SENIOR CITIZEN LEGAL RESOURCE GUIDE

ALBANY LAW SCHOOL

PRO BONO PROGRAM

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This guide is provided strictly for informational purposes. Should you have specific questions about your situation and circumstances, please consult an attorney admitted to practice in your jurisdiction. Although the guide briefly identifies some tax implications of various legal matters, it in no way intends to provide tax advice; for specific tax concerns please contact a professional tax adviser.

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AGING IN PLACE

This first chapter hopes to offer information about some of the programs available to senior citizens to help them stay in their home comfortably as they age. You should explore these programs to determine whether you are eligible for them and to determine whether they will meet your needs. There are additional programs that you may qualify for that will assist you in applying to the listed programs. There may be additional programs that may help you stay in your home that are not listed here.

AFFORDING MY HOME

What can I do to be able to afford to stay in my own home?

Your available resources may include:

- Supplemental Security Income (SSI)
- Medicaid
- Elderly Pharmaceutical Insurance Coverage (EPIC)
- Food Stamps
- Reduced Fares for CDTA
- Qualified Medicare Beneficiary (QMB)
- Specified Low-Income Medicare Beneficiary (SLIMB)
- Qualifying Individuals 1 (QI-1)

You should explore each of these programs to see if you qualify and if they meet your needs.

What is a Reverse Mortgage?

A reverse mortgage is a loan in which homeowners, who are at least 62 years of age, can qualify to borrow against the value or equity of their owner-occupied home to produce a regular stream of income (usually monthly payments, but lump-sum or as-needed against a line of credit is also possible). At termination or foreclosure of the loan upon death or vacating the premises, the loan is repaid from

the sale of the property. Some loans can be foreclosed if the owner(s) fail to maintain the property, insurance or tax payments, or if they fail to reside (live and sleep) in the home for a specified length of time, i.e., 180 days in a 365-day period (not necessarily consecutive) or as few as 90 consecutive days if the owner fails to notify the lender of the absence and make appropriate arrangements for maintenance.

There are many fees, costs and payments involved in applying for this type of loan and before applying, applicants are encouraged to seek counseling from a HUD-approved counselor such as Albany County Rural Housing Alliance, or United Tenants of Albany, Inc.

The amount of funds that you may be eligible for will depend on your age (or age of the youngest spouse in the cast of couples), home value, interest rates, and upfront costs. The older someone is, the more funding he or she may receive. However, there is a limit on the amount of funds a borrower can access during the first 12 months after closing. To determine how much, you may be eligible to receive please visit http://www.reversemortgage.org.

For more information, visit http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/hecm/rmtopten or contact one of the HUD-approved counseling agencies listed above.

My utility bills are so expensive. Is there a way I can keep my services but pay less?

If you are having trouble paying your utilities you should contact the company first, since most companies generally offer various payment agreements or budget billing plans to assist their customers. There are also various other programs that may be able to assist you by making your utility bills more affordable.

- Lifeline Telephone Service
    - The Lifeline Program is a federal program that provides a monthly discount on landline or wireless phone service to eligible low-income households. To determine if your household qualifies please go to www.lifelinesupport.org or call USAC's toll-free number (1-888-641-8722).

- Home Energy Assistance Program(HEAP)

    - HEAP is a federally funded program that assists low-income households with the cost of heating their homes. HEAP also offers an emergency benefit for households in a heat or heat related energy emergency. You can apply for regular assistance between November and April. To determine if your household qualifies please go to www.myBenefits.ny.gov or can contact your local Department of Social Services.

My property taxes keep going up and make staying in my home unaffordable. How can I lessen this financial burden?

The following programs may be able to assist you and make your home more affordable. You should explore these programs to see if you are eligible and whether they will meet your needs.

- Senior Citizens' Property Tax Exemption

    - This is a benefit program that reduces your property taxes by 50%. If you're 65 or older and earn $29,000 or less, you may be eligible. Please check with your local assessor, city/town clerk, or school district to determine if you are eligible.

- Veterans' Tax Exemption

    - These tax exemptions are available to veterans who have served in the U. S. Armed Forces. You must submit the initial exemption application form to your assessor.

- New York State School Tax Relief Program (STAR)

    - This program provides homeowners with partial exemptions from school property taxes based on their household income. To find out more about this program or to determine if you are eligible please visit www.tax.ny.gov/pit/property/star/.

- IT-214 Circuit Breaker (NYS Dept. of Taxation and Finance)

    - Individuals whose gross income is $18,000 or less may qualify for a reduction in taxes if they have lived in the same residence for six months or more and the current market value of their home $85,000

or less. To determine if you are eligible please visit https://www.tax.ny.gov/pit/ads/efile_addit214.htm.

- Expanded In-Home Services for the Elderly Program (EISEP)

    - The EISEP program is designed for low income seniors who do not qualify for Medicaid. To find out more about this program or to determine if you are eligible please visit https://www.health.ny.gov/health_care/medicaid/program/longterm/expand.htm.

DEALING WITH MEDICAL ISSUES

If you have medical problems and are not able to care for yourself, but you still want to stay in your own home, this section may provide you with ideas for how to afford to stay in your own home.

What are the different levels of home care services?

- Medical Home Health Services
- Personal Care Services
- Transportation Assistance
- Grocery Shopping Assistance

Who are the providers of home care services?

- Certified Home Health Agencies
- Long-Term Home Health Care Service Agencies and Licensed Home Care Services Agencies
- Personal Care Providers
- Hospice Programs
- Expanded In-Home Services for The Elderly Program
- Private Duty Nurses

Nonmedical Services at Home

- Emergency Response Systems—Lifeline, Health Watch, Link to Life, and Others
- Case Management Services
- Telephone Reassurance
- Friendly Visitors

- Home Modifications

Where can I get further information on how to access any of the above programs and services?

You should call your local county Office for Aging for further information about options available to aging in place or other housing alternatives.

TRANSFERRING OWNERSHIP OF MY HOME

I want to give my home to my children now, but I also want to remain in my home as long as possible. What is the best way to do this?

The most effective and cost efficient way to accomplish these objectives is through what is referred to as a "**life estate deed**." This is accomplished by actually deeding the home to your children. However, within the body of that deed document, there is a paragraph that provides that you and your spouse have the right to live in that house for the rest of your lives.

During your life or lives, you will continue to be considered the owner(s) of the home for almost all purposes. For example, you will continue to be responsible for the payment of all taxes, insurance, and maintenance of the home. If the property qualifies for the veteran's or old age exemption for property tax purposes, it will continue to qualify for those exemptions after the transfer.

For Medicaid purposes, the new deed is considered a transfer that will create a penalty period (that is, a period of ineligibility for Medicaid benefits). The transfer is not, however, of the full value of the house but of the **remainder interest** in the house. *The remainder interest is the right that your children have received under the deed to receive the home automatically at your death.*

The value of the remainder interest must be calculated using the Internal Revenue Service actuarial tables and is based on your life expectancy. The value of a remainder interest is lower than the full value of the house and will, therefore, result in a shorter Medicaid penalty period than if you had transferred outright ownership of the house to your children.

An irrevocable trust is usually a better way to do this though. You may want to speak with an attorney to determine what would be best for you.

If my name is not on the deed but my spouse's name is, will I lose the property tax exemption my spouse had if they die?

No. You will continue to be eligible for that exemption even after your spouse's death.

What if I just give my house to my children without retaining a life estate deed, but I am still living in the house?

For Medicaid purposes, the penalty period resulting from the transfer will be calculated using the *full* value of the home. Such a transfer may also have gift tax consequences. However, the biggest problems with such a transfer are that the property will no longer qualify for any property tax exemptions that were available prior to the transfer if:

- You lost your legal rights with respect to the property,
- Your children insist that you move out,
- Your children's creditors take possession of the home.

ASSISTANCE WITH PAYING FOR FOOD

For those who face sacrificing good nutrition in order to keep up with the monthly struggle to pay the bills, Food Stamps may provide a solution to help ensure their health and well-being. Food Stamps, now known as the Supplemental Nutrition Assistance Program (SNAP), is a federally funded program which provides assistance to low-income households in the form of an electronic benefits transfer card which can be used like a debit card to purchase food at supermarkets, grocery stores, and food co-ops. Food Stamps may also be used at senior center meal sites, for home-delivered meals, and at certain restaurants by those enrollees who are at least 60 years old, blind, or disabled.

For the purposes of Food Stamps, a household can either be an individual living alone or a group of people who reside together and buy and prepare food together. The monthly allotment of food stamps depends on the number of people in the household and their income. Income includes money received on a regular basis, such as wages, Social Security, SSI, Veterans' benefits, pensions, rental income, interest, and dividends. If at least one person is 60 years of age or older, blind, or disabled, only net income will be used to calculate their eligibility.

For those households, the net income eligibility standard for the food stamp program is income at or below 100% of the Federal Poverty Guideline level, but there are special income deductions allowed. There is no limit if the household is categorically eligible (all household members receive SSI, Family Assistance or Safety Net).

Recent changes to the Food Stamp program have made all households that pass the Gross Income Limit (130% of FPL) categorically eligible, and consequently, most households are NOT subject to any resource test. You can determine your eligibility for SNAP benefits online at: http://www.fns.usda.gov/snap/eligibility.

In addition to meeting the income eligibility for food stamps, a household with a disabled person or with at least one member who is 60 years of age or older is limited to resources of $3,250 or less. Resources are assets or things of value that are available to the applicant, such as cash on hand or in the bank, stocks, bonds, etc. The home a person lives in and its surrounding property, household goods and most personal belongings are not counted as resources. Part of the value of a car may count as a resource. Additional land or buildings owned that do not produce income, for example, a summer camp, will be counted as a resource.

To apply for food stamps, an Albany County resident needs to complete an application and have a confidential interview with a Food Stamp worker at the Food Stamp office located at 162 Washington Avenue in Albany. If you are unable to apply in person, you can give written permission to a family relative or friend to go in your place as your "authorized representative." If you are homebound and unable to find someone to act as your authorized representative, you may be able to mail in your application and be interviewed over the telephone: please call the Albany County Food Stamp Unit at 518-447-5519 to request an application by mail. When you mail it in, write “TELEPHONE INTERVIEW” at the top of the first page.

When turning in your application you will be asked to provide proof of your citizenship or legal status, age, social security number, income, resources, shelter and medical expenses. The more documents you are able to submit with your initial application the sooner you will receive your food stamps if found eligible. In any case, the Food Stamp office will contact you within 30 days to let you know how much you will receive if eligible. Since the amount you receive is calculated from the day your application was first received, it is in your best interest to turn in your application as soon as possible even if you have not gathered all of the necessary documents. You can mail in any missing proofs later.

If you have any questions about the Food Stamp program or the documents required to prove your eligibility, please contact the Food Stamp Office at your local Department of Social Services. Albany County elders who need assistance in completing the application can schedule an appointment at a local senior center

with an Outreach Worker from Legal Aid Society's Nutrition Outreach and Education Program. Call 1-800-462-2922, extension 327 for more information.

Applicants under the age of 60 who are not blind or disabled are subject to different income and resource limitations and should contact the Food Stamp Office directly for more information.

Food Stamp Offices at County Departments of Social Services

Albany: (518) 447-7300
Columbia: (518) 828-9411
Fulton: (518) 736-5600
Greene: (518) 719-3700
Montgomery: (518) 853-4646
Rensselaer: (518) 270-8638
Saratoga: (518) 884-4140
Schenectady: (518) 388-4470
Schoharie: (518) 295-8334
Warren: (518) 761-6340
Washington: (518) 746-2300

WEATHERIZATION OF MY HOME

Weatherization prevents cold air from entering and heat from leaving a home. By ensuring that the home is heated efficiently, weatherization can increase comfort while reducing heating bills.

The Weatherization and Referral Packaging Program called WRAP offers weatherization and other services to qualified homeowners, trailer and apartment dwellers who are age 60 or older.

To qualify, applicants must have household income below the following 2017-2018 guidelines:

Household Size	Annual Income
1	$21,150
2	$28,420
3	$35,735
4	$43,050
5	$50,365

Social Security recipients do **NOT** have to count the Medicare premium as income. In addition, the household must be receiving or be eligible to receive a benefit under the **H**ome **E**nergy **A**ssistance **P**rogram **(HEAP)**. You can contact the Albany County HEAP Hotline for further details at 518-447-7323 or by email at: mreedy@albanycounty.com.

If qualified, weatherization assistance is provided at **NO EXPENSE** to the individual(s) applying. Funding for weatherization work is allocated through Area Agencies on Aging (AAA).

To apply for HEAP or for WRAP, contact the Cornell Cooperative Extension's CHOICES Program (located on Rt. 9W in Faith Plaza, Ravena) at (518) 756-8650 and ask them to mail you a HEAP application. Once CHOICES receives your application, they will determine your eligibility and will notify you. HEAP payments will be made directly to the utility company or fuel provider.

The free program includes an energy audit. The service plan may include replacement or improvement to: insulation, weather stripping, old windows or doors etc. Eligibility for other programs can also be determined through this application process. For more information or to determine eligibility please visit https://aging.ny.gov/NYSOFA/Programs/EconSecurity/WRAP.cfm.

For information about new EPIC guidelines, see Appendix B.

MAKING HOME REPAIRS

Are there programs that can help me make home repairs?

The following programs may be able to assist you by making your home repairs more affordable. You should explore these programs to see if you are eligible and whether they will meet your needs.

- **Countywide:** Weatherization Referral and Packaging Program (WRAP) through your Area Agency on Aging (to be eligible you must be receiving a HEAP benefit); Rebuilding Together (not-for-profit organization)

- **City:** Improvement Corporations offer home maintenance grants to neighborhood residents; Homeowners' Assistance Program, Albany Community Development Agency

- **Rural:** Rural Economic Development and Community Economic Development Grants/Loans; Restore Funds

PAYING FOR IN-HOME SERVICES

Expanded In-Home Services for the Elderly Program (EISEP) provides cost-shared, non-medical services based on income for personal care aides or homemakers for individuals who need assistance with the activities of daily living

(bathing, dressing, toileting, light housekeeping, meal preparation, shopping), but do not qualify to receive these services under Medicaid. There is often a waiting list.

Albany County residents can apply for assistance by calling the Albany County Office for the Aging at 518-447-7177.

When the program has an opening, a public health nurse and DSS social worker will do an in-home assessment of the applicant's needs, determine Medicaid or EISEP eligibility, and arrange services. If the person is not eligible for either program, they will still receive a care plan, at no charge, that they can use to arrange services privately with local providers.

Schenectady County residents should contact the Schenectady County Senior & Long Term Care Services to apply for EISEP.

In other counties, call your local Office for the Aging or another senior resource office.

Columbia: (518) 828-4258
Fulton: (518) 736-5650
Greene: (518) 719-3555
Montgomery: (518) 843-2300
Rensselaer: (518) 270-2730
Saratoga: (518) 884-4100
Schoharie: (518) 295-2001
Schenectady: (518) 382-8481
Warren: (518) 761-6347
Washington: (518) 746-2420

SAVING MONEY ON TAXES

New York State has a number of programs designed to help its older residents remain in their homes even on a fixed income.

SENIOR CITIZEN PROPERTY TAX EXEMPTION

Local governments and school districts in New York State can opt to grant a reduction on the amount of property taxes paid by qualifying senior citizens. This is accomplished by reducing the taxable assessment of the senior's home by as much as 50%.

To qualify, seniors generally must be 65 years of age or older and meet certain income limitations and other requirements. For the 50% exemption, the law allows each county, city, town, village, or school district to set the maximum income limit at any figure between $3,000 and $29,000.

Localities have the further option of giving exemptions of less than 50% to seniors whose income is greater than $29,000. Under this option, called the "sliding-scale option," such owner can have a yearly income as high as $37,399.99 and get a 5% exemption in places that are using the maximum limit.

You should check with your local assessor, city/town clerk, or school district to determine which local options, if any, are in effect.

EXEMPTION FOR PERSONS WITH DISABILITIES

Homeowners who are disabled with limited household income below $37,400 a year may qualify on a sliding scale basis for an exemption of up to 50% of the assessed value of their legal residence. Proof of income, ownership, residency, and official documentation of a disability (e.g. Social Security Disability award letter) is required and homeowners must reapply each year. Property receiving a senior citizen tax exemption cannot also receive this exemption for persons with disabilities. However, property receiving either one of these two

exemptions can receive other exemptions such as **S**chool **Ta**x **R**elief (**STAR**), if eligible.

VETERAN'S EXEMPTION

Property purchased by a veteran with proceeds of a veteran's pension, bonds or other **eligible funds** can receive an exemption of up to $5,000 of its assessed value. An **alternative veteran's exemption** can provide veterans who served during wartime with a 15% or 25% property tax exemption depending on whether they served in a non-combat or combat capacity. This alternative exemption may still be granted to the serving spouse of the qualifying veteran as long as the surviving spouse does not remarry and continues to use the home as the primary residence. Proof of ownership and honorable discharge are required. Veterans do not need to reapply for the Veteran's Exemption each year unless they are receiving an additional exemption based on a percentage of a service-connected disability.

ENHANCED SCHOOL TAX RELIEF (STAR)

Homeowners age 65 years or older with a total combined income below $81,900 per year can apply for an Enhanced STAR exemption from the full value-assessment of their property. Proof of age and income are required for the Enhanced STAR exemption. Homeowners of any age and any income level are eligible to apply for a Basic STAR exemption.

Please call your local tax assessor or town clerk to find out **WHEN** to apply for any of these exemptions. You will find the phone number in the blue pages of your telephone book under the heading of "Local City, Town & Village Offices." Applications must be made by the **taxable status date**, which in most communities is March 1. It is imperative to apply at the appropriate time. Should you miss your community's deadline, you will have to wait a year to apply during the small window of opportunity during which applications are accepted. Exemptions are NOT given retroactively.

IT-214 CIRCUIT BREAKER

This real property tax credit provides a refund to homeowners or renters who are paying high taxes or rents in proportion to their income. To be eligible, you must have lived in New York for the entire time, occupied the same residence for 6 months or more and cannot be claimed as a dependent on someone else's federal income tax returns. If your gross household income is below $18,000 for the year, you can apply for the IT-214 Circuit Breaker even if you do not have to file income tax returns.

Additional conditions apply pertaining to the value of the home ($85,000 or less) or the amount of rent paid ($450 a month or less). This is the only tax break that can be granted retroactively, allowing applicants to go back up to three years to file for any unclaimed refunds for which they were eligible.

For more information or to request IT-214 forms for 2014, 2015, and 2016 call the NYS Tax Department at 1-800-462-8100. Be sure to request the instruction sheets for each year to check all the requirements.

Information about the real property tax credit is available at https://www.tax.ny.gov/pit/credits/real_property_tax_credit.htm.

ESTATE PLANNING

As part of the Estate Planning process, many subjects must be considered, including:

- the objectives of estate planning;
- legal documents typically used to accomplish these objectives, especially a will, health care proxy and a durable power of attorney;
- the effect of beneficiary designations and joint ownership of assets on the disposition of assets at death;
- gift & estate taxes;
- use of a lifetime trust; and
- long term care planning.

The following is a brief outline of some of these considerations. Some additional information is contained in the handout sections on Wills, Trusts, Powers of Attorney, and Health Care Proxies/Living Wills.

What is an estate plan?

An estate plan is a "plan" on how to dispose of any property owned by an individual at his or her death. Everyone has an estate plan; the key is for individuals to make their own estate plans rather than to have an estate plan imposed by the state.

An estate plan may be made by an individual who executes (signs) certain documents setting forth his or her wishes as to the distribution of non-jointly owned property after death. An estate plan may include assets held jointly with another with the right of survivorship, and these assets pass automatically at death to the surviving joint owner. An estate plan may include certain legal devices such as life insurance policies and pensions so that even though assets are not owned jointly during the lifetime of the individual, they pass automatically to another at the time of death. An estate plan may be decided by the State for an individual who dies owning assets in his or her individual name without a plan. This person has died

intestate (without a will), and the State's *laws of intestacy*, as well as the tax laws, determine how the assets will be distributed.

What documents might I have as part of my estate plan?

- a will;
- a durable power of attorney or a springing power of attorney;
- a health care proxy and (optionally) a living will; and for some persons,
- a trust of some sort may also be appropriate;
- other non-probate documents, such as beneficiary forms for retirement plans, IRAs, life insurance and brokerage accounts set up in transfer on death form.

MINIMIZE ESTATE AND GIFT TAXES

What are the tax implications and advantages in doing advance planning?

While small and medium-sized estates (under $1,000,000) will not have this concern, estate planning may enable the individual with a large estate to save considerable amounts of money that would otherwise be paid in estate and gift taxes.

Should I create an irrevocable trust for my assets?

Assets may be placed in an irrevocable trust during the lifetime of an individual. Generally, this will mean the assets are no longer under your control, and thus they are generally not considered part of your estate when you die. By doing this in a timely manner, you may be able to reduce or eliminate estate taxes at your death. However, federal gift taxes may be payable when the trust is created.

Creating an irrevocable trust for your assets may depend on the size of your estate and whether you are willing to give up control of the assets transferred to the trust during your lifetime.

Should I begin gifting some of my assets to my loved ones?

For persons whose estates surpass the level where their estate would be exempt from federal or New York State estate and gift tax, it is often advisable to have a "gifting program." A gifting program consists of making planned, gifts to reduce the taxable base so that estate taxes are lowered or even eliminated.

By gifting to your beneficiaries before your death, you may be able to transfer sufficient assets out of your estate to avoid incurring large estate and gift taxes. Since the gift beneficiary's cost basis for gifted property will usually be the donor's cost basis, the selection of assets to be gifted is an important income tax consideration.

In general, the annual exemption for lifetime gifts is $15,000 for 2018: an individual can give up to that amount to as many donees as he or she chooses. A married couple can elect to make split gifts of up to $30,000 to as many donees as they choose.

Gifts for educational purposes are very attractive, including direct payments of tuition, creation of a Coverdell IRA, and creation of accounts under college savings programs, known as "529 accounts." These educational gifts, and direct payments of medical expenses, are not subject to the gift tax annual exclusion limit. In addition, gifts can generally be made to your spouse or to a qualifying charity, without limit, and without incurring gift tax liability.

ANY GIFT TAX IS PAYABLE BY THE DONOR, NOT THE DONEE

Anyone wishing to enter upon a lifetime giving program should seek appropriate advice. It may be necessary to file federal gift tax returns even if no gift tax is due.

Federal Estate & Gift Tax Levels

A *federal* estate and gift tax is owed on estates in excess of the federal estate tax exemption amount. For people dying in n 2018, the federal estate, gift and generation skipping transfer tax exemption (indexed for inflation) is $11,180,000. The federal estate and gift tax system is a *unified* system in that lifetime *taxable* gifts and the *taxable estate* amount are combined to determine whether a tax is due.

If the entire exemption is not used on the death of the first spouse to die**,** beginning in 2011 a portability rule allows the remainder of the credit to be carried over to the death of the second spouse to die. For example, if the first spouse died in 2018 and used only $1,000,000 of the exemption, the additional $10,180,000 could be carried over so that the second spouse had a $21,360,000 exemption. (This "portability" feature does not apply to New York estate taxes, where the exemption threshold is much lower, $5,250,000 per person in 2018.)

Note that, for federal and state estate tax purposes, the definition of "gross estate" is very broad, and includes some assets that were not actually owned by the

decedent on the date of death, e.g. assets of a revocable living trust created by the decedent.

$15,000 per person annually is the amount an individual may gift away in 2018 without triggering a gift tax consequence. Couples may double the effect of their gifting by making a "split gift" or by making separate gifts to the same person.

Estate planning may be important to individuals with large estates. High federal estate and gift tax rates, if not planned for, may mean a major reduction in assets passed on at death.

http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Whats-New-Estate-and-Gift-Tax.

New York Estate & Gift Tax Levels

New York imposes an estate tax on estates over $5, 250,000. In 2018, a New York taxable estate valued at between $5,250,000 (New York's exemption) and $11,180,000 (the federal exemption) will incur a state estate tax, but no federal estate tax. A New York taxable estate with a value in excess of $11,180,000 will incur both a state estate tax, and a federal estate tax.

New York's gift tax system was repealed, effective February 1, 2000.

APPOINTING AN AGENT

Part of an estate plan is the appointment of decision makers such as an *agent* to "stand in your shoes" and make decisions for you under a power of attorney for property or a health care proxy, prior to your death if you are no longer able to make your own decisions;

- An *executor* to carry out your estate distribution plan under your will; and possibly
- A *trustee* to administer a trust formed while you were living (an inter vivos trust) or a trust set up by your will (a testamentary trust).

The appointment of a decision maker may be one of the most important decisions you make in forming your estate plan. The person(s) you appoint will have broad powers to act for you. It is **essential** that you appoint an honest, reliable person(s) who will act in *your* best interest. Your decision maker should be able to serve as your advocate and be able to work with professionals such as physicians, attorneys, and bankers.

YOU SHOULD DISCUSS YOUR HEALTH CARE AND FINANCIAL INSTRUCTIONS WITH YOUR AGENT SO THAT HE OR SHE CAN CARRY OUT YOUR WISHES IN THE EVENT THAT YOU ARE NOT ABLE.

FINANCIAL CONSIDERATIONS IN ESTATE PLANNING

Modern estate planning entails more than providing for the disposition of your assets upon your death and minimizing the amount of tax levied upon your estate. Comprehensive estate planning will, of course, provide for that. In addition, estate planning will provide for the administration and protection of assets during a lifetime and for decision making in the event of a disabling illness.

In other words, estate planning today goes beyond its traditional role of planning for the security of your dependents and making distributions to them. Today's estate plans could more accurately be called "lifetime plans" because they often focus on your needs throughout your lifetime.

In order to meet your needs adequately, the following information is offered as a planning aid. Some of this information, as well as its importance in estate planning will be discussed in more detail in other sections.

WHAT YOU PAY FOR UNDER TRADITIONAL MEDICARE

***All dollar figures are for the year 2018 unless otherwise indicated. ***

A benefit period begins the day you're admitted as an inpatient in a hospital or SNF. The benefit period ends when you haven't received any inpatient hospital care (or skilled care in a SNF) for 60 days in a row. If you go into a hospital or a SNF after one benefit period has ended, a new benefit period begins. You must pay the inpatient hospital deductible for each benefit period. There's no limit to the number of benefit periods.

