The Definitive Guide to Estate Planning in New York

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Most people don't engage with lawyers until there's an unavoidable need. You wouldn't retain a personal injury lawyer *before* you suffered an injury, of course, any more than you'd retain a DWI lawyer before being arrested for driving while intoxicated. Other areas of law do invite some degree of forethought: for example, you will generally consult with a divorce or real estate attorney before you take serious steps toward divorce or a real estate transaction. These, though, are legal situations that encourage proactive behavior. Facing divorce or a real estate transaction, you want something specific for your future life: safety, peace of mind, a chance at a new relationship, liquid assets to spend or invest, or a new home for you or your family. You can picture these things; you know they are within your reach; and so you consult with an attorney, the person who can help bring you closer to what you desire.

Estate planning is different. The thought of estate planning will for some encourage proactive measures, and for others encourage procrastination. It's not easy to imagine the concrete things we would desire out of a good estate plan – such as long-term healthcare for ourselves, guardianship for our children, and the preservation of our assets to benefit loved ones – because to think of these plans bearing fruit we must first imagine ourselves declining, and then deceased.

Comprehensive and thoughtful estate planning, though, is essential – no matter the current status of your finances. Failure to engage in comprehensive estate planning could lead to serious concerns late in life – if, for example, your mental powers start to fade or if your body begins to fail you – and could be disastrous if you pass away unexpectedly, leaving all of your assets to be divvied up according to New York State regulations, rather than your wishes.

You can avoid these scenarios – easily – by talking through your finances and priorities with an estate planning attorney. While it might at first not seem like a subject you want to broach, it's never too early to start planning for the end of your life, and doing so can give you immediate, lasting peace of mind.

Myths of Estate Planning

Perhaps because so many people avoid thinking about estate planning, there are many persistent myths about this area of the law. Some of these are explained below.

A will gives me complete power over where my assets go when I die.

Even people who accept that they need more than a will for a comprehensive estate plan can still overestimate the legal power of a will. While people unfamiliar with estate planning often think of a will as a straightforward and unfettered statement of their wishes, this isn't the case.

You cannot, for example, disinherit your spouse with a will. A spouse will always be entitled to one half of your "wealth" (broader than your estate). This is called a "right of election." If you attempt to use your will to give your spouse less than one half of your wealth, or if you miscalculate in your will such that it leaves your spouse less than one half of your wealth, your spouse may exercise this right of election and override the terms of your will. You cannot unilaterally refuse this right of election. The only way around it would be through an airtight pre-nuptial or post-nuptial agreement.

As explained above, probate also limits the power of a last will and testament. Two groups of people can potentially challenge a will through probate. One group is the distributes, people who would have taken a portion of your estate had there not been a will. The other group is comprised of anyone the will adversely affects (for example, individuals named in an early will but disinherited in the latest version). To disqualify a will, any challenger must prove incompetence, influence, mistake of fact, or fraud/forgery. In other words, the challenger must demonstrate that you were not mentally capable of writing the will in question; that someone coerced you into writing the will in question; that either you or the witnesses did not know the document you signed was a will; or that the will is fake. None of these claims

is easy to prove; on the other hand, you won't be around to settle the matter with your testimony.

Lastly, a will only affects what happens *after* you die. Proper estate planning includes end-of-life planning. You should have a power of attorney and a health-care proxy to make medical and legal decisions in case you become incapable of either. You cannot assign such powers in a will. Also, a will is not the proper place to put your funeral and burial wishes. The probate process will occur *after* your funeral. Make sure you discuss these arrangements with family and friends, and consider stating your wishes in a separate document. You can talk to an estate planning attorney about the best ways to make your funeral and burial wishes a reality.

It's fine to pick just one person to handle all of my affairs.

When it comes time to assign a power of attorney, healthcare proxy, children's guardian, executor, and trustee, most people can think of just a handful of names. Many are tempted to assign all these powers and roles to one person.

This is not, generally, a good idea. The different roles call for different skill sets, temperaments, levels of commitment, and forms of trust.

The executor, for example, has to make decisions in the difficult weeks immediately following your death; that person must be capable of operating under emotional stress and acting quickly and decisively.

The trustee, however, has the longer-term obligation, managing your estate until the beneficiaries come of age. You will want someone comfortable with such a commitment, and qualified with knowledge and experience in financial affairs.

