

Western Mass Estate Planning

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NEXT STEPS AFTER SOMEONE DIES

Initial Comments:

- 1) We often hear about a client's death hours, or even minutes, after it happens. Wherever you are in the process, be assured that there is very little that needs to be done immediately. Many tasks can wait weeks or even months. In some cases, it may be more important to be present and attentive to others around you and to your own process of grieving, before worrying about the legal and financial steps.
- 2) If you are the individual designated to settle the estate, do not feel pressured by other family members or friends to get started right away or even to take on the task at all. The deceased person has likely named other individuals in his or her Will or Trust to carry out the responsibilities, if the first-named person is not willing or able to act.
- 3) Remember that any Power of Attorney which was in place during the deceased person's life became invalid after death – it can no longer be used to access and control assets
- 4) Reading of a Will is only done in movies – not in real life!
- 5) In some cases, there is almost nothing that needs to be done to settle someone's estate and, sometimes, it can be done without an attorney.
- 6) Just because someone has a Will does not mean it is relevant. If all assets pass by joint ownership or beneficiary designation, the contents of the decedent's Will are irrelevant.
- 7) If there are no assets requiring probate (all are accessible by joint owners or named beneficiaries), it is possible that it will not be necessary to pay certain, unsecured debts of the decedent (some credit cards, for example, will cancel the card and debt if there is no probate estate).
- 8) The only person with an immediate right to see the decedent's Will or trust is the named Personal Representative or Trustee.
- 9) Client confidentiality continues after a person dies (the attorney who prepared the Will and/or Trust cannot share personal or financial information with anyone without the authorization of the Personal Representative and/or Trustee).
- 10) Even if you believe that there are no assets requiring probate proceedings, please do not destroy any original Will – we have had cases where it was needed many years later, for an interest in real estate or other property no one knew existed.

11) A glossary of terms follows at the end of this document.

Time-sensitive Tasks:

- 1) Determine any pre-paid funeral contract (common for individuals who were on MassHealth for in-home or skilled-nursing home care)
- 2) Notify Social Security (if the funeral home has not already done so) – the decedent needed to live the entire month in order to be entitled to final month's benefit – be prepared for Social Security to debit the account where benefits were directly deposited
- 3) Notify any pension source – typically, the decedent will be entitled to benefits for the month of death (unlike Social Security)
 - Former employer(s)
 - Veterans Administration
 - Former spouse's survivor pension benefits
- 4) Notify any supplemental health insurance company (BlueCross, AARP, Humana, etc.)
- 5) Cancel credit card(s) and notify any other users on the account(s)

Less Time-Sensitive Tasks:

- 1) Contact the decedent's homeowners' insurance agent regarding continued coverage
 - be prepared that an unoccupied home may require vacancy coverage, which is typically about three times the cost of traditional insurance.
 - do not take the risk that you will not benefit from it (I have had two cases where the families did not obtain vacancy coverage and ended up with water damage resulting in \$200,000 - \$350,000 in repair costs – none of it covered).
 - do not believe the insurance agent who tells you that you do not need the coverage ("oh, if you plan to stop by a few days a week to pick up the mail, you should be fine..."). That agent will likely not be working for the company when/if you need to make a claim.
- 2) Contact the decedent's automobile insurance agent to clarify coverage – many companies will not cover other drivers, unless the car is being driven for official estate business.
- 3) Arrange to forward the decedent's mail (be prepared that this may happen until a Personal Representative has been appointed).
- 4) Determine whether there is a safe deposit box
 - A joint owner with a key should be able to access the contents
 - If there is no joint owner, be prepared that the bank will not allow access until a Personal Representative has been appointed
- 5) Identify digital assets including social media (Facebook and e-mail accounts, etc.) – be prepared that these may not be accessed or shut down until a Personal Representative has been appointed
- 6) Identify any non-traditional assets, such as book royalties, art collections, mineral rights, or gas or oil leases

