The Importance of Estate Planning

By Linda A. Redlisky and Wendy Hoey Sheinberg

When we think about making plans to secure our future, generally the discussions revolve around education, career, family, and finances. Creating a comprehensive estate plan, including effective advanced directives, can elude even the most organized and diligent people.[1] A survey by Caring.com noted that 1 in 5 people who died during the 2020 pandemic did not have an estate plan.[2] While post-pandemic there is an upward trend in estate planning among younger adults, an estimated 67% of Americans still have no estate plan.[3]

Estate plans do much more than just outline how to distribute your assets upon death. Estate plans should include health care instructions, appointment of a trusted agent to manage your financial affairs, note your guardianship wishes for both yourself and/or your children, what happens to your pets and more. While planning in contemplation of death or incapacity is not the easiest topic to tackle, taking steps to make your wishes known and enforceable will reduce the chaos that unfolds without good planning.

What is included in estate planning?

Advanced Directives

Estate planning is not simply drafting a last will and testament or a trust. It also includes advanced directives, which are documents that nominate people to carry out your wishes or to act in your best interest when you cannot. These directives may include a health care proxy, living will, and a (durable) power of attorney, discussed below.

Health Care Proxy

This document (the HCP) allows you to nominate a health care agent—someone who will make health care decisions for you in the event you cannot. New York State does not allow the appointment of co-agents, meaning only one person can serve as your agent at a time. It is always recommended that you choose both an agent and a successor agent in the event your primary agent predeceases you or cannot act. Your agent should know what your wishes are regarding being kept alive via artificial means, including intubation, nutrition (feeding tube) and hydration, how you feel about the administration of pain medication, even if it shortens your life, and the circumstances under which you would or would not wish to be kept alive. It is imperative that you give your appointed agents copies of the health care proxy appointing them. A copy is just as effective as an original.

Living Will

A living will is a written statement detailing a person's desires about their medical treatment in circumstances in which they are no longer able to express informed consent. More specifically, you can direct your agent under your health care proxy to withhold all life-sustaining measures or you can single out certain measures that you do wish to be taken, including:

- Cardiac resuscitation
- Mechanical respiration
- Dialysis
- Artificial nutrition and hydration (at what point of deterioration you would like food and water removed)
- Antibiotics to treat infection
- Pain medication

New York law does not have a living will statute, and a living will does not appoint a decision maker; it provides additional guidance for your decision makers. Medical professional will look to your health care proxy (agent) for medical instructions on your behalf when you cannot give informed consent or make decisions. However, your proxy (agent) is required to follow your intentions as expressed in your living will if you cannot express your wishes yourself. New York case law recognizes a living will as clear and convincing evidence of a person's end-of-life wishes, which can help the decision maker enforce your wishes in the face of opposition. As with the HCP, you should provide your agent thereunder with a copy of your living will.

Power of Attorney

Title 15 of Article 5 of New York's General Obligations Law provides for a "statutory short form power of attorney," which by default is not affected by later incapacity. The individual (the principal) making the power of attorney (POA) appoints an agent to act on their behalf in personal (non-medical) and financial matters.[4] The POA is a critical document without which an incapacitated person has no one authorized to make financial and legal decisions for you. The statute allows the principal to modify the default powers authorized in the POA and can create conditions precedent to its use, and/or to limit its duration by date, or the happening of a specific event. Without a valid POA, an incapacitated person's affairs will typically remain unaddressed until a court appoints a guardian. The principal can modify the statutory POA to meet their wishes and anticipated needs. Among other actions, the modifications can include authority for the agent to make gifts to third parties and/or themselves from the principal's income and/or assets.[5] The modifications can authorize the agent to make gifts by adding a beneficiary or joint tenant on accounts, gifting of real estate, and creation of trusts. There are specific execution requirements for a statutory POA, including two witnesses and a notary, none of whom can be designated as potential recipients of gifts.

What are Some Traditional Estate Planning Tools?

