CITY BAR JUSTICE CENTER

A SIMPLE GUIDE TO ADVANCE DIRECTIVES AND ESTATE PLANNING

A PUBLICATION OF THE
CANCER ADVOCACY PROJECT
OF THE CITY BAR JUSTICE CENTER

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INTRODUCTION

The Cancer Advocacy Project is a legal services program of the City Bar Justice Center. The project provides cancer patients and survivors with no-cost legal information and advice in three areas: life (estate) planning, health law and cancer-related employment discrimination. Experienced volunteer attorneys with the life-planning panel counsel clients and prepare documents such as simple wills and advance directives. The health law component provides advice and assistance with health insurance issues such as denials of coverage by medical insurance companies, COBRA, HIPAA, Medicaid, Medicare and Social Security. Our employment discrimination component provides information, advice and counseling on issues relating to workplace discrimination and employee benefits.

The purpose of this Guide is to provide a general overview of the basic estate planning topics that you and your family may decide to consider when contemplating future arrangements and wishes. This Guide is not intended to substitute for legal advice. Rather, we hope this Guide will be used to help you to formulate your estate planning objectives and identify potential issues to discuss with your family and your attorney. This Guide does not address estate or income tax considerations or planning for Medicaid or other government benefits. This Guide is a revision of an earlier version which was created by the law firm Stroock & Stroock & Lavan, LLP.

WHAT IS ESTATE PLANNING?

Estate planning describes the process of developing a complete personal and financial plan for you and your loved ones that is usually intended to take effect upon incapacity or death. Most often, estate planning is associated with having a Will prepared by an attorney. Although it is true that a Will is often an important element of a complete estate plan, there are many other considerations that should be addressed, as you will see in this Guide. In fact, the phrase "estate planning" is somewhat misleading because it suggests that you must have a financial "estate" to begin this process. While wealth may lead to a more complex estate plan, some of the most important aspects of estate planning involve personal, and not financial, decisions - for example, who will make health care decisions on your behalf if you are unable to do so, who will care for your minor children, or who will decide upon the disposition of your remains.

The time for estate planning is now. At every stage of life there may be different issues to confront, whether it is the care of minor children, dealing with an estranged spouse, or perhaps choosing an adult child or children to make decisions on your behalf. Without the proper legal documents in place, local law and the local courts may dictate these decisions for you and your family. By planning ahead, your wishes will be honored, and perhaps your loved ones will be spared some added distress.

For some, estate planning includes efforts to minimize estate taxes. However, as mentioned above, this Guide does not address estate tax considerations because most people do not pay estate taxes. As is the case with income taxes, both the federal government and state governments may impose estate taxes.

Federal estate tax: Generally speaking, federal estate tax only applies in the case of individuals who die owning property with a value above a certain amount. In 2013, that amount (or 'threshold') was $5.25 million per individual. Under the American Taxpayer Relief Act of 2013, the exemption amount will continue to be adjusted for inflation each year. There is no 'sunset' provision for these amounts - they will remain in force unless changed by Congress.

State estate tax: New York State taxes estates beginning at $1 million.

In considering whether you may be subject to estate taxes, take into account the current value of your house and retirement accounts, which may have increased over time, as well as life insurance. Consult with a lawyer if there is any chance that your assets may exceed the federal and/or state thresholds.

BEGINNING TO PLAN

A good way to start is by focusing on your objectives. For some, their intentions are simple and may in fact coincide with New York intestacy laws, perhaps making a Will unnecessary.

For others, the intentions may be more complex, perhaps to exclude an estranged spouse, or to disinherit a troubled child or to provide for certain family members, such as minor children or an incapacitated spouse or parent. In these cases, an experienced attorney can help you navigate through the issues.

