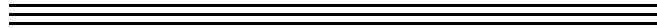


TAKING CONTROL OF YOUR FUTURE THROUGH BASIC ESTATE PLANNING



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Individuals can leave to fate the decision as to who and in what manner their estates will be managed should they become incapacitated or die, or they can anticipate these issues and take control. Basic estate planning tools can be employed to designate who will have authority to direct one's care, and who will have authority to manage one's estate in the future - both during lifetime and after death. This paper surveys those basic tools and how they are applied.

I. FINANCIAL DOCUMENTS - DURING LIFE

A. *POWER OF ATTORNEY*

A **power of attorney** is an agency agreement usually drafted by a lawyer and requiring no Court proceeding. It gives power to a person - called an attorney-in-fact - to take whatever actions are specified in the document. As long as a person has the capacity to understand the meaning of giving someone his/her **power of attorney**, a person can execute this type of document. A person still retains power over his/her own affairs after giving someone a **power of attorney** but the other person (attorney-in-fact) has concurrent power.

B. *LIVING (INTERVIVOS) TRUST*

A **living (or intervivos) trust** is an agreement created by a person during his/her lifetime to hold assets to be administered during the term set forth in the document. If it is funded during lifetime, assets are transferred to the trustee who agrees to manage and hold the property on behalf of the person generally for the rest of the person's life. A living trust can be useful in allowing another person (trustee) to assist an incapacitated person in managing his/her property. Also, assets in a living trust are not subject to probate at death; they pass according to the terms of the trust.

Often, as long as the person creating the trust is able to manage his or her own affairs, he or she serves as the trustee. If he or she becomes incapacitated, he or she can resign or be removed in favor

of a successor trustee.

Sometimes a trust is not funded during the lifetime of the person who creates it. Instead, it is funded at the time of the person's death. Often it is funded through Probate in accordance with the terms of the person's will. Sometimes it is funded through beneficiary designation.

C. *JOINT TENANCIES/RESTRICTED BANK ACCOUNTS*

A bank account can be accessible to both the potentially incapacitated person and another person so that either party has the right to withdraw the entire contents of the account. If there is a fear of exploitation of the incapacitated person, an account can require two signatures for withdrawal. A drawback to this approach is that, at the time of death of the incapacitated person, the account becomes the sole possession of the co-owner. As the distribution of this account happens automatically, it is not subject to the terms of a person's will. Thus, joint tenancy can upset a person's testamentary plans.

II. **FINANCIAL DOCUMENTS - AT DEATH**

A. *WILL*

A **will** is a legally binding document that directs to whom the decedent's property, including personal belongings, cash and real estate, will be distributed after death. It also appoints a legal representative to handle the estate which includes paying debts and making distributions to those named as beneficiaries. A will only affects the distribution of probate property. It has no effect on joint property, trust holdings or any asset that names a beneficiary, such as life insurance or retirement funds.

B *BENEFICIARY DESIGNATION*

A **beneficiary designation** is a method of designating to whom an asset will be distributed at the death of the owner. The most common assets to have beneficiary designations are life insurance, IRAs, and annuities. Investment accounts and savings bonds can name beneficiaries in the form of "payable on death" designations.

Trusts themselves generally name successor beneficiaries.

C. *JOINT OWNERSHIP*

Assets that are jointly owned generally pass to the surviving joint owner(s) at the death of one owner. This is not true if the ownership is in the form of tenancy in common.

III. **MEDICAL DOCUMENTS**

A. *LIVING WILL AND HEALTH CARE PROXY*

A **living will** is a document signed by an individual which states his/her wishes regarding the type of medical treatment he or she wishes to receive or not to receive. A **health care proxy**, instead of expressly stating the wishes of the patient, names another person to make medical decisions for the patient if the patient is incompetent. Massachusetts specifically authorizes **health care proxies**. **Living wills** are not officially sanctioned in Massachusetts but can be useful. Both documents can be revoked at any time by the individual.

IV. **PROBATE AVOIDANCE**

At the time of a decedent's death there are a variety of ways that the decedent's assets are transferred to his or her heirs or beneficiaries. With regard to property such as life insurance, annuities, or IRA's, if the decedent has named a beneficiary, at the time of the decedent's death those assets will pass directly to the named beneficiary outside of probate and regardless of the terms of the will. The same is generally true with jointly held property; it passes automatically to the joint owner. Property held in trust ordinarily passes according to the terms of the trust. Therefore, it is generally only property owned by a decedent in his or her name alone that passes through probate.

The probate process in Massachusetts is initiated by the filing of a petition with the Probate Court which asks for the appointment of an executor (if the decedent has left a will) or an administrator (if the decedent has not left a will). Assuming the Court acts favorably on the petition, the executor or administrator will ultimately be appointed and will be given authority to exercise control over the decedent's estate. The executor or administrator

is responsible to collect the decedent's assets, pay the decedent's bills, and ultimately distribute those assets to the decedent's heirs or named beneficiaries.

Though that process is not as difficult as it is made out to be, many individuals wish to avoid probate. If a person is married one solution is to own everything jointly. Depending upon the size of the decedent's estate, that may or may not be the best solution for estate tax purposes. If a person is widowed, however, putting assets in joint names with children, an approach often utilized, is not generally recommended. Instead, it is generally recommended that all of the assets be placed in a trust which will avoid probate. After the individual's death the trustee who is then serving has access to the assets and can distribute them at that time, according to the terms of the trust, without involving the Probate Court.

For the purpose of probate avoidance, the simplest approach is for the individual to create a revocable trust, to name himself or herself as trustee, and to transfer ownership of all of his or her assets to the trust. As long as the original trust creator ("grantor") is the trustee, the trust is not recognized as a separate entity for tax purposes and thus nothing really changes (except for the fact that the owner of the assets held by the trust is the trustee and not the grantor). The trust names the trustee(s) who are to take over at the time of the grantor's death (or earlier, if the trustee resigns) and the manner in which that trustee is directed to distribute the assets held in trust at the time of the grantor's death.