Estate Planning Information:

Trust v. Will: (both require capacity and knowing/voluntary intent free of duress, mistake,etc.)

-Trust: a complex document to cover unforeseen circumstances; so costs more upfront fees to create but prevents or minimizes later probate burdens (time and attorney fees); is a confidential document that is never publicly filed unless done so through a suit by a beneficiary or heir to set the trust aside, **can provide greater control and limitations by Settlor** (if concerns with beneficiary life styles, creditors, use of properties, etc.), can provide for alternate beneficiaries if named beneficiary/ies die (rather than going through beneficiary's heirs named in will or by law if now will), can protect beneficiary's assets from creditors/spouses/etc., allows for lifetime and/or post-death distributions, can provide for oversight of assets/ distributions up to 21 years after death of last beneficiary, becomes immediately valid when the documents are signed, notarized and trust property is put into the trust (but testamentary trusts are not effective until death), if contains more than just real or personal property assets (like money, stocks, etc) then can involve a lot more record-keeping and red-tape requirements, changes must be done by written amendment and if the trust is irrevocable then only certain changes are allowed, can have charitable provisions that maximize tax purposes.

-Will: is not public record or effective until death, can be changed up until the loss of capacity or the moment of death, must be probated (filed in courthouse and accessible to public, involves a lengthy and complicated process, usually requires attorney assistance who charge the statutory fees which equal 2% - 4% of Estate assets), recipients/heirs can do with or give property as see fit

Person who creates a Trust: called the Settlor, Grantor or Donor.

Trustee(s): Person(s) who administer the assets held in trust, must be age of majority and competent, must act in the best interests of the Trust (per its stated terms, goals and intent) and ALL beneficiaries.

-Trustee's duties in a nutshell: set up the initial Trust requirements (put all trust property, money and assets in the Trust's name; open a bank account in the trust's name, establish a federal EIN tax identification number, follow-up with an accountant about payment of taxes), administer the trust in all ways necessary (pay bills and other trust expenses, maintain financial records with receipts/invoices, do annual accounting, file taxes, etc.), maintain and safeguard trust property, collect and report any trust income/rent, provide beneficiary distributions required, make decisions about the trust or its property in accordance with the trust's best interests, hire specialists (accountants, attorneys, investors, etc.) to maximize trust assets in a safe way and address any trust concerns, etc.

Beneficiary/ies: Person(s) who benefit from the trust aka receive trust assets, benefits or rights.

Trust Advisor: Person(s) who oversee substantive changes (that affect trust assets or beneficiary's rights) or self-interested actions of the Trustee(s). These are often the Settlor's heirs, beneficiaries or trusted advisors.

There are multiple kinds of Trusts: Lifetime (alternative to a Will or supplement to a Will that provides greater control than a Will) or Testamentary (within a Will that does not take effect until death & probate) and Revocable or Irrevocable. There can also be a combination of those types to accomplish the Settlor's goals and intent.

Pro's and Con's of each type:

-Lifetime: allows Settlor to ensure terms and goals are exactly right for his or her purposes/intent, may or may not involve more paperwork and inconvenience (less so for revocable living trusts and more red tape for irrevocable living trusts) than a will or testamentary trust, is a longer process and costs Settlor more attorney fees upfront, but in most cases dramatically saves on the amount of attorney fees by avoiding or minimizing the probate process

-Testamentary:

-Revocable trusts: can be changed easily, use of Trust assets is more accessible than with an irrevocable trust, but is still considered an asset of the Grantor(s) so does not provide creditor/tax/Medicaid planning benefits.

-Irrevocable Trust: In an irrevocable trust, the Settlor retains no power to revoke, change or amend the trust at any time. But certain powers to change the trust may be given to either a Trustee, if an Independent Trustee, or a beneficiary, but with limitations.

