

GUIDE TO UNDERSTANDING ESTATE PLANNING



Estate planning allows you to decide how your personal and financial affairs will be handled if you become incapacitated and how assets will pass to your family upon your death. Estate planning usually involves two steps: designing a plan that is appropriate for your circumstances and signing legal documents to make sure that your wishes are carried out. The following are some of the most common estate planning documents.

- ***Last Will and Testament***

A Will is a legally binding written statement of who will receive assets upon your death. A Will also appoints a legal representative (Personal Representative) who will gather assets upon death, pay off any debts, and distribute assets to the appropriate individuals. In order to have authority to access a decedent's assets, the Personal Representative must be appointed and the Will allowed by the Probate Court. Merely being named as Personal Representative in a Will without the involvement of the Probate Court, does not give the Personal Representative the ability to access assets.

It is a common misconception that having a Will alone avoids probate - it is the Will itself that is probated through the court system. Only assets held in your name alone that do not already pass by operation of law are distributed according to the terms of the Will. Jointly held assets and assets which have a named beneficiary pass directly to the joint owner or the named beneficiary without regard to the terms of your Will. Therefore, joint bank accounts, life insurance policies, most retirement funds (IRAs, 401(k)s, 403(b)s, etc.), and annuities are not considered probate assets.

You can amend your Will (a codicil is an amendment to a Will) or revoke your Will at any time, as long as you are competent to do so.

An original Will should be kept in a safe place, preferably in your home. If you keep your Will in a safe deposit box, you will want to make sure that someone else can access the box if you die. There is no need to provide a copy of your Will to family members or the nominated Personal Representative.

- ***Durable Power of Attorney***

A Durable Power of Attorney (DPOA) is a written legal document authorizing a person to act on your behalf on financial matters. There are two basic forms a DPOA can take: a present DPOA and a springing DPOA. A present DPOA authorizes the person you name (the "agent") to act for you as soon as it is executed. A springing DPOA becomes effective only upon your incapacity. While it would seem to make sense to use a springing DPOA, springing DPOAs are rarely used due to the recurring difficulties encountered when trying to use these documents with banks and other financial institutions.

The DPOA should contain a list of the activities the agent is allowed to undertake on your behalf. Typically, the agent will possess broad powers, such as the ability to make gifts, create trusts, and sell real estate. As such, you will obviously want to choose an agent that is trustworthy and capable.

An individual who has already become incapacitated does not have the appropriate capacity (the ability to understand the consequences of his or her actions) to execute a DPOA.

You can revoke your DPOA by revoking the document in writing and notifying the agent that the power is canceled. As a practical matter, however, the agent may still be able to transact business on your behalf if he has retained a copy of the document and third parties rely on this copy.

You should keep your original DPOA in a safe place, preferably in your home. If you keep your DPOA in a safe deposit box, you will want to make sure that someone else can access the box if you become incapacitated. There is no need to provide a copy of your DPOA to family members or the nominated agent.

- ***Health Care Proxy***

Similar to a DPOA, a Health Care Proxy (HCP) allows you to appoint someone to act as you agent - but for medical, as opposed to financial, matters. A HCP does not take effect until a physician certifies, in writing, that you are incapacitated. Before that time, your agent cannot make medical decisions on your behalf. When the attending physician determines that a person lacks the capacity to make or communicate a health care decision, the physician will look to the agent to make the health care decisions. If the principal regains the ability to make treatment decisions, as determined by the attending physician, the agent's authority ceases.

Under the Health Care Proxy law, you are not permitted to designate more than one agent at a time. You should, however, designate an "alternate" agent in case the agent is unable or unavailable to make decisions on your behalf.

You may revoke your HCP by signing a document which revokes your HCP, communicating orally or in writing to your agent, alternate, physician or lawyer that your HCP is revoked, or by executing a new HCP. In addition, a HCP is automatically revoked when you are legally separated or divorced from a spouse named as an agent. While each of the above actions will act to revoke a HCP, it is recommended that all revocations be accomplished in writing with copies of the revocation letter sent to any person who previously received a copy of the HCP.