A common issue that confronts many planning their estates is who to select to act as a 'fiduciary'. A fiduciary is an individual who assumes legal responsibility to perform duties or manage affairs for the benefit of another person. These individuals may need to serve as your 'agent' during your lifetime – whether it is a health care agent to make health care decisions for you in the event of incapacity, or as agent to manage your property if you are unable to do so. Or, the designations may take effect upon death, such as an Executor, (if you have a Will, or Administrator, if you do not), to act on behalf of your estate, a guardian to care for minor children or a trusted family member or friend to dispose of your remains in accordance with your wishes. The selection of one or more individuals to serve in these important roles may be one of the most difficult decisions to face. However, in most cases, failure to make the decision will leave it in the hands of New York law or the discretion of a court.

It is important to review your intentions with an attorney who can properly advise you as to the best way to accomplish your goals, incorporating the appropriate legal documents.

WILL PREPARATION: WHERE TO BEGIN

First, compile an inventory of your property, including such items as bank accounts, life insurance, retirement assets and tangible belongings such as cars, jewelry and furniture. You should also consider the ownership of those assets; some may be owned by you individually, and some you may share ownership with others and the assets may therefore pass directly to the joint owner. An inventory is important to determine which assets will be governed by your Will and which, if any, will be disposed of by other means.

A Will can be simple or highly complex. More complex versions may incorporate trusts for the benefit of family members, such as minor children (under age 18 for most purposes) or disabled family members. A trust may be recommended if you have a substantial estate. If you have limited estate assets, a trust may be too costly to administer.

WHAT DOES MY WILL COVER?

With certain exceptions described below, most assets that you own individually are considered "probate property" and can be disposed of by a Will. These may include bank accounts in your name, a house owned by you alone (as opposed to some types of joint home ownership), your jewelry and other personal effects, cars and household items. These assets would form part of your "probate estate" after death. If you do not have a valid Will at that time, you will have died "intestate" and your assets would be disposed of in accordance with State intestacy laws.

In New York, the intestacy law provides for distribution of the estate among family members, in order of priority. The following examples demonstrate the order of beneficiaries (those inheriting the assets) under NY intestacy law:

An individual is survived by a living spouse and no children: all property passes to the spouse.

An individual is survived by living children and no spouse: all property is divided among the children equally. (Note that legally adopted and non-marital children have equal rights with biological children born to a married couple. Stepchildren have no rights under law.)

An individual is survived by a living spouse and children: the surviving spouse will inherit the first $50,000 plus 50% of the estate, and the children divide the balance. (This may not be the result you would prefer, particularly if minor children are involved.)

If an individual leaves neither a living spouse nor children, then his or her parents would be the beneficiaries. If the parents are not living, then the individual's siblings and

descendants of deceased siblings are the beneficiaries. More distant family members inherit only if none of these closer relatives is living.

Another function of preparing a will is to appoint someone to be the 'executor' of your estate. Your executor will collect the assets mentioned in the will, pay the debts of your estate and distribute the balance to your beneficiaries. In the absence of a Will, New York intestacy law also grants certain surviving family members the authority to perform the same functions as an executor. In this context, the appointed person is called the 'Administrator'. The order of authority for an administrator to be appointed is, first to the living spouse, or if none, then to the children, or if none, then to the grandchildren, or parents or siblings, in that order, depending upon who is living. More distant family members may be appointed, or a government official may be appointed in appropriate cases, as directed by the intestacy laws and the local Surrogate's Court.

WHAT HAPPENS TO ASSETS NOT COVERED BY MY WILL?

Non-probate assets (assets that are not covered by your Will) would pass in a particular way, regardless of what is stated in your Will (or, if you have no Will, regardless of New York intestacy law). Typically, the reason that property is a non-probate asset would be because it is jointly owned, or because you have named a beneficiary to receive it upon your death. The property will pass directly to the joint owner or a named beneficiary without requiring a Will. The following are a few examples.

Property held jointly with another person will usually pass to the surviving owner. This is referred to as a right of survivorship. Title (ownership) passes automatically to the surviving owner, and typically, all that is required is a death certificate. Some common assets that may be held as a joint tenancy with right of survivorship include jointly held real estate and joint bank accounts. In New York, residential real estate owned jointly between spouses is referred to as 'tenancy by the entirety'. It offers the same survivorship right as jointly held real estate, plus certain protections against creditors.