- 7) Prepare a list of the decedent's debts (utilities, taxes, caregivers, medical, credit cards, etc.)
- 8) Prepare a list of on-going expenses and due dates for each (real estate taxes, homeowners' insurance, condominiums fees, mortgage, time share assessments, automobile insurance, etc.)
- 9) Contact the decedent's income tax preparer, if any, to review relevant deadlines; otherwise, contact your own tax preparer (will need a copy of decedent's most-recent federal and Massachusetts income tax returns, if filed)
- 10) Locate the decedent's most current Will and Trust, if any, including amendments
- 11) Determine who the decedent named to serve as Personal Representative (for any assets passing through the Will) or a successor Trustee (for any assets titled in the name of a trust)
 - confirm that the designated individual is willing and able to serve
 - if not, contact any alternate(s)

SETTLING THE ESTATE (Accessing, Selling and Distributing Assets)

In order to access the assets of an estate, you need to take inventory. The names(s) on an account or its beneficiary designation will determine what next steps are necessary. You should locate the following:

- copies of current bank, retirement, and investment account statements
- copies of deeds to any real estate the decedent owned or had an interest in
- any original life insurance policies the decedent had
- any original stock certificates or savings bonds the decedent owned
- paperwork related to any business the decedent was operating/had an interest in at the time of the decedent's death
- original title and registration to any cars the decedent owned
- documentation related to any other assets the decedent owned or had an interest in

Be prepared that banks and/or life insurance companies say that they will not provide information on the accounts or policies until a Personal Representative (fka an Executor) has been appointed by a Probate Court. Financial institutions will often ask for Letters Testamentary or Letters of Authority. These are documents issued by the Court in cases where an asset had to go through the Probate Court process. The challenge is that, in many cases, there are no assets requiring probate or the asset at issue does not require probate (it has a joint owner or named beneficiary). In other cases, you can't know whether an asset needs probate until you know how it is titled (a Catch-22), but do your best to press for the answers, so that you can, at least, know whether a probate proceeding is necessary. You may be able to locate sufficient paperwork among the decedent's papers to get a sense of which assets might require probate (prior statements, for example) and then plan to get current values once a Personal Representative is appointed.

- 1) **Any asset with a joint owner** (ex: real estate, bank account, shares of stock, mutual fund, or investment account) passes automatically to the surviving joint owner who
 - Will need to provide a death certificate in order to take control of the asset
 - Will want to move the asset into an account in the joint owner's name (removing the name of the deceased owner and opening a new account in the surviving joint owner's sole name, with the joint owner's Social Security number)
 - Has no legal obligation to share the asset with any other individuals
 - Has no legal obligation to use them for final expenses or debt (funeral, credit card, or medical bills)
 - **Exceptions:**
 - automobiles jointly owned with a non-spouse do not pass to any joint owner – probate proceedings are necessary
 - real estate held as tenants in common does not pass to a joint owner – probate proceedings are necessary

- 2) **Any asset with a named beneficiary** (ex: life insurance, IRA, 401k, annuity, or bank account) passes automatically to the named beneficiary/beneficiaries who
 - Will need to provide a death certificate in order to take control of the asset
 - Will likely need to complete a Claim Form with the company/financial institution holding the asset
 - Will often be issued a check for the death benefit (life insurance and annuity) or given the opportunity to roll the funds into a new account in the beneficiary's name (IRA, 401k, life insurance, annuity, bank account)
 - Has no legal obligation to share the asset with any other individuals
 - Has no legal obligation to use them for final expenses or debt (funeral, credit card, or medical bills)
 - Does not owe income taxes on funds received, unless the asset was a qualified/retirement/tax-deferred asset which is being liquidated

