

T H I R D   E D I T I O N

# How to Complete Your **Estate Plan** & **Protect Your Family**

Most commonly asked  
questions and answers



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Estate and Tax Planning is a primary focus of the firm. Complex Commercial Litigation, Real Estate, Zoning and Land Use, Environmental Law, Business Transactions, Intellectual Property, Matrimonial and Personal Injury Law are also part of the firm's practice.

The New York State Supreme Court is across the street from our Riverhead offices. Real estate and Surrogate records for the entire County are only a few blocks away. Using the latest technology and its proximity to the courts and county offices, the firm moves quickly and efficiently on behalf of its clients.

The Martindale-Hubbell Law Directory has given the firm its highest rating for legal competence and professional reliability.

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## What is Estate Planning?

Estate Planning ensures your assets are transferred to those of your choice while minimizing expenses and taxes.

Your goals when creating your estate plan should be:

- provide for the orderly disposition of assets to individuals and entities as you desire
- plan for minor children
- plan for your incapacity or the incapacity of a beneficiary
- maintain financial security
- minimize the expenses of administering your estate
- minimize taxes.

## What is the first step in preparing an estate plan?

Take an inventory of your assets, including your home, jewelry, stocks and bonds, bank accounts, insurance, retirement plans, IRAs, other real property, and artwork. Determine how these assets are owned. Then, take a similar inventory of your debts or liabilities.

The second step is to determine what your goals are with respect to your estate. For example, do you want all of your assets to pass to your children or would you like to benefit a niece, nephew or a charity? Who would be a good candidate to serve as your executor, as your children's guardian, and as trustee of any trust created for the benefit of your children? If something were to happen to your entire immediate family, what should happen to your property?

The third step is to consider the income and estate tax ramifications of your plan and to explore any options available to reduce these expenses.

## **What is a Will?**

A Last Will and Testament is a written document setting forth your wishes for the disposition of your property upon your death. A person making the Will must be 18 years of age or over, be of sound mind, and declare to the witnesses that this is his or her Will. The Will must be dated and signed at the end by the testator and two witnesses. (The requirements for a valid Will vary from state to state.)

## **Why is having a Will so important?**

Every adult should have a Will, regardless of age, marital status, or health. Not only does it give directions on the transfer of your property after death, it also designates an executor to manage your assets and carry out your last wishes, appoints guardians for minor children, provides for the management of property distributed to minors, appoints trustees for trusts created under the Will, and could set forth estate tax savings strategies.

## **If there is no Will, what will happen to my estate?**

Your property will go through an administration proceeding in the Surrogate's Court. New York law provides for the appointment of an administrator to handle the estate. The law also determines who will inherit your assets. Generally, the Surrogate's Court will appoint someone in your family to serve as administrator and see that your assets are passed to your distributees pursuant to the laws of intestacy.

## **Who gets the property if a single person without children dies without a Will?**

The property would go to the deceased's parents. If the parents are predeceased, the deceased's siblings would inherit the property. If any sibling predeceases, nieces and nephews would inherit.

## **Can I keep a list of the people I want my personal belongings to pass to in my home office?**

Yes, however, this list is not binding, and your executor is not legally required to adhere to the list.

## **How do I prevent family disputes over my estate?**

If your Will is properly executed a contesting heir will have a hard time proving to the Surrogate's Court that your Will is invalid. If you anticipate a problem, you could discuss inheritance issues with your family members so they have a clear understanding of your wishes.

## **Can I leave property to young children in my Will?**

Yes, but you should name an adult to manage the property until the child reaches the legal age of 18 or an age when you think the child will be capable of handling the property. You may name the guardian of the child to manage the property or give the management power to an executor or trustee, who is not the guardian.

## **What kind of planning can be done for those in a non-traditional relationship?**

Keep in mind that most state laws dealing with estate matters do not address non-marital and non-traditional relationship issues. Nevertheless, estate planning is possible. In the non-marital and non-traditional relationship, the use of Wills and/or Trusts are likely to be the most important planning tools available to protect your loved ones.

