PROBATE LAW RESOURCE GUIDE

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CHAPTER 1: PROBATE

What is probate?

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 probate terms should I know?

- **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.
- **Claimant** – a creditor who files a claim against a probate estate.
- **Devisee** – a distributee that is named in a will to receive certain property. A devisee 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 valid 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 oversee a decedent's probate estate. A personal representative is 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, at death, the decedent did not have any property to be transferred through probate. A person may take steps to avoid probate while alive, such as the following:

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

- Assigning an interest in a business, personal property, or digital asset.

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 to pay claims and expenses and submits a final accounting and proposed distribution schedule to the court for approval.

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 after an individual's death to finish the administration.

The following are steps in probate administration:

- Hire a lawyer 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.

What are the rights of creditors, and how does collection of debt work?

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).

What happens to taxes after death?

An important function of probate is to assure payment of any tax liability. A probate estate must have a federal taxpayer identification number (TIN). 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.

Estate taxes must be paid on probate assets and other assets transferred at death over a minimum amount. That amount is subject to change by Congress each year.

What are the most common types of probate expenses?

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. Publication costs: 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 on 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 more than this scheduled fee may be paid upon an order of the court or upon consent of all distributees. The minimum scheduled fees are based on 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% of the first $5,000;
- 4% of the next $20,000;
- 3% of the next $75,000;
- 2.75% of the next $300,000;
- 2.5% of the next $600,000; and
- 2% 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% of estate for both fees).

How do I establish 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. In cases of supervised administration, a 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 in which the title to the real property can be so affected is reduced to approximately six months after the first publication of letters.

What are the surviving spouse's rights if there is no will?

In Missouri, the spouse of a decedent is entitled to receive all the estate if the decedent had no surviving descendants. Otherwise, the spouse is entitled to 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 their 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.

What are 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 had surviving descendants.

This election for a spousal distribution is subject to the claims of creditors and estate expenses, and it 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.

What are the two 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 all the distributees agree.

Can you streamline the probate process?

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.

What is ancillary probate administration?

If a decedent was not a resident of Missouri at the time of their death and a probate administration is ongoing in their state of residence, an ancillary probate administration is a quicker alternative to disposing of personal or real property located in Missouri, as it bypasses many notice and filing requirements. So long as no administration is currently pending in Missouri, the out-of-state personal representative may file a petition and authenticated copies of their appointment in the county in which such property is located. The out-of-state personal representative is then granted all duties and obligations of a Missouri personal representative.

Is a lawyer necessary in probate?

Yes, when a regular decedent's probate is undertaken. A lawyer 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 over various issues.

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

CHAPTER 2: WILLS

What is a will?

A will – sometimes referred to as a last will and testament – is a legal document that states a person's wishes for the distribution of their property and assets when they die. A will does not avoid the necessity of probate and must be admitted to the probate court within a year of the will owner's death to have legal effect.

Who can make a will?

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

What key words should I know?

- **Personal representative** – a person appointed by the court to oversee a decedent's probate estate. Also called an executor or administrator, a personal representative can be nominated by the testator in the will.
- **Probate estate** – assets or property owned by the decedent and subject to administration supervised by the probate court, including any income after death.
- **Testator** – the person who made/executed the will.

When is a will legal in Missouri?

In Missouri, a will is legal when the testator signs it, and the signature is witnessed by two people. A will is "self-proving," meaning no additional evidence needs to be admitted to the probate court to prove the will's legitimacy if a special clause is used when the witnesses sign and the testator's signature is acknowledged by a notary public.

A will can be changed through a codicil with the same formalities as when the will was initially signed. For that reason, it is usually easier to replace an old will with a new one. An earlier will may be canceled by properly executing a newer will, or by destroying the original and any copies that may have been made.

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

What if I die without a will?

Without a will to indicate the decedent's preferences, a decision as to who receives their property after their death is set by state law, commonly referred to as "intestate succession." If no relatives are found – a highly unusual circumstance – the property "escheats," meaning it goes to the state.

Who can I give my property to?

A testator may give their property to any person or organization they choose, in almost any manner they choose. Some laws limit what the testator can do in a will, so a testator should seek the advice of a lawyer to better understand if a will can contain all their wishes.

A testator cannot completely disinherit their spouse since the spouse can elect to receive a certain amount, specified in a state statute, from the testator's estate if the spouse is not satisfied with the amount they are to receive under the will.

Why is it better to have a will?

The testator will have the satisfaction of knowing that they have a plan in place for their legacy. The testator can say whom they want to receive their tangible personal property in a list referred to in the will.

A testator can change the list without changing their will or following the same formalities. The testator can also nominate a guardian for their minor children in a will.

A will can save some costs for the testator's devisees by waiving bond and providing for independent administration.

How long is a will legal?

A will is valid/legal until changed or canceled by the testator or by statute (*i.e.*, a will benefitting a spouse will not be enforceable after a divorce).

When should I think about changing my will?

A testator should consider changing their will if one of the following occurs:

- A major life event like changes through marriage, divorce, birth, adoption of children, or death or disability of anyone named in the will.
- The testator's family, property, money, or other assets change significantly in value or nature.
- The testator moves to another state.

What strategies can be used in addition to a will?

A will controls the distribution of a testator's property that they own in their individual name at the time of their death. Utilizing different asset ownership structures, such as joint ownership or a trust, can avoid the need for probate.

An individual can initiate non-probate transfers such as beneficiary deeds for real estate; beneficiary designations for personal property; pay-on-death provisions on bank accounts and other assets; and transfer-on-death provisions on motor vehicle titles, stock certificates, and brokerage accounts.

Beneficiary designations on life insurance policies, individual retirement accounts (IRAs), and employer retirement plans provide for transfer to the named beneficiaries upon the death of the account owner.

You should always have a will in addition to these other strategies 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 your loved ones to totally avoid the need to probate your estate.

Who can write a will?

By law, any capable adult can write a will, 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 is certainly legal. You should find a lawyer who routinely practices estate planning law. Ask the lawyer how much their fee will be to write a will. While it is a usual practice for many lawyers to charge an hourly rate, it is also common for estate planning lawyers to write wills, trusts, and other estate planning documents on a flat-fee basis.

CHAPTER 3: 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 their lifetime and upon 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.

What parties are involved in a revocable living trust?

- **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 married couple create a joint trust, including a qualified spousal trust.
- **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 their 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 can't continue serving for any reason.
- **Beneficiary** – This is the person or entity that will receive the income or principal from the trust. This can be the settlor (and their spouse) during the settlor's lifetime and the settlor's children (or anyone else or a charity the settlor chooses to name) after the settlor's death.

How is a revocable living trust created?

There are two basic steps in creating a revocable living trust. First, a lawyer prepares a legal document called a "trust agreement," "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 the settler amend or revoke a revocable living trust?

Yes. The settlor ordinarily reserves the right in the trust document to amend or revoke the trust at any time during their lifetime. This enables the settlor to revise or terminate the trust to account for change of circumstances such as marriage, divorce, death, disability, "change of mind," or changes in the law. It also gives the settlor the peace of mind that the settlor can "undo" what has been 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. Depending upon how the trust was drafted, sometimes the entire trust, or a portion of it, 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 last will and testament?

