

WARNECK LAW OFFICES

Your Estate Plan

More Than Just a Will

You might think of estate planning as just drawing up a will, but there's much more to it than that. To help you understand what the "more" is, and to help you get started on your own planning, I have compiled some questions that I often hear in my practice and attempted to answer them in plain English. It's only a start, of course, and my answers will surely prompt more questions. But give me a call, and I'll help you figure it all out.

1. What is an estate plan?

Your estate plan is a series of strategic decisions and actions, all aimed at protecting you and your loved ones in the event of your death or disability.

Depending on your exact situation, your estate plan documents may include a will, one or more trusts, a power of attorney, a health care proxy, an advance directive, an emergency guardianship proxy, and/or a homestead declaration.

Additional estate plan elements may include retirement plans, life insurance, long-term care insurance, college savings plans, lifetime gifts, charitable contributions, and/or the transfer of business interests.

2. Why do I need a will?

A will has several functions. Among other things, your will provides instructions for the disposition of your assets, i.e., who gets what, and therefore ensures that your wishes will be carried out after your death. In your will you also appoint the personal representative (formerly known as an executor or administrator) for your estate, i.e., the person who will marshal your assets, pay your debts, and distribute the rest as you have instructed. And if you have children, your will is where you take the critical step of naming their guardian or guardians for

the unlikely but real possibility that both you and your spouse pass away while your children are still minors.

3. If I die without a will, won't all my assets just go to my spouse?

Not necessarily. It depends on your family circumstances and the law of intestate succession. It also depends on who you have identified (or failed to identify) as beneficiaries of life insurance policies, retirement accounts, and the like. If you haven't acted, your spouse may get less than you think and less than he or she needs. Your children may also receive substantial assets that you never intended them to have, assets to which they will have unfettered access when they turn 18. If you want to avoid these consequences, you need a will, and you need to designate beneficiaries.

4. If I die without a will, who gets custody of my children?

When a child loses one parent, the other parent automatically has full legal and physical custody unless he or she is deemed unfit by a court. If neither parent survives, in the absence of a will a court must make the decision. A court proceeding can be quick and smooth if all members of both spouses' families agree about what should be done. But if not, lengthy disputes could add considerable uncertainty and anxiety to an already traumatic time for your children.

In addition, if you and your spouse were both gone, you likely would want a guardian who shared your value system, religious beliefs, attitude toward education, money management values, and the like. A court decision may not accomplish this. By naming someone in advance in your will, you can make sure the guardian you would most like to have will actually take care of your kids.

5. Why might I want a trust?

There are many different kinds of trusts, and they can be tailored to address specific needs and goals. Common reasons for establishing a trust are:

- to avoid probate;
- to manage assets for children;
- to manage assets for a family member with special needs;
- to minimize and defer estate taxes;
- to plan for potential long-term care costs; and
- to implement asset protection planning.

6. Aren't trusts just for wealthy families?

Not at all. There are many reasons a family that does not consider itself rich could benefit from a trust. Here are just a few examples:

- Parents may want their assets to be managed for their minor children should they both pass away prematurely. They also may not want their assets to go to their children outright when they turn 18. To address these issues, they can create a trust to hold and manage assets after their deaths until the children are older (e.g., 25 or 30).
- A family might need to make arrangements for someone with a mental, physical, or developmental disability. A properly drafted trust can manage assets for a special needs family member while still leaving that person eligible for state and federal benefits relevant to his or her condition.
- Someone might decide to transfer title to his or her home to a trust to protect it in the event he or she needs to go into a nursing home.
- Trusts can also be used in combination with other planning methods to protect assets from the claims of creditors.

7. What is “probate” and how do I “avoid” it?

The term “probate” refers generically to the administration of an estate under the supervision of the Probate and Family Court. In addition to the practical matters of marshaling assets, paying debts, and making distributions, the personal representative (formerly known as an executor or administrator) for a probate estate must attend to significant court-related obligations, including providing notice to the appropriate persons, filing an estate inventory, and filing at least one probate account. The process can be complex, time-consuming, and expensive.

This process is required, however, only with respect to one's **probate** estate. By minimizing the assets in your probate estate, you can “avoid probate,” i.e., simplify or minimize court supervision. One's probate estate includes everything that has not passed to a survivor pursuant to joint ownership or a beneficiary or transfer-on-death designation. Thus, one spouse's interest in a home held jointly with the other spouse will pass automatically to the surviving spouse apart from the deceased spouse's probate estate, as will retirement account benefits and life insurance proceeds when the spouse is the named beneficiary. To keep other assets, such as investment accounts or listed

securities, out of your probate estate when you die, you need to get them out of your name when you are alive. To achieve this, you can transfer your assets into a trust, often referred to as a “living trust,” that names you and your spouse as beneficiaries during your lifetime and your spouse and children as beneficiaries after your death.

8. How do we make sure our kids will be provided for if something happens to us before they grow up?

The best way to ensure that your children are provided for in this instance is to prepare a trust or trusts to manage your assets for them. A trust would be funded at the death of the second parent pursuant to the instructions contained in your wills. The assets would then be managed according to the terms of the trust, which generally provide for various distributions to support the children’s various needs and for distribution of all of the assets once the children are older. Such a trust also addresses the problem of having minor children own assets outright and of them (or their creditors) having unfettered access to them after they turn 18. The typical asset management trust will provide for final distribution only when the children are significantly older than 18 (e.g., 25 or 30 or even 35).

