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Medical-Legal Partnership | Boston improves the health and well-being of vulnerable populations by supporting the screening, diagnosis, and treatment of social needs with legal solutions. Though the strategic integration of patient-focused legal advocates into healthcare teams (which both provide direct legal services to patients and build advocacy capacity in the healthcare teams that treat them), we measurably improve healthcare quality and reduce the incidence of harmful health disparities.

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RAISING THE BAR FOR HEALTH

Estate Planning Fundamentals in Massachusetts

Frequently Asked Questions and Sample Forms for Healthcare Providers and their Patients

Because a good plan for tomorrow can be essential for peace of mind today

BACKGROUND

What is estate planning?

Estate planning is your opportunity to make legally effective decisions regarding how you want your property, finances, and health care to be handled. Estate planning may also include planning for the care and custody of your minor children or family members with disabilities in the event of your death. It usually involves deciding how and to whom your property will be distributed. Additionally, it may involve deciding who will manage your financial, personal and medical affairs if you can no longer do so yourself (i.e. if you become "incapacitated"). By preparing an estate plan and communicating your decisions with your loved ones, you can lessen the conflicts and difficulties they may encounter later.

What are typical estate planning documents?

The most common estate planning documents include a durable power of attorney, living will, health care proxy and a last will and testament. Trusts are sometimes used too.

What is a durable power of attorney?

A durable power of attorney is a document in which you authorize someone (called an "agent") to take care of your financial matters. Most often, a durable power of attorney becomes effective immediately upon signing ("execution") and continues in effect until you either revoke it or pass away. Unlike a standard power of attorney, a durable power of attorney remains effective in the event you later become incapacitated. Though some durable powers of attorney grant only limited powers to the agent, generally an agent will be granted broad powers to handle many financial transactions, such as signing checks and tax returns, entering into contracts, buying or selling real

estate, depositing or withdrawing money, buying or selling stock and other assets, applying for public benefits, etc. In Massachusetts, within your durable power of attorney, you can nominate your agent to become your conservator or guardian in the event this should ever become necessary. A **guardian** is someone who is appointed by a court to safeguard the *physical wellbeing* of someone who is incapable of caring for her/himself. A **conservator** is someone who is appointed by a court to safeguard the *financial wellbeing* of a person incapable of this responsibility.

What is a living will?
A living will documents your wishes regarding different kinds of medical treatment. Many people think of a living will as a declaration that if their illness is expected to result in death in a matter of months, or if the patient is in a persistent vegetative state, they do not wish for medical intervention designed to prolong their life ("heroic measures"). A living will is not recognized as a valid legal document in Massachusetts, although it may provide valuable evidence of an individual's wishes regarding medical treatment.

What is a health care proxy?
Your health care proxy is the person or persons designated to make health care decisions for you if you are unable to do so for yourself. In the document appointing your health care proxy you can include specific directions for your proxy to follow, including a living will-type provision. A health care proxy does not override your ability to make your own health care decisions. Rather, your proxy has the authority to act on your behalf only if you are unable to do so. Health care proxies are legally recognized in Massachusetts. You should give a copy of your health care proxy to your doctor, any hospital that you visit, and to the person(s) that you appoint to act on your behalf.

WILLS

What is a last will and testament?
A last will and testament ("will") is a written document that states your intentions and directs how and to whom your "probate property," which includes any property that you own in your name alone, will be handled upon your death.

A will generally governs how your probate property is distributed. Common examples of probate property are your personal effects

or unable to care for their child. The appointment process involves at least one hearing; post- appointment, the guardian will need to file an annual report with the Probate and Family Court. Though the guardian can be removed or resign, the guardianship generally ends when the child reaches age 18.

The foregoing information and sample forms are not legal advice and do not create a lawyer-client relationship between Medical-Legal Partnership | Boston and the end user, whether members of the healthcare team or patients they are assisting. The purpose of these materials is to demystify the complex jargon of estate planning and offer sample documents as points of reference as one contemplates an estate plan. While anyone may create their own estate plan "pro se" (without legal representation and at their own risk), we encourage all people contemplating an estate plan to consult an attorney, even if it's just through a free "lawyer of the day" program sponsored by a local bar association (contact information below). For low-income people with very modest estates, no real estate, and no minor children or other loved ones in their care, it may be possible to create a legally valid simple will and other standard estate planning documents that effectively express their wishes. However, we still encourage all parties to consult with a legal professional to protect their interests as carefully as possible.

