

Guide for Basic Estate Planning - 2022

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Last Will and Testament

- ▶ A legal document that includes your personal instructions regarding the distribution of your assets upon your death. The preparation of a Will allows you to designate the beneficiaries of your estate. Your Will may also name a person to serve as Executor of your estate.
- ▶ If you die without a having a Last Will and Testament in place, New York's intestacy statute (EPTL §4-1.1) will govern and, while that may distribute an estate as most people would desire, it can often include persons that the decedent would not want to include in their estate distribution.
 - ▶ Guardians and/or Trustees for minor children
 - ▶ Protection of special needs family members
 - ▶ Restrictions for spendthrift family members

Testamentary Supplemental Needs Trust for Special Needs Individuals

- ❖ The funds in this type of Trust serve to supplement governmental benefits (such as SSI and/or Medicaid) received by an individual.
- ❖ The assets of Supplemental Needs Trust may not be considered as available resources for purposes of determining eligibility for such benefits. This will help to protect the special needs individual's SSI and Medicaid benefits.

Planning for Digital Assets - Access by Estate Fiduciary

- In order to preserve and administer the estate, a court-appointed estate representative must identify and collect all of the decedent's assets and obtain actual possession. An estate representative has a duty to settle and distribute the decedent's estate as expeditiously and efficiently as is consistent with the best interests of the estate.
- Fiduciaries are obligated to marshal and protect the decedent's assets. Fiduciaries are charged with the same duty of care, loyalty and confidentiality to marshal and protect a decedent's digital assets as they do to manage a decedent's tangibles. See *Estate of Swezey*, 2019 NYLJ Lexis 181 at 4 (2019).
- In fact, fiduciaries may face liability for losing property, including failing to collect money owed to the decedent in a prompt manner.
- The privacy of the deceased user must be weighed against the need to wrap-up the estate.
- ▶ **Prevent Identity Theft**
- ▶ **Post-mortem privacy and reputation preservation**
- ▶ **Preserving the Decedent's Life Story**
- ▶ **Protection of Estate's Business Assets**
- ▶ **Right of Publicity - The right of an individual to control the commercial use of his/her/their identity.**

Tips for Planning in The Digital Age

- Take an inventory of digital assets;
- Select fiduciaries who are comfortable dealing with digital assets;
- Make sure the fiduciary understands the importance of preserving digital assets and knows how to access them;
- Consider estate planning documents with written consent to expressly address digital assets; and
- Regularly back up any electronically stored data.

Appointment of Agent to Control Disposition of Remains

This is a legal document permitted under Public Health Law §4201, that allows a person to designate an agent to control their physical body and remains following death. It also allows for special instructions to be provided to the agent, such as cremation or burial wishes.

- This document can avoid disputes and power struggles among family members
- You may designate your desire for religious or cultural traditions or unique wishes

Planning Your Funeral

Will your family and/or religious officiant know what type of service you want for your funeral? Do you even want a funeral? Remember that funerals are for the benefit of your family and friends. Funerals bring closure and allow people to think about the good things that happened in your relationships with them.

The following questions will help you think about your funeral service, the graveside service, and possible reception that follow.

* * * * *

Do you want to be cremated? _____ yes _____ no

Do you want a religious service at (choose only one):

_____ Funeral Home

_____ Funeral Home and a short service at the graveside

_____ Religious Service only

_____ Church / Temple / religious service and a short service at the graveside

_____ Graveside only

Health Care Proxy/Living Will

A Living Will allows you to document your wishes concerning treatment in the event you become terminally ill, while a Health Care Proxy allows you to designate an agent to make health care decisions in the event you are unable to do so.

- Withdrawal or withhold of life support should be specified
- HIPAA language should be included
- Consider a MOLST - Medical Order for Life Sustaining Treatment

Durable General Power of Attorney

A Durable Power of Attorney is a legal document in which you appoint an agent to make financial decisions on your behalf during your lifetime for convenience or in the event you become incompetent or disabled.

