



Estate Planning Basics

Patricia J. Shevy, Esq., The Shevy Law Firm

patriciashevy@shevylaw.com

1

Reasons for Estate Planning

- **During Lifetime:** Management of assets and personal needs, or protection of assets for a spouse or other family in the event of disability or incompetence.
- **After Death:** Management and distribution of estate assets after death, efficiently and while accomplishing the client's goals.
- **What We Will Discuss Today:**
 - Planning Considerations - Family, Spousal and Beneficiary Issues, Assets, Estate Tax and Long-term Planning
 - Wills, Powers of Attorney, Health Care Proxies and Living Wills

2

Powers of Attorney

- A Power of Attorney permits another person (an agent) to complete financial transactions on a principal's behalf.
- Form appears simple, but lots of implications if not completed correctly. . . . and many times it is not!



3

Powers Granted

- (A) real estate transactions;
 - (B) chattel and goods transactions;
 - (C) bond, share, and commodity transactions;
 - (D) banking transactions;
 - (E) business operating transactions;
 - (F) insurance transactions;
 - (G) estate transactions;
 - (H) claims and litigation;
-

4

Powers Granted

- (I) personal and family maintenance: (annual aggregate gifts \$500 or less);
- (J) benefits from governmental programs or civil or military service;
- (K) health care billing and payment matters; records, reports, and statements;
- (L) retirement benefit transactions;
- (M) tax matters;
- (N) all other matters;
- (O) full and unqualified authority to my agent to delegate any or all of the foregoing powers to any person or persons whom my agent selects;
- (P) EACH of the matters identified by the following letters: _____. You need not initial the other lines if you initial line (P).

5

Agent now has fiduciary relationship:

- Fiduciary relationship with principal, including:
 - Act according to principal's instructions, or if no instructions, in principal's best interest.
 - Avoid conflicts of interest.
 - Keep principal's property separate and distinct from other property controlled by agent.
 - May NOT make gifts to self without SGR.
 - Keep record of receipts, disbursements, transactions.



6

Statutory Short Form POA

- ❑ POA that meets the requirements of § 5-1501B(1)(a), (b) & (c), and that contains the exact wording of the form set forth in § 5-1513.
- ❑ Mistake in wording (spelling, punctuation or formatting) or use of bold or italics is still a SGR but § 5-1513 governs.
- ❑ Use of the form set forth in § 5-1513 is lawful and when used shall be construed as a statutory short form POA.



7

Statutory Short Form POA

- ❑ May contain modifications or additions as provided in § 5-1503, but in no event may it be modified to grant any authority provided in § 5-1514 (SGR provisions).
- ❑ If the authority (SGR) on statutory short form is initialed by the principal, the statutory short form POA must be executed in the manner provided in § 5-1501B **simultaneously** with SGR
- ❑ Statutory short form POA and SGR which supplements it **must be read together** as a single instrument.



8

Statutory Gifts Rider (SGR)

- Document supplementing statutory short form POA to authorize certain major gift transactions other than those authorized by § 5-1520I meeting requirements of Gen. Obligations Law § 5-1514.
- Must contain the exact wording of the form set forth in § 5-1514.
- Mistake in wording (spelling, punctuation or formatting) or use of bold or italics is still a SGR but § 5-1514 governs.



9

Statutory Gifts Rider

- SGR may contain modifications or additions as provided in § 5-1503 as they relate to ALL gift transactions.
- SGR must be executed in the manner provided in § 5-1514 simultaneously with the statutory short form POA in which the authority (SGR) is initialed by the principal.
- SGR & POA it supplements must be read together as a single instrument.



10

Modifications

- Modifications to statutory short form POA and SGR permitted, including provision revoking a prior POA, as long as following requirements are met:
 - 12 point font or equivalent writing
 - Signed, dated and acknowledged by principal with capacity
 - Signed, dated and acknowledged by agent.



11

Sample Modifications

- Nomination of Guardian, if necessary.
- Medicaid Planning, including use of promissory notes and gifting.
- Estate Tax Planning.
- Trust Planning.
- Specifics for payment to agent (hourly rate).

12

Executing a Power of Attorney

- POA is valid only when it has been signed, dated and acknowledged by the principal **AND THE AGENT.**
- The agent can sign later; still valid if lapse of time between principal's signature and agent's signature.



13

POA Problem Points

If you designate more than one agent above, they must act together unless you initial the statement below.

() My agents may act SEPARATELY.

