

# Protecting Your Most Important Assets

Estate Planning and Asset  
Protection Planning for  
Working Parents



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# Overview

- Lifetime Planning
  - Pre and Post-Marital Agreements
  - Healthcare Proxies/Powers of Attorney
  - Durable Powers of Attorney
- Estate Planning
  - Wills
  - Trusts

# Lifetime Planning





# Pre and Post Marital Agreements

## Benefits

- Sets expectations regarding treatment of assets throughout marriage prior to triggering event or potential discord
- Protect Assets in the event of separation or divorce
- Protects Assets in the event of death
- Potentially protects assets from creditors

## Detriments

- Typically benefits the wealthier party
- Risk of waiving rights potentially needed in the future
- May not be sufficient to carry out intended purpose alone\*



# Pre and Post Marital Agreements

- NY Domestic Relations Law §236B(1)(d) defines separate property as:
  - Property Acquired before marriage or by bequest, devise or descent or gift from a party other than the spouse
  - Property acquired in exchange for or the increase in value of separate property
    - Unless through efforts of other spouse
- NY Domestic Relations Law §236B(1)(c) defines marital property as:
  - All property acquired by either or both spouses during the marriage or before the execution of a separation agreement





# Pre and Post Marital Agreements

- NY Domestic Relations Law §236B(1)(a) defines maintenance as payments awarded pursuant to an agreement or by the court for a definite or indefinite period of time as decided by the Court pursuant to §236B(5-a and 6)
- In the event of dissolution of the marriage separate property remains as such and marital property is distributed **equitably** between the parties (NY Domestic Relations Law § 236B(5))
- Child custody and support will always be decided by the Court. While couples can reference choices, the Court has the final say.



# Pre and Post Marital Agreement

- Example 1
  - John and Mark meet as undergraduates in college and get married.
  - John goes to UB for a masters degree in social work and Mark goes to UB law school
  - Prior to marriage John was given a home that he and Mark lived in during grad school. When John finishes his masters program he opens a counseling practice
  - Mark graduates and goes to work in Big Law in NYC while John attempts to move his counseling practice online
    - John rents out Buffalo home and puts money into his personal checking account



# Pre and Post Marital Agreement

- Example 1
  - Mark is a rock star and ends up going in-house at a tech company. Tech company goes public and Mark becomes very wealthy overnight
  - After some time John and Mark decide to divorce
  - Under NYS domestic relations law
    - John's home and all of the income from the home is separate property
    - All of Mark's stock in the tech company is marital property and available for equitable distribution
    - Mark, as the higher earner, may (and likely will) be required to pay some type of maintenance to John





# Pre and Post Marital Agreement

- Example 2
  - Same facts as above except John and Mark had a premarital agreement
  - John's home and the income are separate property
  - Mark's interest in the tech company is separate property not available for division
  - John and Mark could have provided for maintenance or other provisions based upon their intended circumstances and would not be bound by the statutory requirements
    - N.B. If one party will be required to seek public assistance because there is no maintenance then the Court can deviate from the Agreement.



# Pre and Post Marital Agreement

- Example 3
  - Samantha and Aarya meet in law school (and attended Jillian's presentation)
  - Samantha goes Big Law after law school and Aarya gets a job with legal aid.
  - Samantha and Aarya decide to get married and execute a premarital agreement where they treat all property (both before and during marriage) as separate property and they waive all rights to alimony.
  - Aarya transitions into work for a mid-size law firm. Samantha has their child and decides to leave the practice of law (with the agreement that Aarya would support them).



# Pre and Post Marital Agreement

- Example 3
  - Their home is in joint name
  - All of Samantha's big law salary went into her personal accounts (some investment, some retirement and some cash).
  - All of Aarya's assets went into her personal accounts.
  - They maintained a joint account for mortgage/house expenses which they would each pay into prior to Samantha leaving the law
  - Approximately 7 years later Samantha and Aarya divorce



# Pre and Post Marital Agreement

- Example 3
  - Their home is in joint name and will be equitably divided pursuant to the terms of their premarital agreement
  - Their individual accounts remain separate property
  - The joint household account is equitably divided
  - Because Samantha has some assets and does not require public assistance, the terms of the agreement hold and she only receives child support from Aarya
    - Samantha's "income" is not sufficient to support her, therefore she is forced back into the workforce



