

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



This edition of *Legacy* provides examples of the wide breadth of expertise and perspectives of a comprehensive trust and estate practice. The Britney Spears conservatorship saga offered by Attorney Lauren Miller is an excellent demonstration of the benefits of using a durable power of attorney, a trust and a health care proxy. If Britney Spears had developed these documents, it is highly likely that the protracted litigation, unfavorable publicity and exorbitant legal fees would have been avoided. More importantly, the person or persons who would be in place to assist her with her financial and personal decision-making would have been the persons **she chose** in those documents, not someone appointed by a judge. In many instances, when a guardian or a conservator is appointed for a person who was previously capable of managing her or his property and of making informed decisions about health care, there is a missed opportunity to plan appropriately on the part of that individual.

“Aging in place” is a term that has become common parlance in our culture. Our home, our neighbors and our community are big parts of our identity. These are where we feel we belong. So it is important that we become familiar with strategies and opportunities that can maximize our capacity to “age in place” with hope of continuing our relationships and memberships within the community we call “home”. Attorney Mia Lahti’s article describes the “Village Movement” as one strategy that is growing in popularity throughout the country. As a member of the Coastal Neighbors Network covering Dartmouth and Westport, Attorney Lahti credibly articulates the usefulness and potentialities of these community-based efforts. This grass-roots movement has significant potential to shape community-based supports for an aging population.

With the growth of multi-national companies and employment opportunities spanning the globe, our Trust and Estate Department is increasingly called upon to provide guidance to non-U.S. citizens. Understanding the distinctions under U.S. gift and estate taxation applicable to non-U.S. citizens is critical in providing competent legal advice in this area. Attorney Dani Ruran’s article describes the structure and purpose of a foreign grantor trust which can be a useful tool for non-U.S. citizens who are interested in lowering taxes in certain situations.

Trust and estate work is, at its core, about protecting assets from a variety of potential risks throughout a person’s lifetime. A common question for many people is, “How can I protect my home from long-term care costs?” Building on years of experience in using nominee trusts, and using the guidance of a 2021 ruling from the Massachusetts Supreme Judicial Court, Attorney Michael Lahti describes the advantages and limitations of using a nominee trust to protect one’s property from the costs of long-term care.

I’m excited to share with you that the Fletcher Tilton Trust and Estate Department will be developing a podcast titled “It’s Your Legacy.” This podcast will be released later this year. As host, I’ll be introducing listeners to the attorneys within the Trust and Estate Department as well as others who have important and timely information to share about matters relating to trust and estate work. So, stay tuned for future announcements about the release and content of these podcast episodes.

I hope you find this edition of *Legacy* useful. Please contact me or any of the authors with questions or requests for more information.

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Understanding the Conservatorship of Britney Spears and Less Restrictive Alternatives

by Lauren E. Miller, Esq. | 508-459-8044 | lmiller@fletcherilton.com



Late '90s and early 2000s pop star Britney Spears has been making headlines lately that have nothing to do with her illustrious singing career. Ms. Spears has been under conservatorship for more than a decade, and she has filed several pleadings in recent years to express to the court her disapproval of the control that her father continues to maintain over her finances.

In 2008, after Ms. Spears underwent a series of involuntary psychiatric hospitalizations, the Los Angeles Superior Court placed her under conservatorship and named her father, Jamie Spears, along with an attorney, Andrew Wallet, as co-conservators. At that time, the court appointed Mr. Spears and Mr. Wallet as conservators of the person and the estate of Ms. Spears. Analogous to the nomenclature under California law, in Massachusetts, these same designations are identified as guardian of the person and conservator of the estate.

The role of a guardian of the person is to make all decisions about the individual’s support, care, health, and welfare. In contrast, a conservator of the estate is responsible for managing all financial affairs on behalf of the individual, and has a fiduciary duty to act in the best interest of the person under conservatorship. Both guardianship and conservatorship will be granted by the court only if there has been a determination of incapacity. Under the Massachusetts statute, an incapacitated person is defined as an individual who has a clinically diagnosed condition that results in an inability to make or communicate decisions so that “the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance” M.G.L. Ch. 190B, Section 5-501(9). Both California and Massachusetts laws require that a guardian and/or conservator be appointed only if there are no other less restrictive alternatives available. While the court filings in these types of proceedings are typically public record, the court has the ability to seal the records in certain cases. In addition, medical documentation evidencing incapacity is automatically sealed by statute in Massachusetts and California.