No. A revocable living trust may be considered the principal document in an estate plan, but a last will and testament 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 the settlor's lifetime is added to the trust upon the settlor's death after going through the probate process and distributed to (or held for the benefit of) the beneficiary according to the trust instructions.

The settlor may be unable to transfer all desired property to a revocable living trust during their lifetime. For example, the probate estate of a person who dies from 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 pour over 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, discussed in Chapter 2 of this guide.

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 lawyer. 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 or the trust states that the trustee will not receive a fee. 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, as well as income tax returns for the trust, must be filed. Trustees often seek assistance and advice from lawyers, who charge fees for their services, to be certain to comply with the trustee's legal fiduciary duties.

What are 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 the beneficiaries.

Property may be partially distributed to the beneficiaries shortly after the settlor's death, avoiding much of the delay encountered with probate administration (although certain creditor claim periods may apply). Also, probate court approval is not necessary to sell an asset in a trust, thus avoiding further delay. "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, property maintenance expenses, and real estate taxes until real estate is sold or distributed. The trustee might resolve property distribution issues, such as some beneficiaries wanting the real estate while others want money.

What are 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 documents must be prepared to transfer the settlor's assets to the trust, and beneficiary designations need to be changed to the trust — all processes that 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. However, if appropriate in a particular trust administration, a trust can be treated like a probate estate for income tax purposes by making a § 645 election.

What types of provisions can a trust include?

A trust can include various provisions for many types of beneficiaries. The provisions that are included are dependent on the goals and wishes of the settlor regarding his or her estate planning.

A revocable living trust will include provisions for the management of the trust during the settlor's lifetime, including if they become incapacitated. This includes how the trust assets may be used for the benefit of the settlor and for others that may be dependent upon the support of the settlor.

After the death of the settlor, specific provisions for distributing tangible personal property, including pets, may be included. Clear descriptions of these items should be included to avoid any uncertainty after death. In addition, specific assets or amounts to specific beneficiaries may be set forth in the trust. Consideration should be given to whether specific dollar amounts or percentages should be used, as well as what occurs if a beneficiary is not living at the time of the settlor's death.

The balance of the trust may be distributed to a spouse, children, charities, and/or other beneficiaries either outright or in trust. If in trust, it may include marital trusts, residuary or credit shelter trusts, supplemental needs trusts, and specific trust terms for beneficiaries. There are certain creditor protection benefits that can be provided to a beneficiary when the assets are held in trust for the beneficiary. The settlor should consider the tax consequences of these structural options as part of the planning.

Attention should also be given to how the assets should be distributed if all the beneficiaries listed predecease the settlor or die during the continuance of the trust.

A trust will also contain administrative provisions, including detailed, specific powers for the trustee to enable the trustee to act on behalf of the trust. There should also be customized tax provisions depending upon the structural choices made in the trust, as well as customized trustee provisions regarding the succession and appointment of trustees. A trust is also likely to contain an in terrorem clause (a no-contest clause).

Who can serve as trustee?

A settlor who desires to manage their own financial affairs and who is physically and mentally able can (and ordinarily should) serve initially as trustee. 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. The settlor may also desire to make someone else responsible for managing assets, whether temporarily or permanently, by resigning or naming another initial 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 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, as well as a corporate trustee, may be named to serve as co-trustees. If the settlor names more than one trustee, 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, as well as to define how to resolve disagreements between the trustees (*e.g.,* does the vote of the corporate trustee override the individual trustee).

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?

Yes. A settlor of a revocable living trust should 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. The attorney-in-fact under a general durable power of attorney manages assets owned outside of the trust during life, whereas the trustee manages assets owned by the trust. Thus, these documents serve different management purposes.

An advance directive, usually used with a durable power of attorney for health care, as well as a living will, have entirely different functions from a revocable living trust. These documents 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 or living will. Care should be taken, however, to require the trustee to pay for medical expenses for an incapacitated settlor if necessary.

Advance directives, durable power of attorney documents, and living wills are discussed later in this guide.

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. Once all or a portion of the trust becomes irrevocable, typically after the death of one or both settlors, the irrevocable portion of 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 the use of other legal devices like disclaimers. However, depending upon various factors, lifetime gifts of an amount over the annual exclusion amount to a donee may be subject to estate tax if the settlor dies within three years of making the gift.

Does the trustee have to inform the beneficiaries?

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, 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 trustee, and that a copy of the entire 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, typically at least once per year depending upon the trust terms.

Who can advise you about a revocable living trust?

You should never sign a revocable living trust document without the advice of a Missouri lawyer who practices in this field of law. A lawyer will be able to advise if a revocable living trust is right for you and can assist you with making the legal decisions that go into creating a trust.

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 lawyer's help because it may be too late to change it after you die or become incapacitated.

CHAPTER 4: QUALIFIED SPOUSAL TRUST

What is a Qualified Spousal Trust?

The Qualified Spousal Trust (QST) was created in Missouri pursuant to § 456.950 of the Revised Statutes of Missouri. A QST is a variation of a joint revocable living trust that offers married couples asset protection opportunities granted to spouses under the Missouri tenancy by the entirety laws.

What is tenancy by the entirety?

Tenancy by the entirety is a form of joint ownership that is exclusively for married couples. Spouses in Missouri do not hold separate interests in tenancy by the entirety property; rather, it is owned by the parties as if the spouses were one indivisible person. The property cannot be transferred without the consent of both spouses. If one spouse dies, then the other spouse automatically takes full title to the property. This form of ownership applies to real property, such as a home, when owned together by spouses and may apply to personal property, such as a bank account, depending upon the choices made when the account is created (*e.g.,* actively choosing the tenancy by the entirety ownership option rather than joint tenancy with rights of survivorship). In Missouri, there is a rebuttable presumption that any real property jointly owned by a married couple is tenancy by the entirety.

The most important feature of this type of ownership is that the tenancy by the entirety property is immune to creditor claims for debts held by only one spouse. It does not provide protection for debts that are held jointly by both spouses, such as a mortgage.

How is a QST created?

The QST is created the same way as any other revocable living trust, by requiring the drafting of a trust agreement and transferring property to the trust (either through a change of ownership or via a beneficiary designation). The QST can be created as a joint trust with one joint share; a joint trust with more than one joint share; a joint trust with separate shares for each spouse; or a joint trust with a combination of joint and separate shares while simultaneously retaining the tenancy by the entirety protection.

What is the benefit of a QST?

Prior to the enactment of the QST statute in 2011, there was a risk that transferring tenancy by the entirety property into a joint trust would break the tenancy, causing the property to lose the creditor protections. The QST was designed to solve that problem. Because the QST is built on the principle of tenancy by the entirety, creditor protection is preserved for any property transferred into the trust (regardless of how the property was owned prior to the transfer). The QST is a unique blend of tenancy by the entirety ownership protections combined with the ability to hold such property in separate shares for each spouse.

What are the requirements of a QST?

Because the QST is a revocable living trust, it has the same basic requirements such as a settlor(s), trustee(s), and beneficiary(ies). Additionally, the QST requires that:

1. The parties must be married to each other at the time the trust is created
2. The trust must be managed for the benefit of both parties
3. The trust can be revoked by one or both parties (although to be cautious one may wish to require

revocation by both parties for all joint shares.)

