New Hampshire Magazine's **GUIDE TO WILLS AND ESTATE PLANNING**

Ask the EXPERTS
Wills and Estate Planning

Planning for a future that doesn't include us may not be the most uplifting task, but it is essential. We reached out to a panel of experts to learn more about who should create an estate plan, when it should start and what some of the best practices might be.

OUR PANEL:

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Who should have a will or an estate plan?

Gagnon: "Any person age 18 or older should engage in estate planning. It's never too early to plan for and take control of your future. The first step in the process is to meet with an estate planning attorney to discuss your personal circumstances. Based on your wishes and your family and financial information, the attorney will be able to provide you with options and guidance to achieve your goals. The essential components of a modern New Hampshire estate plan include health care advance directives, durable powers of attorney, pour-over wills, and revocable trusts. These documents are all revocable, meaning that you may change them in any way, or revoke them in their entirety, so long as you have the requisite capacity."

Brassard: "Every adult should have an estate plan, which usually includes at a minimum a will (to dispose of one's probate assets at death), a durable power of attorney (so someone else can handle your finances if you are not capable), and a health care proxy (so health care decisions may be made for you if you are not able). An estate plan is important to have because it ensures that your property is distributed in the manner and to the individuals you wish at your death, or if you become incapacitated."

What happens to my assets if I die without a will?

Gagnon: "In the absence of a validly executed will, your probate assets will be distributed in accordance with the New Hampshire intestacy laws, which may not be consistent with your objectives. Intestacy laws dictate which family members will inherit your probate assets after your lifetime, and in what amount. For example, in New Hampshire, the laws of intestacy provide that if you are survived by your spouse and children, then your spouse will

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> — *Whitney A. Gagnon, Esq., Attorney, Trusts and Estates Department* McLane Middleton

receive the first $250,000 plus one-half of any remaining assets and your children will receive the other one-half. This may cause an undesirable outcome particularly if your children are minors.

"Married couples without children might be surprised to learn that in the absence

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GUIDE TO WILLS AND ESTATE PLANNING

of a validly executed will, all probate assets will not automatically pass to the surviving spouse upon the death of the first spouse to die. If you are survived by your spouse and your parents, then your parents will receive a portion of your probate assets. The intestacy laws become more complicated when addressing blended families. If you are survived by your spouse and he or she has children from a prior marriage, then your spouse will receive a reduced amount. Your spouse's inheritance will be further reduced if you have children from a prior marriage. With an estate plan in place, you have the ability to control who will inherit your assets after your lifetime, and in what manner and amount."

O'Neil: "Depending on the type of assets that you owned at the time of your death, your loved ones may have to open a probate administration. After paying final expenses, the assets will ultimately pass to your heirs, as determined by the laws of the state where you lived at the time of your passing. This is known as the intestacy statute, and it is similar to a family tree, in which the state has predetermined who your nearest living relatives are in order to define your heirs. Unfortunately, probate can often be a lengthy and cumbersome process, so it may not be a quick transition."

Brassard: "The answer to this depends on whether the disposition of the asset is governed by law (such as real property held in joint tenancy), contract (in the case of life insurance or retirement benefits, which pass by beneficiary designation), or by probate (for assets held in the name of the decedent individually and which do not pass by law or contract). For assets passing by will, a probate proceeding must be initiated in the local probate court in order for those probate assets to be transferred to the recipients named in the decedent's will. If there is no will, then those probate assets will be transferred by the laws of intestacy, which create a 'default' disposition for any assets that are not transferred by will. Thus a will is a critical part of any estate plan as it ensures that any probate assets are transferred as the decedent wishes, and not as the intestacy statute mandates."

Will or trust – which do I need, and what are the benefits of choosing one over the other?

O'Neil: "In many cases, adding a trust leads to a better and more effective estate plan. Assets held in trust will avoid the probate process, making the administration of your estate quicker, easier, and more efficient for your loved ones. The trust can continue to hold your assets even after you are gone, only distributing to your beneficiaries at predetermined times or under the specific circumstances that you outline within the agreement. This is especially appealing to families with young children, or in situations where it may not be ideal to distribute assets outright to a beneficiary. Examples of this would be those struggling with addiction, facing bankruptcy, receiving government benefits due to a disability, or exhibiting poor money management skills. In rare cases, if a client does not have any assets that would fall into a probate administration if they were to pass and does not have any concerns about their loved ones having outright control over the assets upon death, a trust may not be necessary. A person fitting that fact pattern may benefit by saving the additional cost of adding a trust to their estate plan. However, in most cases a trust is a better option, and well worth the additional expense when creating a plan."

What doesn't a will do?

