

PERENNIAL ESTATE PLANNING GUIDE



WRITTEN BY

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What is Estate Planning?

Estate planning is the process of anticipating and arranging the management and distribution of your property at your death or incapacity. In Massachusetts, the typical basic estate plan consists of three documents: your Will, Durable Power of Attorney, and Health Care Proxy. Almost all of my clients also get a Revocable Living Trust (which I will cover in the second section of this guide), but if you are looking to understand the minimal estate planning documents then the first section of this guide should provide you with the basic information you need going into your initial estate planning meeting.

Although estate planning is traditionally thought of as something that only older people do, all families are beginning to understand the importance of doing proper estate planning as soon as they have their first child (or earlier if they have substantial assets or a complex family situation).

Why? Because an estate plan can substantially reduce the emotional and financial burden placed on your family by allowing you to provide well thought out legal instructions for a variety of situations that may arise in the future - ultimately giving you peace of mind in knowing that your wishes will be fulfilled and followed if something were to happen to you.

However, if you fail to properly plan your estate then your family will likely need to go through the court system (also referred to as the probate process), which is an often drawn out and expensive legal process. Fortunately for you, by being proactive and reading through this guide, you'll quickly learn what you need to do today to prepare your family for the future.

The Perennial Estate Planning Guide is divided into two sections. The first section will cover the basics, which include:

1. Understanding Your Will
2. Understanding Your Power of Attorney
3. Understanding Your Health Care Proxy

The second section will dive into Revocable Living Trusts and touch upon estate planning issues at a high level, including:

1. What a revocable living trust is and how it is used
2. Why your family may want to establish one for estate planning purposes, and
3. Common trust structures used by residents of Massachusetts.

While this guide is intended to focus on the essentials, we understand that estate planning can be a complex and sometimes overwhelming topic. So if you would like clarification on any material covered in this guide or have additional questions, please feel free to contact Perennial Estate Planning by emailing JLento@PerennialTrust.com or calling (781) 202 - 6368.

Enjoy!

A handwritten signature in blue ink, appearing to read "Joseph M. Lento".

Joseph M. Lento, J.D.

Attorney & Owner of Perennial Estate Planning

PART 1: THE BASICS

1. Understanding Your Will

Your Will is the basic foundation of your estate plan. It not only instructs how your probated assets will be distributed, but also appoints your executor (also known as your personal representative) to handle your estate, and guardians to care for your minor children, if applicable. It's important to note that your Will only controls the distribution of assets that pass through probate. So, for example, if you own property that is titled jointly with rights of survivorship then that property will pass automatically to the survivor, or the other person who jointly owns the property, rather than going through probate. Similarly, if you have bank or retirement accounts with an individual listed as a beneficiary then that too will pass outside of probate and therefore outside of your Will. Most importantly, if you title other assets (like real estate) in the name of your Revocable Living Trust, then such assets will also fall outside the scope of probate and therefore not be governed by your Will (except to the extent that your Trust references back to your Will for tax and debt related purposes).

So why should you have a Will if you can just title assets jointly or put beneficiaries on your accounts so that nothing flows through probate? The first reason is that not all assets carry a legal title or are in an account that allows a beneficiary designation - for example, think of all your tangible personal property (or physical stuff you own) in your name individually. Secondly, you'd have to constantly monitor the value of all your assets and re-title and update beneficiary designations depending on how much you wanted to leave to each of your beneficiaries. Third, you would need contingency plans in place. For example, if the person you were leaving the property to predeceases you or is a minor and cannot manage the property themselves.

Even the most simple Will solves all these problems by following a distribution pattern in which everything passes to your spouse, if then living, otherwise to your children equally by right of representation. Right of representation means that if a child were to predecease you or die before you, then that child's children (i.e. your grandchildren) would take the place of the predeceased child and split the assets equally among themselves. To take it one step further, you

could have provisions put in place so that assets transferring to minors or young adults are placed in a Trust until they reach a certain age. For clients that have a Living Trust in place, they will use what is called a pour-over Will, which means any assets that pass through probate will be pushed into the Trust to make sure everything is accounted for.

