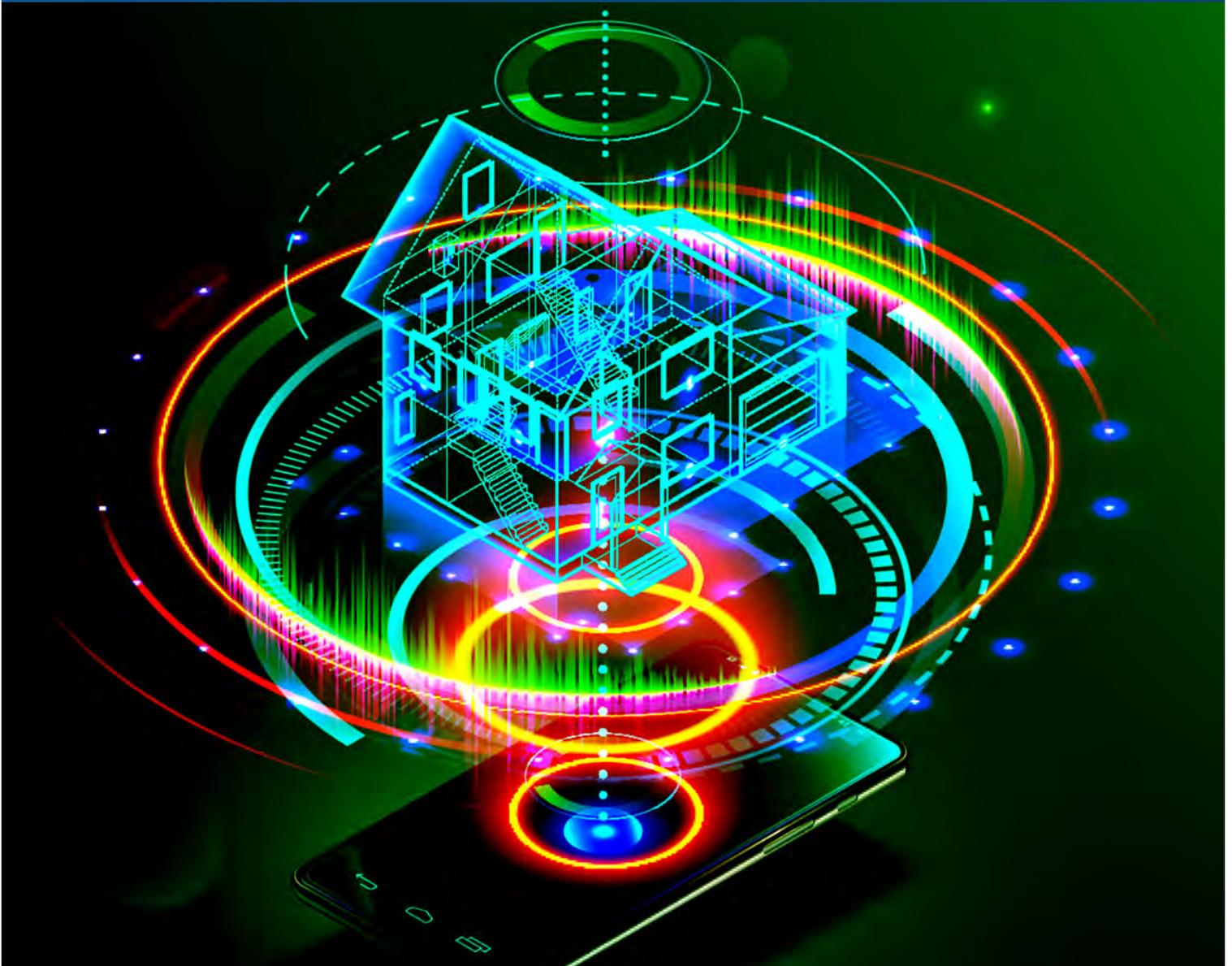


Estate Planning: Preparing for Incapacity or End of Life

MANAGING RETIREMENT DECISIONS SERIES



Aging and Retirement



Introduction

Estate planning is another term for putting one's personal affairs in order. Individuals need to do estate planning all along their life's journey to ensure their affairs are managed or transferred according to their wishes in case of their incapacity or death. Developing an estate plan is not a "one and done" task. As key events in life occur, estate plans need to be revisited and adjustments made accordingly.

