ESTATE PLANNING BASICS

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LIVING WILL

A Living Will (also known as a "medical directive" or an "advanced directive") is a written statement providing an individual's specific instructions regarding medical treatment in certain circumstances where he or she cannot competently make such decisions for himself or herself. Under a properly drafted Living Will, the individual may include specific instructions regarding what medical treatments the person may want or refuse. A Living Will can provide guidance to agents appointed under a health care proxy and medical professionals regarding a person's desires with respect to medical treatment in the event he or she cannot make such decisions. Unlike health care proxies, there is no statutory authority in New York for Living Wills. As such, without an accompanying health care proxy, the Living Will has no legal effect in New York.

Although there are no formal requirements for a Living Will in New York, it still must be drafted carefully. A Living Will that does not accurately reflect a person's intentions with respect to medical treatments is not automatically legally enforceable and may be subject to challenge by medical professionals or family members opposed to termination of life support.

In states other than New York, there may be a requirement that the execution of the Living Will be analogous to that of a Will, i.e. that the Living Will be in writing, signed, dated and have two qualified witnesses. Some states do not require witnesses to a Living Will if the document is notarized. Other states include the Living Will on the driver's license. Furthermore, a state has no duty to obey a Living Will executed in another state that does not meet its requirements. In cases where a client travels frequently, it may be prudent practice to execute a Living Will with the same formality of a Will execution ceremony.

It is imperative in New York to include a health care proxy as part of the planning when drafting a Living Will so that the agent appointed under the health care proxy has the principal's instructions with respect to medical treatments desired and treatments or procedures that the

principal does not want. It may be more practical to include the health care proxy and Living Will into one document so that the instructions are clearly provided within the same document as the designation of the health care agent.

Copies of the Living Will should be provided to the treating physician and those family or friends who would likely be involved. The Patient Self-Determination Act requires medical facilities to ask a patient at the time of admission if he or she has an advance directive, and if so, to make it a part of the patient's medical record.

HEALTH CARE PROXY

The health care proxy differs materially from a Living Will in that a health care proxy appoints an agent to evaluate and render medical decisions on behalf of the principal in the event that the principal cannot do so competently. Unlike the Living Will, a Proxy has been created through statutory provisions of New York Public Health Law Article 29-C.

A health care proxy should contain specific and clear instructions concerning health care decisions. It should also include any limitations on the agent's authority as well when or under what conditions the agent's authority expires.

Under Public Health Law Section 2981(3)(a), operators, administrators or employees of a hospital may not be appointed as a health care agent by any person who, at the time of the appointment, is a patient or resident of, or has applied for admission to, such hospital. These limitations are subject to Section 2981(3)(b)(i) which provides exceptions in the event the prohibited agents (noted in Section 2981(3)(a)) are "related to the principal by blood, marriage or adoption."

Under the Public Health Law, a competent adult may appoint a health care agent by a health care proxy, signed and dated by such person in the presence of two adult witnesses who shall also sign the proxy. Section 2981(2)(a) also provides that the appointed health care agent may not qualify as an "adult witness." The health care proxy form must include a statement by the witnesses that the principal appeared to execute the proxy willingly and free from duress. If the principal resides in a mental health facility (within the meaning of New York Mental Hygiene Law Section 1.03(10)), at least one of the witnesses must not be affiliated with the

facility and, if the facility is a hospital, at least one of the witnesses must be a qualified psychiatrist.

The principal may revoke the health care proxy by notifying the agent or health care provider orally or in writing, or by taking another action that evidences a specific intent to revoke the proxy. A health care proxy is also revoked upon execution by the principal of a subsequent health care proxy. The appointment of a spouse as agent is revoked by a divorce or legal separation unless the principal directs otherwise.

New York State has adopted Section 2990 of the Public Health Law which simplifies some of the complexity in determining when an individual's health care proxy that is created in a state other than New York will be recognized. Section 2990 provides, that "a health care proxy or similar instrument executed in another state or jurisdiction in compliance with the law of that state or jurisdiction shall be considered valid" under New York State Law.

Article 29 of the Public Health Law enumerates the definitions of the specific terms used throughout Article 29 when discussing the applicability and enforceability of a health care proxy. Public Health Law Section 2981 provides as follows:

"1. Authority to appoint agent; presumption of competence.

(a) A competent adult may appoint a health care agent in accordance with the terms of this article.

(b) For the purposes of this section, every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a committee or guardian of the person has been appointed for the adult pursuant to article seventy-eight of the mental hygiene law or article seventeen-A of the surrogate's court procedure act.

2. Health care proxy; execution; witnesses.

(a) A competent adult may appoint a health care agent by a health care proxy, signed and dated by the adult in the presence of two adult witnesses who shall also sign the proxy. Another person may sign and date the health care proxy for the adult if the adult is unable to do so, at the adult's direction and in the adult's presence, and in the presence of two adult

witnesses who shall sign the proxy. The witnesses shall state that the principal appeared to execute the proxy willingly and free from duress. The person appointed as agent shall not act as witness to execution of the health care proxy.

(b) For persons who reside in a mental hygiene facility operated or licensed by the office of mental health, at least one witness shall be an individual who is not affiliated with the facility and, if the mental hygiene facility is also a hospital as defined in subdivision ten of section 1.03 of the mental hygiene law, at least one witness shall be a qualified psychiatrist.

(c) For persons who reside in a mental hygiene facility operated or licensed by the office of mental retardation and developmental disabilities, at least one witness shall be an individual who is not affiliated with the facility and at least one witness shall be a physician or clinical psychologist who either is employed by a school named in section 13.17 of the mental hygiene law or who has been employed for a minimum of two years to render care and service in a facility operated or licensed by the office of mental retardation and developmental disabilities, or who has been approved by the commissioner of mental retardation and developmental disabilities in accordance with regulations approved by the commissioner. Such regulations shall require that a physician or clinical psychologist possess specialized training or three years' experience in treating developmental disabilities.

3. Restrictions on who may be and limitations on a health care agent.

(a) An operator, administrator or employee of a hospital may not be appointed as a health care agent by any person who, at the time of the appointment, is a patient or resident of, or has applied for admission to, such hospital.

(b) The restriction in paragraph (a) of this subdivision shall not apply to:

(i) an operator, administrator or employee of a hospital who is related to the principal by blood, marriage or adoption; or

(ii) a physician, subject to the limitation set forth in paragraph (c) of this subdivision, except that no physician affiliated with a mental hygiene facility or a psychiatric unit of a general hospital may serve as agent for a principal residing in or being treated by such facility or unit unless the physician is related to the principal by blood, marriage or adoption.

(c) If a physician is appointed agent, the physician shall not act as the patient's attending physician after the authority under the health care proxy commences, unless the physician declines the appointment as agent at or before such time.

(d) No person who is not the spouse, child, parent, brother, sister or grandparent of the principal, or is the issue of, or married to, such person, shall be appointed as a health care agent if, at the time of appointment, he or she is presently appointed health care agent for ten principals.

4. Commencement of agent's authority. The agent's authority shall commence upon a determination, made pursuant to subdivision one of section two thousand nine hundred eighty-three of this article, that the principal lacks capacity to make health care decisions.

5. Contents and form of health care proxy.

(a) The health care proxy shall:

(i) identify the principal and agent; and

(ii) indicate that the principal intends the agent to have authority to make health care decisions on the principal's behalf.

(b) The health care proxy may include the principal's wishes or instructions about health care decisions, and limitations upon the agent's authority.

(c) The health care proxy may provide that it expires upon a specified date or upon the occurrence of a certain condition. If no such date or condition is set forth in the proxy, the proxy shall remain in effect until revoked. If, prior to the expiration of a proxy, the authority of the agent has commenced, the proxy shall not expire while the principal lacks capacity.

(d) A health care proxy may, but need not, be in the following form:

Health Care Proxy

I (name of principal) hereby appoint (name, home address and telephone number of agent) as my health care agent to make any and all health care decisions for me, except to the extent I state otherwise.

This health care proxy shall take effect in the event I become unable to make my own health care decisions.

NOTE: Although not necessary, and neither encouraged nor discouraged, you may wish to state instructions or wishes, and limit your agent's authority. Unless your agent knows your wishes about artificial nutrition and hydration, your agent will not have authority to decide about artificial nutrition and hydration. If you choose to state instructions, wishes, or limits, please do so below:

_____

I direct my agent to make health care decisions in accordance with my wishes and instructions as stated above or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

In the event the person I appoint above is unable, unwilling or unavailable to act as my health care agent, I hereby appoint (name, home address and telephone number of alternate agent) as my health care agent.

I understand that, unless I revoke it, this proxy will remain in effect indefinitely or until the date or occurrence of the condition I have stated below:

(Please complete the following if you do NOT want this health care proxy to be in effect indefinitely):

This proxy shall expire: (Specify date or condition)

Signature: _____

Address: _____

Date: _____

I declare that the person who signed or asked another to sign this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed (or asked another to sign for him or her) this document in my presence and that person signed in my presence. I am not the person appointed as agent by this document.

Witness: _____

Address: _____

Witness: _____

Address: _____

(e) The health care proxy shall not be executed on a form or other writing that also includes the execution of a power of attorney, provided, however, that nothing in this paragraph shall invalidate a delegation of the authority to make health care decisions executed prior to the enactment of this article.

(f) A health care proxy may include the principal's wishes or instructions regarding organ and tissue donation. Failure to state wishes or instructions shall not be construed to imply a wish not to donate.

6. Alternate agent.

(a) A competent adult may designate an alternate agent in the health care proxy to serve in place of the agent when:

(i) the attending physician has determined in a writing signed by the physician (A) that the person appointed as agent is not reasonably available, willing and competent to serve as agent, and (B) that such person is not expected to become reasonably available, willing and competent to make a timely decision given the patient's medical circumstances;

(ii) the agent is disqualified from acting on the principal's behalf pursuant to subdivision three of this section or subdivision two of section two thousand nine hundred ninety-two of this article, or

(iii) under conditions set forth in the proxy.

(b) If, after an alternate agent's authority commences, the person appointed as agent becomes available, willing and competent to serve as agent:

(i) the authority of the alternate agent shall cease and the authority of the agent shall commence; and

(ii) the attending physician shall record the change in agent and the reasons therefor in the principal's medical record."

FAMILY HEALTH CARE DECISIONS ACT

Public Health Law Article 29-CC, (the "FHCD Act") was passed on March 16, 2010, with a generally effective date of June 1, 2010 (effective as of March 16, 2010 for hospitals), a copy of which is attached to these materials. Among a long list of definitions, the FHCD Act defined the following:

- "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.
- "Surrogate list" means the list set forth in the FHCD Act.

The FHCD 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. The FHCD Act only applies to patients in hospitals and nursing homes who have lost the capacity to make medical decisions. Public Health Law Section 2994-b(2) provides that prior to seeking or relying on a decision by the Surrogate, the attending physician must make reasonable efforts to determine whether the patient has an agent under a health care proxy. If so, the health care proxy takes precedence over the FHCD Act Surrogate. Under Public Health Law Section 2994-b(3)(a), court-appointed guardians are also granted precedence over an FHCD Act Surrogate.

Public Health Law Section 2994-c(1) presumes that every adult has decision-making capacity unless determined otherwise under the FHCD Act or a guardian is appointed. Public

Health Law Section 2994-c(2) permits an attending physician to make an initial determination that an adult patient lacks decision-making capacity to a reasonable degree of medical certainty. The determination must include an assessment of the cause and extent of incapacity and the likelihood of regaining capacity. Public Health Law Section 2994-c(4) requires notice of a determination that a Surrogate will make health care decisions because the adult patient lacks decision-making capacity to the patient, at least one person on the surrogate list highest in order of priority, and to the director of any mental hygiene facility.

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

If none of the above can be identified, then the FHCD Act establishes a procedure for the facility to make decisions on the patient's behalf. An attending physician is authorized to decide routine medical treatment for an adult patient lacking decision-making capacity. Major medical treatment (general anesthetic; or significant risk; or significant invasion of bodily integrity requiring an incision, producing substantial pain, discomfort, debilitation or having a significant recovery period; or physical restraints; or psychoactive medications) is permitted when an attending physician makes the recommendation in consultation with the hospital staff directly responsible for the patient's care; in a hospital, at least one other physician designated by the hospital independently concurs that the recommendation is appropriate; and in a nursing home, the facility's medical director or physician designated by the medical director independently concurs the recommendation is appropriate.

Public Health Law Section 2994-d(3)(i) gives the Surrogate the authority to make any and all health care decisions on the adult patient's behalf that the patient could make. Section 2994-d(3)(ii) does not require the health care provider to seek the consent of the Surrogate if the adult patient already made a decision about the proposed health care (orally or written).

The FHCD Act does not apply if the patient has already made a decision about the proposed health care (oral or written), or the patient made a decision to withdraw or withhold life

sustaining treatment (written or oral in the presence of two witnesses, 18 or older, one of whom is a health or social services practitioner affiliated with the hospital).

DO NOT RESUSCITATE ORDER

The FHCD Act and Public Health Law Article 29-CCC largely replaced the Public Health Law Article 29-B sections that granted a surrogate with a close relationship to an incapacitated person the ability to consent to "Do Not Resuscitate" orders regarding the use of CPR. The authority to consent to a DNR order for an incapacitated person adheres to the surrogacy order of priority and the standards/procedures of the FHCD Act. Under these provisions, a friend may now enter a DNR order after writing a statement describing the friend's closeness to the incapacitated patient rather than signing an affidavit attesting to knowledge of the patient's wishes.

Public Health Law Section 2994-bb(1)(a) provides that emergency medical services personnel, home care services agency personnel, hospice personnel, and hospital emergency services personnel must honor nonhospital DNRs, except as otherwise provided in Section 2994-ee. A nonhospital DNR does not constitute an order to withhold or withdraw treatment other than cardiopulmonary resuscitation. A nonhospital DNR may be issued during hospitalization to take effect after hospitalization, or may be issued for a person who is not a patient in, or a resident of, a hospital. Public Health Law Section 2994-ee provides that "1. Emergency medical services personnel, home care services agency personnel, hospice personnel, or hospital emergency services personnel may disregard the order if: (a) They believe in good faith that consent to the order has been revoked, or that the order has been cancelled; or (b) Family members or others on the scene, excluding such personnel, object to the order and physical confrontation appears likely; and 2. Hospital emergency services physicians may direct that the order be disregarded if other significant and exceptional medical circumstances warrant disregarding the order."

The New York State Department of Health has an approved standard Out of Hospital DNR form that is legally recognized statewide for DNR requests occurring outside of Article 28 licensed facilities. This form is intended for patients not originating from a hospital or nursing home. The form (DOH-3474) is available on **www.health.state.ny**. There are no other

approved Out of Hospital DNR forms. FAQs regarding non-hospital DNRs are located at **http://www.health.ny.gov/professionals/ems/pdf/99-10.pdf** .

MEDICAL ORDERS FOR LIFE SUSTAIINING TREATMENT (MOLST)

The MOLST program was designed to improve the quality of care patients receive at the end of life by transitioning patient goals for care and preferences into medical orders. The NYS Department of Health approved a physician order form DOH-5003 MOLST. The MOLST is the only NYS authorized form documenting both nonhospital Do Not Resuscitate Orders and Do Not Intubate Orders.

MOLST is intended for patients with serious health conditions who want to avoid or receive any or all life sustaining measures; reside in a long term care facility or require long term care services; or might die within the next year. MOLST includes the patient's goals and preferences regarding:

- Resuscitation instructions when the patient has no pulse and/or is not breathing.
- Instructions for intubation and mechanical ventilation when the patient has a pulse and the patient is breathing.
- Treatment guidelines.
- Future hospitalization and transfer.
- Artificially administered fluids and nutrition.
- Antibiotics.
- Other instructions about treatment not listed.

In hospitals and nursing homes, the MOLST form may be used to issue any order concerning life sustaining treatment. In the community the MOLST form may be used to issue nonhospital DNR and Do Not Intubate orders, and in certain circumstances, orders concerning other life sustaining treatment. The signed MOLST form should be transported with the patient as the patient travels to different health care settings.

More detailed information and forms can be located at the NYS Department of Health's website at http://www.health.ny.gov **with the FAQs located at** http://www.health.ny.gov/professionals/patients/patient_rights/

POWERS OF ATTORNEY

A durable power of attorney addresses the problems which arise when an individual becomes disabled or incapacitated, or is otherwise unable to manage his or her own financial affairs. When properly drafted, a power of attorney allows an individual (the "principal") to designate an "agent" (usually a spouse, adult child or trusted friend) to perform a multitude of duties when the principal becomes unable to do so. It may also provide for alternate agents, compensation of agents and other contingencies described below.

