7 Questions

To Test the Strength of Your Estate Plan

And some tips on making it stronger.

Here's your guide to estate planning in Massachusetts.

Do you HAVE an estate plan?

1

A little planning goes a long way for getting your affairs in order

Estate planning creates a legally binding plan to manage your wealth. And names someone to make important decisions if you become incapacitated. And for distributing your wealth after your death.

What happens if you do nothing?

If you do not have a Will or a Living Trust, your estate is still settled when you die. But, instead of carrying out your wishes, Massachusetts law decides. How others get your investments, properties, businesses, and all your other stuff. Maybe not a good feeling. Maybe fine. It depends. (It is the core of estate planning.)

In Massachusetts—if you die married, with joint children and no stepchildren —it all goes to your spouse. It may or may not be what you want. It is all costly, too. Probate costs, attorney fees, and higher estate taxes cut into what is left for your survivors.

An estate plan helps while you are alive too

An estate plan is not only about what happens after you die. There are safeguards you can put in place. That determine how your estate and your affairs are managed while you are still alive.

If you do not have a health care proxy or a durable power of attorney, you miss an opportunity. To name one or more people you trust to advocate for you if you cannot do so yourself.

Yes, it is uncomfortable to think about, but wouldn't you rather choose who manages your life if you cannot?

And if you do not make that choice, what happens? Massachusetts law makes the decisions for you. As do the rules of health care and financial institutions. They determine health decisions, hinder financial affairs, and dictate the future of your assets.

Thinking about your children's care

If you are a parent of children under the age of 18, an estate plan can make provisions for them as well. A court-appointed guardian is involved if no parent remains.

Don't you want to name the guardian? One (or two) best suited and willing to welcome and comfort your children. And provide them with a safe and happy childhood?

More > Do you HAVE an estate plan?

1

An estate plan can arrange for your children's inheritance to be distributed over time. As they mature. Instead of distributed as soon as they turn 18. (How much would you have left if you got a ton of money at 18?)

Becoming an 'adult' often takes more than 18 years. An arrangement to hold and use the money for a longer time is called a 'sub-trust'. You pick the age.

We start off with 30. Until then, you allow use for education, etc. (We do not trust anyone under 30. Maybe you do.)

Is having a Will good enough?

If you have a Will, congratulations! You are ahead of 50% of people who have not managed to make any kind of plan. Be aware, though, that a Will does not affect jointly owned property. That is in two people's names because that property by law must go to the surviving joint owner. Beneficiaries of a life insurance policy are also unaffected by the Will's terms.

Another thing to consider: Having only a Will by itself means you do not have anyone named to manage your affairs if you become ill. While you are alive.

Having only a Will means that your family may need to go through a lengthy probate process in court when you die. Before they can receive your assets. Not fun. Instead, a Living Trust can avoid those problems and ease your family's worries.

Why is a Living Trust better than a Will?

Assets in a Living Trust avoid:

- Probate at death
- Court interference at incapacity (your own and your beneficiaries')
- Court control of minor children's welfare and inheritances

It brings your assets together under one plan, preventing unintentional disinheriting. To ensure distributions you desire.

You protect assets that remain in the Trust from:

- Beneficiaries' creditors
- Predators
- Irresponsible spending

More > Do you HAVE an estate plan?

1

For these reasons and more, a Living Trust is generally preferred over a Will. It is often the perfect foundation for most families' estate plans.

You are single and do not have children. Why should you bother?

Estate planning is something everyone needs to do. Regardless of age, marital status, or wealth. If you want to keep control of your assets and protect your loved ones when something happens to you.

Without any estate documents, think where would your assets go? To your elderly parent? To a sibling you haven't spoken to in years? Nieces and nephews, some near and dear. Others not so much.

Do you need to use an attorney?

For the best results, yes. An experienced attorney can provide valuable guidance and prepares the documents.

Whatever your work, you have worked hard most days—for years—to build your estate. Having your estate plan prepared by a professional gives you peace of mind.