An estate plan includes a will, power of attorney, health care proxy, living will and other documents such as trusts relating to incapacity or end-of-life decisions. The objective of these documents is to spell out how individuals want to be cared for and how they want their assets and other possessions used or distributed when they die or can no longer handle their affairs.

Although these documents are important to have, they must be implemented properly to be effective. For example, it is prudent to discuss the individual's wishes and share these documents in advance with family or friends chosen to handle their affairs to ensure they are willing, capable and ready to assume such an important role.

Regardless of financial status or age, all individuals need to consider a number of estate planning issues. This Decision Brief points out key considerations for setting up an estate plan.

Who Needs an Estate Plan?

Everyone has an estate, which consists of everything they own, and thus having an estate plan is essential. An estate plan can minimize taxes and expenses and help a family avoid legal hassles.

For those with more assets, estate planning can emphasize strategies to minimize estate taxes. This process often involves, among other things, the use of specialized trusts and large-amount life insurance policies. For those with fewer assets, estate planning tends to center around wills, beneficiary designations, powers of attorney and health care proxies and the need for distribution of assets and care for personal needs when an individual can no longer handle such affairs.

Federal estate taxes can be a factor in certain estate plans and can add complexity. Under the Tax Cuts and Jobs Act (TCJA) of 2017, the exemption level is \$11.7 million for single individuals and \$23.4 million for married couples in 2021. This estate tax exemption will be indexed for inflation each year. In 2026, the estate tax exemption will revert back to the prior law and will be \$5 million for single individuals and \$10 million for married couples, adjusted for inflation.

Note: Although some state laws automatically follow the federal rules, many states apply lower limits, so it is important to check the individual's state laws.

Will and Revocable Trusts

There are two distinct types of estate plans.

One is based on using only a will. The other is based on using a trust along with a will. With either type of estate plan, other documents mentioned below will also be included in the estate plan.

Will. A good place to start is to draft a will, which becomes legally effective after a person's death. Dying without a will means the state laws of intestacy determine how assets will be distributed. A probate court will assign an executor and possibly make decisions for the estate, which can lead to assets being distributed in ways not intended by the deceased. Similarly, the probate court will step in on behalf of the deceased in case the executor predeceases them or cannot perform the duties for some other reason. This may lead to family disputes, excessive legal costs and delays in the settling of the estate.

Bookstores and internet outlets offer do-it-yourself "will" kits. These kits may be sufficient for individuals with simple estates that involve uncomplicated assets and clearly intended heirs. However, for others with more complex estate planning issues and to ensure that the deceased's wishes will be implemented as desired, it may be necessary to have an attorney draw up a more sophisticated document.

Part of the will-making process involves designating an executor of the estate and a backup for the executor. Many individuals appoint a trusted family member. This is appropriate if the appointed individual is capable of handling administrative matters and paperwork effectively and if the family functions well. If a qualified family member is not available, however, appointing an independent third party, such as an attorney or bank trust department, may be the best alternative.

In many instances, a will adequately covers the disposition of assets after death. But some individuals may need one or more trusts as well.

Do I Need to Hire a Lawyer?

An estate planning lawyer is an expert in wills, trusts and other documents used to pass assets to heirs. While most individuals can benefit from their expertise and guidance on planning issues, others may not.

A few items to consider are:

- An individual with a simple small estate passing to one person may not require legal counsel
- Individuals with complex issues such as owning a business, having complex financial assets, caring for incapacitated or special needs family, etc. may benefit from legal counsel

Revocable Trust. A revocable trust is a legal document by which a grantor of the trust names a person or entity—a trustee—who then manages and controls what happens to the assets held by the trust. A revocable trust can be changed or revoked by the grantor during the grantor’s lifetime; only at the grantor’s death does the trust become irrevocable.