Not all jointly owned real estate will automatically be a non-probate asset. A 'tenancy in common' is a form of joint ownership among individuals, but without the survivorship right. Accordingly, if you jointly own residential real estate with another person as 'tenants in common', your share would not automatically pass to the surviving owner upon your death. Instead, your share is considered a probate asset, and it would pass under your Will, or by intestacy if you have no Will.

An exception to the general rule that individual bank accounts are probate assets is the Totten Trust, or 'pay on death account'. You have the option to designate (name) someone (the beneficiary) who will receive the assets of the account upon your death. You can make this arrangement for various types of accounts, including checking, banking or securities accounts. You may change or cancel the beneficiary designation at

any time. Whether or not you prepared a Will would have no effect on the payment of the account to your named beneficiary.

Other assets which typically have designated beneficiaries and are not affected by a Will include life insurance and retirement assets, such as IRAs, 401(k) accounts and pension plans, custodial accounts for children and educational accounts, such as 529 plans. While these assets exist for the named beneficiary, it is important to consider whether you should also name successor owners and custodians. Similarly, if you serve in any form of fiduciary role, such as Trustee of a trust, you also should make arrangements to have successors in place to take over if you are no longer able to fulfill that role.

It is important to review your beneficiary designations from time to time to be certain they reflect your current wishes.

WHAT HAPPENS TO DEBTS?

After compiling an inventory of assets, it is a good idea to consider how any debts you leave at the time of your death will be paid. Generally, such debts are payable from your estate. Only after paying the debts may your beneficiaries inherit from your estate. A co-signer on a loan (such as a mortgage or home equity loan) will continue to be liable on the loan if your estate cannot pay off the debt.

Debts and expenses of an estate are prioritized and paid by the estate in the following order: (1) Reasonable funeral expenses, and expenses related to the administration of your estate; (2) Debts owed to the federal and state governments, such as income taxes; (3) Real property taxes assessed before your death; (4) Judgments entered against you prior to your death, such as alimony or child support, in chronological order; (5) All other debts, such as credit card debts. A debt secured by property (such as a mortgage) has priority over unsecured debts. Unpaid federal student loans are cancelled upon death and may be cancelled upon disability.

As a general rule, unless your estate is named as a beneficiary, creditors cannot seize your life insurance, social security death benefits, most qualified retirement plans, including 401(k) plans, and individual retirement accounts (IRAs). However, if money is owed to the federal government, the government may tap into these otherwise protected assets to satisfy its claims.

Of course, debts can only be satisfied to the extent that the assets of your estate are sufficient to cover them. If you do not have enough assets in your estate to pay your debts, you family will not become liable to pay them unless a family member is a co-obligor or guarantor of the debt. However, exceptions to this may apply if the debt was incurred in your name by, or for the benefit of, a surviving family member.

WHAT IF MY BENEFICIARY HAS SPECIAL NEEDS?

Special consideration should be given when providing an inheritance for a child or other family member with special needs. An inheritance may cause a special needs beneficiary to lose eligibility for government benefits such as Medicaid. New York law provides a mechanism called a "supplemental needs trust," also known as a "special needs trust," which allows parents to create a fund to supplement their disabled child's finances while not, as a consequence, causing the child's disqualification from government aid. This type of trust can be established under your Will with the guidance of an experienced attorney.

ADDITIONAL CONSIDERATIONS FOR WILL PREPARATION

The Will provides your instructions for the distribution of your estate. Subject to certain limitations, described below, you can disinherit family members who would otherwise inherit from you in the absence of the Will, and you can include others (such as non-family members) who would not otherwise inherit from you if you die without a Will. The Will can provide specific instructions, such as giving an item of jewelry to a granddaughter, or it can be very general, say by giving all of your property to a named individual. Your attorney can assist you in considering the various alternatives.