If you do not have a Trust, then a Will can pinpoint specific details such as who should receive your most sentimental possessions, whether certain assets should pass free of debt (legally known as exoneration), how you would like taxes and/or expenses to be apportioned, whether real estate or hard assets should be sold immediately to avoid fighting amongst family members or if you want a child to have the right of first refusal. There are also provisions that are intended to accelerate the probate process with the least amount of hassle and expense such as waiving surety on a bond (something that your personal representative may otherwise have to obtain at your estate's expense), specifying that you would like to have an unsupervised administration (once again to reduce delay and expenses), and listing the powers of your personal representative that would otherwise need court approval (like the license to sell real estate).

Once again, for those of you who would prefer to avoid the probate process as much as possible, you could use a Revocable Living Trust - covered in a later section in this guide.

2. Understanding Your Durable Power of Attorney

Your Durable Power of Attorney for Finances is a document that nearly every adult should have regardless of whether they have a family. It allows you to name a person to make financial decisions on your behalf and this power remains in effect even if you become incapacitated (that is why it is called "durable"). While many people think that their spouse can already access their accounts and make decisions on their behalf without legal documents, that is not always the case. For example, if you own your home as tenancy by the entirety then that requires both spouses' signatures in order to sell the home. In the event that one spouse becomes incapacitated or is not able to sign for whatever reason, then you will need to get court approval before being able to move forward with the sale. Another common problem that spouses face is

accessing retirement accounts without their other spouse's authorization because of federal laws governing these accounts. Once again, it can be a headache if you do not already have a durable power of attorney in place and are forced to get court approval before handling such matters.

It is also worth noting that the durable power of attorneys allows you to name multiple agents simultaneously. So, if you have more than one person that you trust with your finances (or if you prefer to have some sort of check and balance) then you could name two people as co-agents and have them act jointly or individually on your behalf. You may also name alternatives or back-up agents in the event that the first person you name is unable to serve for whatever reason. Most importantly, you can make your durable power of attorney as broad or as narrow as you like, which allows you to tailor the document to your specific needs and concerns.

When considering what powers to give to your agent, it's important to consider whether any conflicts of interest exist or if certain powers would have negative tax consequences on your agent. For example, if your agent has complete control over gifting your assets or amending trusts then that could be viewed as a general power of appointment, which is something you generally want to avoid. Lastly, while this may be obvious, it is worth noting that you should carefully consider the person's financial expertise and ability to handle stressful situations. Oftentimes trust alone doesn't make for a good financial agent.

3. Understanding Your Health Care Proxy

Your Health Care Proxy is a document that allows someone to make medical decisions on your behalf. In other words, while a durable power of attorney covers your finances, the health care proxy covers your physical well-being. However, unlike the durable power of attorney, a health care proxy only comes into effect when the person is unable to make decisions for themselves and only one person can be appointed as your health care agent at any given time. You can still name alternatives or back-up health care proxies and it is common for health care proxies to include language that recommends the agent consult with physicians, siblings, or other family members before making a decision.

While Massachusetts doesn't have a legally binding advanced healthcare directive or living will, it is common for the health care proxy document to include language that briefly explains your wishes in terms of whether you would like to be resuscitated, put on artificial life support, and how to handle other medical situations, all of which are designed to relieve your health care proxy of some of the decision making burden. Once again, such wishes are merely suggestive rather than legally binding, but can nonetheless be very helpful in guiding your agent towards making the right decision for you.

PART 2: REVOCABLE LIVING TRUSTS:

1. What is a Trust?

A trust is a legal agreement consisting of three roles:

1. The **Grantor** (aka Donor/Settlor) - the person who makes the rules/instructions and contributes property to the trust;
2. The **Trustee** - the manager of the trust and its property who must follow the instructions set out by the Grantor; and
3. The **Beneficiary** - the person who receives the benefit of the property placed in trust.

A trust can have multiple grantors, trustees and/or beneficiaries and these roles can shift depending on the circumstances.

“Revocable” means the trust can be amended or revoked at any time so long as the Grantor is alive and mentally competent. This is in direct contrast to an “irrevocable” trust (outside the scope of this guide) which generally cannot be changed. Since most clients prefer to have the flexibility to adjust their trust to meet changing family circumstances, revocable trusts are much more common than irrevocable trusts.

A “Living” trust means that the trust has been created during the life of the Grantor as opposed to being created upon the Grantor’s death.