- May avoid the necessity of costly and protracted guardianship proceedings
- Terminates upon death
- Agent must execute the document before it is effective
- A third-party monitor may be appointed

New NYS Power of Attorney Statute became effective on June 13, 2021

- ▶ Existing Powers of Attorney documents remain effective.
- ▶ A Power of Attorney document that was executed by the Principal *prior to* June 13, 2021 (even though signed by the Agent after that date) will be valid.
- ▶ A refusal to honor a power of attorney must be made, in writing, to the Principal and the Agent within 10 business days of presentation. The document must provide specific reasons for the refusal. If a proceeding is brought to compel the acceptance of a statutory short-form power of attorney, the court can award damages including reasonable attorney's fees.
- ▶ The total basic statutory gifting amount is increased from \$500 per year to \$5,000 per year. If more gifting authority for the Agent is desired, authority must be granted to the Agent in the Modifications section of the POA.
- ▶ The record-keeping requirement for Agents has been clarified. An Agent must keep a record (*i.e.* ledger) of all transactions conducted for the Principal or keep all receipts of payments and transactions conducted for the Principal.

Estate Planning Spectrum

Estate Tax
Planning
(High Net Worth
Individuals)



Medicaid Planning
(Welfare Program)

2022 Estate Tax Exemptions

- ▶ Commencing January 1, 2022, the **New York State Estate Tax Exemption** amount is \$6,110,000.00, *per person*. However, if an individual dies owning just 5% more than the \$6,110,000.00, there is a “cliff” taxing the decedent on the full value of the estate, not just the amount over the exemption amount.

The “cliff” is reached at \$6,415,500.00. Above this level, taxable from the first dollar.
Exclusion amount of \$6,110,000.00 + (\$6,110,000.00 × 5%, or \$305,500.00)

Gifts made in the three (3) years prior to death are subject to “claw-back” and included in the calculation of the NYS gross estate.

The maximum NYS tax rate is 16%.

- ▶ The current **Federal Estate Tax Exemption** is \$12,060,000.00, *per person*, through December 31, 2025. Effective January 1, 2026, the Federal Estate Tax Exemption will sunset and revert back to \$5,490,000.00, *per person*.

The maximum Federal tax rate is 40%.

Ideas for Estate Tax Planning

- ▶ **2022 Annual Exclusion Gifting** (\$16,000.00 per person, per calendar year)
- ▶ **Payment of Tuition and Medical Expenses**
- ▶ **Charitable Gifting**
- ▶ **Irrevocable Life Insurance Trust** - wealth replacement tool

Pursuant to U.S. Treasury Department Circular 230, unless we expressly state otherwise, any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties or (ii) promoting, marketing or recommending to another party any matter(s) addressed herein.

Medicaid Planning/Asset Protection

Substantial changes to the Medicaid laws were passed by Congress and signed into law by President Bush on February 8, 2006 as part of the Deficit Reduction Act of 2005. The laws were adopted in New York State effective August 1, 2006. As a result, rules concerning Medicaid eligibility and the ability to protect assets from long-term nursing home stay underwent many changes. The following is a quick summary of the provisions of the law:

- ❖ Extension of the look-back period for a Medicaid application from three (3) to five (5) years.
- ❖ Changed the way gifts of assets made during the look-back period are penalized. The penalty period begins to run after a person applies (and otherwise eligible) for Medicaid, NOT when the asset was gifted.
- ❖ Requires applicants and their spouses who purchased an annuity after February 8, 2006 to name the State of New York in first position as death beneficiary to pay back Medicaid benefits (or in second position where there is a spouse, minor or disabled child). Any changes made to annuities purchase before February 8, 2006 to prevent the State from recovering may also be considered a transfer of assets.

2022 Medicaid Resource and Income Allowances

Institutional Skilled Care Medicaid Program:

“Institutionalized Individual” may retain the following: \$16,800.00 in resources, life insurance with face value of \$1,500.00 or less, unlimited irrevocable funeral trust account, and \$50.00 per month in income.