Effective as of September 1, 2009, the General Obligations Law made significant changes to the rules governing agents acting under statutory form powers of attorney. The following discusses the history of powers of attorney as well as the recent changes following the 2009 amendments to the General Obligations Law ("2009 amendments").

Powers of attorney are governed by the General Obligations Law as well as general agency law. An attorney-in-fact or agent (the "agent") is the alter ego of the principal and is authorized to act with respect to matters specifically authorized by the principal according to the executed instrument. A written power of attorney is a formal agreement that creates a principal-agent relationship. Lancaster v. Zufle, 932 F Supp 109 (SDNY1996). An implied term of every power of attorney is that it confers on the agent only authority that is permissible under the laws of the place where the action is contemplated. In re Landau's Estate, 172 Misc 651 (Surr Ct Kings Co 1939).

The primary purpose of the written power of attorney is not to define the authority between the principal and agent, but to evidence the authority of the agent to third parties with whom the agent deals. In re Anyon's Estate, 137 Misc. 582 (Surr Ct New York Co 1930). The agent under a power of attorney is a fiduciary, and therefore, has a fiduciary duty to the principal. Matter of Griffen, 160 Misc.2d 871 (Surr Ct Bronx Co 1994). The agent may not act for his or her personal benefit nor may he or she exercise any power that the principal has not specifically authorized in the instrument. *Id.*

An agent must generally act in good faith, and with undivided loyalty toward a principal. Estate of DeBelardino, 77 Misc2d 253, 352 (Surr Ct Monroe Co), affd, 47 AD2d 589 (4th Dept 1975). Due to this fiduciary relationship, an agent may be held accountable to the principal or the representatives of the principal. *Id.*; see also In re Iannone, 104 Misc2d 5 (Surr Ct Monroe

Co 1980). Prior to the 2009 amendments, the standard of conduct applicable under a power of attorney had not been clearly articulated.

Prior to the 2009 amendments, the power of attorney gave the agent a great deal of authority and responsibility with relatively weak safeguards or accounting requirements. The 2009 amendments specifically codify that an agent acting under a power of attorney has a fiduciary relationship with the principal. GOL §5-1501(1); GOL §5-1505(2). The 2009 amendments provide for the appointment of a monitor (a person appointed in the power of attorney who has the authority to request, receive and seek to compel the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal). GOL §5-1501(8). Further, GOL §5-1505 sets forth the standard of care and requires that an "agent shall observe the standard of care that would be observed by a prudent person dealing with the property of another."

The 2009 amendments impose the following obligations on the agent:

(1) to act according to the instructions of the principal; or absent instruction, in the best interests of the principal avoiding conflicts of interest;

(2) to keep the principal's property separate and distinct from other property controlled by the agent (other than property that was joint between principal and agent at the execution of the power of attorney or made joint thereafter pursuant to the SGR);

(3) to keep records of all receipts, disbursements and transactions by the agent on the principal's behalf and to make the records available at the principal's request; the record and a copy of the power of attorney must be available within 15 days of a written request by a monitor, a co-agent or successor agent, a government entity investigating the principal may be in need of protective or other services or investigating an abuse or neglect report, an Article 81 court evaluator, an SCPA guardian ad litem, or the principal's guardian or conservator, a deceased principal's executor or administrator.

If the agent fails to produce the record of his or her actions, a special proceeding may be brought. GOL §5-1510 authorizes the agent, the spouse, child or parent of a principal, the

principal's successor in interest, or any third party who may be required to accept the power of attorney to bring a special proceeding for any of the following purposes:

(1) to determine whether the power of attorney is valid;
(2) to determine whether the principal had capacity at the time the power of attorney was executed;
(3) to determine whether the power of attorney was procured through duress, fraud or undue influence;
(4) to determine whether the agent is entitled to receive compensation or whether compensation received was reasonable;
(5) to approve the record of receipts, disbursements and transactions;
(6) to remove an agent on grounds that agent has violated or is unfit, unable or unwilling to perform the agent's fiduciary duties;
(7) to determine how multiple agents must act;
(8) to construe the provisions of the power of attorney;
(9) to compel acceptance of the power of attorney;
(10) to approve an agent's resignation;

"Springing" Power of Attorney.

A "springing" power of attorney takes effect at a future time or upon an event defined by the principal, including but not limited to, the principal's incapacity. The "springing" power of attorney may be appropriate where the principal wants to retain complete control over his or her assets until disability.

Prior to the 2009 amendments, the power of attorney permitted limiting the "power to take effect upon the occurrence of a specified contingency, including but not limited to the incapacity of the principal." Former GOL 1-1506. It was rare for a practitioner to advise his or her clients to execute a springing power of attorney as the medical community was wary in certifying a principal's lack of capacity for purposes of springing the power of attorney into effect.

The 2009 Amendments provide that under GOL 5-1501B(d)(3)(b) if the power of attorney states that it takes effect upon the occurrence of a date or a specified contingency, then the power of attorney will become effective on that date or contingency, and the agent's

signature. If the power of attorney requires that the contingency be certified by another person in writing, the declaration satisfies the requirement regardless of whether the contingency has actually occurred.

General Powers of Attorney.

Prior to the amendments, there was distinction between durable and non-durable powers of attorney, specifically due to the former statutory forms. A non-durable power of attorney is not an effective tool when planning for incapacity. The non-durable general power of attorney terminates when it is revoked by the principal and is automatically revoked upon the principal's incompetence or death. Repealed GOL §5-1501 (1998). Behren v. Blumstein, 165 AD2d 657 (1st Dept. 1990), appeal denied, 77 NY2d 865 (1991); Matter of Wingate, 165 Misc2d 108 (Suff Co 1995).

Repealed GOL § 5-1505 (1998) provided that a durable power of attorney will not be terminated by the incapacity of the principal if the instrument contains the words "This power of attorney shall not be affected by my subsequent disability or incompetence," or other similar words. The primary advantage of the durable power of attorney over the non-durable general power of attorney is that the durable power of attorney survives the incapacity of the principal. A properly drafted durable power of attorney can avoid the need for a guardianship proceeding upon the incapacity of the principal. It also ensures that the person of the principal's choosing has control over the management of the principal's assets in the event the principal does become incapacitated.

The 2009 amendments repealed GOL § 5-1501 and replaced it with 3 new sections 5-1501 (Definitions), 5-1501A (Powers of Attorney Not Affected by Incapacity) and 5-1501B (Creation of a Valid Power of Attorney; When Effective).

Under the new GOL § 5-1501A(1) a power of attorney is durable (and survives incapacity) unless the power of attorney specifically provides otherwise. GOL § 5-1501A(2) provides that the power of attorney is not revoked or terminated by the principal's subsequent incapacity and the agent's acts during incapacity have the same effect and bind the principal.

GOL § 5-1501B(1) requires that the power of attorney (a) be typed using letters at least 12 point, or if handwritten of reasonable equivalent; (b) be signed and dated by the principal with

capacity and acknowledged in the manner required for the conveyance of real property; (c) be signed and dated by the agent and acknowledged in the manner required for the conveyance of real property; (d) contain exact wording of "Caution to the Principal" contained in GOL § 5-1513(1)(a); (e) contain exact wording of "Important Information for the Agent" in GOL § 5-1513(1)(n).

Statutory Forms Effective 2009 and Revised Again in 2010.

GOL § 5-1513 provides for the statutory short form of the general powers of attorney. GOL § 5-1501 also lists the powers that the principal can grant to the agent while GOL §§ 5-1502A - 5-1502O provide for the construction of each of the authorized powers. The statutory short form incorporates the powers described in the statute; however, it is possible to have a valid power of attorney that is not in the statutory short form. GOL 5-1505B(4) continues to permit powers of attorney not in the statutory short form. Typically, practitioners begin with the statutory short form and revise the power of attorney to include additional provisions.

The statutory short form provides for the following powers:

1. **Real estate transactions:** GOL § 5-1502A sets forth the agent's authority regarding real estate transactions. Such authority includes the authority to purchase or otherwise to acquire either ownership or possession of real property as well as the authority to lease or sublet, sell, exchange or convey real property on behalf of the principal, including the power to execute, acknowledge, seal and deliver any deed.

2. **Chattel and goods transactions:** GOL § 5-1502B defines the agent's authority with respect to chattels and goods. Such authority includes, but is not limited to, the authority to accept as a gift, or as security for a loan, to reject, to demand, to buy, to lease, to receive, or otherwise to acquire either ownership or possession of a chattel or goods as well as the authority to sell, exchange or convey a chattel or goods on behalf of the principal.

3. **Bond, share and commodity transactions:** In addition to the general acts of authority described in (1) and (2) above, GOL § 5-1502C grants the agent

the authority to any other acts which the principal can do through an agent with respect to any bond, share or other instrument of similar character.

4. **Banking transactions:** GOL § 5-1502D grants the agent the authority to continue, to modify or to terminate any bank account owned by the principal. The agent may also open bank accounts in the name of the principal, in the name of the agent, or in joint name. Among other things, the agent is authorized to make, sign and deliver checks; provided however, that with respect to joint accounts existing at the creation of the agency (power of attorney is effective when signed and acknowledged by principal and agent), the authority does not permit the agent to add or delete joint owners without SGR authority.

5. **Business operating transactions:** GOL § 5-1502E defines "business operating transaction" so as to include the authority (to the extent permitted by law) to perform any duty or liability of the principal as a partner or shareholder of a business. With respect to businesses owned solely by the principal, the agent has the authority to continue, to modify, to renegotiate, to extend or to terminate any contractual arrangements.

6. **Insurance transactions:** GOL § 5-1502F authorizes the agent to continue, to pay premiums or to terminate any insurance policies (i.e. life, accident, health, disability or liability insurance). The agent may also purchase new, different or additional insurance contracts. Without authority granted under a SGR, the agent does not have the power to add, delete or otherwise change the beneficiary designations of life insurance policies in existence at the creation of the agency.

7. **Estate transactions:** GOL § 5-1502G authorizes the agent (to the extent permitted by law) to apply for and obtain letters testamentary, letters of administration or letters of trusteeship (none of which is realistic as the SCPA requires a person applying for letters to have capacity). The agent is authorized to act for the principal in all manners in any estate of a decedent, absentee, infant or incompetent, or any trust. The 2009 amendments provide that the authority is

permitted regardless of whether the estate or trust is specifically identified at the giving of the power of attorney and whether in NYS or elsewhere.

8. **Claims and litigation:** GOL § 5-1502H permits the agent to prosecute any cause of action, claim, counterclaim or defense against any individual, association, corporation or other entity. The agent may also waive the issuance and service of process.

9. **Personal and Family Maintenance:** GOL § 5-1502I authorizes the agent to do the acts necessary for maintaining the customary standard of living for the principal's spouse, children and dependents. The 2009 amendments also permit the agent to hire an attorney, accountant, expert witness or assistant for purposes of keeping the required records when the agent finds it desirable for proper execution of the powers granted by the power of attorney. The 2009 amendments also permit the agent to continue making charitable contributions and individual gifts customarily made by the principal prior to the creation of the agency to the extent that the donee's gift does not exceed $500 annually.

10. **Benefits from Governmental Programs or Civil or Military Service:** GOL § 5-1502J authorizes the agent to execute vouchers in the principal's name for allowances and reimbursements by the government, to receive the proceeds, and to invest such proceeds. The 2009 amendments now include the authority to enroll in, apply for, select, reject, change, amend or discontinue a benefit or program on the principal's behalf. Attorneys, accountants and expert witnesses may be retained by the agent when the agent deems it desirable for the proper execution of these powers.

11. **Health Care Billing and Payment Matters; Records, Reports and Statements:** Prior to the 2009 Amendments, GOL § 5-1502K authorizes the agent to keep all records of cash received and disbursed for the principal, to prepare and file tax or informational returns, and to prepare and file any report which the agent thinks is desirable or necessary for protecting the principal's interests. The 2009 amendments authorize the agent to access the principal's health care records and to make decisions regarding the payment of the principal's

health care bills. This does NOT give the agent the authority to make medical decisions.

12. **Retirement benefit transactions:** GOL § 5-1502L grants the agent the authority to contribute to, rollover or withdraw from and deposit funds in any type of retirement plan for the principal. The agent may also make investment directions, select and change payment options and make designations of beneficiaries. The 2009 amendments restrict the agent from making changes to a beneficiary designation subject to the requirements of the SGR.

13. **Tax matters:** GOL § 5-1502M (re-designated from prior GOL §5-1502N) authorizes the agent to prepare, sign and file federal, state, local and foreign income, gift, payroll, federal insurance contributions act returns and other tax returns, claims for refunds, requests for extension of time, or petitions regarding tax matters. The agent is also authorized to pay taxes due, collect refunds, receive confidential information, and contest tax deficiencies.

14. **All other matters:** GOL § 5-1502N (re-designated from prior GOL § 5-1502O) defines "all other matters" to authorize the agent to act as an alter ego of the principal with respect to any and all possible matters and affairs which are not enumerated in GOL §§ 5-1502A - 5-1502M and which the principal can do through an agent. The 2009 amendment codify that this authority does not include the authority to make health care decisions for the principal. The 2009 amendments also restrict the agent from using this authority to designate a third party to act as agent for the principal unless the power is specifically granted via GOL § 5-1502K.

15. **Full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select.** The former GOL does not provide an explanation of this authority. The 2009 amendments still do not provide an explanation of this authority. Presumably, this permits the agent to delegate his or her other powers.

Modifications to Statutory Forms.

GOL § 5-1503 provides for modifications which may be made to the statutory short form POA and SGR established under the statute. The 2009 amendments provide that a modified power of attorney or a modified SGR is not prevented from being a statutory short form power of attorney or SGR as long as the requirements of GOL § 5-1501B(a) (12 point font or equivalent writing), (b) (signed, dated and acknowledge by principal with capacity) and (c) (signed, dated and acknowledged by agent) and § 5-1513 are met.

How to Execute and Revoke a Power of Attorney.

Prior to the 2009 amendments, the precise standard of the mental capacity required for creating a power of attorney had not been clearly established, the principal needing to have at least some minimal capacity to create the agency. See Klipstein and Bloom, Drafting New York Wills, § 17.02 (Matthew Bender 1992, with annual updates). The 2009 amendments define capacity as "the ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney. GOL § 1-1501(3). "Incapacitated" means to be without capacity. GOL § 1-1501(6).

To be valid, the form must be typed or printed using letters which are legible or of clear type no less than twelve-point in size, or if in writing, of equivalent size; GOL § 5-1501B(a); and must contain the exact wording of the "Caution to the Principal" language of GOL § 5-1513(1)(a) and the "Important Information for the Agent" language of GOL § 5-1513(1)(n). GOL § 5-1501B(1).

A power of attorney must be signed, dated and acknowledged by the principal and agent in the manner prescribed for the acknowledgment of a conveyance of real property. GOL § 5-1501B(1)(b) and (c). The power of attorney does not become effective until signed, dated and acknowledged by both the principal and the agent. If there is more than one agent appointed, the power of attorney takes effect when all the agents have signed, dated and acknowledged the document. GOL § 5-1501B(3)(a)

The power of attorney is NOT invalid because there is a lapse of time between the date of acknowledgement of the principal's signature and the date of acknowledgement of the agent's

signature or because the principal became incapacitated during the lapse of time. GOL § 5-1501B(1)(c).

Conflicts of law may prevent or limit the agent's power to act in another state, particularly when real estate transactions are involved. Execution of a power for use in states other than New York should be considered where the principal owns property or has personal or business relationships. If the principal does execute powers of attorney for more than one state, particular care should be taken to insure the powers of attorney are executed pursuant to the applicable state requirements (i.e. acknowledged, witnessed, etc.). For example, Florida requires two witnesses in addition to the Notary (who may be one of the witnesses).

GOL § 5-1512 provides that a power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction or NYS law is valid in NYS regardless of whether the principal is a NYS domiciliary.

The 2009 amendment made changes to the form with respect to the appointment of multiple agents. Under the prior form, if more than one agent is appointed, the principal must initial the blank space to the left of his or her choice regarding whether the agents may act separately or must act together. The new statutory form provides as follows:

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

( ) My agents may act SEPARATELY.