2. The Benefits of a Revocable Trust

The most common reasons to create a revocable living trust are:

1. To avoid Probate (a Public Court Process);
2. To maintain Confidentiality since a Living Trust is a private document;
3. Add protection for your children’s inheritance;
4. Potential to minimize Massachusetts and Federal estate taxes; and
5. To make sure your property goes to who you want, how you want, when you want (maximum control and security).

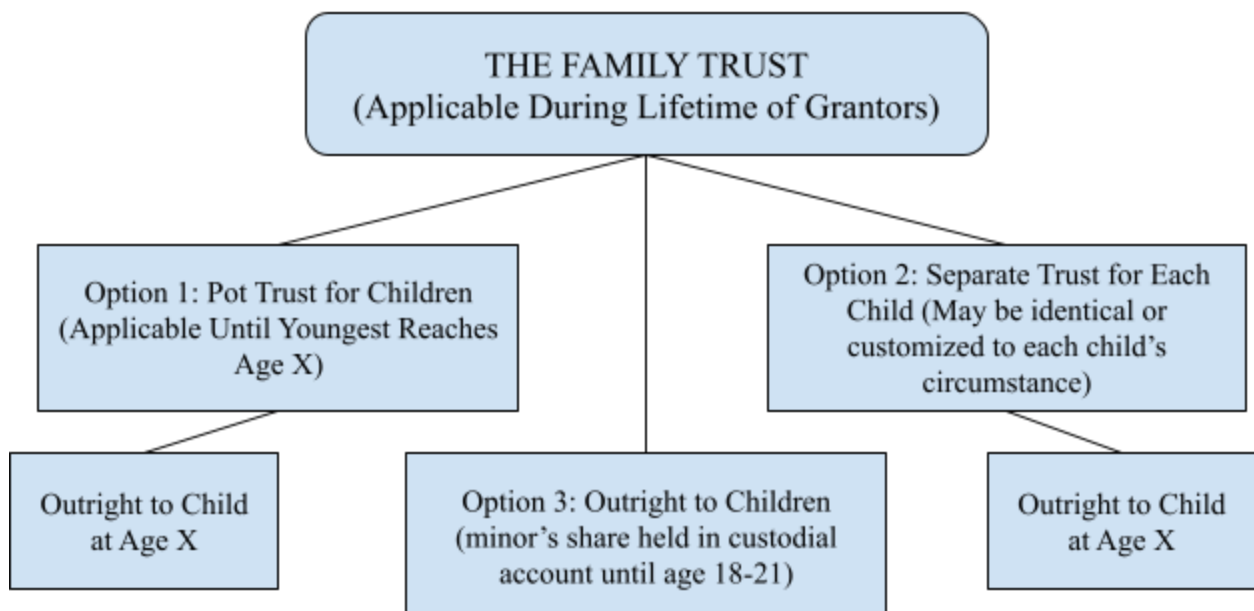
Unlike a Will, which becomes part of a public court process when utilized, a trust is designed to be private and stay private. This means that your family can handle everything themselves without having to deal with government oversight, delays and expenses.

Put differently, a **well-structured trust makes the transition of property to loved ones as stress free and convenient as possible.**

