

# LEGACY

*Looking Forward. Thinking Ahead.*

A NEWSLETTER FROM THE TRUST & ESTATE DEPARTMENT OF FLETCHER TILTON



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# MESSAGE FROM FRED MISILO

## CHAIR, TRUST & ESTATE DEPARTMENT



In the daily routine as a trust and estate attorney, I meet and talk with clients about the future for themselves and their families. In ordinary times, these discussions – absent an imminent health crisis – often have a theoretical or abstract expectation of future life altering events (i.e. onset of disability, need for long term care services, death, etc.) occurring at a distant point on their time horizon. So much has changed. We are not living in ordinary times.

Now, there is a sense of immediacy, relevance and urgency in my discussions with clients.

In recognition of our current environment, we've selected three important areas to cover in this edition of LEGACY. In his article, Attorney Dani Ruran describes the basic reasons why everyone needs an up-to-date estate plan in Massachusetts. One example he cites is the simple fact – one that is often overlooked or not understood by many people – that Massachusetts has the lowest estate tax threshold (\$1,000,000) in the nation. What does this mean? Simply this: If you die as an unmarried person owning over \$1,000,000 in property, the Commonwealth of Massachusetts will impose an estate tax on your estate. His article offers advice on how best to approach this issue.

The second area covered in this edition is the importance of trustee selection. An outright distribution of an inheritance must be avoided in a variety of estate planning situations. Your selection of a trustee has lasting consequences for the trust beneficiary. Toni Brogna, the Director of Trust Services, describes the responsibilities of a trustee and the options you should consider when selecting a trustee.

The third area covered in this edition by Attorney Meredith Greene describes the crucial issues of guardianship, and alternatives to guardianship, when planning for a family member with a disability. Attorney Greene's thoughtful and sensitive approach to this subject presents a helpful guide to parents who have a son or daughter with a disability.

I hope that you find the information contained in this newsletter helpful. I can be reached at [fmisilo@fletchertilton.com](mailto:fmisilo@fletchertilton.com) if you have any comments or feedback.

Stay safe!

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## Why You Should Have An Estate Plan

by Dani N. Ruran, Esq. | 508-459-8048 | [druran@fletchertilton.com](mailto:druran@fletchertilton.com)  
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We are often asked “Why do I need an estate plan?” If you have assets, are married, or have children, any of these is a reason to have an estate plan. An estate plan enables you to distribute your assets to the people you choose, in the manner you want them to be received, and to avoid costly probate and estate taxes. These goals are usually accomplished by a will and one or more trusts. Other components of an estate plan typically include a Health Care Proxy (sometimes called a Health Care

Power of Attorney) and a Durable Power of Attorney. These documents allow you to designate a trusted person to make healthcare or financial decisions for you if you become unable to do so yourself.

If you think the total value of your assets is too low to be subject to estate taxes, on the federal level, you may be right. But, on the state level, chances are good your estate is taxable.

The federal estate tax exemption amount has increased significantly; it was \$600,000 in 1997 and is now \$11,580,000. But the Massachusetts estate tax exemption has unfortunately remained at only \$1 million since 2006.\* Only 12 states have a separate state estate tax system, and Massachusetts is tied with Oregon for having the lowest exemption amount. (Five other states have a state “inheritance tax,” which taxes recipients who receive a decedent’s assets, rather than taxing the decedent’s estate itself as in an “estate tax.”) Because of the low Massachusetts exemption amount, many Massachusetts residents—including non-Massachusetts residents who own Massachusetts real estate—need to engage in appropriate estate planning with a qualified Massachusetts-licensed estate planning attorney to reduce the potential Massachusetts estate taxes on their estate assets.

In general, while taxable estates under \$11,580,000 owe no federal estate tax, Massachusetts taxable estates valued over \$1 million owe a Massachusetts estate tax. The Massachusetts estate tax is a graduated rate system, meaning that increasing levels of wealth are taxed at increasing tax rates. For example, the Massachusetts estate tax on a \$1,000,001 estate is \$33,200 (an effective 3.3% tax rate), but the estate tax on an \$11,000,000 estate is \$1,226,800 (an effective 11.2% tax rate). Note that the Massachusetts “taxable estate” does not include real estate or tangible personal property located outside Massachusetts, or Massachusetts real estate owned by a non-Massachusetts resident through a Limited Liability Company (“LLC”).