There is no statutory requirement that the power of attorney must be filed in the County Clerk's Office. A properly executed instrument containing the power to convey real property may be recorded in the County Clerk's office of any county in which any of the real estate to which it relates is situated. RPL § 294(1). It may also be advantageous to file the power of attorney so that the instrument becomes a matter of public record.

A power of attorney relating to an interest in a decedent's estate *must* be recorded in the Surrogate Court's office. Thereafter, the Surrogate has jurisdiction over the principal and the agent as well as has the power to determine the validity of the instrument. EPTL 13-2.3(a).

Prior to the 2009 amendments, a power of attorney was not a contract subject to rescission, but is an appointment subject to revocation by the principal. Behren v. Blumstein, supra. Further, there was not a formal process for an agent to resign. The 2009 amendments expanded how powers of attorney may be revoked or terminated. GOL § 5-1511(1) provides that the power of attorney terminates when the principal dies; the principal becomes incapacitated (when non-durable power of attorney); the principal revokes the power of attorney; the principal revokes the agent's authority and there is no co-agent or successor agent willing or able to serve; the agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent willing or able to serve; the authority of the agent terminates and there is no co-agent or successor agent willing or able to serve; the purpose of the power of attorney is accomplished; or a court order revokes the power of attorney.

An agent's authority terminates when the principal revokes authority; the agent dies, becomes incapacitated or resigns; the agent's marriage to the principal is terminated by divorce, annulment or declaration of nullity unless the power of attorney expressly provides otherwise; or the power of attorney terminates. GOL § 5-1511(2).

The principal may revoke the power of attorney in accordance with the terms of the document by delivering a written, signed and dated revocation to the agent and to any third party that the principal reasonably believes has received, retained or acted upon the power of attorney. GOL §5-1511(3).

If the power of attorney was filed with the County Clerk's Office, the written revocation must also be filed with the County Clerk's Office. GOL § 5-1511(4). Regardless of whether the revocation is filed, the third party must have actual notice for the revocation to be effective. GOL § 5-1511(4). A financial institution is deemed to have actual notice of revocation after it has had a reasonable opportunity to act on a written notice of revocation or termination following receipt at its office where the account is located. GOL § 5-1511(5).

Unless the principal specifically provides otherwise, the execution of a power of attorney now revokes any and all prior powers of attorney. GOL § 5-1511(6).

Modifications

No changes may be made to the statutory short form power of attorney other than within the Modifications section. Be sure that the balance of the form remains the same as the statutory short form. Leave non-applicable language in the form but be sure that N/A or some other language stating that it is not applicable is included. Modifications suggested by NYSBA include:

Suggested Modifications [paragraph (g)]

Revocation:

1. Although this document revokes all powers of attorney I have previously executed, this document shall not revoke any powers of attorney previously executed by me for a specific or limited purpose, unless I have specified otherwise herein. It shall not revoke any power executed as part of a contract I signed or for the management of any bank or securities account. In order to revoke a prior power of attorney for a specific or limited purpose, I will execute a revocation specifically referring to the power to be revoked.

2. This power of attorney shall not be revoked by any subsequent power of attorney I may execute, unless such subsequent power specifically provides that it revokes this power by referring to the date of my execution of this document.

3. Whenever two or more powers of attorney are valid at the same time, the agents appointed on each shall act separately, unless specified differently in the documents.

Monitor:

Unless reasonable cause exists to require otherwise, the agent shall not be obligated by the monitor to provide financial details or accountings more frequently than annually.

Compensation of Agent:

1. Agent shall be compensated for services in handling my financial affairs at the same rate as that of an executor or administrator of an estate, and may pay said compensation from the funds in his/her hands following the close of each calendar year or more frequently. The commission shall be calculated upon the amount of money received by him/her as income and upon income paid out, whether such income is derived from the corpus of the estate or from any

other source, and also a commission for receiving and paying out corpus of the estate paid out during the period. The commissions on income and principal shall commence each year at the initial bracket. If agent is an attorney and performs any legal services for me, agent shall be entitled to reasonable attorney's fees apart from and in addition to the compensation provided for herein.

2. My agent(s) shall be compensated at a rate of $_____/hr. for services rendered pursuant to this power of attorney.

Gift Giving via Power of Attorney

The Ferrara case has recently brought to the attention of the Court of Appeals the matter of gift giving through the use of a power of attorney. 7 NY3d 244 (2006). The facts here are disturbing. George J. Ferrara, a retired stockbroker, executed a Will leaving his entire estate to the Salvation Army on June 10, 1999. On January 25, 2000, after returning from Florida with his nephew, Dominick, George executed a short-form power of attorney appointing his brother, John, and John's son, Dominick, as his attorneys-in-fact allowing them to act separately. George initialed next to the following language typed on the short-form power of attorney, "this Power of Attorney shall enable the Attorneys in Fact to make gifts without limitation in amount to John Ferrara and/or Dominick Ferrara."

George's power of attorney was notarized by a friend of Dominick, who testified that she acted as notary only and did not legally represent George or Dominick; but she recalled Dominick explaining the power of attorney to George in her presence and does not recall the word gift being mentioned.

George died on February 12, 2000, approximately 3 weeks after executing the power of attorney. In the meantime, Dominick transferred approximately $820,000 of George's assets to himself.

The Salvation Army found out about George's Will from George's unpaid doctor in Florida. The Salvation Army brought a discovery and turnover proceeding. . . . and the case made its way through the Surrogate and Appellate Divisions before finding its way to the Court of Appeals.

The Court of Appeals reviewed the legislative purposes and history of GOL §§ 5-1501 and 5-1502 in specific detail. The Court held that §5-1502M "unambiguously imposes a duty on the agent to exercise gift-giving authority in the best interest of the principal." 7 NY3d 244, 252. The Court further held that nothing in such section "indicates that the best interest requirement is waived when additional language increases the gift amount or expands the potential beneficiaries pursuant to *section 5-1503.*" 7 NY3d 244, 252. Finally, the Court stated "The term "best interest" does not include such unqualified generosity to the holder of a power of attorney, especially where the gift virtually impoverishes a donor whose estate plan, shown by a recent will, contradicts any desire to benefit the receipient of the gift." 7 NY3d 244, 254-255.

The 2009 amendments specifically require the use of a SGR expressly granting the authority for gift giving. GOL § 5-1514. Using the SGR, the principal can permit the agent to make gifts to the principal's spouse, children and more remote descendants and parents up the annual federal gift tax exclusion (currently $15,000). GOL § 5-1514(2). The gift can be doubled if splitting gifts with the donor's spouse. GOL § 5-1514(2).

To be valid, the SGR must be typed or printed using letters which are legible or of clear type no less than 12 point in size; or if in writing, a reasonable equivalent; be signed, dated and acknowledged by a principal with capacity and witnesses by 2 persons not named in the SGR as permissible recipients of gifts as described in EPTL 3-2.1(a); be accompanied by the statutory short form power of attorney in which the authority (SGR) is initialed by the principal; and be executed simultaneously with the statutory short form power of attorney GOL § 5-1514(9).

A sample Power of Attorney with Statutory Gift Rider is included with these materials. Review the form in specific detail and be sure that all modifications are applicable. Explanatory footnotes are included for your reference. If you choose to use this form, please remember that modification may only be made in the modifications sections of the Power of Attorney and Statutory Gift Rider. Also be sure that the principal initials in all applicable sections (checking the box is incorrect). Finally, be sure that you remove the footnotes before the principal executes the power of attorney.

THE IMPORTANCE OF HAVING A WILL

A Will sets forth a person's directions with respect to the direction of his or her assets after death. Without a properly executed Will, the laws of intestacy will apply to the distribution of a person's assets. Many clients assume that the laws of intestacy will suffice. However, what happens in the following example: Husband and Wife have 3 minor children. Husband has $700,000 in assets. Wife has $1,000 in assets. The house is owned jointly by Husband and Wife. Husband dies. Wife keeps the house as surviving joint tenant. The remaining $700,000 is divided between Wife and children according to the laws of intestacy (Wife receives $50,000 plus ½ of the remaining $650,000; the 3 children split the remaining $325,000). But remember the children are minors, so the court will be involved until the youngest child reaches majority. This is probably not the outcome Husband and Wife had in mind.

Problems with Intestate Succession

When a New York State resident dies leaving no Will, the assets of the decedent will be distributed under New York Estates, Powers and Trusts Law ("EPTL") Article 4, which lists the order and amount that family members will take from the estate of the decedent. In cases where a person dies intestate, EPTL §4-1.1 provides that a decedent's assets will be distributed as follows:

- If survived by a surviving spouse and children, the spouse receives $50,000 and ½ of the balance. The children equally share the balance.
- If survived by only a surviving spouse, the spouse receives everything.
- 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.
- If survived by only by brothers and sisters and/or nieces and nephews, the brothers and sisters and/or nieces and nephews, will equally share everything, by representation.
- If survived only aunts and uncles and/or cousins, the aunts and uncles and/or cousins will share equally everything, by representation.
- If survived only by great-grandchildren of grandparents, the great-grandchildren of grandparents will equally share everything.

While EPTL Article 4 clearly describes the distribution of property of a decedent who dies without a Will, it is important to look at some troubling matters that arise outside of the statute. One important reason to have a Will is that New York State does not recognize informal documents that dispose of the decedent's real and personal property if no will exists. All assets pass through the laws of intestacy statute regardless of what the decedent truly wanted.

When a person has died without a Will, the process of administering that person's estate is governed by the laws of intestacy. Rather than an executor being appointed by the Court under a "probate proceeding," an administrator will be appointed by the Court to handle the distribution of that person's assets. New York Surrogate's Court Procedure Act (SCPA) §1001 provides that letters of administration must be granted to the persons who are distributees of an intestate and who are eligible and qualify, in the following order:

- the surviving spouse
- the children
- the grandchildren
- the father or mother
- the brothers or sisters
- any other persons who are distributees and who are eligible and qualify, with preference being given to the person entitled to the largest share in the estate.

Where there are eligible distributees equally entitled to administer the court may grant letters of administration to one or more of such persons. If the distributees are issue of grandparents, other than aunts or uncles, on only one side, then letters of administration shall issue to the public administrator or chief financial officer of the county. SCPA §1001.

In order to qualify to apply for the Administrator position, a person must fall under one of the categories of SCPA §1001 and must meet the following requirements as set forth by SCPA §1002. The petition must allege the citizenship of the petitioner and the decedent or person alleged to be deceased, that the decedent or person alleged to be deceased left no will, or that the case is within 1001(9) and must state whether or not the intestate or person alleged to be deceased left any:

- personal property and its estimated value and

- real property, whether it is improved or unimproved, a brief description thereof, the estimated value of the real property and improvements, if any, and the estimated gross rents for the period of 18 months. SCPA § 1002.

In a proceeding for letters of administration, every eligible person who has a right to administration prior or equal to that of the petitioner and who has not renounced must be served with process. SCPA §1003. Before making a decree granting letters of administration, the court may require the petitioner to serve by mail a written notice of the application upon every distribute of the intestate who has not been required to be served with process and who has not appeared in the proceeding or waived process. SCPA §1005. The original Notice must be filed with the court together with an affidavit of service. SCPA §1005 further provides that this notice shall contain:

- Each and every name of the intestate known by the petitioner.
- The fact that letters of administration have been applied for by the petitioner
- That a decree will be made granting letters and to whom.
- The names and addresses of petitioner and each and every distribute listed in the petition.
- That no other distributes are known to exist.
- That letters will issue on or after the dated fixed on the notice.

There are six instances when a spouse will be disqualified from inheriting under the laws of intestacy. A husband or wife will be considered a surviving spouse unless (1) A final decree or judgment of divorce, annulment, nullity, or dissolution of marriage due to absence, was issued and in effect when the deceased spouse died; (2) The marriage was void as incestuous, bigamous, or there was a prohibited remarriage; (3) The spouse had obtained a final decree or judgment of divorce, annulment, nullity, or dissolution of marriage due to absence outside of New York State that was not recognized as valid under New York State law; (4) A legally recognized final decree or judgment of separation was rendered in New York State against the spouse and was in effect when the deceased spouse died; (5) The spouse abandoned the deceased, and such abandonment continued until the time of death; and (6) a spouse, who had the duty to support the other spouse, failed or refused to so even though that spouse had the means to do so. EPTL §5-1.2. Under any of these six circumstances, a spouse would not be permitted to collect from the estate of the deceased spouse if the decedent died intestate nor will a jury trial be

permitted to determine spousal disqualification. In re Ruggiero's Estate, 51 A.D.2d 969, 970, 368 N.Y.S.2d 722, 726, 82 Misc.2d 211, 215 (1975).

The Court of Appeals gives two elements for proving abandonment by one spouse. The petitioner must show that the abandonment was (1) unjustified and (2) without the consent of the other spouse. The court in In re Maiden's Estate said "to constitute abandonment under this statute something more is necessary than a departure of a spouse from the marital abode or a living apart. The departure must be unjustified and without the consent of the other spouse. The burden to establish abandonment is and remains at all times upon those asserting it." In re Maiden's Estate, 31 N.E.2d 889, 284 N.Y. 429, 430 (1940). In Matter of Baldo, the spouse's choice to sever all contact with decedent at the end of his life and to establish a continuing relationship with another man was evidence sufficient to establish "that hardening of resolve, that irrevocable decision by [respondent]" to terminate her prior conjugal relationship with decedent, and compels a finding of abandonment as a matter of law. Matter of Estate of Baldo, 620 N.Y.S.2d 602, 604, 210 A.D.2d 848, 850 (3rd Dept. 1994).

Similarly, in In re Goethie's Will, the court gives evidence as to who will not take as surviving spouse. The court said, "there can be no clearer or more convincing abandonment of the marital status, or of a spouse, than the solemnizing of a ceremonial marriage to another followed by open and continuous cohabitation and the birth of issue of the subsequent union." In re Goethie's Will, 161 N.Y.S.2d 785, 787, 9 Misc.2d 906, 908 (1957).

EPTL §5-1.4 provides that unless the governing document provides otherwise, a divorce (including a judicial separation) or annulment of a marriage revokes a disposition or appointment by Will, payable/transfer on death designation or beneficiary designation for a life insurance policy or pension/retirement account or by revocable trust. For purposes of these potential transfers to a former spouse, the former spouse will be treated as having immediately predeceased the testator as of the time of the revocation. EPTL §5-1.4(b)(1).

A parent will be disqualified from inheriting under intestacy, any of his or her deceased child's assets if the parent had abandoned the child. Matter of Daniels' Estate, 275 A.D. 890, 90 N.Y.S.2d 26 (4th Dep't 1949.) The court in this case decided that "the compulsory payment of $7.50 for a period of four weeks under order of the Children's Court did not constitute a

resumption of the 'parental relationship and duties' within the purview of the statute [Decedent Estate Law, § 87, subd. (e); § 133, subd. 4, par. (c).]" and therefore, the father would not be allowed to share in the estate of his deceased child. Id.

Multiple cases have been decided in New York State that prohibit a beneficiary who murders the decedent to collect any inheritance from the decedent's estate, including instances where the decedent died intestate. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889.) In re Nicpon's Estate makes a distinction, however, in that, though the wrongdoer cannot inherit as a result of his own wrongdoing and the estate of the wrongdoer cannot inherit, an existing interest in the wrongdoer is not diminished simply because of the wrongdoing. In re Nicpon's Estate, 102 Misc.2d 619, 424 N.Y.S.2d 100 (1980.) A caveat to this rule is that a mentally ill person who murders the decedent will not be disqualified from inheriting. In In re Wirth's Estate, husband who was found not guilty of murdering his spouse by reason of insanity was not disqualified from taking a share of the wife's estate. In re Wirth's Estate, 59 Misc.2d 300, 298 N.Y.S.2d 565 (1969.)

EPTL §4-1.1(d) states that a child who has been adopted becomes a member of that family, the same as a natural born child of that family. The adopted child will be able to take a distributive share of a deceased adoptive parent's estate and has a right to intestate succession. The court in Bourne v. Dorney said, "in other words, the Legislature has ordained that there shall be no difference in the right to inherit between a child by adoption and his heirs and next of kin and a child by nature and his heirs and next of kin, and the courts, as in duty bound, have obeyed the command." Bourne v. Dorney, 171 N.Y.S. 264, 268, 184 A.D. 476, 481 (2d Dep't 1918). Domestic Relations Law §117(1)(a) states that once a child has been adopted and can take under the intestate succession of the adoptive parents, the child is cut off from inheriting under the intestate succession of the natural parents. The court in DeMund v. LaPoint supported the statute when it ruled in favor of the plaintiffs, stating that a court order of adoption had terminated the right of the defendant to inherit from his natural parent. DeMund v. LaPoint, 647 N.Y.S.2d 662, 665, 169 Misc.2d 1020, 1025 (1996).