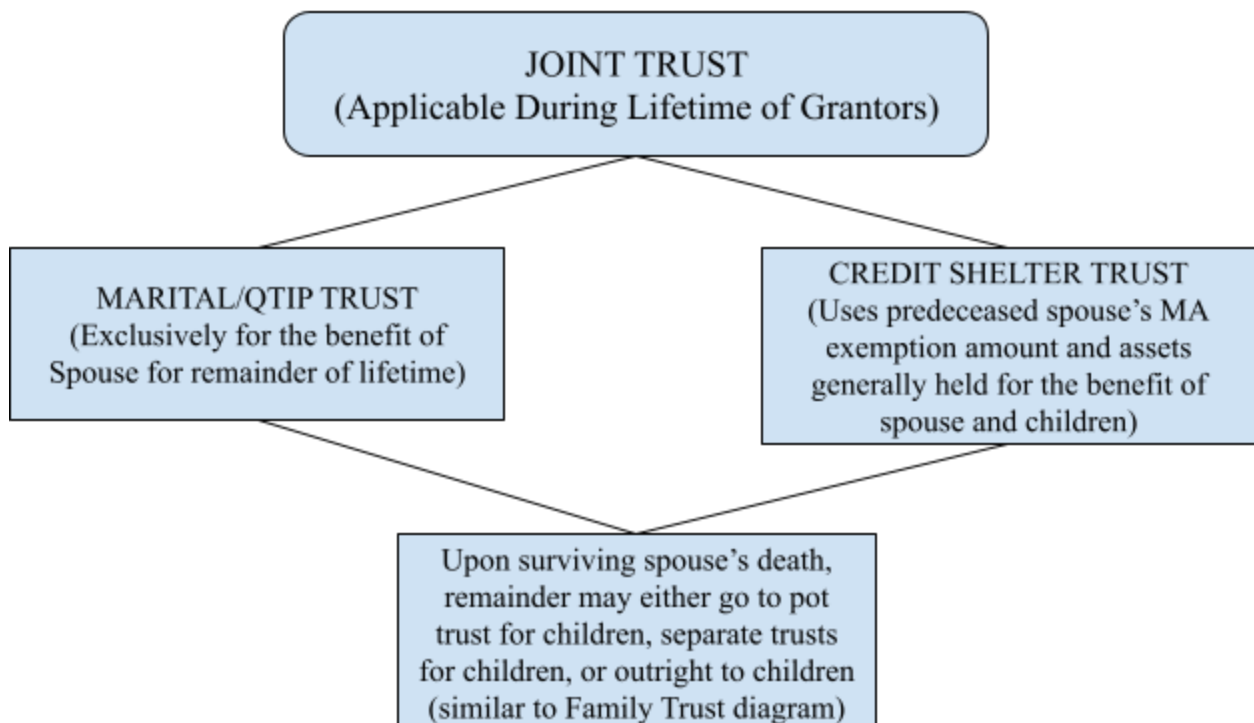
3. Common Massachusetts Trusts

The following are three different structures of revocable trusts that are common in Massachusetts:

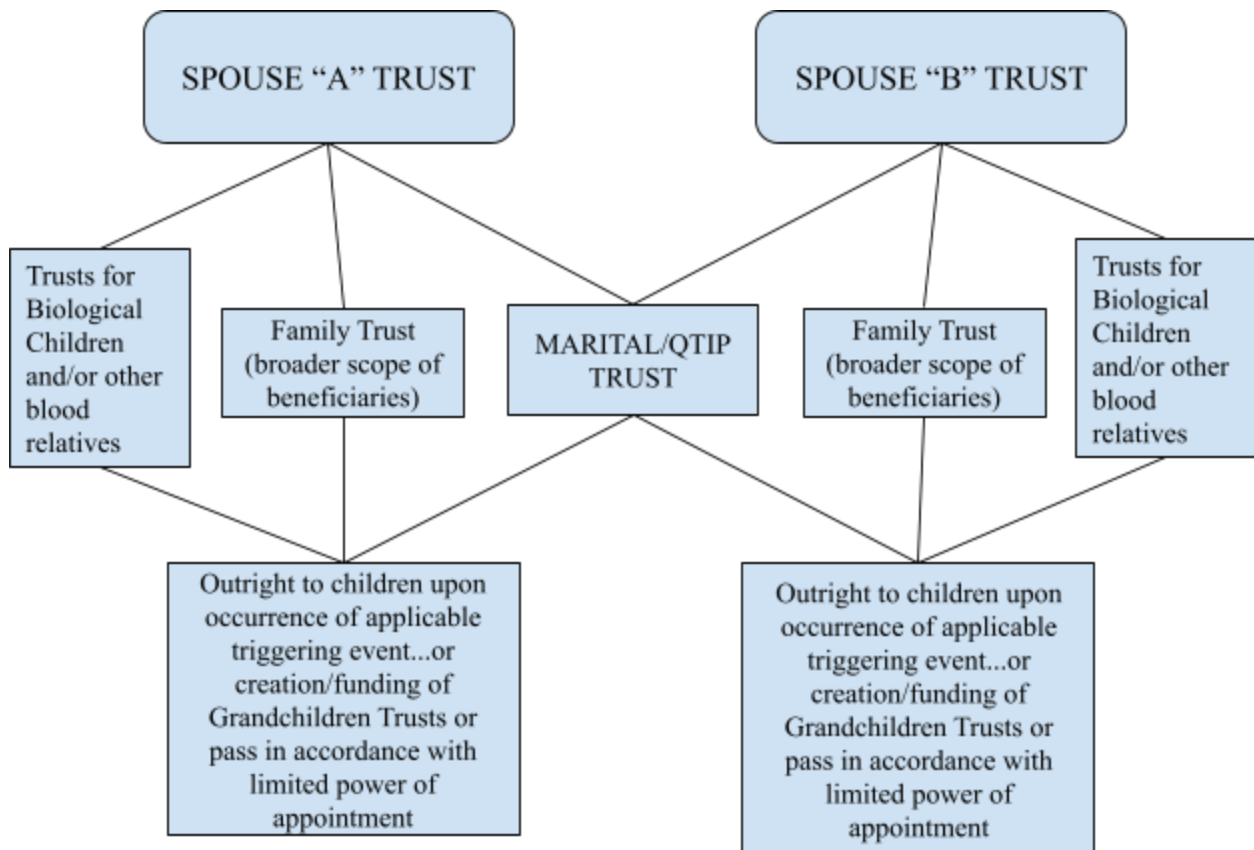
1. **The Family Trust.** Common for married couples with children who have less than \$1,000,000 in property and unmarried individuals with children. For married couples, this trust typically allows the surviving spouse complete access or almost complete access to trust property after the death of the first spouse. Upon the surviving spouse's death, the property may be held in trust until the children reach a certain age. During this time period, the children may receive the benefit of the property for certain types of expenses (e.g., healthcare, education, basic necessities, etc.). Generally, as long as assets are held in trust for the benefit of your children then there is the advantage of asset protection - in other words, it creates a legal protective barrier from your children's potential creditors, bankruptcy and/or divorce if the trust is drafted appropriately.