Two important estate tax reduction strategies to be aware of are:

1. By establishing “Credit Shelter Trust” estate plans, a married couple can double the Massachusetts estate tax exemption to \$2 million (\$1 million for each spouse), thus saving approximately \$100,000 in Massachusetts estate taxes, as compared to married couples who own their assets jointly. In general, a Credit Shelter Trust is a trust for the benefit of

\*In Rhode Island, the estate tax exemption is higher—\$1,579,922—but the tax is calculated differently.

**An estate plan enables you to distribute your assets to the people you choose, in the manner you want them to be received, and to avoid costly probate & estate taxes.**

the surviving spouse--holding up to \$1 million in assets--that is funded after the death of the first spouse. The surviving spouse or someone else may be the sole Trustee, or the surviving spouse and someone else may serve as co-Trustees. A Credit Shelter Trust avoids estate taxes at both spouses' deaths.

2. Single (non-married) individuals who have assets worth more than \$1 million and married couples who have assets worth more than \$2 million should consider making gifts during their lifetime to their children, grandchildren, and/or others. Gifts of up to \$15,000 per year per recipient are "annual exclusion gifts" that reduce one's federal and Massachusetts taxable estates. Additionally, payments of any amounts made directly to schools/colleges for (anyone's) tuition or made directly to (anyone's) medical or other health care providers are also exempt from federal and Massachusetts estate taxation. Note that lifetime gifts of amounts greater than \$15,000 per year per recipient avoid Massachusetts estate taxation entirely, but if the sum of these larger lifetime gifts and the value of one's Massachusetts taxable estate exceeds \$1 million, then a Massachusetts estate tax will be owed based on the value of the Massachusetts taxable estate, even if it is under \$1 million.

Each family has its own unique considerations. Fortunately, your estate plan can be customized with the best possible solutions for your situation. The estate planning lawyers at Fletcher Tilton, PC would be happy to speak with you if you have any questions or would like our help implementing your estate planning goals and wishes in the most tax-efficient manner. **FT**

## Does It Matter Who I Choose For My Trustee?

by *Toni P. Brogna, CTFA, CIS II* | 508-459-8080 | [tbrogna@fletchertilton.com](mailto:tbrogna@fletchertilton.com)  
*Director of Trust & Estate Services*



Choosing the right trustee to serve now or on trusts that may be created in the future is extremely important. In fact, choosing the right trustee may be one of the most important decisions you will make in your estate plan. The following details the trustee's responsibilities and discusses the pros and cons of different types of trustee.

### TRUSTEE RESPONSIBILITIES

A trustee, as the name implies, is someone who can be trusted to manage and administer the trust in an impartial way. The ideal trustee should be someone in whom you have the confidence to make decisions based on the directives you have spelled out in the trust document. Also important is that, after your death, the trustee should be someone who will make decisions the way you would have made such decisions had you been alive to make them: for the benefit of your spouse, family member, or, in some cases, a friend.

The best trustee has a combination of good interpersonal skills and solid technical skills with proficiency and awareness of the duties required. Consider also the type of trust to be administered. Is it a revocable trust, an irrevocable trust, a marital trust, a special needs trust, or something else? Is it a creditor protection trust that would require an independent trustee? Understanding the nature and complexity of the trust is crucial, as is understanding the tax implications on a given type of trust.

Administratively, the trustee has a duty to report--which means they are responsible for generating statements and sending annual accountings to all beneficiaries. They must



maintain detailed records, process transactions, and make sure that fiduciary income tax returns are prepared for the trust.

Trustees have a duty of loyalty. Making objective and unbiased decisions when dealing with beneficiaries who may have different and/or conflicting interests is critical. Therefore, knowing and understanding the family dynamics is helpful.

Trustees also have a duty to preserve trust assets and are responsible to make sure the trust account is productive. Therefore, they need to have some familiarity with basic investment concepts so that they make prudent investment decisions. If they lack investment know-how, they should know to hire an investment advisor who can guide them in sensible investment choices.

### THREE TYPES OF TRUSTEES

Given the nature of their responsibilities, who can you confidently choose to serve as trustee? Generally, there are three types of trustees: (1) an individual trustee who is, oftentimes, a family member or close friend; (2) a professional trustee; and (3) a corporate trustee. There are advantages and disadvantages to each.

#### *Family Member as Trustee*

When thinking about whom to choose as trustee, most people start by considering close friends and family members. Clearly, this group is the most familiar with you and your family, and they will understand your family's dynamics. But, are they really the best choice?