Hospital Stays

$1,340– per "benefit period" for a hospital stay of 1 to 60 days

$335 – coinsurance per day for days 61 to 90

$670– coinsurance per day for days 91 to 150 (only available for 60 days in a lifetime)

All costs for each day after 150 days

https://www.medicare.gov/coverage/inpatient-hospital-care

Skilled Nursing Care

$0 – for the first 20 days in a benefit period

$167.50 – per day for days 21 through 100

All costs after day 100

Source: https://www.medicare.gov/your-medicare-costs/medicare-costs-at-a-glance & https://www.medicare.gov/coverage/skilled-nursing-facility-snf-care.

OTHER SOURCES OF PAYMENT

Medigap Insurance is available to cover many of these expenses. The amount of coverage will vary depending on the policy purchased.

See the explanation at https://www.medicare.gov/supplements-other-insurance/whats-medicare-supplement-insurance-medigap.

You should check your retiree or other health insurance policy to see if it will cover skilled nursing care and other medical expenses.

CUSTODIAL NURSING HOME CARE

Nursing Home Rates

2018 Averages in the Capital District (Northeastern Region)

$352 per day

$128,628 annually

*These figures are from the NYS Department of Health, https://www.health.ny.gov/facilities/nursing/estimated_average_rates.htm.

Sources of Payment

- Private Funds

- income, savings, stocks, CDs and other liquid assets. Non-residential real property may have to be sold.

- Long-Term Care Insurance

  - Special insurance purchased to cover skilled care, intermediate care and custodial care in a nursing home. Home health care provided by home health agencies is also covered. Adult day care is also covered by some policies.

MEDICAID ELIGIBILITY BY THE NUMBERS

Medicare provides very little coverage for long term care. Medicaid covers nursing home care and other medical care—including home care, acute hospital care, physicians and pharmacy. The following are important numbers for Medicaid eligibility for the year 2018.

- $842 + $20 per month: Income eligibility for a single Medicaid applicant.
- $15,150: Countable resources a Medicaid applicant may have and still be eligible for Medicaid.

https://www.health.ny.gov/health_care/medicaid/

- $3,090.00 per month: Income the community spouse is entitled to under Medicaid
- Minimum Resource Standard: $74,820
- Maximum Resource Standard: $123,600

The Community Spouse who is not applying for Medicaid benefits may retain $74,820 or ½ of the countable resources up to $123,600, whichever is greater (see Spousal Protection below).

http://www.wnylc.com/health/afile/15/314/

Additional Sources: https://nyspltc.health.ny.gov/medicaid/index.htm

MEDICAID LOOK BACK PERIOD

Pre February 8, 2006

- 3 years or 36 months: Look back period if there are no transfers to or from a trust.
- 5 years or 60 months: Look back period when there are transfers to or from a trust.

Post February 8, 2006

- 5 years or 60 months: Look back period for all transfers.

How is the penalty period is calculated?

In the Capital District, for every $10,719* that a resident gives away, that person is ineligible for Medicaid for one month.

X divided by $10,719, where X equals the amount of an uncompensated transfer, i.e., a gift = period of the penalty

*$10,719, the monthly regional rate is used for Albany, Clinton, Columbia, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Montgomery, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Warren, and Washington counties (the Northeastern Region for Medicaid purposes). This amount will vary by region in NY.

https://www.health.ny.gov/health_care/medicaid/publications/gis/17ma019.htm

When does the penalty period begin?

Pre February 8, 2006

- From the 1st day of the month following the month of transfer.

http://www.wnylc.com/health/afile/38/37/

Post February 8, 2006

- From the 1st day of the month during or after which the transfers are made or the date on which the individual is eligible for Medicaid and would otherwise be receiving institutional care based on an approved

application but for the application of the penalty period, whichever is later – essentially after the person is in the nursing home and has spent all other assets.

http://www.wnylc.com/health/afile/38/37/

SPOUSAL PROTECTION RULES

The Medicare Catastrophic Coverage Act of 1988 (MCCA) mandated special Medicaid eligibility rules for couples when one member needs nursing home care. The rules protect income and resources for the stay-at-home or community spouse. A community spouse is someone whose spouse is currently institutionalized or living in a nursing home. The community spouse is not currently living in a nursing home and usually resides at the couple's home.

Non-Countable Resources Include

- family residence,
- pre-paid burial expenses,
- personal property,
- and one automobile.

SUPPLEMENTAL SECURITY INCOME (SSI)

Supplemental Security Income (SSI) is a Federal program that provides monthly payments to U.S. citizens or qualified aliens who are 65 or older, or who are blind or disabled with little income or resources.

A person is considered blind when the better eye aided by the use of eyeglasses has vision of no better than 20/200 or a limited visual field of 20 degrees. To be considered disabled, a person must have a physical or mental impairment or combination of impairments that prevents him or her from working and is expected to last at least 12 months or result in death. In the case of a child, Social Security examines how the disability affects his or her ability to perform normal daily activities that healthy children of a similar age can do.

A qualified individual living alone can have monthly unearned income up to **$770**; a couple up to **$1,145**. Unearned income includes social security benefits, workers' or veterans' compensation, pensions, in-kind support and maintenance, annuities, rent and interest. Except for some types of need based income, such as certain veterans' pensions, the **first $20** of income is excluded allowing an individual with up to **$790** or a couple with up to **$1,165** to be income eligible for SSI.

One of the federal government's highest priorities is to help people with disabilities achieve independence by helping them to take advantage of employment opportunities. Work incentive employment supports disabled and blind SSI beneficiaries who go to work by minimizing the risk of losing their SSI or Medicaid benefits. For this reason, the federal government does not count the first $65 of earned income plus one–half of the amount over $65. Therefore, the federal government reduces your SSI benefit only $1 for every $2 you earn over $65.

An individual may have resources of up to $2,000; a couple up to $3,000. Resources include items such as real estate, personal belongings, bank accounts, cash, stocks, bonds and some life insurance policies. Exempt from the resource limits are: the home in which a person resides; a person's car if it is used to go to

work, medical treatments or other essential daily activities, if it is modified for use by a handicap person, or if it is valued at less than $4,500; burial funds set aside up to $1,500 per person or an irrevocable burial account with a funeral home in any amount, burial space and personal effects/household goods up to $2,000 equity.

SSI applicants who meet both the income and resource eligibility requirements would receive a check each month to supplement their income up to the level specified for their living situation. The SSI levels are determined by whether or not a person lives independently, with others, or in a licensed residential facility, such as an adult home or a licensed assisted living program (ALP). All SSI recipients automatically receive free medical assistance through the Medicaid program.

The nearest Social Security offices are as follows:

- Leo O'Brien Federal Building – Room 430
  11A Clinton Avenue, Albany, NY 12207
  1-866-253-9183

- Riverfront Office Building – Suite 101
  500 Federal Street, Troy, NY 12180
  1-866-770-2662

- 1 Broadway Center, 8th Floor
  Schenectady, NY 12305
  1-866-964-1296

For more information or to schedule an appointment to apply for SSI at a local office or with a telephone interview, please call Social Security Monday through Friday between 7:00 am and 7:00 pm at 1-800-772-1213. "TTY" service is available for individuals with a hearing disability at 1-800-325-0778.

http://www.ssa.gov/pubs/EN-05-11015.pdf

DIRECT DEPOSIT FOR SOCIAL SECURITY BENEFIT CHECKS

What is Direct Deposit?

Direct Deposit is having your benefit check sent directly from the Treasury Department into your bank, credit union, or savings & loan account by a process called *Electronic Transfer of Funds*.

Why is Direct Deposit Used?

It is safe and convenient and you do not have to worry about your check being lost or stolen. No matter where you are on check day, you can use your money.

Is it hard to set up?

The following explanation is from the Social Security website: https://www.ssa.gov/deposit/.

If you apply for Social Security or Supplemental Security Income benefits, a new law went into effect March 1, 2013, requiring that you receive your payments electronically. If you did not sign up for electronic payments when you applied for benefits, we strongly urge you to do it now. If you still receive checks, the U.S. Department of the Treasury will contact you about complying with the requirement. For more information regarding switching to an electronic payment, visit the Department of Treasury's Go Direct website or call the helpline at 1-800-333-1795. It's safe, quick and convenient.

The Department of Treasury can grant exceptions in rare circumstances. For more information or to request a waiver, call Treasury at 855-290-1545. You may also print and fill out a waiver form and return it to the address on the form.

If you already are receiving benefits, you can create a "my Social Security" account and start or change Direct Deposit online. You also can sign up at your

bank, credit union, or savings and loan. Or call Social Security at 1-800-772-1213 (TTY 1-800-325-0778).

If you would like to learn more about Direct Express view Treasury's You Tube Video: https://www.youtube.com/watch?v=fV1WPof7VjE&feature=share&list=UUMoBnQJ5lIQFFhAmvfOhL1g.

PLANNING & PAYING FOR LONG-TERM CARE

PRIVATE PAY

Any individual can choose to pay for his or her long-term care out of private funds. However, should you wish to plan to privately pay for your long-term care, there are some staggering bits of information that you should be aware of. Recent figures indicate the average cost for one year of nursing home care in New York is $128,628 in the northeastern upstate region and $147,828 in New York City. Two out of five people over the age of 65 will require some form of long-term care services, even if only briefly. The average stay in a nursing home is two and one-half years. For private pay patients, this translates into total costs exceeding $300,000 for the average stay. Almost two out of every three people who utilize such services are female, and once age 85 is reached, nearly three out of five people will require some type of long-term care services.

For information about average regional cost of nursing home care, see Estimated Average New York State Nursing Home Rates, available at https://nyspltc.health.ny.gov/rates.htm.

MEDICAID FOR LONG-TERM CARE

Medicaid is a joint federal-state program that was established in 1965 to provide medical care to the indigent and medically needy, including long-term custodial care. The basics of the program are discussed later in this handout. New York's Medicaid program is jointly administered with its counties. The federal Medicaid laws mandate the inclusion of certain medical services within the state Medicaid programs but make many covered services optional for each state.

Medicaid does not supply any direct services. Services are rendered by qualified providers who then bill Medicaid for reimbursement of the services provided to the individual client. The reimbursement rates to these providers are established by the state. Medicaid is the payer of "last resort." Reimbursement applies only after private pay, medical insurance, and/or Medicare benefits have been applied. It should be noted that Medicaid was never intended to become the

nation's long-term care insurance program. Medicare pays only a very small percentage of long-term care costs.

However, with the exception of private payments for long-term care services, Medicaid is the largest payer of long-term care expenses both in New York and the nation. With the growing number of New Yorkers (and Americans) living longer, more and more people will need and use long-term care services. Because the New York State Medicaid program costs over $54 billion a year—and spends about 41 percent of it on long-term care and almost half on nursing homes—it is not surprising that policy makers are hoping to overhaul the program.

MEDICARE FOR LONG-TERM CARE

Does Medicare Ever Pay for Long-Term Care?

Medicare was also never designed to pay for long-term care. Medicare was designed to address acute, short-term care. It does provide very minimal coverage for custodial care, accounting for only about 2% of long-term care costs nationally.

Medicare coverage for nursing home confinement:

- begins only after a prior hospitalization of at least 3 days,
- requires a *skilled level of care*, and
- requires that the facility be Medicare certified.

If all of these conditions are met, the traditional Medicare program will pay for some of your costs for up to 100 days. For the first 20 days, Medicare will pay 100 percent of your costs. For days 21 through 100, you must pay your own expenses up to $167.50 per day and Medicare will pay any remaining balance. After day 100, you must pay 100 percent of your costs for each day you remain in a skilled nursing facility. If you are covered by a Medicare Advantage program, or have Medicare Supplement (Medigap) insurance, your out of pocket costs will be different.

For payment of home health care expenses, Medicare requires that the home visits be medically necessary and required on a regular basis. There is no limit on the amount of time you can receive home health services, as long as they remain medically necessary and your doctor reorders them every 60 days. To receive coverage for these services, the home health care provider must be Medicare certified. Therefore, although Medicare might pay for some medically necessary long-term care services, most individuals will not meet Medicare's preliminary requirements.

For information on the types of home health services covered, see https://longtermcare.acl.gov/medicare-medicaid-more/.

To access a list of Medicare certified home health agencies, see https://www.medicare.gov/homehealthcompare/search.html.

For a list of Medicare certified nursing homes, see https://www.medicare.gov/nursinghomecompare/search.html.

LONG-TERM CARE INSURANCE

In New York, there are two categories of long-term care insurance policies: policies state-approved under the NYS Partnership for Long-Term Care, and all other long-term care policies also approved by the NYS Insurance Department.

This handout will address general features to look for in long-term care insurance policies and differences important to New York residents between NYS Partnership for Long-Term Care approved policies and non-Partnership policies.

Who is eligible for coverage by long-term care insurance?

There are no set eligibility requirements to purchase long-term care insurance. Generally, if you are in reasonably good health and can take care of yourself, and if you are between the ages of 20 and 80, you can buy long-term care insurance. There are a few insurance providers who will provide long-term care insurance to individuals over 80, however it should be noted that these policies will likely carry very high premiums.

What do long-term care insurance policies cover?

Generally, long-term care insurance policies cover skilled, intermediate and custodial care in nursing homes. They also cover home health care provided by home health agencies. Many policies also cover adult day care, hospice care, respite care, and Alzheimer's special care facilities.

- **Skilled care** generally means care given by a registered nurse or therapist, usually on a daily basis, under the supervision of a doctor.

- **Intermediate care** means occasional nursing and rehabilitative care under the supervision of skilled medical personnel. It is less specialized and less comprehensive than skilled nursing care and may last

considerably longer.

- **Custodial care** means human assistance with the activities of daily living (bathing, dressing, eating, walking, taking medication, etc.) and often involves nonmedical personnel. Much of the care given in nursing homes, particularly during extended stays, is custodial care.

- **Hospice care** is short-term supportive care for those who are terminally ill, which can be provided at home or in a nursing home, or hospice facility. It should be noted that Medicare typically pays for hospice care and this type of care is not usually considered long-term care.

- **Respite care** is temporary care that is meant to provide time off for those who care for someone on a regular basis. Respite care is usually 14 to 21 days of care per year and can be provided in a nursing home, adult day center, or at home by a private party.

What may not be covered under a long-term insurance policy?

All policies contain limitations and exclusions. It is therefore important to review each policy carefully.

- **Maximum Policy Benefit**

  This is the period of time or dollar amount limit for which long-term care benefits will be paid under the policy. Long-term care insurance policies have maximums from one to ten years, lifetime benefits, or a dollar amount limit. Once the time limit or dollar amount limit is reached, no other benefits for long-term care services will be paid under the policy.

  The maximum policy benefit limits may not be the same for each benefit listed in a policy. For example, nursing home care and home care may have separate time period and dollar amount limits.

- **Elimination or Waiting Period**

  This period is the number of days you must receive long-term care before your insurance provider will pay benefits under the policy. During this period, you will have to pay for the care you receive privately. Depending on the terms of your policy, a new elimination or waiting period may be imposed for each period of care.

- **Preexisting Condition**

  Insurance companies generally require that a period of six months pass before the policy pays for care related to a health problem you had when you applied for insurance. Such health problems are called preexisting conditions.

  Alzheimer's disease and other organic cognitive disabilities developed after people successfully purchased long-term care insurance are generally covered under long-term care policies, but other non-organic mental and nervous disorders are often not covered.

What do long-term care insurance policies cost?

The cost (premium) for a long-term care insurance policy is dependent on such factors as the age when you become insured and the amount of coverage or benefits selected in the policy. In New York, the average monthly policy premium paid by individuals who were 50 years old in 2017 was $7,183.25. It is important to note that these are average numbers and it is important to shop wisely. Some premiums are higher, some are lower, and some insurance companies offer reduced premiums for certain individuals. Policies cost more the older you are when you purchase and if certain benefits, like non-forfeiture, are selected.

What is the New York Partnership for Long-Term Care?

Between 1988 and 1993, New York was awarded grants by the Robert Wood Johnson Foundation to plan and implement an alternate way to finance long-term care. The purpose of the grants was to encourage the state to design a better method for financing long-term care services than paying strictly through private funds which often leads to impoverishment and reliance on the Medicaid program.

In 1990, New York received an additional grant to implement the model design it created under the 1988 planning grant. The program called the "New York State Partnership for Long Term Care" (NYSPLTC) links private long-term care insurance with New York State's Medicaid program. When individuals who purchase the insurance use their benefits for three years of nursing home care or six years of home care, or a combination of the two where every two days of home care benefits equal one day of nursing home care benefits, they may qualify for Medicaid based on their income alone. All of their assets are ignored in determining Medicaid eligibility.

Therefore, regardless of how many assets an individual may have, if the NYSPLTC policyholder meets the time requirements for private insurance use under a NYSPLTC policy, he or she will continue to receive long-term care with Medicaid eligibility based on income only, **regardless of the value of his or her assets.** (This means s/he must meet the Medicaid *income* requirements.) A NYSPLTC-certified policy may be sold only to residents of New York. The policy must meet minimum benefit requirements and also exhibit the special program logo to be called a NYSPLTC policy.

What are the basic requirements for NYSPLTC-approved long-term care policies?

- Guaranteed renewability;
- Disclosure that the policy qualifies under the NYSPLTC;
- Special NYSPLTC logo on each policy;
- No requirements of prior hospitalization or placement at nursing facility;
- All denied requests for benefit authorization based on disability are subject to review by the state Partnership office, and may be resolved, where indicated, by alternate dispute resolution (binding arbitration);
- Inflation protection: the insured can choose between 3.5% compounded or 5 % compounded annually. If the policy is purchased by an individual over 80, the inflation protection is not mandatory;
- Elimination period of no more than 100 days;
- Care management: two days of long-term care planning services with a professional equivalent to two nursing home benefit days per calendar year;
- Alzheimer and other dementia covered *after* effective date of policy;
- 2 years of nursing home care, minimum benefits of $265.00 per day;
- 4 years of care in a residential care facility or community-based care, minimum benefits of $133.00 per day (two home care days can be converted to one nursing home day);
- Hospice care at the applicable nursing home or at home care rate;
- Alternate care (care received in a hospital inpatient setting for persons waiting to be placed in a nursing home or while arrangements are being made for home care);
- Respite care (14 nursing home equivalent days per year);
- Residential care facility bed reservation and nursing home bed reservation (20 days per year for each), which holds residential care facility bed and nursing home bed when insured must leave for period of time;
- Social underwriting is prohibited. Insurance companies cannot use non-

medical primary determinants to refuse to issue an insurance policy. They may only refuse coverage by the applicant's failure to pass medical underwriting;

- Level premiums; any premium payment feature where the premium payment rises automatically after issuance is prohibited.
- Non-forfeiture benefits in the form of a premium and/or benefit adjustment favorable to the policyholder in the event of the establishment of a federal long-term care program;
- Consumer protection against sales practice of churning; and
- 2 month grace period prior to cancellation if a third party was designated, on application, to receive such notification.

What is the advantage of having a NYSPLTC approved long-term care policy?

The major feature of the NYSPLTC insurance program is that it is an *asset protection program* offering special Medicaid extended coverage not available with non-Partnership long-term care insurance policies. **Medicaid income rules remain applicable for eligibility purposes.**

That is, upon the purchase and use of 2 years of nursing home benefits or 4 years of home care benefits, or a combination of the two, the insured may qualify for Medicaid with all of his or her assets protected, regardless of the type or amount of resources he or she has. However, Medicaid eligibility for continued long-term care payment assistance would be determined on the basis of an individual's available income and the cost of care. This means the individual must contribute his or her income to the cost of his or her long-term care during the Medicaid period of coverage according to the Medicaid income rules in effect.

In addition, New York State has opted to participate in a reciprocity program as part of the Federal Deficit Reduction Act of 2005. This means that partnership policyholders who relocate to one of forty other participating states can take advantage of asset protection in those states, dollar-for-dollar, based on the amount of benefits paid on their behalf. For more information, contact the NYSPLTC at 1-866-950-7526.

How can I analyze a long-term care insurance policy?

The best method of analyzing a long-term care insurance policy is to understand the terms and definitions and compare it to other policies in terms of cost, benefits, and company stability and reputation.

The following questions should be asked of each policy:

What is the insurance company's financial rating (stability and reputation)?

Independent agencies monitor the financial integrity and claims-paying ability of insurance companies. Being licensed to sell the policy in NYS is much more important than the company's rating, but you may call the following companies or check with your public library's reference department for their ratings publications:

A.M. Best	(908) 439-2200
Duff & Phelps	(212) 450-2800
Moody's Investors Service	(212) 553-0377
Standard & Poor's	(212) 438-2000
Weiss Group	1-800-291-8545

[Note: all of the above may charge a fee for sending you information.]

If you are interested in the lifetime protection associated with the New York State Partnership for Long-Term Care, is the policy approved under the Partnership*?*

Partnership policies can be identified by the special logo that appears on all material relating to the Partnership.

What levels of care does the policy cover and where is care provided?

- Nursing home care (skilled nursing and custodial care)
- Home care (skilled nursing and custodial care)
- Adult day care
- Assisted living facilities

How are insurance benefits triggered?

For example:

- How many activities of daily living (ADLs) would one need to be deficient?
- Does the company recognize cognitive impairment?

- Does the company recognize a doctor's verification of chronic disability?

Does the policy pay benefits for respite care?

Respite Care is care that temporarily replaces the support received from a family member for the purpose of providing care to the patient while the family member takes a break for personal reasons such as a vacation.

How much does the policy pay for the following benefits?

- Nursing home care
- Home care
- Adult day care
- Assisted living facilities
- Respite care

Does the policy pay benefits for "alternate care days" in a hospital?

This is generally the time a patient is waiting to be placed in a nursing home.

How long will the policy pay benefits?

- 3 years
- 5 years
- Unlimited
- Up to a specified dollar amount
- Other

How long is the elimination or waiting period?

This is generally the period of time a patient must wait before the policy begins to pay for his or her care.

How often do you need to satisfy the waiting period?

Is it once per care episode or once for the life of the policy?

Is there a pre-existing condition exclusion?

If yes, how *far back* can the insurer look for preexisting conditions, and *how long* are you required to have the policy *before preexisting conditions are covered*?

Is Alzheimer's disease covered if you develop it after you purchase the policy?

Are premiums waived for nursing home care and/or home care?

What criteria are used to qualify for benefits?

- Medical necessity,
- Activities of daily living, or
- Cognitive impairment

What type of inflation protection is available under the policy?

Does the policy provide Information and referral services, consultation services (care planning) and/or other care management services?

How much does the policy cost per month?

Where can I get further information about long-term care insurance policies?

For more information on long term care insurance, visit the website of the New York State Department of Financial Services, at http://www.dfs.ny.gov/ and search for long term care insurance. Search results will include a consumer booklet that describes all long-term care insurance policies, including Partnership insurance policies.

Specific information about the NYSPLTC may be obtained from:

NYS Partnership for Long-Term Care
NYS Department of Health
One Commerce Plaza, Rm. 1620
Albany, NY 12210
518-474-0662 or 1-866-950-7526
Website: https://nyspltc.health.ny.gov/
nypltc@health.ny.gov

HEALTH CARE PLANS

TYPES OF HEALTH CARE PLANS

Medicare Managed Care Plans

Enrollees are limited to providers within the plan's network; referral from primary care physician required to see specialist.

Capital District Physicians' Health Plan – Medicare Choice
1-866-641-3950 Local: (518) 641-4000
https://www.cdphp.com/
500 Patroon Creek Blvd.
Albany, New York 12206-1057

Blue Shield of Northeastern New York – Senior Blue 601
1-877-258-7453
https://www.bsneny.com/
30 Century Hill Drive (Route 9)
Latham, NY 12110

WellCare of New York, Inc. – WellCare Choice
1-800-278-5155
https://www.wellcare.com/en/New-York
220 Washington Avenue Extension
Albany, NY 12203

Preferred Provider Organization Plans (PPOs)

Enrollees can save money by seeing providers within the plan's network, but may see out-of-network providers without a referral for higher fees. Some services may require prior plan approval.

BlueShield of Northeastern New York – Traditional Blue

Current members: **1-800-329-2792**
(TTY/TDD 1-877-834-6918)
Prospective members: **1-800-700-8482**
(TTY/TDD 1-877-513-1470)

https://www.bsneny.com/
30 Century Hill Drive
Latham, NY 12110

Private Fee-for-Service Plans

Enrollees can see any provider that accepts the terms of the plan's payment. Payment is determined not by Medicare, but by the company providing the plan.

Universal American
914-934-5200
http://www.universalamerican.com/
44 South Broadway, Suite 1200
White Plains, NY 10601-4411

For more information, publications or assistance call 1-800-MEDICARE or visit https://www.medicare.gov/ and click on "Medicare Personal Plan Finder" or contact the New York State Office on Aging via telephone at 1-800-342-9871 or online at https://aging.ny.gov/healthbenefits/.

Personal Emergency Response Systems (PERS)

Installation of a personal emergency response system involves the attaching of a unit to the subscriber's phone and requires a private line (not available to someone with a party line). The subscriber is provided with a small, waterproof panic button that can be worn around the neck like a necklace or on a wristband like a watch. When pressed within range of the phone unit, this panic button will activate a call to the emergency response system. Most units are voice-activated allowing a subscriber to communicate in an emergency situation without actually picking up the receiver (like a speaker phone). The system is monitored 24 hours a day 7 days a week by professionals who have access to the subscriber's medical history and a plan on how to respond to an emergency. The plan may vary from one system to another.

Lifeline requires a list of responders: family or friends who live nearby; can be given a key and can respond quickly in event of an emergency.

Local Providers

Eddy Lifeline/St. Peters Health Care Services
This program is located at 433 River Street, Troy, NY 12080
Contact Lifeline at 518-833-1040 or visit online at
http://www.sphcs.org/eddy-health-alert

Ellis Hospital Lifeline
Ellis Hospital is located at 1101 Nott St., Schenectady, NY 12308
Contact Lifeline at Ellis Medicine at 518-382-2224 or visit online at
http://www.ellismedicine.org/services/medical-emergency-alert.aspx

Health Watch
Visiting Nurse Association of Albany, Rensselaer and Saratoga
The VNA of Albany, Rensselaer and Saratoga is located at
35 Colvin Ave., Albany, NY 12206
Contact the VNA at 518-489-2681 or visit online at
http://vnaalbany.org/services-programs/

National Providers

AlertOne Services, LLC
1-877-959-7813
https://www.alert-1.com/

Colonial Medical Assisted Devices
1-800-323-6794
https://www.colonialmedical.com/

LONG-TERM HOME HEALTH CARE PROGRAMS

Home health agencies certified by the Department of Health to offer the Long Term Home Health Care Programs can provide a comprehensive array of health and social services to chronically ill or disabled NYS Residents. The "Nursing Home Without Walls" program can help those who want to avoid institutionalization and receive care in their own homes.

