

## **LIFE & ESTATE PLANNING**

**Estate Planning** is for the handling of your affairs after you pass away. The main legal tool for this is a **Will**. Many people also use **Trusts** for Estate Planning. **Life Planning** is concerned with handling your affairs, during your life, if you become incapacitated. The Life Planning tools are **Durable Powers of Attorney**, and **Health Care Proxies/Directives**.

The problems that occur when you fail to plan include the forced distribution of your assets based on the government rules as opposed to your own choice, and the need for costly, and public, guardianship proceedings in the case of incapacity. Almost all planning can be changed or modified over time, but failing to plan can be disastrous when tragedy strikes.

### **THE BASIC TOOLS**

#### **WILL**

A **Will** is a written document controlling the disposition of an individual's property at death. It must be written, signed, and witnessed by two competent people. It may be changed at any time but the formalities must always be followed. You should review and update your Will at regular intervals (every three to five years) and upon major life changes (marriages, births, deaths).

In your Will you get to say who will receive your property after you die. You may give specific items to specific people ("my stamp collection to my nephew George"), or general gifts to groups ("all of my property, in equal shares, to my children") or any combination that you choose. In your Will you nominate the person that you want to be in charge of your estate after your death (executor or "personal representative") and if necessary the person that will take care of your minor children (guardian). When there is no Will the intestate formula in the law determines who receives the decedent's property. These rules are inflexible and do not allow for any special circumstances.

**Estate Taxes** are based on the taxable value of the estate. The tax is paid by the Estate before the heirs receive their shares. Many items are included in your taxable estate even though they don't pass by your Will. Federal law allows a

certain amount to pass without any tax. The exemption amount is currently \$5,250,000 (it is now indexed to inflation and will increase each year – unless Congress changes the rules again). Federal law also allows an unlimited amount to pass tax-free to a spouse.

**Probate** is the official procedure whereby all expenses, taxes, and debts are paid and the remainder of the decedent’s property is transferred to the proper parties. The procedure is supervised by the probate court, whose duty it is to ensure that everything is done fairly and properly. This system protects the intended recipients of a decedent’s property. All property owned solely by an individual must go through the Probate process **whether or not there is a Will.** Jointly owned property and property with a named beneficiary (life insurance, IRA’s) and property held in a Trust, does not become part of the Probate process.

## **DURABLE POWER OF ATTORNEY**

A **Power Of Attorney** is a written authorization, granting power to act for another. The “Principal” (you) designates an “Attorney-In-Fact” or “Agent.” It is like hiring an employee, however an “Attorney-In-Fact” is usually an unpaid friend or relative. A Power Of Attorney is “**durable**” when it is written so that it remains in effect if you are incapacitated, and your Attorney-In-Fact can still carry on your affairs; personal and business (to the extent you granted those powers).

If you become incapacitated **without** an Attorney-In-Fact your family will have to go to court to have a **Guardian** or **Conservator** appointed to handle your affairs. This may cause delays and significant legal costs. With a Power of Attorney, you share your rights and powers with an Agent. In a Guardianship, you lose your rights and powers to the Guardian.

## **HEALTH CARE DIRECTIVE**

This is a special Power of Attorney that names someone to make health care decisions for you if you cannot. Massachusetts law calls this a *Health Care Proxy* while the New Hampshire term is *Power of Attorney for Health Care*. The power granted includes authorization to allow or refuse all medical procedures. You put your life in the hands of the person you name as your health care agent, but this is preferable to leaving it uncertain or up to the court system. Your agent’s power only comes into effect when you cannot make health care decisions for yourself. If you can communicate a preference, your wishes will be followed. The person you

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name in your Proxy will have authority to make life and death decisions for you, if you cannot do so yourself, so you must trust this person with your life. You may also have a statement of your wishes, called a *Living Will* or an *Advance Directive*.

## TRUSTS

You can create flexibility in the management and use of assets with a **Trust**. Trusts can administer your assets if you become disabled and pass them to (or hold them for the benefit of) your chosen beneficiaries when you die.

A **Trust** is an arrangement that transfers legal ownership of property (money, stocks, real estate) from an individual to a **trustee** who holds, manages and distributes the property for the **beneficiaries** of the trust. The written terms of the trust control the use and distribution of the property.

