New York Estate Planning Guide

Wills, Trusts, Power of Attorneys, and Probate

Attorney Thomas F. Hewner

Cole, Sorrentino, Hurley, Hewner, Gambino P.C.

Estate Planning: Planting Peace of Mind

When it comes to the unfortunate fact of human mortality, it's easy to say, "I'll cross that bridge when I get there." This might be the right attitude. Enjoy life – aside from treating your mind, your body, and your loved ones well, there's little you can do to affect those final moments. When you come to that bridge, you *will* cross it.

But what about the people you leave behind?

Your dependents, other relatives, and friends will suffer when you pass away. There will be the emotional impact of the loss, of course, but there are many ways that death can cause distress beyond the unavoidable pang of absence. If you've become incapacitated, who will make important medical decisions for you? Who will care for your dependents after you've gone? How will your debts and assets be divided? Who gets your house, your investments, your treasured possessions? Who will make these decisions where your wishes aren't clear? While there's no getting around the pain your passing will cause the ones you love, you *can* take steps today to minimize stress and confusion when it comes time for you to leave your loved ones, and to provide for them when you're gone. Knowing that you've done this will give *you* peace of mind today.

Estate Planning: Beyond the Will

For many people, "estate planning" is synonymous with writing a will. Writing a will might be the most important part of estate planning and the first concern on your mind, but there are other things to consider. Estate planning is a broad term for the many ways of preparing, legally, for death, and especially the distribution of property and other assets. It also can encompass planning for any physical or mental incapacity you may experience while still alive. Depending upon your needs and circumstances, proper estate planning could involve much more than writing a will. An estate planning attorney could help you:

- Set up and administer a **trust**.
- Establish **power of attorney** or a **healthcare proxy**.
- Review a **life insurance** policy.
- Name a **conservator** for your affairs or a **guardian** for your children.
- Guide your will through **probate** after you're deceased.
- Keep certain assets out of probate.
- Help you (and your beneficiaries) to avoid **estate taxes**.

You might believe you don't need an estate plan because you don't have a lot of property. But estate planning isn't about which relative gets the vacation house or which child gets the classic car. Even if you don't think you have many valuable assets, you should still consult an estate planning attorney. You probably have more worth dividing than you realize. For example, if you have young children or grandchildren, whether or not you have much to leave them now, an attorney could help you place investments in a trust to be released to your descendants when they – and your investments – have matured. Estate planning isn't all about money and assets, either. With an estate plan, you can decide what happens if you become incapacitated and unable to make certain decisions about your medical care, family, and legal obligations, as well as your finances and assets.

Estate Planning Essentials

What you need, and need to plan for, depends on the number, diversity, and value of your assets; on your debts; and on your family situation. However, there are certain basics of estate planning that everyone should dispatch early on. At the very least, you will probably need a **last will and testament** to make your wishes clear, a **healthcare proxy** to make medical decisions if you are incapable of doing so, and someone with **power of attorney** to do the same for your legal affairs.

You might have other concerns beyond these basics. You might be worried about what will happen to your home and assets if you move into an assisted living

facility. You might be concerned about paying for your long-term care. Finally, if you're a high net worth individual, you might be concerned about estate taxes.

An experienced estate planning attorney can help you with the essentials, and then assess what other steps you might want to take.

Important Documents

There are many legal documents you can use to create your estate plan – you've probably heard of a few. Some of the more common documents or legal devices used in New York for estate planning purposes include:

Will

A will is a legal document that sets out how you want to distribute your assets after you die.

Living Will

A living will, sometimes referred to as a document directing health care or an advanced healthcare directive, sets forth the medical care you are to receive and under what circumstances, should you be unable to communicate those decisions yourself.

Health Care Proxy

A health care proxy identifies the person you want to make your medical decisions for you in case you become incapacitated.

Trust

A trust is an arrangement where someone (the trustee) controls property for the benefit of another person (the beneficiary). One of the biggest advantages of having a trust is that it can keep your property out of probate court.

Power of Attorney

The purpose of a power of attorney is straightforward – to give someone the authority to handle certain legal matters for you, such as financial affairs. The power of attorney can set out limited tasks for another person to handle or it can be very

broad, essentially allowing someone else to do anything you would be able to do.

Life Insurance

Life insurance works by having an insurance company pay out a sum of money to a beneficiary when the individual insured under the policy dies. In return for this promise, the insurance company receives regular payments in the form of premiums.