- 3) **Any asset titled in the name of a Trust** passes to the trust beneficiaries as detailed in the trust. These assets do not require Probate Court proceedings.
 - The individual named as successor **Trustee** to the decedent will be in charge of accessing, distributing, and, if appropriate, selling, these assets
 - The Trustee is entitled to reasonable compensation, which is reportable income to the Trustee and is a deduction if estate taxes are due
 - If a Trustee intends to request compensation, detailed records should be maintained, reflecting time for each task and all

beneficiaries should consent to the amount before the Trustee takes any payment

- The trust, which was *revocable* during the decedent's life and used the decedent's Social Security number, becomes *irrevocable* upon the decedent's death. It is no longer appropriate to use the decedent's Social Security number and the successor Trustee will not be able to access Trust assets until a federal tax identification number (EIN) has been obtained for the trust.
- The successor Trustee must apply for an EIN on-line at the IRS website: irs.gov. **Instructions for obtaining a trust tax identification number are here and in a separate document at our website.**
- Some financial institutions also want the successor Trustee to sign a document accepting their role as Trustee. **A sample Acceptance of Appointment as Successor Trustee form is here and in a separate document at our website.**
- The Trustee should also contact all financial institutions holding assets in the name of the decedent's trust and either arrange for new accounts, reflecting the EIN and Successor Trustee's name, OR obtain a check for the close-out proceeds and deposit them in a new account (possibly consolidating with other trust assets) in the name of the trust, using the EIN.
- Expect financial institutions to request one or more of the following:
 - The EIN for the trust (to open a new account in the name of the trust)
 - A certified copy of the death certificate (raised seal)
 - A copy of the trust
 - An Acceptance of Appointment form
- The benefit of a trust is that the assets are immediately available and there is no wait, as there is with probate proceedings. This means that, technically, the successor Trustee can start making distribution of the trust assets immediately. However, the successor Trustee should:
 - Determine whether Massachusetts estate taxes are due by considering the value of decedent's total estate on the decedent's precise date of death (assets held in trust, assets which passed to a joint owner, assets which passed to a beneficiary and assets which passed through Probate Court)
 - if they exceed \$1 million, an estate tax return must be filed and any estate taxes paid within 9 months of date-of-death
 - if they are less than \$1 million, an estate tax return may need to be necessary, depending upon the amount of any lifetime gifts
 - If there is any question, the successor Trustee should consult with an experienced attorney or CPA to

determine/confirm whether an estate tax return needs to be filed

- Retain sufficient funds to cover any estate taxes and ongoing expenses (ex: real estate taxes, etc., pending sale of any property) or outstanding debts
- Consult with an accountant to determine the cost of final income tax returns and any anticipated income taxes due, so that those funds can also be retained
- Prepare an account to the beneficiaries of all trust assets, their date-of-death value, all income to the trust (interest, dividends), all expenses of the trust (legal fees, CPA fees, estate taxes, real estate taxes, insurance, and utilities, etc.) – this does not need to be elaborate, but should ensure that each beneficiary clearly understands how his/her/its share was calculated
- Prepare a letter to the beneficiaries to accompany the account and Release and Assent forms. ***A sample cover letter to the trust beneficiaries is here and in a separate document at our website.***
- Obtain a written assent and release from each beneficiary, before writing final distribution checks/transferring final estate assets. ***A sample Release and Assent form is here and in a separate document at our website.*** Since some assets, such as an investment account, fluctuate in value, it is acceptable to say that the share calculated may differ slightly at the time of actual distribution (depending upon the market)

- A successor Trustee should not distribute the final trust assets until all debts and estate taxes have been paid, funds have been set aside for final income tax preparation, and all beneficiaries have returned signed assents to the Trustee's accounting.

4) **Any asset without a joint owner or named beneficiary and not titled in the name of a trust** cannot be accessed or transferred until Probate Court proceedings have been completed

- A person qualified under Massachusetts law can file the necessary paperwork with the Probate Court, with or without an attorney – the Probate Court has forms and instructions on-line: <https://www.mass.gov/lists/probate-and-family-court-forms-for-wills-estates-and-trusts>
- These assets will be distributed pursuant to
 - The decedent's most-current Will, if any, or
 - Massachusetts law, if no Will can be located
- If the decedent had a Will, the individual named in the Will to serve as Personal Representative (fka "Executor") is the one who should initiate the proceedings