# Pre and Post Marital Agreement

- Requirements for Pre and Post Marital Agreements
  - It is a contract between two parties therefore it must be in writing
  - Signed by Both Parties and signatures must be notarized
  - Must be entered into voluntarily
  - Full disclosure of the parties financial assets at the time of the agreement
  - It cannot be unconscionable
  - If it is a premarital agreement, the parties must marry





# Health Care Proxies

- Articles 29-C and 29-CC of the N.Y. Public Health Law determine who can make health care decisions for an incompetent individual
- Article 29-CC (the Family Health Care Decision Act) provides for health care decisions in hospitals and regarding hospice care for incompetent people
- Priority under 29-CC
  - Guardian (Article 81 or Article 17)
  - Spouse or domestic partner
  - Child
  - Parent
  - Sibling
  - Close friend



# Health Care Proxies

- Article 29-C allows a competent adult to appoint a health care agent
  - For the purposes of Article 29-C all adults are presumed competent unless the person has been adjudicated incompetent
- Health care proxies are not Do Not Resuscitate Orders
  - In NYS DNRs are a medical orders written by a doctor
- Health care proxies are not Living Wills
  - However, a health care proxy may contain Living Will provisions
  - NYS does not have a living will statute, but the COA has stated Living Wills are valid as long as they provide “clear and convincing” evidence of your wishes (*Matter of O’Connor*, 72 N.Y.2d 571 (1988))
  - Living Wills do not permit the naming of an agent.
- Health care proxies are not MOLST (Medical Orders for Life Sustaining Treatment) forms (DOH-5003)
  - Allows a patient to dictate preferences for CPR, etc.
  - Must be completed by a health care professional and patient and signed by a physician



# Health Care Proxies

- Agent may not be an operator, administrator or employee of a hospital if the principal is a patient or resident of the hospital at the time of appointment
  - Unless related by blood, marriage or adoption
- There are limitations on physicians, physician assistants and nurse practitioners acting in certain circumstances
- No person may act as the health care agent for more than 10 principals unless she/he are the spouse, child, parent, sibling or grandparent of the principal or the issue of, or married to, such person.
- Health care proxies must be signed and dated by the principal
- In the presence of two adult witnesses and the witnesses also need to sign the proxy.
  - May be remotely witnessed



# Health Care Proxies

- Example 1
  - Liz and Seth are married. Liz's parents and 2 siblings are alive; Seth's parents are deceased but he has 3 siblings
  - Liz does not want to be kept alive at all costs; Seth's religion does not provide for the cessation of life sustaining measures
  - Liz and Seth are in an accident and unable to make decisions
  - No health care documents
    - Liz's parents make decisions
    - Seth's siblings make decisions
  - Health care documents
    - Liz and Seth can designate, in specific order, who makes decisions
    - Liz and Seth can prepare Living Wills to provide for their desires.



# Health Care Proxies

- Example 2
  - Liz and Seth are **un**married but living together and have been together for 30 years
    - Liz's parents and 2 siblings are alive
    - Seth's parents are deceased but he has 3 siblings
  - Liz does not want to be kept alive at all costs; Seth's religion does not provide for the cessation of life sustaining measures
  - Liz and Seth are in an accident and Liz is unable to make decisions
  - No health care documents
    - Liz's parents make decisions, then her siblings, THEN Seth
  - Health care documents
    - Liz can designate, in specific order, who makes decisions
    - Liz can prepare a Living Will





# Durable Powers of Attorney

- NY General Obligation Law Chapter 24-a, Article 5, Title 15 contains the statutory language for Powers of Attorney (including a statutory short form)
- Permits principal to appoint agent/agents to make various financial and estate planning decision
- Without a POA, a guardianship proceeding is necessary
  - Exception being if an individual is listed on the account as a joint owner
- Requirements
  - In writing
  - Signed, initialed and dated by principal with capacity
    - Principal's signature is notarized
  - Witnessed by two persons who are not agents
  - Agent must also sign (and have their signature acknowledged)



# Durable Powers of Attorney

- Unlike Health Care Proxies, Durable Powers of Attorney are effective upon execution by both parties (unless provided otherwise) and remain effective after the incapacity of the principal (unless expressly provides otherwise)
- Principal can request that, in the event of a guardianship proceeding, the agent may act as the guardian
- If the principal would like the agent to make gifts, the principal must initial that provision and specify the terms and conditions of the gifting power



# Durable Powers of Attorney

- Example 1
  - Janet is a widow survived by her 3 children (Michael, Laura and Christopher). Janet lives with her daughter, Laura.
  - Janet is showing signs of cognitive decline and needs assistance with day-to-day activities.
  - Janet has a Power of Attorney, but it only named her deceased husband, Robert, as her agent.
  - Laura tries to go to the bank to get access to mom's accounts, but the bank explains that Laura needs to be appointed Guardian for mom
  - Laura petitions for appointment as mom's Guardian (person and property) but Christopher attempts to step in as he knows best
  - Mom and Laura are now caught up in a protracted and stressful Guardianship proceeding.