While it is generally true that in your Will you can leave your property to anyone that you choose, a Will may not be effective to completely disinherit a spouse. In New York, if your spouse is alive (subject to certain exceptions provided below) he or she may 'elect' (exercise a right) to receive a minimum share of your estate unless you provide for that minimum share by some other method. For example, instead of leaving your spouse something in your will, you could choose to name him or her as the beneficiary on one of your financial accounts that would pay out at least the minimum share that they would be entitled to. The minimum share is equal to the greater of $50,000 or one-third of the deceased spouse's estate, net of certain expenses.

Generally, a surviving spouse, even an estranged spouse, has a right of election unless the marriage has been legally terminated or annulled or was otherwise void, the parties have legally separated, or the surviving spouse abandoned or refused to support the deceased spouse. If you are estranged from your spouse, your Executor will be required to prove that your estranged spouse abandoned or failed to support you. Because a spouse (including an estranged spouse) may be granted a variety of rights to serve in fiduciary roles unless you make alternate arrangements, it is important that you override these appointments if that is your wish.

Property passing to a minor may be subject to court supervision if the appropriate arrangements are not made in the Will. An alternative is to establish a custodial account

for a child, which may be managed by your Executor or another individual of your choosing. This type of account is also referred to as a Uniform Transfers to Minors Act (UTMA) account, named after the law which authorizes it. Your Will can direct that an UTMA account be created for a minor child to avoid the expense and restrictions of court supervision. An UTMA account is the property of the child, but is managed by your chosen 'custodian'. Distributions (payments) may be made from the account at any time for the benefit of the child. Upon reaching majority (for these purposes, age 21, unless the earlier age of 18 is selected) the child has full rights to the account.

Another important function of the Will is to designate an Executor to administer the estate. You may choose one or more trusted individuals over the age of 18 to serve as Executor or Executors, though neither an incompetent nor a felon may be appointed. In addition, a non-resident, non-citizen may serve as an Executor only if a New York resident is also serving. The court can also disqualify someone who is unfit for a variety of reasons, including substance abuse.

The Executor is responsible for filing and probating your Will in court, collecting the assets of your estate, paying the debts and administration expenses and, ultimately, distributing the estate in accordance with your Will.

Finally, if you have a minor child or children, you can designate a guardian in your Will. This designation serves mainly as a recommendation to the judge, who ultimately has the discretion to appoint a guardian in accordance with the best interests of the minor child. Of course, as the parent, your recommendation would be given heavy consideration. This is discussed in more detail below.

Certain formalities must be observed for the Will to be valid. The Will must be in written form, executed by a competent person over the age of 18 and witnessed correctly. An experienced attorney will be familiar with the necessary formalities.

As circumstances change from time to time, you may choose to revoke (cancel) the Will and create a new one that is more suitable for your new situation. In the past, when it was necessary to change one or more provisions in a Will, a Codicil was used. However, with modern technology, creating a new Will that reflects the changes is no more difficult that creating a Codicil.

GUARDIANSHIP FOR MINOR CHILDREN

A guardian can be named over the *property* of a minor child, say for example to manage a minor's inheritance, over the *person* of the minor child (i.e., a custodial guardian to care for the child him or herself), or both. Generally speaking, a guardian is appointed only if there is no surviving parent. Anyone other than a surviving parent seeking appointment as guardian will have to demonstrate "extraordinary circumstances" showing that it would not be in the child's best interests for the surviving parent to be appointed as

guardian. Unfortunately, there are cases where those extraordinary circumstances exist, such as substance abuse, a showing of physical or emotional abuse of the child, etc.

It is possible to name a guardian for your minor children in your Will. However, a guardianship designation in a Will becomes effective only upon death, after the Will has been probated and the court has issued its order of guardianship. This process may take several months. For parents who are terminally ill, or chronically, progressively ill, and want the guardianship to become effective at some point before death – or immediately upon death – New York State provides an alternative called 'standby guardianship'.

A standby guardianship may also be appealing where some form of dispute is anticipated. The standby guardian takes immediate custody of the minor upon the designated triggering event (such as a decline in your health), unless and until the court orders otherwise. In fact, the designation (discussed below) does not require the consent of any family member, not even a surviving non-custodial parent. However, if there is a surviving parent who seeks custody, the burden would be on the standby guardian to show that the surviving parent is not fit for guardianship of the minor.