Eligibility for this program is determined by a number of factors: the applicant must be medically eligible for nursing home placement, receive physician approval, and the cost must be less than the cost of nursing home care in the county. Services available include: home-delivered meals, social model adult day care, housekeeping, home modification, durable medical equipment, personal emergency response systems, nurses, home health and personal care aides, physical speech, occupational and respiratory therapies, audiology and social work services and respite care.

The cost of care provided through the long term home health care program must not exceed 75% of the average cost of nursing home care in the area. The individual must be eligible for Medicaid or be able to pay privately. For more information, please contact one of the Long Term Home Health Care Programs listed below.

VNA Home Health
35 Colvin Avenue
Albany, NY 12206
518-489-2681
Serving 11 Capital Region Counties: Albany, Columbia, Fulton, Greene, Montgomery, Rensselaer, Saratoga, Schenectady, Schoharie, Warren and Washington

Eddy Visiting Nurse and Rehab Association
433 River Street
Troy, NY 12180
518-270-1314

Visiting Nurse Service of Northeastern New York
108 Erie Boulevard
Schenectady, NY 12305
518-382-7932

MEDICARE COSTS SAVINGS PROGRAMS

Four programs are available to help New Yorkers cope with some of the expenses associated with Medicare, such as premiums, deductibles and coinsurance.

Medicaid allows a $20/per couple deduction from applicant's gross monthly income for when calculating eligibility for MSP. The income listed below reflects the $20 deduction.

QUALIFIED MEDICARE BENEFICIARY (QMB)

In order to be eligible for QMB in New York in 2018, a person has to be currently enrolled in the Medicare program; have gross monthly income of no more than $1,032 a month or $1,392 for a couple.

Individual resource limit $7,560; Married couple resource limit $11,340.

SPECIFIED LOW INCOME MEDICARE BENEFICIARY (SLIMB) PROGRAM

This program pays for the Medicare Part B premium only. Individuals can be eligible for SLIMB only or for SLIMB and Medicaid (with a spend-down). The applicant must have Medicare Part A in order to be eligible for the program. In order to be eligible for SLIMB a person has to:

- Be currently enrolled in the Medicare program;
- Have gross monthly income of no more than $1,234 per month or $1,666 for a couple.

Asset Guidelines: same as for QMB

QUALIFIED INDIVIDUAL 1 (QI)

This program pays for the Part B premium. In order to be eligible for QI, a person has to:

- Be currently enrolled in the Medicare program;
- Have gross monthly income of no more than $1,386 per month or $1,872 for a couple.

Asset Guidelines: Same as for QMB

QUALIFIED DISABLED AND WORKING INDIVIDUAL (QDWI)

This program pays for the Medicare Part A premium only (not Part B). In order to be eligible in 2018, a person has to:

- Be a disabled worker under the age of 65 who lost Part A benefits because of his or her return to work;
- Have gross monthly income of no more than $4,132 a month and resources of no more than $4,000; or $5,572 per month and resources of no more than $6,000 for a couple).

To apply for any of these programs, contact your local Department of Social Services. Individuals who are trying to spend down excess income to become eligible for Medicaid should contact their Medicaid worker directly. If you need assistance to file your application, you may want to contact your local Office for the Aging or your nearest senior center.

MEDICAID

What is Medicaid?

Medicaid is a joint federal and state program that provides payment for institutional and community-based care for eligible persons who are treated by participating institutions and practitioners. Medicaid covers nursing home care and other medical care including home care, acute hospital care, physicians, and pharmacy.

When is a person over age 65 eligible to receive Medicaid?

Medicaid is a means-tested, needs-based program with limitations on income and resources. Anyone who meets the income and resource limitations is eligible to receive Medicaid.

Availability of income/resources (assets): What are current asset and income levels that allow Medicaid eligibility?

Monthly Income (Individuals who are Blind, Disabled or Age 65+):

Individual: $842 (+$20)
Couple: $1,233 (+$20)

The first $20 of monthly income per household will not be counted when determining eligibility for those who are aged, blind, or disabled.

Resources (Individuals who are Blind, Disabled or Age 65+ ONLY):

Individual: $15,150
Couple: $22,200

The availability of income/resources depends on the individual's situation.

INCOME

Income is broadly interpreted, and includes earned and unearned income and most government benefits.

Community Based Medicaid (i.e., care in the home)

The current monthly income limit for an individual over age 65 seeking community based Medicaid (i.e., care in the home) is $842. The individual can claim a $20 disregard in addition to the monthly income limit. Also, an individual can deduct cost of any health insurance premiums from income – Medicare Part B or Part D, Medigap supplemental policy, or employer or private insurance. The current monthly income limit for a couple when one or both partners is/are seeking community based Medicaid is $1,233 /month.

Institutionalized Care

The current monthly Personal Needs Allowance for an individual who is in a nursing home is $50 per month, plus she may keep the cost of any health insurance premiums. If there is no spouse, all of the institutionalized individual's income above $50 and the cost of health insurance premiums must be paid toward the cost of care. If the individual's spouse is still living in the community, the institutionalized spouse may provide a living allowance to the at-home spouse in an amount that brings the at-home spouse's income up to $3,090.00 per month.

Resources

Resources include but are not limited to bank account balances, second homes or vehicles, life insurance policies worth more than $1,500, Individual Retirement Accounts (IRAs) not yet in pay out status and revocable trusts. If distributions are being taken from an IRA, the IRA principal is not included as a resource, but the distribution is counted as income.

Community Based Medicaid (i.e., care in the home)

An individual who is seeking community based Medicaid (i.e., care in the home) can retain resources up to $15,150 plus an exempt irrevocable funeral trust.

The current resource allowance for a couple when one or both partners are seeking community based Medicaid is $22,200

Institutionalized Care

An individual seeking coverage for nursing home care is allowed $15,150 in resources. The spouse of an individual seeking coverage for nursing home care is allowed $74,820 or half of the couple's resources up to a maximum of $123,600. If an institutionalized individual owns a home, special rules apply about whether the home is counted as a resource. If a spouse, and/or a disabled or minor child are living in the home, it will not count as a resource.

Legal advice should be sought if either spouse owns a home, as the rules for Medicaid are complex and there may be tax consequences. Also, the rules about transfers of assets are complex, and legal advice should be sought before transferring assets.

Note: Income and resource levels are subject to annual adjustments. Updated information can be found each year at https://www.health.ny.gov/health_care/medicaid/.

What resources are not counted when determining Medicaid eligibility?

Exempt from inclusion in the Medicaid eligibility resource limit are your family residence (without regard to value); irrevocable pre-paid burial expenses; personal and household property; one automobile; and any life insurance policies with a face value of less than $1,500.

However, the family residence must be the primary residence of the applicant, and/or his or her spouse or minor or disabled child. It may be a one, two, or three family house and also includes any attached property. In order to qualify as the family residence (referred to by Medicaid as "homestead"), the home must be necessary and appropriate to the applicant. Therefore, if an individual with no spouse and/or no minor disabled child enters a nursing home and is not medically expected to return home, he or she would no longer have an exempt homestead due to the fact that the home would no longer be "necessary or appropriate" for that individual. It would then be treated as an available resource for Medicaid eligibility purposes.

The rules regarding transfers of assets are complex, and legal advice should be sought before transferring assets.

How can an individual whose income exceeds the Medicaid limit still qualify for Medicaid?

If the individual has otherwise met Medicaid eligibility requirements, that individual seeking Medicaid would have to contribute any income over these amounts toward the cost of the care on a monthly basis. This is called a "spend down."

What are Department of Social Services' (DSS) requirements to determine Medicaid eligibility for long-term care?

In order to qualify for Medicaid in New York State, the following must apply:

- The applicant must be a resident of New York State;
- The applicant must meet the current monthly income limit subject to the contribution discussed above;
- The applicant must meet the resource limits discussed above.

What are DSS transfer of asset rules?

Any asset transferred *for the purpose of qualifying for Medicaid* is considered an impermissible transfer of assets for which a penalty is imposed. Any transfer of assets for which the transferor does not receive "fair market value" is considered a transfer for the purpose of qualifying for Medicaid unless it can be proven that the transfer was made for another purpose.

For any transfer or sale of an asset for which the applicant receives the fair market value, no penalty period will be imposed.

For transfers made exclusively for *some purpose other than qualifying for Medicaid*, no penalty period will be imposed. An example of this type of transfer would be to repay an outstanding debt, or as a gift for a specific purpose, or a gift as part of a long-established pattern of gift-giving.

A period of ineligibility ("penalty period") will be imposed for any transfers of assets, which do not meet the above criteria. A period of ineligibility for Medicaid institutional services will result from these transfers. Medicaid will calculate the period of ineligibility by the following statutory formula: the dollar value of the transfer divided by the average monthly cost for one month of nursing home care equals the number of months of ineligibility for Medicaid institutional services.

For example, if Mr. Smith gives $50,000 to his son as a gift, Medicaid will calculate the period of ineligibility by dividing the gift amount by the average monthly cost of nursing home care (assume $10,000) to equal the number of months of penalty: $50,000 / $10,000 = 5 months.

The current average monthly cost of care for our region is approximately $10,700. Medicaid regulations impose a thirty-six (36) month look-back period for transfers, made prior to February 8, 2006 unless the transfer was made **to or from** a trust, for which the look-back period is sixty (60) months. After February 8, 2006, the penalty period is sixty (60) months regardless of the type of transfer.

Any transfer of assets between spouses incurs no penalty period. However, any transfer by either spouse to a third party will create a period of ineligibility for the institutionalized spouse, subject to the transfer rules stated above.

Can I give my home to my son/daughter so the nursing home won't take it?

The transfer of a personal residence will result in a period of ineligibility unless the personal residence is transferred to one of the following individuals:

- a spouse of the individual;
- a child of the individual who is under 21 or certified blind or permanently and totally disabled;
- the sibling of an individual who has an *equity interest* in the home, and was residing in the home for at least one year immediately before the date of institutionalization; or
- an adult, non-disabled son or daughter who is residing in the home for at least two years immediately before the date of institutionalization, and who was *providing care* to the individual which permitted him or her to reside at home.

An *"equity interest"* is defined as having an ownership interest in the property as evidenced by being named on the deed, having paid monthly mortgage payments or having made capital improvements.

"Providing care" is defined as making arrangements or actively participating in the arrangement for care, either directly or indirectly, full time or part time.

Can I sell my home to my son/daughter for less than its full value and still get Medicaid?

Any transfer for less than full value is subject to imposition of a period of ineligibility calculated on the difference between what full market value of the asset was and the amount which the individual received for the asset.

Will Medicaid pay for home care?

- Medicaid home care services include:
- part-time or intermittent nursing;
- home health aide services;
- physical, speech, and occupational services;
- personal care services;
- care provided through the long-term health care program ("nursing without walls").

To obtain these services, one must have a written order for a plan of treatment by his or her physician, and must pass a "nursing assessment" and a "social assessment," which will assess the individual's need for and appropriateness of the care. The plan of treatment must be approved by the provider prior to commencement of the home care services.

Most importantly, the average net monthly cost of the proposed care is then compared against the average monthly cost in a residential facility to determine if the plan of care is cost effective. If the average monthly cost of the home care exceeds 90% of the cost of institutionalization, the home care will be denied in favor of placement in a facility, subject to certain exemptions, which are stringent.

How do Medicaid rules differ for a single person and a married person whose spouse is still living in the community?

A single individual applying for nursing home coverage is allowed to keep $15,150 in resources and $50 in monthly income as a personal needs allowance and be eligible for Medicaid. A married person who is institutionalized and whose spouse is living in the community is allowed to keep a maximum of $22,200 in resources in his or her name and $50 in income monthly as a personal needs allowance. However, the community spouse is allowed $3,090.00 in monthly income and resources in a minimum amount of $74,820 or one-half of the combined countable resources up to $123,600, whichever is greater. The spouse is entitled to retain the residence. The residence of a single individual who will not return home will become an "available" resource for Medicaid qualifying purposes;

an institutionalized married person who will never return home retains the exemption on his or her personal residence as long as the community spouse lives there.

COST OF CARE

The 2017 cost of care for New York was:

	Daily	Monthly	Annual
Homemaker Services:	$141	$4,290	$51,480
Home Health Aide:	$149	$4,528	$54,340
Adult Day Health Care:	$80	$1,733	$20,800
Assisted Living Facility:	$131	$3,988	$47,850
Nursing Home			
Semi-Private Room:	$364	$11,076	$132,907
Private Room:	$385	$11,701	$140,416

Source: Cost of Care Survey 2017 – Genworth
https://www.genworth.com/aging-and-you/finances/cost-of-care.html

Important Phone Numbers and Resources

Medicaid Helpline: 1-800-541-2831

Local DSS Numbers:
https://www.health.ny.gov/health_care/medicaid/ldss.htm

Medicaid in New York State:
https://www.health.ny.gov/health_care/medicaid/

Medicaid Reference Guide:
https://www.health.ny.gov/health_care/medicaid/reference/mrg/index.htm

MEDICARE

MEDICARE PART A & PART B

What is Medicare?

Medicare is a federally funded health insurance program for the elderly. This program is run by the Center for Medicare & Medicaid Services (CMS), a branch of the Department of Health and Human Services, and financed through two trust fund accounts held by the U.S. Treasury. There are two programs offering benefits: Part A and Part B. Part A covers in-patient hospital care, limited inpatient care in a skilled nursing facility (SNF), home health care and hospice care. Part B covers medically necessary items and services not covered by Part A such as ambulance services, getting a second opinion before surgery, mental health, and durable medical equipment (DME).

Who is eligible for Medicare?

Both Part A and Part B benefits are available to those who are (1) age 65 and older who are eligible for Social Security or Federal Railroad retirement benefits; (2) disabled and under the age of 65 who are entitled to receive (even if they have not been receiving) Social Security disability benefits for more than 24 months; and (3) suffering from end stage renal disease (permanent kidney failure). Part B benefits are also available to U.S. citizens and resident aliens who are not eligible for federal retirement benefits.

How do I apply for Medicare coverage?

You will be automatically enrolled in Part A and Part B if you are receiving Social Security or Railroad Retirement or disability benefits. You may need to file an application with your local Social Security Administration office if you are eligible for Social Security or Railroad Retirement benefits but have not yet signed up for them, have permanent kidney failure, are not eligible for premium-free Part A, or are one of some government employees who are not eligible for Social Security or Railroad Retirement benefits.

How much are Medicare premiums?

There are no Part A premiums for eligible persons. Ineligible persons may buy into the Part A insurance program by paying monthly premiums. Every person covered under Part B must pay monthly premiums. The standard Part B premium for 2018 is $134 (or higher depending on your income). However, some people who get Social Security benefits will pay less than this amount ($130 on average). There is also a premium for the voluntary Part D prescription drug coverage.

How much are the Medicare deductibles and co-payments?

Medicare deductibles are the amount you, as the insured, must contribute toward your cost of care. Under traditional Medicare, the annual deductible for Part B is $183 for 2018 and your co-payment is generally 20% of the Medicare-approved amount for the service provided. Additional deductibles and co-payments apply under the Part D prescription drug program.

Under Part A, the deductibles paid apply to each **benefit period**, rather than annually. A benefit period begins with the first day of hospitalization or care and ends 60 days after discharge from the hospital or SNF. There may be more than one benefit period during the same year and the number of benefit periods is unlimited.

Part A deductibles increase as the length of the inpatient care increases as follows:

	Days 1-60	Days 61-90	Days 91+
Hospital	$0/day	$335/day	$670/per "lifetime reserve day"*

*Lifetime reserve days are available only one time. Once you use them, you lose them.

	Days 1-20	Days 21-100	Days 101+
SNF	$0	$167.50/day	100%

Part A covers 100% for qualified home health care services; however, there is a 20% deductible or co-payment for new durable medical equipment. Part A also covers 100% of qualified hospice care services for terminally ill patients for two 90-day periods and one 30-day period. There is a co-payment of $5 or 5% (whichever is less) for outpatient drugs and a 5% deductible for inpatient respite care.

How does a health care provider get paid under Medicare Part A?

For hospital care covered by Part A, payments are made directly to the hospital, SNF or other care provider by an insurance company acting as an agent for the government. In New York State, that agent is Empire Medicare. You will receive a statement from Empire Medicare showing the charges that you must pay. Empire Medicare will also provide you with a statement showing any denied payments.

Part B payments may be made either to you, as the insured, in the form of reimbursement or directly to the care provider through an **assignment**. An assignment is a voluntary agreement that you enter into with a health care provider who agrees to submit the paperwork and accept the Medicare "reasonable charge" as full payment. If you do not assign your right to reimbursement, you must pay the care provider in full and submit a claim for reimbursement (Form 1490 "Request for Medicare Payment"). A physician must certify that the claimed items were "medically necessary". In either case, the Medicare insurance provider will send you a statement showing which charges were covered, approved and denied.

Can I appeal a Medicare Part A or Part B denial of coverage?

There are five levels in the Medicare Part A and Part B appeals process. The levels are:

- First Level of Appeal
  Redetermination by a Medicare carrier, fiscal intermediary (FI), or Medicare Administrative Contractor (MAC).

- Second Level of Appeal
  Reconsideration by a Qualified Independent Contractor (QIC)

- Third Level of Appeal
  Hearing by an Administrative Law Judge (ALJ) in the Office of Medicare Hearings and Appeals (subject to there being a minimum amount in controversy)

- Fourth Level of Appeal
  Review by the Medicare Appeals Council

- Fifth Level of Appeal
  Judicial Review in Federal District Court (subject to there being a minimum amount in controversy)

"MEDIGAP"

What is a "Medigap" insurance policy?

Medicare Supplemental Insurance policies (commonly known as "Medigap" policies) are offered through private insurance companies to supplement Medicare coverage. These policies are designed to fill in the gaps in Medicare benefits by paying some of the deductibles and co-payments not covered by Medicare. However, the individual insurance companies set the premium rates and coverage.

Even so, all Medigap policies must offer at least four basic benefits: (1) 100% of Part A co-payments during hospital days 61-90; (2) 100% coverage for at least 365 additional hospital days during a lifetime; (3) Part B 20% co-payments for all Medicare approved charges; and (4) first 3 pints of blood. Additional coverage (such as nursing home co-payments, Part B $183 deductible, personal care services, and excess doctor charges) may be added to a policy for an additional premium. Depending on the policy chosen, Medigap may also pay for services not otherwise covered by Medicare, such as annual check-ups. Most insurance companies base the rate of coverage on the Medicare standards relating to necessary medical treatment and the reasonable charge for the service. Therefore, you will have to make up the difference unless the policy covers excess doctor charges.

In order to apply for a Medigap policy you must have Medicare Parts A and B. Also, states and insurance companies differ in eligibility criteria for those under 65. Regardless of the state in which you live, be sure to look into the following areas when choosing a Medigap policy: (1) pre-existing condition limitations; (2) eligibility periods; (3) renewability of the policy; (4) 30-day free look period; and (5) maximum benefits available. It is important to remember too that no Medigap policy covers all out-of-pocket medical expenses.

A list of types of Medigap Insurance Policies appears at Appendix A.

MEDICARE ADVANTAGE PLANS

Some recipients choose a Medicare Advantage (MA) plan rather than traditional Medicare. MA plans also cost a premium and provide similar benefits through a private insurance company.

Where can I get assistance with Medicare questions?

Medicare Hotline 1-800-633-4227/ TTY 1-877-486-2048

https://www.medicare.gov/ (Official Medicare website)

New York State Insurance Department 1-800-342-3736

MEDICARE PART D

What is Medicare Part D?

Medicare Part-D provides choices for prescription drug coverage plans through insurance companies and other private companies.

Is there a monthly premium?

Yes. The monthly premium varies by plan (higher-income consumers may pay more).

Is there a deductible?

Yes. Deductibles vary between Medicare drug plans. No Medicare drug plan may have a deductible more than $405 in 2018. There may also be copayments for drug expenses in excess of this amount.

How much will the insurance pay for the prescription drugs?

The coverage depends on the state, county and insurance company. A list of prescription coverage available dependent on the state, county and carrier is available at https://www.medicare.gov/.

What drugs will be covered?

The drugs covered will depend on the plan in which you have enrolled.

When did Medicare Part D become effective and when can I enroll?

Medicare Part D became effective on January 1, 2006. Eligible recipients can apply every year during the annual enrollment period: November 15 – December 31. Drug coverage would then begin on January 1 of the following year.

For assistance with enrolling in Medicare Part D, you can call 1-800-MEDICARE (1-800-633-4227) or go online to: https://www.medicare.gov/.

PROBATE

What does it mean to probate a will?

To probate a will means to go through a Surrogate's Court proceeding to prove to the Court that the will is valid. If there are no objections and the will appears in good form, there is rarely a problem with probate. A will is generally probated in the county in which the deceased lived at the time of his or her death. The cost of probate is determined by the total value of the probate assets (assets held in the name of the deceased alone.)

A will may not be probated unless the Surrogate's Court is satisfied as to the genuineness of the will and the validity of the execution (signing) of the will. A will must be probated to be valid.

How is the cost of probate determined?

The law states that the clerk of the Surrogate's Court shall charge and receive fees for services for probating a will. The cost of probate is determined by a statutory fee schedule which is calculated on the value of the estate or subject matter involved.

For example:

- If the property is worth less than $10,000, a fee of $45 is paid to the Surrogate's Court.
- If the property is worth over $100,000 but less than $250,000, a fee of $420 is paid.

There may be additional fees charged depending on the need for any additional action such as a petition to order the opening of a safe deposit box to search for a missing will ($20).

Who is responsible for probating the deceased person's will?

A will names an executor who has the power to petition the Surrogate's Court to probate a will. Other parties may also petition the Court in order to begin probate of a will, such as:

- Parents or guardians of children or an incompetent person named as a beneficiary of the will to receive something (money, furniture, property) under the will;
- A creditor of the estate; or
- The public administrator or county treasurer, on order of the Court, where the will has been filed.

Does the executor get paid for probating a will?

The general rule is that an executor is paid a commission for all sums of money and all property that he or she receives and pays out, including the estate assets and income plus all the reasonable and necessary expenses paid by him or her in order to probate the will.

How is the payment calculated?

Payment may be based on a statutory rate schedule, which is as follows:

- 5% for receiving and paying out up to $100,000.
- 4% for receiving and paying out the next $200,000.
- 3% for receiving and paying out the next $700,000.
- 2.5% for receiving and paying out the next $4,000,000.
- 2% for receiving and paying out sums above $5,000,000.

However, the will may specify different provisions for paying the executor based on a previously agreed rate or fixed amount.

If a family member serves as executor, is it better to receive payment for serving as executor or a disposition under the will?

It may be better for a family member serving as executor, who is also a beneficiary under the will, to receive a disposition. A disposition is not taxable, whereas fees received for serving as executor are taxable as income.

What are the responsibilities of an executor?

An executor is the "personal representative" of the person who is now deceased and as such must administer the estate. The executor must ensure that the will is carried out.

In general, the executor must:

- Handle any funeral arrangements and pay for the funeral of the deceased out of the estate's proceeds;
- Pay any outstanding bills of the estate;
- Collect and preserve assets, and pay debts, taxes, and administration expenses of the estate; and
- Distribute assets in the estate according to the terms of the will.

What are the steps involved in probating a will?

- The executor, or his/her representative, must handle the legal paperwork such as filing a petition for probate with the Surrogate's Court.
- S/he must notify any individuals or guardians of children or incompetent persons who may receive a benefit from the estate, and other parties named in the applicable statute.
- The Court reviews all the documents, and if everything is in order, issues a decree of probate and Letters Testamentary. Letters Testamentary are the official decree of the Surrogate's Court giving authority and appointment to the executor to carry out his/her duties.

What documents/information must be presented to the Surrogate's Court?

- The original will (not a copy);
- a petition for a decree of probate and appointment of an executor;
- a certified copy of the death certificate; and
- depositions or affidavits of attesting witnesses to the will signing.
- Additional information, such as a family tree, may be required and differing local court rules may need to be followed.

Does every estate need to be probated?

A will must be probated to determine the will's validity. New York courts ruled many years ago that "a will enjoys no presumption in favor of its validity." However, probate may not be necessary in all cases and many categories of

property pass outside the will, including joint property, life insurance and retirement plan assets.

What about very small estates?

Very small estates, with or without a will, may not need court-supervised administration. A simple and inexpensive method of administering the estate of a deceased person whose personal assets in the decedent's name alone do not exceed $30,000 (exclusive of certain types of property, the clerk of court can provide more information as to whether you qualify), for persons who died on or after January 1, 2009; or $20,000 for persons who died before then. Voluntary administration may not be used to administer real property. For example, if a deceased person died owning a car, a house in a joint name with his spouse, and a small amount of cash in a joint bank account with the spouse, it would be unnecessary for the surviving spouse to obtain a Letters Testamentary.

What is the difference between probating a will and the settling of a small estate without court administration?

An executor, probating a will, has been appointed in the will and is following the deceased person's specific requests and directions.

A "voluntary administrator" is usually a surviving spouse or other relative (or the chief fiscal officer or public administrator of the county) who qualifies and voluntarily takes up the task of settling the deceased's estate without the formality of court administration.

While each party may have received their authority in different ways, their duties are essentially the same.

What must be done by a voluntary administrator to settle an estate?

A "voluntary administrator" must file with the clerk of the Surrogate's Court an affidavit and a certified copy of the death certificate of the deceased person. A fee of $1 is paid for the filing, and the clerk records it in an index book. The clerk gives the administrator a certified copy of filing that the administrator may use to show authority to pay debts and carry out other various duties to settle the estate. A voluntary administrator is NOT paid for his or her services.

What documents and information are needed to file with the clerk of the court?

A completed affidavit (a filled-out form that may be obtained from the Surrogate's Court) and a certified copy of the death certificate.

Probate forms can be found here:
http://www.nycourts.gov/forms/surrogates/probate.shtml

Small estate forms can be found here:
http://www.nycourts.gov/forms/surrogates/smallestate.shtml

For additional assistance, you can contact the New York State Court System by phone, 1-800-268-7869, or email at questions@nycourts.gov.

What must be done before the estate is considered completely settled?

If the voluntary administrator collects any of the deceased person's money, s/he must open an estate bank account and pay all the necessary administration expenses, the funeral bill of the deceased person, and any other debts of the deceased person. S/he must then distribute the remainder of the estate to the deceased person's beneficiaries.

When the administration of the estate is completed, the voluntary administrator must account for all personal property of the deceased by filing with the clerk of the Surrogate's Court a certified copy of an affidavit containing a statement of all assets collected and of all payments and disbursements made supported by canceled checks and releases and discharges from those receiving the disbursements. There is no court filing fee for the accounting.