Knowing it will work the way you want to protect your assets and those you love.

Do you have the building blocks of a strong estate plan?

- A **Will or Living Trust** that stipulates what happens to your assets when you die.
- A **named guardian** for your minor children. If both parents die or the second dies when children are under 18. A provision added to a Will.
- A **durable power of attorney** to handle your affairs if you are incapacitated. A separate, ancillary document to a plan centered around a Will or a Living Trust.
- A **health care proxy** to carry out your medical wishes if you are unable to. An ancillary document that completes an estate plan.

How strong is your plan?

Your estate plan should have solid answers to the rest of the questions in this guide. If it does not, consider strengthening your plan. So that you protect yourself, your loved ones, and your estate during difficult times.

WHO are your trusted decision makers?

2

An estate plan names people you trust

An estate plan names the **people who will carry out your wishes** and safeguard your estate while you are living and after your death. They are also the guardians of your children, maybe elderly parents, or pets. The people named in your estate plan do not need to live in Massachusetts.

Trusted appointees can be family, friends, or professionals

If you become incapacitated, it is important to name the people who will take care of:

- Finances
- Other administrative responsibilities
- Making medical decisions for you

At death, your Will's personal representative, or your Living Trust's successor trustee, distributes. The guardians you name take responsibility for the care of your minor children. A trustee of the assets you leave can handle money for your elderly parents, and if you've set it up, your pets.

Yet not everyone has a family member or friend to appoint. Both capable and willing. In that case you may hire a professional. These are individuals or firms that invest and decide which distributions to make. You pay them for both services. You may arrange for them to take over after your death. Sometimes they are used during your life as well, depending on the need.

But many people fear the cost of such professional work. The cost is not low. Larger, more complicated situations usually bring them in.

Even so, while fees are not low, they bring expertise to a difficult set of tasks. Unfortunately, many professional trustees demand you establish a million-dollar account. Now. Or they decline a future role as trustee.

Trusteeship now largely is payment for being an investment advisory. They want that involvement for longer than probate—decades, not months to a year or two.

By the way, whether paid or not, 'fiduciary' is another word for the person who takes over. And the law for centuries has required a fiduciary to behave in the most honest way possible.

More > WHO are your trusted decision makers?

2

Set up a durable power of attorney while you are well

Another document is a durable power of attorney. It is a document you sign that **appoints a person to sign your name in the future**. So others accept your agent's signature as if it were yours. And declare it legally binding.

If the need arises, generally due to a physical or mental condition. Or to make life more convenient.

This document can allow the 'agent' to do almost anything you can do. With few exceptions. By doing this, your one-time signature can allow your agent to sign your name many times. Particularly if you become unable. Financial decisions include questions about health insurance and paying health care bills. Or writing checks to a housekeeper. Or paying the mortgage.

Estate attorneys provide a durable power of attorney as part of an estate plan. This document complements a Will or Trust.

A successor trustee named in a revocable Living Trust can take over

A revocable Living Trust can name someone to take over if you become incapacitated. Your 'successor trustee' takes over in the case of your illness or death. This is different from a Will that only acts after death.

This successor trustee is a fiduciary. So they must be honest, fair, and able to manage your assets for your benefit and your beneficiaries.

While you do not need an attorney to set up a revocable Living Trust, a good trust attorney can help.

Sign a Massachusetts health care proxy

You can **name a person to make medical decisions** for you if you cannot communicate those decisions. You do this by signing a Massachusetts health care proxy.

Moreover, this document goes into force only after a doctor signs a statement. One saying that you cannot communicate your medical wishes.

And it is a good idea to add a second person as a backup agent if the first person you name cannot do the job. The law allows for one person at a time, and a total of two people.

More > WHO are your trusted decision makers?

2

Remember, you do not need to be terminally ill to name a health care proxy. Do it when you are healthy.

Your health care proxy can only make medical decisions for you. So they cannot act for you financially. Thus it is important to set up a durable power of attorney for financial decisions as well.