## **Are there any laws that protect significant others?**

Significant others do not have the legal protection that is afforded a spouse. In New York State, you cannot disinherit your spouse, even by Will. If you die without a Will or a Trust, your property would pass to members of your family, not your significant other.

## **How important is it to consider the effect of a divorce on estate planning?**

Families today often include children from current and past marriages. While you are going through a divorce, you must review your estate planning documents to ensure the beneficiaries are consistent with your current wishes. Specifying your wishes in a will or trust may avoid fighting and heartbreak among all heirs and protect your children.

## **Where should I keep my original Will?**

If your attorney has a fireproof vault, the best place is to deposit the original with him or her for safekeeping. Keep a copy at home in a fireproof box or home safe. Be sure to tell your executor where the original and copy are located.

## **How often should I review and update my Will?**

Updating your Will is just as important as establishing one for the first time, and should be done with the same attention to detail. Review your estate plan every three to five years, whenever a new asset is acquired, when the federal estate tax law changes, or when your family structure changes for any reason.

## **What do I do with my old Will once I have prepared a new one?**

Once your new Will has been properly drafted and executed, tear up and dispose of the old Will or leave it with the attorney who drafted the new Will. Do not dispose of your Will if you make a Codicil. A Codicil amends your current will but it does not replace it.

## **What is probate?**

Probate is a Surrogate's Court proceeding to determine if a Will is valid and is, in fact, the last Will. The process also includes the identification of the heirs, the estate property and its worth, the payment of any debt and estate taxes, and the distribution of the remaining property as the Will directs. The Court's supervision

of the probate process ensures the directions are carried out properly. If an individual dies without a Will, an administration proceeding is brought in the Surrogate's Court to pass the assets in accordance with the New York State law.

### **Can probate be avoided?**

Yes, if you expect delays in your probate because of a Will contest, or if you desire privacy, or own property in more than one state, there is a practical way to avoid probate. A revocable trust can provide for the management of your assets during your lifetime and for the disposition of your estate after your death.

### **How long does it take to administer an estate?**

The whole process can take as little as seven months (allowing the opportunity for creditors to come forward) or as long as a several years depending on the nature of the assets and legal issues that might arise.

### **What is an executor?**

An executor is the person who is designated in a Will to administer the estate of the deceased. This should be someone who is willing and capable to serve. Your executor's responsibilities include finding, securing, managing and distributing your assets. Depending on the contents of your Will, the executor may have to decide whether or not to sell your real estate, securities, or other property. Generally, executors engage professional legal assistance to guide them through the estate process. You cannot name a minor, a convicted felon, or someone who is not a United States citizen.

### **Is my executor entitled to compensation?**

An executor is entitled to receive a commission, the exact amount of which is mandated by New York Law. The commission is calculated with a formula based on the value of the assets that passed under the will. If the executor is also a beneficiary, they may waive their right to compensation, alleviating the need for them to report the compensation as income.

## **Is it better to name a bank or trust company as an executor rather than an individual?**

For someone with no family nearby, a bank or trust company might make a better executor. Institutional executors generally have their own fee schedule.

## **What are the benefits to creating a Revocable Trust and a Pour Over Will?**

If you only have a Last Will and Testament, any assets in your name alone will require that your Will be probated when you pass away. However, if you created a revocable trust, you could avoid probate on the assets transferred into the trust. In the event that some assets are not transferred to the Trust, you should also execute a “Pour Over Will.” The Pour Over Will would ensure that any assets left in your name alone would “pour over” into the Trust.

## **What makes a Power of Attorney “durable”?**

A Durable Power of Attorney appoints someone to carry out financial affairs and estate planning objectives in the event you are incapacitated. This type of Power of Attorney is effective immediately and remains in effect even if you become mentally and/or physically incapacitated but is void upon your demise.

## **What if I change my mind about granting a Power of Attorney?**

While you are competent, you may revoke a Power of Attorney at any time, for any reason. You should immediately in writing notify the attorney-in-fact and all other institutions or affected parties of the revocation.