Trust terms can be as specific as you want. You can tell your trustee exactly what to do with the trust assets, or you can give general directions and allow your trustee the flexibility to do what is necessary under the circumstances as they arise.

### LIVING TRUST - TESTAMENTARY TRUST

The terms of a “testamentary” trust are written into your Will, and are effective only upon death. The handling of a testamentary trust is subject to the oversight of the Probate Court. A testamentary trust must be executed with all of the formalities of a Will. A trust that is separate from a Will is created the moment it is signed. Thus the creator is “living” when the trust terms come in to effect. The formalities for creating and changing a “Living Trust” are relatively simple. Living Trusts are not usually subject to the jurisdiction of the Probate Court.

### REVOCABLE - IRREVOCABLE

If the trust, by its terms, can be changed, modified, or terminated, it is called “revocable.” An “irrevocable” trust is unchangeable and cannot be terminated except within its own terms.

### TRUSTS CAN AVOID PROBATE

The probate process controls the transfer of assets from someone who has died, to those still living. Probate only deals with assets owned by the deceased person. Trust property is “owned” by the Trust and is handled by the Trustee according to the terms of the Trust, and does not go through probate.

## TRUSTS CAN REDUCE ESTATE TAXES

A common use for a trust is to utilize or “shelter” the Federal estate tax credit. Each individual can shelter up to \$5.25 million from Federal estate taxes. A couple can shelter \$10.5 million if they both fully use their estate tax credit.

## LIVING TRUSTS CAN PROVIDE MEDICAID PLANNING

Most Trusts do not protect assets from nursing home costs. The assets of a **Revocable** Trust are "countable" for Medicaid eligibility purposes, and will not be safe. An **Irrevocable** Trust can be used for “Medicaid Planning” purposes.

## IRREVOCABLE INCOME ONLY TRUST

An Irrevocable Income Only Trust (IIOT) is used for Medicaid and other Asset-Protection planning. The assets of the trust are non-countable for Medicaid purposes and are protected. The general terms of an IIOT are that the creator gives up all rights to the principal assets of the trust, but reserves the right to income generated by those assets. If a house is owned by the trust, the trust creator can still live in it. An IIOT provides flexibility because real estate can be sold, and a new home purchased by the trustee, while keeping the principal assets protected.

An IIOT is irrevocable. You cannot change your mind later. Once you transfer assets to the trust, you can never get them back. Without a Trust, you can sell your home and use the money for a trip around the world or the monthly fee at a retirement home. Once you transfer an asset to an Irrevocable Trust, your use of that asset will be restricted forever. What you gain, of course, is the assurance that your chosen heirs (the future beneficiaries of the trust) will inherit the asset, and it won't have to be sold and spent on your nursing home care.

## ELDER LAW

Elder Law is the area of law concerning the legal needs of older persons (and their families), including: Estate Planning; Planning for Incapacity; Long-Term-Care Planning; and Public Benefits Planning (also called “Medicaid Planning.”)

For many Elders, a major concern is **Long-Term-Care** and its costs. Most people want the best possible care, but they don't know anything about how to get it, where to get it, and most of all, how they will pay for it. The cost of nursing home care is now more than \$10,000 a month. This expense can devastate a

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family's finances in a short time. The array of choices is staggering and most people don't know where to look, or how to choose among the options.

## **LONG-TERM-CARE**

Long Term Care Planning usually means "Nursing Home" care to most people. But it really means much more. As people age and have medical problems, they may need help with their everyday activities. The need for this care, over an extended period of time (rather than a short stay at a hospital) is what we call "Long-Term-Care." The necessary care can be provided at a private home, at a shared residence such as an assisted living community, or in a medical facility such as a Nursing Home.

You need to think about the care that may be needed, where it will be provided, and the cost of that care. Most medical care is covered by health insurance of some kind. But, the Long-Term-Care we are talking about is not medical care, so is not covered by your health insurance. A short stay in a skilled nursing facility may be covered by health insurance, but Long-Term-Care will not be.

