Basic Elder Law and Estate Planning Concerns

Why Do You Need a Will?

Many people question the need for a Last Will and Testament. A Will is a legal document that ensures that your personal wishes regarding the distribution of your assets are followed after you have died. It is a means by which you may allocate your estate among relatives, friends and/or charities in whatever fashion or proportion you elect. Further, Wills are also flexible instruments in that they can be revised at any time to reflect new circumstances, different testamentary wishes and changes in the law.

Without a Will, state law - which is inflexible and impersonal - prevails. For example, a distant, but unknown relative would have a more legitimate claim to your estate than your oldest friend. A Will allows you to provide for that friend, if that is your choice.

Wills also permit you to make specific provisions for special circumstances such as your elderly parents, disabled children, siblings and minor children or grandchildren requiring trusts. Such special provisions do not automatically exist under state law should you to die without a Will.

Further, a Will allows you to appoint an executor whom you trust (frequently a spouse, sibling or child) to carry out your testamentary wishes, rather than having a court name an unknown administrator with no knowledge of either you or your intentions. Again, the absence of a Will creates a vacuum in which your wishes are unknown, unrecognized and your estate passes in accordance with state law.

Of particular concern to those with children under the age of majority, a Will provides an opportunity to appoint a guardian of the person and property of such minor children. In other words, you can name the relatives or friends to whom you entrust your children and your asset management. Absent a Will, the Court will likely appoint a close relative, but whether or not this relative shares your views on child-rearing, let alone such personal values as religion, is not guaranteed.

A Will also enables you to decide who will bear the burden of estate taxes - the estate itself or your beneficiaries. Another example of a decision that you, rather than the state, should make, might involve one of your children who is perhaps in a troubled marriage. You may want to ensure that the spouse does not receive any benefit from your estate, an estate attorney can help you with provisions that will bequeath assets to your child, but bypass a spouse in favor of your grandchildren.

A consultation with one of our estate attorneys can provide additional information about other inheritance startegies which will help you anticipate events that may be of future concern to you.

We therefore suggest that inidviduals without Wills consider their estate planning needs, and see how their testamentary wishes might be adversely affected in the absence of such a document. For those of you who already have Wills, we recommend that your Will be reviewed periodically to ensure that they accord with current law, and with your present situation and intents. Since different individuals and families have different estate planning needs, we suggest that you discuss with us whether a Living Trust might be another effective instrument to be used in your estate plan.

DO YOU NEED A LIVING TRUST?

A Living Trust is another legal document which contains instructions as to how an individual's assets are to be distributed after his or her death. Further, a Living Trust is useful during one's lifetime, as it protects assets for the individual in the event of physical or mental incapacity through the appointment of a trusted Co-Trustee or successor trustee. For these reasons, and the fact that a Living Trust eliminates Court intervention (Probate after death and formal Guardianship Proceedings in the event of incapacity), the preparation and funding of a Living Trust should be something you consider as part of your estate plan.

However, despite the fact that a Living Trust can eliminate the costs of Probate, fees and involvement of the Surrogate's Court, such considerations may not always warrant the creation of a Living Trust. It is important to understand that if a Living Trust is executed without being properly funded to include all of the individual's assets, there will still be a need for Probate, resulting in diminished benefits to creating a Living Trust. Therefore, even individuals who have a Living Trust should also have a Last Will and Testament in the event that any of the individual's assets have not been transferred into the Trust. Bear in mind, however, that the size and complexity of each individual's testamentary situation is a factor in determining whether or not a Living Trust would be appropriate.

Since each person's situation is unique, all concerns related thereto must be examined before proceeding with an estate plan. Such an examination should include a look at the individual's family situation; the type and location of assets; the ability to appoint trustworthy persons to manage the assets during the Grantor's lifetime; his or her financial situation; the individual's present testamentary plan; and, of course, tax considerations for large estates. We suggest that you discuss with us whether a Living Trust might be an effective instrument to be used in preparing your specific estate plan.

SUPPLEMENTAL NEEDS TRUSTS

For individuals whose children or other relatives have disabilities, a great concern is how to properly provide for the financial future of their loved ones.

One recommended plan is to establish a supplemental needs trust. Any funds

bequeathed to a child or relative from an estate (or the proceeds of a life insurance policy) are held in trust for the legatee's benefit. With proper planning, establishing such a trust will not jeopardize the loved one's eligibility for such governmental benefits as Medicaid. The choice of the trustee of this trust is, as you can imagine, a critical one, since he or she will be charged with the administration of the trust and, therefore, the ultimate benefits from it which will accrue to your loved one.

Please consult with us if you are concerned about protecting the financial security of a member of your family.