4. Both parties must have the right to receive distributions from the trust during their lifetimes and the lifetime of the survivor.

The QST applies to all trusts that meet these criteria whether created before or after 2011.

What if a spouse owns separate property?

The QST was modified by the Missouri Legislature in 2015 to allow a spouse to contribute separately owned property to the trust. This is significant because a spouse can now transfer separately owned property to the QST, even holding such property in a separate share within the QST, and it will receive the same creditor protection as property that is held as tenancy by the entirety.

However, this cannot be used to defraud creditors or hide assets from collection for debts. For example, a spouse could not transfer separate assets to the trust to protect them from an upcoming lawsuit.

Why are the QST separate shares important?

Normally the creditor protection provided by tenancy by the entirety ends with the death of one spouse. If all the property passes outright or directly to the surviving spouse, this means that the surviving spouse's property would be vulnerable to creditor claims. Part of that risk can be avoided because the QST allows spouses to create separate shares within the trust. When the first spouse dies, the deceased spouse's share for the benefit of the surviving spouse may be held in trust, for example in a residuary credit shelter trust, a discretionary trust, or in a marital trust. It retains creditor protection for that trust share when structured properly.

What are the advantages of a QST?

The QST offers the same benefits as the revocable living trust such as avoiding probate and probate expenses. Providing asset protection for the jointly held property of married couples is the primary benefit of the QST. Additionally, it is possible to protect the deceased spouse's portion of the assets for the benefit of a surviving spouse to a limited extent. This provides unique estate planning and credit protection opportunities, particularly for people with high-risk careers such as doctors, dentists, lawyers, accountants, and real estate professionals.

What are the disadvantages of a QST?

The QST is subject to the same disadvantages as any revocable living trust, such as taxes, the expense to create a trust, and necessity of retitling the parties' assets in the name of the trust. As of 2022, the QST has yet to be tested in the courts, so it can be expected that the law will develop further in the upcoming years. Like any other trust, specific tax planning must be reviewed and incorporated into the QST.

Although the QST statute states that the rights of the parties for dissolution of marriage purposes shall not be affected by the transfer of the property to a QST unless it is agreed to by the parties in writing, the parties may wish to consider the ramifications of the same and whether the creation of a postnuptial agreement may be appropriate for their circumstances.

Is a Qualified Spousal Trust right for me and my spouse?

A thorough discussion with a lawyer who practices estate planning law will assist you in determining if a QST is right for your family. The QST must be carefully drafted to ensure you receive Its full benefits offered by the trust. The help of a lawyer will ensure your property receives the most creditor protection possible.

CHAPTER 5: 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 spouses 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 spouse to sever the ownership without the consent of the other spouse.

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, their interest will not pass to the surviving owner or owners but will pass as an individual share according to the deceased co-owner's 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 spouses, 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 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. A person can be certain that their assets will pass as intended only if that individual has a will. A will, properly written and executed, applies to all the property of the maker for which the individual has not otherwise provided. Almost everyone should have a will, even though the individual 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. 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. 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 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 re-register 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 the 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 their 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 their 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.
- A judgment against one spouse cannot affect property held by a married couple as tenants by the entirety.

What are the 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 they cannot sell their partial interest unless the other joint tenants agree and cooperate. In other cases, a joint owner may be able to sell or pledge the property without notifying the other owner.
- 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 disagree, they may require a costly and time-consuming lawsuit for the original owner to exercise their 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 minors 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 to meet tax payments or other cash needs 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. Joint tenancy does not avoid estate taxes. In many instances, all or part of jointly held property may be included 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 largely minimized the gift tax consequences of joint ownership, especially between spouses, effective tax planning for large estates can be greatly complicated using joint property arrangements.

Can I jointly hold a safe deposit box?

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 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 make 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 they attempt 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 an “agent.”

What are 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 individuals who are to receive the property following the original owner’s death 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 TOD instructions or beneficiary deeds without first consulting an estate planning lawyer.

How do I know if a joint tenancy is advisable in my situation?

Your lawyer can advise you after they have been made aware of all of the facts concerning 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, a new law establishing a trust specifically for tenancy by the entirety property called a Qualified Spousal Trust took effect. Please talk with your legal advisor and read Chapter 4 of this guide to learn more about the benefits of such a trust.

CHAPTER 6: MISSOURI FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (MFADAA)

What is the primary purpose of the Missouri Fiduciary Access to Digital Assets Act (MFADAA)?

In today's world, digital assets are more prevalent than ever before. Most people utilize digital assets to communicate, pay bills, manage subscriptions, store photos and music, and much more. Until recently, very few laws outlined who had the authority to access these digital files and accounts if the user became incapacitated or passed away. If the deceased or incapacitated person wanted any of their digital assets to be deleted, modified, or distributed to loved ones, it was almost impossible to determine who would have a legal right to access those assets. And unless the person had previously compiled a list of all usernames and passwords, the fiduciary would have no ability to access them. As a result, digital assets would either be deleted by the company that controls them or simply linger on the Internet long after the person's death, inaccessible by family or friends.

The purpose of MFADAA – enacted in Missouri in 2018 under §472.400-472.490, RSMo – is simple: to give fiduciaries, such as executors, trustees, conservators, and attorneys-in-fact, the legal authority to manage the digital assets and electronic communications of a decedent or incapacitated individual in the same way that tangible assets and financial accounts are managed. The act also attempts to provide privacy protections for the users of digital assets and legal protections for the businesses who make, store, or provide digital assets to users.

What important terms should I know?

- **User -** A person that has an account with a custodian.
- **Custodian -** A person that carries, maintains, processes, receives, or stores a digital asset of a user.
- **Digital asset -** An electronic record in which an individual has a right or interest. This term does not include the underlying asset unless the asset is itself an electronic record.
- **Account -** An arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.
- **Terms-of-service agreement -** An agreement that controls the relationship between a user and a custodian.
- **Catalogue of electronic communications -** Information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person. This would include the name and email address of the sender and the date and time the message was sent. It does <u>not</u> include the subject line of a message.
- **Content of an electronic communication -** Information concerning the substance or meaning of the communication which: (1) has been sent or received by a user; (2) is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and (3) is not readily accessible to the public. Examples include emails, text messages, social media accounts, etc.
- **Online tool -** An electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

- **Designated recipient -** A person chosen by a user using an online tool to administer digital assets of the user.

When does MUFADAA apply?

The restrictions and requirements of MUFADAA apply primarily in cases where a user has become incapacitated or deceased, and are relevant to those acting in the following situations:

- A personal representative acting for a decedent (whether under a will or other legal directive);
- An agent acting under a power of attorney;
- A conservator acting pursuant to a conservatorship proceeding; or
- A trustee acting under a trust.

The obligations of MUFADAA are imposed on the custodians of digital assets if the user currently resides in Missouri or resided in Missouri at the time of the user's death.

MUFADAA does not apply to digital assets in the scope of an employer-employee business relationship.

How may a user provide access and direction regarding digital assets?

There are three primary methods under which a user may direct the custodian to disclose, or refuse to disclose, some or all of the user's digital assets: (1) online tools, (2) directions in estate planning documents, or (3) terms-of-service agreements.