O'Neil: "The biggest differentiator between a will-based estate plan and a trust-based plan is that a will does not allow you to avoid probate. There is a common misconception that having a will means you are set up to avoid probate. A will has no

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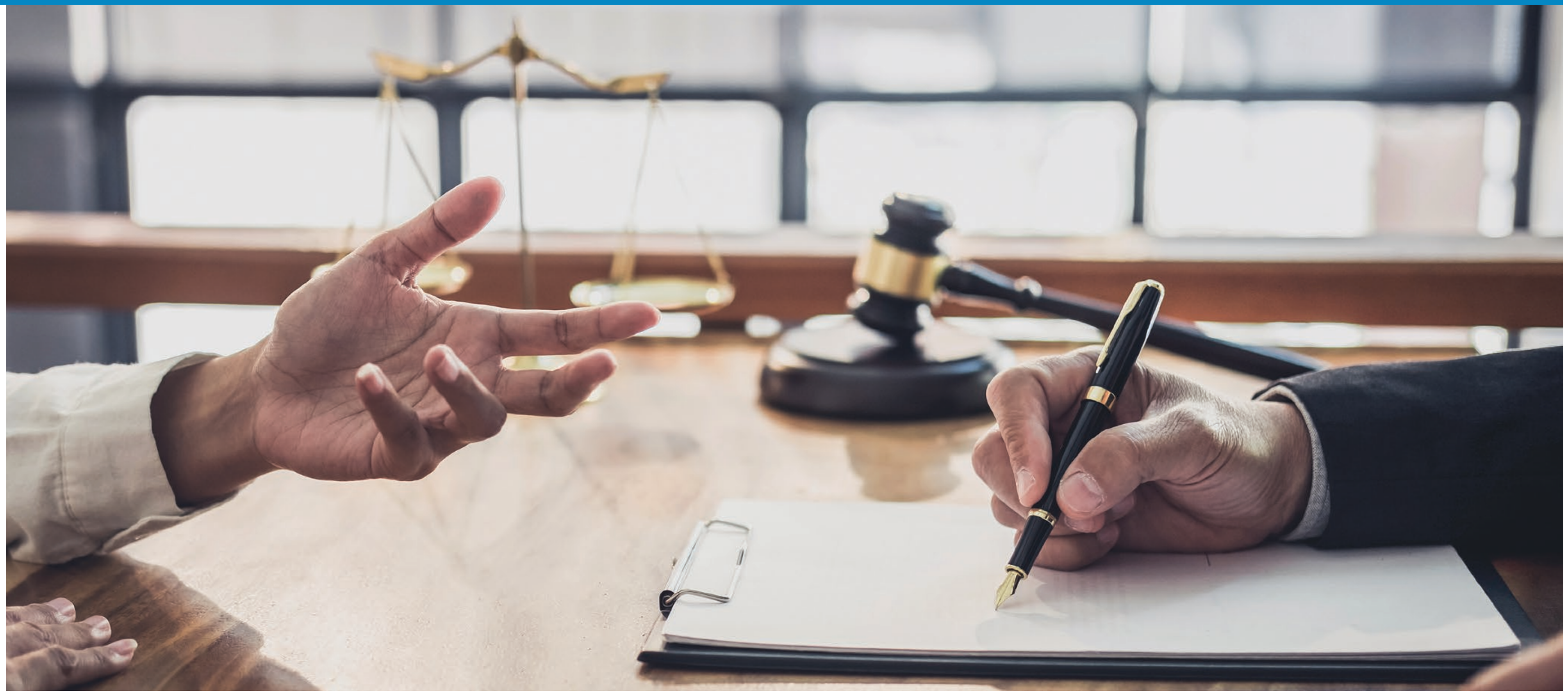

binding authority unless it has been admitted to the probate court and approved as part of the probate administration process."

Brassard: "A will is not effective until a person dies, so it is not a tool for disposing of assets prior to death. For example, if someone is incapacitated but still alive, they should have a health care proxy and a durable power of attorney so that someone else (or an institution) can 'stand in their shoes' and make health care and financial decisions for them."

Stilson: "While a powerful estate planning tool, there are a lot of things a will cannot do. A will distributes your assets to named beneficiaries after you have passed away. This is done through a process called probate. This can be a time-consuming and costly process. Further, the process is public record, meaning that anyone can see what is contained within a will.

"In contrast, a trust can generally accomplish the same things as a will while avoiding some of the shortfalls. There are many different types of trusts, but the most commonly used one is called a revocable trust. A revocable trust allows assets to pass to beneficiaries after you've passed away, but can avoid the probate process if prepared and funded properly. Trusts are different from wills in that they are able to hold assets during your lifetime. A trust is almost like a bucket in which you deposit all of your assets: real estate, personal property, bank accounts, etc. During your lifetime, you fill up the bucket; after you pass away, the contents are given to your beneficiaries according to your wishes, without the involvement of the probate court. This means that your trust does not have to be public record and can remain confidential. A trust may become public record if there is litigation involving the trust, which might happen if the trustee is not acting properly.

