# Do This, Not That!

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**ELDER LAW AND SPECIAL NEEDS ANNUAL MEETING**

# DO THIS, NOT THAT!

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## I. INTRODUCTION

Estate planning and long-term care planning can be complicated and difficult, depending on the circumstances. The drafting of documents, the devising of strategies, and the formulating of plans can be fraught with pitfalls and peril, for the inexperienced and uneducated. The concern of every good estate planning practitioner and elder law practitioner should be not being the reason why an otherwise happy family is disputing over their loved one's plan.

Presented below are some common estate planning mistakes made by attorneys who mostly practice in the area of elder law and common elder law mistakes made by less experienced elder law attorneys and attorneys who mostly practice in the area of trusts and estates.

### A. Powers of Attorney and Statutory Gifts Rider

The qualified Elder Law attorney knows that, sometimes, the path to a successful long-term care plan is through the use of a valid and effective Power of Attorney. Reality dictates that sometimes the client we assist with long-term care does not always have the independent capacity to make decisions for him or herself. As such, having the necessary and

appropriate authority within a valid Power of Attorney will assist the agent/family member/decision-maker make the decisions to put the plan together and put it in place.

In 2009, the New York State legislature enacted a new statutory short form durable power of attorney, codified in General Obligations Law 5-1501 to 5-1514, effective September 1, 2009, and revised by Chapter 340 in 2010. The new law, as revised in 2010, provided a statutory form far lengthier than many wills and trust documents, and revised language in a new statutory gifts rider to include statutory powers and a section for the specific modification of powers, the appointment of monitors as potential "watchdogs" of the agent and the agent's actions, and specific authorization for gifting. Prior to 2009, a power of attorney form was generally concise and easier for the general practitioner to understand and execute. Certain stationary stores sold generic power of attorney forms which were no more than the front and back of a legal-size page. It is important to remember all power of attorneys properly executed prior to the new law remain effective and may still being utilized.

The 2009 power of attorney, as revised in 2010, requires two notarized signatures of the principal, one at the end of the power of attorney (GOL 5-1501B(b)) and one at the end of the statutory gifts rider (GOL 5-1514(9)(b)), but requires the documents to be executed simultaneously and be read as a single document (GOL 5-1514(9)(d)). As such, some general practitioners did not fully comprehend the new forms, and what was necessary to execute and enhance to make the new form suitable for the individual client requesting this document.

When a client asks what events precipitated the need for this new form and format, often containing language completely inapplicable to their needs, we can cite to **In re Estate of Ferrara,** 7 N.Y.3d 244 (2006). What follows is a summary to reacquaint our members of the case often cited as the trigger for the overhaul of the General Obligations Law Article 5, Title 15, Sections 5-1501 to 5-1514.

*On June 10, 1999, George J. Ferrara, a single, childless, retired New York financial broker living in Florida, executed his Last Will and Testament bequeathing his entire estate to the Salvation Army of Daytona Beach, Florida. George's distributees were a brother and a sister, and their children. In December of 1999, George was hospitalized in Florida, and his brother John and John's son Dominick Ferrara were notified. Dominick went to Florida,*

*and in January of 2000, traveled back to New York with George. In New York, decedent executed a New York Durable Power of Attorney, after moving into an assisted living facility, naming John and Dominick as attorneys-in-fact, with the power to act separately. The Power of Attorney was initialed next to the former subdivisions (A) through (O), including (M), which authorized gifts to his descendants, not to exceed $10,000.00 per year. However, a typed addition to the Power of Attorney form enabled the attorneys-in-fact (John and Dominick) to make unlimited gifts to themselves. Dominick alleged George wanted Dominick to have all his assets. This Power of Attorney was prepared by an attorney in New York City. George passed away on February 12, 2000, approximately three weeks after executing the New York Durable Power of Attorney. During the three weeks between the execution of the Power of Attorney and George's passing, Dominick transferred assets in excess of $800,000.00 to himself. Meanwhile, in Florida, the Salvation Army contacted George's Florida attorney about his Last Will and Testament., and commenced a proceeding against Dominick Ferrara in New York. The Rockland County Surrogate dismissed the Salvation Army's petition, and the Appellate Division affirmed. The Salvation Army appealed the case to the Court of Appeals, and the decision was reversed on June 29, 2006. The Court of Appeals reversal held that the gift-giving authority under the statutory power of attorney requires the attorney-in-fact to make gifts pursuant to the principal's best interest, even if the Power of Attorney contained additional language enhancing the gift giving authority.*

