Future Care Planning – Managing Finances and Assets Q&A

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How to use this guide

Senior Law Day Collaborative Q&As are intended to guide older adults and caregivers as they address issues related to aging and planning for the future. We suggest you review this information in the full before seeking out an elder law attorney or other professional, so that you are familiar with the terms and can be ready to ask questions specific to your needs.

At our website – **seniorlawday.info** – you will find:

- additional Q&As for review and download
- a library of recorded webinars on topics relevant to elders and caregivers
- an opportunity to get your specific questions answered via email or during our quarterly consultation events
- notice up upcoming educational programs

All services of the Collaborative are offered at no charge. Our goal is to help you get the answers you need so you can plan and move forward with confidence.

*This publication is an excerpt from the 22nd edition of the **Elder Law Q&A: An Introduction to Aging Issues and Planning for the Future** by Steven A. Schurkman Esq. and members of the Senior Law Day Collaborative.*

Future Care Planning – Managing Finances and Assets

Powers of Attorney

What is a Power of Attorney? Do I need one and who should I appoint?

Everyone should consider signing a power of attorney. A power of attorney is a legal document that allows you (the principal) to appoint another individual (your agent) to act in your place to manage all or part of your financial matters for the purposes stated in the document. Powers of attorney can be used to assist you in managing your day-to-day financial affairs. For example, a power of attorney can grant your appointed agent the authority to write checks on your behalf or to sell or purchase property for you. A power of attorney may also be used to permit someone to act on your behalf in the event of a sudden emergency or to manage your affairs should you become incapacitated.

A power of attorney is a very powerful document as the person you appoint has control over your assets. Thus, only a person you absolutely trust (e.g., spouse, child, other close family relation, lifelong friend or clergy) should be appointed as an agent in the power of attorney.

A copy of the most current New York State Statutory Power of Attorney Form is provided in Q&A Appendices as Appendix F (seniorlawday.info/qa-appendices/) and can also be found at: public.leginfo.state.ny.us/lawssrch.cgi?NVLWO (Search for Sec. 5-1513 of General Obligations Law).

Can a Power of Attorney be used for health care decision making?

No. Only a health care proxy, discussed in the **Health Care Planning Q&A (seniorlawday.info/health-care-planning-qa/)**, can be used to appoint someone to make health care decisions for you. A power of attorney is used primarily for financial decision making.

Can I limit my Agent's authority to act under a Power of Attorney?

Yes. A power of attorney can be tailored to meet your individual needs. At one extreme, a power of attorney can be general and give your agent unlimited and unbridled discretion to make all decisions for you (except decisions concerning your health care). A power of attorney can also be limited to provide that your agent can act on your behalf only with respect to a particular activity or activities (e.g., act at a real estate closing or manage a particular account).

What is a Durable Power of Attorney? Do I need one?

A durable power of attorney is a power of attorney that continues to be effective even after you are no longer competent to make decisions for yourself. If a power of attorney is not "durable," it cannot be used after the principal (i.e., the person signing the power of attorney) becomes incapacitated. All powers of attorney signed in New York State are now deemed to be durable powers of attorney unless the document expressly states otherwise. The durability of the power assures that you have someone to take care of your affairs should you ever become incapacitated.

Do I need a Power of Attorney to manage my accounts, even if I have designated a beneficiary on such accounts?

Yes. Your designating a beneficiary on a Power of Attorney only means that the named beneficiary will inherit the account at the time of your death. Such designation does not grant the beneficiary the right to access the account while you are alive. Therefore, you need to have a Power of Attorney so that someone can have access to your accounts while you are alive and use the accounts for your benefit, irrespective of whether there are beneficiaries on the account who would receive the assets at the time of your death.

What happens if I do not have a Power of Attorney and I become incompetent or otherwise incapacitated?