People often think an advantage of having a family member or close friend serve as trustee is the belief that a family member will waive trustee fees. But that can be a double-edged sword: serving as a trustee can be a lot of work. A family member who shoulders all the responsibilities of overseeing the administration of a trust and monitoring trust assets can easily become resentful if they are not receiving a fee. In cases where the beneficiaries are contentious or ungrateful, the trustee will resent putting in all the work for no recognition and no fee. On the other hand, the beneficiaries – not grasping all the work required of a trustee – may resent a family member getting paid from "their" trust assets if the trustee does take a fee. This can become an extremely uncomfortable situation and can damage familial relationships.

Another potential disadvantage to a family member as trustee is that they may be too close to the family and may get caught up in the drama. Or they may make emotional decisions because they are too close to the situation. In both cases, it may be better to

## Sometimes the clients with modest estates have the greatest number of choices to make.

choose someone with a little more distance who can remain impartial. Do not underestimate the possibility of drama during the distribution of your assets. It is amazing how old jealousies and resentments can emerge, along with feelings of entitlement toward assets which you are perceiving as a gift or windfall for your heirs.

### Professional Trustees

In most situations, your family may be better served by a professional trustee. Professional trustees bring expertise, structure and oversight. They often have the resources in-house to handle the entire administration process. Finally, professional trustees are better suited to make the tough decisions and tell beneficiaries “no” when appropriate and can remain impartial when beneficiaries do not get along.

You will pay for this service, but, in many instances, it will be money well spent. We have seen that, more often than not, a professional trustee can actually save you money. An individual trustee may lack the technical skills required and may need to hire investment advisors, tax preparers, and/or attorneys to help guide the process. All these expenses are paid from the trust, thereby depleting some of the principal.

One concern with professional trustees is that they do not know the family well enough. While it may take time to develop a successful trustee relationship, professionals are accustomed to this role and are quickly able to grasp the nuances. Once the trustee relationship has developed, there is consistency in how the family members are treated. This aspect takes a professional trustee relationship beyond what a corporate trustee may be able to offer.

### Corporate Trustees

This brings us to the third option: the corporate trustee. The corporate trustee is usually a bank or trust company. The relationship here is not with an individual, but with the trust company or bank itself. They offer the same impartiality as a professional trustee, and, certainly, the knowledge and depth of resources.

The main drawback to a corporate trustee is that banks and trust companies may be hard to remove as trustees and are often inflexible. They also tend to be tightfisted in making distributions. Further, having a corporate trustee may slow the distribution process as most requests need to go through a committee. Frequently, a Trust Advisor or Trust Protector must step in to advise.

## CONCLUSION

All three types of trustees are viable options and, depending on the trust and situation, one type might be a better choice than the other. But what if you cannot decide which is better for you or your family? Well, you do not necessarily have to limit yourself to one or the other.

First, consider co-trustees. Why not name your sibling/cousin, or other family member or close friend as the individual trustee, along with a professional trustee? Your family member will be most familiar with the family dynamics, but the professional trustee can

handle all the trust administration and make the tough calls when needed. Having one trustee who is more emotionally involved can work well when balanced by an independent professional trustee who has the technical resources, is emotionally removed, and can remain impartial enough to make objective decisions.

Second, or maybe this should be first, talk to your lawyer and other advisors and discuss your specific situation, the type of trust you need, what you need it for, and all your concerns. Their experience can help guide you to make the right decision for you and your family. **FT**

## Guardianship and Alternatives

by Meredith H. Greene, Esq. | 508-532-3515 | [mgreene@fletchertilton.com](mailto:mgreene@fletchertilton.com)  
Chair, Special Needs Practice Group



In Massachusetts, the law dictates that all individuals are presumed legally competent to make their own decisions upon reaching adulthood at age 18. All adults are afforded the right to privacy relative to their medical information, the right to enter into legal contracts, and the right to make their own life choices. If an individual is unable to make and communicate decisions relative to his/her own safety and care, the Massachusetts Probate Court can appoint a guardian to make medical, educational, and legal decisions for such person. If an individual is able to make his/her own decisions but would benefit from a trusted support system to make life decisions, there are alternatives to guardianship that establish such a support system. Parents and family members of a loved one who is turning 18 and has a developmental delay, an intellectual disability, or a mental health condition, should consider whether their child requires a court-appointed guardian or whether they would be better served by a support system to help them make decisions for themselves.

### GUARDIANSHIP

The Probate and Family Court Department of the trial court in Massachusetts has jurisdiction over the appointment of a guardian and/or conservator for an incapacitated adult. The Petitioner (the individual who requests the guardianship action) must provide documentation to the court that the alleged “Protected Person” (the individual in need of guardianship) has a clinically diagnosed condition rendering him/her unable to receive and evaluate information well enough to make and communicate decisions that would meet essential requirements for physical health, safety, and self-care—even with appropriate technological assistance.