In the case of Ms. Spears, the court placed her under conservatorship of the person and the estate in 2008. In 2019, Mr. Wallet resigned as co-conservator, and in 2020, the court appointed a corporate conservator, Bessemer Trust, to serve as co-conservator of the estate

alongside Mr. Spears. For more than a decade Mr. Spears has maintained total legal control over his daughter's assets.

Controversy and debate regarding the necessity of the conservatorship stems from Ms. Spears' repeated attempts to remove her father as her conservator. Ms. Spears' fans have become known for staging protests outside Los Angeles courthouses during her conservatorship hearings, bringing further attention to these already high-profile proceedings. In addition, the *New York Times* recently released a documentary, *Framing Britney*, that details Ms. Spears' life and the conservatorship saga. One critical piece of information that has been kept from the public is any and all medical evidence that details to the court why the conservatorship, or Mr. Spears' involvement, is necessary and in the best interest of Ms. Spears. To date, the court has denied all of Ms. Spears' petitions to completely remove her father as conservator of her estate. In 2019, Mr. Spears stepped down as conservator of the person and was replaced by a temporary conservator of the person, Jodi Montgomery, who was chosen by the court.

In certain limited cases, because of the medical diagnoses of the individual or other circumstances, guardianship and conservatorship are unavoidable upon an individual's incapacity. However, in the large majority of cases, the expense, time, and public nature of these court proceedings can be avoided by executing certain legal documents. For example, in Massachusetts, a Health Care Proxy is a document that allows an individual to appoint an agent to make health care decisions on his or her behalf if he or she becomes incapacitated. Typically, the authority of a health care agent is invoked only upon a determination of incapacity by a physician.

For financial decisions, there are two common ways to avoid the need for conservatorship: through a Power of Attorney or through a Trust. A Power of Attorney is a document that allows an individual to designate an agent to make financial decisions on his or her behalf. A "durable" Power of Attorney is effective immediately upon execution, whereas a "springing" Power of Attorney requires a doctor's determination of incapacity to be invoked. A Trust is a fiduciary arrangement that allows a grantor (trust creator) to transfer legal title to property to a trustee, to be managed on behalf of a beneficiary or beneficiaries. Typically, for a simple, revocable trust, a client will be named as the grantor, trustee, and beneficiary of the trust while he or she is alive and has capacity, and will name a successor trustee who can step in if he or she becomes incapacitated (or passes away).

One benefit of each of these documents is that they typically avoid the need for court involvement and oversight when an individual becomes incapacitated because the individual legally designated someone to make medical or financial decisions on his or her behalf while he or she still had capacity to do so. Another benefit of these documents is that the terms are private, which means that the details of the individual's finances and wishes will not be available in any publicly accessible records. Finally, these documents allow an individual to choose in advance who will be responsible for important medical and financial decisions at the point that he or she can no longer make such decisions, rather than leaving the decisions to a judge. If court involvement becomes necessary, the court will also weigh heavily the incapacitated person's preferences for the guardian and/or conservator stated in his or her legal documents.

Ms. Spears' conservatorship case is unusual because of her celebrity, her young age, and her multimillion-dollar estate. Without the ability to review the full legal record in her case, including all medical evidence, it is difficult to determine whether conservatorship may have been avoidable for Ms. Spears. However, in the vast majority of cases, executing the proper estate planning documents prior to incapacity can forestall the need for guardianship and conservatorship. **FT**

How Can a "Village" Help You?

by Mia H. Lahti, Esq. | 508-459-8213 | mhlahti@fletcherilton.com



In our work as estate planning and elder attorneys, we find that most people prefer "aging in community" – that is, living at home independently for as long as is safely possible. However, as we age, we encounter an increasing number of physical challenges as well as isolation. The "Village Movement" seeks to support older residents who wish to stay safe and independent while also being connected to their communities.

The Village Movement was developed on Beacon Hill in 2002, and now consists of more than 300 Villages across the country. These Villages are membership-driven, grassroots nonprofit organizations that are run by volunteers and paid staff. Village services can include transportation, simple home repairs, and social and educational events. Villages also maintain a list of local, vetted and discounted vendors to help members live comfortably and safely at home.

I have been a Board member of my local Village in Dartmouth, Massachusetts, the "Coastal Neighbors Network," which now covers both Dartmouth and Westport, MA. Coastal Neighbors, with the leadership of its Executive Director and volunteers, was able to assist all our service members in getting their COVID-19 vaccinations. Anyone who has tried to navigate the online or phone-in registration for vaccines can appreciate how important that kind of assistance can be!