Do all assets of the deceased pass though probate?

No. Many assets pass outside the will and so are not subject to probate, including jointly owned property (with right of survivorship), life insurance, retirement plans and IRAs (which pass to the named beneficiaries) and property held in transfer on death accounts and Totten trusts. In addition, certain assets qualify as exempt property and pass automatically to the surviving spouse or, if there is no surviving spouse, to children under the age of 21, regardless of what the will says.

RETIREMENT PLANNING: RETIREMENT INCOME

What things should I consider when planning for retirement?

1. Setting a target date for retirement;
2. Determining the amount needed for retirement expenses;
3. Planning for savings and voluntary pension contributions to meet the targeted amount;
4. Figuring out how much in current assets you have (i.e. cash, checking accounts, savings accounts, 401(k), bonds, CD's, etc.).

It is foreseeable that individuals retiring this century may spend up to 30 years or more in retirement. Making those years comfortable requires **adequate savings and careful planning today**.

Financial planning for retirement is often referred to as a **"three-legged"** stool. The three legs of the stool are social security, individual savings, and employer retirement benefits (or pensions). Developing an adequate retirement plan requires an understanding of the three contents and their integration to develop an effective retirement plan.

The Social Security Administration has a Retirement Planner on their website that helps people better prepare for their retirement.

To get more information, go to the following website:
https://www.ssa.gov/planners/retire/.

What part will Social Security play in retirement income?

When Social Security was enacted in 1935, it was solely a retirement program intended to provide financial support for retired workers. In the 80 years since its enactment, coverage has been added for other groups of people, so that today, in addition to the old-age benefits, payments are available to the blind, the disabled, and dependents and survivors. These programs are funded by social security taxes.

The Social Security and Medicare taxes--also known as FICA--are deducted from your paycheck and matched by an equal amount paid by your employer. For self-employed individuals, benefits are funded by self-employment taxes. Additional taxes are paid by individuals with high earned income or high investment income.

These taxes pay for four different types of benefits:

- **Retirement income:** At any point from age 62 on, you can retire and receive a monthly benefit for life. Your spouse and children may be eligible for benefits too.

- **Survivors' benefits:** This is life insurance protection. In the event of your death, your spouse and children may receive payments. If you support your parents, they may also be eligible.

- **Disability benefits:** Of particular importance to you and your family during your working years, the disability benefit assures you of a monthly income if you are unable to work because of an illness or other disability. The disabling condition must be expected to last at least 12 months, or to result in death. Your spouse and your children may also be entitled to payments while you are getting disability benefits.

- **Medicare**.

Social Security should be only a part of a "three-legged stool" approach to retirement planning and viewed as the foundation of your retirement financial plan. It should not be viewed as your sole source of income for retirement but rather the beginning point from which to develop your financial plan for retirement.

How important is the individual savings "leg"?

Social Security and pensions could provide less than half of your pre-retirement earnings, making personal savings the deciding factor in the type of retirement you will enjoy.

How might I maximize my individual savings?

Be sure to take full advantage of retirement savings vehicles that offer the benefit of tax-deferred growth. **Don't forget to look at the total return, which means capital appreciation (or growth) plus income.**

What are some of the common tax deferral techniques?

Invest $5,500 a year ($6,500 if you are over 50) in an **Individual Retirement Account (IRA)**. Whether or not you qualify for a deductible contribution, you still get the benefit of tax-deferred compounding. You and your spouse can each have an IRA.

Make the maximum allowable contribution to your **employer-sponsored retirement plan** (i.e., 401 (k) plan). The dollar cap changes each year, so be sure your contribution keeps up. For 2018, the maximum is $18,500 ($24,500 if you are 50 or older).

Open a retirement plan to shelter a portion of any income you receive from board memberships, freelance jobs, lectures, consulting, etc.

The tax rules are complex, so consult a qualified advisor before deciding which technique is most suitable for you.

What should I aim for when choosing retirement investments?

In addition to seeking out tax-deferred investments, you should aim to diversify assets intended for retirement. **Don't put all your eggs in one basket.** It may be advisable to place your assets in a variety of investments including stocks, bonds, and cash (or cash equivalents).

What level of risk should I assume when investing?

The younger you are, the more time you have to weather market cycles and you should consider **growth-oriented** investments. However, although such investments offer a higher rate of return, they may also involve a higher level of risk. As retirement gets closer, you may want to strive for more stable returns by focusing more on **income-oriented** investments.

How can I counter the effects of inflation?

By keeping at least part of your portfolio invested in growth-oriented investments, even during your retirement, you can counter the effects of inflation.

PENSION PLANS AND PENSION RIGHTS

What are the general types of pension plans and what are the general characteristics of each?

The most common plans are: **Defined Benefit** and **Defined Contribution,** which are **Qualified Retirement Plans**.

- **Defined Benefit** plans identify or define the benefit amount each participant will receive at retirement age and then estimate how much

must be contributed each year to accumulate the necessary future fund. Interest rates, ages of participants, and other factors will have an effect on the calculation. An actuary determines the amount of the contribution. Some benefit options include those based on a flat percentage of compensation; a percentage, which increases with years of service; or, a percentage which changes at certain compensation levels. In each, *the investment risk rests on the employer.*

For example, the plan might provide that, beginning at age 65, you will receive a pension, payable for your life, equal to 1% of your salary (averaged over the last 5 years before retirement) for each year of service. You can often retire as early as 55, but the monthly amount will be reduced.

- **Defined Contribution** plans generally contribute a percentage of current salaries into the plan each year. A defined contribution plan does not guarantee the amount of your pension: the amount paid at retirement will be equal to your account balance, which will depend on the plan's investment return and the number of years for which contributions were made. *The investment risk rests on the employee/participant.*

What are the advantages of a Defined Benefit Plan?

This type of plan generally favors **older employees** because more of the employer's contributions must go into the plan for them, to make certain that there will be enough money accumulated to pay the promised (or defined) benefit at retirement age.

What are the advantages of a Defined Contribution Plan?

Your share of the plan's investment earnings is credited directly to your account, so you benefit from good investment results. Many Defined Contribution plans give employees choices as to how their accounts are invested, so you can choose investments appropriate for you. Finally, because most Defined Contribution plans allow you to receive a lump sum, you have more flexibility after you retire.

What are the common kinds of Defined Contribution plans and what are their general characteristics?

Money Purchase Pension: The employer contributes a fixed percentage of the participating employee's salary each year. At retirement, the employee receives the

amount that has accrued. For example, the plan might require the employer to contribute 5% of your salary each year.

Profit Sharing Plan: Similar to the Money Purchase Pension, except that contributions do not need to be a specific percentage of pay, and they do not need to be made every year. Generally, the employer has discretion whether it makes a contribution and how much it contributes.

Employee Stock Ownership Plan (ESOP): Similar to the Profit Sharing Plan, except that an ESOP is designed to invest primarily in the employer's stock. The employer contributes company stock instead of cash.

401(k) Plan: This is a Profit Sharing Plan allowing employees to make tax-deductible contributions by payroll deduction. An employee agrees to contribute part of his or her salary or a bonus. Most 401(k) plans have matching contributions by the employer, to encourage employees to save. For example, the plan might provide that the employer will make a matching contribution equal to 50% of your contributions up to 6% of salary, so that the maximum matching contribution is 3% of salary.

Keogh Plan: If you are self-employed, you can set up a **Keogh** plan to shelter part of your income from the business. This plan can be either a Defined Benefit or a Defined Contribution plan.

Simplified Employee Pension Plan (SEP): Similar to a Profit Sharing Plan, except that employer contributions are made directly to your own IRA.

SIMPLE Plan: This is a relatively new type of plan, which became available in 1997. Like a SEP, employer contributions are made to your IRA, and you can also make deductible contributions up to $12,500 for 2018 ($15,500 if you are 50 or older).

403(b) Plan: This plan is similar to a 401(k) Plan, except that (1) contributions can generally be invested only in annuity contracts or mutual funds and (2) only certain tax-exempt employers may sponsor a 403(b) Plan.

What choices may be made just prior to retiring that effect how my pension(s) is paid out?

Each plan has different rules. You should carefully read the summary plan description, which the employer is required to give you, and should seek professional advice before making any decision.

The usual options are:

- Lump Sum
- Installments
- Annuities

Many Defined Contribution Plans only allow a lump sum payout, and many Defined Benefit Plans only allow annuities.

What are the advantages and disadvantages of a lump sum?

If your plan allows lump sum distributions, the major advantage is that you can have the money transferred (or rolled over) to an IRA, without paying taxes until you start receiving payments from the IRA. You control how the money is invested and, if the money is invested well, you will be able to generate more income than an annuity will provide. The disadvantage is that you have the responsibility for investing the funds: if you are unlucky, or receive bad advice, you may lose money.

What is a single life annuity or a joint and survivor annuity? What are the advantages/disadvantages of taking each one? Who must make the decision?

A single life annuity is paid only for the life of the pensioner. A joint and survivor annuity is paid for the lives of the pensioner and his or her spouse. Taking a single life annuity means a higher monthly payment but also means that the monthly payments end no matter when the pensioner dies (even if shortly after retirement). By electing a joint and survivor annuity, the monthly payment is lower, but payments continue until both persons covered by the annuity die.

For example, assume that you are retiring at age 65 and your spouse is also aged 65. Assume also that you die at age 70, and that your spouse (who is your beneficiary) survives you and dies at age 80.

The plan administrator informs you that you have the following options:

- A single life annuity of $1,000 per month. You would receive $1,000 each month for the 5 year period from your retirement to your death. No further payments would be made after your death.

- A 10 year certain annuity of $900 per month. Under this annuity, payments would be made for your life; and if you die before the end of the 10 year guaranteed period, payments would continue for the

remainder of the period. So you would receive $900 each month for the 5 year period until your death; and after your death your spouse would receive $900 each month for the remaining 5 years of the 10 year period. However, payments to your spouse would end when she is 75; 5 years before her death.

- A 50% joint and survivor annuity of $850 per month. You would receive $850 each month for the 5 year period until your death; after your death, your spouse would receive $425 per month (50% of $850) for the remaining 10 years of her life.

- A 100% joint and survivor annuity of $750 per month. You would receive $750 each month for the 5-year period until your death. After your death, your spouse would receive $750 each month for the remaining 10 years of her life.

NOTE: **The above numbers are only an illustration**. Each plan uses different adjustment percentages.

Some plans do not offer annuities. If your plan does, then both the employee and spouse must generally agree on the selection of how the benefit is paid. You should seek advice as to which option is best for you and your family.

SMALL ESTATE

What is a small estate?

A small estate is the estate of any individual who dies, either testate or intestate, owning property with a value of less than $30,000, which will pass through the estate. Jointly owned property, life insurance payable to a named beneficiary, retirement accounts or other bank accounts payable to a named beneficiary, and exempt property as described in EPTL Section 5-3.1 are not included.

Exempt property includes the following:

- housekeeping utensils and furnishings with value not exceeding $20,000;
- bible, books, video tapes, software and pictures with value not exceeding $2,500;
- domestic animals and food with value not exceeding $20,000;
- automobile with value not exceeding $25,000; and
- cash or personal property not exceeding $25,000.

How is a small estate settled?

A small estate is settled by a voluntary administrator without the need for formal court administration. The voluntary administrator is either the executor *or* alternate executor named in the will, or if the decedent died intestate or neither the executor nor the alternate executor wishes to act, a surviving spouse, adult child or other relative as set forth by law. The voluntary administrator acts without bond.

Can an interest in real property be transferred in a small estates proceeding?

An interest in real property cannot be transferred via a small estates proceeding, but the mere fact that the decedent owned real property does not mean a small estates proceeding cannot be implemented to administer the decedent's personal property.

Who completes the Affidavit in Relation to Settlement of Estates?

The Affidavit in Relation to Settlement of Estates is completed by the voluntary administrator and filed with the court for a $1.00 filing fee. The administrator then obtains certificates of affidavit, which are brought to the bank or other institution holding assets of the decedent in order to liquidate the asset.

How are the assets distributed?

Debts of the decedent are paid (including administration and funeral expenses), then the balance of the account is distributed to the persons entitled, either those named in the will or distributees. Ultimately, once the estate is distributed, the voluntary administrator files an accounting and provides the court with copies of canceled checks or other indicators of receipt of funds.

TRUSTS

INTRODUCTION

Many people would be unsure or inaccurate in their answer if asked, "What would happen to your assets if you were gone tomorrow?" This *should* be an easy question to answer. It is certainly an important one. We work all of our lives to accumulate assets, and we should have control over where those assets go after we are no longer here to enjoy them. However, due to various rules of law, determining an estate plan is not always easy.

For example:

> Wills do NOT control the distribution of all assets. Many assets are distributed outside of the will, so the plan of distribution in a will does not describe the total plan. Property passing under a will does NOT avoid probate.

Making lifetime gifts to children can have serious income tax consequences for both parents and children, particularly if the gifted property has appreciated in value since the parents acquired it, or if the parents' personal residence is gifted.

If you are no longer able to manage assets due to incompetency, a court proceeding would be required in order to take over management of your solely owned assets even if your spouse was available to manage assets. Accounting records showing every penny earned and every penny spent would be mandated by the court.

If minor children or grandchildren inherit property and provisions for management of that property are not specified in a will or trust, the child will receive the entire inheritance at the age of eighteen in New York.

Wills, trusts, and other estate planning documents can be very important in preserving our property and in distributing property during our lifetimes or at our deaths. Without a will or trust, a person's assets are disposed of according to state

law at that person's death. State law, called the *law of intestacy*, may or may not match what the deceased person's desires were as to who should get the property or how the property should be handled.

Even if current law matches a person's wishes for distribution of his/her estate, intestacy law may change. Unless a person wants to constantly keep up with changes in the law, it is wise to have a will or trust.

Will and trust provisions are usually accepted as written, and are generally not affected by changes in the law. However, there are some restrictions on will and trust provisions. For example, a spouse cannot be totally disinherited unless specific steps are taken, such as agreements entered into during lifetime, and where the spouse agrees to total disinheritance.

Although there are some limited exceptions for appointing a guardian for a minor while a parent is still alive, generally, without a will or trust, a person has no opportunity to personally select guardians for minor children, to name the person who should manage the children's assets until they are distributed to the children at a particular age, or to select the person who should handle the details of distributing the estate. Without estate planning, these important decisions are left to a judge who can only apply state law to determine what would be reasonable under the circumstances. Most people would prefer to set their own guidelines for distribution and management of assets. If no special provisions are made, minor children receive their share of the estate immediately upon reaching the age of majority, which is 18 years of age in New York. Through trust provisions, parents can give directions and restrictions on how and when assets should be distributed.

Clearly written wills and trusts can minimize the cost of administering an estate. If a will is used and probate is required, the will tells the probate court what the deceased's wishes were so the court can quickly and inexpensively approve procedures to carry out those wishes. A trust may be used to avoid the probate process, allowing for transfer of assets to beneficiaries with no court intervention.

Provisions may be added to your estate planning documents to prevent unnecessary bureaucracy. For example, the document may provide that if a beneficiary does not survive by at least 90 days, that beneficiary will be deemed not to have survived. This provision could save the cost and delay of probating assets through the estate of the deceased beneficiary to get them to the actual recipient. This provision can also be used in some cases to avoid application of the generation-skipping transfer tax.

A survivorship clause also prevents an unintended distribution of property. Suppose Frank and Joan are a married couple with no children, and have no will or trust. Under the law of intestacy, the distribution of property is determined according to the order of death. If an accident occurs and only one spouse survives, the surviving spouse inherits all property. If the surviving spouse lives for only a week due to injuries incurred in the accident, all assets are inherited by the relatives of the second spouse to die, since the predeceased spouse's relatives are not considered heirs of the spouse who survived one week. Since the spouse who survived legally owned all assets, only that spouse's heirs receive an inheritance. A survivorship clause in a will or trust allows you to establish the amount of time a beneficiary must survive in order to inherit.

It is very important that wills and trusts are drafted according to statutory requirements, are clearly written, and cover all details of the estate plan. If ambiguities arise after death, the person whose document is being discussed is not available to answer questions. Professional help is highly recommended.

Thinking about death, accident, or illness is never pleasant. However, if something does happen, that is not the time for family members to be forced into making decisions and/or to be burdened with excessive administrative details. Planning ahead is much more efficient, inexpensive, and thoughtful than burdening a family during a period of grief. We all work too hard to accumulate property to allow it to be wasted on unnecessary bureaucracy or to allow it to go to someone other than the people or cause of our choice.

DELAYS IN PROBATE

Most people, if asked, would prefer to avoid the expense and time delay of having their estate probated. According to a national survey, sixteen months is the average length of time involved between a person's death and completion of all paperwork required to conclude the probate process. Some of these delays occur in order to analyze various tax savings opportunities and to gather information on current assets and outstanding liabilities. These delays may occur whether probate is required or whether non-probate techniques are used to transfer assets after death. Other delays occur due to notices and mandatory waiting periods required under probate statute and can be avoided through estate planning.

THE COST OF PROBATE

Although fees vary considerably, New York's probate fees, established by statute, are about average among states. Fees to settle an estate do not include special fees for sale of assets, tax preparation and litigation, or personal

representatives' fees. Applying New York statute, the following are examples of applicable probate fees:

Value of Estate or Subject Matter	Probate Fee Rate
Less than $10,000	$45.00
10,000 but under 20,000	$75.00
20,000 but under 50,000	$215.00
50,000 but under 100,000	$280.00
100,000 but under 250,000	$420.00
250,000 but under 500,000	$625.00
500,000 and over	$1,250.00

Although avoiding probate may be less expensive than probate, avoiding probate does not necessarily avoid all of the various fees described above. Expenses are involved in gathering asset information, paying debts and expenses, tax planning and filings, distribution of assets, and other activities regardless of whether probate is required or not. However, utilizing probate avoidance techniques *does* avoid requirements of obtaining signed waivers from heirs, various notices and waiting periods, paperwork required to be filed with the court, and potential court hearings. In many cases, use of probate avoidance techniques is advantageous to minimize expenses, implement tax planning methods, prepare for management in the event of incapacity, and coordinate titling and beneficiary designations on assets so your wishes are carried out.

Various methods of avoiding probate exist. Probate takes place when the owner of property dies. If a joint owner or beneficiary exists for the property, the property avoids probate.

Three common examples of property passing outside probate:

- **Ownership in joint tenancy with right of survivorship**.

  Upon the death of one joint tenant, the surviving joint tenant(s) become the sole legal owner(s), and probate is not required. Probate will be required upon the death of the last surviving joint tenant, since no other owner will survive.

- **Life Insurance, Retirement Plan (such as 401(k)), Individual Retirement Account (IRA) or Annuity with a named beneficiary.**

Upon the death of the insured, account owner or annuitant, the surviving beneficiary is the legal owner of the proceeds and probate is avoided. However, probate is NOT avoided if the insured's/owner's/annuitant's estate is listed as beneficiary or if the beneficiary is deceased. Therefore, it is very important to have a primary and a contingent beneficiary listed, so the proceeds are paid to the contingent beneficiary if the primary beneficiary is not available. Then the proceeds still avoid probate.

- **Non-probate assets passing to minor children.**

  If an asset is transferred to a child *outside* the will or trust through titling or beneficiary designation on an account, life insurance policy, or other asset, the child will receive the asset at the age of majority, even though the will or trust provides that children will not receive assets until a later age. However, titling and beneficiary designations *may* be coordinated with the terms of a trust established for a child under a will or trust. Coordinating IRA beneficiary designations and trusts is especially tricky, but can be well worth doing if there is any likelihood of a young child inheriting a large IRA.

THE LIVING TRUST: A STORY

Avoid Probate While Maintaining Total Management and Control of Assets

A revocable living trust is a method of totally avoiding the probate process. If all assets are owned by a trust, no court is involved in the transfer of trust assets upon death. Therefore, no newspaper notices or letters to heirs are required, no records become public, and no statutory waiting periods apply. It is still necessary to determine what assets exist to pay creditors, to file required tax returns, and to distribute assets to beneficiaries. However, avoiding court proceedings and court requirements simplifies and expedites the process.

Probate only arises when the legal owner of property dies, leaving no joint owner or named beneficiary. A living trust avoids probate because ownership of assets is legally transferred to the trustee or co-trustees (managers) of the trust. Instead of owning property as Frank, the name on the deed, account, security or other asset is changed to "Frank Clark, trustee of THE FRANK CLARK REVOCABLE TRUST under agreement dated _____."

		Frank Clark, trustee of
		the FRANK CLARK
Frank Clark	→	REVOCABLE TRUST
		under agreement
		dated _____.

The trustee of the trust owns the property. Frank, as trustee, has total control over all property just as he did before. Frank could spend money, mortgage, sell or give away assets. He can do anything he would do if the trust did not exist. If Frank should ever lose the ability to manage his financial affairs, the named successor trustee takes over as trustee and manages the trust assets on Frank's behalf. Married couples who have revocable trusts often designate each other as successor trustee and name at least one additional successor trustee in case the spouse is also unable to serve effectively as trustee.

When Frank dies, no probate is required since the trust is still the legal owner of the property. According to the provisions of the trust agreement, the party named as successor trustee will have the power to distribute property according to the terms provided in the trust. The successor trustee is typically the same person or institution who would be named as executor in a will. This should be someone who is capable of completing paperwork, is responsible with money, and can get along with the named beneficiaries. The successor trustee can be the surviving spouse, a family friend, one of the named beneficiaries, or a bank or trust department. Living trusts work well for either married or single people. In the case of a married couple, each spouse has his or her own living trust. If the spouses want to leave everything to each other, then each living trust would designate the spouse's living trust to receive the trust's assets. Each trust would also designate backup beneficiaries in case the spouse had predeceased.

Joint living trusts holding the assets of both spouses are common in a few mostly Western states which have what are known as "community property" laws governing married couples' ownership of assets. Joint living trusts can work well for married couples who live in these states. In New York, as in the majority of states that do <u>not</u> have community property laws, joint living trusts can actually cause serious legal problems. For that reason, they are generally best avoided here.

For single people, the living trust is especially advantageous since the alternative of joint tenancy is usually not practical. If Frank's mother, Joyce Clark,

chose to avoid probate with a living trust, she would execute a trust agreement and change the name on her assets to "Joyce Clark, trustee of the Joyce Clark Revocable Trust under agreement dated _____." The date that the trust was signed is included in the name of the trust to insure that assets are credited to the correct trust.

		Joyce Clark, trustee or successor trustee(s)
Joyce Clark	→	of the JOYCE CLARK REVOCABLE TRUST under agreement dated _____.

For purposes of illustration, assume that, at this time, Joyce Clark has only one asset: an apartment building worth $200,000. She owns this property in her sole name. Joyce has a will which leaves everything to her son, Frank. Upon Joyce's death, Frank takes the will to his attorney and asks what needs to be done. Frank's attorney explains that various papers must be filed with the probate court so the court can authorize Frank to manage the property during the pendency of the probate proceeding. After a waiting period passes, required tax returns must be filed and taxes paid, and an accounting of all activity which occurred since the date of death must be completed. Administrative fees for this process must be paid even though there may be no cash available in the estate.

Frank asks the attorney, "What do I get for this expense and time delay?" The attorney responds, "You get the judge's order saying that the property is yours." Frank stammers, "But the property *is* mine. Mom wanted it to be mine, her will says it's mine, and no one is disputing the fact that it's mine."

Frank leaves the attorney's office and does nothing. He wonders why anyone would spend money on probate. Three years later, Frank receives an offer from a buyer who wants to purchase the building. The offer is for $300,000, but is contingent upon a quick sale since the buyer needs to complete the purchase rapidly for tax planning purposes. Frank is tired of managing the building, could use the cash, and knows that several repairs will be needed soon.

Much to Frank's dismay, he discovers that he cannot sell the property. The deed to the building is in Joyce's name and because she is deceased, she cannot sign a deed transferring the property to the buyer. Frank returns to the attorney and asks how to clear title so that sale can be consummated. The answer: Probate must be initiated to get Frank nominated as executor with authority to transfer the property. Initiation of probate procedures and issuance of a document authorizing Frank to act as the estate representative may be expedited in order to clear title prior to the buyer's deadline. However, Frank's failure to get tax releases may constitute a cloud on title which could take several weeks to clear.

In the meantime, Frank's buyer may be lost. If the sale doesn't go through and Frank keeps the property, the same title problem will arise if he ever wants to mortgage it. In order to clear title, the probate process must be commenced. Substantial additional costs will now be included since tax returns and accounting of all expenses and income must incorporate the entire period of time since the date of Joyce's death. Tax penalties and interest may apply. Income tax rates applicable to income earned may be higher than would have been required if returns were filed promptly and planning was done. Time delays will increase administrative costs.

The moral to this story:

Probate cannot be avoided unless planning is done in advance.

There are various techniques to ensure that Joyce could avoid the probate process with regard to the apartment building.

First, she could transfer the property to Frank during her lifetime. If she did this Joyce would no longer have a legal right to income from the building. Even if Frank gave her the income from the building, the income would be taxable on Frank's income tax return, form 1040, and at Frank's income tax rate. Frank's creditors could reach the building, and, if Frank got a divorce, the building could affect the divorce settlement. Additionally, a great income tax advantage (i.e. a step-up in cost basis upon death) would be lost by gifting the property to Frank during her lifetime rather than letting him inherit it. Possible gift tax ramifications must also be considered. In addition to other considerations, Joyce must keep in mind that if Frank predeceases her, the building will be probated through his estate if it had been put into his name.

A second technique that Joyce could employ to avoid probate of the building would be to transfer the building to Frank and herself as joint tenants with right of survivorship. This form of ownership would eliminate probate of the property as long as either Frank or Joyce survived. However, the concerns outlined earlier

regarding putting property in someone else's name such as tax, creditor, and management problems would apply to Frank's one-half ownership in the property. Whether Joyce changes the name on her deed to Frank's name solely or to Frank and Joyce as joint tenants, Joyce will need Frank's permission in order to mortgage or sell the building.

A third option to avoid probate of Joyce's estate would be execution of a living trust. In order to put the trust into effect, Joyce must sign a revocable living trust agreement, and then execute a deed that transfers the apartment building from Joyce Clark to "Joyce Clark, trustee of the JOYCE CLARK REVOCABLE TRUST under agreement dated _____."

		Joyce Clark, trustee
		of the JOYCE CLARK
Joyce Clark	→	REVOCABLE TRUST
		under agreement dated
		_____.