If you become incompetent or otherwise incapacitated without a power of attorney, then only a court appointed guardian may access your assets. The legal proceeding to appoint a guardian is often expensive, time consuming, unpleasant and may result in the appointment of someone you would never want to act on your behalf. Having a power of attorney in place will generally avoid the need to initiate such a guardianship proceeding.

Does New York State have a standardized Power of Attorney Form?

Yes. Effective June 13, 2021, New York State adopted legislation authorizing the use of a new statutory power of attorney document which is required to be recognized by all financial institutions authorized to do business in New York State. This power of attorney is durable unless the principal states otherwise in the document.

A copy of this Statutory Power of Attorney Form is provided in the Q&A Appendices as Appendix F in Q&A Appendices (seniorlawday.info/health-care-planning-qa/).

Are Powers of Attorney properly signed prior to June 13, 2021 still valid?

Yes, if they were signed in compliance with the law prevailing at the time of signing.

Can you make changes to the new Statutory Power of Attorney?

Yes, but only if such changes are incorporated in a special "MODIFICATIONS" section of the power of attorney set forth in subsection (g) of the document. No changes are permitted to be made to the new statutory power of attorney unless expressly set forth in this MODIFICATIONS section.

Does the new Power of Attorney revoke prior Powers of Attorney executed by the Principal?

No, not unless the power of attorney specifically states so. It is sometimes suggested that the power of attorney state that only prior general powers of attorney be revoked and that powers of attorney used for a specific purpose (i.e., powers of attorney designated for use at a particular financial institution or limited to a specific purpose) not be revoked.

Can the Principal appoint someone to oversee the actions of the Agent under the Power of Attorney?

Yes. Under the power of attorney legislation, the principal may appoint a "Monitor" to oversee the activities of the agent. The Monitor may demand that the agent furnish a record of all transactions which the agent has completed on behalf of the principal, and the agent must comply with such demand. That being said, Monitors are rarely used as most people are comfortable that the agent they appointed will properly carry out their wishes and they do not believe further oversight of such agent is needed.

Can the Agent be compensated for the work it performs on behalf of the Principal?

Yes. The agent is entitled to reimbursement for all reasonable expenses incurred on behalf of the principal. The agent may also be reasonably compensated for services rendered on behalf of the principal pursuant to compensation terms further specified in the MODIFICATIONS section of the power of attorney.

Can the Agent still make gifts of the Principal's assets in the Statutory Power of Attorney?

Yes, but the total amount of the gifts made by the principal may not exceed $5,000 per year unless subsection (g) of the power of attorney (entitled CERTAIN GIFT TRANSACTIONS) is initialed by the principal - thus directing gifts may be made in an amount greater than $5,000 per annum, and as further set forth in subsection (h) of the MODIFICATIONS portion of the power of attorney.

What sort of gifts is the Agent authorized to make on behalf of the Principal in the Power of Attorney?

The amount of the gifts may be limited or unlimited as the principal determines and sets forth in subsection (h) of the MODIFICATIONS portion of the power of attorney. Sometimes gifting is limited such that the agent may only make gifts to individuals in amounts which do not exceed the annual gift exclusion amount (which is currently $ 15,000 per person per year).

Gifting in amounts which do not exceed the $15,000 per person/per annum amount results in the gifts not being taxable and, therefore, not requiring that the principal file a gift tax return with the Internal Revenue Service.

Should there be a monetary limit on the value of the Principal's assets which the Agent is authorized to gift in the Power of Attorney?

Provided that you have full faith and trust in your agent, the principal may want to authorize the agent in the power of attorney to make gifts in unlimited amounts to a specific group of individuals and/or charities designated by the principal to be the beneficiary of his or her assets. Such expansion of the gift giving power may allow the principal to achieve estate tax reduction and/or Medicaid qualification. The agent should always be advised to consult with an elder law attorney and/or tax advisor prior to actually making such gifts.

May the Agent make gifts of the Principal's assets to him or herself ?

Yes, but only if the authority for the agent to make gifts to him or herself is expressly set forth in the MODIFICATIONS section of the Power of Attorney.