Make sure your health care proxy is aware of your:

- Personal attitudes toward health, illness, death, and dying
- Medical treatment preferences. Pain-reducing care, life-sustaining care (like artificial hydration and nutrition)
- Religious beliefs
- Feelings about health care providers, caregivers, and health care institutions

You do not need an attorney to set up a health care proxy. Health care facilities often have a form.

You spell out your wishes and assign one (or two) people to make health care decisions for you. If you are unable to speak up for yourself. You sign the document along with two unrelated persons called 'witnesses'. You do not need a notary on it to make it legal.

Name guardians for your dependents

Without an estate plan, if you die leaving minor children, the court appoints a guardian to care for them. Without knowing whom you would have chosen. Pets are given up for adoption if no one in your circle takes them.

The place for this is in a Will. These are **people whom you trust to love and care for your dependents** as you would.

You should discuss your plans with potential guardians before you sign the documents. Talk with them sometime between your first attorney meeting and signing your Will. You want to know their feelings about this major yet unlikely responsibility. If you become incapacitated or if both parents die before year 18.

WHO will benefit from your estate?

3

You name beneficiaries in a Will, Living Trust, or beneficiary form (contract)

Your estate can include many types of assets and this can be confusing when it comes to estate planning. You may have personal property (prized painting, sports car, jewelry) and real estate. And investments, cash, business interests, and life insurance.

And while hundreds of types of assets exist, most people leave what they own to a few people or organizations.

And there are many types of beneficiaries. They can be humans or not so human. Like charities or educational institutions. The human ones need not live in Massachusetts. They can live anywhere in the world.

For some people, it's obvious to whom they want to leave assets after they die. Many times (but not always), if you have children, you want them to get what you own. Or, another person, like a spouse or partner. Frequently a spouse or partner needs the money to live on. So while you can split assets between a surviving spouse and others, it's not that common.

Yet, for those without children or close relatives, deciding can be difficult

For some, deciding on beneficiaries can be overwhelming. Maybe there are children of more than one marriage. Without 'obvious' beneficiaries some people fail to do estate planning. Others love the challenge and name a dozen or more people or charities. They take their time and ponder. Or repeatedly revise their documents.

Without a Will or Living Trust in place, the law says this: distribute your assets in equal parts to your nearest relatives. In legal terms, your 'heirs at law'. In the following order: spouse, children, parents, siblings, children of siblings. With some special rules thrown in.

For some people, these rules are fine and they have no need for any finer tuning as to WHO. The time of WHEN the beneficiary should receive it all can be another story though.

More > WHO will benefit from your estate?

3

But some want to distribute assets unequally. Maybe to adjust for gifts they made during their lifetime. Or because of unequal needs of beneficiaries. Or because they feel like it. Yes, American law allows you to leave more to those family members you like more. (Maybe they played golf with you or took you out to dinner a lot.)

Apart from a spouse, U.S. law follows 'freedom of testation'. Freedom to choose, mostly. European law is different and dictates more about deciding who receives your assets. Wealth is seen as a family asset. Decisions are not all up to the whims of an individual family member.

So, yes, you can omit someone from your Will or Trust because of an estranged relationship. Or because the relative has plenty of money and does not need your assets.

A spouse is a different story. A surviving spouse has rights in your estate unless they were previously waived by agreement.

A Living Trust adds another type of beneficiary

With a Living Trust, the trustee owns the trust assets. They take ownership while you are alive or after your death. Or a mixture of timing.

From the 'WHO benefits' perspective, a trustee is a different type of beneficiary of your estate. A trustee holds assets for another beneficiary. Maybe a spouse or a child or a grandchild.

And does whatever the trust says to do with those assets. Maybe distribute them very soon after death. Or maybe hold them for years and give what is appropriate to the beneficiary.

So having a trust as a beneficiary of your wealth gives you the power to control the timing of the inheritance. Younger age—or life circumstances—may make a full inheritance after your death an unwise option.

WHEN will beneficiaries receive their money?

