THE LAW OFFICE OF
ARTHUR P. SKARMEAS, LLC
447 Boston Street
Topsfield, MA 01983
Tel: 978.887.0093
Fax: 978.887.7293
www.skarmeaslaw.com

ESTATE PLANNING – ADVICE FOR EVERYONE

One of the biggest misconceptions that people have is that estate planning is only for "old people." This could not be further from the truth. While having a proper estate plan in place is important as we age, the fact is that as you reach retirement age and beyond a good many of the obligations and responsibilities of life have receded. The fact is that if you were to pick a time when it is most appropriate to ensure that your affairs are in order it is when you are young with a family that has a future that depends on you. What if the unforeseen occurs and both parents are either seriously injured or killed in an accident? Who will take care of the children? What will happen to the family home? Who will manage the estate so that the children will be provided for? Who will make decisions for you if you are seriously injured or ill to the point where you cannot make decisions for yourself?

The fact is that without the proper estate documents in place you are leaving everything to chance. The sad part of that is that for so many it doesn't have to be that way. Spending a few hours and committing relatively little money everyone can be ready if the unexpected occurs. So, while having your affairs in order as you get older is of crucial importance, so to is it when you are young and particularly when people depend on you.

What documents should you consider?

THE WILL

The most common and well-known estate-planning device is a Will. The Will is a written instrument by which a person (testator/testatrix) is able to distribute his or her assets upon death. During the individual's life the Will is not operative and may be changed or revoked at any time. However, upon the individual's death the Will becomes operative and mandates the manner of distribution of one's estate.

The manner in which property is held during a person's lifetime, however, will have a bearing on whether it will pass under the Will. Property held jointly, as joint tenants, and property held as tenants by the entirety will not be distributed under the terms of the Will. If property is held jointly it will pass automatically to the surviving joint owner or owners upon the death of the other joint owner. If property is held as tenants by the entirety, the property will pass automatically to the surviving spouse. However, assets, which are not held jointly, can be distributed under the terms of the Will.

The most important benefit of creating a Will is that the individual is able to direct the distribution of his/her estate upon his/her death in whatever manner he/she desires. **The execution of a Will is the only way that you can be certain that your desires concerning your estate will be carried**

out. Absent a Will, a person's assets will be distributed according to the intestacy laws of Massachusetts. In that case, assets would pass to the heirs and spouse of the decedent in a manner and amount determined by statute instead of according to the wishes of the decedent.

In order for a Will to be valid, the testator/testatrix must have the intention to make the particular instrument his or her Will and must have the requisite mental capacity. For a formally attested Will (the usual kind) to be valid in Massachusetts, the following requirements must be met:

1. The testator/testatrix must be at least eighteen years old.
2. The Will must be in writing.
3. The Will must be signed by the testator/testatrix or someone else must sign for him/her in his/her presence and at his/her direction.
4. The testator/testatrix must sign in the presence of two attesting witnesses.
5. The witnesses must sign the Will in the presence of the testator/testatrix.

Once the Will is formally executed in accordance with the above, it will remain valid as written unless formally revoked or unless you change certain portions of the Will by the execution of a Codicil to the Will.

DURABLE POWER OF ATTORNEY

A Power of Attorney is a written instrument by which one person, as a principal, appoints another as his or her agent (attorney-in-fact) and confers upon that agent the authority to act in place of the principal for the purposes stated in the instrument. An ordinary (non-durable) power of attorney terminates upon the incapacity as well as the death of the principal. **Unlike an ordinary power of attorney, a Durable Power of Attorney is effective notwithstanding the disability or incompetence of the principal.** The Durable Power of Attorney permits the principal to exercise full control over his or her affairs until such time as incapacity occurs. Once incapacity or disability occurs the attorney-in-fact exercises those powers granted by him by the signed instrument. Attorneys-in-fact are commonly authorized to handle all such aspects of the following matters for a principal (**this is only a partial list**):

