

ELDER LAW 101:

EVERYTHING YOU NEED TO KNOW ABOUT PLANNING TO PRESERVE YOUR ASSETS

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ESTATE PLANNING DOCUMENTS EVERYONE SHOULD CONSIDER HAVING

- Power of Attorney
- Health Care Proxy
- Will
- Trust

Powers of Attorney

What Are They?

A document by which one person, as **Principal**, appoints another as his or her **Agent (or "Attorney-In-Fact")** and confers upon that Agent the authority to act in place of the principal for the purposes stated in the document.

Why Are They Used?

1. to assist in managing day-to-day affairs (i.e., check writing authority)
2. to accomplish specific limited purpose (e.g., sale or purchase of residence, mortgage refinance, etc.) when unable to be physically present such as when on vacation or due to illness
3. to permit someone to act in event of sudden emergency
4. to plan against future incapacity – someone to manage affairs if become incapacitated

Powers of Attorney

When Is POA Effective?

Immediately unless Springing Power of Attorney.

Revocation – When does Power of Attorney Terminate?

At any time when you decide to revoke it. Must be revoked by Principal in writing before a Notary Public where prior recording has occurred.

All POA's terminate upon death of Principal.

Powers of Attorney

Types of Powers of Attorney

General v. Limited Power of Attorney

General – gives Agent unlimited and unbridled discretion to make all decisions for Principal (except life sustaining medical decisions which can only be delegated by a Health Care Proxy).

Limited – limits Agent's power to act only for certain specified activities.

Bank or other financial institution POA are limited – should use both specific bank form and statutory form – make sure bank form has durability feature. **Current statutory form is document which became effective on June 13, 2021.**

Powers of Attorney

- Consider Allowing agent to gift assets-\$5,000 gift limitation in section (I) of current statutory Power of Attorney may not be enough. May want authority for Agent to make larger gifts to reduce estate taxes or qualify for government assistance and may want to be able to gift to others besides spouse, descendants and parents (consider including authority for Agent to make gifts to him or herself since Agent is fiduciary);
- Note difference between use of POA and Joint Account –
A Joint Account gives inheritance rights to survivor on account – POA does not.

Health Care Proxy

- A document which enables a competent adult, the Principal, to protect his or her health care wishes by appointing someone he or she trusts, the Health Care Agent, to make all health care decisions for the Principal when the Principal is unable (i.e., incompetent) to make decisions for him or herself.

Health Care Proxy

Why have a Health Care Proxy?

- (1) Retain control over who makes health care decisions for you if you become incompetent
- (2) Protects personal dignity
- (3) Avoids cost of futile treatment
- (4) Religious beliefs – (Proxy can also serve to request use of artificial life support)

Health Care Proxy

Agent/Alternate Agent

New York Law seems to permit appointment of only one Agent (no joint Agents) and then, an Alternate Agent may serve, if determined that Agent is unavailable, unwilling and not competent to make timely health care decisions for Principal.

If no Agent appointed, New York State has adopted a Health Care Decision Making Act which determines priority of who can act as Agent.

Health Care Proxy

Signing Procedure/Witnesses

- Proxy must be signed and dated by Principal in presence of two adult witnesses. (No notary)
- Witnesses sign statement (part of Proxy) that Principal signed the Proxy “willingly and free from duress”
- Agent and Alternate Agent may not act as Witnesses

Duration/Revocation of Proxy

- Proxy in force indefinitely unless limited in document
- Proxy in force until you revoke it

Health Care Proxy

Artificial Nutrition and Hydration (Feeding Tubes)

Agent should know Principal's intentions relative to artificial nutrition or hydration or Agent will not be able to withhold same on behalf of Principal. If desired, best to put specific language concerning withholding of artificial nutrition or hydration directly in Proxy or in a separate living will

When Effective?