Bar Associations in Massachusetts:

Massachusetts Bar Association
www.massbar.org, (617) 654-0400

Barnstable County Bar Association
www.barnstablecountybarassociation.org, (508) 362-2121

Berkshire County Bar Association
www.berkshirebar.com, (413) 442-0049

Boston Bar Association
www.bostonbar.org, (617) 742-0625 or (800) 552-7046

Essex County Bar Association
www.essexcountybar.org, (978) 741-7888 or (800) 228-2574

Franklin County Bar Association
www.franklincountybar.org, (413) 773-9839 or (888) 351-8038

Hampden County Bar Association
www.hcbar.org, (413) 732-4648

Lawrence Bar Association
www.lawrencebar.org

Norfolk County Bar Association
www.norfolkbarassn.org, (617) 471-9693

Worcester County Bar Association

attorney to ensure the trust is appropriate and effective.

Under Massachusetts law, how do I nominate a guardian for my minor child?
A guardian can be nominated in a valid will or in another signed writing attested to by at least two witnesses. The appointment of a guardian is overseen by the probate and family court generally located in the county where the minor resides. The appointment of a guardian is not necessary until both parents are deceased, incapacitated, unfit or unable or unwilling to care for the child.

Are there alternatives to formal guardianship?
Yes – Massachusetts law provides two alternatives. The first involves a "caregiver authorization affidavit" which allows a parent, without a court order, to authorize another adult with whom the child resides to share parental power with respect to a child's healthcare and education. The authorization may be valid for a period of up to two years, and after this period, can be extended by signing a new affidavit. This authorization does not require court involvement.

The second involves parental delegation of powers through a signed document to a "temporary agent for the care of a minor child." This delegation is very time-limited: it cannot exceed 60 days. However the delegation can be vast in scope: the parent may delegate, with limited exceptions, all the powers the parent holds regarding the care and custody of the child. The delegation does not require court involvement. However if the child has another living parent whose whereabouts are known and who is available and willing to care for the child, a temporary agent cannot be appointed without this parent's consent.

Assuming these lesser alternatives are not appropriate, in Massachusetts, what does the permanent guardianship process entail?
Permanent guardianship involves filing a petition with the Probate Court. Proper notice must be served on all interested parties, which include the child's parents if alive (or the child's nearest adult relatives if the parents are deceased) and the child if he or she is age 14 or older. The court may appoint a guardian for a child if the parents have consented, are deceased or incapacitated, have had their parental rights terminated due to being deemed unfit, have voluntarily surrendered their rights or are unavailable

(jewelry, furniture, etc.), car, real estate and any checking or brokerage accounts. Probate property does NOT include most property owned jointly with someone else (for example, family homes which are titled in both spouses' names, as tenants by the entirety, joint bank accounts, etc.), trusts and contracts or accounts, such as a life insurance policy, retirement plan or certain bank and brokerage accounts for which a beneficiary other than your estate has been designated. The passage of non-probate property is usually governed by state law and/or any valid beneficiary designation.

In your will, you should name a personal representative (an "executor") of your estate. This person is responsible for the proper handling and settlement of your estate. You may also name your choice for a guardian and conservator for your minor children. Prior to death, a will may be modified or revoked as long as the person creating the will has the legal capacity to understand the changes s/he is making.

Under Massachusetts law, what are the statutory requirements of a will?
The "testator" (person making the will), must be eighteen years or older with capacity ("of sound mind"). The will must be in writing and signed by the testator (or signed by another person in the testator's presence and under the testator's express direction if the testator is physically unable to sign independently). At least two competent witnesses must attest to the fact that the testator has made the will on his or her own and must sign the will in the testator's presence. The witnesses should <u>not</u> be beneficiaries of the will. Though notarization is not mandatory, it is a common practice which helps to demonstrate that the will was executed (signed) properly. The technical formalities of a will must be followed precisely.

