



# Estate Planning Basics

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## Reasons for Estate Planning

- **During Lifetime:** Management of assets and personal needs, or protection of assets for a spouse or other family in the event of disability or incompetence.
- **After Death:** Management and distribution of estate assets after death, efficiently and while accomplishing the client's goals.
- **What We Will Discuss Today:**
  - Planning Considerations - Family, Spousal and Beneficiary Issues, Assets, Estate Tax and Long-term Planning
  - Wills, Powers of Attorney, Health Care Proxies and Living Wills

## Importance of Having a Will

- **No Will:** Laws of intestacy govern the disposition of assets that are not covered by beneficiary designation or joint ownership.
- **Example:** H & W have 3 minor children. H has \$700,000 in assets. W has \$1,000 in assets. House is owned jointly by H & Wife. H dies.
- **Who gets what?**
  - W keeps the house as surviving joint tenant.
  - Wife receives \$375,000 (\$50,000 plus  $\frac{1}{2}$  of \$650,000).
  - 3 minor children split the remaining \$325,000. Court-appointed Guardian must get Court approval to make payouts, and children get the balance of funds at age 18.



## What You Need to Know

- THE FAMILY TREE, and who is an interested party in the estate under the law.
- THE ASSETS, how they are owned (i.e. jointly, p/o/d, etc.), and the tax consequences (estate and otherwise) of different planning options.
- CONCERNS OF THE CLIENT, i.e. family members with disabilities or other issues, future disability concerns of the client or spouse.
- THE WISHES OF THE CLIENT, even if contrary to some planning recommendations.
- WHAT DOCUMENTS, TRANSFERS AND PLANNING should be used for that client.

## The Family Tree

### A PERSON WHO DIES WITHOUT A PLAN HAS A PLAN BY STATUTE: DISTRIBUTEES - (EPTL 4-1.1)

- If survived by a spouse and children, spouse receives the 1<sup>st</sup> \$50,000, and ½ of the balance, and children equally share the other ½ of the balance.
- If survived by only a spouse and no children, the spouse receives everything. (Prior law included parents)
- If survived by only children, the children equally share everything. If there is a predeceased child, his or her children share their parent's inheritance, "by representation."
- If survived by only parents (no spouse, children, grandchildren or younger generations), the surviving parent or parents receive everything. (Siblings do not take if there is a living parent.)



## The Family Tree. . . continued

- If survived by only siblings and/or children of deceased siblings, the siblings and issue of deceased siblings take "by representation."
- If survived by only aunts and uncles and/or children of deceased aunts and uncles (1<sup>st</sup> cousins), the aunts and uncles, and children of deceased aunts and uncles take "by representation" but distribution does not extend any further than 1st cousins (children of deceased 1<sup>st</sup> cousins get nothing if there is at least one 1<sup>st</sup> cousin living.)
- If survived by only great-grandchildren of grandparents (1<sup>st</sup> cousins once removed), the great-grandchildren of grandparents will equally share the estate.
- If survived by no one closer than the above (i.e. only 2<sup>nd</sup> cousins or 1<sup>st</sup> cousins twice removed), the estate escheats to the State of New York.

***Note: Half-blood relatives are the same as whole (a half sister is treated the same as a full sister).***

## “TO ISSUE, BY REPRESENTATION” OR “TO ISSUE, PER STIRPES”

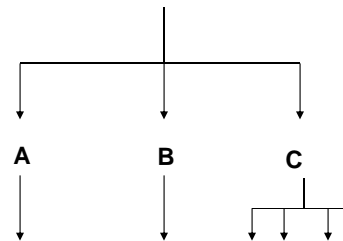
- **"ISSUE"** means: the descendants in any degree from a common ancestor, i.e. the person's children, grandchildren, great-grandchildren, great-great-grandchildren, and on down in a straight line of kinship.
- Intestacy provisions use "BY REPRESENTATION", not "PER STIRPES" as default of distribution (see EPTL 4-1.1).
- An estate with a Will executed prior to 09/01/1992 which made a disposition to "issue" will be distributed "per stirpes", and an estate with a will executed after 09/01/92 will be distributed "by representation" if either or another method is not specified in the will (see EPTL 2-1.2).