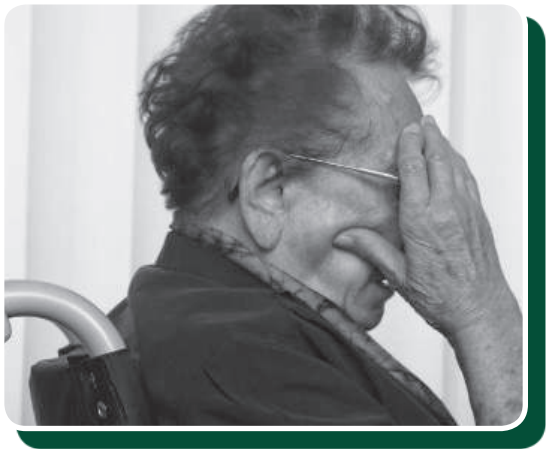
Common Questions About Estate Planning

Before you meet with an attorney, it will help to think about some of the questions you might want to ask.

>> How will my assets be distributed when I die?

When you die, your assets will be distributed in one of two ways, depending on whether they are assets held in your name alone, or assets held jointly.

Assets held in your name alone



Either the instructions in your **will** or the **laws of intestacy** in New York State will determine the distribution of assets held in your name alone. (Intestacy refers to the death of a person who has no "last will and testament.")

If you don't have a will and have only a spouse and no children, all your assets will go to your spouse. If you do have children, your spouse will take the first $50,000 and the remainder will be split between your spouse and children, with your

spouse taking 50 percent and your children dividing the other half. There are, however, rules allowing more distant family members a share. If you have an unusual family structure, this could result in assets going to people you've never met.

Joint Assets

If you've put others' names on your accounts or deeds, or named beneficiaries, assets will go wherever you say they should go. If you own a house or hold a bank account jointly, it will go to your spouse when you die. Insurance policies, pensions, and IRAs also have beneficiaries.

Additionally, some assets are exempt. For example, a person could claim a deceased spouse's vehicle (up to $25,000) by taking a death certificate to the DMV.

>> Do I need a will? What happens if I die without a will?

Depending on your situation, dying **intestate**, or without a last will and testament, can create anything from a minor inconvenience to a significant and expensive conflict. New York State laws will govern the distribution of everything you leave behind. In these situations, what usually happens is that someone will get something you didn't want them to get. As bad as that sounds, it can get much worse.

In some cases, individuals do not need a will. If you've set up your estate and named your children as beneficiaries, or have established joint accounts with your children, you may not need a will. If you accept the intestacy laws of New York State, you may not need a will.

However, you may want an arrangement other than what the New York State intestacy laws set down. In New York, If you have a spouse and children and die without a will, the spouse gets the first $50,000 of your estate plus 50 percent of anything remaining, with the other half divided among your children. *Any other arrangement* requires a will that states your wishes clearly.

When there are important assets at stake, with several individuals claiming rights to the same things, it can result in very long court battles. These battles can become so expensive that the asset in question barely covers the costs of the legal fees. A properly prepared and executed will can avoid or reduce the legal fighting.

You might want a will even if you don't have significant assets. No matter the size of your estate, if you have young children you will not want your assets to go to the children directly, or even to a guardianship. Instead, you'll want to set up a trust so that the assets will appreciate by the time the children are old enough to manage them wisely. Even if you have no assets whatsoever, you might want a will to name the people you wish to take care of your affairs when you die or become incapacitated.

>> What happens to unmarried partners when one dies without a will?

If the decedent has not made any provision in a will for a living, unmarried partner, that partner does not have any legal right to any part of the decedent's estate. This can lead to some awful situations: the person might have been financially dependent on the decedent and could be left unable to support him or herself, or the children of the decedent might kick the living partner out of a formerly shared house.

If you're in a long-term relationship and don't intend to marry, it's important that you and your partner take the necessary steps to protect each other, whether through writing a will, sharing property deeds or bank accounts, or naming each other beneficiaries of life insurance policies. The partners might also grant each other power of attorney, and each could make the other his or her healthcare proxy.

You have many options: speak to an experienced estate planning attorney to pick the best one for your situation.

>> Who will take care of my affairs if I'm incapacitated or deceased?

There are three roles associated with taking care of a person's affairs late in life and after death.

Executor

Your executor deals with the estate as a short-term job by picking up your assets, paying your bills, and distributing things as you said to distribute them. For most couples, this is the surviving spouse, with an alternate named to serve if both were gone.