"Less common — but still powerful — estate planning tools are various types of irrevocable trusts. These trusts can offer less flexibility to you in accessing those assets you put in your trust during your lifetime, but can serve various other needs, such as creditor protection or long-term care planning. These types of trusts should be used only after discussion with a qualified estate planning attorney to determine if one is right for you."

What is a revocable living trust and what problems might it solve in my estate plan?

Gagnon: "A revocable trust serves as the centerpiece of an estate plan and directs how your assets will be administered and distributed after your lifetime. A primary benefit of a revocable trust is to avoid the court-monitored probate process, thereby minimizing legal fees, avoiding court delays and expense, and maintaining privacy of your estate plan. In addition, a revocable trust is often desired over a simple will because it provides more flexibility and planning options, creditor protection, and tax advantages. In order to optimize the benefits afforded by a revocable trust, the trust should be funded during your lifetime, meaning that the ownership of certain assets should be transferred to your revocable trust. You will retain complete control of all assets in your trust as if you owned them in your individual name. As the grantor (i.e. trust creator) you retain the right to amend or revoke the trust at any time and to withdraw all or any part of its assets during your lifetime, so long as you have the requisite capacity. Oftentimes the grantor also serves as the initial trustee of the trust, and you may also appoint a successor trustee to manage your trust assets in the event of your incapacity and after your lifetime."

Weijer: "Revocable living trusts are estate planning vehicles that are utilized for countless purposes, including minimization of estate taxes, planning for minor children or disabled beneficiaries, business succession planning, and charitable giving. However, the most common use in New Hampshire is for probate avoidance. Probate is undesirable for many reasons: it is frustrating, it is costly, it is public, it takes months (and sometimes years) to complete, it delays distribution of assets, and it limits the level of 'dead hand control' a decedent can exert over estate assets. By setting up a trust, the negatives of probate can be avoided and the trustee can administer the trust estate without cumbersome court oversight."

What is probate and should I avoid it?

Stilson: "Probate is a legal process for the administration of one's individually held

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assets after one dies. The court oversees this process and ensures that the estate is managed and distributed according to the terms of the will. When you pass away, someone must be appointed by the court to be in charge of managing the estate and distributing any assets, known as the 'executor' or 'administrator.' In a will, you nominate who you would want to be the executor of your estate. The court will typically then approve your nominee to hold the role, and, in many cases, will also require a bond. A bond is an insurance policy on the executor for the value of the estate in the case something happens to the estate before it is distributed. This can be costly, and, in some instances, your nominated executor may not qualify for one, which would require the court to appoint someone else to be executor.

"Further, the probate process can be daunting for executors, especially when they are grieving a loved one. Probate moves at the pace of the court, which may or may not be the proper pace for a particular estate. Finally, probate is a public process, so anyone can learn about your assets and where they are going. Many people want to avoid probate because they want to give their loved ones freedom to administer the estate without court intervention. Specifically, by avoiding probate, you could save your estate money that could otherwise go to your loved ones. You can also save time by having your loved ones start to manage your estate immediately through the use of a trust and trustee. Avoiding probate also gives confidentiality that some people prefer to a public process."

O'Neil: "Probate is the process of the court overseeing the administration of a person's estate, including the transfer of assets from the person who passed away to their heirs or beneficiaries. Many people wish to avoid probate because of its associated costs and the length of time that it takes to complete. While this process takes place after you are gone, your grieving loved ones will be left to navigate the many hurdles during a time of difficult transition."

What should I consider when choosing an executor? What responsibilities will he/she have?

O'Neil: "When choosing an executor or a trustee, it is important to select someone who is reasonably reliable, responsive, and able to work well with others. This individual is allowed to seek outside assistance from lawyers, accountants, and financial advisors as they navigate the administration of your estate. As such, it is not as important that the person have these technical skills, and more important that they be willing to do what it takes to fulfill their duties. These responsibilities include notifying creditors of your passing, managing assets during the administration process, keeping good financial records, and ultimately distributing the assets to your beneficiaries."

Are there any estate planning strategies unique to someone living in New Hampshire?

Gagnon: "New Hampshire is a leading jurisdiction for establishing trusts because the New Hampshire legislature has continually modernized its trust laws to make administration significantly more efficient, to provide flexibility in modifying a trusts' provisions, and to improve the creditor protection afforded by trusts. New Hampshire law allows for trusts to be updated or 'fixed' as necessary or desirable based on changing laws and family and financial circumstances without the need for court approval through the use of non-judicial settlement agreements, trustee decantings, and trustee modifications."