Copies of your executed HCP should be distributed to your agent, your alternate, your physician and health care providers, and your attorney. Copies may also be given to members of your family, close friends and clergy people, if you wish. You should keep the original HCP with your important papers in your home.

Living Wills, another form of advance directive (a way of making your medical wishes known if you cannot communicate with your physicians), are not legally enforceable in Massachusetts.

- ***Revocable Trust (also called a Living Trust)***

A trust is a legal entity for holding property. One or more persons (trustees) hold property for the benefit of another or several other people (beneficiaries). A Revocable Trust is a trust created by you during your lifetime that you can revoke (terminate) or amend (change) at any time. In this way you can maintain complete control over assets held in the trust. Usually the person who creates the trust (called the Grantor, Settlor, or Donor) also serves as the trustee during his lifetime.

Revocable Trusts are established for many reasons, but the most common reason is to avoid probate. This is accomplished by establishing a Revocable Trust and transferring assets into the trust. Any assets held in the trust upon the Grantor's death will pass directly to the individuals named in the trust, without the need for involvement with the Probate Court. Avoiding probate may save money in legal fees and may allow assets to pass to family members more quickly than with probate.

Revocable Trusts are also commonly used when a challenge to a Will is anticipated. For example, if you want to omit one or more of your children from inheriting any of your assets, the use of a Revocable Trust will make it more difficult for the omitted child to challenge your estate plan. This is because in the Probate Court system there is a relatively easy mechanism for challenging a Will, but no similar easy mechanism exists to challenge a Revocable Trust.

Assets held in a Revocable Trust are considered countable assets for Medicaid purposes (Revocable Trusts do not protect assets against the cost of nursing home care).

- ***Realty Trust***

A Realty Trust is a trust designed solely to hold title to real estate. After a change in the law in 2003 in Massachusetts, the use of Realty Trusts declined significantly.

Prior to 2003, when real estate was transferred to a trust in Massachusetts, the trust had to be recorded with the Registry of Deeds. This meant that the trust became a public record. If real estate was transferred to a Revocable Trust and this trust was put on record at the Registry of Deeds, your entire estate plan would be available to the public. In order to avoid this, real estate was often transferred to a Realty Trust which only stated that the trustees were holding the real estate for the benefit of unnamed beneficiaries. At the same time the owner would execute a Schedule of Beneficial Interests for the Realty Trust which would often name the Revocable Trust as beneficiary of the Realty Trust. This allowed a family to avoid probating real estate when someone died and made sure that an estate plan was not on file at the Registry of Deeds for the public to see.

After 2003, trusts do not have to be recorded with the Registry of Deeds. For this reason, the use of Realty Trusts has declined significantly. However, Realty Trusts are still an effective tool in dividing equity in real estate between 2 Revocable Trusts (as is often done with estate tax planning).

- ***Irrevocable Trust***

An Irrevocable Trust cannot be amended after it is created. Any assets transferred into the trust may only be distributed to beneficiaries in accordance with the terms of the trust. An Irrevocable Trust in which the Grantor retains the right to receive only income is a relatively common tool for Medicaid planning and, if drafted properly, will protect assets against the cost of nursing home care.

- ***Testamentary Trust***

A Testamentary Trust is a trust created by a Will. Such a trust has no effect until someone dies and assets are transferred into the trust. Testamentary Trusts are most often used for Medicaid planning purposes with married couples since assets in most Testamentary Trusts are not considered countable assets for Medicaid purposes upon the death of the first spouse.

- ***Supplemental Needs Trust***

A Supplemental Needs Trust (SNT) is a trust designed to provide principal and income for a beneficiary with a disability without interfering with the government benefits (SSI and MassHealth) that the beneficiary may be entitled to receive. The assets in a SNT are used to enhance the beneficiary's quality of life without jeopardizing cash benefits or health insurance. A SNT can be funded with part or all of your estate in a number of ways, including through your Will, your Revocable or Irrevocable Trust, or with life insurance.

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