Should I consider authorizing my Agent in the Power of Attorney to make gifts of my assets to him or herself or others?

Maybe. New York State law states that unless the power of attorney expressly authorizes the agent to make gifts of the principal's assets in the MODIFICATIONS section of the document, the agent does not have such authority. If your estate is of a size in which you had been or would be making gifts to reduce your estate tax liability, or if you had been or would be making gifts of your assets in order to qualify for Medicaid in the event you suffered a long term custodial health care crisis, then you should consider including in your power of attorney express language giving your agent the authority to gift your assets to those individuals or charities whom you would wish to benefit.

When does a Power of Attorney become effective, and how long does it remain effective?

Unless the power of attorney is a "springing power" which expressly states that it will become effective at a specified moment in the future, a power of attorney becomes effective immediately upon its execution. Perhaps it can just read: All powers of attorney must be executed by both the principal and all primary agents named thereunder. In addition, such signatures must be notarized and witnessed by two (2) witnesses (one of whom can also be the Notary to the document). Thereafter, once the principal signs and delivers a power of attorney to his or her agent who also countersigns the document, the agent can have immediate access to the principal's assets.

Should I use a Springing Power of Attorney?

If you prefer that your agent not be given powers immediately, New York State recognizes a springing power of attorney, which becomes effective only on a certain date or upon the occurrence of a certain event. A springing power of attorney might only be activated, for example, upon a physician determining that you are incapacitated.

However, be mindful of the fact that if you use a springing power of attorney which is triggered by a determination by a physician that you are incompetent or otherwise incapacitated, the power of attorney may be more difficult to use. This is because in order to use the power of attorney, the agent needs to 1) obtain a letter certifying incompetency from a physician and 2) get the financial institution or other third party from whom he or she is seeking information to recognize such certification of incompetency as being valid. At the very least, such requirements are likely to slow down the process of being able to use the power of attorney or, perhaps more likely, may result in the power of attorney not being accepted as valid which would result in the need to file for the appointment of a guardian in order to handle the principal's financial affairs.

As a possible alternative to using a springing power of attorney, a principal concerned about giving the agent so much authority during the principal's competency may sign a power of attorney and not give the agent the document. Instead, they can advise the agent of its location; the agent could then later countersign and use the document if they believed it was in the principal's best interest to act on the principal's behalf.

What about my passwords and other digital assets?

The New York Estates Powers and Trust Law was amended Sept. 29, 2016 to deal with the administration of digital assets upon the death or incapacity of their owner and to give individuals the power to control their digital footprint. A provision discussing how digital assets should be handled can be incorporated into a New York State Durable Power of Attorney. Such a provision grants specific permission to allow the agent to have the power and authorization to access, take control of, conduct, continue, or terminate accounts on digital devices or digital assets, as defined by Article 13-A of the New York Estates Powers and Trusts Law. Such a provision can also detail whether or not you wish to grant your agent the power to obtain log-on credentials, including usernames and passwords for all types of online accounts including but not limited to banking, email and social media.

Do I need to have a Power of Attorney if all my assets are owned jointly with another person?

While the ownership of a joint account with another allows such joint owner (like the agent in a power of attorney) to manage the account during your lifetime, this may also result in the surviving owner of the account having a right of inheritance in the account at the time of your death. (This is particularly true on accounts which state "JTWROS" – meaning the owners of the account own "joint with rights of survivorship," so each party will inherit the account at the time of the death of the other.)

Joint ownership of an account can prove to be problematic in situations in which it was your intention that individuals, other than or in addition to the joint owner, were to receive the assets in the account at your death. Even if your Will states that all of your assets are to be divided equally among multiple individuals, the fact that you own certain assets jointly with another results in those particular assets being distributed automatically, by operation of law, to the surviving joint owner at your death – irrespective of the fact that the terms of your Will state otherwise.