## “BY REPRESENTATION” or “PER STIRPES”

Client had 3 children- A, B & C.

At Client's death, A is living, and B & C predeceased. All 3 had children: A has 1, B has 1, and C has 4.

- "By Representation" would be:  
1/3 to A and  
2/3 in 5 equal shares to B & C's children.
- "Per Stirpes" would be:  
1/3 to A, 1/3 to B's child, and 1/3 to C's 4 children.



## Who Cannot Take Under Intestacy?

- Divorced spouse.
- Abandoning spouse (must be unjustified, without consent and continued through death).
- Abandoning parent (failure to provide support).
- Distributee Murderer of Decedent.
- Adopted Out Children.
- Step-Children (Not Adopted).



## Protecting Yourself as Drafter

Even if the client does not ask/want, be sure to:

- Discuss estate tax planning.
- Discuss long term care planning.
- Document, document, document.
- Terminate relationship when plan is complete, i.e. send a “we’re done - we did what you wanted” letter to get the statute of limitation started.



## Testamentary Capacity

- “Testamentary Capacity” for purposes of Will execution is knowing generally, without prompting:
  - Nature of the act performed (Will execution);
  - Nature and extent of assets to be disposed of;
  - Names and relationship of persons who are the “natural objects of one’s bounty” (distributees)



## Drafting the Estate Plan

- An attorney must know how to draft a will or trust, and be able to answer the following questions:
  - What items should be placed in a will?
  - What forms of gifts, outright or in trust, should be considered to accomplish the client’s goals?
  - Should there be provisions for minor or disabled beneficiaries?
  - Who should be the fiduciaries and what authority should they be given?



## Wills: Due Execution

- A Will is a declaration of a person's wishes as to the disposition of his or her property, to take effect after death.
- EPTL 3-2.1: Will must be:
  - **in writing**, signed by Testator, age 18 or older, and executed and attested according to:
    - The laws of *New York State* (EPTL 3-2.1); or
    - The laws of the *place where executed*; or
    - The laws of the *place where testator was domiciled*, either when Will executed or at time of death.

## Wills: Due Execution (Cont'd)

- **Signed at the end** by testator (or another in testator's presence and by his direction);
- In **presence of** (or acknowledged to) each witness;
- Testator **declares** signed document is his Will to each witness; and
- At least **two witnesses sign** name and address at testator's request (within 30 days).

## Will: Witness Requirements

- Attestation clause, witness addresses and date are not necessary for Will to be valid.
- If a witness is a beneficiary under the Will, that witness will not receive more than the intestate share.
- Best Practice: No distributees or beneficiaries act as witnesses.

## Proper Execution of Will

- Best practice: Same execution ceremony over and over, every time.
  - No one but testator and witnesses in the room.
  - Review dispositive provisions out loud.
  - Attorney asks, "Is this your Will?" (Declaration)
  - Attorney asks, "Does the Will express your wishes?"
  - Attorney asks, "Are you asking W1 and W2 to be the attesting witnesses to your Will?"
  - Testator signs every page and at the end.
  - Witnesses sign after Testator.
  - Witnesses sign Self-Proving Affidavit.



## Affidavit of Attesting Witnesses

- Without “self-proving” witness affidavits, **actual testimony** needed to prove due execution of Will.
- Witness affidavits (executed in compliance with SCPA 1406) are not copies of the attestation clause, but recite required minimum testimony regarding proper execution of the Will.
- Can be signed at execution or any time thereafter, including after death. **Best practice is at execution.**
- Actual testimony in person may still be required (contested estates or question re: execution).