() (P) EACH of the matters identified by the following letters: A, B, C, D, E, F, G, H, I, J, K, L, M, N and O.

() (SGR) I grant my agent authority to make gifts in accordance with the terms and conditions of the Statutory Gifts Rider that supplements this Statutory Power of Attorney.

14

SGR Problem Points

() I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which my agent reasonably deems to be in my best interest: **YOU NEED TO DESCRIBE THE GIFTING POWERS HERE.**

() I grant specific authority for the following agents to make the following gifts to himself or herself: **YOU NEED TO DESCRIBE WHICH AGENTS CAN GIFT TO SELF AND THE GIFTING POWERS HERE.**

15

Health Care Proxies

- A Health Care Proxy appoints an agent to make health care decisions for the principal if the principal cannot make the decision for him/herself.



16

Health Care Proxy Statutory Requirements

- Name of Principal and Agent.
- Statement of intent that agent has health care authority.
- Signature and date by the Principal or other acting on the principal's behalf.
- Two witnesses who observe the execution and who sign below a statement indicating that the Principal acted willingly and free from duress.

17

Health Care Proxy Mistakes

- Putting Proxy on same form as Power of Attorney.
- Picking a medical professional (unless related).
- Multiple appointments (never pick 2 people at the same time).
- Choosing the right person- pick someone who will be able to stand up to the rest of the family.



18

What is a Living Will?

- A Living Will provides specific instructions regarding health care to the agent appointed under the principal's Health Care Proxy.
- Includes directions as to wanted medical treatments and unwanted medical treatments.
- Works in conjunction with a Health Care Proxy.



19

What a Living Will CANNOT Accomplish

- There is no statutory authority in New York for a Living Will.
- A Living Will may be subject to challenge by medical professionals or family members.



20

What happens if there is not a Health Care Proxy?

- Article 81 Guardianship OR Family Health Care Decision Act (Public Health Law Art 29-CC)
 - “Decision-making capacity” means the “ability to understand and appreciate the nature and consequences of proposed health care, including the benefits and risks of and alternatives to proposed health care, and to reach an informed decision.”
 - “Surrogate” means the “person selected to make a health care decision on behalf of a patient” pursuant to the FHCD Act.



21

Family Health Care Decision Act

- Empowers a Surrogate to make health care decisions for a person who is in a hospital or nursing home if the patient lacks decisional capacity and did not leave instructions or sign a health care proxy.
- Only applies to patients in hospitals and nursing homes who have lost the capacity to make medical decisions.

22

Family Health Care Decision Act

- Public Health Law Section 2994-d(1) lists the Surrogate priority as follows
 - a guardian authorized under the Mental Hygiene Law
 - a spouse (if not legally separated or domestic partner)
 - a child 18 years old or older
 - a parent
 - a sibling 18 years old or older
 - a close friend.

23

Importance of Having a Will

- **No Will:** Laws of intestacy govern the disposition of assets that are not covered by beneficiary designation or joint ownership.
- **Example:** H & W have 3 minor children. H has \$700,000 in assets. W has \$1,000 in assets. House is owned jointly by H & Wife. H dies.
- **Who gets what?**
 - W keeps the house as surviving joint tenant.
 - Wife receives \$375,000 (\$50,000 plus $\frac{1}{2}$ of \$650,000).
 - 3 minor children split the remaining \$325,000. Court-appointed Guardian must get Court approval to make payouts, and children get the balance of funds at age 18.



24

What You Need to Know

- **THE FAMILY TREE**, and who is an interested party in the estate under the law.
- **THE ASSETS**, how they are owned (i.e. jointly, p/o/d, etc.), and the tax consequences (estate and otherwise) of different planning options.
- **CONCERNS OF THE CLIENT**, i.e. family members with disabilities or other issues, future disability concerns of the client or spouse.
- **THE WISHES OF THE CLIENT**, even if contrary to some planning recommendations.
- **WHAT DOCUMENTS, TRANSFERS AND PLANNING** should be used for that client.

25

The Family Tree

A PERSON WHO DIES WITHOUT A PLAN HAS A PLAN BY STATUTE: DISTRIBUTEES - (EPTL 4-1.1)

- If survived by a spouse and children, spouse receives the 1st \$50,000, and ½ of the balance, and children equally share the other ½ of the balance.
- If survived by only a spouse and no children, the spouse receives everything. (Prior law included parents)
- If survived by only children, the children equally share everything. If there is a predeceased child, his or her children share their parent's inheritance, "by representation."
- If survived by only parents (no spouse, children, grandchildren or younger generations), the surviving parent or parents receive everything. (Siblings do not take if there is a living parent.)