Upon attending physician determining **"to a reasonable degree of medical certainty"** that a Principal lacks capacity to make his or her own health care decisions. Determination must be made in writing. For a decision to **withhold life sustaining treatment**, the attending physician must consult with a **second physician** to confirm that Principal lacks capacity. (**Note:** If physician is appointed Agent by Principal, same physician can't also make competency determination).

Who Can Serve as Agent?

- Any adult, except an operator, administrator or employee of a hospital or residential health care facility in which the Principal is a patient or resident. (However, o.k. if such administrator, etc. is related to Principal by blood, marriage, or adoption).
- Physician, unless physician affiliated with hospital or residential health care facility (unless related by blood, marriage or adoption). *Remember physician can't be both Agent and make decision determining incapacity.
- Can't be someone who is Agent for ten or more Principals unless Agent is spouse, child, parent, brother, sister or grandparent of the Principal.

Types of Asset Titling


The way in which an asset is titled impacts how that asset may be preserved

- Joint ownership of assets with another, if containing language which states **Joint with Rights of Survivorship** (“JTWROS”), results in assets being distributed to the surviving owner irrespective of the terms of your Will or Trust – may want to consider using **Tenancy in Common** (“TIC”) ownership or Power of Attorney so there is no inheritance right for the survivor.
- Ownership of account which has a designated beneficiary such as an **In Trust For** (“ITF”) bank account or **Transfer on Death** (“TOD”) brokerage account or has a beneficiary designated such as on a retirement account or life insurance policy results in account being distributed to the named beneficiary irrespective of the terms of your Will or Trust.
- If you have created a **Trust** and titled the ownership of your assets into the Trust (e.g., “Trust of John Smith”), then the terms of the Trust direct who is to receive the assets.
- If you have created a **Will**, then all assets owned by you in your individual name (not jointly owned or with beneficiary designation) pass in accordance with the terms of the Will, provided the Will is probated.



Distribution Of Assets

In order for your assets to be distributed to your intended beneficiaries, the asset must be titled properly or be controlled by the terms of your Will or Trust



Failure to Title Assets or Have a Will or Trust results in your assets passing at the time of your death by the LAWS OF INTESTACY to beneficiaries determined by New York State who may not be the individuals who you want to inherit your assets.

Last Will and Testament

- A Will is a statement of your intentions as to whom and on what terms your assets are to be distributed at the time of your death.
- A will does not protect your assets during your lifetime.
- Will only controls assets which are owned by you in your individual name without beneficiary designation (“probate assets”). Note difference between probate estate and taxable estate as all assets are subject to tax but may not be subject to probate.
- Will is not effective unless it is probated at the Surrogate’s Court (Just because there is a Will does not mean it controls your assets when you die) - - PROBATE requires:
 - Persons who would inherit assets if there was no Will (i.e., through intestacy) to be given a copy of the Will and an opportunity to object to its terms because if objection is successful then such objecting person will inherit the assets.
 - Review and approval of Will by the Judge of the Surrogate’s Court that Will was properly signed and witnessed and no bona fide objections made and that Executor and Trustee named under the Will are qualified to act and be appointed.
 - Probate requires payment of a statutory fee in New York State (highest fee is \$1,250 for estates valued at over \$500,000).

TRUST

- A Trust is an Agreement between the person establishing the Trust (known as the “Grantor” Settlor” “Creator” or “Trustor”) and the person managing the Trust (known as the “Trustee”). Sometimes the person establishing the Trust and managing the Trust is the same person.
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- Trust can control assets of Grantor during his or her lifetime and also control the disposition of the assets at the time that the Grantor dies (like in a Will).
- A Trust is a way of preserving assets during life and distributing them after death.

Use of a Trust is sometimes preferable to the use of a Will:

- To plan against future incapacity (perhaps avoid guardianship over persons and/or property), a Trust 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 (Super Power of Attorney).
- Where intention is to exclude next of kin from being beneficiaries or if the identity or whereabouts of such kin are unknown, use of a Trust should be considered (Probate notice requirements can be extremely burdensome and expensive to implement as the laws require locating estranged family members only for the purpose of advising them of their rights to object to the terms of the Will).