Trustee

When there are children, the executor turns the remaining assets over to the trustee, whose job lasts longer because the trust will be in place until the children reach 21, (often funding their education).

Guardian

A guardian is the actual caretaker who will have responsibility for your children until they reach majority (usually at 18).

When most people think about these issues, they can name only a few individuals they'd trust with their assets and their children. When writing a will, many people name the same individuals at executor, trustee, and guardian. This is fine – but think carefully about your choice. Someone financially savvy will be better suited to the role of trustee, while someone with the means and inclination to care for your children would be better suited as guardian.

Consider you parents' wishes (and abilities) before you name them as guardians. Few people in their sixties or seventies *really* want to raise another teenager.

>> How do I plan for my long-term care?

There are only three ways to pay for long-term care. You can pay for it out of your savings, you can get long-term care insurance, or Medicaid can cover it. You might not be able to get long-term care insurance if you're advanced in age

and have certain pre-existing conditions. In this case, you'll want to speak with an estate planning attorney about how you might arrange your finances to cover these expenses in the long-term, and/or qualify for Medicaid.

>> Does the size of an estate matter?

The law allows for **voluntary administration** of an estate with assets of less than $30,000 and no real property. If it falls to you to close up the affairs of a loved one whose estate falls within these bounds, you can file a four-page form listing the people involved in the estate (beneficiaries if there is a will, distributes if there is not), and the specific assets that need to be administered. The court will give you certificates allowing you to collect those assets for distribution. This route will save you time and money on filing fees.

>> Do I have to worry about estate taxes?

Most people in the U.S. (and especially in the Western New York area) do not have reason to be concerned about estate taxes. For federal purposes, an individual can have an estate of up to $5 million dollars without facing any estate tax, and a concept called "portability" allows a husband and wife to share an estate of $10 million and escape estate taxes. New York State doesn't currently have portability, but still, individuals with estates within the range of $5 million will not have to face estate taxes. If you're concerned that your estate might exceed that range, talk to an experienced estate planning attorney in your area.

>> How can I avoid estate taxes?

There are several ways to avoid state and federal estate taxes. The easiest is gifting.

One very simple and easy technique is to give away a permissible amount every year without affecting your estate tax credits. You can give away a certain amount of money per person, per year, without filing gift tax returns or affecting estate tax credits.

For federal purposes, gift taxes and estate taxes are intertwined to the extent that they reduce your available credit (over $5 million dollars) for gifts. You can't use it for state estate taxes, but gifting before death enables you to reduce your federal estate tax.

But what assets should you give away? If you own stock that you expect to appreciate in the future, that could increase your estate taxes, and it could be better to transfer the stock to your children. If you already own highly appreciated stock, you might prefer to retain it because you get a "step-up in basis" for your assets. This means that if you bought a stock for $100 and it's now worth $1,000, your children could sell it after your death at a basis of $1,000, and there won't be any income tax.

Keep aware of where you are in life. If you're 87 years old and well below estate tax limits, don't worry about it; on the other hand, if you're getting close to the limit, you may elect to take advantage of some of these strategies. Talk to an experienced estate planning attorney.

>> What happens if there are insufficient assets in an estate to cover debts?

When an individual dies, the estate is liable for that person's debts. No individual can be personally liable for debts in another person's name. That means that no executor, trustee, or spouse can be liable for debts in the decedent's name alone.

If a husband dies leaving $50,000 of assets and $100,000 of debts, creditors are entitled to those assets – but only what's there. Under a deficit estate, each creditor gets a pro rata share, and nothing beyond this.

Even in cases with significant creditors, certain property is considered family exempt property. The spouse is entitled to $25,000 of cash or cash-type assets based on the theory that she must not be left poverty-stricken. A spouse is also entitled to a car valued under $25,000, furniture, and various personal items.

Power of Attorney

>> What should I consider when signing a power of attorney?

Signing a **power of attorney** gives someone authority to handle your affairs. You could think of it as making it easier for people to help you. A standard power of attorney includes specific lists of powers from which to choose. For instance, an individual with power of attorney over your bank account will be authorized to pay bills and write checks, but not to sell your house – unless you give that power. Today, most spouses give power of attorney to each other.

Because of a history of abuse, the New York State Legislature capped gift-giving under power of attorney. Now if you've given someone power of attorney and want that person to be able to give gifts over $500 a year, you have to fill out a separate document, a **major gift tax rider**.

You can always revoke power of attorney, unless you are mentally incompetent. In that case you can neither sign nor revoke power of attorney.

>> What is durable power of attorney?