Although the pandemic initially limited the kinds of in-person services that Coastal Neighbors could provide, the services providing rides to medical appointments have continued, as well as virtual social and educational programs. There is an annual membership fee, and many Villages like Coastal Neighbors have scholarship funds if the fees are too steep. Then there's the choice of joining as either a member who supports the organization and participates in social activities, or as a member (single or couple) who receives services from the vetted and trained volunteers, and who can also participate in Village-sponsored activities.

If you want to find out if your community has a Village, you can visit the Village to Village Network's website (vtvnetwork.org) and, under the "About" tab, click on "Village Map." Or check out the website for Helpful Village (helpfulvillages.com), and under "Village Movement" click on "Find a Village near you!" If you find that you don't have a Village in your community, Helpful Village can assist in starting one. The Village Movement approach can help communities develop their own Villages, and allow seniors to comfortably and confidently age in their own homes. **FT**



“Foreign Grantor Trusts”: Non-US Persons Can Provide for Children Living in the US While Avoiding US Gift, Estate and Income Tax

by Dani N. Ruran, Esq. | 508-459-8048 | druran@fletcherilton.com



Rather than gifting assets directly to a child (or other individual) living in the United States who is subject to US income tax (which would then subject the assets to US income tax), someone who is not a “United States Person” (not a US citizen or a US permanent resident/“Green Card” holder) may transfer assets to a “Foreign Grantor Trust” for the benefit of such child (or other individual). Doing so with appropriate assets can exempt the trust property from US (and state) gift, estate and income taxation while the trust continues to be a Foreign Grantor Trust. (Only “US source income” earned by the trust – for example, dividends from shares of US corporations – is subject to US income tax.)

A Foreign Grantor Trust is a trust in which either: (a) the Grantor reserves the right to revoke the trust alone or with the consent of a related party, or (b) the Grantor (and spouse, if any) is the sole trust beneficiary during the Grantor’s lifetime. (While typical trusts require a foreign Trustee in order to be considered a foreign trust for US income tax purposes, a Foreign Grantor Trust need not have a foreign Trustee.) Assuming the Grantor wants a child to be a beneficiary immediately, the Grantor would use trust type (a), above – that is, reserve the right to revoke the trust. By reserving the right to revoke the trust, the Grantor’s gifts to the trust – regardless of the type of asset – avoid US gift tax, and by reserving the Grantor’s right to distribute trust property to anyone during her lifetime, the trust assets qualify for a “step up” in basis at the Grantor’s death, for capital gains avoidance purposes, thus reducing potential capital gains tax on the gifts when they are sold after the Grantor’s death.

Different US gift and estate taxation rules apply to non-US Persons, as compared to US Persons. First, US Persons are currently entitled to an \$11.7 million combined gift/estate



tax exemption, while non-US Persons only have a \$60,000 gift/estate tax exemption (unless modified by applicable treaty). Second, while US Persons are subject to such taxation on “worldwide assets,” (a) non-US Persons are subject to US gift tax only on gifts of real or tangible personal property located in the US, including gifts of US or foreign currency or cash within the US (gifts of shares of US corporations are not subject to the gift tax); and (b) non-US Persons are subject to US estate taxation only on US situs property (real or tangible property located in the US, but including shares of US corporations).

Therefore, typically, non-US Persons will transfer US bank accounts or shares of foreign corporations to such a trust (which are exempt from gift tax regardless of which type of Foreign Grantor Trust is used – type (a) or (b), described above). Then, interest on those accounts and dividends from such shares are not subject to US income tax during the Grantor’s lifetime, even if distributed to the US trust beneficiaries (instead they are treated as gifts from the Grantor requiring reporting to the IRS on Form 3520), and at the Grantor’s death, these accounts and shares are not subject to US estate tax.

As the best structure of such trusts and the best type of assets to be gifted to and held by such a trust depend on your personal situation, please contact us to learn how a Foreign Grantor Trust might help in your circumstances. **FT**



The Massachusetts Nominee (or “Realty” Trust) Perhaps a New Tool to Protect One’s House

by Michael T. Lahti, Esq. | 508-459-8212 | mLahti@fletcherilton.com



Imagine you are observing an estate planning appointment. At some point, you would hear the client say, “I want to protect my assets.” It is a common request. It is why people *do* estate planning. They want to protect their assets. The real question is, “Protect them from what?”

