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*Plan Your Estate  
Plan For Your Future*

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## **PLAN YOUR ESTATE** **PLAN FOR YOUR FUTURE**

Everyone who is interested in preserving their assets for the benefit of others, reducing estate taxes, protecting personal autonomy and maintaining financial independence should consider establishing plans to do so as soon as possible. There are several primary estate planning tools that are applicable to almost every individual.

### **LAST WILL AND TESTAMENT**

#### **Who needs a Will?**

Everyone should have a Will to ensure that upon their death their assets will pass to whomever they intend. These intended recipients are called beneficiaries and may include family members, friends or even charities.

#### **What if I don't have a Will?**

If a person dies without a Will, the assets that remain at the time of his or her death will pass according to state intestacy law. This means that the state will determine to whom and in what proportion the assets will be distributed. Sometimes this leads to unintended consequences.

**Example #1:** Mr. S. dies without a Will. He leaves behind a wife and three independent adult children. Under New York's intestacy laws, the first \$50,000 plus ½ of what remains in the estate will pass to his wife. The remaining ½ will be divided equally among the children. However, Mr. S. wanted his wife to get his entire estate.

**Example #2:** Mr. S dies without a Will. He leaves behind 2 grandchildren from his predeceased child, John, as well as 3 grandchildren from his predeceased son, Sam. The intestacy statute provides that the estate will be divided 5 ways, among the 5 grandchildren. However, Mr. S. wanted John's children to get John's entire share.

**Example #3:** Belle, an 89 year old single woman, disliked her only sister and wanted to leave her estate to her cousin who had cared for her throughout the years. However, Belle never got around to preparing a Will, and upon her death, Belle's entire estate passed to her sister pursuant to New York's intestacy laws.

**Example #4:** Mr. X is a widower without children or family, but with many beloved friends and various charitable interests. However, if Mr. X dies without a Will, none of his assets will go to friends or charity. Instead, New York intestacy laws will be applied and result in his estate "escheating," or passing to the state.

### **What if I already have a Will?**

Every Will should be reviewed at least every five years to make certain that it continues to accurately reflect the testator's wishes. A change in circumstances often creates undesirable results when an old Will is probated on behalf of a testator.

### **What is Probate?**

Probate is the process of proving the validity of the will in Surrogate's Court. The appropriate Surrogate's Court is determined by the county in which the decedent resided at the time of his or her death.

There is often discussion regarding avoiding the time and expense of probate. If you are concerned about the potential detriment of probate in your situation, consult an elder law attorney so that your circumstances may be assessed in light of your concerns.

### **How else can a Will help me?**

Wills can accomplish numerous goals in addition to effectuating your general wishes for property distribution. One of the most important reasons for making a will is to nominate an executor instead of leaving the estate's management to a court appointed administrator.

For parents of minor children, their wishes regarding appointment of a guardian may be made known through a Will.

For parents of a disabled child, a "special needs trust" can be included in a will to ensure that the child's supplemental needs are met without jeopardizing the child's right to various government benefits.

Where a parent or a grandparent would like to provide for a beneficiary who may not be sufficiently responsible to manage such a windfall, a Will may be drafted which distributes the asset in increments or at the discretion of a trustee.

Charitable distributions may be provided for within a Will.

A Will may also be used to expressly disinherit someone who you do not wish to receive any portion of your estate (except a spouse).

### **How do I prepare a Will?**

It is strongly recommended that you consult with an attorney who is experienced in estate planning to draft your Will. An attorney will assist you in recognizing all likely contingencies, and will help to ensure that your true intent is reflected in your Will.

## **POWER OF ATTORNEY**

### **What is a Power of Attorney?**

A Power of Attorney is a legal document that allows an agent to act on behalf of another individual (called a principal) with regard to financial and personal matters. The Power of Attorney is essential, especially if the principal becomes incapacitated or is otherwise unable to handle his or her affairs. It is also useful to have a Power of Attorney if the principal is planning to be away from home for an extended period of time. Generally, signing a comprehensive Power of Attorney is a method of ensuring that

someone whom the principal trusts is able to protect the principal's interest in the event that he or she is unable to do so for himself or herself.

**For all powers of attorney executed on or after September 1, 2009, the power of attorney must be signed, dated and duly acknowledged, not only by the principal but also by the agent. Further, major gifting by the agent on behalf of the principal will now require a second form, called a Statutory Gifts Rider which has additional requirements regarding the appropriate signing. It is essential that an elder law attorney draft the power of attorney for a senior to ensure that all estate and Medicaid planning provisions are added to the document.**

### **Who should have a Power of Attorney?**

Everyone should have a Power of Attorney. Accidents and illnesses may occur at any time and a Power of Attorney will help minimize some of the potential inconveniences during such difficult times. However, all seniors over 60 years of age should strongly consider signing a power of attorney with added estate and Medicaid planning provisions.

### **What is a "Durable" Power of Attorney?**

A Durable Power of Attorney is a Power of Attorney that is executed when the principal has capacity and remains in effect in the event the principal becomes incapacitated. Generally, this is the most useful type of Power of Attorney for individuals who are concerned about someone acting on their behalf when they are unable to act for themselves.