4

You have an estate planning choice. Give it soon after your death. Or build in some protection for a loved one.

After your death, without a Living Trust, your beneficiaries receive their full inheritance. When the probate court proceeding finishes and usually within about 18 months.

To spend or misspend, in your eyes. Subject to all the events that life may cause. Untimely death. Divorce. Spending. Addictions.

There may be even more reasons to think about not giving it all in one shot soon after your death. For example, maybe estate tax can be lowered by using a trust provision.

So, outright distribution may not be the best option for some of your beneficiaries. On the other hand, maybe that's fine.

Estate planning is not just documents. It's also a process that looks at to **whom**, **when**, and in what **form** inheritances should be made. And who should be in charge.

A trustee under a Living Trust can disburse money over a time frame you determine: The WHEN

Your attorney can put clear instructions inside a Living Trust for you. Maybe you want to keep the money for any child or grandchild in trust, useable for them, until they reach an age of 30. This is the most common type of trust provision. You can lower or raise the age. Or the trust holding may be for the entire lifetime of a particular beneficiary.

You are almost always the initial trustee of a revocable Living Trust. And if you are married, both of you are joint trustees. Yes, you can be the trustee of your own trust. We call the person who takes over for you the 'successor trustee'.

More > WHEN will beneficiaries receive their money?

4

After your death, with no spouse, maybe a beneficiary receives government benefits. Because of a disability perhaps. Your Living Trust document can provide that your trustee set aside and then hold that share for them. Instruct your successor trustee to invest and use that share for the beneficiary's benefit. Until that 'sub-trust' ends. And then to distribute whatever is left in the sub-trust to someone else.

You may do this because if the beneficiary receives a large sum at once, laws may end those government benefits.

You instruct the trustee to supplement—but not replace—the government benefits. It is called a supplemental needs trust, or a special needs trust. So the beneficiary still gets government benefits plus what you give.

A Living Trust can disburse smaller amounts over time when substance abuse/drinking lurks

If you have a child or other beneficiary with a drug or alcohol problem, you may hesitate to provide a full inheritance right away. They may spend the money in months, if not weeks.

In that case, you can tell the successor trustee to continue to hold that beneficiary's share. Another use of the 'sub-trust' approach.

And then to use it for the beneficiary's benefit. Keep the beneficiary housed, with food in the refrigerator and the lights and heat on.

Your money can be part of the solution. If the problem ends, the trustee can loosen the purse.

Have you included ALL your assets?

5

Your estate plan considers all your wealth. Do not forgot about retirement accounts, pensions, and life insurance.

Estate planning focuses on the precise way assets are owned and distributed. Is an asset owned in your sole name? In joint names? You may also own community property, if you earned money while married and living in a Western state.

Where your assets go depends on the ownership at death and if you have:

- No estate plan
- A Will only
- A Living Trust

Assets in your name only and no estate plan?

If you have assets that are in your name only, the probate court process dictates who receives them. They go to your nearest relatives, outright, and handled by the person who applied to the court to take charge.

Life insurance benefits are not determined by a Will

Without a Living Trust, life insurance benefits go directly to the beneficiary. Regardless of what your Will says. But with a Living Trust, the beneficiary is the trust. And the successor trustee manages the benefits.

Joint ownership does not always avoid probate

When two or more people hold title to an asset together in joint ownership, both own the entire asset. From the start. On death of one, that interest disappears. The surviving joint owners continue to own it, free from the expired interest. (By the way, this is the law.) Some people use joint ownership to avoid probate, but it carries risks.

Unintended beneficiary

Joint tenancy inheritance is not controlled by a Will. If you own a camp property with your brother, that property goes to your brother. Your spouse does not become a joint owner of the camp.

More > Have you included ALL your assets?

5

Death or incapacitation of a co-owner requires probate

If the co-owner dies at the same time as you do, the property must go through probate before it can go to the heirs.