Let's assume that Frank is named as successor trustee of the trust. Pursuant to the trust agreement, Frank has two duties. If Joyce becomes incompetent as evidenced by written affidavits from two physicians, Frank would step in and manage the trust assets, in this case the apartment building, for Joyce's benefit. This would eliminate the requirement of going into court to prove that Joyce is incompetent to manage her affairs. Upon Joyce's death, the legal owner of the property does not die, so probate is not required. The deed shows the trustee of the trust as owner of the apartment building. The trust agreement appoints Frank as successor trustee so that upon Joyce's death, Frank becomes the trustee of the trust and has legal authority to transfer the property to the beneficiaries named in the trust agreement. In this case, Frank is the beneficiary, so he issues a deed that transfers the property from "Frank Clark, successor trustee of the Joyce Clark Revocable Trust under agreement dated _____," to Frank Clark.

Tax returns must be filed, but no probate, statutory waiting periods, or notice requirements apply. Time requirements and costs of administration are reduced.

If Joyce wanted to avoid probate, but did not want to name Frank as successor trustee, she could instead appoint a family friend or other individual or a bank trust department or other professional could be appointed as successor trustee.

A LIVING TRUST: AN ESTATE PLANNING DOCUMENT

This document:

Avoids probate of the estate, so no court is involved.

To the extent the trust is funded, trust assets avoid probate, so no court is involved. Funding is essential: setting up the trust only avoids probate to the extent that assets are effectively transferred to the trust (e.g., by a deed in the case of real estate).

Eliminates the requirement of public notices in a newspaper if family members are unknown or cannot be located.

Keeps your plan of distribution private.

Is acceptable in all states, so avoids probate of out-of-state property as well as property located in the state of residency. (A will requires probate in each state where real estate is owned and in the state where the deceased lived on the date of death).

Provides for management of assets by a family member or an institution (whichever you select) if you are unable to manage assets due to health problems and avoids proving incompetency in a court proceeding.

Helps in organizing lists of assets for personal financial planning and helps beneficiaries locate assets.

Allows for optimum tax planning using federal and state income, gift and estate tax law, yet requires NO extra tax returns or filings.

Does not affect your ability to manage and control your own property and does NOT require management fees to be paid to anyone unless you *wish* to appoint an outside manager.

As with all estate planning, each person's individual situation and wishes must be analyzed before a decision is made as to the most effective planning technique. In considering living trusts or other probate avoidance and estate planning techniques, it is very important that a professional knowledgeable about living trusts be consulted. Just as an obstetrician may not be the one to do heart

surgery, all attorneys are not familiar with the most effective methods of using living trusts.

Living trusts may not be for everyone, but for many people, a bit of extra planning now in setting up a living trust can save much time, money, and frustration for their loved ones in the future. **Estates take a lifetime to create, and should be protected as much as possible!**

LIVING TRUST

Introduction

A Living Trust is a method of avoiding the probate process if properly funded. If assets are owned by a trust, no court is involved in the transfer of assets upon death. Therefore, no newspaper notices or letters to heirs are required, no records become public, and no statutory waiting periods apply. It is still necessary to determine what assets exist, to pay creditors, to file required tax returns, and to distribute assets to beneficiaries. However, avoiding court proceedings and requirements simplifies and expedites the process.

A trust is a legal entity created and funded during the lifetime of the creator for the benefit of designated beneficiaries under the laws of the state and a valid trust document.

- The **grantor** (or settlor) is the creator of the trust;

- The **trustee** holds legal title to the property and has the responsibility to manage the trust's principal assets and income for the economic benefit of all the beneficiaries; and

- The **beneficiaries** can be either *current* beneficiaries who receive income and/or principal during their lifetimes from the trust, or *remainder* beneficiaries who receive the balance of the trust principal and/or income when the trust is terminated.

What if I change my mind? Can a Living Trust agreement be changed or revoked?

Living Trusts may be set up in any way that is desired by the person or people putting assets into the trust. A Revocable Living Trust allows you to amend any provision of the trust or to totally revoke the trust.

REVOCABLE LIVING TRUST

What is a Revocable Living Trust? How does one function?

A Revocable Living Trust is a trust established during the lifetime of the trust creator in which he or she:

- transfers the legal ownership of the trust property to the trustee;
- retains the right to control income and principal;
- retains the right to revoke or amend the trust any time prior to death; and
- after the trust creator's death, the trust becomes irrevocable and serves as a will substitute by directing how the trust assets are to be distributed.

The trustees of the trust own the property. Thus instead of owning property as Frank Smith, the name on the deed, account, security or other asset is changed to Frank Smith, trustee of the Frank Smith Revocable Trust under agreement dated _____. Frank, as trustee of the trust, has total control over all property just as he did before. Frank could spend money, mortgage, sell, or give away assets, or do anything he would do if the trust did not exist.

If Frank should ever lose the ability to manage his financial affairs, the named successor trustee takes over as trustee and manages the trust assets on Frank's behalf. Married couples who have revocable trusts often designate each other as successor trustee and name at least one additional successor trustee in case the spouse is also unable to serve effectively as trustee.

When Frank dies, no probate is required since the trust is still the legal owner of the property. According to the provisions of the trust agreement, the party named as successor trustee will have the power to distribute property according to the terms provided in the trust. The successor trustee is typically the same person or institution who would be named as executor in a will. This should be someone who is capable of completing paperwork, responsible with money, and who can get along with the named beneficiaries. The successor trustee can be the surviving spouse, a family friend, or one of the named beneficiaries or a bank or trust department.

What are the advantages of creating a Revocable Living Trust?

Advantages include:

- Using the trust to plan for future incapacity (an alternative to guardianship) by ensuring continuity of management of your assets if you

are no longer able to take care of your own financial affairs;
- Avoidance of probate in another state if you own real property in that other state (a will requires probate in each state where real estate is owned and in the state where the deceased lived on the date of death)
- Avoidance of probate so no court is involved;
- Potentially, earlier distribution of your assets after death;
- Keeping your plan of distribution private;
- Eliminating the requirement of public notices in a newspaper;
- Allowing for optimum tax planning using federal and state income, gift, and estate tax law, yet requires no extra tax returns or filings; and
- Allowing you to remain in control and manage your own property and does not require management fees to be paid to anyone unless you wish to appoint an outside manager.

What are the disadvantages of a Revocable Living Trust?

Disadvantages include:

- Higher attorneys' fees to draft a Revocable Living Trust and Pour-Over Will
- Costs of funding the trust (that is, transferring ownership of assets to the trust and reviewing all beneficiary designations);
- The cost of a third-party trustee to manage your trust (by law, trustees receive a yearly commission and a commission in the year the trust terminates, based on the assets of the trust, unless otherwise provided for in the trust document);
- The loss of control when a third-party trustee manages your property during your lifetime; A creator of a Revocable Living Trust can serve as his or her own trustee as long as he or she has the capacity to do so;
- The cost of preparing the trust income tax returns if the creator of the trust is not the trustee;
- Foregoing the assistance of the Surrogate's Court in monitoring the stages of estate administration; and
- Lack of a statutory time period after which creditors' or contestants' claims are cut off.

What a Revocable Living Trust will NOT accomplish:

A Revocable Lifetime Trust does <u>not</u> shelter your assets from state and federal estate and income taxes. Retaining the right to revoke or amend the trust is

considered, under federal and New York tax law, sufficient control of the property to include it in your taxable estate.

What must be done to fund a Revocable Living Trust?

Again, it is essential that a Revocable Living Trust be funded properly.

In order to fund the trust:

- Bank accounts must be transferred to the trustee of the trust;
- The trustee of the trust must be made the registered owner of stocks and bonds;
- Real estate must be deeded over to the trustee of the trust.

If every asset owned individually by the person has not been transferred to the trust prior to death or does not have a beneficiary designation, such asset must go through probate or other proceeding in the Surrogate's Court before the asset can be distributed to beneficiaries.

How are assets managed with a Revocable Living Trust?

Assets transferred to the Revocable Living Trust must be managed by the trustee and accounted for separately. All income is paid to the trustee who then distributes the income in accordance with the terms of the trust.

Additionally, the trustee is usually given direction in the trust agreement with respect to investments and distribution of the trust principal.

When the creator is serving as trustee of the trust, he or she retains control over the investment and distribution of the trust assets.

If I have a living trust, do I still need a will?

If all assets are held in the name of the living trust, a will is not used at the time of death. However, a will must be signed in conjunction with a living trust to deal with after-acquired assets, or assets that it is not practical to transfer to a trust, or in case an asset is inadvertently left out of the trust. The will simply states that any property not already in the living trust should be transferred to the trust. This document is called a POUR-OVER WILL since it POURS assets over into the trust.

Does having a living trust mean that I still have to file income tax returns?

As long as the person who put the assets into the trust is the manager of the trust, the individual will continue to file and pay income taxes in exactly the same way as before the trust was created. Income generated by trust assets is simply treated as income of the individual, so no extra tax returns are required. There is no need for the trust to obtain a separate federal tax I.D. number.

Can having a living trust save me money on taxes as well as avoid probate?

It may be able to contribute toward the goal of minimizing taxes but it usually can't do the job alone. Depending on the size of the estate and several other factors, tax planning can minimize income, estate and/or gift taxes. Tax planning incorporates all of the components of a person's or a couple's estate, including jointly held assets, assets such as life insurance, annuities, and IRAs (which have separate beneficiary designation documents), assets held in a living trust, and assets owned outright. Therefore, tax planning language included in a living trust would be just one aspect of a carefully coordinated plan.

So minimizing taxes and avoiding probate are separate matters. Yes, they can be—and often are—combined in an individual's or a couple's estate plan, especially for the tiny minority (under 2%) of people whose estates are large enough to become potentially subject to estate taxes.

When my spouse passed away, no probate was required. Why should I be concerned with probate of my estate?

Don't be fooled into thinking probate is not required because probate did not rise on the death of the first spouse. It is very likely that no probate was required on the first death because the couple may have owned all property in joint tenancy. This form of ownership allows the surviving joint tenant to inherit property without going through the probate process. However, when only one joint tenant survives, probate will be required to transfer assets upon the remaining joint tenant's death.

How large must an estate be to make a living trust worthwhile?

One benefit of a living trust is that it allows assets to be transferred to beneficiaries with no court involvement. Prior to executing an estate plan, cost of completing the estate plan and expense of steps required upon disability and/or death utilizing various types of planning tools should be compared. Specific probate fees may vary from state-to-state and from attorney-to-attorney, but the

chart of Surrogate's Court fees earlier in this section is a place to begin in approximating potential probate fees.

Although administration of a living trust is generally less costly than probate, a trust will not eliminate all fees of administration since, even with a trust, titling must be verified, values determined, expenses paid, and distributions made. The trust *does* eliminate all court involvement, maintains more privacy than probate, eliminates notice requirements and waivers from beneficiaries, and, in many cases, simplifies implementation of tax planning techniques.

The benefit of a living trust also depends upon the personal desires and goals of each individual. In some cases, regardless of whether dollars can be saved in the long run, an individual may not want to spend time or money completing estate planning during lifetime. The right estate planning tool for you depends upon your personal goals.

In some cases, the desire to keep affairs private and to allow for transfer of assets without waiting periods required in probate may make use of a living trust beneficial regardless of the level of cost savings. The primary goal of any estate plan must be to achieve the individual's desired objective. No minimum estate value is required in order to benefit from a living trust. The type of assets involved and overall goals should be assessed to determine whether a living trust would be beneficial.

What is the cost to set up a living trust?

Costs of a living trust will vary substantially from attorney-to-attorney and from state-to-state, and costs will vary depending upon your particular estate planning needs. An initial consultation will allow you to meet an attorney and discuss your individual situation. At the conclusion of that meeting, a cost estimate should be made available to enable you to balance costs vs. benefit.

The cost of a living trust may exceed the cost of a will. However, a comprehensive estate plan—whether a will or trust—should include an analysis of titling and beneficiary designations on existing assets. Otherwise, the will or trust will not effectively transfer assets to the correct beneficiaries. If this analysis is properly completed, the costs of an estate plan utilizing a will or a trust will not be significantly different in cost.

In order for a living trust to work properly, it is important that the law office provide advice and forms to help in changing the name on the title of assets to the trust. It is also important that the living trust agreement is coordinated with a will,

a durable power of attorney and other documents which all work together to accomplish your goals. When comparing costs of living trusts, legal services to fund the trust should also be considered. Prior to deciding to purchase a trust, you should be aware of total cost involved and all the steps necessary to fully fund the trust.

Will a living trust protect my assets from potential nursing home costs?

Revocable living trusts, which allow you to continue to manage your own assets and which can be revised or revoked at any time, have been discussed in this commentary. Revocable living trusts *will not* shield assets from nursing home costs. Assets held in a revocable living trust will be considered to be your assets for purposes of Medicaid eligibility. Medicaid is the government program which covers costs of nursing home care for those eligible. Eligibility is available only to those whose income and assets are under allowable levels. If you can manage and control the assets, the assets are considered as yours for purposes of Medicaid eligibility.

Is an attorney necessary in setting up a living trust?

Many sources exist for 'purchase' of a living trust. Do *not* purchase a living trust without personally meeting with the attorney who drafts it! Your estate plan affects every asset you own, including tax ramifications and final distribution. Mail-order documents or documents sold by non-attorneys are *extremely dangerous* and are often more expensive than an estate plan personally designed for you by a reputable estate planning attorney. Information from a financial planner or another non-attorney financial professional can be very helpful in planning, but document drafting should *always* be completed by an attorney with whom you have had a confidential appointment to discuss your individual goals and specifics of your situation. Beware of documents which are drafted by someone you have not met with personally.

Trusts are like any type of estate plan. They *must* be customized to your individual situation. As a consumer, what you pay for is individual advice and application of tax, probate, and other state and federal law to your specific needs and goals.

What are other types of trusts?

Trusts may be either **revocable** or **irrevocable**:

- *Revocable* trusts which may be amended or terminated during the

lifetime(s) of the trust creator(s); and

- *Irrevocable* trusts which generally may not be amended or terminated during the lifetime(s) of the trust creator(s).

In New York a trust is considered to be irrevocable unless the trust document states that it is revocable.

Trusts may be divided into two further categories: Lifetime trusts, or *inter vivos* trusts, are established during the lifetime of the individual creating the trust; and *Testamentary trusts* which are established at the death of the individual creating the trust in the creator's Will.

A lifetime trust is irrevocable unless it expressly states that it is revocable.

Trusts may be established for any legal purpose.

Some examples are:

- for providing for the creator of the trust or the spouse, child, or other beneficiary;
- for tax planning;
- for the use by a beneficiary during his/her lifetime with the remainder to go to a charity;
- to manage assets in case of incapacity; or
- to avoid probate; i.e. to opt out of court-supervised administration of an estate.

Why would a person want to set up an Irrevocable Lifetime Trust?

An Irrevocable Lifetime Trust is *not* the same as a Revocable Lifetime Trust.

An Irrevocable Lifetime Trust is used to address different estate planning objectives, such as:

- to provide asset management for a beneficiary who needs financial assistance now, but who is immature or financially irresponsible;
- to provide asset management for a disabled beneficiary;
- for Medicaid planning;
- to provide payments during the lifetime of the initial beneficiary or beneficiaries with a charity receiving the trust balance at the death of the initial beneficiary or beneficiaries;

- to remove assets from a person's taxable estate or to achieve validation discounts in the net worth of certain assets. Some of these trust arrangements trigger the payment of gift taxes and the filing of gift returns.
- life insurance trusts – to remove the proceeds of life insurance from the estate of a decedent;
- minors' trusts – to provide management of the assets and to pay income and principal for the support, maintenance, and education of a minor;
- charitable trusts – to help an individual obtain income tax deductions, increase diversification of an investment portfolio without incurring an immediate capital gains tax, increase cash yield generated by assets and decrease the size of the estate.

WILLS

What is a will?

A will is a written, legal document that sets forth how a person (the testator) wants his or her property distributed or not distributed at the time of his or her death. A will is signed (executed) by the testator with formalities required by state law. A will may be changed or revoked during the lifetime of the testator.

What are the legal requirements for the writing and signing of a will in New York?

To execute a will, the testator must be eighteen years of age or over and of sound mind and memory. Generally, the testator must sign the end of the will in the presence of two witnesses who know that the document being signed is a will. The witnesses should be disinterested, that is, they do not have an "interest" in the estate of the testator.

Do different laws in other states mean that a will made in New York would not be accepted in another state?

Generally, a will that is valid in the state in which it was executed is valid in another state.

Can a will made in another state be accepted in New York?

New York recognizes wills that were validly executed in another state.

Why is it desirable to have a will? What happens if a person does not have a will?

If you write a will, you have control over how your assets will be distributed and to whom, and you can appoint the person who will handle your affairs after your death. If you die without a will and have assets that do not pass automatically to another at the time of your death, state law will dictate how those assets will be

distributed. This law is referred to as the *Law of Intestacy.* That is, when a person dies *intestate*, or without a will, often the way state law or the courts direct distribution of a deceased's estate is not what that individual would desire, especially if you want assets distributed to a person outside of your family.

What assets pass automatically without needing a will?

Assets in joint names with another individual, such as a joint bank account; in trust for another individual, or payable on death to another individual, for example, life insurance proceeds or IRAs, pass to the named individual (beneficiary) and do not pass by the terms of your will. These assets are considered to pass "outside the will."

If all my assets are owned jointly or set up to pass outside my will, do I still need a will?

It is advisable to have a will for any assets you may have forgotten to put in joint names or made other provisions for. If you do not have a will and have assets that would be distributed under the will, the laws of intestacy will apply for those assets. If all your assets are owned jointly, you should have a will to direct how your assets should pass in the event that that other joint owner(s) predecease you.

Types of will provisions:

The average will:

- directs payment of funeral and administrative expenses;
- directs payment of the testator's debts;
- directs the manner and allocation of estate taxes if estate taxes will be due;
- names an executor; and
- directs how the testator's assets are to be distributed at his/her death.

Special circumstances can cause a wide variance in the contents of wills. A will may also:

- name a guardian for minor children and set up a trust for assets that might pass to those children;
- provide for disabled children;
- provide for gifts to charity;
- set up trusts for the benefit of children with the remainder to

grandchildren.

How can a will be changed? What should NOT be done to change a will?

Wills can be changed by:

- Executing a new will that revokes all prior wills; or
- Executing a codicil; this is an amendment to a will, and changes only certain parts.

Wills **cannot** be changed by writing the changes on the existing will or by crossing out items on the existing will.

How can a will be revoked?

A will can be revoked by physically destroying the document *or* by executing a new will which revokes prior wills.

Where should a will be kept? Where should a will NOT be kept?

Your original will should be kept in a safe place with other important papers. It can be filed for safe keeping with the Surrogate's Court in your county or kept in your attorney's vault. Your named executor should know how to locate your will.

A will should **not** be kept in the testator's safe deposit box, because there may be delays in opening the safe deposit box due to NYS tax department rules.

What happens if a will cannot be found after the testator's death?

If the original will, was in the possession of the testator and cannot be found after a diligent search, it will be presumed revoked by the testator unless it can be established that the will has not been revoked. If it is considered revoked, the laws of intestacy will apply. If the original will, was in the possession of an attorney or the Surrogate's Court and is lost or destroyed, the will can be "proven" by using a copy or draft of the will or by two credible witnesses who must be able to clearly and distinctly prove all provisions of the will.

What is the interaction between wills and trusts?

Trusts may be established by a will. This type of trust is a *testamentary trust.* A testamentary trust may be established for the purpose of:

- providing for a spouse, child, or other beneficiary;
- for tax planning; or
- for the use by a beneficiary during his/her lifetime with the remainder to go to a charity.

Wills may also be used to fund trusts. This type of will is a *pour-over will*. A pour-over will directs that estate assets be added to an existing trust (a living trust that was established during the lifetime of the testator) for further distribution in accordance with the terms of the trust.

What is the function of an executor/executrix of a will? Who can be an executor?

An executor is appointed by you to make sure that the provisions of your will are carried out. An executor can be a family member, trusted friend, or bank. A will generally appoints an alternate to serve if your executor predeceases you or is otherwise unable to serve.

An executor may have to post a surety bond to insure his or her faithful performance unless the Testator's will directs otherwise.

What if there is no executor or alternate who can act?

If the alternate is also unable to act, the Court appoints an administrator who is chosen according to statute but who acts according to the terms of the will.

What is probate and how does it work?

To probate a will means to go through a Surrogate's Court proceeding to prove to the Court that the will is valid. If there are no objections and the will appears in good form, there is rarely a problem with probate. A will is generally probated in the county in which the deceased was domiciled at the time of his or her death.

The cost of probate is determined by the total value of the probate assets (assets held in the name of the deceased alone).

FUNERAL ARRANGEMENTS

PART ONE

If you are planning a funeral, you may feel overwhelmed or confused. There are many important decisions to be made.

First, choose a funeral home with which you feel comfortable. You and the funeral director will have an arrangement conference. This could be done at the funeral home, your home, or in some instances, over the telephone. If you meet in person, you will be given a General Price List and shown the merchandise available. When you have made your selections, you will be given an Itemized Statement. For most funeral arrangements, this Itemized Statement will include contractual language that legally obligates you to pay the cost of the funeral. If the arrangements have been made by telephone, you will be given the General Price List when you receive an Itemized Statement.

As the person paying for the arrangements, you are the customer. You have the right to shop around or ask questions.

IMPORTANT TERMS FOR MAKING FUNERAL ARRANGEMENTS

Arrangement conference: the meeting between you and the funeral director during which you choose the services and merchandise you would like.

Basic arrangements fee: the price charged by the funeral home making all the arrangements for final disposition of the body. This covers the cost of a funeral director, staff, and the equipment to respond to a death or inquiry. The fee also includes the arrangement conference and securing necessary authorizations such as filing the death certificate and getting permits. You cannot decline this charge. Note: If you select a direct *burial or direct cremation, the arrangements fee cannot be added since it is already figured into the prices for these services*.

Burial: the most commonly chosen final disposition. Costs associated with burial include such services as grave opening and closing and/or perpetual care

(maintenance) of the grave site. You will also be charged by the funeral home for the purchase of a gravesite if you buy it through the home.

Cash advance items: items of service or merchandise paid by the funeral home to a third party, such as advance fees for the cemetery or crematory, death certificates and clergy. The funeral home cannot profit on these items. Some funeral homes require you to pay for these items before the funeral service. You may be able to pay some of these fees directly, if you choose. (Don't forget to get receipts for any money you spend, whether it is to the funeral home or to third parties.)

Casket price list: a printed or typewritten list that the funeral home presents to you before you discuss or are shown a casket. This list will provide a brief description of each casket and alternative container (such as a cardboard or pressed wood box) regularly offered by the funeral home. It must state the retail price of each item offered.

Cemetery deed: the document from the cemetery which establishes your right to bury the deceased in the plot. If the funeral director has the deed, he or she must return it to you within 7 days of the funeral, unless you have made a different agreement. Be sure to put it in a safe place, because it can be difficult to replace.

Columbarium: a type of vault with spaces for storing urns containing ashes or remains (see "cremation" below).

Cremation: a process which reduces the body to ashes. The ashes may be buried, placed in a columbarium, or kept in your home. Some people choose to purchase an urn for the remains rather than use the container provided by the crematory. There will be charges for the cremation and, if you choose, for an urn and space in a columbarium. You may also dispose of the remains in any manner that complies with state and local regulations.

Custodial care: a fee the funeral home may charge for days that the body is being held and no other services are being provided. This fee must be disclosed and identified as a daily, weekly, or one-time fee.

Customer: the person making funeral arrangements. The customer may be a family member, legal representative, or a friend legally designated by the decedent. The customer will be legally responsible for the payment of the funeral bill.

Customer's Designation of Intentions: a specific form that the funeral director will complete if you select cremation. It includes space for what you plan to do with regard to disposal of remains. You should be aware that 120 days after the

cremation, the funeral home has a right to dispose of the remains if you do not claim them. This fact, and the manner of disposition, must be clearly stated on the form. You must be given a copy of this form when arrangements are made.

Direct burial: the disposition of human remains by burial without a formal viewing, visitation, or ceremony, except for a graveside service.

Direct cremation: the disposition of human remains by cremation without a formal viewing, visitation, or ceremony.

Entombment: burial in an above-ground crypt in a mausoleum or in a lawn crypt. There will be a charge for the use of the crypt.

General Price List: a form which lists the price (or range of prices) for all of the services and merchandise regularly offered by the funeral home. This form must be given to you to keep at the beginning of the arrangement conference. You may request a copy from a funeral home when a personal visit is made. You do not need to complete funeral arrangements to receive this form.

Itemized Statement of Services and Merchandise: a detailed outline of the specific goods and services you chose, the price of each item, and a total cost. Also included is an estimate of the cash advance fees to be paid on your behalf to third parties. The Itemized Statement will serve as your contract.

Outer Internment Receptacle: a container in the ground, such as a vault or a grave liner, in which the casket is placed. Some cemeteries require outer interment receptacles to prevent collapse or sinking of the grave. If you do not want to buy one, be sure to choose a cemetery that does not require them.

Outer Internment Receptacle Price List: a printed list that the funeral home presents to you before you discuss or are shown an outer internment receptacle. This list provides a brief description of each outer internment receptacle regularly offered by the funeral home. It must contain the retail price of each item offered.

Refrigeration Fee: a fee charged by some funeral homes for cooling the body when embalming is not selected. If such a fee is charged, it must be stated up front, on both the General Price List and the Itemized Statement. This charge can be declined by the customer.

Topical disinfection: external cleansing of the body for which you will be charged. There cannot be an additional charge for this service when embalming is selected, since topical disinfection is part of the embalming process.

Transfer of remains fee: a fee for transportation of the body from the place where death occurred (or from the airport or morgue) to the funeral home.

IMPORTANT QUESTIONS ABOUT MAKING FUNERAL ARRANGEMENTS

Who can make funeral arrangements?

The customer. It is very important for family members to agree about the type of services and merchandise to be purchased. Ideally, the family should designate one person to make the arrangements and to convey the family decisions to the funeral director. The customer will generally be responsible for the payment of the bill.

Do I need a funeral director?

Yes, in New York State only a licensed and registered funeral director may make funeral arrangements for the care, moving, preparation and burial or cremation of a deceased person. The funeral director will file the death certificate, coordinate with cemetery or crematory representatives, make the necessary preparations, and move the body to the cemetery or crematory.

Does New York State require the use of a casket or outer internment receptacle?

No, but many cemeteries do require the use of a "suitable container". New York State law allows for the use of an unfinished wooden box or an "alternative container" made of cardboard, pressed wood, composition materials, canvas or other material. Even though burial vaults or grave liners are not required by law, some cemeteries require them to prevent collapse or sinking of the grave. If you do not want to buy a burial vault, choose a cemetery that does not require vaults.