In New York, there are two methods of appointing a standby guardian in the event that a custodial parent has a progressively chronic illness or an irreversibly fatal disease and can no longer care for her or his child. One method includes a court proceeding. The other is a simple written designation, followed by a court proceeding within 60 days of the time that the designation becomes effective. Under either method, the commencement of the standby guardian's authority does not remove the parental or guardianship rights of the child's parent or legal guardian. Rather, the standby guardian assumes concurrent authority with respect to the child. Under either method, the parent can revoke the guardianship at any time by notifying the guardian in writing and, if the petition has been filed, by filing such notification with the court.

REVOCABLE INTER VIVOS TRUST

A revocable inter vivos trust (also called a living trust) is a trust created during your lifetime, and is usually intended to avoid the expenses and delays that may be associated with probating a Will. It can be changed at any time during your lifetime. To be effective, it would hold your assets during your lifetime, and include instructions for distributing those assets after your death, similar to a Will. As the creator of the trust, you may serve as the Trustee during your lifetime, and you would typically name a successor Trustee to manage the property if you become incapacitated, or to dispose of the property after your death.

Unlike a Will, a revocable trust does not automatically become a matter of public record. However, any advantages may be outweighed by the complexity and costs of setting up the trust, and transferring property to it. Unless all of your individually owned assets are transferred to the trust, probate may still be required. In addition, a revocable trust may

be just as vulnerable to objection as a Will, may be contested in a court proceeding, and a copy may be obtained by objectants (persons challenging its contents) in a court proceeding. Finally, there are no tax advantages to using a revocable trust over a Will.

If your objective is to avoid probate, there may be other less expensive, less complicated ways to accomplish that goal, such as converting probate assets into non-probate assets, including jointly held property, Totten trusts and life insurance.

HEALTH CARE DIRECTIVES AND POWER OF ATTORNEY

Health care directives, such as a health care proxy and a living will, are used to document and protect your health care wishes in the event you are unable to communicate them.

A health care proxy enables you to appoint an individual to make health care decisions on your behalf, in the event you are unable to do so. You may appoint anyone you trust who is over the age of eighteen, other than your attending physician and certain staff members of the hospital or nursing home where you are admitted. New York law states that, in order to avoid conflict, only one individual can be named to act as your agent at any one time. However, you may name an alternate agent who can step in to act if your first choice is unavailable. The health care agent's power becomes effective only if your doctors find that you no longer have the capacity to make decisions about your medical treatment. Once the power is effective, your doctors must respect your health care agent's decisions as if they were your own, including decisions with respect to treatment. However, the health care agent can only refuse artificial nutrition and hydration if you expressly grant your agent that power. It is best to express this in writing, on the health care proxy form itself.

A living will is generally aimed at documenting your end-of-life wishes. These instructions can be expressed within a health care proxy document, but in New York, is more usually a separate document. If you have strong feelings about what treatment you would prefer to continue with, or to refuse, if your condition deteriorated and you had no reasonable chance of recovery, a living will is a useful document. When used in conjunction with a health care proxy, your agent is obligated to make decisions in accordance with your end of life wishes and instructions. Since a living is directed at your treating physicians and does not involve naming an agent, it is sometimes the only health care directive available to individuals who cannot prepare a health care proxy because they do not have a suitable person to serve as agent.

Many health care facilities use Do Not Resuscitate (DNR) Orders, which instruct medical professionals not to perform CPR when your heartbeat or breathing stops. New York also has a legal form of "nonhospital" DNR order which may be used when you are being cared for at home or in a hospice. Under New York law, your health care agent may consent to a DNR on your behalf.