# Durable Powers of Attorney

- Example 2
  - Margaret is a widow. She has some nieces and nephews who live locally. Margaret also has a daughter who she has not spoken to in many years and a granddaughter (from a different predeceased child) who lives a few states away.
  - Margaret's granddaughter decides to move closer so she and Margaret can have a better relationship.
  - Margaret's granddaughter convinces Margaret to sign a Power of Attorney appointing her (granddaughter) as agent for Margaret.
  - Relationship between Margaret and granddaughter sours because of granddaughter's spouse.
  - Granddaughter withdraws all of Margaret's money from her accounts using her Power of Attorney. When Margaret protests granddaughter files a guardianship proceeding.

# Estate Planning







# Intestate Succession

- Estates Powers and Trusts Law (EPTL) §4-1.1 contains the statutory provisions for how a decedent's assets are distributed in the event the decedent dies without a Will.
- If decedent is survived by a spouse and issue:
  - Spouse gets the first \$50,000 and 1/2 residue
  - 1/2 residue to issue by representation
- If decedent is survived by spouse and no issue, spouse gets everything
- If decedent is survived by issue and no spouse, all to the issue by representation
- If decedent is survived by parents and no spouse or issue, the parents
- Then issue of parents, then issue of grandparents, and then great-grandchildren of grandparents



# Intestate Succession

- “Half-blood” relatives are treated as whole blood relatives
- Distributees conceived before the decedent's death but born thereafter, take as if they were born during the decedent's life
- Adopted children are treated as natural born children (per the domestic relations law)
- A non-marital child is “always” the legitimated child of their mother; however there are specific requirements for the legitimation of a child to their father.
- Unmarried individuals have no statutory rights to their partners assets
  - If there are children of the relationship, the most the surviving partner can do is represent a minor child's interest as guardian



# Intestate Administration

- Surrogate's Court Procedures Act (SCPA) §1001 provides the order in which people can be appointed administrator of an individual's estate
  - Surviving spouse
  - Children (assuming child is over 18)
  - Grandchildren (assuming grandchild is over 18)
  - Parents
  - Siblings
  - Any other person who is a distributee, with preference given to the largest share in the estate
  - Guardian of a minor or incompetent distributee
  - Fiduciary of a deceased distributee
  - Public Administrator



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  - Fiduciary of a deceased distributee
  - Public Administrator
- Guardian for minor child can be appointed by Will or Deed
  - Otherwise Article 17A proceeding



# Intestate Succession

- Example 1
  - Martha and Stephanie are married and have two minor children.
  - Martha passes away without a Will survived by Stephanie and the two children
  - Martha and Stephanie owned a home by tenants by the entirety, they had a joint bank account with right of survivorship
  - Martha also had an 1/3 interest in her law firm which was an S-Corp(valued at \$300,000)
  - Martha's interest in the law firm has to be appraised/valued.
  - Stephanie is appointed administrator of Martha's estate
  - Stephanie receives the home and joint bank account by operation of law
  - Stephanie receives the first \$50,000 of Martha's interest in the firm and 1/2 of the remaining \$250,000
  - Stephanie remains guardian for the children and the children's 1/2 interest (1/4 each) of the \$250,000 goes into a custodial account for their benefit.





# Intestate Succession

- Example 2
  - Rebecca and Graham are not married and have two minor children.
  - Graham passes away without a Will survived by Rebecca and their two children
  - Graham and Rebecca lived in a home together but it was only in Graham's name, they had a joint bank account with right of survivorship
  - Graham also had an 1/3 interest in his law firm which was an S-Corp(valued at \$300,000)
  - Graham's parents or siblings (depending on who survives) has priority to be appointed administrator
  - Rebecca receives the joint bank account
  - Rebecca's children receive the home and remaining assets in custodial account
    - Had the children not been properly legitimated by Graham, Rebecca would have received the joint account and the remaining assets would have gone to Graham's parents or siblings