There is no real "system" for paying for Long-Term-Care. For the most part you have to pay for it yourself. **Medicare** may pay for some skilled nursing care (up to 100 days). But, Medicare does not pay for care that is not medically necessary (long-term custodial care in a nursing home, or long-term/at-home care.) More people are buying **Long-Term-Care Insurance** today, but if you do not buy it before a medical need develops, you will not qualify. The result is that most people pay out of their own savings for their care until they become eligible for Medicaid. While **Medicare** is an entitlement program, **Medicaid** is a form of welfare. To be eligible for Medicaid, you must be "needy" under the rules of the program. Few people choose to go on Medicaid, but it is important to know the rules and plan for the possibility.

## **MEDICAID**

**Medicaid** (called *MassHealth* In Massachusetts) is administered by the state Department of Health and Human Services (DHHS). To qualify for federal reimbursement, the state programs must comply with federal laws and regulations,

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so the Federal Centers for Medicare and Medicaid Services (CMS) also has jurisdiction.

The basic rule of nursing home Medicaid eligibility is that an applicant, whether single or married, may have no more than the maximum amount of "countable" assets in his or her name (\$2000 in Mass., \$2500 in NH). "Countable" assets generally include all belongings except for (1) personal possessions, such as clothing, furniture, and jewelry, (2) one motor vehicle, (3) the applicant's principal residence (with some exceptions), and (4) assets that are considered inaccessible.

The home will not be counted against the asset limits for Medicaid eligibility as long as the nursing home resident intends to return home or his or her spouse or other dependent relatives live there. So, most nursing home residents do not have to sell their homes in order to qualify for Medicaid. However, a lien may be placed on the home, and the State may seek estate recovery.

### **TRANSFER PENALTIES**

A major rule of Medicaid eligibility is the penalty for transferring assets. If an applicant (or spouse) transfers (gives away) assets, he will be ineligible for Medicaid for a certain period of time based on how much was given away. All transfers within the five years before applying for Medicaid may make the applicant ineligible for benefits. Transferring assets to your spouse or disabled child (plus some other exceptions) will not result in Medicaid ineligibility.

### **LIENS AND ESTATE RECOVERY**

The state has the right, and duty, to recover whatever benefits it paid for the care of a Medicaid recipient from his estate. Generally, the only property of substantial value a Medicaid recipient owns at death is his home. Many states only seek recovery against "Probate" assets. Assets that bypass probate, such as jointly held assets, may avoid estate recovery. Congress has given the states the right to seek recovery against non-probate property. New Hampshire has extended its recovery procedures to include non-probate assets in addition to the Probate Estate, while Massachusetts has not.

### **SPOUSAL PROTECTIONS**

A nursing home resident on Medicaid must pay all of his income, less certain deductions, to the nursing home. The deductions include a personal needs

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allowance (\$72.80 in Mass, \$56 in NH), uncovered medical costs (including medical insurance premiums), and, in the case of a married applicant, an income-allowance to the spouse at home.

The income of the community spouse will not have to be used to support the nursing home spouse receiving Medicaid. In some cases, the community spouse is also entitled to share in some or all of the monthly income of the nursing home spouse. The Federal Government determines an income floor for the community spouse, known as the Minimum Monthly Maintenance Needs Allowance, (MMMNA) which is calculated for each community spouse based on his or her expenses. The MMMNA is indexed to inflation. If the community spouse's income falls below the MMMNA, the shortfall can be made up from the nursing home spouse's income.

Medicaid law provides some asset protection for the spouse of a nursing home resident. The *community spouse* is permitted to keep one-half of the couple's combined assets up to \$115,920. (In Massachusetts the spouse gets to keep the first \$115,920, even if it is more than half) The determination of the level of the couple's assets is made as of the date of institutionalization. That date is the day on which a person enters a medical facility and then stays for at least 30 days.

### **Cautionary Note**

This summary is a simplified guide to a complex area of law. Do not act on this summary without the guidance of an attorney at law. This summary is based on Federal, Massachusetts and New Hampshire laws and regulations and may not be accurate in other jurisdictions. Laws are frequently changed; the information in this summary may become outdated and inaccurate. This summary is for educational purposes only and should not be construed as legal advice. Consult your attorney for all legal advice.

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