### 1. Execution of the Power of Attorney/Statutory Gift Rider

The current form requires the principal and the agent to sign and date the power of attorney form, and the power of attorney is only effective when the agent signs. GOL 5-1501B requires the principal and the agent to sign and date the form, and their signatures must be notarized. Some practitioners are unaware of the requirement that the instrument must be dated by both the principal and the agent, and prepare the document with the date already completed. This is technically incorrect, pursuant to GOL 5-1501B(1)(b) and (c). Moreover, because the statutory form fails to provide a line for the agent(s) to date, many agents do not date the form. This is also technically incorrect, pursuant to GOL 5-1501(B)(1)(c).

**a. From an Estate Planning/Elder Law POV.**

For both the Estate Planning attorney and the Elder Law attorney, attention must be given to the execution requirements of the power of attorney and statutory gifts rider.

**2. Modifications in the Authority Granted to the Agent**.

**a. Power of Attorney**.

GOL 5-1503 provides for the modifications of the statutory short form power of attorney and of the statutory gifts rider. This subsection has been in existence for many years, and was used on a power of attorney prior to 2009 when there was added language to the prior statutory subsections, such as in the ***Ferrara*** case. So often in our practice, a client comes to us with a power of attorney drafted by an attorney not familiar with the need for modifications, and the modifications section on both parts of the form is unused. This is a lost opportunity to tailor the form to a clients' specific need to expand and enhance (or contract) the authority of their appointed agent(s). GOL 5-1502A through 5-1502N provide construction language for each of the proposed authorities granted to the agent in the fourteen statutory subdivisions. 5-1502N provides the general subdivision "all other matters". The principal can initial subdivision P on the statutory form to grant the agent authority for each of the matters identified by the following letters; A, B, C, etc. Without a completed modifications sections, the powers of the agents are limited.

What modifications should be included in the appropriate section of the power of attorney and statutory gifts rider? The answer is not generic; the modifications should be tailored to your client and their needs. Below are sample modifications you may wish to include for certain clients:

As a new technologically competent generation ages, their assets include online passwords, email accounts, access to bank and financial accounts, registrations, licenses, websites, domain names, music, photos and other information. It is essential the agent have access to this information. A sample modification in the power of attorney for access to the principal's digital assets:

**(__) My agent shall have the power to (a) access, use, and control my digital devices, to include but not limited to, desktop and laptop computers, tablets, storage devices, mobile telephones and smartphones, and any similar digital device which currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets, (b) access, modify, delete, control, and transfer my digital assets, wherever located and to include but not limited to, email accounts including all e-mails, digital music, digital photographs and videos, digital books and spreadsheets, software licenses, social network accounts, file sharing accounts, photo sharing accounts, (c) access online and digital financial accounts, banking accounts, domain registrations, web hosting accounts, tax preparation service accounts, online store accounts, affiliate programs, any and all other online accounts, and similar digital items which currently exist or may exist as technology develops, and (c) the power to obtain, access, modify, delete, and control my passwords, security questions and other electronic credentials associated with my digital devices and digital assets described above. This authority is intended to constitute "lawful consent" to a service provider to divulge the contents of any communication under The Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et seq.), to the extent such lawful consent is required, and an agent acting hereunder shall be considered as an authorized user for purposes of any and all computer-fraud and unauthorized-computer-access laws.**