2. **Joint Trust with Marital Trust & Tax Credit Shelter.** Common for married couples who have a combined estates somewhere between \$1,000,000 - 6,000,000. While you could technically use this type of trust for clients with total net assets equal to the current federal estate tax exclusion amount (\$11.7 million in 2021), it is not recommended for reasons I'll explain in #3. This trust is similar to #1 except upon the first spouse's death the property may be split between two trusts - one designed to take advantage of the Massachusetts estate tax exemption amount ("Credit Shelter Trust") and the other designed to use the unlimited marital exclusion ("Marital Trust/QTIP Trust"). The type and amount of property held in each trust will vary depending on your family's preferences. The distribution provisions and controls will also have to account for your family's specific needs. Most importantly, you have to balance the needs of your spouse with the needs of your children or other beneficiaries. For example, while you may want to provide for your spouse, if your spouse's standard of living requires only a portion of the assets, then you may want your children to benefit (or at least have the option to benefit) from some of the property while your spouse is still alive. You may also be concerned about the possibility of remarriage or a new significant other's influence on the situation. There is also the possibility of divorce, lawsuit, bankruptcy, and creditors that should be protected against. It's these types of concerns that will determine the controls you and your attorney put in place.



3. **Separate Individual (non-Joint) Revocable Trusts with various sub-Trusts.** Common for second marriage persons (i.e., blended families) or married couples with greater than \$6,000,000 in assets or individually owned businesses. Having separate individual trusts allows each Grantor more control over their individual property, isolates assets for creditor protection purposes, and also helps for estate tax purposes if/when laws change in the future (sunset expected in 2025). For example, as of right now the current federal estate tax exclusion could revert back to half of what it currently is by 2026 - at which time it is estimated to be somewhere between \$6 - 7 million depending on inflation. Similar to #2, this type of trust will likely split into at least two different trusts upon the death of the first spouse, but could further split to account for the gap in Federal and Massachusetts estate tax laws (QTIP elections can be different between Massachusetts and Federal estate tax returns). You could also have different trusts for certain children, grandchildren, or other beneficiaries under varying instructions. The more complex the family scenario and/or property typically means a more comprehensive solution that must be worked out with your attorney.



Closing Remarks

Congratulations! If you understand the above material, then you now know more than most do about the benefits of estate planning and how these legal instruments can help you gain peace of mind and protect your family's future.

We hope you found this guide to be helpful and encourage you to share it with your family and friends. If you are interested in completing your own Revocable Living Trust, Will, Durable Power of Attorney, and Health Care Proxy, then please feel free to contact Perennial Estate Planning by calling (781) 202 - 6368, emailing JLento@PerennialTrust.com, or using our online scheduling tool at PerennialEstatePlanning.com.