

ESTATE PLANNING WITHOUT AN OBVIOUS REPRESENTATIVE

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CHECKLIST

- Durable Power of Attorney
- Health Care Proxy
- MOLST
- Will
- Beneficiary designations
- Trusts

Durable Power of attorney

- New York General Obligations Law Section 5-1501 *et seq.*, provides the statutory forms for powers of attorney, and allows for a wide range of transactions. Powers of Attorney must be executed by a person while competent and will survive incapacity.
- The Power of Attorney must be signed and accepted by the Agent.
- The Power of Attorney does not automatically revoke prior Powers of Attorney, unless it specifically states otherwise.

Durable Power of attorney

- Powers of Attorney are effective immediately. You can do a “Springing Power of Attorney” which becomes effective upon incapacity, but generally not recommended.
- May be used in conjunction with a Personal Services Agreement

Durable power of attorney

- There is a box for Agent compensation. If no provision is made, the Agent can not be compensated. Also, reasonable compensation can be specified in the Modifications section.
- The POA also allows for choosing a Guardian if necessary. Not legally binding.

Advance directives

1. **Health Care Proxy**

Public Health Law Section 29C provides the statutory form to appoint an agent to make health care decisions for another. The Health Care Agent becomes the decision-maker when the principal is incapacitated.

2. **Family Health Care Decisions Act**

New York adopted a law 2010 which allows family members, domestic partners and close friends to make health care decisions in the absence of a Health Care Proxy. Although the statute provides a prioritized list of relationships to designate the patient's decision maker, individuals should choose their health care agents using a Health Care Proxy, as the FHCDA is a default statute

3. **MOLST**

Medical Orders for Life Sustaining Treatment. Gives specific instructions to medical personnel regarding end-of-life decisions. Signed into law in 2008 in New York. Must be signed by a physician.

Wills

If No Will is Prepared and No Trust Funded - What Happens?

The assets pass as controlled by N.Y. law (and not as you necessarily want) as follows:

- ❖ If survived only by spouse (no children or parents) - everything to spouse;
- ❖ If survived by spouse and parent or parents (no children or grandchildren, great grandchildren, etc.) entire estate to spouse
- ❖ If survived by spouse and any children (or grandchildren of deceased children) - \$50,000. plus 1/2 of estate to spouse, 1/2 of estate to children or grandchildren;
- ❖ If no spouse, children or parents, then to grandchildren and further descendants, if any; and if no descendants, then to brothers or sisters or their issue.
- ❖ **NOTE:** Adopted children and illegitimate children of decedent have same rights as biological and legitimate children (except illegitimate children only have inheritance rights from deceased father if they prove paternity).

Wills

- **Executors and administrators cannot act until appointed by the Court.**
- **Usually entitled to statutory commissions based on size of the estate.**
- **If attorney is serving as executor, attorney may be entitled to legal fees also, but must be disclosed at the execution of the Will.**

Information for Will

- Instructions for burial, cremation, organ donorship may be set forth but should also be set forth in a separate document since Will may not be readily available at death; use an Appointment of Disposition of Remains for burial instructions.
- Specify items of personal property to specific individuals;
- To whom you want bulk of estate distributed (spouses have right of election and must receive greater of 1/3 of estate or \$50,000, regardless of the Will.);
- Set forth a substitute beneficiary if main beneficiary is not around;
- If a trust is necessary for minor children, grand-children, disabled dependents, etc. - name of trustee and terms of trust (i.e. age, when minor child will be entitled to receive assets);

Assets Not Controlled by Will

- Joint ownership assets (e.g. joint bank a/c; real estate owned as joint tenants)
 - NOTE: Convenience accounts now exist in which joint account can be set up without survivorship feature.
- Life insurance or other property designating a specific beneficiary (e.g., IRA, Retirement Plan, Totten Trust bank account, TOD).
- These assets are not part of **probate estate** but are still part of **taxable estate**.

Trusts

- ❖ A transfer of assets to a trustee or trustees to manage the assets on behalf of the beneficiaries you designate. The person establishing the trust is generally called a grantor.
- ❖ A bank, investment company or attorney can serve as trustee, with compensation detailed in the trust; otherwise, they can receive statutory commissions.
- ❖ The grantor can designate him or her self as a beneficiary of income or principal. Similar to a will, the trust also details how the trust's assets are to be distributed after the death of the grantor.
- ❖ Most common is a **Revocable Trust**, which can be revoked by the Grantor at any time. Avoids Probate, but not Estate Tax, and for Medicaid purposes, assets in a Revocable Trust are available to pay for the Grantor's care.

Revocable trusts

➤ Reasons for using Revocable Trusts:

- **Grantor is the Trustee**, but someone is named as successor.
- To plan against **future incapacity** (perhaps avoid conservatorship over property) allows individual Grantor to maintain control over assets so long as Grantor remains competent and provides for detailed management of assets in the event of incapacity.
- To **avoid probate** in multiple states where Grantor owns real estate in more than one state.
- To avoid probate notice requirements where certain family members (i.e., distributees) have been intentionally left out of Will or their whereabouts are unknown.
- **Privacy/Confidentiality** - Trust document never made public record in court. Streamline management of assets during life (no separate income tax return required and all taxed to Grantor).
- Allows for management and distribution of assets after death similar to a Will - often used as a Will substitute

Irrevocable trusts

- ❖ If the trust is **Irrevocable**, it will avoid Probate, and possible Estate Tax, but can be considered a transfer for Medicaid nursing home care and will result in ineligibility for a period of time.
- ❖ Grantor cannot serve as Trustee if Medicaid protection is needed.
- ❖ Additional benefits of Irrevocable Trusts:
 - ❖ **Estate Tax Savings** - e.g., can form life insurance trust in which life insurance policy is owned by Trust and therefore not part of decedent's taxable estate;
 - ❖ **Income Tax Savings** - e.g., 2503(c) Minors trust in which parents place money in trust for children, which money (up to certain limits) may be taxed at child's lower income tax bracket; and
 - ❖ **Preservation of Assets** - to remove from use by creditors (if transferred far in advance) or to qualify for coverage by Medicaid.

Testamentary trusts

- ❖ A Trust can also be created by Will, and allow for assets to be held by the Trustees on behalf of another.
- ❖ In some cases, it may be a trust to hold assets for a group or an individual, e.g., a trust for minor grandchildren, with payouts at particular ages.
- ❖ Also, there are marital and Credit Shelter Trusts created by Will, in which assets are left to a surviving spouse in a way which takes advantage of the marital and QTIP deductions to minimize Estate Tax liability

Supplemental needs trusts

- ❖ Supplemental Needs Trusts are authorized under Section 7-1.12. of New York Estates, Powers and Trust Law.
- ❖ The law allows for the creation of trusts intended to supplement, but not supplant governmental assistance that may be available.
- ❖ If created with a person's own funds, the person must be under 65, except for pooled trusts, and include a Medicaid "payback" provision for the person to be eligible for SSI and Medicaid (see Social Services Law Section 366[2]).