The Petitioner must file medical documentation evidencing the Protected Person’s inability to make decisions for him/herself. For those individuals with an intellectual disability, such medical documentation must be in the form of a Clinical Team Report (“CTR”). The CTR must be signed by a licensed psychologist, a social worker, and a physician. Each of these professionals must be experienced in the evaluation of persons with an intellectual disability and must examine the Protected Person within 180 days of the petition for guardianship being filed. If the petition for guardianship is filed close to the individual’s 18th birthday, the timing might work out such that the school psychologist and social worker who participated in a school’s three-year re-evaluation process are eligible to sign the CTR.

If the Protected Person is not intellectually disabled, a medical certificate signed by a registered physician, certified psychiatric nurse clinical specialist, nurse practitioner, or licensed psychologist must be filed based on an evaluation of the Protected Person within 30 days of filing the petition for guardianship with the court. There must also be a medical certificate based on an evaluation of the individual within 30 days of the final hearing. Typically, the final hearing is more than 30 days after the initial filing of the petition, which means this must be a second, updated medical certificate.

The Petitioner is required to provide notice of the guardianship petition by in-hand service to the Protected Person as well as to a number of interested people. Notice of the petition must be mailed to the Protected Person's immediate family members, anyone living with the Protected Person, those who have had care and custody of such person within the last 60 days, the current guardian/conservator (if any), and the current representative payee (if any), as well as the Department of Developmental Services for those individuals with an intellectual disability.

A guardian, once appointed by the court, has the responsibility to make day-to-day decisions for the Protected Person, including decisions relative to legal proceedings, educational development, medical care, advocacy, and obtaining appropriate adult services. The guardian should consider the Protected Person's own desires, preferences and thoughts in making appropriate decisions and should encourage independent decision-making to the extent the Protected Person is able to make decisions relative to his/her own well-being.

A guardian of an adult does not have the broad powers that a parent of a minor child has, regardless of the guardian's familial relationship to the Protected Person. There are limitations to the types of medical decisions that a guardian can consent to without obtaining court approval. These limitations include the authority to treat with antipsychotic medications, sterilization, abortions, electro-shock therapy, psychosurgery, some level III behavior modification plans, and the withdrawal of life support. Additionally, a guardian must have court approval to admit the Protected Person to a nursing home for longer than 60 days or to commit such individual to an in-patient mental health facility.

Once appointed, the guardian has a duty to report to the court on the condition of the Protected Person. Such reporting is required 60 days after the initial appointment as well as annually. The guardian must give a copy of such report (called a Guardian Care Plan Report) to the Protected Person prior to filing it with the court.

### ALTERNATIVES TO GUARDIANSHIP

There exists a misconception in society that all individuals with disabilities, particularly intellectual disabilities, require a guardian to make decisions for them in order to protect them from exploitation. However, many individuals with disabilities are capable of making decisions relative to their health, finances and life choices as long as they have the correct support system in place. There are statutory alternatives to guardianship that allow for the individual to retain his/her right to make choices, to advocate for him/herself, to express his/her own choices, and to formalize a system of support for such choices.

**A Guardian of an adult does not have the broad powers that a parent of a minor child has, regardless of the guardian's familial relationship to the Protected Person.**

A health care proxy is a document signed by an individual ("Principal") who is at least 18 years old, that designates a health care agent to make medical and health care decisions for the Principal if he/she is unable to make or communicate such decisions for him/herself. The health care agent has the ability to employ medical professionals and to consent to medical treatment or hospitalizations. The health care agent has access to medical information in order to make medical decisions. The authority for an agent to act can be revoked at any time by the Principal. Any decisions made by such agent can be overruled by the Principal.

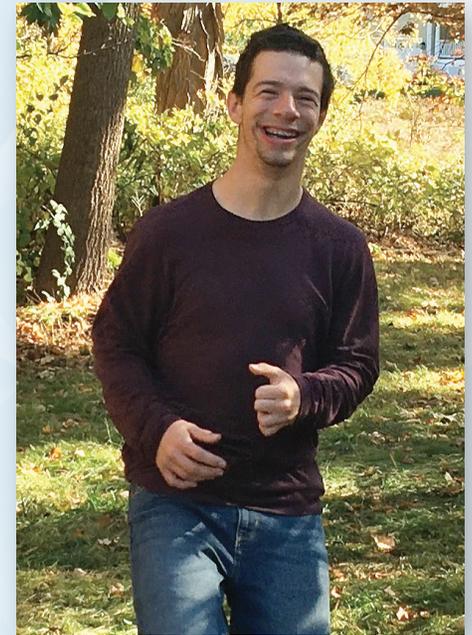
The durable power of attorney is a legal document signed by the Principal appointing someone as "attorney-in-fact" to perform a broad variety of acts on the Principal's behalf. The attorney-in-fact may deal with the Principal's finances, property or legal matters. The law allows such appointment to be effective even upon a subsequent determination of the Principal's incapacitation. Similar to a health care proxy, the durable power of attorney is valid only so long as the Principal does not revoke it.

