian of an incapacitated person must act and make decisions relative to the ward's care, treatment, shelter, education, support and maintenance. A guardian must assure that the ward resides in the least restrictive setting reasonably available and receives all medical care which he or she may need. A guardian may give necessary legal consent for the ward's treatment. However, a guardian may not admit the ward to a mental health facility for more than 30 days without a court order. A guardian must report to the court, at least annually, on the ward's physical condition.

A conservator, under the supervision of the court, is responsible for the protection and management of the protectee's financial estate. The conservator must properly and prudently invest the protectee's assets, apply such assets for the protectee's care and maintenance, and account for all funds received and expended on behalf of the protectee. Because of the strict accounting requirements imposed by law and the necessity of obtaining a court order authorizing most expenditures from the estate, the conservator must work closely with an attorney in order to administer the protectee's estate properly, no matter how large or small it may be.

Is the Conservator or Guardian Personally Liable for the Debts of the Protectee or Ward?

No, as long as the conservator indicates that he or she is acting on behalf of the protectee or ward in a representative capacity. In addition, neither the conservator nor the guardian assumes personal responsibility for the protectee's or ward's debts that may have been incurred by the protectee or ward prior to the court's determinations that he or she is an incapacitated or disabled person. Of course, unauthorized use of the protectee's estate or misappropriation of the protectee's property by either the conservator or guardian will likely require revocation of legal authority as conservator or guardian by the court and may result in personal liability for any harm or loss suffered by the estate.

How Are Guardianship and Conservatorship Terminated?

Guardianship and conservatorship for a minor terminate when the minor reaches 18 years of age. If there was a conservatorship estate for the minor, the conservator prepares and files with the court a final accounting of the administration of the estate. Upon the court's approval of the final accounting, the conservator transfers the estate to the former protectee and, upon filing a final receipt with the court, the conservator and guardian are discharged by the court from any further responsibility.

On the other hand, guardianship and conservatorship for an incapacitated and disabled person terminate only when the protectee is found to be competent by the court or upon the death of the protectee. When either of these two events occur, the conservator prepares a final accounting for the court and the conservator and guardian are discharged in much the same manner as with the termination of a minor's estate. In some cases, when the estate of the protectee has been completely exhausted, the conservator may be discharged by the court upon filing a final accounting, but the duties of the guardian will continue until such time as the ward is found to be competent by the court or dies.