26

The Family Tree. . . continued

- If survived by only siblings and/or children of deceased siblings, the siblings and issue of deceased siblings take "by representation."
- If survived by only aunts and uncles and/or children of deceased aunts and uncles (1st cousins), the aunts and uncles, and children of deceased aunts and uncles take "by representation" but distribution does not extend any further than 1st cousins (children of deceased 1st cousins get nothing if there is at least one 1st cousin living.)
- If survived by only great-grandchildren of grandparents (1st cousins once removed), the great-grandchildren of grandparents will equally share the estate.
- If survived by no one closer than the above (i.e. only 2nd cousins or 1st cousins twice removed), the estate escheats to the State of New York.

Note: Half-blood relatives are the same as whole (a half sister is treated the same as a full sister).

27

"TO ISSUE, BY REPRESENTATION" OR "TO ISSUE, PER STIRPES"

- **"ISSUE"** means: the descendants in any degree from a common ancestor, i.e. the person's children, grandchildren, great-grandchildren, great-great-grandchildren, and on down in a straight line of kinship.
- Intestacy provisions use "BY REPRESENTATION", not "PER STIRPES" as default of distribution (see EPTL 4-1.1).
- An estate with a Will executed prior to 09/01/1992 which made a disposition to "issue" will be distributed "per stirpes", and an estate with a will executed after 09/01/92 will be distributed "by representation" if either or another method is not specified in the will (see EPTL 2-1.2).

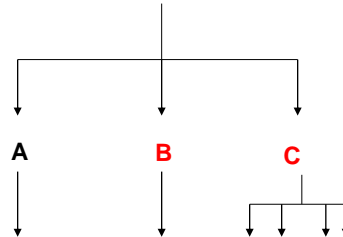
28

“BY REPRESENTATION” or “PER STIRPES”

Client had 3 children- A, B & C.

At Client's death, A is living, and B & C predeceased. All 3 had children: A has 1, B has 1, and C has 4.

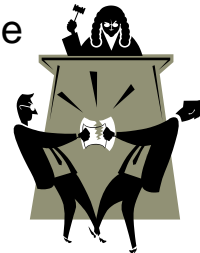
- “By Representation” would be:
1/3 to A and
2/3 in 5 equal shares to B & C's children.
- “Per Stirpes” would be:
1/3 to A, 1/3 to B's child, and 1/3 to C's 4 children.



29

Who Cannot Take Under Intestacy?

- Divorced spouse.
- Abandoning spouse (must be unjustified, without consent and continued through death).
- Abandoning parent (failure to provide support).
- Distributee Murderer of Decedent.
- Adopted Out Children.
- Step-Children (Not Adopted).



30

Protecting Yourself as Drafter

Even if the client does not ask/want, be sure to:

- ❑ Discuss estate tax planning.
- ❑ Discuss long term care planning.
- ❑ **Document, document, document.**
- ❑ Terminate relationship when plan is complete, i.e. send a “we’re done - we did what you wanted” letter to get the statute of limitation started.



31

Testamentary Capacity

- “Testamentary Capacity” for purposes of Will execution is knowing generally, without prompting:
 - ❑ Nature of the act performed (Will execution);
 - ❑ Nature and extent of assets to be disposed of;
 - ❑ Names and relationship of persons who are the “natural objects of one’s bounty” (distributees)



32

Drafting the Estate Plan

- An attorney must know how to draft a will or trust, and be able to answer the following questions:
 - What items should be placed in a will?
 - What forms of gifts, outright or in trust, should be considered to accomplish the client's goals?
 - Should there be provisions for minor or disabled beneficiaries?
 - Who should be the fiduciaries and what authority should they be given?



33

Wills: Due Execution

- A Will is a declaration of a person's wishes as to the disposition of his or her property, to take effect after death.
- EPTL 3-2.1: Will must be:
 - **in writing**, signed by Testator, age 18 or older, and executed and attested according to:
 - The laws of *New York State* (EPTL 3-2.1); or
 - The laws of the *place where executed*; or
 - The laws of the *place where testator was domiciled*, either when Will executed or at time of death.

34

Wills: Due Execution (Cont'd)

- **Signed at the end** by testator (or another in testator's presence and by his direction);
- In **presence of** (or acknowledged to) each witness;
- Testator **declares** signed document is his Will to each witness; and
- At least **two witnesses sign** name and address at testator's request (within 30 days).