- If the first-named individual cannot or does not wish to serve in this capacity, the next-named nominated individual may serve
 - If there is no Will, the law lists individuals in order of priority who may serve in this capacity
 - No one is required to serve – anyone named or in priority status may decline

- If the assets needing probate consist of one car (of any value) plus other non-real estate assets with a total value of less than \$25,000, there is a short-form of probate (known as a Voluntary Probate), which is inexpensive, easy, relatively quick, and does not require notice to any heirs. It cannot be filed sooner than 30 days after death, but, in many counties, will be completed within a few days of filing

- If the assets needing to be probated consist of real estate or more than one car and other assets (including additional cars) totaling greater than \$25,000, a full probate proceeding will need to be filed and all heirs will need to be notified of the proceeding and given an opportunity to object to any Will and/or the proposed Personal Representative
 - A full probate proceeding takes a minimum of a year to complete, involves numerous court forms, and is much more expensive than the short-form of probate. Many people find they need legal counsel to assist them.

- Once the Personal Representative has been appointed, that individual
 - will need to apply for an EIN for the estate;
 - will need to open an account in the name of the estate, using the EIN
 - must pay estate debts
 - may access estate assets
 - may list any real estate for sale, subject to any release of estate tax lien, required Court authority, and terms of the Will
 - must secure estate assets, pending distribution
 - must file a Massachusetts and/or federal estate tax return within 9 months of the decedent's death

- When dealing with estate assets, expect financial institutions to request:
 - The EIN for the estate (to open a new account in the name of the estate)
 - A certified copy of the death certificate (raised seal)
 - A certified copy of the Probate Court document reflecting the Personal Representative's appointment (usually called "Letters Testamentary" or "Letter of Authority")

- The Personal Representative is entitled to reasonable compensation, which is reportable income to the Personal Representative and is a deduction if estate taxes are due
 - If a Personal Representative intends to request compensation, detailed records should be maintained, reflecting time for each task and all beneficiaries should consent to the amount before the Personal Representative takes any payment
- A Personal Representative should not distribute the final estate assets until all debts and any estate taxes have been paid, funds have been set aside for final income tax preparation, and all beneficiaries have returned signed assents to the Personal Representative's accounting.

GLOSSARY OF TERMS USED:

WILL: A Will is a document legally executed by a person in which the person states how he or she wants his or her property to be distributed at death (who gets how much and whether it will pass directly or continue to be managed by someone else) and nominates who will oversee distribution of assets (this person is called a "Personal Representative").

TRUST: A trust is a legal instrument that holds title to assets and allows property to be passed to designated beneficiaries without going through probate. It serves the same purpose as a Will, but assets properly titled in the name of a trust or which designate a trust as beneficiary do not require Probate Court proceedings in order to access and control them following the death of the person who established the trust.

PERSONAL REPRESENTATIVE: Formerly and more commonly referred to as an "Executor," this is the person nominated in a Will to settle an estate. The job includes determining which assets are subject to Probate Court, filing paperwork with the Court, notifying heirs and/or beneficiaries of the proceeding, accessing, liquidating (if appropriate), and distributing assets to the named beneficiaries and accounting to the beneficiaries for the estate assets (what assets are involved, income from all sources, and expenses, so that each beneficiary is clear about how his, her, or its share was calculated).

TRUSTEE: This is the person nominated in a trust to administer the trust assets. The job includes determining which assets are titled in the name of the trust or which have the trust as beneficiary; accessing, liquidating (if appropriate), and distributing assets to the named beneficiaries; and accounting to the beneficiaries for the trust assets (what assets are involved, income from all sources, and expenses, so that each beneficiary is clear about how his, her, or its share was calculated).

This is intended to be a general description of the most common steps needed to settle an estate. Please note that, because each situation is different and relevant Probate Court and tax forms and practices may change, you may need to consult with an experienced estate attorney in particular situations. This publication is for informational purposes only and is not intended to constitute comprehensive or specific legal advice.