



Estate Planning Basics

Each client should have a basic Estate & Elder Plan and depending on his or her situational requirements, additional Trust planning should be considered as well. For those with diminished capacity and/or disabilities, both Guardianship and Supplemental Needs Trusts should also be considered.

Most of us don't want to confront our own mortality, would prefer to hold off thinking about it until we reach a certain age, or are even confronted by a long-term health issue. However, neglecting to prioritize or complete your Estate Plan ultimately means you are at risk of your family having to endure expensive and stressful guardianship and probate court proceedings.

Here are the basic four documents that every Estate Plan should incorporate:

Last Will & Testament – this document will distribute assets owned by a decedent individually and solely in their name. It does not apply to assets owned jointly with another in a survivorship arrangement and it does not apply to assets with beneficiaries or assets owned by a Trust. A Will requires Probate to give the nominated Executor/Executrix the authority to marshal and distribute the assets.

TIPS:

- A Will needs to be signed at the end of the document by the Testator.
- It requires 2 witnesses to sign after the Testator.
- It should have a signed and notarized Affidavit as the last page.
- It should not have any handwritten additions or corrections or any rips or tears.
- The Will should include contingent trusts for minor and/or disabled beneficiaries.
- It should have Guardianship appointment language if there are minor children.
- It should not ever be unstapled.
- The Testator should always be in possession of the one original Will.



Durable Power of Attorney – this document allows an Agent to act for another called the Principal. It covers only financial issues not health care decision making. The current form is broken into two parts and is meant to be more protective for the Principal to avoid fraud and self-dealing. The first part is the detailed listing of the authority being granted to the Agent. The second part is called the Statutory Gifts Rider.

TIPS:

- For estate & elder planning purposes including asset protection, the Gifts Rider must be executed and attached.
- Each of the two parts of the Power of Attorney has an optional Modifications section and both must be significantly expanded to cover all estate planning, elder law, Medicaid and asset/income protection issues.
- The Power of Attorney must be “Durable” which means there is a sentence stating the document will remain valid even if the Principal loses capacity.
- The Principal can appoint more than one Agent but must immediately after that section detail whether they to act separately or together. If ‘act together’ is selected, then two signatures on each check or both agents on each phone call when acting on behalf of the Principal will be required.
- There are numerous places for the Principal to sign, initial and date. Both witnesses and a notary is required at different locations.
- Each primary Agent must sign before a Notary accepting their responsibility before acting and each successor agent must do the same if they are needed to serve in the future.
- There should always be a successor Agent appointed in case the primary Agent can’t act.

Health Care Proxy – this document allows a Principal to appoint one person as an Agent or Proxy to make health care decisions for them if they cannot do so themselves.

TIPS:

- The law only allows one Agent to be appointed at a time.
- There should always be a successor named.
- The document should include a HIPAA authorization which is a privacy release to view Personal health information.



- Should have a statement that the Agent knows the wishes of the Principal as to artificial hydration and nutrition.
- Required to be signed by the Principal and then by two witnesses. A notary is not necessary.

Living Will – this document is the end of life health care document. It should be a simple statement as to end of life wishes should the client be unable to communicate their desires about medical treatments, i.e. ventilators, respirators, feeding tubes, etc.

TIPS:

- The more straightforward the better with this document as too many details or contingencies can make the document overly complicated and confusing which can then lead to contradiction.
- It should not appoint a health care proxy/agent as there is a separate document for that purpose.
- This document is not required but is encouraged if the client agrees with it to ease the burden of the final decision-making.
- Required to be signed by the Principal and then by two witnesses. A notary is not necessary.

General Planning Tips:

- The client should be in possession of all of these original documents. Most attorneys that do this work will regularly ensure that there are at least two original Powers of Attorney, Health Care Proxies and Living Wills in case one is lost. There can only be one original Will and Trust.
- The originals should not be kept in a safe deposit box but rather in a fire and waterproof safe or cabinet in the client's home.
- The person appointed fiduciary or agent does not need to have all of the documents but should at least know the whereabouts of the original documents and how to access them.
- If possible, there should always be successor agents, executors and/or trustees in case the primary one is unable to serve.



Disclosure

This document is based on current law and is for informational purposes only. It is NOT legal advice. Only a licensed lawyer can give legal advice. It is important that the individuals and families discuss all legal options and consequences with a qualified estate and elder law attorney prior to any action.