Are you required by New York State law to embalm the body?

No. In fact, a funeral director must obtain specific approval to embalm from the customer. A funeral home may require embalming if certain services are selected, such as a viewing with an open casket. Embalming fees must be clearly stated on the General Price List, the Itemized Statement of Services.

Can the funeral director refuse to embalm the body?

No. The funeral home may not refuse to embalm or otherwise handle the body, regardless of the cause of death of the deceased. The home also may not charge extra for preparing or handling the body of a person who has died of an infectious disease, such as AIDS, hepatitis B, or tuberculosis.

Can the funeral director refuse to allow me to view the body when visitation has been selected?

No. While the funeral director may advise against a viewing due to the cause of death or condition of the body, the final decision is left to the customer.

Can I see the body for the purposes of identification?

Yes. No matter what the funeral arrangements are, the customer has the right to see the body briefly. If this process is prolonged, the funeral director may consider it a viewing or visitation and a fee will be required.

What will the funeral arrangements cost?

The costs of funeral arrangements vary greatly, depending on the funeral home and on the type of service and merchandise you choose. For example, if the service you select involves viewing the remains, the funeral home may require embalming and preparation of the body, which can be expensive. There is also tremendous range in the price of caskets, depending on style, type of wood, and lining. The least expensive type of funeral is direct burial or direct cremation.

If I choose a direct burial, can the funeral home charge for a graveside service?

A direct burial includes a graveside ceremony if the customer wants it. The price for the ceremony, excluding cash advances, must be included in the fee for a direct burial.

However, if the service required staff in addition to the funeral director supervising the burial, an additional charge may be added. If so, this charge must be clearly listed on both the General Price List and the Itemized Statement of Services.

Does the New York State Department of Health set the charges?

No. While the Department of Health regulates the business and practice of funeral homes, it does not regulate prices.

What can I do if I think the prices are too high?

You can call several funeral homes and compare prices. Funeral homes are required to give price information over the telephone. If you have shopped around and the price is still too high, you may have to reconsider your selections.

Can I rent a casket for viewing?

Possibly. Casket rentals are not prohibited and some funeral homes offer this option. If a funeral home offers rental caskets, it must be stated on the General Price List. If you rent a casket for viewing, you can then buy a suitable container for burial.

Can the funeral director criticize my selections?

No. It is illegal for funeral home staff to state or imply that any merchandise they offer for sale is unsatisfactory in any way.

Are there other actions that are illegal for funeral homes?

Yes. Illegal actions include:

- pressuring the customer to select certain services or merchandise;
- charging an additional fee for filing the death certificate or getting it medically certified;
- charging a "handling fee" for paying third parties on your behalf;
- charging a fee for handling the casket provided by the customer;
- charging interest on an outstanding balance unless this charge is disclosed at the time the funeral arrangements were initially made and is stated in the Itemized Statement;
- having persons other than a licensed funeral director make funeral arrangements, prepare the body, or supervise the burial; and
- misrepresenting the laws and regulations relating to funeral directing.

Remember: You do not have to accept services or merchandise you do not want!

You must be informed of all charges in advance! Always get a receipt!

Do I need more than one copy of the death certificate?

Yes—you will need to give certified copies to insurance companies, banks, and other parties who require verification of death. The funeral home may obtain them for you. The funeral director files death certificates with the Registrar of Vital Records in the locality where the death occurred.

Can I prepay my funeral?

Yes. Prepayment can lift much of the financial burden from your survivors. It also allows you to select the type of funeral arrangements you want. Pre-need plans are regulated by the Pre-Need Funeral Consumer Protection Act; for more information, read the New York State Health Department's publication "Before Prepaying Your Funeral, Know Your Rights."

Can the funeral home change arrangements without my permission?

No. The funeral director must obtain your approval before making any substitutions or changes.

What if the deceased wanted to donate organs?

It is important to honor the wishes of people who want to donate all or part of their bodies upon death. Those who want to be donors should carry organ donor cards, sign the donor space on the back of their licenses, include their wishes in their wills, and inform family members. For more information on organ donation, call 1-800-24-DONOR (1-800-243-6667).

What if I decide to change funeral homes?

You have the right to change funeral homes at any time. You will need to pay for any services that you have already authorized and have been completed. A funeral home must allow the transfer of the body to another funeral home; a funeral home may not hold a body in exchange for payment.

PART TWO

Do you want to plan your funeral now, and be sure that your family doesn't have to pay for your funeral?

You can preplan your own funeral and pay for it in advance. But before doing so, you should review a brochure on the topic published by New York State titled: "Before Prepaying Your Funeral, Know Your Rights." It is available online at https://www.health.ny.gov/publications/0703/.

This brochure explains your rights under the law, and the decisions you need to make when preplanning or prepaying your own funeral, or that of a friend or relative.

What is the difference between preplanning and prepaying?

You can preplan your funeral without paying now. Once you have selected a funeral home, you can discuss your wishes with the funeral director. When your plan is complete, the funeral director will keep it on file until it is needed. Your estate will then have to pay for the services at the rates being charged when your funeral is held. In addition to preplanning, many people choose to prepay their funeral expenses. Prepaying for a funeral allows you to pay for your funeral ahead of time.

There are two ways to prepay. The first method is by agreeing with the funeral home to deposit the funds into a trust with the funeral home as beneficiary. The second method is to deposit the funds in a bank account for the benefit of the funeral home. Either way, you can agree to pay the specified amount of money in one lump sum or in installments.

Are there advantages to preplanning funeral arrangements?

Preplanning funeral arrangements can reduce the concerns of your family or friends who would otherwise have to guess what you would have wanted for your funeral. A local funeral director can provide professional advice on this important matter.

Are there advantages to prepaying funeral arrangements?

By prepaying funeral arrangements, you can have peace of mind that the money needed for your funeral has been set aside. If the funeral director has guaranteed the funeral, your survivors will not have to worry about how to pay the

bill. When you prepay, the funeral director will provide a Pre-Need Agreement which addresses many important matters such as: how the final expenses will be determined; if additional funds will be needed when death occurs; what will happen if the merchandise selected is no longer available; and what will happen if any money remains after the funeral bill is paid.

Are there drawbacks to prepaying?

As with any financial transaction, there are potential drawbacks. While the law gives New Yorkers some of the strongest protections in the country, it does not provide absolute protection. Ultimately, if you prepay your funeral, your money is under the control of the funeral director.

There are some additional considerations you must make before entering into a prepaid funeral arrangement:

- Make sure you always have a pre-need agreement for services whenever you prepay a funeral, whether it is directly with a funeral home or on your own with the funeral home as beneficiary.
- Let someone you trust know that you have prepaid your funeral arrangements and the name of the funeral home. Otherwise, they may select a different funeral home and pay again.
- Always deal with a funeral home with which you are familiar and comfortable, or that has been recommended by someone whom you trust. Know how and where your money is being deposited.
- If you pay by cash, get a receipt and keep it in a safe place.

How do I prepay my funeral?

Once you have selected your funeral home, you should meet with the funeral director. Prior to making any selections, the law requires the funeral director to give you:

- A **General Price List** with the current prices for any merchandise, services and facilities offered by the funeral home.
- A **Pre-Need Itemization Statement** that lists the items of merchandise, services, and facilities you have chosen, and the price of each. You can leave the details of some items open until you have made a final decision, or until you have chosen someone to make these decisions for you. A **Pre-Need Agreement** that outlines all the terms, as well as your rights as the purchaser. It must also state how the principal and interest will be applied to the cost of your funeral services and merchandise at the time

they are provided, funeral homes may offer a guaranteed funeral or a non-guaranteed funeral in the agreement.

What is a "guaranteed" funeral?

With a *guaranteed* funeral, the funeral home guarantees to provide the services, merchandise and facilities you selected for the amount of money in your account. The guaranteed funeral is not affected by future price increases since the funeral home accepts the principal and interest as payment in full. Your estate will not have to pay anything extra for those items that are guaranteed. A guaranteed funeral will not include certain items, such as cemetery costs, clergy fees, death certificate fees, etc.; however, the funeral home cannot charge more than its actual cost for these cash advance items.

What is a "non-guaranteed" funeral?

With a *non-guaranteed* funeral, the funeral home provides the items and services you selected, at the rates being charged at the time of your funeral. The principal and interest of your account will be applied to the funeral home's total charges. If this amount does not cover the expenses, your estate will be charged the difference. If the amount in your pre-need account is greater than your funeral costs, the excess money will be refunded to your estate.

Is it possible to prepay cemetery, crematory, clergy and death certificate costs?

Yes. But many funeral homes prefer not to include these expenses because they have no control over them. If you want to prepay these expenses, they will probably be non-guaranteed. As an alternative, you can deal separately with the cemetery, crematory, or monument dealer.

What happens to the money I prepay to a funeral home?

The funeral director must deposit your money within 10 days in an interest-bearing account or a government-backed investment, such as U.S. Treasury bills.

How will I know my money has been deposited?

The funeral director must notify you where your money has been deposited within 30 days of the deposit. Also, the location and amount of interest earned will appear on the IRS form 1099-INT (or equivalent) sent to you in January of each year. Check the account information carefully each year. Also, upon your written

request, the funeral home must advise you of the total value of your account, including principal and interest.

Am I responsible for paying income taxes on the interest earned by this account?

Yes. It is still your money.

Can I get my money back if I change my mind?

If you established a revocable agreement, you can withdraw the principal and the accrued interest at any time. The funeral director cannot charge any processing or administrative fees, or penalties for early withdrawal. However, if you established an irrevocable agreement you cannot withdraw any principal or interest.

When is an irrevocable agreement established?

You must establish an irrevocable agreement if you are applying for Medicaid, or if you are applying for Supplemental Security benefits under Section 209 of the Social Services Law. These are the only instances for which an irrevocable pre-need agreement may be established. The moneys paid to fund these agreements may not be refunded under any circumstances.

If there is an irrevocable agreement, can I change funeral homes?

Yes. The moneys may be moved from one funeral home to another. To have the moneys transferred, notify the funeral home in writing of your new choice of funeral home. The moneys must be transferred within 10 days of the receipt of your request.

If moneys are left in an irrevocable account after the payment of the funeral expenses, is the money returned to my estate?

No, any moneys left in an irrevocable account must be paid to the county.

Can my next of kin change my preplanned or prepaid funeral arrangement?

Yes. Changes in the funeral arrangements you have chosen can be made by your next-of-kin when death occurs. If you do not want the arrangements to be changed, you should speak with an attorney. An attorney can tell you what

additional legal documents, beyond the pre-need agreement, are needed to prevent any changes.

What happens if the funeral home sells its business to another funeral home?

Both funeral homes must provide written notification to you WITHIN 30 DAYS of the sale. At any time, you can: change your arrangements, request your money back with interest, or give written authorization to transfer the funds to another funeral home.

What happens if the funeral home goes out of business?

The funeral home must return your money, with interest, or you can give written authorization to transfer the funds to another funeral home. The funeral home must notify the State Health Department of the disposition of all of the money being held in trust for pre-need agreements. If the funeral home fails to notify the State Health Department, and the owner relocates, it may be difficult to get your money back.

To confirm that the State Health Department has been notified that a funeral home had gone out of business, call the Bureau of Funeral Directing at (518) 402-0785.

What can I do if I am treated unfairly?

If you think that you have been a victim of unfair or illegal practices, you can file a written complaint by writing:

New York State Department of Health
Bureau of Funeral Directing
875 Central Avenue
Albany, NY 12206

In addition, the State Attorney General can seek a court order for restitution and issue fines.

How do I complain about a cemetery or crematory?

New York State does regulate cemeteries and crematories. You can send a complaint to:

NYS Department of State
Division of Cemeteries
One Commerce Plaza
99 Washington Avenue
Albany, NY 12231-0001

However, if the cemetery is owned by a religious organization or is municipally-owned, it may not be subject to regulation.

How do I complain about a Funeral Director?

Complaints can be made in writing to one of the following:

New York State Department of State
Division of Cemeteries
One Commerce Plaza
99 Washington Avenue
Albany, NY 12231-0001

New York State Department of Health
Bureau of Funeral Directing
875 Central Avenue
Albany, NY 12206

https://www.dos.ny.gov/cmty/index.html

https://www.health.ny.gov/professionals/funeral_director/

For more information on preplanning or prepaying, see your local funeral director.

DURABLE POWERS OF ATTORNEY

Please note that changes to the law regarding powers of attorney became effective September 1, 2009.If you executed a power of attorney prior to September 1, 2009, it remains in full force and effect provided it meets all the requirements of the law in effect at the time you executed it. It is not affected by the changes in law on September 1, 2009.

What is a durable power of attorney?

A power of attorney is a document which allows you--the **principal**—to give another person—your **agent** or, the older term, still in use, **attorney-in-fact**—the authority to make decisions necessary for managing your financial affairs, such as paying your bills, selling or buying property, or even managing your investments.

You can choose any competent, trusted individual over the age of 18 to act as your agent.

A **"durable"** power of attorney authorizes your agent to continue making those decisions for you even if you lose the capacity to make your own decisions. The durable power of attorney is an important document to put in place when you are planning for incapacity. A power of attorney is automatically a durable power of attorney unless you indicate otherwise.

The durable power of attorney **becomes effective when you and your agent sign the document and your signatures are acknowledged before a notary public; you and your agent do not have to sign the document at the same time.** The durable power of attorney remains in effect until your death, unless you revoke it.

A new power of attorney does not automatically revoke any older powers of attorney you have previously executed unless you specifically indicate otherwise.

What makes a power of attorney durable?

In New York, the power of attorney is durable unless it specifies otherwise.

Why should I have a durable power of attorney?

A durable power of attorney helps you avoid an expensive, complicated, and lengthy court procedure to appoint a "guardian" if you should ever become incapacitated, because you will already have an agent in place to manage your financial matters.

A statutory short form durable power of attorney (discussed in greater detail in question 4 below) contains a long list of powers that you may grant your agent. The powers in the list—for example, "banking transactions"—are shorthand for lengthy explanations included in New York's General Obligations law. These powers are therefore much more expansive than they appear to be on the face of the form, and cover a very wide range of financial matters. If you grant all of the powers, your agent will therefore have broad authority to manage your financial affairs, if you become incapacitated and unable to manage them yourself. For many people, the powers on the statutory short form will suffice to cover the kinds of financial matters that come up. However, for other people, the "plain vanilla" statutory form may not include all of the powers necessary for the agent to manage all of the principal's financial affairs. In this case, additional powers are written and included in a designated place on the statutory short form durable power of attorney.

If you want your agent to engage in estate planning and asset protection, you must execute a **Gifts Rider** along with the statutory short form durable power of attorney. See discussion at question 5 below.

It is best to consult an attorney to insure your power of attorney is expansive enough to cover your particular needs.

A word of caution is in order at this point. In order to be useful in addressing your needs if you become incapacitated, a durable power of attorney allows you to grant extensive powers to the agent. These powers potentially could be abused. It is therefore *extremely* important that you take great care in deciding whom to name as your agent.

What is a statutory short form durable power of attorney?

A statutory short form durable power of attorney means that the durable power of attorney form is included in a New York statute (namely, section 5-1513 of the General Obligations law). "Short form" means that the powers listed on the form are shorthand for about twenty pages of language in the statute, all explaining the powers in great detail. The "statutory short form" power of attorney is much shorter.

The statutory short form durable power of attorney is a legal form which, when filled out, will grant certain powers to your agent.

The short form of power of attorney provides a relatively simple mechanism for a person (known as the **principal**) to appoint one or more persons (known as the **agent(s)** or **attorney(s)-in-fact**) to act on the principal's behalf in a wide variety of financial and other transactions.

For example, the short form will allow you, the principal, to grant to your agent powers pertaining to:

- Buying or selling real estate, personal property, stocks and bonds, and insurance;
- Banking transactions, business operating transactions, or estate transactions on your behalf;
- Making expenditures or collecting funds for you with regard to litigation, personal relationships, or benefits from military service;
- Assigning to another the power(s) that you have given to him or her;
- Tax matters; and
- Retirement benefits.

What if I want my agent to transfer my property to himself or herself or other members of my family when I become incapacitated?

If you want your agent to have authority to make gifts of your property and engage in other non-compensated transfers of your property, such as changing the beneficiaries of your retirement plan or insurance policies, you must execute a document called a **Gifts Rider.** The **Gifts Rider** is an optional document. It is up to you to decide whether to give the agent this type of authority.

The **Gifts Rider** must be signed by you, and your signing of it overseen by two witnesses, just as if you were executing a Will. It must be executed at the same time that you execute the statutory short form power of attorney. The consequences

of executing a **Gifts Rider** can be very significant as it authorizes the agent to take actions that could reduce your property or change how your property is distributed upon your death.

Before executing a **Gifts Rider** you should seek legal advice to avoid unintended consequences and to ensure that your intentions are clearly and properly expressed.

Are there any additional powers not enumerated in the statutory short form durable power of attorney that I may wish to grant to my agent?

Powers granted from a principal to an agent can be expanded, restricted, or "customized" as the principal designates. However, if you wish the agent to use the durable power of attorney for estate planning and asset preservation purposes, you must execute a **Gifts Rider** along with the Statutory Short Form Power of Attorney as described in Section 5.

Are there other types of powers of attorney?

New York allows you to create two other powers of attorney: the nondurable power of attorney and the durable power of attorney effective at a future time (usually called a "springing" power of attorney).

The **nondurable power of attorney** ceases to be effective when the principal becomes incapacitated. The nondurable power of attorney is not appropriate for use in planning for incapacity and should therefore be **avoided** for this purpose. As of September 1, 2009, in New York, the statutory form is a durable power of attorney. You, as principal, may create a nondurable power of attorney which will cease to be effective upon your incapacity by modifying the standard form. You can do this by including a statement such as "This Nondurable Power of Attorney will cease to be effective if I become incapacitated" in the section of the form labeled "modifications." The "modifications" section of the statutory short form should be used as the collection point for all modifications of the basic statutory form, including language converting the form to a nondurable power of attorney.

The **springing power of attorney** specifies an event or circumstance that causes the power of attorney to take effect. To convert the standard form to a springing durable power of attorney which is to take effect at a certain date or upon the occurrence of a stated contingency, you should add language in the section of the form labeled "modifications" specifying that the power of attorney does not

become effective until the date you have chosen or the contingency you have chosen. One of the more common contingencies listed is the principal's incapacity.

Under a springing durable power of attorney, it is necessary to designate the person or persons (often a physician) who will certify that the specified triggering event has occurred. This designated individual or individuals will complete an affidavit to the effect that your contingency has been met, thus allowing your springing durable power of attorney to become valid for the agent appointed in the document.

Although the springing power of attorney is a very appealing concept, in practice it is difficult to prepare and use. First, in preparing a springing power of attorney which will take effect upon incapacity, you must also execute a **separate document** (known as a HIPAA-compliant authorization for release of protected medical information). This authorization gives your physician your permission to release the certification of your incapacity to a third party (your agent). To be valid, this authorization must comply with strict rules set forth in a federal regulation called the HIPAA Privacy Rule.

There is no set form to use for such an authorization, so physicians, or more likely, their legal counsel, have to scrutinize each authorization submitted in order to make sure it complies with the rules. Thus, there may be delay before the physician's affidavit may be completed.

Second, many banks and other financial institutions are reportedly reluctant to accept springing powers of attorney because of lack of certainty that the springing event has in fact taken place.

Because of these difficulties, it is not advisable to prepare a springing power of attorney without the assistance of an attorney experienced in this area of the law.

What are the duties of an agent?

Your agent has a legal obligation to act in your best interest and to avoid conflicts of interest.

Your agent cannot make an uncompensated transfer of your property to himself or herself or to anyone else unless the statutory short form power of attorney is accompanied by a **Gifts Rider** which specifically grants this type of authority to your agent and which is signed before two witnesses in the same manner as you would execute a will.

Your agent may not exercise any power on your behalf that you have not specifically granted to them.

Your agent must keep a complete record of all transactions entered into on your behalf. The legal term for this collection of obligations is **"fiduciary duty."**

What powers are NOT available in New York to an agent under a durable power of attorney?

A durable power of attorney does **not** grant your agent the ability to make health care decisions for you should you become incapacitated. The right to make health care decisions is granted in a separate document known in New York as a "Health Care Proxy." (A similar document is known in some other states as a "power of attorney for health care" or "durable power of attorney for health care.")

You may appoint the same person as your agent under both a durable power of attorney and a New York health care proxy. However, you must execute two separate documents to do this.

To plan for future incapacity, you should execute **both** a durable power of attorney **and** a health care proxy.

A durable power of attorney cannot grant the agent the ability to create the principal's Last Will and Testament, or to exercise the principal's governmental voting privileges. And lastly, a durable power of attorney does not grant the agent (sometimes called the "attorney-in-fact") the authority to practice law without a license or to represent the principal in a court of law.

Is my agent entitled to compensation?

You may provide in the statutory short form power of attorney that you would like your agent to receive compensation for taking care of your financial affairs.

Is a durable power of attorney accepted by third parties such as banks and insurance companies?

It should be. It is a violation of law for a bank or other institution not to accept a properly completed durable power of attorney. However, many banks are reluctant to recognize this law and must be reminded of their legal obligation to do so. The New York law which mandates that banks and other similar financial institutions accept a properly executed power of attorney is General Obligations

Law section 5-1504. By law, banks and other institutions may not require you to execute a power of attorney on one of their forms as a condition of accepting the power of attorney.

How many copies of the durable power of attorney need to be signed?

Only one copy needs to be signed to make a legally binding durable power of attorney. However, for the sake of convenience, you may wish to execute duplicate originals for yourself and your agent(s), so that each of you might have one.

Many banks and financial institutions will require either an original or a certified copy before they will do business with your agent on your behalf. You can obtain certified copies of your power of attorney by filing (recording) it with the County Clerk and purchasing certified copies from the Clerk's Office. You may also receive an attorney-certified copy of your original document from your attorney.

Should I record my durable power of attorney at the County Clerk's office?

This is a matter of personal preference. By filing a durable power of attorney with the County Clerk's office for a small fee, you will be safeguarding against the loss of the document and you will ensure that certified copies can easily be obtained for your agent's use if you become incapacitated.

However, there are drawbacks to recording. Filing a document in the County Clerk's office makes it a public document, and an unscrupulous agent could easily acquire extra certified copies for improper uses.

As discussed below, if you recorded your power of attorney with the County Clerk's office and then revoke that same power of attorney, your revocation should also be recorded at that same County Clerk’s office.

If you will be using the power of attorney to transfer real estate, the power of attorney must be recorded in the office of the County Clerk where the property is located.

What if it is necessary to conduct business in another state?

While other states should recognize the grant of a power of attorney under a power of attorney properly executed under another state’s law, each state has its own statutory requirements for such documents. If you know that transactions may

be necessary in another state should you become incapacitated, it is best to find out what that state's requirements are concerning the durable power of attorney document and, if necessary, have a document drafted which meets the requirements of that state.

How might a later guardianship affect a durable power of attorney?

The appointment by the Court of a guardian does not necessarily revoke a durable power of attorney. Therefore, the agent may continue to exercise the powers granted by the durable power of attorney as if there were no guardian. If there is suspicion that the power of attorney was made while the principal was incapacitated or if there is suspicion that the agent is abusing the authority granted by the power of attorney, the Court has the authority to revoke the power of attorney upon presentation of evidence that the power was improperly granted or is being abused. The Court may choose to revoke, modify, or amend the powers granted to an agent. The Court may also invalidate any improper actions taken by the agent. The agent is personally liable for any fraud or abuse that he or she committed against the principal.

If I gave a durable power of attorney over my financial affairs to my son/daughter when I was seriously ill, and I have now recovered, can my son/daughter still act under that power of attorney?

Yes. Unless your durable power of attorney states that it will terminate upon a certain happening or contingency (and stating what proof of that contingency being met would be), the powers granted under your durable power of attorney will remain in effect until you revoke it or until you die. Such a contingency might be your recovery to a certain degree, spelled out by you. In such a case, you might designate your primary physician as the person to make the determination of your recovery; however, this would require a HIPAA-compliant authorization, with all its attendant difficulties.

If that power of attorney terminates, you should seriously consider executing a new durable power of attorney as part of planning for future incapacity.

What must I do if I no longer want my agent to act for me under a durable power of attorney?

If, for any reason, you wish to terminate or revoke a grant of power under a durable power of attorney, you must inform your agent in writing of your intention and you must take all reasonable steps to notify any persons or financial institutions which have previously been given a copy of your durable power of attorney. It

would be helpful to have your agent notify you of names and addresses of institutions that have been given a copy of your durable power of attorney so you can keep a list.

If the durable power of attorney was recorded or filed in the County Clerk's Office, you must also record a document stating that you revoke that power of attorney.

Remember that the key in New York law is *the knowledge of your revocation.* So, it is wise for you to be sure that you inform your (former) agent and every individual and institution you feel is pertinent *by certified mail, return receipt requested,* of your revocation of the power of attorney.

Again, it may be advisable to execute a new power of attorney naming another individual as your agent and recording your *new* power of attorney along with the revocation of the old power of attorney in the County Clerk's Office.

When is a power of attorney/durable power of attorney no longer valid?

A power of attorney which is **non-durable** is no longer valid if it is revoked by the principal or upon the incompetence or loss of capacity or death of the principal who created it.

A **durable** power of attorney or a springing power of attorney is no longer valid upon the death of the principal or once it has been revoked.

All authority granted to your agent by your power of attorney, *durable or not,* ceases upon your death.

Is an attorney's help necessary to execute a statutory short form durable power of attorney?

No. A durable power of attorney made without the assistance of an attorney-at-law is valid if it meets the requirements set forth in the various laws of New York State.

If you contemplate giving your agent authority to make gifts, you are strongly urged to consult an attorney-at-law.

However, it is strongly advised that an attorney counsel you, the principal, as to the various powers you may wish or need to grant to your agent to act on your behalf. He or she can also explain to you, *and your agent if you wish,* the fiduciary

and ethical responsibilities of your agent. Your attorney will advise you on your choice of agent, which is often the single most important decision you make regarding your power of attorney.

Additionally, by consulting an attorney, you can ensure that your document meets all of the necessary statutory requirements to be a valid and *durable* power of attorney and that it covers all contingencies and will stand up to scrutiny should you become incapacitated.

GUARDIANSHIP

What is a guardianship?

A guardianship is a court-administered relationship of one person appointed to make certain decisions for another because that individual is no longer able to make those decisions for him or herself. These decisions can concern the management of that person's property and/or can concern the management of that person's health or well-being (for a personal needs guardian).