Joint ownership of an account may also prove problematic from an estate tax perspective since if one of the joint parties (other than a spouse) were to die, the entire value of the joint account becomes part of the taxable estate of such predeceased joint owner. This is true even if the predeceased joint owner did not contribute any funds to the joint account. The burden to overcome the presumption that the predeceased joint owner did not own 100% of the account is on the executors of the decedent's estate. They must demonstrate (by furnishing records

and otherwise) that the deceased party did not contribute all of the assets to the account and, therefore, the entire account should not form part of his or her taxable estate.

A will only controls assets in your individual name and does not control joint accounts or other contract assets, like life insurance or retirement assets, which have designated beneficiaries. A power of attorney ceases to be effective at the time of your death resulting in the assets owned in your individual name during your lifetime being distributed in accordance with the terms of your will at death. If you intend that multiple beneficiaries share in your estate at death, use of a power of attorney, rather than joint ownership of assets, becomes particularly important.

Living or Inter Vivos Trusts

What is a Living or Inter Vivos Trust?

Like a power of attorney, a Living Trust (also known as an Inter Vivos Trust) is a legal tool that you can use to plan for the possibility of your future incapacity. To create the trust, you (the grantor) transfer all of your assets into the name of the legal entity known as the trust (e.g., the Jane Doe Trust) and appoint a trustee to manage the trust's assets. The trustee makes all decisions concerning the trust. Generally, income generated by the trust is paid to the grantor on a regular basis. Payments from the principal of the trust are made, within the trustee's discretion, for the support, maintenance, and care of the grantor. Similar to a will, the trust also details how the trust's assets are to be distributed after the death of the grantor. The most common form of Living Trust is a Revocable Living Trust which the grantor may revoke at any time.

Trusts can be complicated documents with significant tax ramifications. If you are considering transferring your assets to a trust, it is strongly recommended that you consult with an attorney first.

I am healthy and competent and not comfortable with the idea of having someone else manage my assets right now. Can I serve as the trustee of my own Living Trust?

Yes. You can name yourself as the trustee of your own Living Trust and provide for a successor trustee to take over in the event of your incapacity or upon your death. You can also name yourself and an independent third party trustee as co-trustees, and provide that you and the independent trustee will act together to manage the trust until you become incapacitated or die, at which time the independent trustee will take over. Finally, you can appoint a third party trustee to manage the trust assets without your acting as co-trustee, but still maintain control over the trust by reserving the power to terminate the trust at any time.

Can a Revocable Living Trust be used to distribute my assets at death instead of a will?

Yes. In certain states the Revocable Living Trust, rather than the will, has become the instrument of choice for distributing assets at death. This is because in certain states the cost of probate (i.e., a legal proceeding to have the court approve a will at death) is expensive, as it can be equal to as much as 5% or more of your estate. In contrast, a Revocable Living Trust is a private document which permits distribution of assets after death without court approval.

The majority of the states in the United States (including New York) are probate friendly, meaning that the statutory fees to submit the will to the court for probate approval are reasonable. In New York, the court costs related to a probate filing do not exceed $1,250. In probate friendly states, it may not be appropriate to establish a Revocable Living Trust, since in order for a Revocable Living Trust to save a modest amount of probate fees, an individual must totally overhaul the manner in which his or her assets are owned by currently transferring all assets into the title of the Living Trust. For example, real estate owned in the name of John Smith has to be transferred to the Trust of John Smith, and a bank account in the name of Mary Jones must be transferred to the Trust of Mary Jones. Such costly and time consuming asset transfers, combined with legal fees to establish the trust, may outweigh the savings of minimal probate fees.

Are there circumstances where it still makes sense to use a Revocable Living Trust even if you reside in a probate friendly state such as New York?