## **Can a Durable Power of Attorney be used for health care decisions?**

No. In New York State, you must sign a Health Care Proxy to appoint an individual to make health-related decisions.

## **Why is having a Durable Power of Attorney so important?**

By executing a Durable Power of Attorney you avoid the time-consuming and costly process of having the Court appoint a guardian to act on your behalf in the event of incapacitation – whether temporary or permanent.

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

A Health Care Proxy appoints another individual to make health care related decisions in the event you are unable to make them yourself. Your health care agent will make medical decisions for you even if it is not the type of medical situation you anticipated in your living will. The person you appoint should be someone you trust, someone with whom you feel comfortable discussing your wishes, values and beliefs, and someone who will respect your wishes. While you need not appoint someone who lives in the same general

area as you, proximity should be considered. In New York State you can also express your direction with respect to organ donation in the Health Care Proxy.

### **What happens if I don't have a Living Will and Health Care Proxy?**

If you do not have these documents, the medical profession is obliged to maintain life at all costs. Your doctor will use his or her own discretion in deciding what kind of medical care and life support you should receive. Problems arise when family members disagree about the treatment. In a worst case scenario, these battles over medical care can wind up in court, where a judge decides the future of your treatment. Such legal battles are avoidable by making and properly executing a Living Will and Health Care Proxy.

### **What is a DNR?**

A DNR is a Do Not Resuscitate order. This instructs medical personnel not to perform Cardiopulmonary Resuscitation (CPR), an emergency procedure to restart your heart or lungs when your heartbeat or breathing stops. This is typically issued in a health care facility and put in your medical chart.

### **Can I appoint more than one health care agent?**

No. New York State laws allow you to appoint only one health care agent. You may, however, appoint an alternate health care agent to act on your behalf in case your primary agent cannot.

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

A Living Will is a document that states your wishes about medical treatment. Typically, it contains your wishes about end-of-life care and life prolonging procedures.

## **What is estate and gift taxation?**

Both the Federal Government and New York State impose estate taxes that must be paid within nine months of death on estates that exceed certain levels. Whether or not your estate goes through probate, it will be taxed depending upon the size of the estate and whether your spouse survives you. New York State does not currently impose a gift tax. There is a gift tax on the federal level that is tied to the estate tax.

## **What is the marital deduction?**

Transfers of assets between spouses who are U.S. citizens are made free of gift and estate tax. If you predecease your spouse, the value of assets passing to him or her generally qualifies for the marital deduction, which could eliminate or significantly reduce estate taxes.

## **How do I protect my estate from estate taxes?**

There are many techniques used to minimize your estate tax liability. Depending on the size of your estate, the type of assets owned and your family structure, an experienced estate planning attorney can recommend a gifting plan, trusts to hold various assets or family owned entities. A married couple should first ensure the full use of the estate tax credit available to every U.S. citizen, or resident.

## **What is a Trust?**

A Trust is a legal entity created by a person (the creator or grantor) to hold assets for the benefit of the grantor or other designated individuals (the beneficiaries). The grantor (also settlor or donor) creates and funds the Trust. The trustee (either a person or qualified company) holds the property and, invests and distributes it according to the terms of the Trust.

## **What can a Trust do for me?**

A Trust can be created for any purpose, as long as the purpose is legal and not against public policy. Trusts can manage assets before and after death, reduce or eliminate estate taxes, transfer property to heirs, protect assets from lawsuits and seizures, avoid probate, or hold assets for the benefit of minors or disabled individuals. There are two types of Trusts, Revocable Trusts and Irrevocable Trusts.

A Revocable Trust can be revoked or changed by the grantor and usually allows greater flexibility, but the Trust assets will be included in the estate of the grantor for tax purposes.

An Irrevocable Trust cannot be easily changed or terminated. What you lose in flexibility, you make up in tax savings. Most often, Irrevocable Trusts can be drafted so that the assets transferred to it are no longer part of the grantor's estate therefore providing estate tax benefits.