9. Should I be worried about estate taxes?

The answer to this question depends on the value of your assets. You need to consider doing some estate tax planning if the value of your assets (your combined assets if you are married) exceeds the federal exclusion of \$5 million (\$10 million if you are married) and/or the Massachusetts filing threshold of \$1 million. It is important for you to review your assets carefully and answer this question as part of the estate planning process. Your taxable estate, in contrast to your probate estate, includes every asset in your name at your death, as well as any significant assets transferred to someone else during your life. It also includes any proceeds from your life insurance coverage. When you take things like home equity and life insurance proceeds into account, you may very well be in estate tax territory.

Estate tax planning generally involves trusts of various kinds. Properly drafted, these trusts can take maximum advantage of the federal exclusion and the Massachusetts filing threshold and/or segregate assets from your estate entirely. They can be used in various combinations to defer and minimize the estate tax ultimately due.

10. How can I protect my house if I have to go to a nursing home?

To protect your house or other assets in the event that you have to go to a nursing home, you need to plan well in advance of any potential need so that you can qualify for benefits from MassHealth (the state implementation of the federal Medicaid program) without first having to sell all of your assets and spend the proceeds on your care.

Long-term care in a nursing home is not covered by regular health insurance or Medicare. You will qualify for MassHealth (which pays for institutional care only, not home care) only when your assets are almost entirely depleted, and MassHealth will assert a claim against your home and (later) your estate for reimbursement of the benefits it pays out on your behalf. But a plan that is made well before any long-term care need arises may allow you to qualify for MassHealth benefits while still being able to pass some assets to your children and grandchildren. For example, by transferring your assets (such as your home) to a properly-drafted trust, then waiting at least five years before applying for MassHealth benefits, the value of those assets will be insulated from MassHealth's consideration for both the initial eligibility determination and a later reimbursement claim.

11. Why do I need a power of attorney and a health care proxy? How are they different?

A complete estate plan should also address what happens if you become disabled or incapacitated during your life. If you are unable to manage your own financial affairs, some or all of your assets will be frozen until a court appoints someone to make decisions on your behalf. If you are unable to make decisions about your own medical care, again, a court must appoint someone to make decisions on your behalf. In either case, a court's choice may not be the choice you would have made, and competing appointment requests can increase the stress on your family. But by signing a power of attorney (for financial and personal affairs) and a health care proxy (for medical care), you choose who will act for you, and you lessen the stress on your loved ones, should you ever need someone to make decisions and enter into transactions on your behalf.

12. What is a living will?

A living will, also known as an advance directive, is an opportunity to clearly state your preferences for end-of-life medical intervention. If you should become very ill, your health care agent may need to decide whether to continue with artificial life supports or life-prolonging procedures when you have a terminal condition or your odds of recovery are extremely low. If you know that you would not want to be kept alive by such measures (which doctors and hospitals are otherwise required to provide), an advance directive can provide clarity and peace of mind for your health care agent and limit the potential for emotional disputes. A living will is not binding in Massachusetts as it is in other states, but your health care agent and doctors will take it into account when making end-of-life care decisions, and it is strong evidence of your contrary wishes should someone seek in court to have such supports or procedures maintained.

13. What is an emergency guardianship proxy? How does it differ from the guardian appointment in my will?

The guardian appointment in your will addresses who should take care of your minor children after you are gone. An emergency guardianship proxy applies during your life. In it you appoint the person or persons you want to care for your children on a temporary basis (up to 60 days) should you be unable to do so. The document can be relied upon immediately should both parents be unable to care for their children due to disability or other circumstances (e.g., being stranded in another country while the children are in the U.S.). This limits the potential for disputes over who should care for your children and the court proceedings necessary to resolve such disputes. It also significantly reduces uncertainty and anxiety for the children and other family members during what may already be a difficult time.

14. What is a homestead declaration?

A homestead declaration is a basic, inexpensive asset protection device that should be part of any estate plan. Once properly recorded, a homestead declaration can protect your home, with certain limitations, for up to \$500,000 from the claims of creditors. A homestead declaration will always be subordinate to any bank mortgage on your home (the loan documents will require it), and there are other limitations, but it can prevent you from losing your home in certain circumstances.

15. How do I implement my estate plan?

Once you have constructed your plan, you must implement it by signing the relevant documents. The documents must be prepared very carefully and signed according to specific procedures to ensure that they do precisely what you intend and that they are operative under the law. Additional steps, such as changing life insurance or retirement plan beneficiaries or deeding real estate to a trust, may also be necessary to fully implement your plan.

16. Can't I just use forms from the Internet or a computer program to do this myself?

You could, but not without considerable risk. Effective estate planning involves an experienced attorney identifying all of your issues, understanding how they interrelate, and crafting a plan that balances and resolves them in a way that achieves your goals to the greatest extent possible. It also requires expertise in a number of areas of the law as well as the ability to keep up with the law's near-constant modification and development. You cannot be confident that computer software, a generic form, or boilerplate language will be up-to-date, identify or address the issues relevant to your situation, meet your specific goals, succeed in making your wishes clear, or hold up in court should disputes arise.

Please contact me to discuss your situation and how I can help you construct and implement an estate plan that is tailored to your circumstances and that advances your goals in providing for and protecting you and your loved ones.

The foregoing is provided solely for informational purposes and does not constitute legal advice. It does not address specific situations, and no attorney-client relationship is created by its provision or receipt. Contact an attorney for legal advice that is specific to your circumstances.

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