It is well settled law that a step-child of the decedent who has not been adopted will not be able to take under the estate of the decedent. The only way for a step-child to take under the estate of the decedent is for the step-child to have been adopted by the decedent. Then the court

considers the step-child and parent to be of the same blood. In re Marquet's Will, 178 N.Y.S.2d 783, 784, 13 Misc.2d 958, 959 (1958.)

A non-marital child can inherit from the natural mother and the mother's family. EPTL §4-1.2 states that a non-marital child can inherit from the father if proof can be offered for any of the following: (1) An Order of Filiation has been filed; (2) There has been an acknowledgment of paternity by the father which has been filed with the Putative Father's Registry; (3) The father has consented to and tested positive in a blood genetic marker test, showing paternity, and other clear and convincing evidence has been presented; or (4) There has been open and notorious acknowledgment by the father that he is the father, and there is other convincing evidence or proof of paternity. In re Flemm's Will, 381 N.Y.S.2d 573, 577, 85 Misc.2d 855, 861 (1975.) This proof can not be offered posthumously, but must be offered during the decedent's lifetime. Matter of Malavase, 520 N.Y.S.2d 49, 49, 133 A.D.2d 759, 760 (2d Dep't 1987.)

Lastly, Abandoned Property Law §600 (1) (b) and Surrogate's Court Procedure Act §2222 state that unclaimed property will be deemed abandoned property if at the time a person is entitled to receive the distribution of monetary proceeds from the decedent's estate, the whereabouts of that person are unknown. In this situation, the money owed to that person will escheat to the state, and more specifically, to the comptroller, who will retain the money in case the person appears to claim it. In 2003 there was an addition to the statute, section 1422, that now requires due diligence before remitting funds to the state. This includes advertising the names of property owners in publications and performing mailings at scheduled intervals before turning over the money to the state. Aban. Prop. §1422 (2004).

Though the New York State legislature has written a statute that disposes of a decedent's estate if no Will has been written, the main advantage to having a Will is that the writer's wishes will be honored. Without a Will, the decedent's wishes may not be met. Certain people may be disqualified from receiving assets that the decedent intended if they do not fall within EPTL §4-1.1. The best way to be sure that the decedent's assets go to the people the decedent intended is to specifically name those people in a Will.

Drafting Wills

In New York State, the substantive law of Wills is governed by Article 3 of the New York Estates, Powers and Trusts Law ("EPTL"). Any person 18 years of age or older, of sound mind and memory, may dispose of his or her assets by Will and exercise a power to appoint such property. EPTL §3-1.1. "Sound mind and memory" requires only a "lucid moment" that the testator have a general understanding of the testator's assets and the objects of the testator's bounty (those who would inherit if there is no Will). A good test to determine capacity is to request that the testator draw out a family tree with the attorney draftsperson, naming all of the children, grandchildren or other closest living blood relatives. If there are no children, it is also a helpful practice to draw the family tree so that location of the distributees will be made easier after the testator's death.

Every Will should include the following:

- Any Specific Bequests;
- Tangible Personal Property Disposition;
- Any Cash Bequests;
- Residuary Disposition;
- Appointment and Resignation of Executors, Trustees and Alternates;
- Powers of Executors and Trustees;
- Bonding (or No Bonding Requirement);
- Tax Apportionment Provisions (EPTL §2-1.8 governs if Will is silent).

Other common Will provisions include:

- Marital Deduction Trusts (estate tax planning, permitting the deferral of estate tax until the second death);
- Credit Shelter Trusts (estate tax planning, ensuring the use of each spouse's estate tax exemption);
- Trusts for Minor (or Young, not necessarily "Minor") Beneficiaries;
- Creditor Protection Provisions;
- Medicaid Protection Provisions;
- Lifetime Trusts ("Dynasty Trusts").

Estate tax planning must be considered. While a detailed analysis of the federal and New York State estate tax rules is beyond the scope of these materials, the federal gift and estate tax exemption (the amount which a person may give during lifetime or pass at death without paying federal gift or estate tax) is $11.4 Million, indexed for inflation (sun-setting in 2025 and returning to pre-2018 law, $5.74 Million in 2019). There is "portability" of the federal estate tax

exemption for married couples, meaning that the unused estate tax exemption of the predeceased spouse can be utilized by the surviving spouse ($22.8 Million total exemption for a married couple). In addition to the $11.4 Million estate and gift tax exemption, each person may gift up to $15,000 annually to as many recipients as he or she chooses without even filing a gift tax return.

New York States does not have a gift tax, but does have an estate tax that brings back gifts made within 3 years prior to death as part of the estate tax calculation. The New York State estate tax exemption increases annually as follows:

January 1, 2019 and forward	Equal to Federal Exemption under 2014 law (currently $5.74 Million)

Under the federal rules, "portability" permits spouses to use each other's exemptions, meaning that a married couple can fully utilize the full $22.8 Million of federal exemption. New York does not recognize portability, so planning must be implemented for each spouse to use both spouses' New York exemptions. Additionally, New York's estate tax law requires estates valued at 105% of the exemption (currently $6,027,000) to lose the exemption in its entirety with New York estate tax calculated on the full value of the estate (essentially meaning there is no state estate tax exemption for these estates). An estate valued at $6,027,000 results in New York estate tax of $514,040.

Other NYSBA programs sponsored by the Trusts and Estates Section and Elder Law and Special Needs Section are routinely offered providing instruction in Will drafting, estate and long term care planning.

Proper Execution of Wills

Pursuant to EPTL §3-2.1, except for nuncupative and holographic Wills authorized under EPTL §3-2.2, every will must be in writing, and executed and attested in the following manner:

- The Will must be signed at the end thereof by the testator (or in the name of the testator by another person in the testator's presence and by the testator's direction).

- The signature of the testator must be affixed to the Will in the presence of each of the attesting witnesses, or must be acknowledged by the testator to each of the witnesses

to have been affixed by the testator or at the testator's direction. The testator may sign either in the presence of, or acknowledge the testator's signature, to each attesting witness separately.

- The testator must declare to each of the attesting witnesses that the instrument to which the testator's signature has been affixed is the testator's Will.

- There must be at least 2 attesting witnesses, who must, within one 30 day period, both attest the testator's signature, as affixed or acknowledged in their presence, and at the request of the testator, sign their names and affix their addresses at the end of the Will.

The competence of an attesting witness is addressed by EPTL §3-2.2. An attesting witness to a Will to whom a beneficial disposition or appointment of property is made is a competent witness as if no disposition or appointment has been made, subject to the following:

- Any disposition or appointment to an attesting witness is void unless there are, at the time of the execution and attestation, at least 2 other attesting witnesses to the Will who receive no disposition or appointment.

- Such an attesting witness is entitled to receive so much of his or her intestate share as does not exceed the value of the disposition made to the witness under the Will.

In practice, it is advisable to follow the same execution ceremony every time your client executes his or her Will. It is also advisable that a draft of the Will be provided to the testator long in advance of the execution ceremony, leaving the testator sufficient time to review the draft, ask questions and make changes. An example of such an execution ceremony is as follows:

- The lawyer, testator and 2 attesting witnesses are in the same room and no one enters or leaves the room during the Will execution ceremony.

- The lawyer provides the final Will to the testator and gives the testator time to review the Will. The lawyer described generally the dispositive terms of the Will and appointments of fiduciaries.

- The lawyers asks the testator the following questions, to which the testator responds yes:
    - Is this your Will?
    - Does it express your wishes?
    - Are you asking Witness 1 and Witness 2 to be the attesting witnesses to your Will?
- The testator then signs the Will at the end thereof. The witnesses sign after the attestation clause. It is also best practice to have the witnesses sign the Affidavit of Subscribing Witnesses at the same time.

If the Will is not stapled prior to execution, it is a good practice to have the testator sign or initial in the margin of every page of the Will. It can be explained to the testator that by signing each page, no one can remove or replace the pages of the Will after the execution ceremony as the testator's signature/initials appear on every page.

If the lawyer cannot be present at the Will execution ceremony, the following instructions should be provided to the testator, in writing:

- Ask at least two people to be witnesses to the execution of the Will. None of the witnesses should be your spouse, children or anyone who is a beneficiary of your estate. Each must be at least 18 years old.
- The Will has been prepared with what is called a Self-Proving Affidavit. That is the very last page of the Will and should be signed at the same time the Will is signed. It must also be notarized and, therefore, a notary public should also be present when the Will is signed. If that is not possible, that affidavit should be left blank. The notary cannot be the same person as one of the witnesses.
- At the time you sign the Will, you, all witnesses, and the notary should be in the room together and everyone must watch everyone else sign.

- When you sign the Will, you must state to the witnesses that the document you are signing is your Will. You must insert the day and month in which you are signing in the spaces provided and then sign on the line indicated.

- You must then specifically ask the witnesses to sign as witnesses and each of them should sign his or her name and address in the spaces provided beneath your signature.

- Please also have each of them print his or her name and address on a separate sheet of paper so that we will be sure that we are able to read the signatures and spell the names and addresses correctly.

- You and each of the witnesses must also sign the Self-Proving Affidavit on one of the lines just below the middle of the page and the notary will then sign at the bottom. The notary must also insert the witnesses names in the appropriate spaces and, if the Will is being signed in Florida, list the form of identification.

- It is very important that each of these steps be followed exactly as I have indicated. They are what are called testamentary formalities and are required to have been observed in order for the Will to be seen as valid. Each of the witnesses should also understand that the self-proving affidavit is a sworn document that will be submitted to the court in which the Will is offered for probate. By signing it, the witness is swearing that you declared the document to be your Will and asked him or her to sign, that he or she saw you and the other witnesses sign, and that you were of sound mind at the time.

- Once the Will has been signed, please send the original, and the separate sheet on which the witnesses have listed their names and addresses, to me by certified mail, return receipt requested. The Will will be placed in our vault for safe-keeping. I will have a photocopy made and sent back to you to keep for your records.

- If you have the original of any earlier Will, that original should now be destroyed by you by tearing it in pieces and throwing the pieces in the trash. If you do not have the original, you should contact the attorney who drew it to ask him or her to send that original to you so it can be destroyed.

Sample Wills

The following Wills are meant as examples. It is important that each Will be prepared with the specific instructions of the testator in mind. Explanatory footnotes are included in these drafts for the ease of the testator in reviewing the drafts before execution. The explanatory notes **MUST** be removed before the Will is executed. Also remember, that under Schneider v. Finmann, the executor of the estate now has the ability (and duty) to bring a malpractice action against the attorney draftsperson. Schneider v. Finmann, 15 N.Y.3d 306 (2010). As such, it is important that the attorney draftsperson have a full understanding of the testator's goals, and discuss both estate tax planning and long term care planning to ensure the testator has been apprised of all applicable planning tools available. If the testator has potential estate tax and refuses to implement estate tax planning, be sure the file notes and the letter accompanying the draft documents indicate that the planning was recommended and rejected by the testator.

Samples have been included for the following scenarios:

- Estate Planning Worksheet
- Single Person, No Trusts for Beneficiaries;
- Single Person, Trusts for Minor/Young Beneficiaries;
- Married Couple, No Trusts for Beneficiaries;
- Married Couple, Trusts for Minor/Young Beneficiaries.

ESTATE PLANNING WORKSHEET

_____
First *Middle Initial* *Last* (Self)

_____
Date of Birth *Social Security Number*

_____
First *Middle Initial* *Last* (Spouse)

_____
Date of Birth *Social Security Number*

Address_____
Street *City* *State* *Zip*

Phone Numbers: Home _____Work- Self _____

Work- Spouse _____ Cell- Self _____

Cell- Spouse _____ Email: _____

Marital Status: ☐ Married ☐ Divorced ☐ Separated ☐ Single (including widowed)

Do you presently have a will? ☐ Yes ☐ No

Do you presently have a trust? ☐ Yes ☐ No

Were there any previous marriages? ☐ Yes ☐ No

Do any of your children or other beneficiaries have disabilities? ☐ Yes ☐ No

Do you own a farm or business? ☐ Yes ☐ No

Are you a U.S. citizen? ☐ Yes ☐ No

Are there any serious health problems? ☐ Yes ☐ No

If yes, please describe briefly: _____

Do you own a long-term care (nursing home) insurance policy? ☐ Yes ☐ No

Please bring copies of any existing estate planning documents with you to our meeting.

CHILDREN, GRANDCHILDREN OR OTHER BENEFICIARIES

Name	Address	Phone Number	Date of Birth	Relationship

ASSET/LIABILITY INFORMATION

Please list your asset/liability information in the appropriate category below. Attach a separate page if necessary. While exact amounts are not necessary, a realistic estimate for each account is required to provide us with the information required to make the proper recommendations.

Type of Asset	Title in Which Held (Self, Spouse, Joint, Joint with Another Person)	Type of Property (Residential, Commercial)	Current Value
REAL ESTATE (Include address. Bring deed and tax bill if considering Medicaid planning.)			
Personal Residence			
Vacant Land			
Other:			
LIQUID ASSETS (Include Financial Institution)			
Cash on Hand			
Checking Accounts			
Savings Accounts			

Other Asset Types	**Title in Which Held (Self, Spouse, Joint, Joint with third party; or Tenants in common, etc.)**		**Current Value**	
Certificates of Deposit				
Brokerage				
Equity in Business ☐ Sole Prop. ☐ Partnership ☐ Corporation ☐ LLC				
Notes and Loans Receivable				
Pension/Profit Sharing	Owner	Beneficiary		
Life Insurance	Owner	Beneficiary	Cash Value	Death Benefit
Retirement Accounts, IRAs, 401(k)s, 403(b)s, Deferred Compensation	Owner	Beneficiary		
Other Assets				
Liabilities	**Name Loan Taken In: (Self, Joint, Other)**		**Amount Owed**	

GIFT TAX RETURNS

Have gift tax returns ever been filed to report gifts made? _____ If yes, please bring copies of the returns to your appointment.

APPOINTMENTS

1 . PERSONAL REPRESENTATIVE (Executor). The Executor is responsible for administering your estate (paying bills and making distributions to beneficiaries), and probating your Will. Please include addresses and phone numbers.

EXECUTOR: _____
ALTERNATE: _____
SECOND ALTERNATE: _____

2. HEALTH CARE AGENT. Who should be named to make medical decisions on your behalf including decisions regarding medical consents, life support issues and nursing home admission if you were unable to make these decisions yourself? It is not necessary to appoint the same person who is your successor trustee or personal representative as your health care agent. Please include addresses and phone numbers.

HEALTH CARE AGENT: _____
ALTERNATE: _____
SECOND ALTERNATE: _____

3. AGENT UNDER POWER OF ATTORNEY. Who should be named to transact business in your name in the event you become disabled or incompetent?

AGENT: _____
ALTERNATE: _____

PLAN OF DISTRIBUTION

1. SPECIFIC GIFTS. Do you want to make charitable gifts, such as to a church or other institution? Do you wish to make a special gift to a particular person, such as a piece of jewelry to a particular child?

_____
_____
_____
_____
_____

Briefly describe where you would want assets remaining after any specific gifts are distributed. (Don't worry about tax planning or other considerations in answering this question. We'll consider those details later if needed.)

_____

_____

_____

_____

_____

PLEASE COMPLETE THIS SECTION ONLY IF YOU HAVE MINOR BENEFICIARIES OR BENEFICIARIES WITH DISABILITIES

1. GUARDIAN. If you have minor children or an incompetent child, you will need to appoint a guardian. The guardian is responsible for the day-to-day care of the child. It is a good idea to name an alternate guardian in the event your first choice cannot serve.

   GUARDIAN: _____
   ALTERNATE: _____

2. TESTAMENTARY TRUSTEE. You may need a trustee to manage assets for children until they reach an age when you believe they should be capable of managing property on their own. The trustee can be a relative, friend, trust company or other person you trust to manage and distribute assets according to your wishes. The testamentary trustee can be the same person named as the guardian, or could be a different person.

   TESTAMENTARY TRUSTEE: _____
   ALTERNATE: _____

3. AGE OF DISTRIBUTION. If you do establish a trust to allow a third party to manage assets for beneficiaries, then it is necessary for you to decide when the beneficiaries will be mature enough to manage assets on their own. You may want to give each beneficiary his/her share at the time the beneficiary reaches a particular age. I typically recommend 30 as the youngest age for outright distribution. You may consider splitting the distribution, such as ½ at age 25 and the balance at age 30, or 1/3 at 21, 1/3 at 25, and 1/3 at 35. You may use any age or combination of ages that you choose.