The easiest method for a user to direct or prohibit disclosure of digital assets is through an online tool. As defined above, online tools are electronic services provided by a custodian that allow the user, in an agreement distinct from the terms-of-service agreement, to provide specific directions regarding disclosure to a third person. This is very similar to a "Transfer on Death" designation for tangible assets. For example, Google and Facebook are two companies that have provided online tools to their users.

A user may also include language in their estate planning documents, such as a trust, will, or power of attorney, which provides their named fiduciaries access to digital assets after death or during incapacity. This method becomes important if the user failed to utilize an available online tool or if such a tool is unavailable. While this is also a relatively simple way to ensure your digital assets can be recovered in the future, it may cost a bit more to set up than using an online tool.

If an online tool allows the user to modify or revoke a past direction, such a direction overrides a contrary wish outlined in the user's trust, will, or power of attorney. Therefore, it is important to ensure that a user's wishes regarding disclosure of digital assets as expressed in their estate plan are consistent with any online tools being used.

If a user failed to outline their wishes regarding disclosure of digital assets in an online tool or in their estate plan, the custodian's terms-of-service agreement will apply as a last resort. Generally, the terms of these agreements are very restrictive. They often bar access to digital assets to anyone but the user and require immediate termination of the assets after the user's death. Luckily, a user's direction regarding disclosure of digital assets used through an online tool or in an estate planning document overrides a contrary provision in a terms-of-service agreement.

What information must a <u>personal representative</u> provide to a custodian to obtain access to a decedent's digital assets?

Personal representatives are entitled to access all digital assets of the user, including a catalogue and the contents of a user's electronic communications, if they provide the following:

1. A written request for disclosure in physical or electronic form;
2. A certified copy of the death certificate of the user;
3. A certified copy of the documents by which the probate court appointed the personal representative (e.g. Letters Testamentary or Letters of Administration);
4. A copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications. (Note: This is not required if the user directed disclosure using an online tool. This is also not required to obtain only a catalogue of the user's electronic communications.)
5. If requested by the custodian for the purpose of identifying the correct account of the user:
    a. A number, username, address, or other unique account identifier assigned by the custodian to identify the user's account;
    b. Evidence linking the account to the user; or
    c. A finding by a court that:
        i. The user had a specific identifiable account with the custodian;
        ii. Disclosure would not violate other federal law regarding disclosure of electronic communications.
        iii. The user consented to disclosure of the content of electronic communications; and
        iv. Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

What information must an <u>agent</u> under a power of attorney provide to a custodian to obtain access to the principal's digital assets?

Agents are entitled to access all digital assets of the user, including a catalogue and the contents of a user's electronic communications, if they provide the following:

1. A written request for disclosure in physical or electronic form;
2. An original or copy of the power of attorney expressly granting the agent specific authority over digital assets or general authority to act on behalf of the principal;
    a. To obtain the content of electronic communications, the power of attorney must specifically provide the agent with authority over such communications;
3. A certification by the agent, under penalty of perjury, that the power of attorney remains in effect; and
4. If requested by the custodian for the purpose of identifying the correct account of the correct user:
    a. A number, username, address, or other unique account identifier assigned by the custodian to identify the principal's account; or

b. Evidence linking the account to the principal.

What information must a trustee under a trust provide to a custodian to obtain access to the grantor's digital assets?

If the trustee is the original user of the account, and unless otherwise ordered by a court or provided in the trust, a custodian must disclose to the trustee any and all digital assets of the account held in the name of the trust, including a catalogue and the content of electronic communications.

If, however, the trustee is not an original user of an account (*e.g.,* the trustee is a successor to the original user who is now deceased), the trustee must disclose the following:

1. A written request for disclosure in physical or electronic form;
2. A certified copy of the trust instrument or a certification of the trust under § 456.10-1013, RSMo, that includes the grantor's consent to disclosure of the content of electronic communications to the trustee;
3. A certification by the trustee, under penalty of perjury, that the trust remains in existence and the trustee is a currently acting trustee of the trust; and
4. If requested by the custodian for the purpose of identifying the correct account of the correct user:

    a. A number, username, address, or other unique account identifier assigned by the custodian to identify the trust's account; or

    b. Evidence linking the account to the trust.

What information must a conservator under a conservatorship estate provide to a custodian to obtain access to the protected person's digital assets?

After a formal court hearing, a court may grant complete access to any and all digital assets of the protected person, including a catalogue and the contents of all electronic communications. Without such a blanket court order, however, the conservator must provide the following:

1. A written request for disclosure in physical or electronic form;
2. A certified copy of a court order that gives the conservator authority over the digital assets of the protected person (obtained after a formal hearing); and
3. If requested by the custodian for the purpose of identifying the correct account of the correct user:

    a. A number, username, address, or other unique account identifier assigned by the custodian to identify the account of the protected person; or

    b. Evidence linking the account to the protected person.

A conservator with general authority to manage the assets of a protected person may request a custodian to suspend or terminate an account of the protected person for good cause. Such a request must be accompanied by a certified copy of the court order giving the conservator authority over the protected person's property. Outside of a court order, MUFADAA does not authorize a conservator to access the contents of a user's electronic communications.

What information must a fiduciary provide to the custodian to request the termination of a user's digital accounts?

1. A written request for termination of the account in physical or electronic form;
2. A certified copy of the death certificate of the user (if the user is deceased);
3. A certified copy of the relevant documents giving the fiduciary authority over the account. (Note: this may require Letters Testamentary or Letters of Administration in a full probate estate; a certificate of clerk in connection with a small-estate affidavit; or court order, power of attorney, or trust); and
4. If requested by the custodian for the purpose of identifying the correct account and the correct user:

    a. A number, username, address, or other unique account identifier assigned by the custodian to identify the user's account;

    b. Evidence linking the account to the user; or

    c. A finding by a court that the user had a specific account with the custodian, identifiable by the information specified in paragraph 4.a above.

When must a custodian comply with a fiduciary's disclosure request?

A custodian must comply with a request from a fiduciary or designated recipient to disclose a user's digital assets or terminate an account within 60 days of receipt of the required information outlined above. Custodians may assess a reasonable administrative charge for the cost of disclosure.

If the custodian fails to comply, the fiduciary or designated recipient may seek a court order directing compliance with the request. Such court order must contain a finding that compliance does not violate other federal law regarding disclosure of electronic communications (*e.g.,* Stored Communications Act, Computer Fraud and Abuse Act, etc.). Note that a custodian incurs no penalty for noncompliance; the estate bears all costs for seeking a court order to mandate disclosure. However, a custodian may be liable if it fails to comply with a court order.

What rights and legal protections do custodians have after receiving a disclosure request?

When disclosing the digital assets of a user, custodians have sole discretion, after reviewing the specific request, to determine whether it is prudent to:

1. Grant full access to the user's account;
2. Grant only partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or
3. Provide a fiduciary or designated recipient a *copy* of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

A custodian is prohibited from disclosing a digital asset previously deleted by a user.

If a user directs, or a fiduciary requests, a custodian to disclose only part of the user's digital assets, the custodian may refuse if isolation of the requested assets would impose an undue burden on the custodian. In such cases, either the custodian or fiduciary may seek a court order requiring disclosure of:

- A subset of digital assets limited by date;
- All of the user's digital assets;

- None of the user's digital assets; or
- All of the user's digital assets to the court for review *in camera* (when a judge reviews the materials privately).