A good trustee might not make a good guardian for your children. Here more than for any other role you need to pick someone who understands and accepts the commitment to care for your children after you've passed. This might be a godparent or it might be your own parents – but think twice before you ask. Grandparents do not often *want* the responsibility of raising another child or group of children so late in life; retired, they will not have financially planned for this and it may be an untenable burden on them; and they may not be at all suited to "trying again" at

raising a child in a culture so different from the one they knew when they raised you.

Finally, your power of attorney should be someone you trust completely, and someone with a broad understanding both of your affairs and of legal affairs generally. In contrast your healthcare proxy should understand your stated wishes as well as your philosophical and religious convictions.

You need to be very rich to make setting up a trust worthwhile.

When people think of "trusts," they often think of the very wealthy – of annual investment incomes and "trust fund babies" and all the trappings associated with the leisure class. They might even think a lawyer would decline to set up a trust for assets below a certain threshold.

This is all misleading and misled. Almost anyone can set up a trust. If your debts are larger than your assets when you die, then creditors will make claims to your estate – but even in this case you may be able to use a trust to pass assets on to your loved ones before creditors come to seize them.

Even if you only have a few thousand dollars to pass on, a trust could be worthwhile. If your beneficiaries are young, and if you appoint a capable trustee, those funds could grow significantly after your death and make a much bigger impact than you might realize when your trustee finally distributes them.

Talk to your estate planning attorney about your finances to understand if a trust might help in your situation.

If I die with debts that exceed the value of my estate, my family will be liable.

No individual can be legally liable for debts solely in another individual's name. Your *estate* will be liable for your debts, but this liability does not extend to your family members, to the beneficiaries named in your will, or to your executor or trustee.

This doesn't mean that the creditors won't call making inquiries. Many do contact the family members of deceased debtors; this is patently fraudulent but not

necessarily illegal. Know that if you've survived a loved one who left debts, you do not have to talk to any creditors, and it probably will not benefit you to do so. If you continue to receive calls or if you receive any communication you feel is harassment, contact your attorney.

If you have debts, or shortly will have debts, and are beginning your estate planning process, you'll be worrying about leaving nothing behind for your loved ones. If you take action early enough, you could pass on your most significant assets and keep them safely beyond the legal claims of your creditors. You might use deed transfers or revocable or irrevocable trusts.

Why Estate Planning Is Essential

To understand why estate planning is essential, you need to understand the consequences of approaching the end of your life without any estate plans.

Intestacy: Dying Without a Last Will and Testament

If you die without a will in New York State, our "intestacy" laws determine what will happen with your assets. These stipulate the following:

- If you die leaving behind a spouse but no children, all of your assets go to your spouse.
- If you die leaving behind children but no spouse, your entire estate will be divided equally among your children.
- If you die leaving behind a spouse and children, your spouse will get $50,000 off the top of your estate, and 50 percent of the remainder. Your children will split the other half equally.
- If you die leaving behind neither a spouse nor children, all of your estate will pass to your surviving parents.

- If you do not have a surviving spouse, children, or parents, your entire estate will be divided equally among your siblings.
- If one or more of your siblings have passed, their portion of your estate will be divided by their children (or *grandchildren*, if their children are not living).
- If you do not have a surviving spouse, children, parents, or siblings, your estate will be divided among maternal and paternal grandparents.
- If you do not have a surviving spouse, children, parents, or siblings, and one or more of your grandparents have died, then their portion(s) of your estate will go to their children (your aunts or uncles); if they do not have surviving children then their portion(s) will go to their grandchildren (your first cousins); and if they do not have surviving grandchildren their portion(s) of your estate will go to their great-grandchildren (your second cousins).
- If there are no surviving heirs or no surviving heirs can be found, the estate will "escheat," or pass to the state.
- Note that there is *no* provision in New York State intestacy laws for passing assets on to friends or other non-relatives.

End-of-Life Challenges and Concerns

Not all estate planning concerns have to do with assets and inheritance. You also need a comprehensive estate plan for end-of-life scenarios.

If you don't have a healthcare proxy and power of attorney, a sudden illness or accident or the onset of Alzheimer's or dementia could leave you incapable of making legal and medical decisions, caring for your dependents, and managing your affairs. This scenario could be a legal disaster, fueling conflict between your loved ones and leaving no clear authority or designation of powers when your life and the wellbeing of your loved ones might be at stake.

