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Estate Planning
A Guide for Clients

The purpose of this guide is to give you a general sense of what will be involved in planning your estate. It is not intended to be encyclopedic, or to give conclusive advice on your particular situation. Still, we hope it will make the whole process a little less mysterious and a little simpler for you. We also provide an Estate Plan Information sheet which should help you to organize your planning and ours.

What is a will for?

Your will is the document by which you direct how your property will be distributed after death. It is also, if you have children under age 18, your best hope of ensuring that your children will have the guardian or guardians you think will be best for them.

A will is a matter of public record. After death, it is filed with the Probate Court for the county in which you lived. (If you owned real estate in other states, a court-certified copy of the will must generally be filed in those states as well.)

Once the will is probated the personal representative, who is the person named in the will to manage the estate, receives a court appointment, and from that time on, until the estate is closed, the personal representative is responsible for all of the property of the estate. It is possible and sometimes advisable to have more than one personal representative. Also, it is not uncommon to name one's spouse or child as personal representative.

The term "estate," as used above, means your "probate" estate, which only includes property held in your individual name, such as a bank or brokerage account or an interest in a business. Your probate estate does not include "non-probate" property. Jointly-owned assets (which automatically pass to your co-owner); insurance policies, retirement benefits and brokerage accounts payable directly to a named beneficiary; and property held in trust are all examples of "non-probate" property.

Why is a will advisable?

If you die "intestate," that is, without a will, your heirs will select who will administer your estate and the laws of Massachusetts will determine where your probate property goes. What the laws provide often differs from what a person would freely choose.

Furthermore, if you have a child who requires a guardian and die without a will, the Probate Court will have no guidance in choosing who should serve in this role. It will turn in most cases to your closest relatives, who may or may not be the appropriate persons for the task.

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Should you "avoid probate"?

Many years ago a man with a good feel for how to alarm people wrote a book on this subject. While it is true that probate proceedings can in some cases cause delay, the dangers of this are greatly exaggerated. A competent personal representative will be able to handle the process smoothly and efficiently. To ease the transition period it is a good idea to keep some cash in a joint account with a spouse or a dependent, and life insurance is often advisable as well.

Keeping your probate estate low can, in many instances, reduce your fees and expenses, particularly if your estate is relatively modest and tax planning is not a consideration. This can be done by holding property jointly with your intended beneficiary, creating a "transfer on death" account, making your life insurance and retirement benefits payable directly to a beneficiary, or putting your assets into a lifetime trust. However, each of these approaches has drawbacks, and none should be taken without thought on your part and good advice.

What is a trust?

A trust is essentially an agreement between you and a trustee or trustees, who promise to hold your money upon whatever terms you specify. It enables you to allocate your property in ways that reflect your family's true needs, where a simple division of assets is inappropriate. A trust is a flexible device that permits you to provide for the lifetime needs of a spouse, a child or an aging parent while keeping control of the ultimate recipient of the property. As long as the trust is in existence, it can protect trust property held for its beneficiaries from the reach of creditors and others. Where a sizeable estate is concerned, it is also a necessary part of any sound tax plan.

Choosing trustees is in many ways more important and more difficult than choosing personal representatives. Your trust will probably last much longer than your estate, and the trustees must not only be good investors but sensitive to your family's needs. Sometimes it is a good idea to have one trustee who knows how to handle money, and one who knows the family well.

Most large banks and many law firms offer trustee services, and there are a number of individuals and small companies that specialize in this work. A professional trustee offers experience and organization, and, if chosen carefully, access to good investment advice. A professional trustee will not always, however, be in the best position to know your family's needs, and you should consider naming an additional trustee for that purpose. You may also choose to rely solely on family members or friends to be trustee, particularly a family member or friend with a good business sense.

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How do you plan for your own incapacity?

In addition to planning for the disposition of your estate, it is important to plan for decision-making during your life. A power of attorney and health care documents enable you to choose the people who will manage your finances and make health care decisions for you should you become unable to act on your own behalf. Without these important documents, your family would need to go to court to obtain the appointment of a guardian to make personal decisions on your behalf and a conservator to manage your finances. These public proceedings can be costly and time-consuming.

Your durable power of attorney will name an agent who can pay bills, access bank accounts, invest money, file tax returns and buy and sell property while you are incapacitated or simply in need of assistance for a limited period of time due to absence or illness. Your agent will also have authority to support you and others who are dependent upon you for support, to fund your trust and to make gifts. You can choose how narrow or broad you want your agent's power to be. Also, if you have a child with special needs, you can nominate a guardian for your child who will serve in your place when you are no longer able to act in that capacity.