Most power of attorneys are "durable." All this means is that the authority continues even if the signer is incapacitated. (Power of attorney always ceases upon death, however.) In some cases you might want to use a non-durable or single-purpose power of attorney. For example, if a husband and wife are buying a house together but the husband is going out of town, he will want to give the wife a single-purpose power of attorney.

>> What should I consider when choosing someone for power of attorney?

When selecting someone to whom you'll grant power of attorney, you'll want to look for the same qualities you would in an executor. You want someone who

"takes care of business." You might consider Benjamin Franklin's adage: "If you want something done, ask a busy person."

>> What are the legal liabilities for a person granted power of attorney?

A person granted power of attorney owes a **duty of care** to the grantor. This broadly means that the person with the power of attorney must do his or her best to act in the grantor's best interests. This doesn't mean that a person will be liable for poor investments or the sale of a house at a price slightly lower than its full market potential. He or she will be liable for negligence or misconduct.

Writing a Will

>> What information do I need to write a will?

What you need to bring to a consultation with an estate planning attorney will depend on that attorney's habits and approach. Some will have you fill out a questionnaire or other paperwork. Others will have you "bring yourself."

Each has advantages. If you come with plenty of documents you might feel like you're accomplishing something and getting the whole process over more quickly. It might give you peace of mind. On the other hand, *your needs* should drive the estate planning process, not *your assets*. Your first meeting with an attorney should be a frank and comfortable discussion of what you hope to accomplish, what your concerns are, and what courses you might take. If you're not sure what you want, that's OK, too – often you need to work through these questions with an attorney to realize what it is you value and desire.

>> Should I name my second spouse as trustee if I have children from an earlier marriage?

You should also think twice about leaving the spouse of a second marriage to care for the financial future of children from your first marriage. This isn't necessarily a matter of trust alone – people change and drift apart. Your second spouse might remarry. He or she might lose contact with the children of your

first marriage, and later question having a will that names as beneficiaries distant people, not blood relatives, he or she hasn't seen in many years. Your passing might create a rift between your second spouse and earlier children. There's nothing necessarily devious or dishonest in these scenarios, but they might lead to outcomes you wouldn't desire. You can't change these circumstances, but you *can* plan ahead to minimize their impact and ensure *everyone* you love is provided for.

You should know, however, that your spouse is legally entitled to at least 50 percent of your "wealth" (technically broader than your estate) when you die, and if you leave your entire estate to your children, your spouse could make a **right of election** to your estate. One or both parties might waive the right of election in a **pre-nuptial agreement**.

Probate: Contesting (and Defending) a Will

So, you've written and signed your will. You have gone through a "will ceremony," making certain declarations and asking witnesses to sign your will. And these two witnesses have signed the document, affirming that you were competent and free of undue influence.

You may call that document a "will," but it doesn't become a legal will until the testator dies and it passes a process called probate. The word comes from the Latin probare, meaning to test and prove. During probate, then, the document – which at this point is only "purporting to be a will" – must be "proved" in the county surrogate court.

The word "probate" alone sometimes causes anxiety. Some of this anxiety might come from the notion that you have no control over your own probate – that you, "the deceased," are on trial along with your last will and testament, but are unable to influence the court's decision. In

almost all court cases, probate is in fact an easy, simple process. An attorney submits some paperwork, pays a filing fee, and initiates the process. A surrogate court judge then examines the will and appoints the executor named in it to carry out the wishes of the deceased. A well-adjusted, friendly family can probate a will in six days to two weeks, depending on the queue at circuit court.

In some cases, though, parties can object to a will, initiating a complex and potentially expensive process. If, there is a lot of animosity, your will leaves people out, or people are concerned that the person you named will not be fair, it can be problematic.

>> *I've been left out of a will. What can I do?*

If you think you've been wrongfully left out of a will, your only recourse is to object to that will. You are entitled to an **examination of witnesses and the drafter**. When the will goes before a judge, you can petition for a **1404 examination**. In this process you can find out more about the circumstances: when and how did the decedent and testator come to the drafter? Did the testator sign the will at home, or in a hospital? Who were the witnesses?

Beyond this – and at a cost to you – you can obtain medical records, bank and asset records, and other information.

After this, you may decide whether you want to object to the will. Filing an objection will be an expensive process, and few judges in New York State overturn attorney-drawn wills. However, the will in question may be at the heart of a serious injustice, and you might be robbed of significant monies, assets, or heirlooms. Before you make up your mind, consult with an experienced estate planning attorney.