The basic difference between a will and a revocable trust is that a will simply transfers assets directly to the heirs or a testamentary trust after death. A revocable trust receives and holds assets transferred by the individual before death and is generally more specific about managing the assets and how and when the assets will be transferred to heirs after death.

Note: When preparing a trust document, individuals may want to consult with an experienced trust attorney who is up-to-date on the latest trust laws and can offer guidance in what assets should be placed in the trust.

Example: A couple have an adult child with special needs. They may decide to set up a special needs trust to provide for the child’s needs after they both have died.

Trusts may also be used to do the following:

- Establish care arrangements for minor grandchildren for whom the grandparents are legally responsible.
- Provide oversight on spending by an adult child who has problems handling money.
- Specify bequests when the heirs may be from previous marriages.
- Plan for the care of companion animals.

The downside of using trusts is the time and expense involved and the need, in many instances, to hire a professional trustee.

Trust Words

A revocable trust is a trust that a person sets up and funds while still alive.

A testamentary trust is a trust that a person—the testator—establishes in the testator’s will; the funding occurs at the time of the testator’s death.

Power of Attorney, Health Care Proxy and Living Will

Power of Attorney. A comprehensive estate plan would also involve working with a lawyer to execute a durable power of attorney, which is effective while a person is alive. This legal document authorizes a named individual—the agent—to handle financial affairs, such as banking, real estate transactions and asset protection planning, among others, on behalf of a person (the principal) if the principal becomes unable to handle their financial affairs. At death, the power passes to and is governed by the will and executor of the estate or the trustee of a trust.

One important issue is to define when the agent will be able to take control of handling the finances. A power of attorney can be drafted to become effective immediately regardless of health status (full authority) or only upon determination of incapacity (limited authority). Incapacity is usually determined by at least one doctor’s examination and specification.

Although the power of attorney provides some access to assets, a revocable trust provides the trustee more capability and easier access to trust assets to handle the affairs for an incapacitated person.

One key decision is whether to grant the power of attorney to a relative, an individual outside the family or a professional, such as an attorney. It is important that the person or entity is willing, capable, above reproach and available to assume the duty. If an older person does not trust an individual with this responsibility, does not have family or friends to rely on or is concerned that a conflict may erupt over the chosen individual, appointing an independent professional may be the best alternative. Partners, second marriages and blended families also raise the potential for problems in these areas.

Unfortunately, many cases of elder abuse and even stealing do involve family members or other “trusted” individuals, so it is worth being cautious in granting this power.

Note: In practice, a power of attorney can have some limitations. Some financial firms have developed their own standards for accepting a power of attorney. They may require use of their own form for a power of attorney and may require such a form be signed and notarized within a prescribed period such as the previous six months. Thus, it is best to work with the financial firms in advance to ensure compliance with their standards and that the agent will be recognized and able to conduct affairs when needed.

Health Care Proxy. Another important document is the health care proxy (also called a durable health care power of attorney), which is effective while a person is alive. The proxy may be a standard state-issued form that grants authority to an individual to make medical decisions for health care during a person's incapacity. Everyone over the age of 18 is advised to have a health care proxy.

The proxy may cover the extent to which the person wants use of extraordinary measures that prolong life and whether or not to allow organ donation. It may name specific medical procedures to use or not use when the person is unable to make decisions. It will also grant authority to discuss medical care with hospitals, doctors and other medical providers.

Typically, the health care proxy form appoints a health care agent and an alternate health care agent to carry out the person's wishes. A health care agent must be able to be an advocate with health care providers and make medical decisions. Often these appointees are the spouse or partner, who is typically named the agent, and an adult child, grandchild or other trusted individual, typically named as the alternate.

Note: HIPAA Release. The Health Insurance Portability and Accountability Act (HIPAA) laws have caused health care providers to become very protective of personal medical information. Such protections may restrict the health care proxy agent from exercising their authority. Thus, the health care proxy must include a HIPAA release to avoid such barriers. HIPAA release forms are state-specific and so are completed for the residency state along with other states in which time is spent, such as at a vacation or second home.

Health Care Proxy and Living Will

Q: Who would need to have copies of the health care proxy and living will?