ADVANCE DIRECTIVES

Properly drafted and executed advance directives can be of tremendous benefit when you become incapacitated or incompetent and need assistance with medical decisions and financial obligations. Documents such as a **Health Care Proxy** (also known

by other names in different states, such as "Health Care Directives" or "Designation of Health Care Surrogate") and a **Power of Attorney** can serve to avoid a myriad of costly and time consuming legal entanglements during a time when your health care concerns should be primary. These documents provide you the opportunity to clearly articulate your wishes and allow for you to select your own Agent or Agents in advance of the time when you lack decision making capacity regarding your health and finances. You may also wish to consider a Living Will, a Halchic Will and a DNR.

1. **Health Care Proxy**

In 1914, the New York Court of Appeals recognized that common law confers on all competent adults the right to determine what shall be done with their own bodies. "**Self-determination**" was viewed as a personal right that a designated agent could **not** exercise on behalf of an incompetent patient without "**clear evidence**" of the patient's intent prior to losing their capacity. Today, our nation's courts have extended, by varying degrees, the rights of competent designated agents to make decisions on behalf of an incompetent, as evidenced in prior, duly executed directives to guide the court.
A designated agent was allowed to exercise such a right of self-determination for an incompetent patient in the 1976 New Jersey case of Karen Ann Quinlan. **In re Quinlan**, 70 N.J. 10, 355 A.2d 647 (1976). Twenty-one-year-old Karen Quinlan had, for unknown reasons, entered into a chronic, persistent vegetative state with no possible hope of recovery. The Quinlan decision stated that "the only practical way to prevent destruction of the right to terminate treatment is to permit the guardian and family of Karen to render their best judgment...as to how she would exercise it in these circumstances." This is, in other

words, the concept of **substituted judgment**, or allowing a ward's family member to determine what the now incompetent patient **would have done** had she been able to decide for herself. It is important to note, however, that the New Jersey Supreme Court adopted a very liberal approach in rendering this decision, and has hence forth greatly limited the ability of an agent to make life and death decisions without proper documentation.

On the other hand, the 1990 Supreme Court decision of **Cruzan v. Missouri Dep't of Health** 110 S. Ct. 2841 (1990) demonstrated a much more conservative judicial approach to the question of how to effectuate the wishes of terminally ill, incompetent individuals regarding their right to die. The Court determined that where a patient is incompetent, it is constitutionally permissible for a State to require "clear and convincing" evidence of the patient's wish to withdraw life-sustaining treatment before such wish can be granted. Requiring such "clear and convincing" evidence, however, is a high evidentiary standard that places an enormous burden on those wishing to act on the patient's behalf.

As a direct effect of the Cruzan case, six days later the New York State Legislature passed an amendment to the Public Health Law that had been pending for years, Article 29-C: Health Care Agents and Proxies. This law promoted the right of individuals to decide about their own treatment options in accordance with their religious, moral and personal convictions, and further, enabled family members or others chosen by the patient to ensure that the patient's wishes about treatment would be honored after the patient has lost the capacity to express their own wishes. In other words, the law recognized the validity of a written document (e.g., a **Health Care Proxy**) as "**clear and convincing**"

evidence of an individual's wishes and, as such, removed the burden previously placed on the designated agent to make these decisions on his own.

The drawback, however, is that the law did not address the broader issue of proxy decision making for patients who lack capacity and who had never designated an agent in writing.

New York Courts have never adopted the substitute judgment approach for fear that a proxy's decision-making could be easily swayed by emotion or other external interests inconsistent with the welfare of the patient. As such, an incompetent patient's family or proxy remains legally powerless to enforce the wishes of the patient regarding life-sustaining treatment absent **specific evidence** provided by the patient (e.g., a **Health Care Proxy** or otherwise legally recognized written document). Given current evidentiary rules, a patient's oral statements may be completely disregarded by the Court if they were made in general terms, in casual circumstances, as a spontaneous reaction to another person's medical treatment, or while the patient was young and in excellent health. The Cruzan decision legitimizes such an approach, thereby giving judicial protection only to those individuals who express their views regarding life-sustaining treatment in a manner sufficient to meet the rigorous standards imposed by the New York State Courts.

A duly executed Health Care Proxy is "clear and convincing" evidence.

For over a decade, Health Care Proxy Laws ("HCPLs") have enabled persons to remain in control of their medical treatment after becoming incapacitated. Health Care Proxies allow you to

delegate authority over medical decisions to a trusted Agent. To be valid, the instrument must be properly signed and dated by the person granting the proxy in the presence of witnesses. An adult is presumed competent to appoint a health care agent unless he or she has been previously and legally declared to be incapacitated.

We have amended the basic health care proxy to include a reference to staying at home and to the Health Insurance Portability and Accountability Act (HIPAA). This critical law protects your privacy and restricts access to your medical records, and of great importance, it also ensures that your Agent, acting as your surrogate, has the authority to obtain disclosure of your records and other information protected by HIPAA.