A custodian is entitled to notify the user (if living) that a request for disclosure or to terminate an account was made. This will primarily come up in cases where an agent or conservator is acting on behalf of another person.

A custodian may deny a request from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any other lawful access to the account (*i.e.,* by the original user) following the receipt of the fiduciary's request.

In cases where the original user is alive, the custodian may require a fiduciary or designated recipient to obtain a court order which specifies that an account belongs to the user and specifies that there is sufficient consent from the user to support the requested disclosure.

A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with MUFADAA.

What rights, duties, and obligations does a fiduciary have when managing digital assets?

The same legal duties that apply to a fiduciary who manages the tangible property of another person apply in cases of digital assets, including the duty of care, loyalty, and confidentiality. A fiduciary who manages digital assets is also subject to any applicable terms-of-service agreements and federal law.

If an individual is acting within the scope of their fiduciary capacity on behalf of another, such person has full right and authority to access any digital asset in which the decedent, protected person, principal, or settlor had an interest. Such access may include the right to receive account information when such information is needed to terminate an account. The fiduciary is assumed to be an "authorized user" for purposes of applicable computer fraud laws. This authority may be limited, however, in cases of assets which are managed by a custodian or are subject to a terms-of-service agreement.

The fiduciary is prohibited from using their authority over another's digital assets to impersonate the user.

CHAPTER 7: ADVANCE DIRECTIVES AND LIVING WILLS

What is an advance directive?

An “advance directive” is the all-encompassing term used for any document that either gives instructions about future health care or names an agent to make your health care decisions. As such, living wills, health care declarations, and health care powers of attorney are all types of advance directives.

What is a living will?

A living will is a brief written statement that specifies when life-sustaining treatments may be either withheld or withdrawn under certain circumstances. The living will states the wishes of a person in case they become terminally ill or are otherwise incapacitated and unable to make medical decisions.

The Missouri statute authorizing the creation of living wills is quite strict and specifies that the written statement 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 do I create a living will?

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 and, while not required, it is common practice to sign the document before a notary public. A living will or any other advance directives should 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.

What are the limitations of a living will?

While most people have heard of living wills, many are unaware of the significant limitations of a 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 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.

What is a health care directive?

Because of the strict statutory limitations surrounding a living will, many people in Missouri choose to instead create a broader advance directive, commonly referred to as a "health care directive." A health care directive is a written 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 or direct that such treatment be discontinued. Without a health care directive, once a patient becomes incapacitated, they may lose that right.

While a living will is only useful when death is imminent, health care directives can be useful in broader circumstances. Missouri courts have made it clear that people have the right to make 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 health care 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 certain procedures be used for a reasonable period of time and then discontinued if they do not prove to be effective. Generally, health care directives should be signed, dated, and witnessed in the same manner as living wills.

What should I do with my living will and/or health care directive?

The most important part of having a living will or other advance directives after they are signed is 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 you should 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 questions about any procedures, as well as ask your physician if they will follow your directions.

If you have appointed an attorney-in-fact to make health care decisions in case of your incapacity, they should have a copy of the document. You should also discuss your directives with your attorney-in-fact so they are fully aware of your wishes. 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.

Can I revoke a living will or health care directive?

Once made, a living will or other advance directives can be easily revoked or canceled. They can be revoked either orally or in writing. If possible, 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.

Do I need both a durable power of attorney and health care directive?

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 health care directive? The answer is "yes."

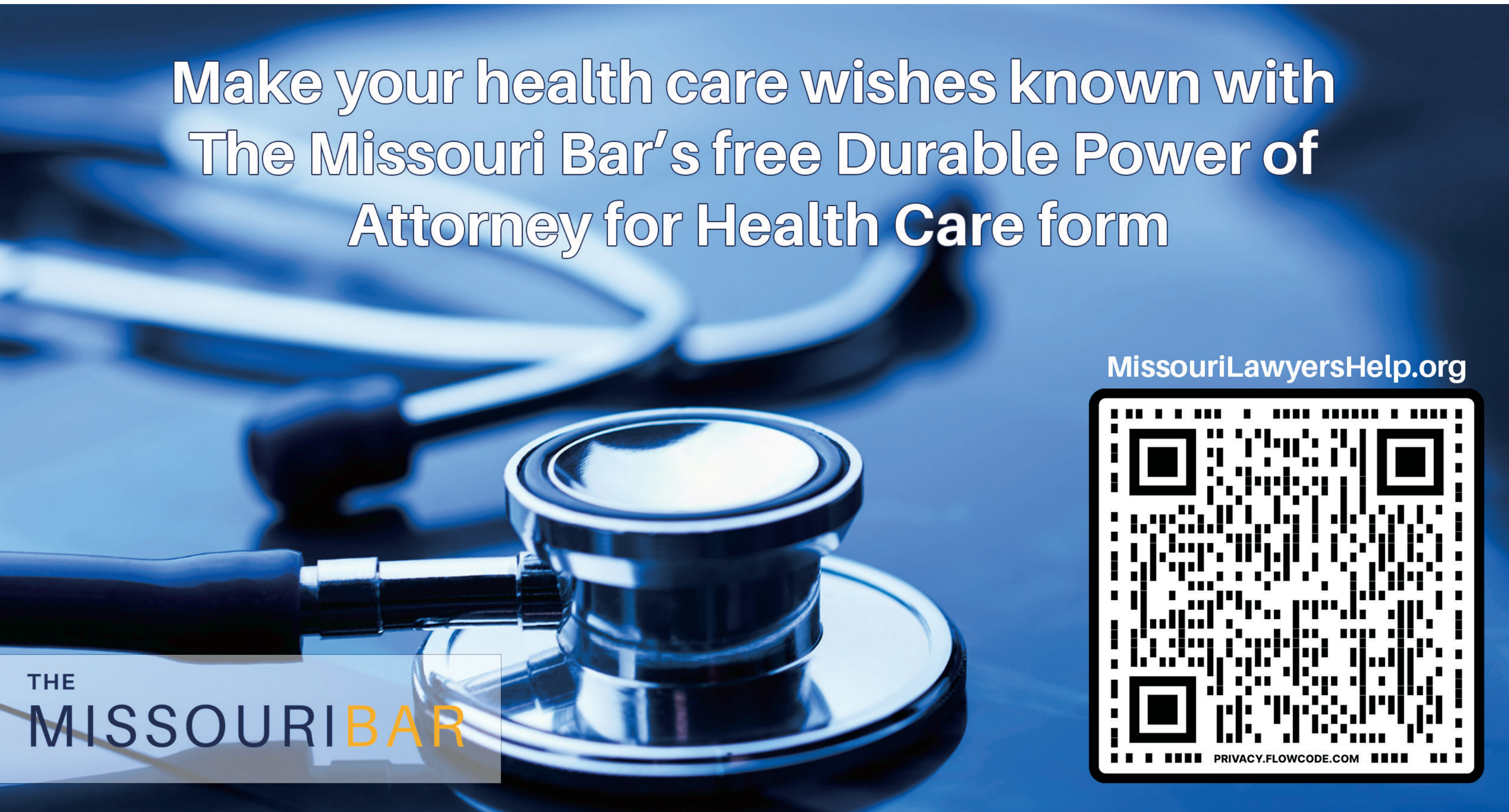
Whether or not you have a power of attorney does not affect the need or desire for a living will or other health care directive. If you do not have a power of attorney, your advance directives will be very helpful to instruct your physician and the hospital as to the care you desire. If you do have a 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 health care directives into one document.

