

Ten Estate Planning Tools

Start the new year off right by utilizing these legal planning tools for death and disability. Preserve your assets, facilitate medicaid and estate planning and make it easier on your family. Ensure that your wishes are carried out when you die or become disabled with:

1. **Durable Powers of Attorney (POA).** By signing a poa, you can authorize your agent to manage your assets and income if you are unable to do so and implement Medicaid planning to protect your assets.

The poa authorizes another person to act on your behalf to perform any number of specified acts, such as: real estate transactions, banking, operation of a business, insurance or lawsuits. To authorize the agent to make gifts, gift-giving authority must be initialed by the principal (person who signs a power of attorney) and accompanied by a Gifts Rider (GR) acknowledged and witnessed by two witnesses in the same manner as the execution of a will.

Specific provisions in the GR grant the agent authority to create, revoke, modify and fund living trusts; designate insurance beneficiaries; create joint accounts; and change beneficiaries on retirement benefit plans. Small gifts of not more than \$500 each per calendar year to individuals and charities, which continue a custom of the principal, can be made by the agent without a GR.

The principal has the option of appointing a “monitor” to request and receive records of transactions by the agent. The agent has specific fiduciary responsibilities, including a “prudent person standard of care”.

This includes record keeping with receipts and imposing on the agent the requirement that records be made available within 15 days of a written request by a monitor, co-agent, certain governmental entities, court evaluator, guardian, or a representative of the principal’s estate.

An agent may be liable for conduct or omissions which violate the fiduciary duty. Agents may resign by following certain procedures. A special proceeding can be instituted to compel an agent to produce a record of receipts and disbursements and for various other purposes. If a guardian is later appointed, the agent must account to the guardian, rather than the principal.

The form must be signed, dated and notarized, not only by the principal, but also by the agent. It takes effect when the principal and agents have signed before a notary, unless it is a Springing Power of Attorney which takes effect upon a future occurrence.

Provisions regarding health care billing and payment matters allow the agent access to health care records in accordance with HIPPA requirements.

Provisions can be added to the form or GR in the section labeled “modifications.” which eliminate or supplement a power, or add a provision not inconsistent with the other

provisions of the form.

Acceptance of the form by third parties, e.g. banks is required. A third party cannot refuse to honor the GR or any poa form properly executed under the laws in effect at the time it was executed, without reasonable cause. It is unreasonable for a third party to require their own form or to object because of the lapse of time since the execution or between acknowledgement by the principal and the agent.

2. **The Living Will** is a declaration which instructs your family and your doctor about life-prolonging medical procedures when your condition is terminal and there is no chance of recovery. Under constitutional and common law, you have the right to refuse medical treatment.

A living will gives you the opportunity to express your wishes in advance, since you may not be able to make them known when it becomes necessary to do so. Life prolonging procedures include hooking you up to a machine when you cannot breathe on your own, performing operations or prescribing antibiotics that cannot realistically increase your chance of recovery, starting your heart mechanically when it has stopped beating or feeding you by tube.

3. **Health Care Proxies** recognize your right to appoint a health care agent that you trust to decide about medical treatment in the event that you become unable to decide personally. Unless you specify otherwise, the agent will have the same authority that you would decide about treatment.

The authority encompasses the right to forego treatment or to consent for needed treatment. The agent's authority begins only when a physician determines that you have lost the capacity to decide about treatment.

4. **Wills.** By executing a will, you may dispose of property at your death in the proportions and to the persons you wish, appoint competent and trustworthy executors, trustees and children's guardians and create testamentary trusts.
5. **Prepaid Funeral Account** is set-up by a funeral home and is considered an exempt asset for purposes of qualifying for Medicaid.
6. **Appointment of Agent to Control Disposition of Remains.** Although you can state your wishes in your Will, the Will may not be read or opened until after the funeral services. The new form for the appointment of an agent to make these decisions on your behalf should be kept in a safe place in your home with your other important decision-making papers, such as your durable power of attorney, health care proxy and living will.

The new law gives you the ability to specify your wishes and give instructions to the agent. You are also able to indicate whether you have completed a Pre-Need Agreement with your funeral home. If you do not designate an agent, the law names a hierarchy of people who have the right to control the disposition of your remains:

- (a) surviving spouse
- (b) surviving domestic partner
- (c) any of the surviving children over 18 years old

- (d) either of the surviving parents
- (e) any of the surviving siblings over 18 years old
- (f) a guardian appointed by the court or (g) the fiduciary of the estate.

There are certain formalities that must be followed to comply with the law. A simple hand written note is not sufficient.

7. **Life Estate Deed** . Transfer your home to your children with a life estate deed which gives you the right to live there for the rest of your life. During your lifetime, you will continue to be considered the owner of the home for most purposes. For example, you will still be responsible for the payment of all taxes, insurance and maintenance of the home.

Social Services cannot require you to liquidate the life estate or to rent the life estate interest property. However, if you rent out the property, any net rental income you receive is counted in determining eligibility for Medicaid. Also, if you sell the property, part of the proceeds or fair market value are a countable resource for determining Medicaid eligibility. The life estate deed has many advantages over an outright gift, including:

- the property will still qualify for any property tax exemptions such as veterans and senior citizens exemptions that were available prior to the transfer as long as you continue to reside in your home;
- your children can't make you move out; your children's creditors can't take possession of the home;
- capital gains when your children sell the home will be calculated on a stepped-up basis which is the value at the date of your death rather than your original cost basis, and;
- since the value of the remainder interest is lower than the full value of the house, it will result in a shorter Medicaid penalty period than an outright transfer. You can also purchase a life estate in another's home or a new home without penalty if you live there for one continuous year.

8. **New York State Partnership Long Term Care Insurance** allows you to access Medicaid after the insurance runs out, regardless of the amount of assets that you own.
9. **Caregiver Agreements** to pay your relatives for helping you. This is an agreement by the caretaker to provide personal and/or managerial services in exchange for market rate compensation. It should clearly spell-out the duties, responsibilities and compensation of all parties.
10. **Living (Inter Vivos) Trusts** are an agreement under which a person or institution (trustee) holds legal title to real or personal property for the benefit of another (beneficiary). The person who creates the trust is known as the grantor. The trust agreement sets forth the rights and responsibilities of all parties involved. Living trusts have numerous advantages including proper management of assets; avoidance of probate; eliminating the need for guardianships, life estates or joint ownership; and

assuring privacy.

Consult with an attorney to have these forms properly drafted.

The preceding information was provided by Robert Friedman, an [Estate Planning Attorney in Buffalo, New York](#).