If you are living and your co-owner becomes incapacitated, someone must go to court. To ask the judge to appoint someone to sign for your co-owner. To sell or refinance. If the co-owner lacks a durable power of attorney.

A Living Trust owns most major assets

A Living Trust should own many of your assets. As the Living Trustee, you manage those assets as you always do. But when you die, the successor trustee immediately controls your assets. To distribute them according to your exact instructions.

You also create a 'pour-over' Will along with a Living Trust. This transfers any assets that are still in your name alone at your death. And to transfer it to your Living Trust. (Think bank account in your sole name at local bank.)

But a Will needs to pass through the probate process to make the transfer. Because it is still a Will. And Wills go through probate when you die with assets still in your sole name.

Are fees and taxes LIMITED?

6

Make sure your beneficiaries receive as much as possible

A good estate plan seeks to **reduce the charges that are taken off the top**. Before your beneficiaries receive their inheritance, these charges may reduce the estate's size:

- Court fees
- Attorney fees
- Estate taxes
- Outstanding debt
- Other payments

In most cases, a Living Trust is the best way to preserve more for your beneficiaries.

Living probate incurs court costs and attorney's fees

Your estate goes through 'living probate' if you become incapacitated. And you do not have a durable power of attorney or Living Trust. Assets in your sole name always need someone with legal control to deal with them.

In that case, living probate appoints a court-appointed agent to manage your affairs. This is also called a conservatorship or guardianship proceeding.

If property is jointly owned, the court agent represents your ownership. And the joint owner must deal with them for any transactions about the joint property.

You can avoid this expensive and public process. By first putting a Living Trust or a durable power of attorney in place. If you have a Living Trust, trust assets avoid the living probate process. Because those assets are not in your sole name.

Professional Tip: These days **a Will alone is not enough**. Get a complete estate plan including a **durable power of attorney**.

More > Are fees and taxes LIMITED?

6

Death probate incurs court costs and attorney's fees and pays off debts

Your estate goes through death probate if you have only a Will or even if you have no Will. The purpose of death probate is to manage and distribute your estate and pay your debts after you die.

A probate court proceeding is necessary if you die with assets in your sole name. A probate court authorizes the transfer of those assets to someone else.

If you owned real estate in another state, your family would need a second probate. With more court expenses and local attorney's fees. Think condominium in Vermont. Or land in New Hampshire or Maine in your name alone. Land you inherited years ago that is still in your name? Timeshare?

You can avoid this expensive, public, and lengthy process. By having a Living Trust, to which you have transferred most assets.

If there are no assets in your name, there is no need for probate. Sometimes having a Will does not require a death probate proceeding. That is when no assets are in your sole name at death.

Death probate delays your family's access to funds

The probate court appoints someone to oversee your affairs. If you had a Will, the court likely will accept your choice of a representative. Typically the appointed person hires an attorney. To help with the paperwork and decision making.

In Massachusetts, creditors have one year to come forward with claims for payment. The entire process usually takes about 18 months but can take several years. During this time, your family may not have full access to all the money in the estate.

But it is not all gloom. They are able to pay real estate bills, credit card bills, funeral costs, or other expenses.

Yet first the probate court must approve the Will's validity. That is 'probate' or 'proof' of the Will. After the Will's proof and appointment, this happens.

More > Are fees and taxes LIMITED?

6

The court-appointed person takes an inventory of the estate's assets. If needed, your estate engages experts to write appraisals of some assets. To determine date-of-death values.

You need date-of-death values for both income and estate purposes. Getting those values is central to the post-death process.

The estate first pays fees. These include court fees, appraisal fees, and income taxes. And attorney and personal representative's fees. After paying them, the heirs finally receive the rest of the estate according to the terms of the Will.

The smaller your estate, the more vulnerable it is to probate costs

According to some experts, the average **cost of death probate is over 7% of the value of your estate**. Most of the costs go to lawyers. The person who acts as the personal representative is also paid.

The startup process and costs of settling a probate estate are similar. Whether the estate is large or smaller.

So the smaller estates get hit harder. Here is how.