**Effective September 2009, all Powers of Attorney are durable and not affected by the later incapacity of the principal, unless specifically stated otherwise in the "modifications" section of the Power of Attorney.**

### **What if I change my mind after I execute a Power of Attorney?**

A Power of Attorney is revocable by the principal. To do so, the principal need only destroy the Power of Attorney instrument and notify any financial institutions at which the agent may have acted on behalf of the principal or at which the principal has accounts.

### **What if I don't execute a Power of Attorney?**

If a Power of Attorney has not been executed and a person becomes unable to handle his or her financial matters, it may become necessary for someone - a family member, a creditor or someone else - to go to court to have a guardian appointed. Guardianship proceedings are authorized pursuant to Article 81 of New York State's Mental Hygiene Law and often become very costly and time consuming.

## **HEALTH CARE PROXY**

### **What is a Health Care Proxy?**

A Health Care Proxy is a document whereby an individual (the “principal”), appoints an agent to make health care decisions on his or her behalf in the event the principal is unable to do so. Health Care Proxies are governed by New York State statute.

### **How is a Health Care Proxy different from a Living Will?**

While a Living Will is an advance directive made directly by a person specifically indicating his or her wishes, a Health Care Proxy solely covers the appointment of an agent to make substituted health care decisions, effectuating the wishes of the principal.

### **What does a Health Care Proxy cover?**

Generally, a Health Care Proxy empowers an agent to make any and all health care decisions on behalf of the principal. These decisions may include issues relating to medications, therapy, the change of treating physicians, and any other issues that arise in the course of medical treatment. Under New York State law, unless your agent knows your wishes about artificial nutrition and hydration (feeding tubes), the agent will not have the authority to make decisions about these measures.

### **Who do I appoint as my Health Care Proxy?**

The person you appoint as your Health Care Proxy should be someone who you know well and with whom you have discussed your health care wishes. Your Health Care Proxy should be someone who is capable of making difficult decisions under the most trying circumstances.

## **LIVING WILL**

### **What is a Living Will?**

A Living Will is an advance health care directive that expresses the health care wishes of an individual. A Living Will is typically utilized when there is a medical diagnosis of a persistent vegetative state with no hope of recovery. New York State does not have a Living Will statute.

### **What do I do with a Living Will?**

Once executed, copies of a Living Will should be given to the appointed health care agent as a direction of the individual’s wishes. The individual should keep the original document and should make its whereabouts known to the health care agent.

## **OTHER TOOLS USED FOR ESTATE PLANNING**

### **What is a Revocable Living Trust?**

A Revocable Living Trust is an agreement between an individual (settlor) and a trustee whereby the trustee holds assets for the benefit of the settlor. The trust is funded by the settlor. Hence, title of some or all of the settlor's assets must be transferred into the trust. The settlor may maintain control of the trust assets by naming himself or herself as trustee during his or her lifetime and/or capacity. Thereafter, a successor trustee (usually one of the settlor's children) may be appointed to assume these responsibilities in relation to the trust.

A Revocable Living Trust is often considered a substitute for a Will. If drafted properly, a Revocable Living Trust enables the passing of an individual's assets without the need for probate. However, in addition to a Revocable Living Trust, the settlor should also have a "pour-over" Will to account for any assets that may not have been placed into the trust prior to the settlor's death.

### **What is a Qualified Personal Residence Trust?**

A Qualified Personal Residence Trust enables a person to put his or her home into a trust that allows such person to reside in his or her home for a term of years, at the end of which the house passes to the trust beneficiaries. This results in a "gift" to the beneficiaries at a fraction of the home's value, which reduces the estate tax burden substantially. However, there are significant income tax and practical considerations in drafting a Qualified Personal Residence Trust and it is advised that an experienced estate planning attorney be relied upon to draft such a trust.

### **Can I make Gifts to reduce the value of my estate?**

Yes, gifting is one of the easiest and most effective methods for an individual to reduce the size of his or her estate. The most often utilized gifting strategy involves making annual exclusion gifts of up to \$14,000 per donee every calendar year. (Spouses may make annual gifts of \$28,000 per donee.) Gifts exceeding this amount will subject an individual to potential gift taxes, so such gifts should be made with the advice of an estate planning/elder law attorney and an accountant.

### **What about Life Insurance?**

Life insurance is said to be one of the last true tax shelters. If purchased by the correct entity, life insurance can create tremendous estate tax planning benefits. A key factor in evaluating the benefit of a life insurance policy depends on determining who is the owner and beneficiary of the policy. Such significant issues must be discussed with an attorney and an insurance agent prior to purchasing a policy for estate planning purposes.

### **Should I consider purchasing Long Term Care Insurance?**

Long term care insurance may be purchased to cover nursing home and home health care costs. Long-term care insurance is a great idea for healthy individuals who are between the ages of 40 through 80 and who have adequate assets. However, long-term

care insurance can be expensive and may be cost-prohibitive for senior citizens who do not have adequate income and resources.

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