# Wills

- Allows an individual (Testator) to direct who they want to receive their assets, who they want to serve as Guardian for minor children and who they want to serve as Executor/Trustee(fiduciary)
- EPTL 3-1.1 provides that in order to make a Will you must be over 18 and of sound mind and memory
- EPTL 3-2.1 provides that Wills
  - Must be in writing
  - Signed at the end by the Testator,
  - In the presences of two disinterested witnesses, or the Testator can acknowledge his/her signature if the witnesses are not present when signed(must be acknowledged within 30 days of signing)
  - Testator must also declare that the document being signed is their Will



# Wills

- EPTL 3-1.2 provides that all interests a Testator has in property can be devised in their Will
  - In practice, you cannot devise assets which do not come into the probate estate
  - However, you can include provisions regarding non-probate assets (powers of appointment, etc) in your Will
- Domestic Relations Law §81 provides that an individual can name successor Guardians for their minor child by Will or Deed
  - Will must then be probated and Letters of Guardianship are issued by the Surrogate
  - Surviving parent of a minor child will always be the Guardian (unless parental rights have been terminated)
- NYS (specifically EPTL 3-2.2) only recognizes nuncupative (oral) wills and holographic (handwritten Will that is not properly executed) under certain, extremely limited circumstances
- Under EPTL 7-6.1-6.26 (Uniform Transfers to Minors Act) a minor under the age of 21 may not receive assets outright under a Will or Trust. Instead that minor's interest is put in a custodial account



# Elective Share

- EPTL §5-1.1-A contains the statutory provisions for a right of election by a surviving spouse
  - This statute only applies if there is a Will or other “testamentary substitutes” and no pre/post marital agreement
- Surviving Spouse receives the pecuniary amount equal to the greater of
  - \$50,000, OR
  - One-Third of the Net Estate
- Right of Election is Personal to surviving spouse and must be exercised within six months of the issuance of Letters
- If the surviving spouse elects against the Will, they are viewed as having predeceased the decedent with regards to their other interests in a Will



# Trusts

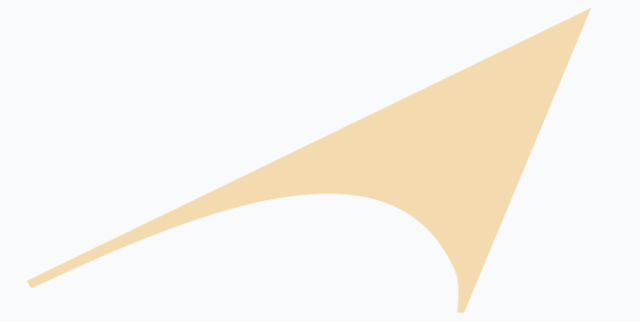
- Inter Vivos Trusts are governed by Article 7 of the EPTL. An inter Vivos trust is created during the lifetime of the Grantor/Settlor
  - Revocable—Trust can be revoked, modified or amended during the Grantor/Settlor's lifetime
    - Revocable Trust becomes irrevocable at Grantor/Settlor's death
  - Irrevocable—Trust that cannot be modified, revoked or amended by the Grantor/Settlor
    - Except this isn't really true
- Testamentary Trust are governed in part by EPTL 3-3.7 and in part by EPTL Article 7. A testamentary trust is a Trust created in an individual's Will.
  - All Testamentary Trust are irrevocable

# Trusts Pros and Cons



- Testamentary Trusts
  - Pros
    - Takes effect at death so it can be changed often
    - Doesn't require retitling assets
    - Cuts down on paperwork
  - Cons
    - Does not take effect until Will is probated (which may cause a gap)
    - People often forget to update their Will
    - Modification requires testamentary capacity and execution

# Trusts Pros and Cons



- Inter Vivos Trust
  - Pros
    - Takes effect immediately so no “gap”
    - Doesn't have to be fully funded until death, but it can be
      - Though it becomes less effective
    - *Can* be modified, amended or revoked at anytime
    - In some states, can be created or modified by Agent under POA
    - *Can* avoid probate
  - Cons
    - To be most effective, it requires the retitling of assets
      - Could require changing of insurance
    - More expensive at the beginning





# Estate Planning for Parents

- Estate planning for parents can be stressful but it does not need to be complex
- Parents of minor children will ALWAYS want a trust
  - Can be a testamentary or inter vivos trust
- Parents of minor children will ALWAYS want a Will
  - Determine Guardian for minor children
  - Determine Executor
  - Determine Trustee
  - "Pour" assets into Trust if Trust is Revocable
- Parents should consider having life insurance
- Parents should consider reviewing their estate plan regularly
  - At each "life circumstance" change
  - When minor children become adults
  - At least every 10-15 years