Trust Versus Will

- Where privacy/confidentiality is a concern, use of a living trust may be preferred since unlike a Will, a trust document is not required to be filed with the court and thereby made a public record at death as a Will is in a probate proceeding.
- To provide a more detailed and streamlined asset management tool during life a Trust should be considered (i.e., more than just a power of attorney which only gives someone general authority to act and can't speak to income and distribution, special needs, etc.). A revocable living trust is easy to administer (as it does not even require the filing of a separate income tax return) and will avoid the necessity of guardianship proceedings in the case of future incapacity.
- To avoid probate in multiple states where Grantor owns real estate in more than one state a Trust may be preferable as the law requires that you probate a Will in each state in which the decedent owned real estate. To avoid probate in multiple states under such circumstances, which could prove to be costly, complicated and time consuming, it may make more sense to establish a single living trust which can own all the real property and more efficiently distribute such property out at death without the need to follow the probate requirements of multiple states.

Types of Trusts:

- Revocable Living Trust a/k/a Grantor Trust: Remains under control of Grantor and is not a means of protecting assets
- Irrevocable Living Trust: Not under control of Grantor who is seeking a tax benefit or asset protection.

Revocable Living Trust a/k/a Grantor Trust

- **What is it?**

A Trust over which the Grantor has the absolute right to revoke and terminate at any time.

- **How Does a Revocable Trust Work?**

Grantor must transfer assets into Trust. To accomplish this, Grantor must change title of assets into trust name (e.g., bank accounts, real estate from individual name of John Smith to “Trust of John Smith”). Generally, all income paid to Grantor on regular basis. Principal payments made within discretion of Trustee for Grantor’s support, maintenance and care. Upon death of Grantor, trust property distributed in accordance with trust instructions (like will).

Common Misconceptions Concerning Revocable Living Trusts

- Saves estate and income taxes – **NOT TRUE** (only removes assets from probate estate – NOT taxable estate).
- Protects assets so individual can qualify for Medicaid – **NOT TRUE** since trusts of this sort must be irrevocable unless set up by third party – otherwise assets in Trust must be spent down to qualify individual for Medicaid since Trust is Revocable and remains under control of Grantor.
- Beneficiaries always get money quicker than if probate – **NOT ALWAYS TRUE** since distribution of assets are never made until tax issues are first settled and tax filing deadlines are the same for Trusts and Wills.
- Avoids probate fees/court costs – Not a major concern in New York where probate costs are not equal to percentage of estate and such fees and costs are deductible (but if estate over \$500,000.00 still may be \$1,250.00 in filing fees).
- No executor(s) commissions – **TRUE**, except most people select family members who don't charge commissions anyway and if not family member, then would have to pay commission to Trustee rather than Executor (commissions are also deductible).
- Reduced attorney fees – **TRUE**, as relates to prep of probate documents but all estate tax and estate settlement issues must still be handled and fees to prepare trust could exceed probate fees.

Always Have A Will Even If The Trust Is Your Primary Planning Document

➤ Always have a Will

- i. In case certain assets may inadvertently not have been placed in Trust; or
- ii. Can't be placed in Trust (i.e., personal property, co-op apartment, automobile); or
- iii. Should not be placed in Trust (i.e., depreciating assets or assets with passive activity losses such as rental property).

➤ Will may direct assets pass to Trust – Pour Over Will

Irrevocable Trusts

- **What is it?**

A Trust, which once established, cannot be revoked or terminated by the Grantor.

- **Why is it Used?**

- 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 claims of creditors (if transferred far in advance) or to qualify for Medicaid coverage.

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Costs:

\$150,000. or more per annum average nursing home cost in metro NY area

Medicare – at best covers a maximum of 100 days of skilled care following a hospitalization and provided course of treatment includes a rehabilitative component

Private Long Term Health Care Insurance – if affordable, enables insured to keep control and ownership of assets. No asset transfers necessary.