We suggest that individuals with a disability who require educational supports, or who may receive government benefits as an adult, also execute an appointment of advocate. In this form (created specifically by Fletcher Tilton PC), the Principal would designate an advocate to work with the school system or the appropriate adult service organization, such as the Department of Developmental Services (DDS), Department of Mental Health (DMH), or Massachusetts Rehabilitation Commission (MRC). This would enable the advocate to sign an Individualized Education Plan (IEP), an Individual Service Plan (ISP) in order to receive notifications from agencies and entities providing services to the Principal, and to allow for such agencies and entities to communicate with the appointed advocate.

In addition to naming an agent, attorney-in-fact, and advocate, as described above, the Principal should designate individuals as successor agents, attorneys-in-fact and advocates should the primary agent be unable to continue to serve in their roles.

### CONCLUSION

Every individual has the right to dignity, respect, and self-determination. Regardless of whether that individual has substituted decision-making through a guardianship or supported decision-making through health care proxies and advocates, the parties who are responsible for decision-making must take extreme caution to promote and ensure independence and self-advocacy within the best interest of the Protected Person/Principal to every extent possible. Both guardians and agents/advocates should take the time and effort to understand and effectuate the preferences and desires of the individual for whom they have the honor of making decisions. **FT**



## FIRM NEWS



**FLETCHER TILTON VOTED THE WINNER** in the category of **Special Needs Legal Assistance** by the readers of *Boston Parents Paper*.

See the 2020 Family Favorites Reader's Choice awards in the August issue of *Boston Parents*.



**ATTORNEY MICHAEL T. LAHTI**, Chair of the Elder Law group, is recognized by *Rhode Island Monthly* for **Excellence in Law** in their May/June 2020 issue.



**FRED MISILO SPEAKS ABOUT PROTECTING THE RIGHTS OF PERSONS WITH DISABILITIES.** In his capacity as President of the Arc of the United States, Chair of Fletcher Tilton's Trust & Estate Department, Fred Misilo, Jr., speaks with Naveh Eldar from BlueCross BlueShield of Tennessee about the mission of The Arc and its roots as a civil rights organization fighting for the rights and inclusion of individuals with intellectual and developmental disabilities. They discuss several initiatives such as: Criminal Justice, Health, Employment, and Travel.



This is followed by an eye-opening conversation of how persons with intellectual and developmental disabilities are sometimes penalized by a system that doesn't understand their needs. Educating the community—not just professionals—is key to making progress here. To hear the conversation, visit [FletcherTilton.com/firm-news](http://FletcherTilton.com/firm-news).

**GOING VIRTUAL.** Some estate planning meetings can be handled virtually. If you are quarantining, ask your FT attorney whether a virtual meeting makes sense for you.



Dennis Gorman, Esq.



Dani Ruran, Esq.



Collin Weiss, Esq.



## UPCOMING WEBINARS

Remaining 2020 events will be **LIVE WEBINARS**. Check website for details.

**Estate Planning** with attorney Michael Lahti

- Thur., September 10, 2020 | 10:00-11:30 a.m. | Live Webinar
- Tues., September 22, 2020 | 10:00-11:30 a.m. | Live Webinar
- Tues., October 13, 2020 | 10:00-11:30 a.m. | Live Webinar
- Wed., November 4, 2020 | 10:00-11:30 a.m. | Live Webinar
- Tues., November 17, 2020 | 10:00-11:30 a.m. | Live Webinar

**Housing & Supported Decision-Making** with attorneys Frederick Misilo, Jr., Theresa Varnet and Meredith Greene

- Wed., September 30, 2020 | 6:00-8:00 p.m. | Live Webinar

**How to Administer a Special Needs Trust** with Fletcher Tilton's Special Needs Practice Group

- 3 sessions: Thurs., November 5 | All Live Webinars
- Tues., November 10 | from 6:00-7:30 p.m.
- Thurs., November 12 | Check website for details.

For details and registration, visit [FletcherTilton.com/seminars-events](http://FletcherTilton.com/seminars-events)

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