New York State's Guardianship Statute (Article 81 of the Mental Hygiene Law) is designed to provide for the person who requires such help and also to instruct and provide guidelines for the guardian appointed. This statute attempts to ensure that the guardian's authority is narrowly tailored to do only those things that the person can no longer do for himself or herself. To help ensure this, a hearing is required before the guardian is granted any powers.

NOTE: New York also has a guardianship statute that covers individuals diagnosed with an intellectual disability or a developmental disability that arose before the age of 22 and a traumatic brain injury that occurred at any time. This statute is Article 17A of the Surrogate's Court Procedure Act. The discussion that follows addresses Article 81 of the Mental Hygiene Law. A consultation with an attorney would be helpful in deciding which statute is applicable.

Who might need a guardian?

The need for a guardian could arise when an individual becomes physically or mentally incapacitated for any number of reasons, including accident, disease, or merely the natural process of aging. This incapacity must pose a risk of harm to the individual and the individual must be incapable of understanding the nature and consequence of his or her incapacity and its potential risk.

Thus, any person who has incapacities that may pose a risk of harm to that person and who lacks a clear understanding of the nature and consequence of those incapacities might need a guardian.

Who can seek a guardianship for an individual?

A variety of people may commence a proceeding for the appointment of a guardian such as:

- The person him or herself;
- A relative, such as children, siblings, or parents;
- The chief executive of a hospital or other health facility where the person is a resident;
- A person with whom the person alleged to be incapacitated resides; and
- Others who can demonstrate direct concern with the welfare of the person alleged to be incapacitated.

In the event that a qualified person brings a guardianship proceeding, the procedure ultimately results in a court hearing where, with the assistance of reports prepared by Court Evaluators, the Court makes a determination as to whether or not a guardianship is necessary.

Who makes the determination that a guardian is needed?

The Court. The Court typically appoints an impartial evaluator to interview the **alleged incapacitated person (AIP)** and make recommendations to the Court. The Court hears from all of the interested parties involved, especially the alleged incapacitated person if that person is able to communicate his or her wishes. The court appointed evaluator, the AIP's attorney if represented by counsel, and the person seeking the guardianship, are all present and heard.

What are the responsibilities/duties of a guardian?

The guardian's most important responsibility is to make decisions for the incapacitated person. These decisions must be well reasoned, protecting the incapacitated person and within the scope of the authority the Court has granted the guardian.

These might include decisions such as:

- Managing the monthly income and expenses of the incapacitated person;
- Selling real or personal property;

- Hiring home health aides;
- Applying for government benefits; or
- Making health care treatment decisions.

The guardian's other responsibilities include:

- Visiting the incapacitated person at least four (4) times a year;
- Providing the court with a report no later than 90 days after his or her appointment that explains the steps the guardian has taken to meet the needs of the incapacitated person; and
- Providing the court with a yearly report on the status of the incapacitated person and whether the guardianship should continue.

When the guardian is appointed, the Court generally fixes the fee that will be paid to the guardian for his or her services. This fee is paid from the assets of the incapacitated person. The Court may also direct that a fee be paid to the Court Evaluator and/or the incapacitated person's court-appointed attorney.

Who is eligible to be a guardian?

Anyone over eighteen years of age is eligible to be a guardian. Typically, the Court appoints the spouse, adult child, parent, sibling, or the County Department of Social Services where applicable. Once appointed, the guardian may be directed to take a training course that explains the duties and responsibilities of being a guardian.

Can a guardianship be terminated?

If the incapacitated person becomes able to make decisions for him or herself, the guardianship can be terminated. The recovered incapacitated person, the guardian, or anyone who could have sought the appointment of a guardian can apply to the Court to have the guardianship ended. Guardianship can also be terminated pursuant to Article 81 (Section 81.35) if the Court determines that the guardian has failed to comply with its order, is guilty of misconduct, or for other reasons as the Court sees just.

ADVANCE DIRECTIVES: HEALTH CARE PROXIES, DNRs, AND LIVING WILLS

Advance directives are documents signed by an adult with decision-making capacity that will set in place procedures to allow for health care decision-making for that individual if he or she loses decision-making capacity.

HEALTH CARE PROXY

What is a Health Care Proxy?

In New York, the advance directive to appoint someone to make health care decisions for you if you become unable to make them yourself is the Health Care Proxy. With a Health Care Proxy, the individual ("principal") appoints an agent to make health care decisions if the principal is unable to do so. With a Health Care Proxy, the principal is setting up the process so that the agent can make decisions based on the circumstances at the time decisions need to be made. In New York, unlike some other states, the Health Care Proxy and a power of attorney are separate documents.

LIVING WILL

What is a Living Will?

A Living Will is also an advance directive. However, instead of setting up a process for health care decision-making, a Living Will contains a person's written instructions regarding such issues as the withholding or withdrawal of life-sustaining treatment in certain medical situations.

A person may want to refuse unwanted medical treatment, such as the administration of artificial food and water (or tube feeding), if faced with a terminal condition, permanent unconsciousness, or irreversible brain damage and no reasonable expectation of recovery. Others may use a Living Will to declare their desire for any available life-sustaining treatment.

Although New York is one of only a few states that does not have a Living Will statute, Living Wills are recognized in New York as evidence of a person's wishes.

How do these two "advance directives" differ?

As previously stated, the Health Care Proxy sets up a procedure so that the agent can respond with flexibility to unanticipated circumstances. A Living Will is an advance directive that contains specific instructions for certain situations.

Does an individual need both documents?

No, but you should recognize that each document serves a different function. In New York, an individual should execute a Health Care Proxy if he or she has a family member or other trusted person who can act as an agent on his or her behalf. The Proxy applies to all health care decision-making unless limited.

Many individuals also execute a separate Living Will document. This gives their health care agent further evidence of their wishes. It also provides lasting evidence of your wishes in case your agent and your alternate agent are unavailable or have predeceased you. It is often sufficient, however, to appoint an agent and then discuss your wishes with your agent.

If you wish your agent to have full decision-making authority over decisions involving tube feeding, it is helpful to include in your Health Care Proxy a statement such as the following:

> "I have discussed with my agent my wishes on artificial nutrition and hydration (tube feeding) and my agent will act in accordance with my instructions."

Some attorneys include both the appointment of a health care agent and Living Will language in a single document for their clients to sign. A person who lives part-time in another state may be wise to execute an advance directive according to the laws of the state with the most onerous or strict requirements. In the alternative, a person should consider having the document notarized in order to satisfy the recognition requirements of some other states.

Who can/should complete a Health Care Proxy?

All adults over the age of 18 who have decision-making capacity can and should have a Health Care Proxy. **They are not just for senior citizens.** Senior

citizens should encourage their children and grandchildren to also appoint a health care agent.

Who can be appointed as health care agent?

Any adult over the age of 18, a family member, a close friend, or another trusted person can be your agent. You also may select your doctor, however keep in mind that if you do appoint your doctor, he or she cannot act as both your attending physician and your agent. Also, there are special rules for residents of nursing homes or other facilities who appoint an employee of the facility.

Can more than one person be appointed?

Only one person may be appointed an agent, but it is possible and it is recommended that you name an alternate or successor agent if the person you appoint is unable, unwilling, or unavailable to act for you.

When would an agent act and what kinds of decisions can the agent make?

Your health care agent would have the power to make decisions for you only when it has been medically determined by your attending physician that you are incapable of making your own health care decisions. Notice of the physician's determination must be given to you if there is any indication that you would be able to understand such notice. Moreover, if a decision is to be made regarding tube feeding, the attending physician must consult with another physician to confirm that the patient lacks capacity.

If a medical determination of your incapacity stands, your agent can then make any decision for you that you could make for yourself. However, unless your agent has reasonable knowledge of your wishes about artificial nutrition and hydration, he or she will not be able to make medical decisions regarding those treatments for you.

What if I regain decision-making capacity? If I have a health care proxy, can I make my own decisions again?

Yes. Your attending physician is required to reassess your decision-making capacity periodically. If you regain capacity to make your own decisions, your agent's authority ends.

What should I (as the proxy maker or principal) discuss with my agent about the proxy?

- First, it is very important to discuss with your agent your intention to appoint him/her as your agent.
- Second, you should discuss your wishes and beliefs (religious and moral) regarding the extent of medical treatment you would wish in the event you are in particular medical circumstances.
- Third, you should discuss your wishes about artificial nutrition and hydration (tube feeding).
- Fourth, it is advisable to discuss acceptable outcomes with your agent. If you can, tell your agent more than merely, "if this happens to me, I would/would not want that." Discuss under what conditions you may or may not want particular life-sustaining treatments. What quality of life is acceptable to you?

How can a Health Care Proxy be revoked or the agent changed?

Your Health Care Proxy may be revoked or canceled by filling out a new form. You may also include an expiration date in your Proxy or state that it will expire upon the happening of a specific condition.

You may also change the person you want to act as your agent or you can change instructions on the Proxy form. If you do revoke or change your Health Care Proxy, you should promptly notify your agent and your doctor.

Where should the Proxy be kept, and who should be given copies?

You can keep your Proxy with your important papers. You can also keep a copy in your wallet or purse.

You should give a copy to your agent and your doctors. You do not have to give them an original. Photocopies are acceptable.

What are the legal requirements for completing a Health Care Proxy?

A Health Care Proxy must contain:

- The name of the person creating the Proxy;
- The name of the agent;
- A statement that the principal (creator of the Proxy) intends the agent to make health care decisions for him or her;

- The principal's signature;
- The date of the signature;
- The signatures of two witnesses (the agent may not be a witness); and
- A statement that the principal was acting of his or her own free will in signing the Proxy.

The New York Department of Health form contains all of this information and is recognized and accepted by hospitals and doctors.

Is a lawyer's assistance necessary?

No, a lawyer's assistance is not necessary to complete a Proxy.

Once a Health Care Proxy is completed, what factors may make a Health Care Proxy outdated?

You should review your Health Care Proxy periodically (every 2 or 3 years or every time a significant change occurs in your life) to make sure that your Proxy continues to reflect your wishes. At that time, you may wish to initial and date your Proxy indicating that you have reviewed it, and that it continues to reflect your wishes.

Additionally, if you have appointed your spouse as your agent and you become divorced or legally separated, you will need to redo your Health Care Proxy since the appointment of your spouse will be canceled automatically.

Where can I obtain a Health Care Proxy form?

The Health Care Proxy form and more information about the Health Care Proxy is available from the New York State Department of Health at:

http://www.nysba.org/Healthcareproxy/

https://www.health.ny.gov/professionals/patients/health_care_proxy/

FAMILY HEALTH CARE DECISIONS ACT

If you do not have a Health Care Proxy, the Family Health Care Decisions Act, passed in New York in 2010, provides for a list of people who can make medical decisions for you if you are unable to do so yourself. This list ranges from a court appointed guardian, to your spouse or domestic partner, all the way to a close friend if you have no living relatives.

Under certain circumstances, the surrogate acting under the Family Health Care Decisions Act, may make decisions regarding end-of-life treatment in your best interest. This act requires that someone can act as your surrogate and make medical decisions for you if you are unable to, based on your wishes, if known, or your best interests, if your wishes are not known.

A Health Care Proxy is generally better than relying on the Act, as it enables you to choose who makes the decisions and it applies to health care provided outside of a hospital or nursing home.

DO NOT RESUSCITATE (DNR) ORDERS

Who Is Subject to A DNR Order?

The sole purpose of the DNR Law was to recognize the decision of a patient or a surrogate decision maker to withhold cardiopulmonary resuscitation (CPR) from the patient in the event of cardiac or respiratory arrest. The sole medical decision authorized under this law is to withhold CPR in the event of cardiac or respiratory arrest. Originally, there were two types of DNR orders: (1) ones for hospitalized patients and (2) ones for non-hospitalized patients. With the enactment of the NYS Family Health Care Decisions Act in 2010, its provisions now govern issues regarding CPR for hospitalized patients. A separate law governs community or non-hospital DNRs.

This material addresses DNR orders for non-hospitalized patients or community DNR orders.

Who may request a Community DNR Order?

Any adult capable of making a decision regarding CPR may request or consent to the placement of a DNR Order in his or her medical records. A non-hospital 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. All adults are presumed by law to have capacity to make this decision.

If the adult has capacity at the time the DNR Order is to be issued, his or her consent must be obtained even if he or she consented to an order in the past unless the attending physician believes, and a second physician agrees, that the individual would suffer injury from a discussion regarding CPR. In that event, the physician may rely on a prior consent to a DNR Order. If no such consent exists, the

physician must consult the patient's health care agent or surrogate after attempting to ascertain the wishes of the patient.

Where the individual lacks the capacity to make a decision concerning CPR, the individual's health care agent, or, if no agent has been appointed, surrogate may consent to a DNR Order on the individual's behalf. A health care agent may consent to a DNR Order when the health care agent believes the principal would have wanted a DNR Order. A surrogate must comply with the Family Health Care Decisions Act requirements. A surrogate's authority is more limited, as noted below. A surrogate, in descending order of priority, may be one of the following: the spouse, adult son or daughter, a parent, adult brother or sister, or a close friend. If none of these individuals is available or able to make the decision, the individual's attending physician may make the decision and issue a DNR Order, provided a second physician chosen by the hospital agrees with the attending physician that CPR would be medically futile.

When can a surrogate consent to a community DNR Order?

A surrogate may consent to a DNR Order only when the individual:

- has a terminal condition; or
- is permanently unconscious; or
- CPR would be medically futile; or
- CPR would impose an "extraordinary" burden on the individual given the probable outcome.

The individual's attending physician, with the agreement of a second physician, must determine that the individual lacks the capacity to consent or object to a DNR order. In addition, the attending physician and a second physician must agree that one of the above physical conditions exists before a surrogate will have the authority to consent to a DNR Order.

How is a community DNR Order made?

An individual with capacity may issue instructions that CPR is to be withheld. The individual's attending physician then places a written DNR Order in the individual's medical record. If an individual lacks capacity and has a health care agent, he or she issues the instructions. If there is no agent, and a surrogate makes the decision consenting to a DNR Order, the physician must determine that the individual's physical condition falls within one of the categories listed above before placing a written DNR Order in the individual's medical record. The physician also

must review periodically the individual's condition to determine if the DNR Order is still appropriate.

COMPLYING WITH COMMUNITY DNR ORDERS

The only decision authorized under a DNR Order is to withhold CPR. Other medical decisions such as to give or to withhold other types of treatment are not authorized under this order.

Often, CPR is administered before it is discovered that a DNR Order exists. This happens most often when emergency medical personnel are called to an individual's residence or a individual suffers cardiac arrest when out in the community, and the person calling for medical assistance does not know of the DNR Order. This also happens when an unconscious individual is brought to the emergency room of a hospital.

If a DNR Order is not readily known, the EMS team administers CPR in the event of cardiac arrest.

The law presumes that an individual desires CPR.

If a surrogate has made the decision to consent to a DNR Order and other individuals on the list of surrogates oppose the order, the matter must be submitted for a dispute resolution. In contrast, if a health care agent has made the decision in accordance with a valid proxy, the agent's decision will stand.

How do emergency medical personnel identify individuals who have a DNR Order?

The individual and his or her family must make the DNR Order known by:

- Presenting the Order, which must be written on a standard form.
- Wearing a bracelet stating the existence of the DNR Order.
- Letting others who might be checking on the individual know of the Order so they can inform an EMT team that might be called. The individual or family should keep in mind, however, that EMT personnel are required to comply with a DNR Order only when they are actually provided with a non-hospital standard DNR form or when they identify the standard DNR bracelet on the individual's body. When those two forms are not present, the EMT personnel will not be held responsible for providing CPR.

Information about the form for a Community DNR and the DNR bracelet is available in Appendix C.

How can consent to a DNR Order be revoked?

An individual may revoke his or her consent to a DNR Order by telling a doctor that he or she wishes to revoke the Order. The individual also may give a statement in writing or revoke consent through his or her actions.

A surrogate also may revoke his or her consent to a DNR Order by notifying the attending physician in the presence of an adult witness. Any written declarations revoking consent to the DNR Order must be dated and signed.

AVOIDING SCAMS AND FRAUD

TELEPHONE SCAMS

Consumers of all ages should be careful about making purchases over the telephone. However, seniors are often made a special target by those selling bogus products and services.

Telemarketing fraud is a multi-billion dollar business in the United States. Every year, thousands of consumers lose anywhere from a few dollars to their life savings to telephone con artists. To protect yourself when you get a sales offer by phone, follow these simple rules:

- Don't buy over the phone from unfamiliar companies.
- Always take your time making a decision.

Legitimate businesses that sell by phone understand this. Remember that most people who lose money in telemarking scams never see a penny of it again.

Telemarketing Fraud

Fraudulent telemarketers try to take advantage of older people who may be more trusting and polite toward strangers. This is especially true of older women.

Here are some of the reasons people become victims of telemarketing fraud:

- It is often hard to know whether a sales call is legitimate. Telephone con artists are skilled at sounding believable – even when they are really telling lies.
- Sometimes telephone con artists reach you when you're feeling lonely. They may call day after day until you feel a friend, not a stranger, is trying to sell you something.
- You may find it hard to get salespeople off the phone—even if they are selling something that you are not interested in because you don't want to be rude.

- You may be promised free gifts, prizes, or vacations—or the "investment of a lifetime"—but only if you act "right away." It may sound like a really good deal.

In fact, telephone con-artists are only after your money. **Don't give it to them.**

Common Telephone Scams

Con artists are always developing new scams. Here are some common ones:

- **Prize Offers:** You usually have to do something to get your "free" prize—attend a sales presentation, buy something, or give out a credit card or social security number. The prizes are generally worthless or overpriced.

- **Travel Packages:** "Free" or "low-cost" vacations can end up costing a lot with all their hidden costs. Or they may never happen. You may pay a high price for some part of the package—like hotel or airfare. The total cost may run two to three times more than what you'd expect to pay or what you were led to believe.

- **Vitamins and Other Health Products:** The sales pitch also may include a prize offer. This is to entice you to pay hundreds of dollars for products that are worth very little.

- **Investments:** People lose millions of dollars each year in "get rich quick" schemes that promise high returns with little or no risk. These can include gemstones, rare coins, oil and gas leases, precious metals, art, and other "investment opportunities." These turn out to be worthless or worth much less than what you paid.

- **Charities:** Con artists often label phony charities with names that sound like better-known, reputable organizations. They won't send you written information or wait for you to check them out with watchdog groups like those listed later under "For More Help."

- **Recovery Scams:** If you buy into any of the above scams, you're likely to be called again by someone promising to get your money back. Be careful not to lose more money in this common practice. Even law enforcement officials can't guarantee to recover your money.

Tip-Offs to Fraud

Telephone con artists spend a lot of time polishing their "lines" to get you to buy. Here are some of them:

- You have to "act now"—or the offer won't be good.
- You've won a "free" gift, vacation, or prize—and you pay "only" for "postage and handling" or other charges.
- You must send money, give a credit card or bank account number, or have a check picked up by courier—before you've had a chance to carefully consider the offer.
- You don't need to check out their company with anyone—including your family, lawyer, accountant, local Better Business Bureau, or consumer protection agency.
- You don't need any written information about their company or their references.
- You can't afford to miss this "high-profit, no-risk" offer.

If you hear these or similar lines from a telephone salesperson, just hang up the phone.

What You Can Do To Protect Yourself

It's very difficult to get your money back if you get cheated over the phone. So, before you buy anything by telephone, remember:

- Don’t buy from unfamiliar companies.
- Legitimate businesses understand when you want information about their offer or company.
- Always ask for and wait until you receive written material about any offer or charity. If you get brochures about expensive investments, ask someone whose financial advice you trust to review them.
- Always check out unfamiliar companies with your local consumer protection agency, Better Business Bureau, State Attorney General, the National Fraud Information Center, or other groups listed later under "For More Help." Unfortunately, not all bad businesses can be identified through these organizations.
- Always take your time making a decision.
    - Legitimate companies won't pressure you to make a fast decision.
    - It's never rude to wait and think about an offer. Be sure to talk over

big investments offered by telephone salespeople with a trusted friend, family member, or financial advisor.

- Never respond to an offer you don't thoroughly understand.
- Never send money or give out your credit card or bank account number to unfamiliar companies.
- Be aware that any personal or financial information you provide may be sold to other companies.

For More Help

Before you buy from an unfamiliar organization, check it out first with some of these groups. Your local phone directory has phone numbers and addresses.

- National Fraud Information Center, Email: www.fraud.org
- State Attorney General
- Better Business Bureau
- Local Consumer Protection Organizations

Check national charities with:

BBB Wise Giving Alliance
3033 Wilson Blvd., Suite 600
Arlington, VA 22201
Phone: 703-276-0100
Website: http://www.give.org/
Email: give@council.bbb.org

To avoid unwanted telephone sales calls from many national marketers, you can send your name, address, and telephone number to:

National Do Not Call Registry at https://www.donotcall.gov/.

Under the Telephone Consumer Protection Act of 1991, you can request that companies put you on their "do not call" lists. If the company calls you again, you can bring an action in Small Claims Court.

INDISCRIMINATE SALES OR SURVEY CALLS

When used correctly, proper selection of prospects or respondents and careful choice of the time to call, selling and surveying by phone provide useful services for companies and their customers. In addition, these services give

employment to people who cannot work at other jobs, such as some disabled persons.

People usually get annoyed when firms sponsoring the calls don't use selectivity in choosing names or times.

What You Can Do

Remember, a telephone call is just as personal as a face-to-face conversation. Do not feel obligated to answer questions just because the questioner sounds "official." Do not answer questions on the phone you would not answer if asked by a stranger on the street.

Always find out who is calling; ask for the name of the person and the company he or she represents.

If the caller is a sales person and you're not interested, say so. One response is to ask the caller to send you all the information in a letter so you can consider it at your leisure.

If you don't recognize the name of the company conducting a survey, offer to call back or ask the caller to call you again after you've had time to check the firm with the Better Business Bureau.

Remember, it's your phone service and your time. If you're not interested, say so. If the caller is rude enough not to let you go graciously, hang up.

Harassing, Abusive, Or Obscene Calls

Surprisingly, experience has shown that nuisance calls don't come just from strangers. They also come from acquaintances, neighbors or business associates. Generally, such calls are made at random. If you get such a call and give the caller no satisfaction, the person will usually give up after one or two attempts. If you get anonymous calls or calls that try to get information you don't want to give, here are some suggestions for dealing with them.

What You Can Do

Always use the telephone on your terms, not those of the caller. Don't talk to anyone unless you want to.

Ask the caller to identify him or herself. If the caller asks, "Who is this?" don't give your name. Instead ask, "What number did you call?" or "Whom do you want?" If the call isn't legitimate, that very likely will end it.

Instruct your children and the baby-sitter never to talk on the phone to someone they don't positively recognize. Teach them to ask for the number so someone can call back later.

If the caller remains silent after you answer, hang up. Some want to listen, just to see what you'll do, particularly to see if you'll get angry. If the caller makes an obscene or improper remark, hang up immediately.

HARASSING PHONE CALLS FOR DEBT COLLECTION

Improper use of the telephone for debt collection purposes is also a concern. This includes calls from collection agencies that make annoying or threatening phone calls to obtain money that may be owed to them. Calls in this category could include:

- Calls received outside normal business hours. (Generally 8:00 am to 9:00 pm are considered normal business hours).
- Repeated calls-more than two calls per week to discuss the matter with the debtor involved.
- Calls to third parties during which the details of a debtor's account are discussed.
- Calls threatening bodily harm or property damage.
- Calls asserting that your credit rating will be hurt or that legal action will be taken if this is not true.

Debt collection calls made in a manner intended to frighten, abuse, or harass the debtor are in violation of Intrastate and Interstate tariffs, the New York State General Business Law, the Fair Debt Collection Practices Act, and the New York City Consumer Protection Law. Complaints regarding debt collection should be referred to the New York City Consumer Protection Law if you live in New York City, or the New York State Attorney General (Intrastate) or the Federal Trade Commission (Interstate).

THREATENING CALLS

Calls in this category include the extreme cases—bomb threats, threats to life and property, threats of kidnapping, robbery, or bodily injury to members of your family. Sometimes, these calls are repeated over an extended period of time

to harass and frighten a family. If you are unfortunate enough to be a victim of such a campaign, the techniques in this material aren't enough. Call the police and the telephone company immediately. They will work together toward eliminating the problem.

CONSUMER FRAUD

What is "Consumer Fraud"?

Fraud is a crime commonly committed against the elderly. Simply put, it involves deceit, dishonesty, and swindling. According to the National Fraud Information Center, 60% of the calls to its national information hotline come from senior citizens or retired persons. Con artists believe that the elderly crave contact with other people, and the clever con can exploit this need.

Why are the elderly a popular target of con artists and swindlers?

Several reasons can be cited for the targeting of seniors, including:

- Seniors tend to be more trusting;
- Seniors often have special needs and concerns that the con artist can exploit;
- Con artists feel they can more easily intimidate seniors;
- Con artists believe seniors will not report the crime because of the fear of reprisal, embarrassment, and losing their independence if family members learn of the scam;
- Seniors are home during the day, making them easier targets;
- Seniors tend to be more isolated and more willing to talk to strangers; and
- Seniors have money (home equity, savings accounts, pension income).

How can someone avoid being "scammed"?

Generally speaking, here are some useful tips for avoiding being victimized by a scam artist:

- Never make a buying decision based upon emotion (such as "do it for your kids or your grandkids");
- Don't let yourself be pressured into a quick decision;
- Check out the company or individual with the Better Business Bureau or law enforcement agencies;
- Be wary of "something-for-nothing" or "get-rich-quick" schemes;
- Remember that when someone tries to sell you something, you are in

control, so you can cut the conversation when you want;

- Never make a purchase at the time it is presented to you—give yourself time to verify the company or product offered;
- Never send cash through the mail;–send a check or money order or use a credit card(certain protections are available to the consumer using a credit card—see Section III entitled Credit Card Consumer Protections);
- Beware of any door-to-door salesmen (such as contractors);
- Beware of any salesperson who insists you send him or her money immediately, and high-pressure sales tactics;
- Never give your credit card number for identification purposes (some merchants may request to see your card for identification purposes, but the merchant, by law, may not write down the identification number);
- Never give anyone your credit card or checking account number over the phone—unless you are familiar with the company and you initiated the call;
- Never give the expiration date of your credit card to unfamiliar or unsolicited callers;
- Keep in mind that written authorization is not required to withdraw funds electronically from a checking account on a one-time only basis;
- If a service is offered, ask for references and contact them;
- Contact a family member to get another opinion prior to signing a contract or purchasing a product; and
- When seeking to purchase a product or service, comparison-shop.