Whether the estate is $90,000 or $900,000, there are many similar steps. Say the probate costs are $20,000. Probate costs of even $10,000 are over 10% of the smaller estate, and much less a percentage of the larger one.

Some costs do not decrease just because the estate is small. Basic steps may take the same time regardless of estate size. Locating a Will, publication, and beneficiary communication come to mind. In other words, similar efforts for both large and smaller estates. A professional must focus.

But some costs depend on the sheer number of accounts or the nature of an asset. Read a private business interest that needs appraisal. Or hundreds of stock certificates.

The smaller your estate, the more vulnerable it is to being 'eaten up' by all these costs.

More > Are fees and taxes LIMITED?

6

With a Living Trust, the **trust already owns the assets**. So there is **no need for probate** proceedings. Yet there are costs when a Living Trust is involved. It is a myth that nothing needs to be done in that case. There are post-death steps that should be done.

Estate taxes are imposed before beneficiaries inherit

The government imposes federal and state estate taxes on your death. The federal tax starts at 40% of everything you own at death for estates over $11,700,000 (as of 2021). Estates valued at less than that are exempt from estate tax.

The federal tax affects very few people. Much less than 1% Massachusetts estate tax affects you if your wealth exceeds $1 million. The Massachusetts estate tax ranges from .8% up to 16%.

For married persons, having a Living Trust estate plan generally gives the family a tax break. The plan uses both the estate tax exemption and marital deduction. Without a Living Trust, all assets end up in the second estate. A sub-trust changes that.

Using a sub-trust in the first estate, each spouse can better use their $1 million MA estate tax exemption. If planned for, the first $1 million of the first spouse does not get taxed in the estate of the second spouse to die.

So, in Massachusetts, a married couple can each have a Living Trust. Each can pass $1 million without Massachusetts estate tax. Because each estate is under $1 million.

Federal law has tax requirements to get a deduction for assets left to a non-citizen spouse. This affects us in Massachusetts. The U.S. citizen may need a QDOT provision in their documents.

Are the documents UP TO DATE?

7

Estate planning is an ongoing process, not a one-time event

You should update your estate plan as your situation and the laws change. Do all the documents in your estate plan contain **your most recent wishes**? About beneficiaries and assets? Do you have a health care proxy to **make medical decisions** if you are unable to? Have circumstances changed with any beneficiaries that need a change to the arrangements?

Changes in your life

Changes in your life may affect your estate plan.

- Marriage or divorce
- Remarriage
- The birth of a child
- Minor children becoming adults
- Address change
- Terminal illness
- Early dementia
- Major new assets
- Change in bank

Changes in an appointee's life

Changes in a beneficiary's, trustee's, or guardian's life may affect your estate plan.

- Death
- Estranged relationship
- Address change
- Divorce
- Life difficulties
- Incapacitation

You should sign a new durable power of attorney after several years have passed

Many financial institutions **reject a durable power of attorney** signed too long ago. They might call it 'stale' and not useable after several (4–7) years. They just will not accept its use. But this end date differs for each financial institution.

In our firm, we remind clients about this. It is part of our semi-annual reminder about changes that life can bring. And to keep an eye on possibly creating a new durable power of attorney from time to time. To lower the risk of nonacceptance.

Have you recently moved to Massachusetts?

A Living Trust or Will is valid in all 50 states, regardless of where you signed it. The U.S. Constitution says so. But if you have moved to Massachusetts recently you should consult an attorney. To discuss your estate planning. And make any useful or needed changes specific to now being a Massachusetts resident.

