

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 at death or should they become incapacitated during life, 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 or her **power of attorney**, a person can execute this type of document. A person still retains power over his or 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 or her lifetime to hold assets to be administered during the term set forth in the document. If the grantor transfers assets to the trustee during his or her lifetime, the trustee manages the property on behalf of the beneficiaries for the term of the trust. Assets held in a living trust are not subject to probate at death. They are administered after the grantor's death according to the terms of the trust.

Often, as long as the grantor 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 property of the co-owner. As the ownership changes automatically, it is not subject to the terms of a person's will. Thus, joint tenancy can upset a person's estate plans unless it has been considered at the time that estate planning documents are drafted.

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 administer 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, property held in trust, 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 certain assets 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 a tenancy in common.

III. MEDICAL DOCUMENTS (MASSACHUSETTS)

A **living will** is a document by which individual makes known his or her wishes regarding the type of medical treatment he or she wishes to receive or not to receive particularly at the end of life. 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 recognized 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, generally only property owned by a decedent in his or her name alone 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 debts, 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 often advisable for all of the assets be placed in a living 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. The trust is not recognized as a separate entity for tax purposes as long as the trust creator (grantor) is living 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 grantor resigns as trustee) and the manner in which that trustee is directed to distribute the assets held in trust at the time of the grantor's death.