There are many risks. Lawsuits, divorce, bankruptcy, long-term medical (i.e., nursing home) costs, loss of public benefits, taxation, probate and even mismanagement by the beneficiary themselves are common ways property can be taken from you or your heirs.

This article will address merely a small segment of asset protection, that being how the use of a Massachusetts Nominee Trust, or as it is commonly known, a “realty trust,” may now offer another option to protect one’s real estate.

When is a trust not a trust? The answer might be when you have a *nominee trust*. A nominee trust is not a trust at all. It is more accurately a principal-agent relationship. An agent (the “trustee” named in the instrument) acts at the behest of an undisclosed principal (the person or persons listed on the “schedule of beneficial interest”).

When is a trust not a trust? The answer might be when you have a nominee trust. A nominee trust is not a trust at all. It is more accurately a principal-agent relationship.



The nominee trust keeps the “real” owner’s identity private,¹ allows for off-record transfers,² and facilitates partial property ownership.³ Traditionally these qualities, and the potential that unscrupulous persons might abuse them, made nominee trusts highly suspect and therefore less than optimal as a tool for protecting one’s residence from long-term medical costs.

People often assume that nursing homes “take” their houses. In 2021 in Massachusetts, the house is an *exempt* asset unless the equity surpasses \$906,000. It should be made clear that the house (and any other assets, for that matter) will never be “taken.” What does happen is that when one goes into a nursing home and MassHealth⁴ is needed to pay the costs, *countable* (non-exempt) assets need to be spent down before MassHealth coverage begins.⁵ At that point, a *lien* is placed on real estate⁶. The lien is collected upon death from one’s probate estate.⁷

The inherent advantages of the nominee trust put MassHealth at a distinct disadvantage. Because of this, MassHealth routinely lumped together and treated nominee trusts in the

- ¹ Do not conflate privacy with asset protection. In a lawsuit, the holders of the beneficial interest are “discoverable.”
- ² The holders of the beneficial interest can simply assign ownership to another without the necessity of recording anything at the registry of deeds.
- ³ This allows different parties to own different ownership interests in the property, which can be useful when spouses are trying to balance wealth between them, when smaller ownership interests are transferred or, now, when different types of ownership interests are desired (for instance, when one party holds the life interest and another holds the remainder interest).
- ⁴ In Massachusetts, MassHealth is the agency providing and coordinating medical benefits in a nursing home setting when assets have depleted for the person needing care.
- ⁵ One cannot have more than two thousand dollars (US \$2,000).
- ⁶ Optimally, at that point the house will be protected. But if it is not protected, you would at least want it to be deemed as an exempt asset so that MassHealth coverage would commence without further assets needing to be spent, and the amount eventually recovered from the equity of the house will be at the lower state rate MassHealth pays compared to the cost for nursing homes that one would have to pay privately.
- ⁷ If the real estate does not pass through probate, the lien does not attach to it and the property is “protected.”

same fashion as typical revocable trusts and counted the assets inside them.⁸ Recently, the Supreme Judicial Court of Massachusetts addressed this issue in *Guilfoil v. Sec’y of Exec. Off. of Health & Hum. Servs.*, 486 Mass. 788, 162 N.E.3d 627 (2021), “Guilfoil.”

In *Guilfoil*, the nursing home applicant placed her residence inside a nominee trust. The nominee trust was typical in many ways but differed from the norm in other vital areas. In *Guilfoil*, the nominee trust could be revoked only with the consent of *all* holders of the beneficial interest, and the applicant retained only a life estate.^{9 10}

The court contrasted the retained life estate to other forms of direct property ownership interests such as joint tenancy, tenancy in common and tenants by the entirety. It noted that a life estate holder could not unilaterally amend the terms to alter the beneficial interest. The court further explained that because a life estate does not permit an individual to sell the home and distribute the proceeds, a life estate in one’s primary residence does not render the property a countable asset for MassHealth.

The court’s decision in *Guilfoil* will likely result in the increased use of nominee trusts as a planning tool to protect one’s property. The advantages of nominee trusts of privacy, off-record transfers and ease of creating partial property interests will entice many people. But keep in mind that although the decision in *Guilfoil* might add a powerful new option for the estate planner and his or her clients, it is no panacea, as planning must still fit within the parameters of the law. Protective planning like this involves an inherent loss of control over the property and must be established at least five years before the MassHealth application itself. Still, nominee trusts may now be a unique and helpful tool that our clients might use for protecting their houses.