"Only some states permit so-called asset protection trusts wherein the trust creator can retain a beneficial interest in the trust assets while also protecting the assets from his or her creditors, and New Hampshire recently strengthened the creditor protection provided by irrevocable trusts of this nature. New Hampshire repealed its rule against perpetuities, and thus under New Hampshire law the grantor of a trust may create a tax advantaged 'perpetual trust' or 'dynasty trust' to benefit multiple future generations. These are only some of the benefits of establishing and administering a trust in New Hampshire."

O'Neil: "New Hampshire has some of the most progressive trust laws in the country, including the ability to create a self-settled domestic asset protection trust, dynasty trusts, and directed trusts. If an individual has concerns and wants to protect an asset from creditors, is seeking state tax advantages, and wants greater flexibility in the management and administration of their trust, New Hampshire offers wonderful opportunities to explore."

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Stilson: "New Hampshire offers great estate planning options, some of which are not found in other neighboring states. First, New Hampshire does not have an estate tax, meaning that when you pass assets to family members, no state-level estate tax will need to be paid on items they inherit.

"Additionally, New Hampshire has very well-developed and flexible trust laws. These laws permit many different types of trusts and trust provisions and allow for customizing a plan to each person's unique situation and estate planning goals. For example, New Hampshire law allows for trust protectors and trust advisors. These roles allow the creator of a trust to appoint individuals who can oversee the management of a trustee's decisions and can advise on different asset management strategies.

"Finally, New Hampshire has established the Complex Trust Docket, a court dedicated entirely to the oversight of complex trust litigation. Having this specialized court speeds up the court process for trust litigation. It also ensures that a judge who is well versed in complicated trust matters is hearing each case, resulting in fair and consistent application of New Hampshire law. This, combined with the liberal trust laws in New Hampshire, make it an ideal place to plan your estate."

What should I consider when crafting an estate plan with retirement benefits in mind?

O'Neil: "Retirement benefits present unique issues when crafting your estate plan. It is important to consider the age of your beneficiaries, the modified timelines under which beneficiaries must withdraw inherited retirement benefits under recent changes, and whether you want those assets held in trust vs. distributed outright to your loved ones."

Weijer: "When setting up a trust, individuals should have robust conversations with their planner about the makeup of their estate and how certain assets should be treated. Ordinarily, a revocable living trust that is settled for probate avoidance should be 'funded' with all of an individual's assets, except for qualified retirement accounts. Such accounts are usually the largest single asset of middle class families. The reason to avoid making your trust a beneficiary of your qualified retirement account is largely due to the required minimum distribution (RMD) rules imposed by the internal revenue code.

"When an individual's qualified retirement account passes via beneficiary designations, the withdrawal period is readjusted and based on its new recipient. Upon the passing of the 2019 SECURE Act, recipients of inherited accounts must withdraw the entire amount over a ten year period (many exceptions or caveats apply to the general rule, such as when the inheritor is a surviving spouse, a minor, disabled, or a charity, etc.) This new withdrawal schedule differs greatly with the former convention. Before the SECURE Act, the annual required minimum distributions (RMDs) an inheritor must have taken was based on his or her life expectancy. Since most inheritors were a generation removed from the original holder, this resulted in smaller RMDs, thereby reducing the amount taxed each year. It also renewed the period for continued tax-deferred growth. As one can see, the longer the money can stay in a qualified account the better. As the withdrawal period is shortened, however, the vehicle becomes less attractive.

"More importantly, individuals who are settling trusts should be aware that the withdrawal period is even shorter for trusts—just five years. This even shorter period results in higher RMDs, which can have the effect of pushing the beneficiary into higher tax marginal tax brackets. It also shortens the period of tax-deferred growth. For this reason, estate planners generally advise clients to keep their children as individual beneficiaries of requirement accounts if possible, rather than directing those assets through the trust. However, this approach can be frustrated where individuals want to use the trust to exert 'dead hand control' over certain children who require restraints or protections put on their share of a parent's estate. A skilled estate planner can address these concerns by implementing plans that provide the protections necessary for certain beneficiaries while also maintaining equality between beneficiaries and minimizing tax burdens."

What are the benefits of using a financial advisor when establishing a will or putting together an estate plan?

O'Neil: "Clients should think of their financial advisor as part of their overall estate planning team, consisting of an attorney, a tax advisor, an insurance advisor, and a financial planner. The financial advisor can assist with funding a trust after it is created, assessing long term care needs, and developing strategies for tax planning."

Weijer: "The design of an estate plan is only as good as the attorney's understanding of the estate itself—both in its present and future form. Individuals who are creating an estate plan benefit greatly when their financial advisor participates in the process. In fact, it is not uncommon for financial advisors to attend or call into their clients' initial conference with an estate planning attorney. Financial advisors are generally in the best position to understand a family's financial goals and can provide guidance on what a family's estate consists of, as well as what it might consist of two, five, or even ten years in the future. Conversely, it is important for financial advisors to understand how their client's plan will operate and what issues the attorney may anticipate going forward."