If your Health Care Proxy does not explicitly cite the above regulation, you may wish to consider updating.

Persons drawing up a Health Care Proxy should, to the best extent possible, be sure that their Agent understands their wishes about their medical treatment, and specifically about artificial nutrition and hydration; which you may wish to express further by also executing a Living Will.

- **Living Will**

A Living Will is a document that expresses an individual's general wishes concerning medical treatment by addressing certain type(s) of treatment desired in the event he or she becomes incapacitated.

While a Living Will may provide guidance as to the appropriate treatment you might desire, only the Health Care Proxy provides the legally recognized authority for your Agent to so act on your

behalf. In New York State, for example, Courts have held that where a patient did not execute a Health Care Proxy, a hospital did not violate the rights of the patient when it refused to honor her Living Will.

<u>**Illustration**</u>: Madame X attempted suicide by shooting herself. The hospital performed emergency surgery and Mme. X was placed on a respirator. Upon arriving after the surgery, Mme. X's sister requested that her sister be removed from life support as evidenced by Mme. X's Living Will; the hospital refused. The lower court dismissed the complaint by Mme. X's sister stating that in the absence of a Health Care Proxy or a Court order, there could be no cause of action against the hospital for saving a life. This type of decision, which is most likely to be rendered by a court, demonstrates how important it is to execute a Health Care Proxy, and offers a clear caveat against mistaking a Living Will for a Health Care Proxy. It is the Health Care Proxy which allows you to delegate, to a specific person, decision-making authority regarding treatment options relating to your particular medical circumstances.

- **Halachic Health Care Proxy**

For those who wish to conform with **Orthodox Jewish law (*Halacha*)**, wishing to prepare a Health Care Proxy, the best course for observant Jews is to appoint a *Halachic* authority of their choice to rule on medical issues as they arise in the event they become incapacitated. Within Orthodox Judaism, two versions of advanced directives have evolved. One expounds a very specific position and advises its followers to make a Living Will following its mandates; the other merely gives general guidelines as to what one should do and reserves ultimate decision-making to the individual's pre-selected Rabbi.

This specific form of Health Care Proxy places an additional responsibility on your Agent to ensure that each provision conforms with *Halacha*, or Orthodox Jewish law. Should any question arise as to the requirements of your religious beliefs, it directs your Agent to consult with and follow the guidance of either a Rabbi of your choice or an Orthodox Rabbi referred by an Orthodox Jewish institution or organization of your choice.

The document also directs your physician and other attending medical personnel to undertake all essential emergency and/or life-sustaining measures on your behalf pending contact with your representative and/or an Orthodox Rabbi.

Lastly, the *Halachic* Health Care Proxy addresses certain postmortem decisions concerning the handling and disposition of your body pursuant to Jewish law and custom as determined in accordance with strict Orthodox interpretation and tradition.

- **Do-Not-Resuscitate Order (DNR)**

A do-not-resuscitate order (DNR) is a written instruction in the patient's medical charts alerting medical staff not to try to revive the patient if breathing or heartbeat has stopped. This includes emergency procedures such as mouth-to-mouth resuscitation, chest compressions, electric shock, intubation, and injections of medication into the heart.

Under New York Public Health Law § 29-B, adult patients can request a DNR order. If the patient is physically or mentally incapable of deciding about resuscitation, a health care agent or court appointed guardian may make this decision. The patient or anyone who consents to a DNR on their behalf may withdraw the consent at any time by informing medical staff of this decision.

A hospital DNR should be reviewed by the attending physician for continued appropriateness at least every 7 days, however it remains effective if timely

review is not conducted. A non-hospital order issued by a doctor in an "institutional" setting should be reviewed by a community doctor every 90 days for continued appropriateness; however it remains effective without review.

If the patient is in a nursing home, a DNR order instructs the staff not to perform emergency resuscitation and not to transfer the patient to a hospital for such procedures. If the patient is transferred to a hospital from a nursing home, the hospital may continue the DNR order, but is not required to. If the order is not continued, the patient or the patient's health care agent may request that the DNR order be entered again at the hospital.

In conclusion, it is imperative for individuals to have a duly executed advance directive for health care if they want to ensure that their end of life decisions are respected; that their wishes concerning medical treatment are carried out by a trusted family member or friend; and that their designated Agent is not faced with the burden of proving by "clear and convincing" evidence their intent through the legal system.

- Durable Power of Attorney

Another area that should be of concern is the possibility that some time in the future you may be unable to manage your finances due to incapacity or incompetence. The preparation and execution of a comprehensive **Durable Power of Attorney** is one of the most important planning vehicles available.

A **Durable Power of Attorney** is an advance directive in which you (the "principal") appoint another person or persons (the "agent(s)" or "attorney(s)-in-fact") to manage your financial affairs should you become disabled or incapacitated.