A power of attorney enables you to authorize someone as your agent, to make decisions on your behalf with regard to financial matters. You may select anyone you trust who is over the age of eighteen and you may select more than one agent. Unlike a health care proxy, you may direct that your agents are required to act together. In New York, a Power of Attorney is granted via a statutory form. Powers can include the authority to, among other things, buy and sell your real estate, manage your banking transactions, invest your money, make legal claims on your behalf, attend to your retirement and tax matters, and make gifts on your behalf. You may grant your agent very broad or very limited powers. If you choose to allow your agent to make gifts in excess of an annual total of $500, or to be able to significantly reduce your property or change how it is distributed at your death, you must also complete a Statutory Gifts Rider at the same time that you complete the basic Power of Attorney form.

A power of attorney becomes effective as soon as both you and your agent (or agents) have signed and notarized the form, and remains effective even after you become incapacitated, unless you instruct otherwise. It is possible to modify the power of attorney so that it does not become effective until a future time, upon the occurrence of a specified event, usually upon incapacity. In effect, your incompetence would have to be proven before your agent could begin utilizing your power of attorney. However, proving incapacity can be a long and taxing process, during which time your intended agent will be unable to act on your behalf. This may have serious consequences in some instances with, for example, no ability to access bank accounts or negotiate with a landlord. For this reason, this type of modification is less commonly used.

A valid durable power of attorney, in conjunction with a health care proxy, should avoid the need for a guardian to be appointed by a court, should you become incapacitated. Without these instruments, not only would the court have the authority to select a guardian to make all decisions on your behalf, but also a costly and lengthy court proceeding is required, with ongoing monitoring by the court, at your expense.

DISPOSITION OF REMAINS

Until fairly recently, New Yorkers had limited options for providing burial instructions. One such option was to provide instructions in the Will. However, because it is rare for a Will to be probated between the time of death and the time of interment or cremation, this method did not always ensure that the person's wishes were carried out.

Today, New York law sets out a formal procedure allowing you to designate an agent to carry out your burial or cremation wishes and make related decisions after death. In the absence of a formal designation, the law provides a hierarchy of individuals who have the right to carry out your wishes. This authority is first given to the surviving spouse, followed by the surviving children over 18 years of age, then surviving parents, and finally, surviving siblings. Notably, New York law explicitly includes a domestic partner as a spouse.

New York law makes the agent, at least initially, financially responsible for the cost of carrying out the burial or cremation wishes of the decedent (deceased person). A prospective agent should understand that, even though the law provides for reimbursement by the decedent's estate, it also requires that the agent initially cover the costs. Many funeral, burial and cremation service providers offer advance and pre-paid arrangements for their services, which may avoid financial pressures on the agent. Be sure to deal with a reputable company.

The New York statute offers a sample form called Appointment of Agent To Control Disposition Of Remains, which is available from the New York State Department of Health. However, because certain formalities must be followed in appointing an agent, it is a good idea to discuss your wishes with your attorney.

A related topic is organ donation. New York's Department of Health offers a variety of resources and information, including a registry. For more information, please see their website at http://www.health.state.ny.us/nysdoh/donor/ or call 1-866-NYDONOR.

The estate planning basics covered by this guide are intended to educate and inform, but not substitute legal advice. The Cancer Advocacy Project is available to assist you in pursuing your estate planning objectives with the assistance of a qualified attorney. For further information please contact the Cancer Advocacy Project at:

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GLOSSARY:

Administrator: the person or financial institution that is appointed to take care of the estate of a deceased person who died without a will.

Beneficiary: a person or entity that is entitled to receive something from your estate.

Codicil: a written amendment to a will.

Executor or Executrix: the person or financial institution that is appointed to administer the estate of a deceased person who died with a will.

Fiduciary: a person to whom property or power is entrusted for the benefit of someone else.

Guardian: an adult appointed by a surviving parent in his/her will or by a court, who is responsible for a minor or incapacitated person.

Intestate: refers to dying without a will.

Probate: the process of determining if the deceased person left a valid will and admitting that will to the Surrogate's Court.

Testate: refers to dying with a will.

Trust: an arrangement, usually established by a written document, to provide for the management and disposition of assets.

Trustee: an adult individual or financial institution that is designated to be responsible for the administration of a trust.

Will: a written document that disposes of one's property at death.