In most cases, when assets are transferred to an irrevocable trust the Settlor has made a gift to that Trust. For gift and estate tax purposes, the gift may be classified as non-taxable because the gift is equal to or less than the Settlor's annual gift exclusion to trust beneficiaries, non-taxable because the gift is equal to or less than the Settlor's lifetime federal gift tax exemption amount (currently $1,000,000.00), or taxable because the gift exceeds the Settlor's available annual exclusion amounts and lifetime gift tax exemption amount.

People that transfer assets to an irrevocable trust must be solvent (assets exceed debts), not have any impending delinquencies or unpaid debts, and must continue to pay on current debts even after transferring such to an Irrevocable Trust. The Settlor(s) should check with creditors before transferring assets that have current debts or liens associated with them, because transferring without such prior authorization may result in the creditor "calling the loan" and making it immediately due and payable. Any debts associated with assets that are in fact transferred to an Irrevocable Trust must continue to be paid or the asset itself could be foreclosed or forfeited to the Creditor.

When the Settlor(s) are Trustees of their own irrevocable trust, then their use and decision-making ability is limited (often to 5% of the Trust principle per year and must have a Special Trustee appointed for self-interested discretionary actions or distributions). This is because the trust assets are no longer "owned" by the Settlor, which is how Irrevocable trusts result in the increased creditor/tax/Medicaid planning benefits.

Current law: For Medicaid planning purposes, gifts made to either individual persons or to a trust within five years of an application to receive Medicaid benefits are "countable" to determine eligibility for benefits. (The assets that were transferred will make the applicant ineligible for Medicaid benefits.). A Bankruptcy Court can access Trust assets for 10 years after the assets are transferred to an Irrevocable Trust. Otherwise, assets properly transferred to an Irrevocable Trust are protected from creditors the day after the Trust is written.

Trust & Will alternatives:

-Deed to beneficiary now & have beneficiary do a Life Estate back to the Grantor(s):

-Pro's: gets title out of Grantor's name and starts the 5 year Medicaid look-back period when Deeds done; minimal change in Grantor's use of property; Grantor aka Life Estate holder(s) are still able to get the Homestead tax exemption; Grantor/Life Estate holder can solely use property during life; Grantor/Life Estate holder must maintain taxes, maintenance and upkeep;

-Con's: Grantor/Life Estate holder CANNOT transfer property without Remainder Title Owners' consent; Grantor/Life Estate holder CANNOT use property in a way that affects future land interests (cannot mine, timber, use or sell mineral interests if applicable, drastically alter or build permanent structures on the property, etc.

-Deeds with rights of survivorship (good for married persons who are young or have long-term care insurance):

-Pro's: deeded property passes directly to the surviving title owner, avoids probate delays and attorney fees

-Con's: heirs of owner that passes away first get nothing (bad for married persons with separate children)

-Transfer on Death Designations aka TOD or Payable on Death aka POD (for Insurance, Financial Accounts, Deeds, etc.):

-Pro's: pass directly to beneficiary/beneficiaries you name in whatever percentage you direct, does not pass through probate (reduces probate attorney fees), is accessible shortly after the beneficiary/ies provide the provider notice of the owner's death (rather than an approximate year later through probate)

-Con's: Does not allow Grantor any limits or control over beneficiary's use

-Gifting during lifetime (intent, delivery and acceptance that transfers possession):

-Pro's: person you want to have property gets and enjoys it before you die

-Con's: you may not have a chance to make gifts because life/death is unpredictable/uncertain, creates family upset/hard feelings/drama, tax free up to federal gift tax limit (currently $14,000) and beyond that person making a gift incurs transfer tax

-Setting up a Limited Liability Company (LLC), Corporation or partnership

-would want written and signed article of establishment and bylaws to verify and validate terms, rights and responsibilities

-Pro's: limits liability of owner and sometimes recipient, allows some control over assets and distributions (per terms)

-Con's: transfers are still taxed above federal gift tax limit (currently $14,000), rights are vested in stockholders/owners and they could dissolve entity to get their assets, still requires the entity have sufficient assets and insurance or the owners are not immune from liability