35

Will: Witness Requirements

- Attestation clause, witness addresses and date are not necessary for Will to be valid.
- If a witness is a beneficiary under the Will, that witness will not receive more than the intestate share.
- **Best Practice: No distributees or beneficiaries act as witnesses.**

36

Proper Execution of Will

- **Best practice: Same execution ceremony over and over, every time.**
 - ❑ No one but testator and witnesses in the room.
 - ❑ Review dispositive provisions out loud.
 - ❑ Attorney asks, “Is this your Will?” (Declaration)
 - ❑ Attorney asks, “Does the Will express your wishes?”
 - ❑ Attorney asks, “Are you asking W1 and W2 to be the attesting witnesses to your Will?”
 - ❑ Testator signs every page and at the end.
 - ❑ Witnesses sign after Testator.
 - ❑ Witnesses sign Self-Proving Affidavit.

37

Affidavit of Attesting Witnesses

- Without “self-proving” witness affidavits, **actual testimony** needed to prove due execution of Will.
- Witness affidavits (executed in compliance with SCPA 1406) are not copies of the attestation clause, but recite required minimum testimony regarding proper execution of the Will.
- Can be signed at execution or any time thereafter, including after death. **Best practice is at execution.**
- Actual testimony in person may still be required (contested estates or question re: execution).

38

Affidavit of Attesting Witnesses

- Affidavit states that:
 - the testator requested the signature of the witnesses to the Will,
 - Testator signed in their presence and they signed in each other's presence (or other acceptable alternative per execution statute),
 - the testator was competent, of full age, and not under any undue influence.
- Signed by witnesses before a Notary Public

39

Who is Executor?

- Letters Testamentary may be granted to natural person or entity authorized by law to be a fiduciary (i.e. bank with trust powers) except those ineligible under SCPA 707:
 - Infants (under age 18)
 - Judicially-declared incompetents
 - Non-domiciliary aliens (unless they serve as co-fiduciary with NY resident fiduciary)
 - Convicted felons
 - Those disqualified due to substance abuse, dishonesty, improvidence, want of understanding, or otherwise unfit
 - Persons unable to read/write English, in Court's discretion

40

What Every Will Should Include

- Specific Bequests (if any)
- Tangible Personal Property
- Cash Gifts (if any)
- Residuary Disposition
- Appointment of Executors and Trustees
- Fiduciary Powers
- Bonding or No Bonding
- Tax Allocation- Residuary or Apportionment?
- Resignation of Fiduciaries



41

Other Common Provisions

- Marital Deduction Trusts.
- Estate Tax Planning Trusts.
- Trusts for Minor (or Young, not necessarily “Minor”) Beneficiaries.
- Supplemental needs trusts for Disabled Beneficiaries.
- Creditor Protection Provisions.
- Medicaid Protection Provisions.
- Lifetime Trusts (“Dynasty Trusts”).

42

Common Will Mistakes

- **UNCLEAR:** “I give the sum of \$10,000 to my sister, Sue.”
- **CLEAR:** “I give the sum of \$10,000 to my sister, Sue, if she survives me.”
- **CLEAR:** “I give the sum of \$10,000 to my sister, Sue; or if she does not survive me, equally to her children who survive me.”



43

Common Will Mistakes

- **UNCLEAR:** “I give \$10,000 to Sue and Bob.”
- **CLEAR:** “I give the sum of \$10,000 to each of Sue and Bob, who shall survive me.”
- **CLEAR:** “I give the sum of \$10,000 equally to Sue and Bob, or all thereof to such of them who survives me.”



44

Common Will Mistakes

- **INCORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed in equal shares to my issue.”
 - **CORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed to my descendants who survive me, per stirpes.” (or ...“by representation.”)
 - **CORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed in equal shares to my children who survive me.”
-

45

Estate Tax Planning

- **Why?** To ensure the use of both spouses' estate tax exemption and to defer estate tax until second death.
 - Typically includes use of credit shelter and marital deduction trusts:
 - Estate tax exempt amount goes into a credit shelter trust (which can appreciate estate tax free).
 - Excess over estate tax exempt amount passes either outright to the surviving spouse or to a marital deduction trust for the surviving spouse.
-

46

Estate Tax Issues



■ FEDERAL ESTATE TAX

- \$11.4 Million exemption. 40% Tax Rate
- Portability- Unused exemption of first spouse to die passes to and can be used by the surviving spouse (\$22.8 Million total per couple). Consider whether wise to rely on portability availability.