Why should I prepare advance directives?

You accomplish at least three 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 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. Third, you appoint a person that you trust to make health care decisions for you if you are unable to make such decisions for yourself. Additionally, you may be avoiding litigation to determine what treatment you really desired or intended.

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 make treatment decisions based on a physician's opinion;
2. Who may have access to medical information and records under the Health Insurance Portability and Accountability Act;
3. Who has the vested right to make funeral and burial arrangements;
4. Who may make anatomical gifts and organ donations, if any; and
5. Whether artificial nutrition and hydration should be withheld.



CHAPTER 8: OUTSIDE THE HOSPITAL DO-NOT-RESUSCITATE ORDER

What is an Outside the Hospital Do-Not-Resuscitate (OHDNR) Order?

An Outside the Hospital Do-Not-Resuscitate (OHDNR) Order is a special type of physician order on a form approved by the Missouri Department of Health and Senior Services that a patient, or the patient's legal representative, and the patient's attending physician sign that authorizes emergency medical services personnel to withhold or withdraw cardiopulmonary resuscitation (CPR) if the patient suffers a cardiac or respiratory arrest outside a hospital.

The OHDNR order only applies to the withholding or withdrawing of CPR, cardiac compression, defibrillation, respiratory intubation, and other means of emergency cardiac and respiratory resuscitation methods outside a hospital by emergency medical personnel.

How is an OHDNR order made?

A patient who is 18 years of age or older and who has capacity at the time of signing, or, if the patient is incapacitated, the patient's legal representative (the patient's agent appointed under a Durable Power of Attorney for Health Care or court-appointed guardian) discusses with the patient's attending physician that the patient does not want to be resuscitated if a cardiac or respiratory arrest occur outside the hospital setting. The patient – or the patient's legal representative – and the patient's attending physician that has primary responsibility for the patient sign this form. The form becomes the first page of the patient's medical record. Usually, only a patient with a terminal condition or wo is frail and failing to improve signs this form, as a physician would not usually authorize a DNR order for an otherwise healthy patient.

What are the limitations of an OHDNR order?

An OHDNR only authorizes the withholding or withdrawal of resuscitative measures outside a hospital. All other medical care must be provided to stabilize a patient, to keep a patient comfortable, and alleviate the patient's pain. Treatments such as the administration of medication, fluids, and oxygen; means to stop bleeding; and treatment of broken bones or other injuries must be provided.

How does a patient make medical personnel aware they have an OHDNR order?

The patient should have on their person an OHDNR identification card printed on purple card stock that is signed by the patient's attending physician. The patient could also wear an OHDNR bracelet or necklace approved by the Missouri Department of Health and Senior Services.

When a patient leaves a hospital, the OHDNR order is to accompany the patient to any care setting to which the patient goes, including home, an assisted living facility, nursing home, or wherever the patient will be living or receive treatment.

What if I change my mind and want to be resuscitated outside the hospital?

A patient or the patient's legal representative can communicate to emergency services personnel any time before or after a cardiac or respiratory arrest the desire to be resuscitated in any manner. The OHDNR order form can also be destroyed upon the request of the patient or the patient's legal representative and removed from the patient's medical record.

What is the difference between a health care directive and an OHDNR order?

A health care directive is a document created by a patient that expresses the patient's end-of-life treatment wishes regarding the use of life-sustaining treatment. An OHDNR order is a physician order because it is signed by the patient's physician. Emergency medical personnel outside a hospital cannot stop or withhold resuscitation based on a patient's health care directive - rather only a completed and signed OHDNR order is required.

Do I still need a health care directive if I have an OHDNR order?

Yes. An OHDNR order only applies to resuscitation. A health care directive expresses a patient's wishes regarding a number of life-sustaining treatments and whether the patient wants some, all, or no life-sustaining treatment if the patient has a terminal condition, is in a coma, is in a persistent vegetative state, and/or is otherwise unable to participate in health care decision-making.

CHAPTER 9: DURABLE POWER OF ATTORNEY

What is a power of attorney?

A power of attorney is a document created by one person to give another person the authority to act on their behalf. The person creating the power of attorney document is the principal, and the person being given authority is called the agent or the attorney-in-fact.

If you have appointed an agent through a power of attorney, then actions taken by your agent that are allowed by the document are legally binding as though you had performed the acts yourself. The power of attorney can authorize the agent to perform a single action or many different actions, some of which will be discussed below. However, an individual named to be an agent does not have to accept the position. For that reason, among others, it is very important to list additional individuals to act as successors in case the agent "in line" before them is unwilling or unable to serve.

Who may be appointed under a power of attorney?

The agent appointed in a the power of attorney document must be an adult, and is often a close relative, lawyer, or other trusted individual. The person appointed does not have to be a Missouri resident. Under Missouri law, the following individuals may **not** serve as agents:

- 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.
- No full-time judge and no clerk of court, unless closely related.
- No one under the age of 18, no person judicially determined to be incapacitated or disabled, and no habitual "drunkard."
- For a health care provider, no one who is the attending physician of the principal and no one who is conncted with the health care facility in which the principal is a patient, unless such a person is closely related to the principal.

What are the types of power of attorney?

There are two primary types of power of attorney documents: one granting financial powers and another for health care powers. Additionally, <u>financial</u> power of attorney documents are written so they are either immediate or springing. By signing a financial power of attorney document that states it is immediate, the person named as the attorney-in-fact immediately becomes able to act on your behalf. However, it is also possible to create a power of attorney so that it will only go into effect when you become incapacitated or when some other stipulated event or condition occurs. This is the springing power of attorney.

Contrary to the financial power of attorney, all power of attorney documents for health care are automatically springing. This is because health care providers will always defer to the patient regarding their own health care choices if possible. By necessity, power of attorney for health care documents are considered "durable."

What is a "durable" power of attorney?

Many people are unaware that an ordinary financial power of attorney stops working if the principal becomes incapacitated. Under Missouri law, and the law of many other states, a power of attorney with proper wording may be considered "durable." This means that the power of the agent to act on the principal's behalf continues despite the principal's incapacity, regardless of any formal decrees stating the principal is incapacitated.

Through a durable power of attorney, an agent may continue to act on your behalf even after you have experienced a stroke or other incapacitating illness or accident. If outlined in the the power of attorney, the agent can do things such as use your funds to pay your bills, contract for nursing home services on your behalf, and make basic health care decisions for you. It is now common practice to make durable financial powers of attorney unless the power of attorney was only granted for a specific purpose.

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 out routine matters as such tasks grow difficult for the parent, and to provide a smooth transition in the event the parent later becomes disabled or incapacitated. In many instances, this arrangement is far better than making the adult child the joint owner of the parent's bank accounts and other property and assets. However, estate planning decisions are complicated, and you should speak with your lawyer regarding your specific circumstances to determine the best options for your situation.

How do I create a durable power of attorney?

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 generally state that "this power of attorney shall not be affected by subsequent disability or incapacity."

The Missouri Bar offers free, fillable Durable Power of Attorney for Health Care forms at MissouriLawyersHelp.org.