   _____

   _____

   _____

GENERAL QUESTIONS

NOTES AND QUESTIONS: Please note anything else which may be of importance in planning your estate, or note and questions you may have.

NOTES

WILL

OF

[CLIENT][1]

I, [CLIENT], of [City], New York, do make, publish and declare this to be my Will hereby revoking all prior Wills and Codicils made by me.

FIRST: I give all of my personal effects, household effects, automobiles and other tangible personal property to my children who survive me, to be divided among them as they agree, or if they are unable to agree, then as my Executor determines. Without in any way limiting this gift, I request that my tangible personal property be distributed in accordance with a letter I plan to leave for that purpose.[2]

SECOND: I give the rest of my property, real and personal, wherever situated, herein called my residuary estate, to my descendants who survive me, per stirpes.[3]

THIRD: [4] Whenever, under this Will, any property vests in a person who has not attained the age of 21, my Executor, without authorization from any court, shall have the power to manage such property, may exercise in respect of such property and the income

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1 This Will is a sample only. Be sure to prepare based on client's wishes. Remove footnotes before the Will is executed.

2 This Article provides for the distribution of all personal and household effects. If you would like certain items to be distributed to particular family members, you should provide specifically so in this Will. While a letter will provide your wishes, it is not legally enforceable.

3 The rest of your assets will be distributed to your descendants (children and younger generations) on a "per stirpes" basis. "Per stirpes" is a legal term that means the children of a predeceased beneficiary equally share their parent's inheritance. For example, if [Child] predeceases you, [Child]'s children will equally share [Child]'s interest in your estate.

4 In the event a minor inherits under your Will, the Executor can hold the minor's inheritance in trust until the age of 21 or distribute the minor's inheritance directly to the minor, to the minor's parent or to a custodial account for the minor.

therefrom all powers conferred by this Will on my Executor (and all powers conferred by law on executors) and may hold such property until such person attains the age of 21 upon the following terms:

A. There may be used for the person as much of the property, and the income therefrom, as may be determined in the discretion of my Executor. Any income not paid shall be accumulated and added at least annually to principal.

B. In connection with the exercise of the above discretionary power to distribute income or principal, there is no requirement to take into account the other income or capital resources of the person, the interest of the person in any other fund, or the duty of any one to support the person, although these factors may be taken into account.

C. Any part or all of such property, or the income therefrom, may be applied for the benefit of the person, and in the case of a minor may be paid or delivered to the minor, to a parent or guardian of the minor, to an individual with whom the minor resides, or to a custodian for the minor under any Uniform Transfers to Minors Act or similar statute, as may be determined in the discretion of my Executor.

D. The remaining property shall be distributed to the person when he or she attains the age of 21, or to the estate of the person upon his or her death prior to attaining such age.

FOURTH: In addition to the powers conferred by law, my Executor has complete discretion to exercise each of the following powers without authorization from any court, it being my intent that these powers be construed in the broadest possible manner:[5]

A. To retain any property, real or personal, to carry on any business in which I may have an interest, and to invest and reinvest in any property, real or personal, all as my Executor may determine, without regard to any requirement for diversification;

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[5] This Article grants specific powers to the Executor. These are broad powers designed to ensure maximum flexibility in the administration of your estate.

B. To sell, grant options with respect to, or dispose of, any property, real or personal, for cash or on credit, with or without security, upon the terms that my Executor may determine;

C. To lease any property, real or personal, for any period, upon the terms (including options for renewal) that my Executor may determine, and to improve or take any other action with respect to real property;

D. To borrow money for any purpose, from others or from any Executor, with or without security, and to mortgage or pledge any property, real or personal;[6]

E. To employ agents, brokers, attorneys, accountants, custodians and investment advisors (including any individual Executor), and to treat their compensation as an administration expense;

F. To take control of, conduct, continue or terminate any of my digital accounts on any social networking website, any micro-blogging or message service website or any e-mail website, including, but not limited to, broker accounts, utility accounts, Credit Union and bank accounts, other financial institutions and similar digital accounts related to personal, financial, photographs, medical, tax and real estate, customer affinity programs, and any file storage sites; and

G. To sell any property, real or personal, to any Executor or beneficiary at fair market value; and

H. To make any distribution or division of property wholly or partly in kind, whether or not pro rata, using specific assets or undivided interests therein.[7]

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[6] While it is unlikely that the Executor may need to borrow money, this power also means that the Executor or others may be reimbursed for funds advanced for the payment of your funeral expenses or other bills that are paid before your Will is admitted to probate.

[7] A distribution "in kind" means that the Executor can distribute an investment directly to a beneficiary. For example, if the estate owns 10 shares of stock in a corporation, the Executor can distribute the 10 shares directly to the beneficiary rather than liquidating the shares and distributing the cash.

FIFTH: Where a party to any proceeding with respect to my estate has the same interest as a person under a disability, it is not necessary to serve legal process on the person under a disability.[8]

SIXTH: All inheritance, estate, transfer, succession or other death taxes (including any interest or penalties) payable by reason of my death with respect to the property passing under this Will or any property not passing under this Will shall be paid from my residuary estate.[9]

SEVENTH: A. I appoint my [Ex Relation], [EXECUTOR], to be the Executor of this Will. If [s/he] fails to qualify or to continue to act, I appoint my [Ex2 Relation], [EXECUTOR2], and [Ex3 Relation], [EXECUTOR3], or the survivor of them, to be substitute Executors.[10]

B. No bond (including a bond with respect to the advance payment of commissions or the issuance of Preliminary Letters) or other security is required of any Executor in any jurisdiction.

C. Any Executor may resign by filing a written notice of resignation with the court having jurisdiction of the administration of my estate. In addition, any Executor is deemed to have resigned if there is filed in such court a certification in writing from any attending physician of that Executor that he or she is no longer able to make decisions with respect to financial matters.

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8 This Article permits the Court to waive the appointment of a Guardian Ad Litem (an attorney) for a minor or otherwise disabled beneficiary if a competent adult has the same interest under your Will as the minor or disabled beneficiary.

9 This Article concerns the payment of estate tax. The federal estate tax exemption (the amount a person can pass without paying federal estate tax) is $11.4 Million with a 40% tax rate. The New York State estate tax exemption is $5.74 Million and indexes annually with inflation.

10 This Article concerns the Executor, provides for the appointment of successor Executors and the resignation of Executors.

D. As used in this Will, the term "Executor" means the Executor or Executors acting from time to time and any Administrator with the Will annexed.

IN WITNESS WHEREOF, I have duly executed this Will this ___ day of _____, 20___.

_____
[Client]

The foregoing written instrument was on the date thereof, signed, published and declared by the testator therein named as the testator's Will in the presence of us and of each of us, who, at the testator's request, in the testator's presence and in the presence of each other, have subscribed our names as witnesses thereto.

_____residing at _____

_____

_____residing at _____

_____

STATE OF NEW YORK)
: SS.
COUNTY OF ALBANY)

All of the undersigned, individually and severally being duly sworn, depose and say:

The foregoing Will was subscribed in the presence and sight of all of the witnesses by [CLIENT], the testator, on the ____ day of _____, 20__, at [address where Will is signed], at which time the testator declared the instrument so subscribed to be the testator's Will. All of the witnesses thereupon signed their names as witnesses at the request of the testator, in the presence and sight of the testator and of each other, and under the supervision of [SUPERVISING ATTORNEY], an attorney-at-law.

Each of the witnesses was acquainted with the testator at such time and makes this affidavit at the testator's request. The testator was, at the time of so executing said Will, over the age of eighteen years, and, in the respective opinions of the witnesses, of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a Will; could read, write and converse in the English language; and was suffering from no defect in sight, hearing or speech, or from any other physical or mental impairment that would affect the testator's capacity to make a valid Will. The Will was executed as a single, original instrument and was not executed in counterparts.

_____
Witness

_____
Witness

Severally subscribed and sworn to before me this
_____ day of _____, 20___.

_____
Notary Public

WILL

OF

[CLIENT][11]

I, [CLIENT], of [City], New York, do make, publish and declare this to be my Will hereby revoking all prior Wills and Codicils made by me.

FIRST: I give all of my personal effects, household effects, automobiles and other tangible personal property to my children who survive me, to be divided among them as they agree, or if they are unable to agree or if any of them is a minor at the time of division, then as my Executor determines. Without in any way limiting this gift, I request that my tangible personal property be distributed in accordance with a letter I plan to leave for that purpose.[12]

SECOND: I give the rest of my property, real and personal, wherever situated, herein called my residuary estate, to my descendants who survive me, per stirpes, subject to Article THIRD.[13]

THIRD: Any property (other than tangible personal property) that would otherwise pass outright under this Will (other than pursuant to the exercise of a discretionary fiduciary power) to a descendant of mine who has not attained the age of [Age], shall instead be

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[11] This Will is a sample only. Be sure to prepare based on client's wishes. Remove footnotes before the Will is executed.

[12] This Article provides for the distribution of all personal and household effects. If you would like certain items to be distributed to particular family members, you should provide specifically so in this Will. While a letter will provide your wishes, it is not legally enforceable.

[13] The rest of your assets will be distributed to your descendants (children and younger generations) on a "per stirpes" basis. "Per stirpes" is a legal term that means the children of a predeceased beneficiary equally share their parent's inheritance. For example, if [Child] predeceases you, [Child]'s children will equally share [Child]'s interest in your estate.

held by the Trustee as a separate trust for that descendant (the "Beneficiary") upon the following terms:[14]

A. The Trustee may distribute to the Beneficiary any part or all of the income and principal of the trust as the Trustee may determine for health, support, maintenance or education. Any income not paid shall be accumulated and added at least annually to principal.

B. The Trustee shall distribute the remaining principal of the trust to the Beneficiary upon his or her attaining the age of [Age].[15]

C. If the Beneficiary dies prior to attaining the age of [Age], then upon his or her death the remaining principal of the trust shall be distributed, subject to this Article, in equal shares to his or her then surviving children; or if there is none, to the then surviving descendants, per stirpes, of the person who, among a class consisting of me and my descendants, is the Beneficiary's closest ancestor with any then surviving descendant.[16]

D. Notwithstanding anything herein, any trust created under this Will for any person not in being at the date of my death shall (unless terminated earlier) terminate 21 years after the death of the last to survive of all descendants of my parents in being at such date, and upon such termination the assets of such trust shall be distributed to that person.[17]

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[14] This Article establishes a trust for any beneficiary under the age of [Age]. During that time, the Trustee may distribute the trust assets for the beneficiary's health, support and educational needs.

[15] The balance of the trust will be distributed to the beneficiary when he or she attains the age of [Age].

[16] If the beneficiary dies before the age of [Age], the beneficiary's children will inherit the balance of the trust. If the beneficiary does not have children, the beneficiary's siblings will share the balance equally.

[17] This prevents any trust from violating the Rule Against Perpetuities-- a rule that does not permit trusts to last forever.

FOURTH: [18]A. Any property, whether principal or income, distributable to any person under this Will, may be applied for the benefit of that person, including without limitation a distribution to a trust for the benefit of that person. In the case of a minor, the property may be paid or delivered directly to the minor, to a parent or guardian of the minor, to a person with whom the minor resides, or to a custodian for the minor under any Uniform Transfers to Minors Act or similar statute until age 21 or whatever earlier age is the maximum permitted under applicable law.[19]

B. Except as otherwise specifically provided herein, in connection with the exercise of a discretionary power to distribute income or principal to any person, there is no requirement to take into account a person's other income or capital resources, the interest of the person in any other fund, or the duty of anyone to support the person, although these factors may be taken into account.[20]

C. Notwithstanding anything herein, no person may participate in a decision to make any proposed discretionary distribution of income or principal to himself or herself or to satisfy any legal obligation of that person.[21]

D. No beneficiary of any trust has any right or power to anticipate, pledge, assign, sell, transfer, alienate or encumber his or her interest in the trust in any way; nor is any interest in any manner liable for or subject to the debts, liabilities or obligations of the beneficiary or claims of any sort against the beneficiary.[22]

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18 This Article provides standard terms for administering your Will.

19 If a minor's inheritance is too small to justify a trust, this permits the Executor to distribute the inheritance directly to the minor, to the minor's parent or to a custodial account for the minor.

20 The Trustee may take a beneficiary's income and other resources into consideration, but is not required to do so.

21 A Trustee cannot distribute trust assets to himself or herself or to satisfy the Trustee's legal obligations, such as child support. This is necessary to provide for creditor protection.

22 This Section protects trust assets from the beneficiary's creditors.

FIFTH: Except as otherwise specifically provided herein, in addition to the powers conferred by law, my Executor and the Trustee have complete discretion to exercise each of the following powers without authorization from any court, it being my intent that these powers be construed in the broadest possible manner:[23]

A. To retain any property, real or personal, to carry on any business in which I may have an interest, and to invest and reinvest in any property, real or personal, all as my Executor or the Trustee may determine, without regard to any requirement for diversification;

B. To sell, grant options with respect to, or dispose of, any property, real or personal, for cash or on credit, with or without security, upon the terms that my Executor or the Trustee may determine;

C. To lease any property, real or personal, for any period, upon the terms (including options for renewal) that my Executor or the Trustee may determine, and to improve or take any other action with respect to real property;

D. To permit any income beneficiary (and the guardian of any minor income beneficiary and the family of such guardian) to use any real property or tangible personal property held hereunder for the benefit of the beneficiary, rent free or otherwise, upon such terms as my Executor or the Trustee (other than the beneficiary or guardian) may determine;

E. To borrow money for any purpose, from others or from any Executor or Trustee, with or without security, and to mortgage or pledge any property, real or personal;[24]

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[23] This Article grants specific powers to the Executor and Trustee. These are broad powers designed to ensure maximum flexibility in the administration of your estate.

[24] While it is unlikely that the Executor may need to borrow money, this power also means that the Executor or others may be reimbursed for funds advanced for the payment of your funeral expenses or other bills that are paid before your Will is admitted to probate.

F. To employ agents, brokers, attorneys, accountants, custodians and investment advisors (including any individual Executor or Trustee), and to treat their compensation as an administration expense;

G. To sell any property, real or personal, from my estate to any trust or from any trust to my estate or from one trust to another;

H. To sell any property, real or personal, to any Executor, Trustee or beneficiary at fair market value;

I. To make loans to any income beneficiary hereunder, interest free or otherwise, upon such terms as my Executor or the Trustee (other than such beneficiary) may determine;

J. To sever any trust into two or more separate trusts having the same terms as the original trust, and to combine two or more trusts having identical terms and beneficiaries (whether or not these trusts resulted from division of a prior trust), at any time and from time to time (whether before or after funding), without approval of any court, for administrative, tax or any other purpose determined by the Trustee to be in the best interests of any beneficiary (including any remainder beneficiary);[25]

K. To hold the property of any separate trusts as an undivided whole; provided that these separate trusts must have undivided interests; and provided further that no holding may defer the vesting of any estate in possession or otherwise;

L. To allocate administration expenses to income or principal in the proportions that my Executor or the Trustee may determine, to the extent this discretion is permitted under applicable law, without liability to any person for any consequences of this allocation;

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[25] Paragraphs J through M permit the Trustee to make different tax elections for the various trusts created under your Will.

M. To treat capital gains on the books, records and tax returns of any trust as part of a distribution to a beneficiary of the trust to the extent of principal distributed to the beneficiary;

N. To take control of, conduct, continue or terminate any of my digital accounts on any social networking website, any micro-blogging or message service website or any e-mail website, including, but not limited to, broker accounts, utility accounts, Credit Union and bank accounts, other financial institutions and similar digital accounts related to personal, financial, photographs, medical, tax and real estate, customer affinity programs, and any file storage sites; and

O. To change the situs of any trust at any time and from time to time for the convenience of the beneficiaries or the Trustee or for any other reason; and[26]

P. To make any distribution or division of property wholly or partly in kind, whether or not pro rata, using specific assets or undivided interests therein.[27]

SIXTH: Where a party to any proceeding with respect to my estate or any trust has the same interest as a person under a disability, it is not necessary to serve legal process on the person under a disability.[28]

SEVENTH: All inheritance, estate, transfer, succession or other death taxes (including any interest or penalties) payable by reason of my death with respect to the property

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[26] A change in situs means a change in jurisdiction or location. For example, if a beneficiary moves to a state that does not have a state income tax, the trust can also be moved to that state.