In Massachusetts, what is the impact of a divorce or annulment on a will or beneficiary designation?
A divorce and annulment both serve to revoke dispositions in a will to a former spouse. Additionally, a divorce or annulment will serve to revoke any "revocable disposition" to the former spouse including revocable beneficiary designations in life insurance policies and retirement accounts. *Note – the express terms of the governing instrument (e.g., life insurance policy), a court order, or a contract relating to the division of the marital estate override this revocation so the revocation only goes into effect if there are no express terms to the contrary.*

If I do not make a will, how will my probate property be distributed at my death?

If you die without a will, your probate property will be distributed in accordance with the laws of intestacy in the state in which you were a resident immediately prior to death. In Massachusetts, the intestacy distribution scheme is generally as follows:

If there is a surviving spouse:	
and the only children of the person who dies ("decedent's") are children of the surviving spouse and the surviving spouse has no children who are not also the decedent's children:	Spouse receives the entire estate
and if any of the decedent's children are not children of the surviving spouse or if the surviving spouse has children who are not the decedent's children:	Spouse receives the first $100,000 plus ½ the balance of the estate; decedent's children receive the other ½ balance
and the decedent did not have children yet a parent(s) of the decedent is living:	Spouse receives the first $200,000 and ¾ of the balance of the estate; parents (or the survivor of them) receives the remaining ¼ balance
and the decedent did not have children and his parents are deceased:	Spouse receives the entire estate
If there is no surviving spouse yet there are children:	Children receive the entire estate
If there is no surviving spouse and no children but the decedent is survived by parents:	Parents receive equally (or the survivor receives the entire estate)
If there is no surviving spouse, no children or parents:	Descendants of the decedent's parents (siblings, etc.) would receive the estate

What if I have already made a last will & testament but now I want to change part of it?

A document called a "codicil" documents the change(s) a person wishes to make to her/his will. As a practical matter, it is best to revoke and replace a will if there are to be many and/or major changes to it. Multiple documents including complicated or numerous codicils can be confusing and one purpose of estate planning is to clarify a person's wishes rather than add to uncertainty about them. That said, a simple change can be made effectively through a codicil, and a sample codicil form is provided in this brochure for illustration. An example of a simple change is "Strike clause 7 and replace with the following: 'I bequeath my calico cat, Mr. Purrfect, and all his toys, bedding, and grooming supplies, to my next door neighbor, Leo Lyon.'"

What is a trust?

A trust is a legal relationship under which one individual (the "donor" or "settlor") provides for the transfer of property to another (the "trustee") who holds and manages the trust property for the person or persons who will benefit from the property (beneficiaries).

What are common reasons trusts are created?

Trusts are often created for:

- Avoiding public disclosure of assets and trust terms. Since a trust is not considered a probate asset, the terms of the trust and the amount of money in a trust are not available for public inspection and viewing.
- Consistent uninterrupted management of assets before and/or after the donor's death, illness or disability. Living revocable trusts are often created and funded so that the donor, who is usually the initial trustee, has full access to the trust assets prior to his/her incapacity. During a period of incapacity, a successor trustee typically uses the trust funds for the benefit of the donor. Upon the donor's death, the remaining trust assets generally avoid the probate process and pass directly to the beneficiaries in accord with the terms of the trust.
- Preserving assets by preventing the beneficiaries, or their creditors, from gaining direct access to the trust property.
- Planning for the care of loved ones with disabilities.
- Reducing estate taxes.
- Eliminating or lessening costs and delays associated with probate administration.

When should you consider creating a trust?

Depending on its terms, trusts can be complex and involve various administration expenses and fees. Trusts can be very beneficial in certain situations, but should only be considered when there is a particular need or specific advantage. No sample trust documents are supplied here for two reasons: (1) the kinds of trusts appropriate for given factual situations vary too greatly for any one form to be illustrative, and (2) trusts typically contemplate long term management and distribution of assets which is why it's prudent for the donor to work with a qualified