A health care proxy allows you to select an agent who will make health care decisions for you if you are unable to do so on your own. You will also want to sign a HIPAA Authorization which will give your agent (or other people of your choosing) access to your medical records. Finally, you may wish to consider a living will that will provide your agent with guidance about your wishes as to the use of life support in the event of an extreme mental or physical disability.

How do you protect a child with special needs?

Planning for the care of a child who will need lifelong assistance presents unique challenges. Fortunately, much can be achieved by putting in place a special needs trust, sometimes referred to as a supplemental needs trust. The goal of the trust is to provide for the management of assets for the benefit of your child while permitting him or her to qualify for available government services, programs and benefits. The trust can supplement the benefits in a way that will enhance your child's quality of life, such as providing for caregivers, therapists, travel and recreation. You may also select the people who will serve as Trustees of the trust and the individuals who will succeed you as legal guardian if you are serving in this capacity.

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What taxes will your estate incur?

Both the federal and Massachusetts governments levy an estate tax if the size of your "taxable estate" exceeds a set amount (often referred to as the "exemption amount") at the time of death. The taxable estate includes both probate and non-probate property, to the extent of a decedent's power to control where the property goes. Thus, life insurance is usually included, because the insured person normally retains the power to change the beneficiary. Jointly-owned property is also included, but the amount taxed varies depending upon the relationship of the co-owners. Married couples are treated as if each owned 50% of jointly-owned assets at death, while up to 100% of assets owned jointly with another person will be included to the extent the funds contributed came from the decedent. Fees, debts, expenses, and charitable bequests are deducted, as is 100% of property passing to a surviving spouse. Special rules apply to married couples if one or both members are not U.S. citizens.

The federal government may also tax gifts made by you while living in excess of $14,000 per year per person (with future adjustments for inflation). Tuition and medical expenses paid by you for another are excluded from this lifetime exemption as long as the payment is made directly to the provider. In addition to the estate and gift taxes, gifts or bequests to any individual two generations or more below you, e.g. a grandchild, in excess of the exemption amount may incur a generation-skipping transfer ("GST") tax.

The federal estate, gift and GST taxes (often referred to as "transfer taxes") are tied together in a unified transfer tax system, which means that the exemption amount is available over the course of your lifetime and, to the extent it is not applied to lifetime gifts, can be used by your estate. The federal exemption is $5 million, adjusted each year for inflation. In 2017, the adjusted exemption amount is $5.49 million.

The Massachusetts estate tax, which is currently based on federal law as it existed on December 31, 2000, is very different from the 2017 federal estate tax. The Massachusetts exemption amount is $1 million, with the result that a Massachusetts tax will often be due even though the estate is exempt from federal tax. This means that Massachusetts residents and those with Massachusetts property will still need to engage in tax planning to the extent of the first $1 million owned by a decedent.

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Can these taxes be reduced?

If your estate exceeds the applicable exemption amounts, you may be able to take steps which will reduce or, perhaps, eliminate both the Massachusetts and federal estate taxes.

For example, couples with combined estates in excess of $1 million may want to consider the use of a trust as a fairly simple way to save estate taxes. A couple with $2 million split evenly between them could avoid all federal and Massachusetts estate taxes on both deaths by having the first one to die leave their share of the combined property in trust for the benefit of the survivor rather than outright to him or her.

The use of a trust to achieve tax savings for married couples is optional under federal law because any exemption remaining after the death of the first spouse can be used by the surviving spouse, i.e. is portable to the survivor, during life or at death for estate and gift (but not GST) tax purposes, as long as an election is made on a timely-filed federal estate tax return. In 2017, this gives married couples a combined exemption of $10.98 million, adding considerable flexibility to the planning process.

In addition to the planning available with trusts and portability, any person with charitable intent can achieve tax savings by making gifts to charitable organizations. These may be made directly or through special charitable trusts which permit the gift to be split between an individual and a charity.

These are merely a few of the many tax planning options which may be appropriate for your plan. You can choose to explore such options in detail or to keep them in the background as is suitable to your individual situation.

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We hope this guide helps in your initial thinking about your estate plan. Please remember that each estate plan is unique and that these are only general guidelines. We look forward to helping you work through the particulars of your own plan

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