[27] A distribution "in kind" means that the Trustee can distribute an investment directly to a beneficiary. For example, if the trust owns 10 shares of stock in a corporation, the Trustee can distribute the 10 shares directly to the beneficiary rather than liquidating the shares and distributing the cash.

[28] This Article permits the Court to waive the appointment of a Guardian Ad Litem (an attorney) for a minor or otherwise disabled beneficiary if a competent adult has the same interest under your Will.

passing under this Will or any property not passing under this Will, shall be paid from my residuary estate.[29]

EIGHTH: [30]A. I appoint my [Gu Relation], [GUARDIAN], to be the Guardian of the person and property of each child of mine who is a minor at the time of my death. If [s/he] fails to qualify or to continue to act, I appoint my [Gu2 Relation], [GUARDIAN], to be such Guardian.

B. I appoint my [Ex Relation], [EXECUTOR], to be the Executor of this Will. If [s/he] fails to qualify or to continue to act, I appoint my [Ex2 Relation], [EXECUTOR2], to be substitute Executor.

C. I appoint my [Tee Relation], [TRUSTEE], to be the Trustee under this Will. If [s/he] fails to qualify or to continue to act, I appoint my [Tee2 Relation], [TRUSTEE2], to be substitute Trustee.

D. No bond (including a bond with respect to the advance payment of commissions or the issuance of Preliminary Letters) or other security is required of any Guardian, Executor or Trustee in any jurisdiction.

E. Any Executor or Trustee may resign by filing a written notice of resignation with the court having jurisdiction of the administration of my estate. In addition, any Executor or Trustee is deemed to have resigned if there is filed in such court a certification in writing from any attending physician of that Executor or Trustee that he or she is no longer able to make decisions with respect to financial matters.

F. To the extent that the exercise of this right does not conflict with the foregoing, each individual acting or designated to act as a Trustee has the right to

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[29] This Article concerns the payment of estate tax. The federal estate tax exemption (the amount a person can pass without paying federal estate tax) is $11.4 Million with a 40% tax rate. The New York State estate tax exemption is $5.74 Million and indexes annually with inflation.

[30] This Article concerns the Executor and Trustee, provides for the appointment of successor Executors and Trustees and the resignation of Executors and Trustees.

designate a person to act as a substitute Trustee in the event he or she fails to qualify or to continue to act, provided that no conflicting prior designation is in effect. Any designation of a substitute Trustee shall be made by a duly acknowledged instrument filed with the court having jurisdiction of the administration of my estate. Different Trustees may be designated for separate trusts.[31]

G. As used in this Will, the term "Executor" means the Executor acting from time to time and any Administrator with the Will annexed.

H. As used in this Will, the term "Trustee" means the Trustee acting from time to time.

IN WITNESS WHEREOF, I have duly executed this Will this ___ day of ___, 20__.

_____
[Client]

The foregoing written instrument was on the date thereof, signed, published and declared by the testator therein named as the testator's Will in the presence of us and of each of us, who, at the testator's request, in the testator's presence and in the presence of each other, have subscribed our names as witnesses thereto.

_____residing at _____

_____

_____residing at _____

_____

[31] This permits a Trustee to appoint his or her successor in the event no other Trustee is appointed under your Will.

STATE OF NEW YORK)
: SS.
COUNTY OF ALBANY)

All of the undersigned, individually and severally being duly sworn, depose and say:

The foregoing Will was subscribed in the presence and sight of all of the witnesses by [CLIENT], the testator, on the ____ day of _____, 20__, at [location where Will is executed], at which time the testator declared the instrument so subscribed to be the testator's Will. All of the witnesses thereupon signed their names as witnesses at the request of the testator, in the presence and sight of the testator and of each other, and under the supervision of [SUPERVISING ATTORNEY], an attorney-at-law.

Each of the witnesses was acquainted with the testator at such time and makes this affidavit at the testator's request. The testator was, at the time of so executing said Will, over the age of eighteen years, and, in the respective opinions of the witnesses, of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a Will; could read, write and converse in the English language; and was suffering from no defect in sight, hearing or speech, or from any other physical or mental impairment that would affect the testator's capacity to make a valid Will. The Will was executed as a single, original instrument and was not executed in counterparts.

_____
Witness

_____
Witness

Severally subscribed and sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

WILL

OF

[CLIENT][32]

I, [CLIENT], of [City], New York, do make, publish and declare this to be my Will hereby revoking all prior Wills and Codicils made by me.

FIRST: I give all of my personal effects, household effects, automobiles and other tangible personal property to my spouse, [SPOUSE]; or if my spouse does not survive me, to my children who survive me, to be divided among them as they agree, or if they are unable to agree, then as my Executor determines. Without in any way limiting this gift, I request that my tangible personal property be distributed in accordance with a letter I plan to leave for that purpose.[33]

SECOND: I give the rest of my property, real and personal, wherever situated, herein called my residuary estate, to my spouse, [SPOUSE]; or if my spouse does not survive me, to my descendants who survive me, per stirpes.[34]

THIRD: [35] Whenever, under this Will, any property vests in a person who has not attained the age of 21, my Executor, without authorization from any court, shall have the

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[32] This Will is a sample only. Be sure to prepare based on client's wishes. Remove footnotes before the Will is executed.

[33] This Article provides for the distribution of all personal and household effects after the second death. If you would like certain items to be distributed to particular family members, you should provide specifically so in this Will. While a letter will provide your wishes, it is not legally enforceable.

[34] After you are both gone, the rest of your assets will be distributed to your descendants (children and younger generations) on a "per stirpes" basis. "Per stirpes" is a legal term that means the children of a predeceased beneficiary equally share their parent's inheritance. For example, if [Child] predeceases you, [Child]'s children will equally share [Child]'s interest in your estate.

power to manage such property, may exercise in respect of such property and the income therefrom all powers conferred by this Will on my Executor (and all powers conferred by law on executors) and may hold such property until such person attains the age of 21 upon the following terms:

A. There may be used for the person as much of the property, and the income therefrom, as may be determined in the discretion of my Executor. Any income not paid shall be accumulated and added at least annually to principal.

B. In connection with the exercise of the above discretionary power to distribute income or principal, there is no requirement to take into account the other income or capital resources of the person, the interest of the person in any other fund, or the duty of any one to support the person, although these factors may be taken into account.

C. Any part or all of such property, or the income therefrom, may be applied for the benefit of the person, and in the case of a minor may be paid or delivered to the minor, to a parent or guardian of the minor, to an individual with whom the minor resides, or to a custodian for the minor under any Uniform Transfers to Minors Act or similar statute, as may be determined in the discretion of my Executor.

D. The remaining property shall be distributed to the person when he or she attains the age of 21, or to the estate of the person upon his or her death prior to attaining such age.

FOURTH: In addition to the powers conferred by law, my Executor has complete discretion to exercise each of the following powers without authorization from any court, it being my intent that these powers be construed in the broadest possible manner:[36]

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[35] In the event a minor inherits under your Will, the Executor can hold the minor's inheritance in trust until the age of 21 or distribute the minor's inheritance directly to the minor, to the minor's parent or to a custodial account for the minor.

[36] This Article grants specific powers to the Executor. These are broad powers designed to ensure maximum flexibility in the administration of your estate.

A. To retain any property, real or personal, to carry on any business in which I may have an interest, and to invest and reinvest in any property, real or personal, all as my Executor may determine, without regard to any requirement for diversification;

B. To sell, grant options with respect to, or dispose of, any property, real or personal, for cash or on credit, with or without security, upon the terms that my Executor may determine;

C. To lease any property, real or personal, for any period, upon the terms (including options for renewal) that my Executor may determine, and to improve or take any other action with respect to real property;

D. To borrow money for any purpose, from others or from any Executor, with or without security, and to mortgage or pledge any property, real or personal;[37]

E. To employ agents, brokers, attorneys, accountants, custodians and investment advisors (including any individual Executor), and to treat their compensation as an administration expense;

F. To take control of, conduct, continue or terminate any of my digital accounts on any social networking website, any micro-blogging or message service website or any e-mail website, including, but not limited to, broker accounts, utility accounts, Credit Union and bank accounts, other financial institutions and similar digital accounts related to personal, financial, photographs, medical, tax and real estate, customer affinity programs, and any file storage sites; and

G. To sell any property, real or personal, to any Executor or beneficiary at fair market value; and

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[37] While it is unlikely that the Executor may need to borrow money, this power also means that the Executor or others may be reimbursed for funds advanced for the payment of your funeral expenses or other bills that are paid before your Will is admitted to probate.

H. To make any distribution or division of property wholly or partly in kind, whether or not pro rata, using specific assets or undivided interests therein.[38]

FIFTH: Where a party to any proceeding with respect to my estate has the same interest as a person under a disability, it is not necessary to serve legal process on the person under a disability.[39]

SIXTH: All inheritance, estate, transfer, succession or other death taxes (including any interest or penalties) payable by reason of my death with respect to the property passing under this Will or any property not passing under this Will shall be paid from my residuary estate.[40]

SEVENTH: A. I appoint my spouse, [SPOUSE], to be the Executor of this Will. If my spouse fails to qualify or to continue to act, I appoint my [Ex 2 Relation], [EXECUTOR2], to be substitute Executor.[41]

B. No bond (including a bond with respect to the advance payment of commissions or the issuance of Preliminary Letters) or other security is required of any Executor in any jurisdiction.

C. Any Executor may resign by filing a written notice of resignation with the court having jurisdiction of the administration of my estate. In addition, any

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38 A distribution "in kind" means that the Executor can distribute an investment directly to a beneficiary. For example, if the estate owns 10 shares of stock in a corporation, the Executor can distribute the 10 shares directly to the beneficiary rather than liquidating the shares and distributing the cash.

39 This Article permits the Court to waive the appointment of a Guardian Ad Litem (an attorney) for a minor or otherwise disabled beneficiary if a competent adult has the same interest under your Will as the minor or disabled beneficiary.

40 This Article concerns the payment of estate tax. The federal estate tax exemption (the amount a person can pass without paying federal estate tax) is $11.4 Million with a 40% tax rate. The New York State estate tax exemption is $5.74 Million and indexes annually with inflation.

41 This Article concerns the Executor. Additionally, this Article provides for the appointment of successor Executors and the resignation of Executors.

Executor is deemed to have resigned if there is filed in such court a certification in writing from any attending physician of that Executor that he or she is no longer able to make decisions with respect to financial matters.

D. As used in this Will, the term "Executor" means the Executor acting from time to time and any Administrator with the Will annexed.

IN WITNESS WHEREOF, I have duly executed this Will this ___ day of _____, 20__.

_____
[Client]

The foregoing written instrument was on the date thereof, signed, published and declared by the testator therein named as the testator's Will in the presence of us and of each of us, who, at the testator's request, in the testator's presence and in the presence of each other, have subscribed our names as witnesses thereto.

_____residing at _____

_____

_____residing at _____

_____

STATE OF NEW YORK)
: SS.
COUNTY OF ALBANY)

All of the undersigned, individually and severally being duly sworn, depose and say:

The foregoing Will was subscribed in the presence and sight of all of the witnesses by [CLIENT], the testator, on the ____ day of _____, 20__, at [location where Will is executed], at which time the testator declared the instrument so subscribed to be the testator's Will. All of the witnesses thereupon signed their names as witnesses at the request of the testator, in the presence and sight of the testator and of each other, and under the supervision of [SUPERVISING ATTORNEY], an attorney-at-law.

Each of the witnesses was acquainted with the testator at such time and makes this affidavit at the testator's request. The testator was, at the time of so executing said Will, over the age of eighteen years, and, in the respective opinions of the witnesses, of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a Will; could read, write and converse in the English language; and was suffering from no defect in sight, hearing or speech, or from any other physical or mental impairment that would affect the testator's capacity to make a valid Will. The Will was executed as a single, original instrument and was not executed in counterparts.

_____
Witness

_____
Witness

Severally subscribed and sworn to before me this
_____ day of _____, 20___.

_____
Notary Public

WILL

OF

[CLIENT][42]

I, [CLIENT], of [City], New York, do make, publish and declare this to be my Will hereby revoking all prior Wills and Codicils made by me.

FIRST: I give all of my personal effects, household effects, automobiles and other tangible personal property to my spouse, [SPOUSE]; or if my spouse does not survive me, to my children who survive me, to be divided among them as they agree, or if they are unable to agree or if any of them is a minor at the time of division, then as my Executor determines. Without in any way limiting this gift, I request that my tangible personal property be distributed in accordance with a letter I plan to leave for that purpose.[43]

SECOND: I give the rest of my property, real and personal, wherever situated, herein called my residuary estate, to my spouse, [SPOUSE]; or if my spouse does not survive me, to my descendants who survive me, per stirpes, subject to Article THIRD.[44]

THIRD: Any property (other than tangible personal property) that would otherwise pass outright under this Will (other than pursuant to the exercise of a discretionary fiduciary power) to a descendant of mine who has not attained the age of [Age], shall instead be

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[42] This Will is a sample only. Be sure to prepare based on client's wishes. Remove footnotes before the Will is executed.

[43] This Article provides for the distribution of all personal and household effects after the second death. If you would like certain items to be distributed to particular family members, you should provide specifically so in this Will. While a letter will provide your wishes, it is not legally enforceable.

[44] After you are both gone, the rest of your assets will be distributed to your descendants (children and younger generations) on a "per stirpes" basis. "Per stirpes" is a legal term that means the children of a predeceased beneficiary equally share their parent's inheritance. For example, if [Child] predeceases you, [Child]'s children will equally share [Child]'s interest in your estate.

held by the Trustee as a separate trust for that descendant (the "Beneficiary") upon the following terms:[45]

A. The Trustee may distribute to the Beneficiary any part or all of the income and principal of the trust as the Trustee may determine for health, support, maintenance or education. Any income not paid shall be accumulated and added at least annually to principal.

B. The Trustee shall distribute the remaining principal of the trust to the Beneficiary upon his or her attaining the age of [Age].[46]

C. If the Beneficiary dies prior to attaining the age of [Age], then upon his or her death the remaining principal of the trust shall be distributed, subject to this Article, in equal shares to his or her then surviving children; or if there is none, to the then surviving descendants, per stirpes, of the person who, among a class consisting of me and my descendants, is the Beneficiary's closest ancestor with any then surviving descendant.[47]

D. Notwithstanding anything herein, any trust created under this Will for any person not in being at the date of my death shall (unless terminated earlier) terminate 21 years after the death of the last to survive of all descendants of my parents and my spouse's parents in being at such date, and upon such termination the assets of such trust shall be distributed to that person.[48]

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45 This Article establishes a trust for any beneficiary under the age of [Age]. During that time, the Trustee may distribute the trust assets for the beneficiary's health, support and educational needs.

46 The balance of the trust will be distributed to the beneficiary when he or she attains the age of [Age].

47 If the beneficiary dies before the age of [Age], the beneficiary's children will inherit the balance of the trust. If the beneficiary does not have children, the beneficiary's siblings will share the balance equally.

48 This prevents any trust from violating the Rule Against Perpetuities-- a rule that does not permit trusts to last forever.

FOURTH: [49]A. Any property, whether principal or income, distributable to any person under this Will, may be applied for the benefit of that person, including without limitation a distribution to a trust for the benefit of that person. In the case of a minor, the property may be paid or delivered directly to the minor, to a parent or guardian of the minor, to a person with whom the minor resides, or to a custodian for the minor under any Uniform Transfers to Minors Act or similar statute until age 21 or whatever earlier age is the maximum permitted under applicable law.[50]

B. Except as otherwise specifically provided herein, in connection with the exercise of a discretionary power to distribute income or principal to any person, there is no requirement to take into account a person's other income or capital resources, the interest of the person in any other fund, or the duty of anyone to support the person, although these factors may be taken into account.[51]

C. Notwithstanding anything herein, no person may participate in a decision to make any proposed discretionary distribution of income or principal to himself or herself or to satisfy any legal obligation of that person.[52]

D. No beneficiary of any trust has any right or power to anticipate, pledge, assign, sell, transfer, alienate or encumber his or her interest in the trust in any way; nor is any interest in any manner liable for or subject to the debts, liabilities or obligations of the beneficiary or claims of any sort against the beneficiary.[53]

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[49] This Article provides standard terms for administering your Will.

[50] If a minor's inheritance is too small to justify a trust, this permits the Executor to distribute the inheritance directly to the minor, to the minor's parent or to a custodial account for the minor.