Last Will and Testament (LWT)

Not all LWT(s) are the same, but generally they direct the disposition of the assets of the maker (testator) upon the testator's death. Often a LWT will:

- Nominate executors and successor executors
- Nominate guardians of the person and/or property of minors
- Create testamentary trusts
- Estate tax reducing trusts
- Generation skipping trusts
- Asset management trusts
- Supplemental Needs Trusts
- Trusts for young beneficiaries
- Trusts for financially unsophisticated or imprudent beneficiaries
- Nominate trustees and successor trustees of testamentary trust
- Override default tax apportionment rules
- Authorize or direct certain tax elections
- Exercise general and limited powers of appointment
- Distribute (pour-over) assets to trusts created outside of the testator's LWT

Not every document purporting to be a testator's LWT is an LWT. Most states, including New York, have statutory requirements that determine if a document is an LWT. During the testator's life the LWT has no legal effect, and if a testator has *testamentary capacity,* they can change their LWT. After the testator's death, the LWT, together with a probate petition and other documents, is submitted to the court of proper jurisdiction, which determines if the document is the valid LWT of the testator. Even if no interested party objects to the LWT's admission to probate, the court can still deny probate if it is not satisfied that the document meets the statutory requirements for a LWT or is otherwise not satisfied that the document is valid.

The fact that most attorneys have taken classes in trusts and estates does not mean that they should be drafting LWT(s) any more than taking an intellectual property class bestows the competence to litigate trademark and copyright issues. Typically, a fatal flaw in an improperly drafted or executed LWT is not discovered until the death of the testator. Like many things, just because you *can* do it yourself does not mean you *should* do it yourself.

Intervivos Trusts

An intervivos trust is a trust created by a person (the grantor/maker/donor) or their authorized agent under a POA, intended to be effective during the grantor's life. The trust can be revocable or irrevocable; the trust can direct that the income and/or assets are for the benefit of the grantor or third parties. Different types of trusts serve different purposes, and one size does not fit all. Inter vivos trusts are sometimes called "living trusts," "family trusts" or "testamentary substitutes."

Regardless of a trust's title, its true nature and effect depends on the terms contained in the trust.

Revocable Living Trusts (RLT)

RLTs typically provide for the management and distribution of trust income and assets for the benefit of the grantor and are included in the grantor's estate for estate tax purposes. RLTs typically direct the distribution of trust assets after the grantor's death, either outright or in continuing trusts for other beneficiaries.

The grantor can be the trustee of their own trust,[6] and the RLT will typically support successor trustees to take over trust administration on the incapacity, resignation, or death of the grantor.

An RLT can do many of the things a LWT does, but it is not a substitute for an LWT. The grantor of an RLT must also have an LWT. The LWT can direct the executor to distribute testamentary assets to the RLT, or it can direct a completely different distribution. There is nothing about the existence of an RLT that makes the need for a LWT obsolete. A trust can only dispose of income and assets that are titled to the trust. Listing an asset on the trust schedule is different from the asset being titled in the trust. If an intestate grantor dies with assets outside of the trust, and those assets do not have joint owners with rights of survivorship or valid beneficiary designations, those assets will not be distributed according to the trust. An intestate grantor's estate will be subject to the intestate distribution rules.

Irrevocable Trusts (IRT)

IRTs share many characteristics of RLTs, among other differences:

- The grantor cannot unilaterally revoke or amend an IRT; and
- Some IRTs are completed gifts for estate tax purposes and can be excluded from the grantor's taxable estate.

Not all IRTs are the same; different goals typically require distinct types of IRTs. A trust that makes the assets unavailable for the grantor's Medicaid eligibility is vastly different from the trust for leveraged gifting and estate tax excludability.

A one-size fits all estate plan is like a one-size fits all tee shirt: it is something to wear, but it is not quite right. Estate plans are as unique as our individual clients. We urge all to consider how empowering it is to be the author of your life's story, regardless of the obstacles that lie ahead.

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Endnotes

1. The information provided in this article does not, and is not intended to, constitute legal advice; instead, all information and content is for general informational purposes only.
2. Daniel Cobb, *2022 Study: The Effect of COVID-19 on Estate Planning*, Caring.com (June 2022).
3. https://www.cnbc.com/2022/04/11/67percent-of-americans-have-no-estate-plan-heres-how-to-get-started-on-one.html.
4. N.Y. GOL LAW § 5-1513.
5. N.Y. GOL LAW § 5-1509; see also D N.Y. Prac., Trusts and Estates Practice in New York § 1:209.
6. New York abolished the default merger doctrine in 1997 by amending EPTL: 7-1.1.