Many people are under the false impression that family members such as a spouse or children have the automatic right to step in and handle matter in the event of incapacity. This is not the case. The failure to name a specific Agent by means of a duly executed Power of Attorney may result in a costly, time-consuming and often disconcerting legal proceeding usually referred to as a Guardianship Proceeding, wherein a Court appoints a person, **not necessarily a family member**, to handle the incapacitated person's affairs. While a Guardian acts in much the same capacity as an Agent appointed under a Power of Attorney, the Court-appointee is oftentimes not the person the incapacitated person would have chosen. Further, a significant amount of money is spent by the incapacitated person in a proceeding to appoint a Guardian or Conservator.

A duly executed Power of Attorney usually gives the Agent or Agents very broad powers over the principal's financial affairs without oversight by a court or government agency, the person named as Agent should be a trusted and reliable family member or close friend

(or professional) who knows the principal's finances, is willing to act as the principal's Agent; and has the principal's best interests at heart.

A Durable Power of Attorney is effective immediately upon signing and remains valid regardless of the principal's competence. Powers of Attorney are effective planning tools for the management of the principal's financial affairs by granting the Agent access to the principal's funds which allows the Agent to pay the principal's monthly utility bills, rent or mortgage payments, as well as conduct any necessary banking transactions on behalf of the principal. Further, an Agent is able to pay any necessary medical bills, hospital bills or ambulette service bills for the principal.

However, a Power of Attorney should be granted with caution, since it gives the person whom you designate as your Agent broad powers to handle your property during your lifetime, which may include powers to mortgage, sell, or otherwise dispose of any real or personal property without advance notice to you or approval by you.

The powers granted under a Power of Attorney may be modified or tailored to meet your specific needs, and all Powers of Attorney are revocable by the principal at any time on the condition that the principal has capacity to act on his or her own behalf (please see Special Concerns regarding Power of Attorney below).

On September 1, 2009, a new statute regarding the New York Power of Attorney form went into effect which:

- requires that both the principal (you) and your Agent (the person[s] you appoint) sign the document in the presence of a notary public;
- further clarifies the powers delegated to your Agent;
- necessitates either a "major gifts" rider or a separate "gifts document" to detail the authority given to your Agent to make gifts and transfer assets;
- allows your Agent to review and pay medical bills under the HIPAA laws; and
- provides you with the option to appoint a third party Monitor to supervise the transactions made by your Agent.

If you already have a Power of attorney, we encourage you to review it to insure that these changes are included; if they are not, you may wish to consider updating your documents to conform with the provisions of the 2009 law.

Special Concerns regarding Power of Attorney

By executing a Power of Attorney, you appoint others (your “Agent”) and thereby create a very special legal relationship with your Agent, the foundation of which must be trust...as we say, with a capital “T”. While we believe that it is of utmost importance to protect yourself by designating trusted Agent to act when you cannot act for yourself, we also believe that it is imperative for you to thoughtfully select the Powers that you would like your Agent to be able to exercise with your assets on your behalf.

When reviewing drafts and again when executing your Power of Attorney, we ask that you very carefully and deliberately consider the delineated powers that you may, or may not, entrust to your Agent. The Statutory Power of Attorney form requires you to initial the powers that you wish to grant to your Agent. You may elect to grant all or some of these powers to your Agent. You may also wish to grant additional or different powers which can be drafted into your Power of Attorney document.

Once your Agent accepts and acts, your relationship imposes on your Agent legal responsibilities that continue until either you revoke or terminate your Power of Attorney or your Agent resigns by giving written notice to you, any co-agent, successor agent and monitors that you may have nominated in your Power of Attorney document. Your Agent may not use your assets to benefit themself or anyone else and must act in your best interest. However, by initialing certain powers delineated in the document, you will be granting powers to make certain payments of your funds to others. For example, the Statutory Gift Rider grants to your Agent specific authority to make gifts on your behalf in equal or unequal amounts, in or out of proportion and to individuals that you may or may not have mentioned in your estate planning documents such as your Last Will and Testament or Trust. In fact, if full powers are granted, your Agent will be able to make direct gifts, withdraw or terminate joint accounts, withdraw or terminate beneficiaries on accounts and contracts in which you have previously designated beneficiaries such as annuities, retirement accounts and life insurance policies. Your Agent could also determine that gifting your assets to quality you for benefits such as Medicaid would be in your best interest and could do so. Additionally, your Agent could also amend and transfer assets out of trusts that you had previously created.

We point the above information out to you so that you have the opportunity to thoughtfully reflect on what it is that you want your Agent to do, based on your elder and estate planning goals and the degree of trust that you place in your Agent. This is, not unlike appointing a health care proxy, a very serious matter.