[51] The Trustee may take a beneficiary's income and other resources into consideration, but is not required to do so.

[52] A Trustee cannot distribute trust assets to himself or herself or to satisfy the Trustee's legal obligations, such as child support. This is necessary to provide for creditor protection.

[53] This Section protects trust assets from the beneficiary's creditors.

FIFTH: Except as otherwise specifically provided herein, in addition to the powers conferred by law, my Executor and the Trustee have complete discretion to exercise each of the following powers without authorization from any court, it being my intent that these powers be construed in the broadest possible manner:[54]

A. To retain any property, real or personal, to carry on any business in which I may have an interest, and to invest and reinvest in any property, real or personal, all as my Executor or the Trustee may determine, without regard to any requirement for diversification;

B. To sell, grant options with respect to, or dispose of, any property, real or personal, for cash or on credit, with or without security, upon the terms that my Executor or the Trustee may determine;

C. To lease any property, real or personal, for any period, upon the terms (including options for renewal) that my Executor or the Trustee may determine, and to improve or take any other action with respect to real property;

D. To permit any income beneficiary (and the guardian of any minor income beneficiary and the family of such guardian) to use any real property or tangible personal property held hereunder for the benefit of the beneficiary, rent free or otherwise, upon such terms as my Executor or the Trustee (other than the beneficiary or guardian) may determine;

E. To borrow money for any purpose, from others or from any Executor or Trustee, with or without security, and to mortgage or pledge any property, real or personal;[55]

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[54] This Article grants specific powers to the Executor and Trustee. These are broad powers designed to ensure maximum flexibility in the administration of your estate.

[55] While it is unlikely that the Executor may need to borrow money, this power also means that the Executor or others may be reimbursed for funds advanced for the payment of your funeral expenses or other bills that are paid before your Will is admitted to probate.

F. To employ agents, brokers, attorneys, accountants, custodians and investment advisors (including any individual Executor or Trustee), and to treat their compensation as an administration expense;

G. To sell any property, real or personal, from my estate to any trust or from any trust to my estate or from one trust to another;

H. To sell any property, real or personal, to any Executor, Trustee or beneficiary at fair market value;

I. To make loans to any income beneficiary hereunder, interest free or otherwise, upon such terms as my Executor or the Trustee (other than such beneficiary) may determine;

J. To sever any trust into two or more separate trusts having the same terms as the original trust, and to combine two or more trusts having identical terms and beneficiaries (whether or not these trusts resulted from division of a prior trust), at any time and from time to time (whether before or after funding), without approval of any court, for administrative, tax or any other purpose determined by the Trustee to be in the best interests of any beneficiary (including any remainder beneficiary);[56]

K. To hold the property of any separate trusts as an undivided whole; provided that these separate trusts must have undivided interests; and provided further that no holding may defer the vesting of any estate in possession or otherwise;

L. To allocate administration expenses to income or principal in the proportions that my Executor or the Trustee may determine, to the extent this discretion is permitted under applicable law, without liability to any person for any consequences of this allocation;

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[56] Paragraphs J through M permit the Trustee to make different tax elections for the various trusts created under your Will.

M. To treat capital gains on the books, records and tax returns of any trust as part of a distribution to a beneficiary of the trust to the extent of principal distributed to the beneficiary;

N. To take control of, conduct, continue or terminate any of my digital accounts on any social networking website, any micro-blogging or message service website or any e-mail website, including, but not limited to, broker accounts, utility accounts, Credit Union and bank accounts, other financial institutions and similar digital accounts related to personal, financial, photographs, medical, tax and real estate, customer affinity programs, and any file storage sites; and

O. To change the situs of any trust at any time and from time to time for the convenience of the beneficiaries or the Trustee or for any other reason; and[57]

P. To make any distribution or division of property wholly or partly in kind, whether or not pro rata, using specific assets or undivided interests therein.[58]

SIXTH: Where a party to any proceeding with respect to my estate or any trust has the same interest as a person under a disability, it is not necessary to serve legal process on the person under a disability.[59]

SEVENTH: All inheritance, estate, transfer, succession or other death taxes (including any interest or penalties) payable by reason of my death with respect to the property

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[57] A change in situs means a change in jurisdiction or location. For example, if a beneficiary moves to a state that does not have a state income tax, the trust can also be moved to that state.

[58] A distribution "in kind" means that the Trustee can distribute an investment directly to a beneficiary. For example, if the trust owns 10 shares of stock in a corporation, the Trustee can distribute the 10 shares directly to the beneficiary rather than liquidating the shares and distributing the cash.

[59] This Article permits the Court to waive the appointment of a Guardian Ad Litem (an attorney) for a minor or otherwise disabled beneficiary if a competent adult has the same interest under your Will.

passing under this Will or any property not passing under this Will shall be paid from my residuary estate.[60]

EIGHTH: [61]A. If my spouse fails to continue to act as Guardian of the person and property of any minor child of mine, I appoint my [Gu Relation], [GUARDIAN1]; or if [s/he] fails to qualify or to continue to act, I appoint my [Gu2 Relation], [GUARDIAN2], to be such Guardian.

B. I appoint my spouse, [SPOUSE], to be the Executor of this Will. If my spouse fails to qualify or to continue to act, I appoint my [Ex2 Relation], [EXECUTOR2], to be substitute Executor.

C. I appoint my [Tee Relation], [TRUSTEE], to be the Trustee under this Will. If [s/he] fails to qualify or to continue to act, I appoint my [Tee2 Relation], [TRUSTEE2], to be substitute Trustee.

D. No bond (including a bond with respect to the advance payment of commissions or the issuance of Preliminary Letters) or other security is required of any Guardian, Executor or Trustee in any jurisdiction.

E. Any Executor or Trustee may resign by filing a written notice of resignation with the court having jurisdiction of the administration of my estate. In addition, any Executor or Trustee is deemed to have resigned if there is filed in such court a certification in writing from any attending physician of that Executor or Trustee that he or she is no longer able to make decisions with respect to financial matters.

F. To the extent that the exercise of this right does not conflict with the foregoing, each individual acting or designated to act as a Trustee has the right to

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60 This Article concerns the payment of estate tax. The federal estate tax exemption (the amount a person can pass without paying federal estate tax) is $11.4 Million with a 40% tax rate. The New York State estate tax exemption is $5.74 Million and indexes annually with inflation.

61 This Article concerns the Executor and Trustee, provides for the appointment of successor Executors and Trustees and the resignation of Executors and Trustees.

designate a person to act as a substitute Trustee in the event he or she fails to qualify or to continue to act, provided that no conflicting prior designation is in effect. Any designation of a substitute Trustee shall be made by a duly acknowledged instrument filed with the court having jurisdiction of the administration of my estate. Different Trustees may be designated for separate trusts.[62]

G. As used in this Will, the term "Executor" means the Executor acting from time to time and any Administrator with the Will annexed.

H. As used in this Will, the term "Trustee" means the Trustee acting from time to time.

IN WITNESS WHEREOF, I have duly executed this Will this ___ day of _____, 20__.

_____
[Client]

The foregoing written instrument was on the date thereof, signed, published and declared by the testator therein named as the testator's Will in the presence of us and of each of us, who, at the testator's request, in the testator's presence and in the presence of each other, have subscribed our names as witnesses thereto.

_____residing at _____

_____

_____residing at _____

_____

[62] This permits a Trustee to appoint his or her successor in the event no other Trustee is appointed under your Will.

STATE OF NEW YORK)
: SS.
COUNTY OF ALBANY)

All of the undersigned, individually and severally being duly sworn, depose and say:

The foregoing Will was subscribed in the presence and sight of all of the witnesses by [CLIENT], the testator, on the ____ day of _____, 20___, at [location where Will is executed], at which time the testator declared the instrument so subscribed to be the testator's Will. All of the witnesses thereupon signed their names as witnesses at the request of the testator, in the presence and sight of the testator and of each other, and under the supervision of [SUPERVISING ATTORNEY], an attorney-at-law.

Each of the witnesses was acquainted with the testator at such time and makes this affidavit at the testator's request. The testator was, at the time of so executing said Will, over the age of eighteen years, and, in the respective opinions of the witnesses, of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a Will; could read, write and converse in the English language; and was suffering from no defect in sight, hearing or speech, or from any other physical or mental impairment that would affect the testator's capacity to make a valid Will. The Will was executed as a single, original instrument and was not executed in counterparts.

_____
Witness

_____
Witness

Severally subscribed and sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

POWER OF ATTORNEY
NEW YORK STATUTORY SHORT FORM[63]

(a) **CAUTION TO THE PRINCIPAL:** Your Power of Attorney is an important document. As the "Principal," you give the person whom you choose (your "agent") authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. "Important Information for the Agent" at the end of this document describes your agent's responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public. You can request information from your agent at any time. If you are revoking a prior Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to any third parties who may have acted upon it, including the financial institutions where your accounts are located. You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.[64]

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) **DESIGNATION OF AGENT(S):**

I, [PRINCIPAL], residing at [Principal Address], hereby appoint [AGENT], residing at [Agent Address], as my agent(s).

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

( ) [65]My agents may act SEPARATELY.

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[63] Remember when you prepare a power of attorney that the only place where you are allowed to make changes to the statutory form are in the Modifications Sections. Do not remove any language outside of the Modifications Sections; or you risk compliance with the General Obligations Law (and do NOT have the protections afforded to statutory powers of attorney).

[64] The power of attorney must be at least 12 point font. Remember to remove all footnotes before executing the power of attorney. Be sure to search and replace all information contained in [ ] brackets.

(c) **DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)**

If any agent designated above is unable or unwilling to serve, I appoint as my successor agent(s): [SUCCESSOR AGENT], residing at [Successor Agent Address].

Successor agents designated above must act together unless you initial the statement below.

( ) [66]My successor agents may act SEPARATELY.

You may provide for specific succession rules in this Section. Insert specific succession provisions here: Not Applicable.

(d) This Power of Attorney shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications."

(e) This Power of Attorney DOES NOT REVOKE any Powers of Attorney previously executed by me unless I have stated otherwise below, under "Modifications." If you do NOT intend to revoke your prior Powers of Attorney, and if you have granted the same authority in this Power of Attorney as you granted to another agent in a prior Power of Attorney, each agent can act separately unless you indicate under "Modifications" that the agents with the same authority are to act together.

(f) **GRANT OF AUTHORITY:**

To grant your agent some or all of the authority below, either

(1) Initial the bracket at each authority you grant, or

(2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

( ) (A) real estate transactions;
( ) (B) chattel and goods transactions;
( ) (C) bond, share, and commodity transactions;
( ) (D) banking transactions;

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[65] If more than one agent is named and the principal wishes for them to be able to act separately (only 1 signature required), principal must initial in the space between brackets.

[66] Remember that the client must initial in the space between brackets if agents may act separately. Also, be aware that as drafted, if 2 or more agents are named initially and 1 can no longer act, the successor agent will replace that original agent, and will act with the other original agents. See the language, “If any agent designated above is unable or unwilling to serve,” above. If the principal wants some other plan for successor agents, detail that plan after the language, “Insert specific succession provisions here.” Sample language- “If my original agent, ABC, fails to continue to act, I appoint XYZ to serve in his/her place.” Alternate sample language- “My designated successor agent shall only act if all agents originally appointed fail to continue to act.”

(	)	(E)	business operating transactions;
(	)	(F)	insurance transactions;
(	)	(G)	estate transactions;
(	)	(H)	claims and litigation;
(	)	(I)	personal and family maintenance: If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five hundred dollars;
(	)	(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(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select(s);
(	)	(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. You need not initial the other lines if you initial line (P).

(g) **MODIFICATIONS: (OPTIONAL)**

In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Gifts Rider (Optional).[67]

1. ***Revocation of Power of Attorney:*** *This Power of Attorney specifically revokes my Power of Attorney dated _____. This Power of Attorney shall not be revoked by any subsequent Power of Attorney I may execute, unless such subsequent Power of Attorney specifically provides that it revokes this Power of Attorney by referring to the date of my execution of this Power of Attorney. Whenever two or more powers of attorney are valid at the same time, the agents appointed in each shall act separately, unless otherwise specifically provided in the powers of attorney.*

2. ***HIPAA Release.*** *I intend for my agent to be treated as I would be with respect to my rights regarding the use and disclosure of any individually identifiable health information governed by the Health Insurance Portability and Accountability Act of 1996 (a/k/a HIPAA), 42 USC 1320d and 45 CFR 160-164. I authorize any person or entity that has provided treatment or services to me or that has paid for or is seeking payment from me for such services to give, disclose and release to my agent, without restriction, all of my individually identifiable health information and medical records regarding any past, present or future medical or mental health condition, to include all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness and drug or alcohol abuse. The authority given to my agent shall supersede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information. The authority given to my*

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[67] The italicized language include sample modifications. They may not be appropriate in every case, and should be reviewed with the client before execution. If you do use any of this language, remove italics designation.

agent has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health care provider.

3. ***Digital Accounts.*** *My agent may take control of, conduct, continue or terminate any of my digital accounts on any social networking website, any micro-blogging or message service website or any e-mail website, including, but not limited to, broker accounts, utility accounts, Credit Union and bank accounts, other financial institutions and similar digital accounts related to personal, financial, photographs, medical, tax and real estate, customer affinity programs, and any file storage sites.*

4. ***[68]Reasonable Compensation.*** *If I have provided that my agent shall be entitled to reasonable compensation for services rendered as agent, "reasonable compensation" shall be paid at an hourly rate equal to five times the federal minimum wage in effect at the time services are rendered.*

(h) **CERTAIN GIFT TRANSACTIONS: STATUTORY GIFTS RIDER (OPTIONAL)**

In order to authorize your agent to make gifts in excess of an annual total of $500 for all gifts described in (I) of the Grant of Authority Section of this document (under Personal and Family Maintenance), you must initial the statement below and execute a Statutory Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make gifts. The preparation of the Statutory Gifts Rider should be supervised by a lawyer.

( ) [69](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.

(i) **DESIGNATION OF MONITOR(S): (OPTIONAL)**

If you wish to appoint monitor(s), initial and fill in the Section below:

( ) [70]I wish to designate [None], whose address(es) is (are) [Not Applicable], as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the Power of Attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) **COMPENSATION OF AGENT(S): (OPTIONAL)**

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[68] This allows you to define "reasonable compensation." Some attorneys treat it like an executor's or trustee's commission. Determine with your client what the client deems to be reasonable compensation. Allowing for compensation does not require that the agent take the compensation, but allows for it. If the agent does take compensation, the agent must report that compensation on his or her personal income tax return for the year of receipt.

[69] If the principal wishes to execute the statutory gift rider (to allow for Medicaid and/or estate tax planning by the agent), the principal must place his or her initials in the space between the brackets. The statutory gift rider at the back of this form must be completed at the same time as the power of attorney, and is read together as 1 document.

[70] Appointing a monitor means that the agent must report to a person designated for purposes of reviewing the actions of the agent. It is rare for a principal to appoint a monitor as the person designated as an agent should be someone that the principal implicitly trusts.

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define "reasonable compensation", you may do so above, under "Modifications."

( ) [71]My agent(s) shall be entitled to reasonable compensation for services rendered.

(k) **ACCEPTANCE BY THIRD PARTIES:** I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) **TERMINATION:** This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law. Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) **SIGNATURE AND ACKNOWLEDGMENT:**

IN WITNESS WHEREOF, I have hereunto signed my name on _____, 20__.

_____
[Principal], Principal[72]

STATE OF NEW YORK)
)SS.:
COUNTY OF)

On the _____ day of _____, in the year 20__ before me, the undersigned, personally appeared [PRINCIPAL], personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, he/she executed the instrument.

_____
Notary Public

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[71] If the principal wants to allow compensation to the agent, the principal must place his or her initials in the space between the brackets.

[72] The principal must date and sign the power of attorney before a notary.

(n) **IMPORTANT INFORMATION FOR THE AGENT:**

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the Principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

(1) act according to any instructions from the Principal, or, where there are no instructions, in the Principal's best interest;
(2) avoid conflicts that would impair your ability to act in the Principal's best interest;
(3) keep the Principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;
(4) keep a record or all receipts, payments, and transactions conducted for the Principal; and
(5) disclose your identity as an agent whenever you act for the Principal by writing or printing the Principal's name and signing your own name as "agent" in either of the following manners: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).

