

Estate Planning Essentials:  
Wills, Power of Attorney, Health Care Proxies  
and Trusts

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Power of Attorney

Many of us take for granted our ability to talk and express ourselves. But what happens if a person suffers an injury or an illness like Alzheimer's, and they become unable to communicate informed decisions?

Durable Power of Attorney ("DPOA") covers your material possessions: your real estate, bank accounts and other assets.

The DPOA can be limited to a specific purpose, or it can be written with broad powers given to the person who acts as your Agent. The DPOA can authorize an Agent to:

- ▶ buy or sell property
- ▶ transfer assets
- ▶ conduct any other business which you authorize in the document.

This authorization is crucial when assets have to be transferred in time deadline situations such as real estate market changes and Medicaid benefits eligibility.

[Under Massachusetts law](#), the Power of Attorney is made durable by the language stating that "I intend that this power of attorney shall be a durable power of attorney. It shall not be affected by my subsequent disability or incapacity."

**Warning: The Power of Attorney is not a "one size fits all" form. Your circumstances are unique. Be certain that your Power of Attorney is properly drafted.**

Your Agent is the substitute person who acts for you. The powers in the Power of Attorney document can have income tax and estate tax consequences for you and the person you name as your attorney-in-fact. Make sure your Agents get advance counseling and information, so they understand how to properly use your DPOA to manage your property in a way that will respect your wishes and protect your interests.

[Connecticut Case Example](#): daughter of a nursing home resident was held responsible for nursing home bills that were incurred after money and property was transferred using a Power of Attorney.

[New Hampshire Case Example](#): Las Vegas woman indicted on charges she misused her mother's power of attorney over a nine-month period. The woman had control of her mother's money, knew her mother needed nursing home care and allegedly diverted \$93,000. Case prosecuted by NH Attorney General's Medicaid Fraud Unit.

[New York Case Example](#): Brother and sister end up in an expensive lawsuit over their mother's Power of Attorney. In [Anderson v. Anderson](#), Jessie Anderson was suffering from mild dementia. She executed a power of attorney naming her son as her agent, but she did not include any language specifically authorizing gifts.

She moved in and lived with her son, and eight months later moved to a nursing home. The son, using the power of attorney, transferred all of his Mother's real property, stocks and other assets to himself. Jessie died

a year later, leaving a will and all her assets equally to her son and daughter.

After being appointed executrix of the estate, the daughter filed suit to recover the gifted assets, claiming that the purpose of the gifts to her brother was solely to protect the assets from nursing home expenses. Now that the mother had died, the daughter wanted the assets reconveyed to Jessie's estate.

Evidence that Jessie trusted her son, wanted him to manage her money, and may even have been fearful of her daughter, was not enough to allow son to keep the gifts he made to himself.

The Courts decided that without a specific gift-giving provision written in the Power of Attorney, a gift to the agent "carries with it a presumption of impropriety and self-dealing."

### Health Care Proxy

The person you designate as your "Agent" in your Health Care Proxy has authority for your health care and treatment at times when you cannot speak for yourself. Massachusetts law says that your Agent "shall have the authority to make any and all health care decisions on [your] behalf that [you] could make, [including decisions about life-sustaining treatment.](#)"

The law says that your Agent will make these decisions either:

- ▶ in accordance with the agent's assessment of your wishes, including your religious and moral beliefs, or
- ▶ if your wishes are unknown, in accordance with the agent's assessment of your best interests."



**Terri Schiavo died on Thursday March 31, 2005 in a Florida nursing home. She was 41.**

**Ms. Schiavo's death came 13 days after removal of the feeding tube that she needed for nutrition and**

**hydration, by order of a Florida Probate Court.**

**In more than 30 rulings, Florida Probate Courts and federal courts backed her husband's claim that Terri said she never wanted to be kept alive by artificial means.**

**Ms. Schiavo's parents said she never expressed her views on that issue, and that she could have recovered brain function with therapy.**

**Both sides accused each other of being motivated by greed over a \$1 million medical malpractice award.**



**Pope John Paul II, who was 84 years old, died Saturday April 2, 2005 in his Vatican City apartment.**

**During the weeks before his death, Pope John Paul was hospitalized twice, and he relied on a feeding tube**

**for nutrition and hydration.**

**With his organs failing following a heart attack, the Pope decided not to go back to the hospital for more aggressive treatment on the Thursday before his death. The Pope was able to express his wishes to the people close to him. He decided to remain in the bedroom of the Vatican apartment that had been his home for 26 years.**

**The Pope's apartment was furnished with medical equipment, and staffed by a doctor, nurses, and Polish nuns who cared for him.**



**Power of Attorney  
and  
Health Care Proxy  
can prevent the need for  
Probate Court Guardianship**

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**More information on**

**Health Care Proxy**

**Power of Attorney**

**Wills and Trusts at**

**[EstatePlansPlus.com](http://EstatePlansPlus.com)**

## Wills

To properly prepare a Will properly, an attorney must:

- ▶ become knowledgeable about the existence and identity of the client's relatives
- ▶ understand the client's finances and property ownership
- ▶ discuss the client's intentions
- ▶ take special precautions if the client is of advanced age and/or has a medical condition or impairment. This protects the client, and family members, from potential challenges to the Will.