How do I revoke a durable power of attorney?

The death of the principal revokes even a durable power of attorney, except for when a third person is relying on the power of attorney and does not yet know of the death. A durable power of attorney may also be revoked by the principal at any time, either orally or in writing, so long as the principal has capacity. It is recommended that, when possible, revocations be written down to avoid confusion.

What powers does a power of attorney grant?

Prior to 1989, a valid power of attorney had to spell out in detail all the authorizations granted to the agent. Now, however, under Missouri law, 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. These powers may be found in § 404.710, RSMo.

What powers must be specifically listed?

In Missouri, certain powers must be specifically stated in the power of attorney for the agent to be authorized to perform those 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 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 themselves 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.

What powers may not be granted by a power of attorney?

No power of attorney governed by 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 their will, to take any action or to refrain from taking any action; or

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

Must I sign a power of attorney, 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. While many hospitals will offer a short-form version of living wills and health care power of attorney, signing the document cannot be a requirement for admission.

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.

It is always advisable to discuss these issues with your physician in advance of any hospitalization or extensive treatment. Some medical facilities will allow you to have power of attorney documents placed in your file, but if possible, someone should always bring a copy of the document during medical emergencies.

What should I consider when 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 of law. Such lawyers are often described as "estate planning lawyer" or "elder law lawyer." Furthermore, you should use care in the selection of your agent. Remember, you are trusting your property, and 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 agent access and control of the principal's assets. The agent should have the ability under the document to conduct every financial affair the principal may have had to correct any and all issues which may arise in the principal's estate. Additionally, the power of attorney documents should be provided to all your financial institutions upon creation. Some institutions require additional paperwork be completed to remove any potential liability concerns.

Although Missouri law sets no limits on the duration of a durable power of attorney, the best practice would be to maintain "fresh" documents that coordinate with other areas of law and are up to date with current financial transactions. Any large life-changing events such as having children, getting married or divorced, and retiring are good times to review your documentation. Otherwise, it is a good idea to review your estate plan with your lawyer every three to five years to ensure it aligns with your desires and that no changes made to the law impact your documents.

CHAPTER 10: 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 make donations of organs or tissue during your lifetime. However, gifts of organs and/or tissue made during your lifetime can be made with certain medical providers, but this process is not covered in the anatomical gift law (Revised Uniform Anatomical Gift Act, § 194.210-194.320, RSMo.).

Can I be a donor?

Anyone can decide to become a donor. A parent or guardian may make the final decision regarding organ and tissue donation for an unemancipated minor.

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 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 even more if a donor can give corneas and tissue.

What organs and tissue can I donate?

Vital organs and tissues can be donated for transplantation. Donation of organs – which include the heart, kidney, pancreas, lungs, liver, and small intestine – 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 death criteria. Tissue includes 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.

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 functioning. 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, but not organs, after their deaths.

May I donate my body for science, education, or research purposes?

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

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 is legally declared. The doctors working to save your life are 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, but 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. Individuals medically ineligible for donation include those with HIV, active hepatitis, and, for donors of solid organ transplants, those who test positive for SARS-CoV-2 (novel coronavirus). 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. The decisions regarding what conditions or illness may prevent donations is continually reassessed as conditions evolve.

Will donation disfigure my body?

No. Donation does not disfigure the body or change the way it appears in a casket.

Will donation affect memorial or funeral arrangements?

No. Generally, donation does not delay funeral or memorial services or 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. However, the family remains responsible for funeral and burial expenses. The organ or tissue recipient bears the responsibility of the organ or tissue recovery costs.

Does the family receive any money for donation?

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

Does my religion approve of donation?

Most major religions in the United States support organ and tissue donation and consider it the final act of love and generosity toward others. A list of religious views on donation is available at OrganDonor.gov. Consult your religious advisor with any questions.

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. Organs, eyes, and tissues are given to people who need them the most first at the local level, then the regional level, and finally country wide.

Can I direct a donation?

You can specify an individual to receive a donated organ. If the organ is a suitable match for a person who is waiting for a transplant, they can receive the transplant as a gift. You cannot specify a donation be given to a recipient on the basis of age, gender, race, ethnicity, physical or mental disability, or congenital condition.

How can I become an organ, eye, and tissue donor?

There are several ways you can document your decision to give an anatomical gift:

1. By authorizing a statement or symbol to be imprinted on the face of your driver's license or state identification card, or by placing a donor symbol sticker issued by the Missouri Department of Health and Senior Services on the back of your driver's license or state identification card.
    a. Make this authorization each time you renew your driver's license or state identification card.
    b. Revocation, suspension, expiration, or cancellation of your driver's license or state identification card upon which an anatomical gift is indicated does not invalidate the gift.
2. In a last will and testament, a living will (an advanced health care directive), or in a Power of Attorney document.
    a. An anatomical gift made in a will takes effect upon your death regardless of if the will is probated.
    b. Invalidation of the will after the donor's death does not invalidate the gift.
    c. If such donationis only delinieated in your will, the will may not be found in time to honor your donation wishes.
3. During a terminal illness or injury, by any form of communication addressed to at least two adults and at least one of whom is a disinterested witness.
4. Completing a donor card or other record signed by you or your agent, or by authorizing that a statement of symbol indicating that you made an anatomical gift be included on a donor registry.
    a. If you are physically unable to sign a record, the record may be signed by someone else at your direction.
    b. Such record shall be witnessed by at least two adults, at least one of whom is a disinterested witness.
    c. Include in the document that it has been signed and witnessed in accordance with law.
5. Register online at DonateLifeMissouri.org/Register.
6. Complete an Organ and Tissue Donor Registry Enrollment Application (MO 580-2545) online at Health.Mo.Gov or print and mail to:

    Missouri Department of Health and Senior Services
    Organ/Tissue Donor Program and Registry
    Po Box 570
    Jefferson City, MO 65102-0570
7. Sign the back of your driver's liscence or state identification card with a permanent marker.
8. Sign and carry a donor card or other signed record.

Should I tell anyone about my donation decision?

Once you make the decision to be a donor, record your decision and tell your family. Your family will be notified of your decision to donate and that your decision is being honored at the time of your death. Telling them early ensures they will not be surprised at a very difficult time. You might also like to speak with your faith leaders, friends, and physician about your decision to be a donor.

What is the organ and tissue donor registry?

The Organ and Tissue Donor Registry at DonateLifeMissouri.org is a statewide voluntary, confidential registry of potential organ and tissue donors that was enacted by law in 2008. It is a first-person consent registry, which means your decision is 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 re-enroll in the registry. You can do this in several ways. Complete the online application form that will automatically update your record. Submit a completed Organ and Tissue Donor Registry Enrollment Application (MO 580-2545) to the Department of Health and Senior Services (contact information noted above), and the department will update your record. 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, driver's license, or state identification card so 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 federally regulated organ procurement organizations, and 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. 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.

Is there an 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 or legal guardians. They may complete a registration form for you.

What will the symbol on my driver's license look like?

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

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.

Do I need to have special language in an advanced directive or living will?

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.

May I later withdraw or revoke my consent concerning the Organ and Tissue Donor Registry?

Yes. You may withdraw or revoke your consent to be listed on the registry. However, this action does not mean a refusal to make an anatomical gift. Your agent, next of kin, guardian, or other public appointed 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.

