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Estate Planning – Getting Started

The goal of this newsletter is to give you a road map of what documents you should have in place so you don't leave behind a mess for those you care about most. If you don't have your estate plan in order, you're in good company, most people don't have a Will nor any other documents in place. If you have any doubts about the importance of getting organized, talk to someone who has dealt with a death in the family or a parent who could no longer manage their own affairs. Without the proper documents, it will be an emotionally draining, time consuming and expensive experience.

Which Documents Should You Have?

As a starting point, below are the documents you should consider.

- Health Care Proxy
- Living Will
- Power of Attorney
- Standby Guardianship
- Will

Keep in mind: signing a bunch of papers and putting them a fire proof safe in the back of your closet isn't enough. The documents need to be accessible not only to you, but to your family and to those you've named step in when you can't. At a time of emotional stress, you don't want the people you've designated to help searching for scattered pieces of paper.

Health Care Proxy

A health care proxy appoints someone to make health care and medical decisions for you if you are unable to make them yourself. Your medical records are protected by Federal privacy laws known as HIPAA. Some doctors, hospitals, and nursing homes require a health care proxy before they will discuss medical issues with others or release your medical records.

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Living Will

A living will expresses your wishes regarding medical treatment when there is no reasonable hope that your condition will improve. You are basically stating that you do not want to be kept alive by artificial means such as feeding tubes, breathing apparatuses, etc. when recovery is medically unlikely.

Who really knows exactly what they want when they become ill? What medical advances have been made since you signed the document? When a serious health condition emerges and you have the mental capacity to discuss end of life care, completing a Medical Orders for Life-Sustaining Treatment (MOLST) will document your specific wishes into binding medical orders. Unlike a Living Will, a MOLST is completed by you and/or your health care agent and your physician. It is not a recognized document in all states. In New York it is an authorized form for documenting nonhospital 'do not resuscitate' and 'do not incubate' directives.

Power of Attorney (POA)

A Power of Attorney is a powerful document that gives another person the authority to act on your behalf in matters of financial decisions and transactions. In the most practical scenario, you can take another person's check book and pay their bills with your signature.

A POA can be either General or Specific. A General POA gives broad authority and can include all your assets. In a Special POA only specific transactions or accounts or assets are covered. Unless a POA specifically states differently, it expires if the person who gave it becomes incapacitated. To remedy this, the POA (whether General or Special) is usually made "Durable" or "Springing". A Durable General Power of Attorney is effective immediately and is still valid even if you later become incapacitated. A Springing POA comes into effect (i.e., springs into action) only if and when you become incapacitated.

Standby Guardianship

The Standby Guardianship document names a guardian while you're alive. While a Will appoints a guardian in the event that both spouses die, consider the following scenario: a car accident where one spouse dies and one is in a coma. Or a single parent that is incapacitated. The guardian as specified in your Will cannot act as such because you are still alive. An example where this can cause a problem: if your child needs to register for school (or anything that requires a parent's signature.)

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Will

Your Will states to whom and under what conditions your assets will be distributed at your death. It also names:

- An executor whose responsibility is to wind down your estate (pay outstanding debts, make sure your tax return is filed, and distribute your assets according to your Will)
- A guardian for minor children (in most states, those under 18 years old)
- A trustee to manage your assets until they are distributed to your children or other heirs

What happens if you die without a Will? Nothing but problems. All states have "their version" of a Will for you and you probably won't like it. If you have minor children, the surrogate's court will appoint a guardian for your children. Your assets will be distributed based on state law. In New York, everything does not necessarily go to a surviving spouse. Of your individually owned assets (meaning not jointly owned), the first $50,000 goes to your surviving spouse, the remainder is divided in half between the spouse and your children. If your children are minors, they cannot inherit any assets directly. And that's only the beginning of the problems.

One of the most common individually titled assets is a small business. If you're a co-owner of a business, the surviving partners will have a tough time running the company while your shares are in limbo. It will take time and money to sort things out during an already stressful time.

Not everything requires a Will before it passes on to an heir. Items that pass directly to others:

- Jointly owned assets. For example, if you and your spouse have a joint checking account or own your house together, at the death of one spouse, the account or asset automatically and immediately passes to the surviving spouse.
- Retirement accounts such as 401(k), IRAs, etc. When opening a retirement account, a beneficiary is specified on the application; at death of the owner of the account, it passes to the person named as beneficiary.
- Life insurance policies. On the application, you specify a beneficiary. At the death of the insured, the proceeds are paid directly to the beneficiary.
- Assets in trusts. It is sometimes appropriate to move an asset into a trust. The trust document provides the details of how the assets are distributed at death of the owner.

Note: Unlike the other documents described in this newsletter, copies of a Will are not accepted by the surrogate court(that's where you probate a Will) so keep it in a safe accessible place and make sure someone besides you knows where it is.

It's best to have an attorney draft these documents, but again, the purpose of this newsletter is to spur you into action.