■ NEW YORK STATE ESTATE TAX

- Matches the federal exemption under 2014 law (currently \$5.74 Million).
- Graduated tax rates, top rate of 16%.
- No Portability.
- The Cliff- Estate 5% over exemption- **NO EXEMPTION!**

47

Sample Wills

- In Materials.
- Remember to customize.
- Remember to remove footnotes before signing.
 - Married Couple
 - With adult children
 - With trusts for minor children/grandchildren
 - Single Person
 - With adult children
 - With trusts for minor children/grandchildren

48

What is a Trust?

- A Trust is a written, formal agreement between:
 - **The Grantor** (settlor, creator)- the person who makes the contribution to the Trust.
 - **The Trustee**- the person who takes over control of the Trust.
 - **The Beneficiary**- the person who is going to receive benefits (income and/or principal from the Trust).
-

49

Major Law Governing Trusts

- Surrogate's Court Procedure Act
 - Estates Powers and Trusts Law
 - Article 7- General Trust Provisions
 - Article 11- Fiduciary Duties and Responsibilities
 - Article 11-A- Principal and Income Act
-

50

Article 7: General Trust Provisions

- **EPTL §7-1.14:** Any person (a natural person, an association, board, any corporation, court, governmental agency, authority or subdivisions, partnership or other firm and the state under EPTL §1-2.12) may by lifetime trust dispose of real and personal property. A natural person must be at least age 18.
 - **EPTL §7-1.16:** A lifetime trust is irrevocable unless it expressly provides that it is revocable.
-

51

Article 7: General Trust Provisions

- **EPTL §7-1.17(a):** A lifetime trust shall be in writing and executed and acknowledged by the grantor and at least one trustee (who may be grantor) in the manner required for the recording of a deed; or in lieu of acknowledgement, 2 witnesses.
 - **EPTL §7-1.18:** A lifetime trust is valid as to any assets therein to the extent the assets have been transferred to the trust.
 - **EPTL §7-1.19(a):** Any trustee or beneficiary may petition to terminate an uneconomical trust.
-

52

What kinds of trusts exist?

- **Testamentary Trusts**— established under your Will or other Lifetime Trusts
 - Trusts for Minor Children/Grandchildren
 - Trusts for Spendthrifts
 - **Revocable Trusts**
 - **Irrevocable Trusts**— lots of kinds
 - Medicaid Trusts
 - Insurance Trusts
 - Pet Trusts
-

53

Revocable Trust

- **What is it?** A revocable trust is an agreement established by a donor that acts as the donor's "alter ego."
 - The donor can amend, alter or revoke the agreement.
 - The donor can act as sole Trustee of the trust.
 - The donor is in full control.
-

54

When to use a Revocable Trust

- Client owns real estate in a foreign jurisdiction
 - Client has a domestic partner – who the clients want to inherit his/her estate.
 - The client is involved in a non-traditional marriage (second marriage, no marriage).
 - Client wishes to keep something private.
 - Client may move to a state that is more complex.
 - Client may acquire vacation/retirement home in another state.
-

55

Provisions During Lifetime

- **Disbursement of Income-** who decides, who can receive, convert to principal if not taken.
 - **Disbursement of Principal-** who decides, who can receive.
 - **Power to Amend/Revoke-** Remember, trust is irrevocable unless specifically stated that it can be revoked; and by whom.
-

56

What happens after death?

- **Payment of Taxes and Administration Expenses-** are they allocated proportionally, paid from residue, . . . Remember to coordinate with beneficiary designations and joint ownership.
 - **Cash Gifts/Other Gifts-** Be specific, and clear in drafting. Remember to coordinate timing (“who survives me” versus “is then surviving.”)
-

57

What happens after death?

- **Residuary-** how are the remaining assets distributed after death, outright or held in further trust.
 - **Trusts for Young Beneficiaries-** assets available for health, support, maintenance or education until a specified age (25 or 30 or forever).
-

58

Administrative Provisions

- Trustee's powers to manage trust assets.
 - Appointment of Trustee and successors.
 - Discretionary distribution rules.
 - No bonding or insurance, minimal court involvement.
 - Accounting requirements.
 - Compensation.
 - Governing law.
-

59

Drafting Reminders. . . .

- Samples are samples. You need to customize based on the client's facts, family and goals.
 - Footnotes in *italics* are notes to you, the drafter. Normal footnotes are explanations for the client when reviewing a draft.
 - Remove the footnotes before the client signs.
-

60

THE END.
Questions?