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. A refusal in your will (although if only done in your will, the refusal may be found too late to prevent donation).

b. 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 at least one of whom must be a disinterested party, who also signs the document at your request and attests to your decision.

c. A communication made by you in any form during your terminal illness or injury, addressed to at least two adults, at least one of whom is a disinterested witness.

How can a lawyer assist me with an anatomical gift or refusal?

A lawyer who practices in the areas of estate planning and elder law can help you clarify and implement your wishes concerning anatomical gifts by putting your wishes in your will, durable powers of attorney, and living will and/or advance health care directive.

CHAPTER 11: GUARDIANS AND CONSERVATORS UNDER MISSOURI LAW

What is a guardian?

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

Who may be appointed guardian and conservator?

Oftentimes, the same person or entity is appointed both guardian and conservator, although it is possible for different people or entities to be appointed to serve in each role.

Parents are the natural guardians of their minor children. Parents have all the powers of a conservator to manage the property and financial resources of a minor and need not be appointed as such by a court unless the minor will receive property from a source other than their parents, such as the settlement of a personal injury action or an inheritance from an estate.

However, if a minor has no living parent or a minor's parent(s) are deemed unfit, the court may consider a guardian or conservator if the minor (14 years of age or older) selects someone, or a person is named in the will of the last parent to die.

In any event, the court will appoint as guardian and conservator the most suitable person who is willing to serve and whose appointment serves the best interest of the child to a stable and permanent placement. A grandparent or other close adult relative are common examples.

An incapacitated or disabled person may nominate their own guardian or conservator if, at the time of the hearing (discussed below), the person is able to make and communicate a reasonable choice to the court.

The court will also give priority to a person or entity nominated by the incapacitated or disabled person in a durable power of attorney document or other instrument signed before the inception of the person's incapacity or disability, provided the durable power of attorney document or other instrument was signed in the presence of two witnesses. If no suitable guardian or conservator has been nominated by the incapacitated or disabled person, the court will consider appointing, in order of priority:

1. The spouse,
2. Parents,
3. Adult children,
4. Adult brothers and sisters, or
5. Other close adult relatives.

If no such persons are willing or able to serve, the court may appoint any suitable person or entity, or, as a last resort, the public administrator.

Generally, the court will not appoint an unrelated third party as guardian or conservator unless there is no relative suitable and willing to serve. A person need not be a Missouri resident 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?

An "incapacitated person" is one who is unable by reason of any physical, mental, or cognitive condition to receive and evaluate information or to communicate decisions to such an extent that the person - even with appropriate services and assistive technology - lacks capacity to manage their essential requirements for food, clothing, shelter, safety, or other care such that serious physical injury, illness, or disease is likely to occur.

A "**partially incapacitated person**" is one who is partially unable to meet essential requirements for food, clothing, shelter, safety, or other care without court-ordered assistance.

A "**disabled person**" is one who is unable by reason of any physical, mental, or cognitive condition to receive and evaluate information or to communicate decisions to such an extent that the person lacks ability to manage their financial resources.

A "**partially disabled person**" is one who is partially unable to manage their financial resources. Under certain circumstances, a conservator may be appointed by the court for a person who has disappeared or is detained against their will.

What is the legal effect of a judicial determination of incapacity or disability?

The legal effect of a judicial determination of **total** d**isability or incapacity** differs from a finding of only **partial disability or incapacity.** A **partially disabled or incapacitated** person is still presumed to be competent and is deprived only of those rights which the court finds are consistent with the individual's condition (*e.g.*, the right to make medical decisions, to sign contracts, or choose where to live).

On the other hand, if the court finds a person **totally disabled or incapacitated** (or both), the person is presumed to be incompetent and legally disabled for all purposes. Even if the court finds a person **totally disabled or incapacitated**, the court may allow the person to retain the right to vote, to drive a motor vehicle, or to marry.

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 must be represented by a lawyer. The court will appoint a lawyer to represent the respondent and advocate on their behalf.

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 upon the minor (if 14 years of age or older); the parents of the minor; the spouse of the minor, if any; any persons or entities nominated to serve as guardian or conservator; and any other persons or entities directed by the court.

In the case of an alleged disabled or incapacitated person, notice of the application must be served upon: the respondent; the respondent's spouse, parents, and children (if 18 years of age or older); any person having power to act in a fiduciary capacity with respect to the respondent's financial resources; any person having care and custody of the respondent; and any co-tenants with respondent or co-owners of the respondent's assets.

If no such spouse, parent, or child is known or living, notice is given to at least one of the respondent's closest relatives who is over 18 years old.

What are the duties of a guardian?

A guardian must always act in the best interest of the ward. The guardian of a minor is charged with the minor's custody and control and must provide for and make decisions regarding the minor's education, support, and maintenance. A guardian of an incapacitated person must provide for and make decisions regarding the ward's support, care, education, health, and welfare. A guardian must ensure that the ward resides in the best and "least restrictive" setting reasonably available and receives all medical care and other services which the ward may need. "Least restrictive" means a decision or approach that places the least possible restriction on the ward's personal liberty and promotes the inclusion of the ward into their community, but is consistent with meeting the ward's essential requirements for health, safety, habilitation, treatment, and recovery, and protecting the person from abuse, neglect, and financial exploitation.

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 status of the ward and the guardian's plans for future care.

What are the duties of a conservator?

A conservator, under the supervision of the court, is responsible for the protection, preservation, and management of the protectee's assets. The conservator must properly and prudently invest the protectee's assets, apply such assets for the protectee's benefit, and faithfully account for all funds received and expended on behalf of the protectee. The protectee's assets must be kept separate from the conservator's own property.

Because of the strict accounting requirements imposed by law and the necessity of obtaining a court order authorizing most expenditures of the protectee's assets, the conservator must work closely with a lawyer 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. Guardians and conservators are not personally responsible for debts incurred by the ward or protectee prior to the court's determination of incapacity or disability. Similarly, conservators are not personally responsible for contracts or agreements entered on the protectee's behalf, so long as the conservator indicates that they are acting on behalf of the protectee. Guardians are not obligated to use their own financial resources for the ward's support.

Of course, unauthorized use of the protectee's estate or misappropriation of the protectee's property by either the conservator or guardian could lead to revocation of legal authority as conservator or guardian by the court and may result in the guardian or conservator being held personally liable for any harm or loss to the protectee's assets.

How are guardianships and conservatorships terminated?

Guardianship and conservatorship for a minor terminate automatically when the minor reaches 18 years of age. If there was a conservatorship estate for the minor, the conservator must prepare and file with the court a final accounting of the administration of the minor's assets. Upon the court's approval of the final accounting, the conservator transfers the assets to the minor and files a final receipt with the court, which discharges the conservator from any further responsibility.

On the other hand, guardianship and conservatorship for an incapacitated and disabled person terminates only when the ward is found to have been restored to capacity or ability. Guardianship and conservatorship also terminate upon the death of a minor or ward. With court approval, guardians may direct funeral and burial arrangements for the minor or ward.

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 assets of the minor or ward have 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 the ward is found to be competent by the court or dies.

Notes and Next Steps

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This guide is produced and revised by the Probate Trust Division of The Missouri Bar.

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