**Steps to protect a client who is of advanced age:**

**Conduct a private interview, to insure that the client feels free to express his/her true feelings, wishes and concerns.**

**Optimize the client's capacity, by scheduling the meeting at a time when the client is most alert, and not fatigued.**

**Enhance capacity with a law office that is accessible, comfortable, well lit, and quiet, with a minimum of distractions.**

**Take time to understand the client's values and standards, so that the client wishes are clearly expressed in the Will and other documents.**

## **Examples of How Trusts Can Protect You, And Your Family**

A Trust can be the centerpiece of a plan that:

- ▶ minimizes or eliminates estate taxes and income taxes
- ▶ avoids probate proceedings
- ▶ directs assets to a surviving spouse or children, grandchildren and other beneficiaries.
- ▶ protects eligibility for Medicaid and other government benefits



### **Irrevocable Life Insurance Trust**

Dr. Roger Cardigan and Eileen Cardigan have been married for thirteen years, and they have three young children. Roger also has two older children from a previous marriage.

Roger wants to leave assets outright to Eileen that are not tied up in a trust. He's also worried that there won't be enough assets to go around. If Roger's assets are exhausted by Eileen during her life, his older children from the prior marriage would get nothing.

The solution for Roger is life insurance owned by an **Irrevocable Life Insurance Trust** that allows Roger to balance the needs of Eileen, and his two older children. Roger uses some of his current income to pay the premiums on life insurance that will be owned by the trust. The Trust provides an immediate death benefit to Roger's older children, preventing friction between them and their stepmother. The older children won't complain about how Eileen is spending money from their father's estate, and Roger's other assets will be available to support Eileen and the younger children.

### Supplemental Needs Trust



Mr. and Mrs. Avery have three children, Andrew, Barry and Christopher. Barry has special needs. They have several choices:

- ▶ no special plans, and leave an inheritance to all three children. This would disqualify Barry from government benefits, and leaves no one in charge of managing his assets and care;
- ▶ disinherit the disabled child, leave assets to other children and hope the disabled child is cared for the way that the parents would want;
- ▶ make special written plans for the disabled child, including a **Supplemental Needs Trust** that protects the child's eligibility for public services and benefits, and designates a specific person responsible for Barry's assets and care.

Mr. and Mrs. Avery chose the Supplemental Needs Trust with a Trustee to protect Barry's independence, and manage his money so he's not disqualified from services and benefits.

### Income Only Irrevocable Trust



Because of a medical diagnosis, Ms. Inga Olney is not likely to qualify for long term care insurance. Inga decided that an **Income Only Irrevocable Trust** would be the best way to hold ownership of her home, and other assets. This Trust is Irrevocable, and it only provides Income to the Grantor (Inga).

If Inga applies for nursing home assistance from Medicaid 5 years after she funds the Trust, Medicaid should not consider her the owner of anything in the Trust. Unlike Medicaid, the IRS does consider Inga to be the owner of the Trust assets including her house. So, the house will still be covered by the Principal Residence Exclusion if the day comes when the house needs to be sold during Inga's lifetime. Inga can move to assisted living or condo using money from the house sale, and pay no capital gains tax.

More about Medicaid and Long Term Care at [MassHealthHelp.com](http://MassHealthHelp.com)

### QTIP Trust



Mr. Quinones has two children from a previous marriage. After the death of his first wife, he married Jennifer Quinn – Quinones.

Mr. Q set up a **QTIP Trust** for Jennifer. When Mr. Q dies, Jennifer will get lifetime income from the QTIP trust. Mr Q names his children as the remainder beneficiaries, so they will get the remainder of the property upon Jennifer's death. Jennifer has no power to change the beneficiaries named in the QTIP. Mr. Q can rest peacefully, knowing that his children from his first marriage will receive the assets remaining in the

trust after the death of Jennifer. No person has a power to allocate any part of the property to anyone other than the surviving spouse. The QTIP trust allows Mr. Q to balance his two estate planning goals:

- ▶ provide income for spouse Jennifer
- ▶ make sure that all of their remaining assets pass to his children.