Basics of Estate Planning

While the consequences of failing to make an estate plan are dire, the steps you need to take to make that plan are not difficult or daunting. Learn about some of the essential documents below.

Estate Planning Essentials

Establishing your estate requires three fundamental documents: a last will and testament, a healthcare proxy, and a power of attorney.

Will

Your will designates where your assets will go (within the restrictions explained above). It names beneficiaries (which may be people or institutions) as well as an executor, who will handle your will through the probate process, and a trustee, who will handle the distribution or management of your estate afterwards. It can also include provisions for the care of your children, including the appointment of a guardian.

Healthcare Proxy

A healthcare proxy allows you to designate someone to make healthcare decisions for you. This is not an unqualified delegation of power. The healthcare proxy will only go into effect if you become incapacitated or otherwise unable to make decisions. Your physician will decide whether you are capable of making your own healthcare decisions. You can also include instructions about specific scenarios in this document. The healthcare proxy will be bound by these instructions, up to the point at which there is no clear indication of your wishes. This isn't, then, a document granting total control over your life to one person. Instead, it names someone who can act based on your stated wishes and what he or she knows of your beliefs.

You should give your physician a copy of your healthcare proxy document as soon as you've completed it.

Power of Attorney

Power of attorney, like a healthcare proxy, is a designation triggered if and when you become incapable of making sound decisions on your own. Whereas a healthcare proxy will be making stressful but limited decisions, someone with power of

attorney could be facing a relatively mundane but more time-consuming job. This person will take care of your household expenses, mortgage payments, other bills, and the proper deposit of incoming funds.

This should be a *durable* (or permanent) power of attorney – temporary power of attorney documents serve in other, less common scenarios.

More Estate Planning Tools and Documents

The will, healthcare proxy, and power of attorney may be the "must have" documents of estate planning, but your circumstances might call for other measures.

Trusts

Trusts are an alternative method of distributing assets. They are particularly valuable if:

- You want to keep certain assets out of probate.
- You have young children who will not be able to use assets you leave them immediately.
- You want to pass on assets before you die, but retain control of them while you live.

A will might contain a "trust clause" which can create a trust. It designates a trustee to manage certain assets, and states the age at which those assets will pass to the beneficiaries (usually young children at the time a person writes the will). It can also set restrictions on how the beneficiaries can use the assets – for example, they might be reserved for college education.

However, you can establish a trust separate from your will. This might be a "living trust," which takes assets out of your "ownership" while you are alive. These assets pass out of your ownership and into the trust. You still control the trust,

though, which means you can manage the assets and even take them out whenever you feel like it. Another named party will become trustee when you die or become incapacitated. Because of this arrangement, assets in a living trust will not be subject to probate or the efforts of creditors, and they may even serve to disinherit a spouse of certain assets. They are also valuable if you want to reduce the value of your estate (for example, to avoid estate taxes).

Medicare Planning

"Medicare planning" is another reason you might want to reduce the value of your estate. Medicare is a social welfare program designed to help the poor and elderly. Medicare can pay for the majority of your medical expenses late in life – but only if you've exhausted all your other assets. This means that if you've saved up something to pass on to your loved ones, an illness or long-term care at the end of your life could wipe this out, leaving your loved ones with nothing, and leaving your estate plans in ruin.

If you don't currently qualify for Medicare but want to use it to pay for your end-of-life care and preserve something for your children, you might use a living trust. This could "reduce" your net worth enough to allow you to qualify for Medicare, though you'd maintain control over your assets and ensure that those assets pass on to your named beneficiaries, no matter what happens to you.

Medicare does have a "five-year look-back period," though. This means that if you passed your assets into a living trust less than five years ago, you may not qualify for Medicare. This makes advance planning for long term care crucially important.

What To Include in a "Legacy Drawer"

Because there are so many documents involved in estate planning, you should keep copies in one easy-to-find place, and let some loved one – perhaps your executor – know where this is.

This place – often called a "legacy drawer" or "legacy portfolio" – should contain a copy of your active will, healthcare proxy, power of attorney, trust documents, property deeds, bank account information and statements, bills and documentation of monthly expenses, and documents explaining your funeral and burial or cremation wishes. Include the names and addresses of your attorney, accountant, financial advisor, power of attorney, healthcare proxy, and executor. You might also consider leaving personal items or notes here, too.