Protecting one’s house (and other assets) from long-term medical costs is not “do it yourself” estate planning and should only be considered with the help of an experienced estate planner. Should you have concerns regarding the advantages (and disadvantages) of such planning, please reach out to one of the attorneys at Fletcher Tilton PC, and we will be happy to guide you through the process. **FT**

⁸ All assets inside a revocable trust are countable assets for MassHealth purposes.

⁹ Typically, in nominee trusts, any holder of beneficial interest can cause the trust to be revoked and assets distributed.

¹⁰ A “life estate” is temporal and allows a person merely the use of the property for his or her lifetime.

ATTORNEY SPOTLIGHT



Lauren E. Miller is an Officer in the firm’s Trust and Estate Department. Her practice focuses on elder law, special needs planning, guardianships and conservatorships, MassHealth Applications and MassHealth appeals. She serves as an advocate for her clients who are in a nursing home, and helps advise families regarding the legal and financial implications of aging in place, moving to an assisted living or moving to a nursing home. Ms. Miller also advises clients regarding asset protection strategies both in advance of the need for long-term care or in crisis situations when the client has done no advance planning.

Who Needs an Estate Plan?

by Lauren E. Miller, Esq. | 508-459-8044 | lmiller@fletchertilton.com



If 2020 has taught us anything, it is to hope for the best, but plan for the worst. This also holds true when it comes to estate planning. While most people plan to live a long, healthy life, it is important to have certain legal documents in place in the event that you fall ill or pass away. Who needs an estate plan? While this is not an exhaustive list, here are a few important factors to consider:

1. Anyone over the age of 18 should have a Health Care Proxy and Power of Attorney. If you do not designate someone to make health care and financial decisions for you prior to becoming unable to do so, the state will decide who has this authority through a time consuming and expensive court process called guardianship and conservatorship.
2. Parents with minor children or children with a disability should have a Will and a Trust. In Massachusetts, a Will is the only place a parent can designate a legal guardian for a minor child or disabled adult child. A Trust can hold assets until children are mature enough to receive outright distributions, or for the duration of the beneficiary's life.
3. Anyone who owns real estate should consider avoiding probate. Certain assets can pass directly to a beneficiary upon your passing. However, if you own real estate in your name, even if you have a Will, it will require that your estate is probated to transfer your real estate to your beneficiaries. A Trust can avoid the need for probate and provide other valuable protections. **FT**

FIRM NEWS

RECOGNIZED BY 2021 EDITION OF BEST LAWYERS®

Two attorneys from Fletcher Tilton's Trust & Estate Department have been recognized in the 2021 edition of *Best Lawyers*®. Congratulations to **Rick Barry** and **Fred Misilo**.



Richard Barry, Jr.
Trusts & Estates



Frederick Misilo, Jr.
Elder Law

Recognition by *Best Lawyers* is based entirely on peer review. *Best Lawyers* employs a sophisticated, conscientious, rational, and transparent survey process designed to elicit meaningful and substantive evaluations of the quality of legal services.



FLETCHER TILTON WINS "BEST LAW FIRM" DESIGNATION IN BEST OF CENTRAL MA READER'S CHOICE CONTEST

17,960 Telegram & Gazette/LocaliQ readers voted in the 2020 Best of Central MA Contest, casting a total of 324,000 votes. Fletcher Tilton PC garnered 383 votes, making the firm first place winner in the category of "Best Law Firm."

Congratulations to all our legal professionals whose high quality work inspired T&G readers to vote for us—you are all winners! And "Thank you" to everyone who voted—your recognition inspires us.



UPCOMING WEBINARS

Guardianship & Alternatives with attorney Meredith Greene

Thursday, May 13, 2021 | 7:00-8:30 p.m. | Live Webinar

Turning 18: Transition Considerations for Your Child's Future with attorney Meredith Greene

Thursday, May 20, 2021 | 12:00-2:00 p.m. | Live Webinar

Estate Planning with attorney Michael Lahti

Tuesday, May 11, 2021 | 10:00-11:30 a.m. | Live Webinar

Tuesday, June 1, 2021 | 10:00-11:30 a.m. | Live Webinar

Tuesday, July 20, 2021 | 10:00-11:30 a.m. | Live Webinar

Tuesday, August 3, 2021 | 10:00-11:30 a.m. | Live Webinar

Tuesday, August 31, 2021 | 10:00-11:30 a.m. | Live Webinar

Tuesday, September 21, 2021 | 10:00-11:30 a.m. | Live Webinar

For details and registration, visit [FletcherTilton.com/seminars](https://www.fletchertilton.com/seminars)

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