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Eligibility for Medicaid – Applicant must be:

- (1) a U.S. citizen or lawful permanent resident
- (2) over age 65, or disabled in accordance with state Medicaid standard; and
- (3) a resident of the state and county where application is made

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Exempt Assets for Nursing Home Care

Those assets the individual or Community Spouse (i.e., the live at home spouse, hereafter “CS”) may retain and still qualify for Nursing Home Medicaid – includes:

(1) Homestead (residence) – always state that it is intention of Medicaid applicant to return home (try to get physician’s statement to that effect)

(2) Resource Allowance (Amount of Assets) –

Individual - \$30,182

CS - \$148,620.00 (minimum) excluding homestead);

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Exempt Assets for Nursing Home Care continued:

(3) Minimum Maintenance Needs Allowance (Amount of Income) – Individual Medicaid recipient must contribute “all” of his or her own monthly income except for \$50. per month. CS - \$3,715 per month. If CS income below \$3,715, may be wise for Institutionalized Spouse (hereafter “IS”) to transfer income flow from IS to CS to bring up to \$3,715. If CS income exceeds \$3,715., CS may make application of enhanced Community Spouse Resource Allowance (“CSRA”)

(4) Automobile and personal effects (Term Life Insurance also exempt);

(5) Burial Fund of \$1,500.00 plus can enter into prepaid Medicaid qualified funeral contract for reasonable funeral expenses (\$10,000+ has routinely been approved).

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Exempt Assets for At Home Care (NOTE: Cost must be less than 90% of what it would cost New York State to care for same individual in nursing home in order for such party to qualify for at home care)

(1) Homestead;

(2) Resource Allowance – (**Amount of Assets**)

Individual - \$30,182.; Married - \$40,821. (both spouses)

(3) Income Allowance – Individual may retain \$1,677 per month Married - \$2,268 per month; Surplus Income can be contributed to Charitable Pooled Income Fund

PRESERVATION OF ASSETS- MEDICAID QUALIFICATION/TRUSTS

Exempt Assets for At Home Care continued:

- (4) Auto, Personal Effects and Term Life Insurance;
- (5) Burial Fund of \$1,500.00.

Non-Exempt Assets – subject to usage for Medicaid and includes everything except items (1)-(5) above. Joint Accounts – Medicaid Recipient deemed to own 100% unless you can prove otherwise.

***NOTE:** Even if qualified for Medicaid home care – you may not be entitled to same level of care paid for privately (number of hours of care and assignment of care providers subject to Medicaid approval).

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Transfers of Assets:

“**Look Back**” period is the 60 month period that DSS can look back and review records preceding Medicaid Application. Thus, if transfer of \$300,000 made but application for Medicaid is submitted 61 months later, entire transfer is exempt and applicant would qualify for Medicaid. If Medicaid application put in prior to 61 months, will be subject to penalty period.

A “**Penalty Period**” (i.e., period of time one has to wait from time of entry in nursing home to qualify for Medicaid following a transfer of assets) equal to the value of the assets transferred divided by the average monthly cost of a nursing home for a private paying patient (in Westchester County average cost is \$13,906 per month while in New York City it is \$14,142 per month).

Thus, transfer of \$834,360 ($\$13,906 \times 60$ months) will trigger full transfer period. Smaller transfers may trigger shorter penalty periods.

Important - Currently there is no lookback or penalty for transfers made to qualify for home care Medicaid. However, implementation of new law in New York will cause up to a 30 month lookback and penalty period for transfers made to qualify for home care services. This law is expected to be imposed starting March 1, 2024.