1. Real Estate and tangible personal property
2. Securities and bank accounts
3. Taxes
4. Retirement plans, insurance policies, and their benefit
5. Litigation on behalf of the principal
6. Management of the personal affairs of the principal, maintaining the customary standard of living of the family

One of the main benefits of this type of arrangement is that the principal is free to select his or her own agent rather than to be forced to rely on the judgment of a court to make the selection in a guardianship proceeding. Using a durable power also avoids the costs associated with court proceedings. Perhaps even more importantly, it is a definitive statement of your wishes and prevents unexpected family disputes when the time comes to act.

Creating a Durable Power of Attorney is not difficult. The power must meet several requirements.

1. It must be in writing.
2. It must contain the words, "this Power of Attorney shall not be affected by the subsequent disability or incapacity of the principal" or "this Power of Attorney shall become effective upon the disability or incapacity of the principal."
3. The principal must have legal capacity to make the appointment at the time the power is created.

As for termination, the Power of Attorney terminates when it is revoked by the principal, upon the death of the principal, or when it expires according to its own terms.

Unlike the Health Care Proxy (see below), the Durable Power of Attorney may be effective (depending upon the manner in which you have the document drafted) immediately upon execution.

HEALTH CARE PROXY

This document works much the same way as does a Power of Attorney. The Health Care Proxy designates someone to direct your medical care in the event you are unable to do so yourself. The person designated as the proxy holder is directed to see that the terms of any Living Will are respected (although the Living Will is not authorized by statute in the Commonwealth of Massachusetts). The Health Care Proxy must be in writing and signed by the principal in the presence of two other adults who must sign as witnesses. The witnesses must affirm in writing that the principal appeared to be at least eighteen years of age, of sound mind and under no constraint or undue influence. The proxy itself must:

1. Identify the principal and the health care agent
2. Indicate that the principal intends the agent to have the health care authority
3. Describe the limitation, if any that the principal intends to impose upon the agent's authority
4. Indicate that the agent's authority is effective upon the incapacity of the principal

The health care agent has authority to make any and all health care decisions on the principal's behalf that the principal could make, including decisions about life-sustaining treatment, subject, however, to any expense limitations in the proxy. The determination that a principal lacks the capacity to make his or her own health care decisions is made by the attending physician and will be in writing. Once the agent reviews that determination his or her authority commences.

The principal may revoke a Health Care Proxy by notifying the agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the proxy. The proxy is also revoked upon the execution by the principal of a subsequent proxy or on the divorce or legal separation of the principal and his spouse where the spouse is the health care agent.

The **Living Will** is generally a separate document that deals only with setting forth your wishes concerning end of life issues. In its most simple form it will instruct those responsible for your care that you do not wish to be kept alive by artificial means when there is no hope of any further meaningful life.

DECLARATION OF HOMESTEAD

Under Massachusetts's law, its owner may acquire an estate in homestead to the extent of $500,000 of a home occupied as a principal residence. The homestead may be declared in the original deed or may be declared in a separate document, which is recorded at the registry of deeds. The statute creating the homestead provides that an owner includes a sole owner, joint tenant, tenant by the entirety or tenant in common. Additionally, except in the limited circumstances noted below, only one owner may acquire an estate of homestead for the benefit of his family and that said homestead may be acquired on only one principal residence.

This Declaration of Homestead allows a homeowner to shield up to $500,000 of the owner's equity in the principal residence from the claims of certain creditors, thereby discouraging or preventing attempts by certain creditors to seize and force a sale of the home to satisfy a debt. The estate of homestead is exempt from attachment or levy on execution, and from the laws of conveyance, descent, devise, and sale for payment of debts or legacies except for the sale for non-payment of taxes, for a debt contracted prior to the acquisition of the homestead, for a debt contracted for the purchase of the owner's principal residence, and for the enforcement of child support payments.