## **What are the ongoing costs of administering a Trust?**

If the Trust is Irrevocable, and earns a minimum amount annually, fiduciary income tax returns must be filed with the IRS and New York State. Revocable Trusts generally are taxed on the grantor's individual tax return alleviating the need for a fiduciary income tax return. In either event the trustees, who are not the grantor, are entitled to trustee commissions.

## **How are Irrevocable Trusts used in advanced estate planning?**

The assets of an Irrevocable Trust are often removed from the grantor's estate. However, there may be gift tax consequences when the assets are transferred to the trust.

## **Is it better to name a bank or trust company as a trustee rather than an individual?**

For someone with no family able or willing to serve, a bank or trust company might serve as a convenient trustee. Naming an individual may provide the benefit of personal knowledge of the Trust's affairs. On the other hand, if there are sizable assets involved and no one in the family with financial expertise, a bank or trust department would be a very logical choice. A bank or a trust company generally have their own set of commissions that you must agree in advance to pay. The questions you must ask yourself are: Who will handle the task in a prudent and efficient manner? Does your prospective trustee want the job?

## **What additional planning should I consider if I own a small business? Investment property? Securities?**

You could decide how to pass these assets to your heirs through a gifting program that will reduce the estate tax liability and possibly avoid probate. This can be done by forming family entities such as a limited liability company. There are additional planning devices available to you but you should contact a qualified estate planning attorney to discuss the options and consequences.

## **What is Medicare?**

Medicare is a government-sponsored medical insurance program for people 65 years of age and over and for disabled persons. Medicare covers nursing care either in a Skilled Nursing Facility or at home for a very limited time.

## **What is Medicaid?**

Medicaid is a government-sponsored program that provides long-term care. Medicaid only provides this benefit after your assets have been depleted. An application for Medicaid benefits requires the full disclosure of your assets and financial affairs.

## **How can I qualify for Medicaid?**

To legally shelter assets in order to qualify for Medicaid requires advanced planning. Medicaid requires you to provide them with detailed financial statements dated five years prior to your application. They review the information looking for transfers of assets. If any assets were transferred out of the applicant's name for less than fair market value, Medicaid will calculate a penalty period during which the applicant will be ineligible for Medicaid coverage.

## **Once on Medicaid, can they take my home after my death?**

A personal residence is, for the most part, an exempt asset when determining your Medicaid eligibility providing you maintain the intent to return home. However, upon your death, Medicaid can put a lien on your home for the value of the benefits they provided to you. There are ways to exempt your home from Medicaid by properly creating an Irrevocable Trust or purchasing Long-Term Care Insurance. These options may not be appropriate or feasible in certain situations.

## **What is Long-Term Care Insurance?**

This type of insurance specifically provides for home care and nursing home care expenses, thus avoiding the need for Medicaid.

# How To Get Started On Your Estate Plan

## 1. Make An Inventory of your assets.

Include the purchase price and current value of each asset.

- Cash
- Securities
- Life Insurance
- Retirement Plans
- Real Estate
- Automobile

## 2. Determine your goals.

- To avoid estate tax?
- Asset protection?
- Eventual distribution of assets?
- Protect children?

## 3. Contact a financial planner or attorney to create a complete estate plan.

It is common for significant tax savings to be lost without proper planning.

## 4. Once you have a plan in place, consider making changes to your estate plan if any of the following takes place:

- Marriage, divorce, separation, or a birth or a death in the family
- The death of a business associate
- You take a new job, sign a work contract, or start a business
- You or your primary beneficiary becomes ill
- You change your mind about including one or more of your designated beneficiaries
- You acquire or sell a major asset
- Your estate changes significantly in size, composition, or liquidity
- You purchase out-of-state real estate
- Your income level changes, or there is a change in your anticipated inheritance
- New tax legislation passes
- You move to another state
- You reach age 70-1/2 and start taking mandatory distributions from a qualified retirement plan.

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