A: This is a personal decision, but the document is so important that experts generally recommend that several parties have copies on file, including

- Family members
- A trusted individual
- The family attorney
- The primary care physician
- The hospitals most often used.

Living Will. A living will (also called an advanced health care directive) is a document effective while a person is near the end of their life and unable to make their own decisions. The document states the person's wishes for end-of-life care, such as pain management, and administration of life-saving procedures, such as resuscitation, medical ventilation and artificial nutrition.

State law governs living wills, so it is important to understand the specific laws of the individual's state. Some states do not officially recognize living wills, while others may use a living will as a reference but do not make medical decisions based on it alone.

Without a living will, if one becomes incapacitated and unable to make decisions, physicians will turn to the closest family members (spouse, partner or children) to make decisions. This can place a heavy burden on family members and may cause disagreements within the family.

Avoiding Probate

Probate assets are assets that individuals hold in their own names at the time of death. These assets pass to their heirs according to terms of a will, subject to court supervision.

The probate process often entails delays and costs, but some estate planning strategies can be used to mitigate those drawbacks by passing assets to heirs outside of probate. These strategies include joint ownership, beneficiary designations and transfer on death designations. (A revocable trust can also be used for this purpose.)

Joint Ownership. This refers to assets such as bank accounts jointly owned with another person. It is a common strategy for couples. The joint ownership makes it far easier for the surviving spouse or partner to make financial decisions following the death of a loved one.

Unless spouses or partners struggle with issues of trust, it is fairly typical for the two to own assets such as bank accounts, investment accounts and property on a joint basis, with the right of survivorship.

Beneficiary Designations. Many financial institutions allow the account owner to indicate (designate) the person or persons to whom to transfer the asset upon the owner's death. Individuals can make such beneficiary designations for retirement accounts such as 401(k), 403(b), IRA and Roth IRA plans and for annuities and life insurance policies.

When a beneficiary is specified, the assets will pass directly to the beneficiary outside of probate. In addition, a beneficiary designation is primary and takes precedence over any provisions in a will or trust.

Many individuals name primary and secondary beneficiaries so that if the first beneficiary dies before the account owner, there is no question about who the next beneficiary will be.

Important: Review beneficiary designations periodically or after major life events such as marriage, divorce, birth or adoption of children or the death of a named beneficiary. Most important is to be sure the designations continue to represent the account owner's wishes.

Naming beneficiaries is usually a straightforward process, but a few considerations must be kept in mind.

For example, a common designation might be "my spouse, if they survive me, and if not, equally to my children." A potential problem with this is that grandchildren, if they exist, could be left out of the inheritance if their parent predeceases their grandparent. Adding the legal term *per stirpes* to the designation can overcome this problem. *Per stirpes* essentially says that equal shares of the inheritance will pass to *branches* of the family.

In situations involving nontraditional families, such as unmarried partners, blended families and stepchildren, documents must be clear to distinguish their intended rights and inheritance. Such situations are a topic to be discussed clearly when developing an estate plan.

If family members have special needs, it is wise to use caution before naming them as beneficiaries. If they receive an inheritance, it may cause them to lose government benefits.

Transfer on Death. For taxable accounts held at brokerage firms, the owner of the assets may want to have the brokerage set up a transfer on death (TOD) provision. Some bank accounts use TODs too. A TOD acts like a beneficiary designation, so the assets pass directly, outside of probate. This is particularly helpful if the owner has no spouse or partner to name as joint owner.

Many individuals want to consider their close friends and charities in their estate planning. Individuals may set up charitable trusts or charitable gift annuities to provide for specific causes. Be aware that the transfer of assets to charitable trusts or charitable gift annuities may be irrevocable, meaning the individual cannot withdraw donations if they change their mind or need extra cash.

Those individuals who want to make significant contributions can invest in charitable funds offered through investment companies. The account owner can take tax deductions at the time of donation and specify scheduled payouts from the fund.

Business ownership is another area for special consideration. The owner will want to plan carefully who will run the business upon the owner's death. Specialized life insurance may need to be factored into the transition, so that ownership will transfer with minimal disruption.