An individual sixty-two (62) years of age or a disabled individual, regardless of age, may also declare his or her own homestead for $500,000. As such, for those couples over the age of 62, you may be able to obtain protection to the level of $1,000,000.00 under present law.

TRUSTS

A Trust is a fiduciary relationship with respect to property in which one person, the trustee, holds legal title to trust property subject to enforceable rights of another, the beneficiary. It is basically a device whereby one or more persons manage the property for the benefit of others. The trustee ordinarily has legal title to the property, while the beneficiaries have equitable (ownership) title.

There are two common types of Trusts (1) Revocable and (2) Irrevocable. In a **Revocable** Trust the terms of the Trust Agreement may be altered or amended or its creator may revoke the Trust. On the other hand, the terms of the **Irrevocable** Trust may not be altered or amended and the Trust may not be revoked. Whatever the form of the Trust, it is a private covenant for the management and disposition of property both during the creator's life and after his or her death.

One of the most important and desirable features of a Trust is privacy. The Private Trust Agreement is not available for inspection by the general public as is a Will after it is filed for probate. The public will not be able to find out how much was dealt with or to whom the Trust property went. Privacy could be useful if there is a good deal of money in a family that wishes to maintain a low profile. Privacy can also be appropriate if the creator wishes to do something with respect to the disposition of his or her assets that is unusual or embarrassing to the creator's family.

Another important feature of a Trust, if it is funded during the creator's lifetime, is that it will reduce probate expenses. Assets put into a Trust during lifetime do not become part of a person's probate estate upon death. These assets would pass to beneficiaries under the terms of the trust agreement without the

need of probate and its inherent costs. In addition to the saving of probate expenses, the use of a Trust to distribute assets upon death also reduces the time it would take for the beneficiaries to receive the assets. The probate process can take months while the trustee under a Trust can distribute the assets almost immediately.

There are many different types of trusts, each appropriate in different circumstances. To determine whether a trust is appropriate for your present situation you should contact your legal advisor to further inquire into this potentially valuable legal instrument.

LIFE INSURANCE TRUST

The Irrevocable Insurance Trust has, as a principal purpose, the avoidance of estate taxation on the proceeds of life insurance. It can be drafted in such a way that the trust assets, including policy proceeds, will be excluded from both the estate of the insured and the estate of the insured's spouse. This can be accomplished even though the spouse of the insured benefits from the trust assets while alive. **This advantage would not be available if the insured or the spouse owned the life insurance policy.** The popularity of this type of trust is due additionally to the relatively low gift tax cost of life insurance and the flexibility that the trust format can provide. This type of trust has become a very important estate-planning tool for use in solving a variety of estate planning problems, (e.g., estate liquidity, providing income for minor or disabled children, etc.).

The irrevocable insurance trust is typically established by the insured when the insured either irrevocably assigns to the trust an existing life insurance policy on his or her life or "purchases" a new life insurance policy with the trust as the initial applicant and owner. Irrevocable Insurance Trusts are categorized as follows:

1. **FUNDED** – This trust is one where the grantor, at the trust's inception, either irrevocably assigns to the trust both an existing insurance policy and the assets sufficient to fund the premium payments required to maintain the policy, or transfers to the trust the assets sufficient to both purchase a new insurance policy and make the premium payments required to maintain the policy.
2. **UNFUNDED** – This trust is one where the grantor, at the trust's inception, assigns only the insurance policy (or the funds necessary to purchase the policy). The funds necessary to pay the premiums are transferred in future years as premiums come due.

While the irrevocable insurance trust has much merit, it is not without its drawbacks. The primary disadvantage is the grantor's loss of control over the policy, including loss of the right to borrow against or make use of the policy's cash surrender value. Another disadvantage is that the trust is irrevocable. Once the grantor establishes the trust; he or she gives up the power to make changes. The trust will need to be irrevocable in order to obtain the desired estate tax savings.