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Transfer of Asset Rules not subject to penalty waiting period. The transfer of any asset is not subject to the 60 month “look back” or “penalty period” if:

- (1) The asset was transferred to the CS (may measure subsequent transfer by CS as being made by IS which may run 60 month period again);
- (2) The asset was transferred to a blind or disabled child;
- (3) The asset was transferred to a trust established solely for the benefit of any disabled individual;
- (4) The asset is the Medicaid applicant’s residence and the residence is transferred to a sibling of the Medicaid applicant with an equity interest in the house;
- (5) The asset is the Medicaid applicant’s residence and the residence is transferred to a child of the Medicaid applicant who is blind, disabled or under 21;
- (6) The asset is the Medicaid applicant’s residence and the residence is transferred to a child of the Medicaid applicant who has resided with the Medicaid applicant for 2 years prior to institutionalization while providing care to the Medicaid applicant which allowed the Medicaid applicant to remain at home (i.e., caretaker child).

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Outright Transfers (Gifts)/Transfers in Trust:

(1) Outright Gifts

- Lose Control of Asset
- Gift tax problem
- Lose step up in tax basis for capital gain

(2) Annuity

May be purchased and transfer would be totally exempt from Medicaid qualification if annuity purchase is for fair value.

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Outright Transfers (Gifts) Transfers in Trust continued:

(3) Transfer to Trust

- Maintain some control of investment of asset – No gift tax filing required – if retain Power of Appointment

- No loss of step up in tax basis

(a) Irrevocable

(b) Trustee (which cannot be Medicaid applicant or spouse) must have no power to distribute principal to Grantor – Distribution of trust principal to Grantor will cause such distributed property (and perhaps the whole trust) to be considered available resource of Grantor when applying for Medicaid. **However, trust income can be transferred back to Grantor.**

(c) Grantor may retain limited power of appointment over trust principal to give Grantor ability to change beneficiary designation.

(d) Income and principal may be distributed to children of spouse – who could thereafter return for use by parent.

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Last Minute Transfers:

Can still make property transfers – (even after institutionalized) to preserve portion of principal from being spent down by transferring part of the disqualifying assets to family as a loan and part as a gift (Rule of Halves Planning)

- **Formula** = Amount of money transferred ÷ \$13,906. (Westchester Nursing Home Care Regional Rate) = ineligibility period (as measured in number of months)
- **Planning Technique** – “Rule of one-half” transfers where half of Medicaid applicant’s funds are transferred away and preserved for family and remainder of applicant’s assets are used to pay costs until penalty period has lapsed (in effort to shorten penalty period below 60 month period) is a frequently used last minute technique.

But be careful to retain enough funds to pay privately during any disqualification penalty period.

PRESERVATION OF ASSETS – MEDICAID QUALIFICATION/TRUSTS

Transfers Between Spouses-Additional Issues:

1) *Subsequent Transfers:*

Must be made after by CS after the IS Medicaid application is approved.

2) *Spousal Refusal:*

Medicaid will not be denied to IS if CS has excess Resources and/or Income Allowances and CS refuses to contribute his or her excess resources provided the CS discloses the amount of assets in CS's possession

But Spousal Refusal may result in:

(a) Dept. of Soc. Services suing the CS (may avoid lawsuit if CS voluntarily contributes 25% of amount CS income exceeds resource allowance)

(b) Liens being filed against CS property

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Thank you!

Questions?

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Steven Schurkman has over 40 years experience in the practice of law, focusing in the areas of estate planning, probate, elder law, real estate and commercial transactions. He advises individuals and families concerning estate tax, asset preservation and business succession planning. He counsels individuals with disabilities and assists families with the establishment of supplemental needs trusts and guardianships. He also advises clients concerning the use of long-term care insurance and reverse mortgages as well as on issues relating to hospital discharge, medical coverage, admission to skilled nursing facilities and Medicare and Medicaid home care services.

Mr. Schurkman is the author of “[Elder Law Q & A: Answers to Questions About Estate and Financial Planning, Health Care Planning and Elder Abuse](#),” written under a grant from the New York State Division of Criminal Justice Services; in its 22nd edition, it is widely disseminated throughout New York State through the continued support of the Westchester Public Private Partnership for Aging Services, the New York State Attorney General’s Office, and the Pace Women’s Justice Center in collaboration with the Harry & Jeanette Weinberg Center for Elder Abuse Prevention at The Hebrew Home for the Aged at Riverdale, NY.