Leaving Detailed Information

Standard estate planning documents do not cover all the information that survivors will need after the death of a loved one. Wills are usually quite general, covering disposition of major assets, but they typically do not mention smaller assets or family treasures and keepsakes.

It is wise to discuss one's wishes with family and friends well in advance. This allows time and space for all concerned to reach an agreement that all are comfortable with (if that is possible). Once the principals are incapacitated or deceased, it may be too late.

If controversy is likely to erupt over the disposition of such smaller assets, the individual may want to consider leaving a letter of instruction with the executor.

Letter of Instruction. A letter of instruction does not have the legal standing of a will. However, it is more flexible and can be changed easily. A goal of such letters is to provide needed clarification for families, especially when family members do not communicate well with each other or have differences in expectations. For some situations, individuals may want to seek the assistance of an attorney who can set up a legal document that clarifies an individual's wishes.

Burial Instructions. A written letter with burial instructions should be prepared and discussed with family and friends to ensure that desires concerning cremation, burial and services are understood and handled as the individual wishes. Some individuals pre-pay for their burial arrangements by purchasing a cemetery plot or niche or cremation services and include such agreements with the estate planning documents.

Inventory of Assets. It is prudent to leave a detailed inventory of all bank accounts, safe deposit boxes, investment accounts, retirement accounts and insurance policies. This is of utmost importance for couples in which one member handles most of the financial affairs.

Investment management is another important area. When one member of a couple handles most of the investments, consider establishing an investment management plan. Review this plan after the death of either spouse or partner to determine if the plan remains appropriate for the surviving spouse or partner and that they can handle the responsibility of the investments.

The investment plan will help a lesser-informed spouse or partner avoid becoming the target of unscrupulous individuals who pose as investment professionals and then raid the couple's accounts. It is prudent to set up financial relationships and services while both spouses or partners are still alive, so that the surviving spouse or partner has a trusted resource available when the other spouse or partner dies. Thus, it is important that both members of the couple are comfortable with the trusted resource.

Digital Assets. Finally, it is important to make arrangements for a trusted person to have access to computer passwords and other information needed for authentication and digital assets. These may be necessary for accessing accounts, closing electronic billing services and other actions. It is wise to keep lists and passwords in a secure place and somewhere other than on the computer at all times. When setting up an estate plan, individuals also need to decide who will have access to the digital assets and inform them about the location of this important information.

Storing and Sharing Estate Planning Documents

Original signed estate planning documents need to be stored safely but also be available when they are needed. Many estate planning attorneys retain signed original documents, but be sure to ask how long they will be retained. Individuals will also be provided with signed original signed documents and are advised to store them in a waterproof and fire-safe container. Just be sure the successor trustee or executor has access to the signed original documents (such as giving them the combination to a safe or a key to a lock box).

Giving a copy of estate planning documents to a successor trustee or executor is always a good choice. Give those who will be responsible for executing the estate plan the opportunity to read carefully through everything that applies to them. It is important to deal with any needed clarifications upfront so there will be no misunderstandings later.

Families are often geographically dispersed. This can complicate management of an estate after death. It may help to at least provide family members with summary information about the estate plan. This will enable everyone to act immediately when death occurs, without having to make a long trip to locate documents or track down key financial advisors and institutions.

In Summary

Regular reviews every few years or after major life events, changes in state residency or changes in legislation will be needed to keep the estate plan up-to-date. In the review, individuals should also consider arranging and simplifying financial affairs to provide for ease of transition in case of death or incapacity. The following is an example of a worksheet that could be used when conducting those reviews, as well as when organizing and communicating estate planning information. Some experts also suggest creating a list of things that need to be handled quickly after death—such as notifying Social Security, stopping health insurance premiums, changing pension recipients under the pension option elected or stopping pension checks altogether, and notifying the insurance company and local police department if a house will be empty for an extended period.