>> *Who can contest a will?*

Certain people have the right to contest a will, and that's where the process can get complicated. One group is the "distributees," or those who would take a distribution from an estate if there were no will. If a person creates a will leaving everything to a friend, his or her spouse and children could contest that will

because if the will were not valid, they would get the entire estate. The person's parents could not contest it, nor could any first cousins. The only other people who could contest a will are individuals the will adversely affects. For example, if a woman wrote a will giving most of her estate to the Smithsonian, but then wrote a *new* will giving all her property to her nephew Ned, the Smithsonian could contest the will.

Probate is the only opportunity these parties have to contest a will, so the court must identify and notify these parties before a will goes before a judge. When there is no conflict over a will, these individuals can sign waivers to notify the judge that they take no issue with the will and won't contest it. This happens in most cases. When this isn't possible, the court must notify these individuals of the court date, either through certified mail or by process servers. Then those individuals, distributees or people adversely affected by the will, have the right to come to court and object.

>> *On what grounds can I object to a will?*

There aren't many "grounds" for contesting a will.

Incompetence

You can allege that the person who created it was incompetent – usually mentally – *on the date he or she signed the will*. If you can only secure medical testimony or other evidence that the person became incompetent at some point after signing the will, your case will not stand.

Influence

The second potential ground is that of undue influence. For an extreme example, imagine a healthcare worker threatening a vulnerable elderly person with neglect and even death if he or she doesn't sign over his or her estate to the worker. This is a very difficult claim to make, as "undue influences" usually occur without witnesses, and leave little evidence.

Mistake of Fact

If, for example, a decedent left only one child out of a will and there was no evidence of any conflict or dispute between the decedent and child, the child could object on the grounds of "mistake of fact" – alleging that the decedent simply forgot he or she had a another child. (This is, in essence, incompetence.)

Fraud or Forgery

You could allege that a will is fraudulent or forged, or that the testator or witnesses didn't know what they were signing.

No matter the grounds, contesting a will is difficult. Any allegations go directly against the sworn testimony of the witnesses, whose signatures affirm the opposite of all the grounds listed above. The witnesses have sworn that the testator was of sound mind, was not subject to undue influence, and knew what he or she was signing. Distributees and people adversely affected by a will can examine these and other witnesses, but the burden of evidence is very high. Sometimes, people contesting a will call on medical experts, or go through a "discovery" process of gathering information, including medical records and bank statements from the deceased. They will base their objections on this evidence.

>> *How long does probate take?*

Without conflict, a will could pass through the probate process in as little as six days. In cases of extreme conflict, a will might go to a jury trial, and the entire process could last over a year.

This doesn't mean that your estate is completely frozen during probate, however. One useful aspect of a will is that the person you name as executor can obtain preliminary letters before the will is admitted to probate and administer the estate, collect the assets, and pay the bills. The executor cannot distribute assets, but can deal with the estate.

Once preliminary letters are established, an estate must remain open for seven months to give creditors time to make claims. During that time, an executor

can make distributions, but must be careful to ensure that money is available to cover claims filed later in the process.

>> How can I avoid probate?

If you want to avoid the uncertain outcome of probate, you do have options. One is to create a **revocable trust**. Instead of holding assets in your name, you place your assets into a trust agreement. You will be the beneficiary as well as the trustee, but upon your death, a second trustee – perhaps one of your children – will take over, and distribute the assets in whatever way you've instructed. While someone could challenge a revocable trust, it's a much harder document to challenge because it never goes in front of a court. These are popular in large cities because it avoids over-scheduled courts. Revocable trusts are also a good way of dealing with assets in other states – for example, a condominium in Florida – which could lead to "ancillary proceedings" upon your death. It will take time for the out-of-state court to recognize the New York court, which can be expensive and time-consuming for your executor. A revocable trust avoid all this.

>> Are any assets exempt from probate?

When you die, you will likely have probate and non-probate assets. Probate assets are any held in your name alone. Jointly held assets are not subject to probate. If you have a joint bank account, for example, this will pass to the surviving signer. Assets with beneficiary designations – like life insurance, pensions, and IRAs – are not subject to probate; even the will itself has no affect over joint assets or assets with named beneficiaries.

For this reason, it's important to approach estate planning as a "big picture." Think about everything you possess – think about what you hope to accomplish – think about your needs, and the needs of your loved ones – and think about who might be best suited to handle your affairs for you. Then consult with an experienced estate planning attorney to discuss your options.