Absolutely. A Revocable Living Trust may be the preferred estate planning instrument to a will and more appropriate in the following circumstances:

1. If you own real property in multiple states, the law requires that you probate the will in each state in which the decedent owned real estate. To avoid probates 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.
2. If you do not intend to leave your assets to your heirs at law (also referred to as distributees) and/or the whereabouts of such heirs at law are unknown, the use of a Living Trust may be preferred so that your estate is not burdened, both financially and otherwise, with the probate notification laws which require having to locate estranged family members to advise them of their rights in your estate even though you have not provided for them in your will.
3. 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.
4. To provide a more detailed and streamlined asset management tool during life (i.e., more than just a power of attorney which only gives someone general authority to act). A Revocable Living Trust is easy to administer (as it does not even require the filing of separate income tax returns) and will avoid the necessity of guardianship proceedings in the case of future incapacity.

Will the use of a Revocable Living Trust save income or estate taxes?

No. Since the trust is revocable (meaning the trust can be terminated and its assets can be taken back by the grantor at any time), the Internal Revenue Service taxes all income generated by the assets in the same manner as if they were owned in the individual name of the grantor.

The Internal Revenue Service has also stated that all assets in a revocable trust form part of the grantor's taxable estate (since the grantor could take the assets back into his or her individual name until the time of the grantor's death) and are subject to estate taxes to the extent the grantor's estate exceeds taxable limits discussed in the **Taxes Q&A (seniorlawday.info/taxes-qa/)**.

Will the use of a Revocable Living Trust protect the trust assets and allow the Grantor to qualify for Medicaid?

No. Since the grantor can terminate the trust at any time and take the assets back for him or herself, the Department of Social Services considers the assets in the trust to represent part of the overall resources owned by the grantor and will disqualify the grantor from receiving Medicaid assistance to the extent the grantor's resources exceed the Medicaid resource allowance.

What type of trust will offer tax and asset protection advantages?

An Irrevocable Trust, in which the grantor has irrevocably transferred his or her assets into the trust and no longer has access to the principal assets placed in such a trust. Similarly, a properly drawn irrevocable trust will protect the principal assets contained in the trust and allow the grantor to qualify for Medicaid after the transfer penalty period has lapsed discussed in the **Preservation of Assets/Medicaid Planning (seniorlawday.info/preservation-of-assets-qa/)**. It is possible for the grantor of the Irrevocable Trust to retain a right to receive the income generated by the assets owned by the trust (i.e., interest and dividends) – and still protect the principal assets in the trust from spend-down in order to qualify for Medicaid in the event of a long term custodial care crisis.

Do I still need a will if I have a trust (Revocable or Irrevocable)?

Yes. A will is always important to have in case there are certain assets which cannot be transferred into trust title (e.g., a co-op which the Board of Directors refuses to transfer) or if assets are discovered which were inadvertently left out of the trust. The will can direct that such miscellaneous assets be paid to and thereafter distributed in accordance with the terms of the trust at the time of the grantor's death. This type of will is called a "Pour Over Will" and is important for purposes of controlling those miscellaneous assets still remaining in the grantor's individual name at the time of his or her death. Without a will, such assets would be distributed in accordance with the intestacy laws of the State of New York, which laws dictate how assets not controlled by a will or trust are to be distributed at the time of a person's death (discussed in the following section on "Wills").

Wills

I am married, have no children, and do not have much property. Do I need a will?

If you do not have a will (or a Funded Trust) to dispose of your assets upon your death, your assets will be distributed according to the New York State intestacy law, irrespective of what you otherwise would have intended. The New York intestacy laws prioritize the distribution of assets, as follows:

1. If survived only by spouse (no children or parents) – everything to spouse
2. If survived by spouse and parent or parents (no children or grandchildren, great-grandchildren, etc.) – entire estate to spouse
3. If survived by spouse and any children (or grandchildren of deceased children) – $50,000 plus ½ of estate to spouse and ½ of estate to children or grandchildren
4. If no spouse, children or parents, then to grandchildren and further descendants, if any

5. If no descendants as in (4), then to brothers or sisters or their issue
6. If there are more remote family relationships extending out to first cousins once removed (sometimes referred to as "laughing heirs" as they would inherit assets not having ever known the decedent)

NOTE: Adopted children and illegitimate children of a decedent have the same rights as biological and legitimate children (except illegitimate children only have inheritance rights from deceased father if they prove paternity).