“Community Spouse” may retain the following: \$74,820.00 in resources (or ½ of the couple’s combined assets up to a maximum of \$137,400.00, whichever is greater), a residence with up to \$906,000.00 in equity value, a vehicle of any value, unlimited irrevocable funeral trust account, and \$3,435.00 per month in income. If there is not sufficient income available to provide the community spouse with his/her income allowance, additional resources may, in some cases, be retained to generate additional income.

- The 5-year look-back rule currently applies.
- The penalty period for any transfer made within the look-back period will begin to run after the person applies (and would have been otherwise eligible) for Medicaid.
- Exempt transfers between spouses, to disabled children, to trust for the sole benefit of disabled child, or caretaker child are permissible.

Medicaid Resource and Income Allowances (continued)

Community Medicaid - Nursing Home Transition and Diversion Program:

The Medicaid applicant must suffer from some cognitive impairment. The applicant must undergo a screening evaluation to determine his/her care needs.

The Medicaid applicant may retain the following: \$16,800.00 in resources, life insurance with face value of \$1,500.00 or less, unlimited irrevocable funeral trust account, and \$934.00 per month in income.

The Medicaid applicant's spouse may retain the following: \$74,820.00 in resources, a residence with up to \$906,000.00 in equity value, a vehicle of any value, and unlimited irrevocable funeral trust account. The income contribution of the applicant's spouse fluctuates depending on the individual circumstances.

A 30 month look-back rule will apply (this look-back period is currently in abeyance)

Medicaid Allowances - Paying for Burial Expenses

Both Medicaid and SSI allow applicants to take savings that exceed the resource limits and pre-pay for funerals or create burial accounts - for themselves and for some family members.

Paying for Burial Expenses (continued)

What Pre-Paid Funeral Agreements may an APPLICANT have?

The applicant or recipient may have an unlimited, pre-paid funeral agreement that is IRREVOCABLE. Once they pay the cost to the funeral home, they cannot change their mind and cancel the agreement or ask for their money back.

Paying for Burial Expenses (continued)

The agreement may contain both “burial space items” and “non-burial space items.”

- **BURIAL SPACE ITEMS** include:
 - The casket, urn, mausoleum, vault, headstone or plaque, and headstone engraving.
 - The burial plot and cost of opening and closing the gravesite and perpetual care contract of gravesite.
 - While the Medicaid Reference Guide does not specify it, the cost of cremation should be permissible as an alternative to burial.
 - NOTE: Certain burial space items purchased and paid for in full prior to entering into an irrevocable pre-need funeral agreement may remain outside the agreement, such as a cemetery plot, casket, urn, vault, mausoleum, crypt or headstone.
- **NON-BURIAL SPACE ITEMS** include:
 - Embalming, funeral transportation (hearse, limousine, out of town shipping), burial clothes, use of funeral home facilities for services or wake, clergy services, death notices, and flowers.

Paying for Burial Expenses (continued)

What Burial Expenses can be Paid for FAMILY MEMBERS?

BURIAL SPACE ITEMS - The applicant or recipient may pre-pay for BURIAL SPACE items for members of his/her “immediate family.”

- “Immediate family” includes the applicant or recipient parents, spouse, children (minors or adults and including adopted children and step-children), and brothers and sisters (including step-siblings and adopted siblings). The spouse of each of these relatives is also included as long as they are still married to the applicant or recipient’s relative.
- The allowed Burial Space Items are the same as for applicants/recipients:
 - The casket, urn, mausoleum, vault, headstone or plaque, and headstone engraving.
 - The burial plot and payment for the opening and closing of the gravesite.
 - Contract for care and maintenance of the gravesite, sometimes called perpetual care.
 - While the Medicaid Reference Guide does not specify it, the cost of cremation should be permissible as an alternative to burial.
- Do not include these expenses in the applicant or recipient’s own prepaid irrevocable funeral agreement - they should be in a separate agreement or purchase.
- There is no cost limited on the above expenses.
- As of January 1, 2011, these expenses must be in *irrevocable* accounts.