## Affidavit of Attesting Witnesses

- Affidavit states that:
  - the testator requested the signature of the witnesses to the Will,
  - Testator signed in their presence and they signed in each other’s presence (or other acceptable alternative per execution statute),
  - the testator was competent, of full age, and not under any undue influence.
- Signed by witnesses before a Notary Public

## Who is Executor?

- Letters Testamentary may be granted to natural person or entity authorized by law to be a fiduciary (i.e. bank with trust powers) except those ineligible under SCPA 707:
  - Infants (under age 18)
  - Judicially-declared incompetents
  - Non-domiciliary aliens (unless they serve as co-fiduciary with NY resident fiduciary)
  - Convicted felons
  - Those disqualified due to substance abuse, dishonesty, improvidence, want of understanding, or otherwise unfit
  - Persons unable to read/write English, in Court's discretion

## What Every Will Should Include

- Specific Bequests (if any)
- Tangible Personal Property
- Cash Gifts (if any)
- Residuary Disposition
- Appointment of Executors and Trustees
- Fiduciary Powers
- Bonding or No Bonding
- Tax Allocation- Residuary or Apportionment?
- Resignation of Fiduciaries



## Other Common Provisions

- Marital Deduction Trusts.
- Estate Tax Planning Trusts.
- Trusts for Minor (or Young, not necessarily “Minor”) Beneficiaries.
- Supplemental needs trusts for Disabled Beneficiaries.
- Creditor Protection Provisions.
- Medicaid Protection Provisions.
- Lifetime Trusts (“Dynasty Trusts”).

## Common Will Mistakes

- **UNCLEAR:** “I give the sum of \$10,000 to my sister, Sue.”
- **CLEAR:** “I give the sum of \$10,000 to my sister, Sue, if she survives me.”
- **CLEAR:** “I give the sum of \$10,000 to my sister, Sue; or if she does not survive me, equally to her children who survive me.”



## Common Will Mistakes

- **UNCLEAR:** “I give \$10,000 to Sue and Bob.”
- **CLEAR:** “I give the sum of \$10,000 to each of Sue and Bob, who shall survive me.”
- **CLEAR:** “I give the sum of \$10,000 equally to Sue and Bob, or all thereof to such of them who survives me.”



## Common Will Mistakes

- **INCORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed in equal shares to my issue.”
- **CORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed to my descendants who survive me, per stirpes.” (or ...“by representation.”)
- **CORRECT:** “The rest of my property, real and personal, wherever situated, herein called my residuary estate, shall be distributed in equal shares to my children who survive me.”

## Estate Tax Planning

- Why? To ensure the use of both spouses' estate tax exemption and to defer estate tax until second death.
- Typically includes use of credit shelter and marital deduction trusts:
  - Estate tax exempt amount goes into a credit shelter trust (which can appreciate estate tax free).
  - Excess over estate tax exempt amount passes either outright to the surviving spouse or to a marital deduction trust for the surviving spouse.

## Estate Tax Issues



- **FEDERAL ESTATE TAX**
  - \$5 Million exemption (inflation index to \$5.49 Million in 2017).
  - 40% Tax Rate
  - Portability- Unused exemption of first spouse to die passes to and can be used by the surviving spouse (\$10.98 Million total per couple). Consider whether wise to rely on portability availability.
- **NEW YORK STATE ESTATE TAX**
  - \$5.25 Million through December 31, 2018; Increases in 2019 when it matches the federal exemption.
  - Graduated tax rates, top rate of 16%.
  - No Portability.
  - The Cliff- Estate 5% over exemption- **NO EXEMPTION!**

## Sample Wills

- In Materials.
- Remember to customize.
- Remember to remove footnotes before signing.
  - Married Couple
    - With adult children
    - With trusts for minor children/grandchildren
  - Single Person
    - With adult children
    - With trusts for minor children/grandchildren

THE END.  
Questions?