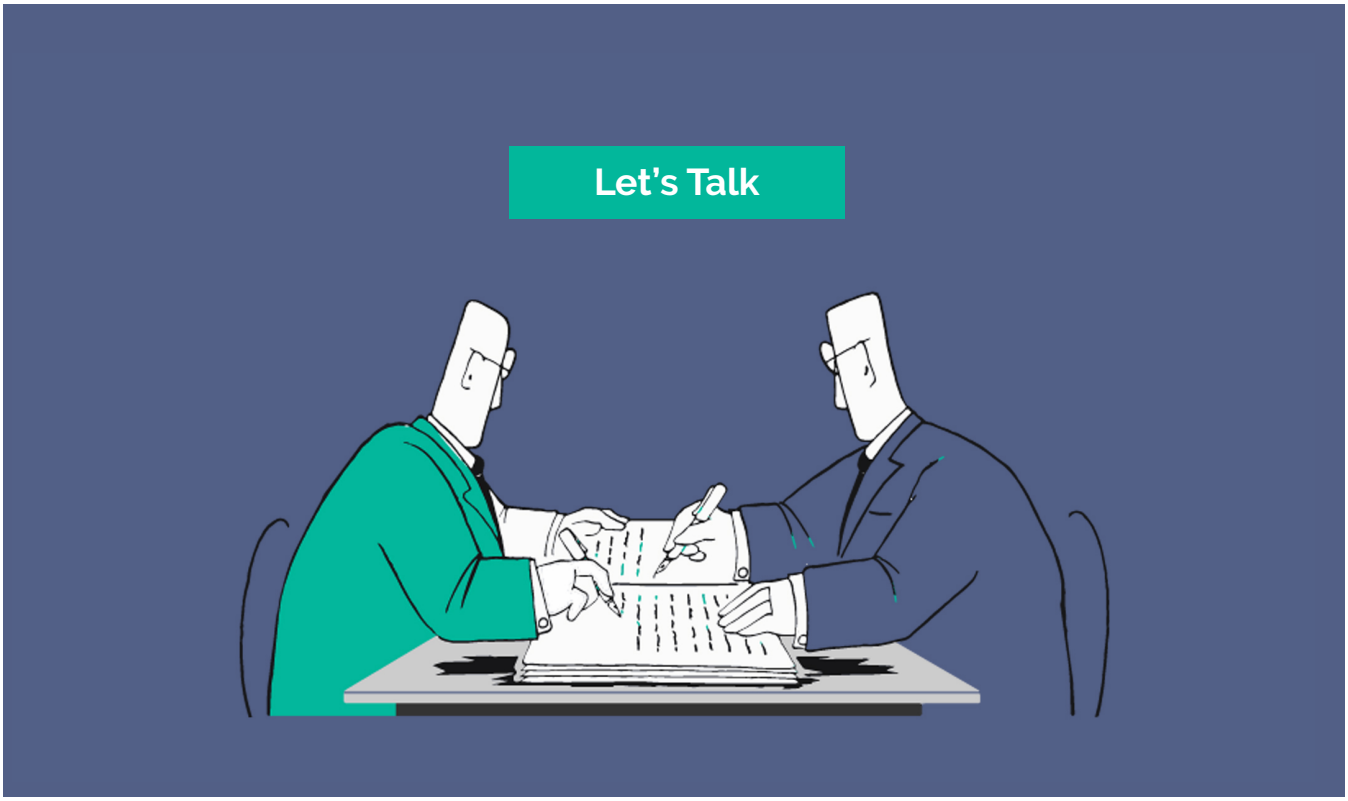
MA Wills & Trusts is HERE to help.

Estate planning in Massachusetts is all we do.

We focus on speaking and writing **in plain English**, so you understand what your estate plan does.

If you already have an estate plan, we can check the documents you have now and tell you about possible additions or changes. We can also start from scratch if you have not started a plan.

The process usually takes about three to four weeks for a new estate plan. Time commitment by you is minimal.



Imagine how good it will feel to have that long-delayed estate plan done!

Let the paralyzing thoughts go.

Let's get started planning your estate.

Let's Talk

Most middle-aged people are not ready for their inevitable death. We make estate planning simple, affordable, and quick. So people can live in peace, knowing their affairs are in order.

Massachusetts Wills & Trusts | Lexington, MA

Email: joel@jbernsteinlaw.com | Phone: (781) 863-8606