Financial & Estate Information – Date _____		
	Location of Information	Comments
Will, Revocable Trust, Power of Attorney, Health Care Proxy and Living Will		Include contact information for attorneys and executors and other “who to notify” information
Letters of Instruction and Burial Documents		Include letters with instructions for personal assets and burial arrangements
Assets and Investments		Include contact information for each investment company and for advisors and planners
Credit and Loan Information		Include account and contact information for credit cards, mortgage loans and other personal loans
Monthly Income		Include sources, records and contact information
Monthly Outgo		Include information on each of the recurring bills and how they are paid
Income Taxes		Include contact information for tax preparer, if one is used, and keep a separate file for seven years of federal and state income tax records
Home and Insurance		Include ownership documents, mortgage documents (and contact information) and insurer information

Cars and Insurance		Include title information and maintenance records for cars, boats and other motorized recreational equipment
Pensions and Annuities		Include a summary for pension sources and annuity policies: amounts, named beneficiary and contact information
Survivor Benefits and Life Insurance		Include a summary for life insurance policies or employer insurance coverage: employer, insurer, policy number, amount, named beneficiary and contact information
Health Insurance and Providers		Include contact information and membership number
Personal Identification		This includes documents such as birth and marriage certificates, death certificates for deceased spouse or partner and children, passport, driver's license and medical cards
Safe Deposit Box and Passwords		Make sure executor knows the location and has access and keys
Digital Assets		Include account information, access codes, passwords and other information needed for authentication

References and Resources

- DeLiema, Marguerite, et al. Thinking ahead: Informing the design of a roadmap for keeping your money safe as you age, Society of Actuaries: <https://www.soa.org/resources/research-reports/2020/thinking-ahead/>

A downloadable report summarizing the research phase of a multiphase project and a Conversation Guide to plan for changes in financial capacity and decision-making. Other reports such as Fact Sheets and Worksheets may be published in the future.

- Five Wishes: <https://fivewishes.org/>

A tool that provides a way for individuals to think through how they want to die and have care decisions managed.

- Hogan, Paula. A guide to dealing with an estate planning attorney, American Association of Individual Investors: <https://www.aaii.com/journal/article/a-guide-to-dealing-with-an-estate-planning-attorney>

An article that provides details on the process of estate planning and associated ideas of how things work.

- Beyer, Gerry W. Web meets the will: Estate planning for digital assets. NAECP Journal of Estate & Tax Planning: <https://www.naepcjournal.org/journal/issue20p.pdf>

An article on digital assets and planning for them in estate planning.

- Rappaport, Anna. A conversation on dementia and cognitive decline. Society of Actuaries: <https://www.soa.org/globalassets/assets/Files/resources/research-report/2018/cognitive-conversation.pdf>

A report that summarizes key points made during an online discussion through the SOA's Aging & Retirement Strategic Research Program and issues related to dementia and cognitive decline.

- Compassion and Choices: <https://compassionandchoices.org>

A nonprofit organization that has developed a website offering information about end-of-life choices.

- My end-of-life decisions: An advance planning guide and toolkit. Compassion and Choices: <https://compassionandchoices.org/resource/my-end-of-life-decisions-an-advance-planning-guide-and-toolkit/>

Among other things, this guide, which may be downloaded, includes a section, Who Will Speak for Me: Choosing Your Representative, on choosing a representative to make health care decisions.

- *Managing someone else's money*, Consumer Finance Protection Bureau (CFPB): <https://www.consumerfinance.gov/consumer-tools/managing-someone-elses-money/>

An online guide to managing other people's finances.

- Find legal help, American Bar Association: https://www.americanbar.org/groups/legal_services/flh-home/

A resource for finding an attorney, including free legal services that are available for those with financial constraints.

- MyMoney resources—Life events, *MyMoney.gov*: <https://www.mymoney.gov/life-events?filter=63126—>

A website about financial issues that brings together information from federal government sources, including information for the death of a family member.

- Verheyen, Tony. *In Our Reach—How Resourceful Employees Build and Preserve Wealth at Work* (Elk Grove, WI: Richfield Companies, 2021).

A book that provides a simple framework for building a financial life with practical steps leading to improvements and success. Chapter 19, "Making Things Right," discusses how one can leave a positive and lasting legacy.

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475 N. Martingale Rd., Suite 600
Schaumburg, IL 60173