Frequently Asked Questions

- **Why do I need a will?**

A will determines who will take your property and when each person will receive it. For instance, you can direct that your property be held in trust until the person you want to receive it reaches a specified age, or you can give property from your estate to charity. In your will, you can also choose who will administer your estate (the" personal representative"), who will raise your children (the "guardian"), and who the other 'players' (such as trustees, conservators, or custodians) will be. If you do not have a will, the Massachusetts intestacy statute applies, and the state determines who will receive your property. With a will, you can broaden the powers your personal representative will have over estate as- sets, such as the power to sell real estate without license of the court. You can also direct the personal representative to serve without sureties on his or her bond.

- **Can my spouse and I have a joint will?**

No. Massachusetts does not provide for joint wills. Both you and your spouse need separate wills, even if you own all your property jointly. When the first spouse dies, all joint property will pass to the survivor. Therefore, the survivor, who becomes the sole owner of the property, should have a will. Because there is no way of knowing who will die first or second, both spouses should have wills. Also, you may own property—either in the future or even now without knowing it—that is not held jointly with your spouse.

- **How and why should I change my will once it has been signed?**

Once you have made your will, you should not just put it away and forget about it. You should review your will every three to five years, to make sure it still accomplishes your desires; however, it may be necessary to review it even more frequently if:

- you have married, divorced, separated, or remarried (marriage will no longer revoke a will under the MUPC, but it may not provide for your spouse in the manner you would like);
- a child or grandchild has been born;
- someone who is named as the personal representative or guardian becomes ill or dies;
- you have changed domicile;
- there is a change in tax laws;
- your assets have increased or decreased in value; or
- your relationship with a beneficiary has changed or a beneficiary’s needs have changed.

A will can be changed, revoked, or replaced by a new will at any time, so long as you are competent. To be considered competent, you must understand the nature of your act, know the extent of your estate, and know who are the "objects of your bounty"—i.e., the people you want to benefit.

A will can be changed by signing a codicil, which is an amendment to a will, with the same formality as a will — i.e., before two witnesses and a notary public.

A will can be revoked by tearing it up, canceling it, or signing a new will.

- **Who should I choose to be my personal representative?**

People often pick their spouse, a friend or neighbor, or a relative to act as personal representative. This choice is often made to save on administrative costs or to honor an individual. However, as tax compliance and post-mortem decisions become more complicated, this choice may impose a real burden on the individual and not achieve the original goal. In addition, a personal representative who is not responsive and well organized can actually increase administration costs.

The personal representative should be trustworthy, highly competent, well organized, and responsive and should have good financial judgment and business sense. One choice might be a bank trust department or an attorney. Another possibility is to name a family member as co–personal representative with a professional. In this way the personal interest is mixed with professional expertise and management.

- **What is a living trust?**

A trust is an arrangement where assets are given to a trustee (generally you are the trustee during your lifetime) to hold and manage for your benefit or the benefit of your beneficiaries (the intended recipients of your property). The purpose of a trust can be any of the following:

- to manage assets in order to produce income for a beneficiary, conserve assets, or provide for growth of the assets;
- to reduce estate taxes;
- to control use or disposition of assets long after you are deceased;
- to provide for spouse and descendants;
- to provide for children during minority or if disabled; and
- to protect beneficiaries (other than yourself) from creditors.

A living trust is just one type of trust, created while you are living. It is also called an inter vivos trust. It can be funded while you are living or after your death. If funded before you die, the assets in the trust will not pass through probate and to that extent will avoid the probate process. You can be a beneficiary of this type of trust.

A testamentary trust is a trust under a will (meaning it is written as part of the will). It is not funded before you die.

- **Should I put funeral instructions or anatomical gift provisions in my will?**

It depends on your particular circumstances. Unless you believe that your next of kin will not honor your wishes, it is generally not recommended. Your will may not be probated or even read until some time after death, quite possibly not until after the funeral. Therefore, it generally is not a good place to deal with these issues. However, because the burial provisions in a will control disposition of your remains, it can be a good idea to put them in your will if there is disagreement about how your remains should be disposed of. If there is not such disagreement, it is usually sufficient to send a letter with funeral instructions to your family, funeral home, or religious affiliation. For anatomical gifts, there are forms that can be filled out in advance and documentation that can be kept with you in case of accident. Anatomical gifts can be indicated on your driver's license, through forms available at the Registry of Motor Vehicles.

- **Why do I need a power of attorney since my spouse and I own all our assets jointly? Why do I need a health care proxy?**

A power of attorney is a written instrument by which one person (the principal) designates someone as his or her agent or attorney in fact to perform certain acts. If it is "durable," it continues in effect even if the principal becomes incompetent. This document can be very important if either you or your spouse becomes incompetent because it may help avoid the appointment of a conservator for the management of assets. Even if property is jointly owned, signatures of both parties are often required, such as in the transfer of real estate. A power of attorney would allow you to sign for your spouse. It also allows you to be the payee of certain items, such as Social Security payments, and it allows you to sign income tax returns on behalf of your spouse.

A **health care proxy** is a document by which one individual (the principal) appoints another (the health care agent) to make health care decisions for him or her should he or she be unable to make or communicate such decisions for himself or herself. The health care agent can even make decisions concerning the use or terminating the use of life support systems. Again, this is extremely important if you become incompetent.

These documents are needed not just for the elderly or infirm. There is no way to predict when an accident might happen or when such a document will be needed. Both are crucial parts of every estate plan.

- **What is probate and why should I avoid it?**

Probate is the court process of proving the validity of a will. If there is no will, the process proves who the next of kin are, to determine who will take the estate. In Massachusetts, probate under the MUPC should prove to be shorter and less expensive than previously. However, it may take some time for the full advantages of the MUPC to be realized due to the learning process of attorneys and the courts.

Probate can be avoided by having assets held in a form that will pass title to others after your death by operation of law. This includes joint ownership of assets or assets where a beneficiary can be named, such as life insurance, "payable on death" accounts with banks or brokerage firms, IRAs, pension plans, etc. The assets transferred to living trusts prior to death are also not subject to probate, but are controlled by the trust agreement.

- **Can I keep my ex-spouse from inheriting my estate and yet still take care of my kids when I die? Can I provide for my second spouse and still protect my assets so they will pass to my children on my spouse's death?**

Yes. This is why a will, and particularly, a trust are so important. Your ex-spouse may very well be appointed guardian of your minor children. If you have no will, your children will inherit your estate when you die. But if they are under age eighteen, your ex-spouse—as guardian—will have control of your money.

If you have a will, you can create a testamentary trust to hold your estate for your children until they reach majority (or preferably older) so that your ex-spouse never controls the money you want your children to receive. A living trust can also accomplish this objective, and often is preferable.

Likewise, providing for a second spouse and still protecting assets for your children can be accomplished through either a testamentary or living trust. You can provide as much or as little for your spouse as you wish for his or her lifetime (subject to his or her statutory rights to take a certain share of your estate). Because the assets are in trust, he or she can benefit from them but not control them. You, not your spouse, control the final disposition of the assets. Your trust can provide that when your spouse dies, the balance will pass to your children or descendants, or it could be held in further trust for them. Your children or descendants could even be beneficiaries of the trust while your spouse is living, if you wish. However, if tax planning is a concern, there are certain restrictions that must be taken into account.