Even if your estate is small, a will can ensure that certain items of personal property are given to specific individuals upon your death. A will is also useful to provide instructions regarding the disposition of your remains (i.e., your burial, cremation), and whether you want to be an organ donor. If you intend to donate your organs, however, it is best to set forth this intent in a separate document (e.g., the appropriate portion of your New York State driver's license or in your health care proxy as previously discussed), since your will may not be accessible in a timely manner upon your death and organ donorship requires quick action. Likewise, your funeral arrangements should be set forth in an accessible letter of instructions, since your will may not be readily available.

If my assets will be distributed by the laws of intestacy to the same people who would inherit my assets if I had used a will, do I still need a will?

It is best still to have a will. If you do not have a will, a bond will need to be posted at additional cost to the estate before anyone can be appointed to administer your estate. Also, the individual appointed to administer your estate may not be someone who you would want to manage your affairs.

My will provides for all my assets to pass to my spouse. I have a joint bank account with my daughter. Who will get the funds in that account when I die?

A will only controls assets in your individual name. The funds contained in the joint account are not controlled by your will and, therefore, pass to your daughter (unless the account was set up without a survivorship feature). The same is true for other jointly owned real or personal property. In addition, proceeds from life insurance policies or other accounts that have specific designated beneficiaries (e.g., IRA, 401(k) or other retirement accounts, or "in trust for" or "payable upon death" bank accounts) are not controlled by your will. These assets will pass outside of your probate estate to the designated beneficiaries. These assets are, however, still included in your estate for estate tax purposes.

Estate Planning Without the Use of a Will or a Trust

Can I title my assets as being owned jointly with another person so when one joint owner dies the assets will automatically pass to the surviving joint owner – without relying on the terms of a will or a trust?

Yes. You can title the ownership of your assets as being owned by you and another individual as "Joint with Rights of Survivorship" ("JTWROS") during your lifetimes. Upon the death of one joint owner, such ownership results in your assets being distributed directly to the surviving joint owner. The terms of joint ownership means that the assets automatically pass "by operation of law" to the survivor and, therefore, supersedes the terms of any will or trust which may exist.

However, while such an arrangement may avoid the need to use a will or a trust for JTWROS assets, it may present income or estate tax issues. You should consult with your attorney or tax advisor before creating a JTWROS account.

What happens to my assets at the time of my death if they are titled joint tenancy in common instead of joint with rights of survivorship?

Joint tenancy in common means that you and the joint owner each own a portion of the account (usually 50/50) and can each manage the entire account during your lifetime. However, at the time of the death of one owner there is no right of survivorship leaving the assets directly to the survivor. Instead, the assets of the one who died first would be distributed according to the laws of intestacy previously mentioned if there was no will. If there was a will, it would be distributed pursuant to its terms once the will was accepted for probate.

Can I designate a beneficiary for my assets so that at the time of my death the assets will automatically pass to such beneficiary without relying on the terms of a will or a trust?

Yes. Certain assets, such as a bank and/or brokerage account, can designate a beneficiary and such designation will also trump the terms of any will or trust which may exist as relates to such accounts.

In particular, bank accounts, known as totten trust accounts, which are titled as one person IN TRUST FOR ("ITF") another will automatically pass, by operation of law, to the beneficiary so designated at the time of the death of the account holder. Similar rules apply for brokerage accounts which are titled Transfer on Death ("TOD") accounts, as these accounts will also automatically pass to the beneficiary of the account holder irrespective of any will or trust which may exist.

However, as stated previously, while such an arrangement may avoid the need to use a will or a trust for beneficiary designated assets, it may present income or estate tax issues. You should consult with your attorney or tax advisor before completing a beneficiary designation form.

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