You may not use the Principal's assets to benefit yourself or anyone else or make gifts to yourself or anyone else unless the Principal has specifically granted you that authority in this document, which is either a Statutory Gifts Rider attached to a Statutory Short Form Power of Attorney or a Non-Statutory Power of Attorney. If you have that authority, you must act according to any instructions of the Principal or, where there are no such instructions, in the Principal's best interest. You may resign by giving written notice to the Principal and to any co-agent, successor agent, monitor if one has been named in this document, or the Principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of Agent: The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

(o) **AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:**

It is not required that the Principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I, [AGENT], have read the foregoing Power of Attorney. I am the person identified therein as agent for the Principal named therein.

I acknowledge my legal responsibilities.

_____

[Agent], Agent[73]

STATE OF NEW YORK)
)SS.:
COUNTY OF)

On the _____ day of _____, in the year 20__ before me, the undersigned, personally appeared [AGENT], personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, he/she executed the instrument.

_____

Notary Public

[73] Before an agent may use a power of attorney, the agent must sign the power of attorney accepting appointment. It is not necessary for the agent to sign the power of attorney at the same time as the principal. A power of attorney does not become stale because the agent has not signed the power of attorney at a later date. If there is more than 1 agent, copy and paste this language so that each agent signs the power of attorney in the presence of a notary.

(p) **SUCCESSOR AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:**

It is not required that the Principal and the successor agent(s), if any, sign at the same time, nor that multiple successor agents sign at the same time. Furthermore, successor agents cannot use this Power of Attorney unless the agent(s) designated above is/are unable or unwilling to serve.

I, [SUCCESSOR AGENT], have read the foregoing Power of Attorney. I am the person identified therein as successor agent for the Principal named therein.

I acknowledge my legal responsibilities.

_____

[Successor Agent], Successor Agent[74]

STATE OF NEW YORK)
)SS.:
COUNTY OF)

On the _____ day of _____, in the year 20__ before me, the undersigned, personally appeared [SUCCESSOR AGENT], personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, he/she executed the instrument.

_____

Notary Public

[74] A successor agent should not sign the power of attorney until such time as it is necessary for the successor agent to act (the primary agent can no longer act).

POWER OF ATTORNEY NEW YORK STATUTORY GIFTS RIDER AUTHORIZATION FOR CERTAIN GIFT TRANSACTIONS[75]

CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make gifts in excess of an annual total of $500 for all gifts described in (I) of the Grant of Authority section of the statutory short form Power of Attorney (under Personal and Family Maintenance), or certain other gift transactions during your lifetime. You do not have to execute this Rider if you only want your agent to make gifts described in section (I) of the Grant of Authority Section of the Statutory Short Form Power of Attorney and you initialed "(I)" on that section of that form. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Certain Gift Transactions" are described in section 5-1514 of the General Obligations Law. This Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.

This Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument. Before signing this document authorizing your agent to make gifts, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) **GRANT OF LIMITED AUTHORITY TO MAKE GIFTS.** Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property. If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below. To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

( ) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code. This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) **MODIFICATIONS:** Use this section if you wish to authorize gifts in amounts smaller than the gift tax exclusion amount, in amounts in excess of the gift tax exclusion amount, gifts to other beneficiaries or other gift transactions. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. If you wish to authorize your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

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[75] Remember that the gift rider must be executed at the same time as the power of attorney. Without a properly executed gift rider, the agent is limited to gifts totaling $500 per year (not $500 per recipient, $500 in the aggregate for the year).

( ) 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:[76]

1. ***Gifts Exceeding Annual Exclusion.*** *My agent shall have the power to make gifts, outright or in trust, of my property in amounts exceeding the annual federal gift tax exclusion pursuant to the Internal Revenue Code to my spouse, my descendants [my domestic partner, XYZ, and the descendants of my parents] and charities to whom I have made regular gifts previously, except that this power does not include the power to make gifts in favor of himself or herself, his or her creditors, his or her estate or the creditors of his or her estate. Subject to the limitations herein, my agent may make these gifts in any amount, but only after considering my history of making such gifts and my estate plan.*

2. ***Additional Powers.*** *My agent may make gifts in any of the following ways: (1) opening, modifying or terminating a deposit account in the name of the Principal and other joint tenants; (2) opening, modifying or terminating any other joint account in the name of the Principal and other joint tenants; (3) opening, modifying or terminating a bank account in trust form as described in §7-5.1 of the Estates, Powers and Trusts Law, and designate or change the beneficiary or beneficiaries of such account; (4) opening, modifying or terminating a transfer on death account as described in part 4 of Article 13 of the Estates, Powers and Trusts Law, and designate or change the beneficiary or beneficiaries of such account; (5) changing the beneficiary or beneficiaries of any contract of insurance on the life of the Principal or annuity contract for the benefit of the Principal; (6) procuring new, different or additional contracts of insurance on the life of the Principal or annuity contracts for the benefit of the Principal and designate the beneficiary or beneficiaries of such contract; (7) designating or changing the beneficiary or beneficiaries of any type of retirement benefit or plan; (8) creating, amending, revoking or terminating an inter vivos trust; and (9) opening, modifying or terminating other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.*

3. ***Manner of Gifts.*** *A gift authorized herein may be made outright, by exercise or release of a presently exercisable general or special power of appointment held by the Principal, to a trust established or created for such individual, to a Uniform Transfers to Minors Act account for such individual (regardless of who is custodian), or to a tuition savings account or prepaid tuition plan as designed under §529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account).*

4. ***Trusts.*** *My agent has the unrestricted power to act with respect to trusts, including, but not limited to creating and funding a trust, revoking or modifying a trust, and adding property to an existing or subsequently created trust and also to transfer any of my assets into any trust and to withdraw and/or receive on my behalf income and/or principal of a trust to which I may be entitled; to expend such distributions or withdrawals for my benefit and/or to give such distributions or withdrawals to any person or charity if allowed under the provisions of such trust; and to disclaim any interest I may have in any trust.*

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[76] If the principal wishes to allow the agent to make gifts to someone other than himself or herself, the principal must initial in the space between the parentheses The language in italics is sample language. Discuss what gifting powers your principal wishes to permit before crafting your permitted gifting language. For example, if the principal does not have a spouse but has close friends or a domestic partner, be sure to so designate that person or persons as permitted recipients. If the principal does not have children, similar analysis should be made.

5. ***Disclaimers.*** *My agent may disclaim all or part of any transfers to me if it is probable that no gift taxes will be imposed on me on account of such disclaimer.*

6. ***Retirement Accounts.*** *My agent shall have the power to establish one or more individual retirement accounts or other retirement plans or arrangements in my name. In connection with any pension, profit sharing or stock bonus plan, IRA, Roth IRA, §403(b) annuity or account, §457 plan, or any other retirement plan, arrangement or annuity in which I am a participant or of which I am a beneficiary (whether established by my agent or otherwise) (each of which is hereinafter referred to as a "Plan"). My agent shall have the following powers, in addition to all other applicable powers granted by this Power of Attorney: (1) to make contributions (including "rollover" contributions) or cause contributions to be made to such Plan with my funds or otherwise on my behalf; (2) to receive and endorse checks or other distributions to me from such Plan, or to arrange for the direct deposit of the same in any account in my name or in the name of any revocable trust established by me; (3) to elect a form of payment of benefits from such Plan; (4) to withdraw benefits from such Plan; (5) to make contributions to such Plan and to make, exercise, waive or consent to any and all elections and/or options that I may have regarding the contributions to, investments or administration, of, or distribution or form of benefits under such Plan; and (6) to designate one or more beneficiaries or contingent beneficiaries, for any benefits payable under such Plan on account of my death, and to change any such prior designation of beneficiary made by me or by my agent; provided however, that my agent shall have no power to designate my agent directly or indirectly as a beneficiary or contingent beneficiary to receive a greater share or proportion of any such benefits than my agent would have otherwise received unless such change is consented to by all other beneficiaries who would have received the benefits but for the proposed change. This limitation shall not apply to any designation of my agent as beneficiary in a fiduciary capacity, with no beneficial interest.*[77]

7. ***Medicaid Planning.*** *My agent may engage in planning for my eligibility for Medicaid benefits and my agent has (1) the authority to enter into a personal care contract or caregiver agreement on my behalf with third parties, including my agent; (2) the authority to purchase a life estate on my behalf in the home of a third person, including my agent; (3) the authority to make loans to third parties, including my agent, and to accept a promissory note that complies with the Deficit Reduction Act of 2005 as security for such a loan; (4) the authority to purchase and/or enter into an annuity contract that is compliant with the Deficit Reduction Act of 2005 with third parties, including my agent; and (5) the authority to create, and fund with my assets, a grantor retained annuity trust compliant with the Deficit Reduction Act of 2005.*

(c) **GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE GIFTS TO HIMSELF OR HERSELF: (OPTIONAL)**

If you wish to authorize your agent to make gifts to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

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[77] Without specific language, a power of attorney cannot be used to change a beneficiary on a retirement account.

( ) I grant specific authority for the following agents to make the following gifts to himself or herself:[78]

Any agent appointed under my Power of Attorney may make the following gifts to himself or herself:

1. ***Gifts Exceeding Annual Exclusion.*** *My agent shall have the power to make gifts, outright or in trust, of my property in amounts exceeding the annual federal gift tax exclusion pursuant to the Internal Revenue Code to himself or herself only to the extent that such gifts are not construed as a general power of appointment. Notwithstanding the foregoing, my agent shall have the power to consume, invade or appropriate my property for his or her benefit but only as necessary for my agent's health, education, support or maintenance. Subject to the limitations herein, my agent may make these gifts in any amount, but only after considering my history of making such gifts and my estate plan.*

2. ***Additional Powers.*** *My agent may make gifts in any of the following ways: (1) opening, modifying or terminating a deposit account in the name of the Principal and my agent as joint tenants; (2) opening, modifying or terminating any other joint account in the name of the Principal and my agent as joint tenants; (3) opening, modifying or terminating a bank account in trust form as described in §7-5.1 of the Estates, Powers and Trusts Law, and designate or change the beneficiary or beneficiaries of such account, including my agent; (4) opening, modifying or terminating a transfer on death account as described in part 4 of Article 13 of the Estates, Powers and Trusts Law, and designate or change the beneficiary or beneficiaries of such account, including my agent; (5) changing the beneficiary or beneficiaries of any contract of insurance on the life of the Principal or annuity contract for the benefit of the Principal, including my agent; provided however, that my agent shall have no power to designate my agent directly or indirectly as a beneficiary or contingent beneficiary to receive a greater share or proportion of any such benefits than my agent would have otherwise received unless such change is consented to by all other beneficiaries who would have received the benefits but for the proposed change; (6) procuring new, different or additional contracts of insurance on the life of the Principal or annuity contracts for the benefit of the Principal and designate the beneficiary or beneficiaries of such contract, including my agent; provided however, that my agent shall have no power to designate my agent directly or indirectly as a beneficiary or contingent beneficiary to receive a greater share or proportion of any such benefits than my agent would have otherwise received unless such change is consented to by all other beneficiaries who would have received the benefits but for the proposed change; (7) designating or changing the beneficiary or beneficiaries of any type of retirement benefit or plan, including my agent; provided however, that my agent shall have no power to designate my agent directly or indirectly as a beneficiary or contingent beneficiary to receive a greater share or proportion of any such benefits than my agent would have otherwise received unless such change is consented to by all other beneficiaries who would have received the benefits but for the proposed change; (8) creating, amending, revoking or terminating an inter vivos trust; and (9) opening, modifying or terminating*

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[78] If the principal wishes to allow the agent to make gifts to himself or herself, the principal must initial in the space between the parentheses. This is sample language allowing an agent to make gifts to himself or herself in accordance with the principal's overall estate plan. While it may first appear that this language duplicates the language above, it (or something similarly drafted) is required for the agent to make gifts to himself or herself (which may be an integral part of planning for a principal's Medicaid eligibility or estate tax planning). This language may also be limited so that only specific agents have the power to gift to himself or herself. For example, a spouse may be permitted to gift to himself or herself, but gifting to another agent may not be permitted. Remember to remove the italics if you choose to use this language.

other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein, including my agent.

3. ***Manner of Gifts.*** *A gift authorized herein may be made outright, by exercise or release of a presently exercisable general or special power of appointment held by the Principal, to a trust established or created for such individual, to a Uniform Transfers to Minors Act account for such individual (regardless of who is custodian), or to a tuition savings account or prepaid tuition plan as designed under §529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account).*

4. ***Disclaimer.*** *My agent may disclaim all or part of any transfers to me if it is probable that no gift taxes will be imposed on me on account of such disclaimer even if my agent receives the property subject to said disclaimer.*

5. ***Trusts.*** *My agent has the unrestricted power to act with respect to trusts, including, but not limited to creating and funding a trust, revoking or modifying a trust, and adding property to an existing or subsequently created trust and also to transfer any of my assets into any trust and to withdraw and/or receive on my behalf income and/or principal of a trust to which I may be entitled; to expend such distributions or withdrawals for my benefit and/or to give such distributions or withdrawals to any person or charity if allowed under the provisions of such trust; and to disclaim any interest I may have in any trust.*

6. ***Retirement Accounts.*** *My agent shall have the power to establish one or more individual retirement accounts or other retirement plans or arrangements in my name. In connection with any pension, profit sharing or stock bonus plan, IRA, Roth IRA, §403(b) annuity or account, §457 plan, or any other retirement plan, arrangement or annuity in which I am a participant or of which I am a beneficiary (whether established by my agent or otherwise) (each of which is hereinafter referred to as a "Plan"). My agent shall have the following powers, in addition to all other applicable powers granted by this Power of Attorney: (1) to make contributions (including "rollover" contributions) or cause contributions to be made to such Plan with my funds or otherwise on my behalf; (2) to receive and endorse checks or other distributions to me from such Plan, or to arrange for the direct deposit of the same in any account in my name or in the name of any revocable living trust established by me; (3) to elect a form of payment of benefits from such Plan; (4) to withdraw benefits from such Plan; (5) to make contributions to such Plan and to make, exercise, waive or consent to any and all elections and/or options that I may have regarding the contributions to, investments or administration, of, or distribution or form of benefits under such Plan; and (6) to designate one or more beneficiaries or contingent beneficiaries, for any benefits payable under such Plan on account of my death, and to change any such prior designation of beneficiary made by me or by my agent; provided however, that my agent shall have no power to designate my agent directly or indirectly as a beneficiary or contingent beneficiary to receive a greater share or proportion of any such benefits than my agent would have otherwise received unless such change is consented to by all other beneficiaries who would have received the benefits but for the proposed change. This limitation shall not apply to any designation of my agent as beneficiary in a fiduciary capacity, with no beneficial interest.*

7. ***Medicaid Planning.*** *My agent may engage in planning for my eligibility for Medicaid benefits and my agent has (1) the authority to enter into a personal care contract or caregiver agreement on my behalf with third parties, including my agent; (2) the authority to purchase a life estate on my behalf in the home of a third person, including my agent; (3) the authority to make loans to third parties, including my agent, and to accept a promissory note that complies with the Deficit Reduction Act of 2005 as security for such a loan; (4) the authority to purchase and/or enter into an annuity contract that is compliant with the Deficit Reduction Act of 2005 with third parties, including my agent; and (5) the authority to create, and fund with my assets, a grantor retained annuity trust compliant with the Deficit Reduction Act of 2005.*

This authority must be exercised pursuant to my instructions, or otherwise for purposes which my agent reasonably deems to be in my best interest.

(d) **ACCEPTANCE BY THIRD PARTIES:** I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Statutory Gifts Rider.

(e) **SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:**

IN WITNESS WHEREOF, I have hereunto signed my name on _____, 20__.

_____
[Principal], Principal[79]

STATE OF NEW YORK)
)SS.:
COUNTY OF)

On the _____ day of _____, in the year 20__ before me, the undersigned, personally appeared [PRINCIPAL], personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, he/she executed the instrument.

_____
Notary Public

[79] The principal must sign and date the gift rider at the same time as the power of attorney to be effective. The gift rider must be signed the presence of a notary and 2 independent witnesses. The notary can act as 1 of the witnesses.

(f) **SIGNATURES OF WITNESSES:** By signing as a witness, I acknowledge that the Principal signed the Statutory Gifts Rider in my presence and the presence of the other witness, or that the Principal acknowledged to me that the Principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the Principal has stated that this Statutory Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of gifts.

Signature of Witness	Signature of Witness
Date	Date
Printed Name of Witness	Printed Name of Witness
Street Address	Street Address
City State Zip Code	City State Zip Code

(g) This document prepared by:[80]

[80] Insert your name and address here.