Advance Fee Schemes

Newspaper ads offering loans that use money available from "foreign investors." If the "foreign investor" lender asks for an advance fee, chances are the lender intends to take the fee without ever providing a loan. The "processing" fee can typically range from $200 to $500.

Phony Mortgage Notices

If you receive a notice stating that a new company has taken over the loan servicing or purchased your mortgage, be sure to check with the loan company with whom you were doing business. Usually the con artists give a post office box as the address for sending payments. (**Note**: If you are concerned about payments being correctly credited to your account, many banks allow payments to be processed by their local branches, making it easier to make your payment in person.)

Unscrupulous Loan Brokers

Carefully compare loans, interest rates, points and fees. Deal only with licensed brokers but be warned that even licensed brokers are not subject to usury laws. While an institutional lender usually charges from zero to three points for a loan, private lenders can charge as much as 20 points (a point is 1% of the loan; if your loan is $100,000, one point is $1,000).

Anyone who has a valid real estate broker's license may also act as a mortgage broker. Be sure to check the license. What is the license number? Who issued it? Does it match the individual's driver's license? It is illegal for an individual to work under another person's license.

FORECLOSURE SHARKS

These sharks will scan the newspaper foreclosure notices for easy marks. They will offer to save one's home, clear bad credit and arrange refinancing. Often the fine print in these contracts includes a provision transferring the house title to the foreclosure shark. In addition, the sharks may include a provision for a balloon payment at the end of the "consolidation" contract.

HOME IMPROVEMENT FINANCING

Sharks con seniors into purchasing home improvements secured by a mortgage on the home. Most consumer advocates discourage the use of one's home as collateral for repairs. Be advised: anytime you are getting involved in a real estate transaction to refinance your home, get legal advice.

As with the mortgage broker, check the home improvement contractor's professional license, note the number, and make sure it matches the individual's driver's license. Check with a knowledgeable friend, family member, and/or attorney.

HOME REPAIR

The con artist will often offer to oil a shingled roof or repair a driveway for a low fee, if they can do the work immediately. Once the work is done, the fee turns out to be much higher. Older people are especially vulnerable since they are usually unable to check the work (such as going up on the roof). It is not uncommon for the con artist to do work at a low fee for one resident to create a referral in the neighborhood.

Many of these home repair scams allow the con artist access to the house and the valuables stored in the home. There is one large group of home repair scam artists, known as "The Travelers," who work the entire United States.

Tips to Avoid This Scam:

- Beware of someone who comes to your door unannounced and claims to have a load of whatever he says your property needs: asphalt, shingles, paint, etc.;
- Get three estimates for the work to be done;
- Get references;
- Check the references on previous work done by these contractors;
- Never advance more than 25% of the cost up front;
- Be sure that all the work to be done is detailed in writing;
- Never sign a certificate of completion before the work is completed;
- Never sign an estimate without first reading it carefully—it may actually be a deed of trust;
- Offer to review the estimate and return it to the contractor at a later time so you can check with an attorney, family, or friends; and
- Call the Better Business Bureau to make sure there are no complaints against the contractor.

SELLING PROPERTY WITHOUT A BROKER

A prospective buyer may approach a homeowner and offer to pay the full asking price, but will only put 1% to 5% down and leave the remainder to be paid later. The con artist will rent the property and the seller never sees the money.

FALSE CHARITABLE SOLICITATION

Beware of calls or visits from individuals claiming to represent a charity. Often the con artists will use a false group name containing the word "United" which can easily be confused with the United Way.

Tips to Avoid This Scam:

- Never commit to a donation at that time;
- Ask the individual to leave the information at your door or mail it;
- Beware if the caller refuses to send you information on the charity;
- Beware if somebody offers to send someone to pick up the money, asks you to use immediate delivery service (such as Federal Express), or wants

it sent to a P.O. Box. Bypassing the normal mail service shields the con artist from prosecution for mail fraud;

- Hang up; call the organization that is supposedly asking for donations and confirm that it is involved in a fund drive and what percentage of the money it is receiving (professional fund-raising groups may be receiving over 50 percent of the proceeds); and

- Confirm that the organization exists using the Attorney General's website (https://www.charitiesnys.com/donors_new.html), calling the Better Business Bureau (https://www.bbb.org/en/us/local-bbb/bbb-serving-metropolitan-new-york), or using the Charity Navigator (http://www.charitynavigator.org/).

BOGUS SWEEPSTAKES

A legitimate sweepstakes is an advertising or promotional device by which items of value (prizes) are awarded to participating consumers by chance, with no purchase or "entry fee" required to win. By law, you should have an equal chance of winning whether or not you order.

Some individuals may believe their chances to win will be increased if they make a purchase and confuse separate "yes" and "no" envelopes as requiring a purchase. Nevertheless, the chance of winning a large prize is generally quite small.

Bogus operators often request a fee to process your entry or to process your "winning entry." Be warned: never send money to receive a prize. If you have won something, **why should you pay**?

According to a 1992 Louis Harris survey 92 percent of all adult Americans have received phony prize notifications and nearly a third took the bait.

Tips to Avoid This Scam:

- Beware of any mail featuring "Congratulations, You've Won;"
- Beware if a "you've won" notice comes by phone on a weekend when most business offices are closed, which prevents a supposed winner from verifying the story with the real company;
- Beware if you are urged to act now; and
- Beware if you hear "legitimate-sounding" group names: American, Clearinghouse, Digest, Publisher's, Family, etc.

AUTO-REPAIR RIP-OFF

Typically, the dishonest shop will take advantage of the fact that most people know little about their car. One of the most common scams is the "metal filings in the transmission oil pan" scam. A certain amount of metal is normal and the metal is kept separate from the rest of the transmission by a transmission-oil filter. Nevertheless, customers have been scammed into ordering an expensive overhaul of the transmission.

Tips to Avoid This Scam:

- Check with friends or family about shops that have given them good service. Contact your local Better Business Bureau to check whether any complaints have been filed against a shop you are considering using.
- Are the shop's mechanics "ASE certified"? (The National Institute for Automotive Service Excellence is a non-profit organization that tests and certifies mechanics' competence. Certified shops display the white and blue ASE logo.)
- Is the mechanic working on your vehicle certified to do the work?
- Are the employees and the shop relatively clean and tidy?
- A clean operation may suggest that you and your car will be treated with the proper consideration.
- Be sure to get a written estimate before authorizing any repair work.
- Ask the shop to keep all of the old parts for you. Fear of the customer's inspection of the old parts may cause the shop to think twice about ripping you off.
- Have the mechanic **show you the new component on your car**.
- Contact your local AAA office if they offer a low-cost diagnostic service (approx. $40) which does not rely on repairing vehicles for its income.
- Beware of shops that advertise a hard-to-believe low price for a basic service like a front-end alignment. This may be a lure to scam customers to have expensive and unnecessary work done (such as ball-joint replacement).

SO-CALLED GOVERNMENT AGENCY

An organization claiming to be associated with the Social Security Administration will offer a service such as card replacement for a fee. **All services from the Social Security Administration are free.**

INVESTMENT FRAUD

A company may claim to be offering a "retirement-oriented" investment which is "IRS approved." In addition, the retirement investment opportunity will supposedly yield a much higher return than a bank or legitimate IRAs (as much as 200% or 300%).

Churning is a scheme in which a stockbroker sells some of the shares from a customer's portfolio to purchase new shares. By doing so, the stockbroker makes a commission on the new sale which the customer had not authorized.

Tips to Avoid This Scam:

- Keep track of existing investments;
- Exercise extra caution during the tax season;
- Take the time to evaluate the opportunity and consult a competent tax advisor;
- Avoid any investment touted as "IRS approved." The IRS **does not** endorse specific tax deals;
- Don't buy an investment on the basis of a television infomercial or radio ad. The ad **has not** been "cleared" by some federal or state agency or the broadcaster;
- Beware of promises of no-risk, sky-high returns. Basic Rule: **A higher return means a higher risk;**
- Remember, a promise of 200% or 300% profit may be a reflection of someone who has no intention of delivering on the promise and will say anything to make the sale;
- **Never transfer or roll-over your IRA or other retirement funds directly to an investment promoter. Your fund should go directly to a pension fund administrator (bank, trust department, or mutual fund) to be recognized as an IRA; and**
- Beware of investing in a "general partnership" or "limited company." Con artists use such schemes to evade the consumer protection requirements of securities laws (such as disclosure of previous violations, personal bankruptcies, and actual marketing costs).

PIGEON DROP

This old scheme is still quite common. The con artists claim to have found a large sum of money and offer to share it with you. You are asked to withdraw

"good faith" money and are given a phony address where you are to collect your share of the found money. You never see them again.

BANK EXAMINER

A phony bank examiner contacts you and asks for your help in catching a dishonest bank employee. The "examiner" asks you to withdraw a specified amount of cash from your account so that he or she may check the serial numbers. After turning over your money to the "examiner," you never hear from him or her again.

MEDICAL FRAUDS

Fake laboratory tests, miracle cures and mail-order clinics are other methods criminals dream up to defraud you. Legitimate doctors and hospitals do not advertise through the mail.

TELEMARKETING RECOVERY SCHEMES

Fraudulent telemarketers will sell lists of people they have swindled to other fraudulent telemarketers. The second group will contact the people and offer to recover their money for a fee.

SKIMMING SCAM

The "skimmer" offers to buy your house for your asking price, but then says he or she will close the deal sooner if he or she doesn't have to get financing through a bank. He or she convinces you to sign a contract containing a "subject to rehabilitation loan" clause enabling him or her to go to a lender to borrow money using the home as collateral. He may borrow thousands of dollars and even rent out the home. Eventually, he will default on the loan without ever making payments to you. As a result, you end up taking back the house which now has a huge mortgage on it. By then, the skimmer has since disappeared.

INSURANCE FRAUD

Churning is a scheme in which policyholders are persuaded to buy variable-life or whole-life policies without paying any money out of pocket. The agent tells the customer that the new, more valuable policy will be paid with the cash value from their prior policy. However, the value of the new policy exceeds the value of the old policy. So to keep the premiums current, the customer unknowingly is borrowing money from the company.

Twisting is similar, but occurs when company A's agent persuades company B's customer to pledge his or her current life insurance policy to purchase company A's policy.

CREDIT REPAIR SERVICES

It is not unusual for a company to offer to repair a bad credit report. For a fee, the company offers to erase a bad credit history. However, **no one** can remove any accurate information from your credit report. You can have any incorrect information removed from your credit report by contacting the credit bureau yourself and supplying proof of the error, or you can supplement your credit report by filing information that contradicts existing information.

DEBT CONSOLIDATION AGREEMENTS

Some for-profit debt consolidation companies promise to help consolidate and negotiate debt for a low monthly rate. Some of these companies have very poor track records and ultimately end up plunging consumers further into debt while collecting enormous fees. Check with the Better Business Bureau to ensure you are working with a reputable company before engaging in such an agreement, and/or seek out a not-for-profit organization such as a credit-counseling agency to assist with your consumer debt issues.

CREDIT CARD CONSUMER PROTECTIONS

The Fair Credit Billing Act protects consumers using credit cards to make purchases for goods and services.

The protections are as follows:

Billing errors appearing on your statement: charges which you did not make or cannot identify; a charge listed with the wrong amount; a charge for goods you did not accept or which went to the wrong address; and/or incorrect credits for items returned.

Contact your credit card issuer in writing as soon as possible. **Don't ignore the error. You do not have to pay the disputed amount until then problem is resolved and your nonpayment will not be reported to the credit bureau.**

Defective goods and services: if you have unsuccessfully tried to solve the problem with the merchant, you may withhold payment (if you used a store-issued

card). Otherwise, you are covered only if the sale was for more than $50 and took place in your home state or within 100 miles of your home address.

When requesting a credit from the merchant rather than the card issuer, ask for a copy of the credit to be mailed immediately. If you do not receive it, dispute the claim in writing to the credit card issuer.

Fraud: if your card is lost or stolen, **report it immediately**. If no charges have been made by the time you notify the credit card issuer, you are not responsible for any subsequent ones. Under any circumstances, you are liable only for a maximum of $50 of unauthorized charges.

If you think that the Fair Credit Billing Act has not been followed, be sure to contact the compliance officer **in writing** at the credit card issuer's address. After your phone conversations with the merchants or card issuers, write follow-up letters that repeat what you discussed. In addition, if the card issuer is unresponsive, you can contact the Federal Reserve Consumer Helpline at 1-888-851-1920 or via mail:

Federal Reserve Consumer Help
PO Box 1200
Minneapolis, MN 55480

Tips:

- Sign your credit card as soon as you receive it. Otherwise, a thief can sign your name in his or her writing.
- Keep credit card statements and receipts from credit purchases for a year.
- In the event of a dispute, keep copies of all related correspondence, receipts, and telephone records so you can prove you followed proper procedures.
- Check your credit report for errors. It should contain: name, social security number, birth date, current and previous address, payment history with credit cards, department store charge accounts, loan payments, credit inquiries, whether or not you were granted credit, and public record information (bankruptcies, foreclosures, or tax liens).

COMMON CONSUMER MYTHS

Myth # 1: You have a three-day right to cancel any purchase.

Generally, it applies to credit or cash transactions of $25 or more initiated through face-to-face contact (door-to-door sales) away from the seller's regular place of business. This provision does not cover vehicle purchases.

Myth # 2: A store must give you a refund if you request one.

Each business has the right to set its own return/refund policy. However, each business (merchant) must **conspicuously** post its policy. If no policy is posted, the business must accept returns for 20 days from the date of purchase. Options include offering customers cash, store credit, exchanges, or no adjustment at all.

Before purchasing anything, check the store's return policy.

Myth # 3: All the money you contribute to a charity goes for its intended charitable purpose.

Charitable organizations are not obligated to spend a certain percentage of their contributions on their stated charitable purposes. Ask the telephone solicitor whether they are being paid or volunteering their services. Inquire about the percentage of the proceeds being used for the organization's primary programs.

A common rule of thumb: at least 65 to 70 percent of the donations solicited by a charity should go towards charitable purposes.

AUDITING YOUR MEDICAL BILLS

Insist on a completely itemized bill. You have a right to examine the bill, whatever the source of payment.

- Is the personal information (name and address) correct?
- Is the insurance policy information correct?
- Check the company name, group number, and your policy number for any errors.
- Were you billed for the hospital room you **requested**? Is the rate and length of your stay correct?
- Were you charged **twice** for the same item?
- Were you charged for any procedure which was not done or which you did not authorize?

- Does the price of the same procedure vary on your bill from one day to another? If so, ask for an explanation.

If you have questions, contact your doctor/business office.

Contact Numbers:

- National Fraud Information Center
  1-800-876-7060
  (9 a.m.-5 p.m. EST, Monday-Friday)
  Call with any questions relating to a possible scam,
  or to complain if you believe you have been victimized.

- Consumer Financial Protection Bureau
  1-855-411-2372
  (8 a.m. – 8 p.m. EST, Monday-Friday)
  P.O. Box 4503
  Iowa City, Iowa 52244

- NYS Office of Attorney General
  Consumer Frauds Bureau
  1-800-771-7755
  Complaint Forms are available at https://ag.ny.gov/complaint-forms

- Better Business Bureau
  www.bbb.org
  703-276-0100

- Equifax (credit bureau)
  1-800-685-1111
  Equifax Credit Information Services, Inc.
  P.O. Box 740241
  Atlanta, GA 30374

- Trans Union LLC (credit bureau)
  1-800-888-4213
  Consumer Disclosure Center
  P.O. Box 1000
  Chester, PA 19022

- Experian Information Solutions
  1-888-397-3742
  P.O. Box 9530
  Allen, TX 75013

IDENTITY THEFT

Identity theft has increased significantly in recent years. Identity theft occurs when identity thieves access personal information, like your name or Social Security number (SSN), to commit fraud or other crimes. Some common ways identity thieves access your information include:

- A stolen wallet or credit card
- Documents or receipts in the trash
- Phone or e-mail scams
- Hacking into unsecure computers and wireless networks.

Once the thieves gain access to your personal information, they can purchase items on your credit card, open new credit card accounts, or even file a fraudulent tax return in your name.

Consider these tips to help keep your personal information safe and secure and protect you from identity theft:

Create Strong Passwords and Update them Frequently. Remember to create a strong password, by avoiding common or easy-to-guess passwords. Common passwords often include a birth date, a pet's name, a mother's maiden name, or a person's school or work. A safer password usually has some capital letters and at least one numeric or other non-alphabetical character. From time to time, it is important to change commonly used passwords.

Be Aware of What You Share. Between the increasing numbers of social networks, from Facebook to Twitter, and LinkedIn to Google+, a significant amount of personal information is being shared online that can be used to authenticate a person's identity. Don't share or post personal information online, such as your address, phone numbers, SSN, birth date, or birth place.

Keep Sensitive Personal and Financial Documents Secure. Most people store personal and financial information on their computer. If you do, it's important to protect your computer by installing a firewall, using anti-virus and anti-spyware software, keeping your browser updated, and securing your wireless network. If you are disposing of financial or tax documents, make sure you shred them, and if

you are keeping hard copies for your records, store them in a safe location. Never carry around your Social Security card.

Protect Your Mobile Device. There are great apps available to help you bank, track your finances, and even do your taxes on your mobile phone. Make sure the apps that you download are from a reputable company and check the ratings and comments to be aware of what the app does and what information it may access on your mobile device. You should also secure your device with a strong password and use your phone's auto-lock feature to protect personal information.

Check Your Credit Report. You are entitled to one free credit report each year, which is compiled from information from the three major credit bureaus: Experian, Equifax, and TransUnion. Take advantage of the free report in order to catch any errors. If any information has been compromised, set up a fraud alert with the three major credit bureaus to put a security freeze on your files and information.

Don't Fall for Phishing Scams. These email scams can come from a party claiming to be a trustworthy entity, (e.g., your bank) asking you to click on a link and confirm personal details including address, account numbers, or even your SSN. Trustworthy companies would never ask you to provide personal or sensitive information without first signing into your account behind a secure firewall. The IRS in particular will never communicate or request personal information via unsolicited email. Do not open or forward emails claiming to be from the IRS—forward them to phishing@irs.gov.

If you believe your identity has been stolen, it is important to put a hold on bank and credit accounts, change commonly used passwords, and file a complaint with the Federal Trade Commission (FTC). Providing the FTC with an overview of what information has been compromised allows them to build a case for any wrongdoing. Unfortunately, the FTC cannot get back any money lost, but can help safeguard against further fraudulent activity and conduct an investigation into any hacked information.

In addition, if you think a fraudulent tax return has been filed with your SSN or you may be at risk due to such events as a lost or stolen purse or wallet, questionable credit card activity, or credit report, contact the IRS Identity Protection Unit at 1-800-908-4490.

How to Protect Yourself from Identity Theft:
https://money.usnews.com/money/personal-finance/family-finance/articles/how-to-protect-yourself-from-identity-theft.

FINDING AN ELDER LAW ATTORNEY

Can any lawyer serve as an Elder Law Attorney?

Elder law attorneys require knowledge of a wide variety of legal disciplines and services such as: advance directives, Medicaid, Medicare & Social Security law, trust & estate planning, tax planning, housing options, mental health law, and discrimination & disability law. Some states require that elder law attorneys acquire a certification as an expert in the field, but New York does not. Even without a state certification, Elder law attorneys must appreciate the inter-relationships between the various fields of law, as decisions made today may seriously impact future planning.

Aside from legal expertise, elder law attorneys must also be knowledgeable about other issues affecting older clients. The attorney must be sensitive to changes in their client's cognitive or physical health, and be able to differentiate between a client's physical or mental limitations and a lack of legal capacity. Additionally, an elder law attorney must be comfortable working with other elder-care practitioners, such as psychologists, social workers, or other service providers, should formal or informal consultation become necessary during the course of the legal representation. Lastly, the attorney must recognize complex family dynamics, while remaining focused on the client's wishes and needs.

Before making a decision about an elder law attorney, be sure to ask whether the attorney is experienced with your area of concern, and in what other areas of elder law he or she regularly practices. For example, you want to be comfortable that the attorney you hire to do your estate planning understands the implications for you and your spouse with regard to tax planning, Medicaid, or long-term care needs.

How do I find an Elder Law Attorney?

If you are comfortable using a computer, there are many search engines available to help you locate an attorney in your area. LexisNexis provides a list of attorneys searchable by zip code. The website is located at

https://www.lawyers.com/.

Additionally, the National Academy of Elder Law Attorneys hosts a searchable database of all of their member attorneys at https://www.naela.org/.

The New York State Bar Association has a lawyer referral service available at its website: https://www.nysba.org/.

Other sources for finding an attorney are local agencies in your area that cater to the aging population. The National Academy of Elder Law Attorneys suggests the following examples:

- Alzheimer's Association
- American Association of Retired Persons
- Social Security Office
- State or Local Bar Association
- Support Groups for specific diseases
- Hospital or Nursing Home Social Service Department

Check your local yellow pages under Associations for the contact information. Scan through the attorney ads in your yellow pages as well. Do any of the ads strike you as interesting or sincere? If you have any special needs, do the ads address your needs? Finally, do not discount personal referrals. Although only you will know if the attorney recommended is right for you, a referral from another attorney, a family member or friend, or even a respected acquaintance can help you compile a working list of prospects.

How do I know if a prospective lawyer is qualified or has had any disciplinary action against him or her in the past?

The Center for Professional Responsibility sponsored by the American Bar Association has agencies in each state, which oversee lawyer conduct and practice. You can contact your state agency to see if a prospective attorney is licensed, or if the attorney has any past disciplinary issues. You can also contact the agency if you wish to file a complaint against your attorney.

To locate the agency in your area, contact:

The American Bar Association
321 North Clark Street, 15th Floor
Chicago, IL 60654
312-988-5000 or 1-800-285-2221 or
online at https://www.americanbar.org/aba.html

Is the first consultation free? How do I know if the fee is appropriate?

Unlike other areas of law, most Elder Law attorneys do not take clients on a contingency basis, nor do they provide a free consultation. Before you meet a prospective attorney, make sure you understand the fee arrangement for the first meeting. Once you have met with the attorney, make sure that any subsequent fees and services are clearly explained in writing.

Fees vary based on a variety of factors, including the attorney's experience in a given area, and the complexity of your situation. Additional costs may include fees for research, preparation of correspondence and court documents and court appearances. In addition to these costs, you will be responsible for the expenses associated with photocopying/faxing, mailing, long-distance calls, and travel. Although it is difficult to assess an average fee, ask the attorney for a listing of what services are provided as standard practice and what other costs may or may not be included.

Many Elder Law attorneys will bill by the hour or request a retainer. Some will charge flat fees for standard documents or procedures, and charge hourly or request a retainer for other services. While fees vary, your attorney should be able to provide you with a rough estimate of your total cost for specific services; however, complications may require additional time and added expense. Let your attorney know if you want an estimate of how much a specific task will cost before he or she engages in the activity.

A retainer is like an escrow account. By providing an initial lump sum, or retainer, to the attorney, you are guaranteeing that the attorney will be available to work on your case. Usually the attorney's services will be charged against the retainer, while any additional or unexpected costs would be billed separately. Lawyers who work on retainer may charge higher fees because they are contracting to be available to you, which may interfere with their ability to accept new clients. Be wary of flat fees for advertised services such as "simple wills" or "quick settlements." Many times, what may start out simple can quickly turn complex,

based on your individual circumstances, and the added services will be charged outside the flat-fee rate.

Whichever method your attorney uses to collect his or her fees, make sure that the agreement is in writing and clearly indicates what is and what is not included. Be aware that generally you are responsible for any oral agreements that incur the services of the attorney, whether or not you signed an agreement.

Consequently, it is always best to have a document that you can read through to avoid any confusion. If there is something you do not understand, ask for clarification! Also, do not be afraid to ask if there are ways to reduce the costs. Your attorney is providing a service and it is best for both of you to know that the requirements and expectations are understood.

What should I do before meeting with the attorney?

It is a good idea to organize your information in advance of your meeting with your attorney. This will make it easier and less costly for the attorney to advise you. Make copies of all of your important documents, such as your birth certificate, tax return, prior wills, Medicare or Medicaid applications, social security benefit information, trust documentation, or similar documents, and keep them in an easily accessible folder. Bring this folder with you when you meet with the attorney.

In some cases, the attorney may send you a questionnaire to be completed before you come to the first meeting. By filling in the questionnaire as completely as possible, you will not only help organize your records, but you will reduce the amount of time and the associated expense required for the attorney to gather your information.

Also before the meeting, compile a list of questions that you would like your attorney to answer. Remember that this is your time and in most cases, you are paying for the service. Be aware that the attorney may not give you an answer immediately, but may take down your information with a promise to get back to you.

The law is complicated and your circumstances may warrant a different answer than what you have read or what you may have heard from a friend. Requesting time to get back to you usually indicates that the attorney cares to take the time to ensure that his or her response is thorough, accurate, and considers the complexities of the law.

What is the most important thing to consider about a prospective attorney?

Aside from the basic qualifications, the most important considerations for a successful attorney-client relationship are trust and communication. You must feel comfortable that the attorney is going to work with your best interests in mind. Concurrently, you must be honest with your attorney about your expectations and your concerns. If the attorney you are considering is not open to your questions, or makes you feel uncomfortable or intimidated, keep looking! A good elder-law attorney understands that the process and issues can be overwhelming and that he or she must be sensitive to your needs.

After you have evaluated the attorney's credentials, ask yourself the following questions:

- Do you feel that you could work closely with this person?
- Do you trust the lawyer's ability to work on your particular issues?
- Did the attorney answer your questions in a way that seemed clear and understandable?
- Did the attorney provide you with a clear understanding of what you should expect from a follow up meeting and what information you need to provide?
- Did the attorney provide you with a written agreement that clearly defines what is covered in the basic fee and what is considered extra?

If you are not comfortable with your answers to the above questions, than the attorney may not be right for you. Your comfort level with your attorney, and with the office staff and assistants is critical to the success of your relationship.

Where Can I Get Additional Information About Hiring An Attorney or What to Expect?

The National Association of Elder Law Attorneys provides a free brochure, "Questions and Answers, When looking For An Elder Law Attorney," which includes information on hiring an attorney, how to prepare for your initial meeting, and what you should expect during the meeting. For a copy of the brochure, send a stamped self-addressed business sized envelope to:

National Association of Elder Law Attorneys
1577 Spring Hill Road, Suite 220
Vienna, VA 22182

You can also locate a copy of the brochure and other important information about elder law at the Association website: https://www.naela.org/.