Clients with pets are often as concerned about the care of their pet as they would be for a child or other family member. Many clients are relieved when they know their agent will have the authority to care for their pet, take them to the vet, find a temporary foster family, and use the principal's funds for these purposes. A sample provision in the power of attorney modifications section to authorize agents to care for and/or delegate care for principal's pets:

**(___) My agent shall have the authority to care for and provide food, shelter and medical care for any domestic animal living in my home, or within any real property I own. My agent shall be authorized to utilize my assets to pay for any and all ordinary and necessary**

**expenses for food, medicine, supplies, veterinary care, grooming, bathing, boarding, walking, and recreational activities, including day care expenses. If necessary, my agent shall have the authority to take emergency and temporary possession and custody of any such animals, so that all such animals will receive the same standard of health, care and welfare as would be provided under my care. This agency also authorizes all licensed animal health care practitioners, veterinarians, and other persons who are providing care to such animals to discuss any confidential communication with my agent. Such provider shall also provide complete patient records, including health and vaccination history, examination and test results, reports, or other information to my agent;**

When we have a client who can no longer take care of his or her financial affairs, we often invoke the power of attorney to allow the agent to act for the client/principal. However, in the absence of a valid, properly executed power of attorney, filing for an Article 81 guardianship of the property may be necessary. Even with a power of attorney, there are occasions when an Article 81 guardianship is necessary. Section 81.17 of the Mental Hygiene Law authorizes a person to nominate their choice of a guardian through a written statement. If this is the case, a modification authorizing the agent to do is as follows:

**(___) My agent shall have the power serve as the guardian of my person and property, or to appoint or designate another individual to serve as the guardian of my person and property, and such individual shall serve without bond, in the event that I shall be declared unable to manage my affairs pursuant to Article 81 of the Mental Hygiene Law of the State of New York or any statute corresponding thereto;**

Another important modification is the agent's authority to determine the principal's domicile and intent to return to their home, the right to refuse or disclaim an inheritance, and the right to exercise a spousal refusal, especially for Medicaid purposes.

**(___) My agent shall have the power to change or maintain my domicile and/or residency for any and all purposes and take any and all actions to effectuate the foregoing (including but not limited to the power to execute a Statement of Intent to Return Home) , and shall have the power to enter into a contract with an independent living community, assisted living facility, skilled nursing facility, or nursing home to provide for my residence in any such place, and the power to terminate said contract and move me to another facility or back home, and to make any statutory waivers, elections or disclaimers, including the power to disclaim or refuse to accept an inheritance or life insurance proceeds, the right to exercise and elect a spousal refusal, and to exercise any special power of appointment held by the principal;**

Both the health care agent and agent under the power of attorney may need the authority serve as a "qualified person" and a "personal representative" under the current HIPAA federal and state statutes. A modification in the power of attorney should address the health care information needed by the agents as such:

**(___) In addition to other powers granted by me in this document, my agent shall have the power and authority to serve as a "qualified person" pursuant to New York State Public Health Law 18 and a "personal representative" for all purposes of the Health Insurance Portability and Accountability Act ("HIPAA"), Confidentiality of Alcohol and Drug Abuse Patient Records, Confidentiality of Mental Health Records, New York Public Health Law section 2782 (confidentiality of HIV related information) or any amendments or similar legislation later enacted. My agent is authorized to execute any and all releases and other documents necessary in order to obtain, review and photocopy any or all of my patient records and any other health or medical information, reports, statements, medical and health care bills, records for any past, present or future medical or mental health condition or treatment. This authority shall supersede any prior agreement I have made with any health care provider to restrict access to or disclosure of any health information.**

**b. Statutory Gifts Rider.**

The modifications section of the statutory gifts rider also should include some very important modifications to ensure the agent has the authority to act for the principal's assets and estate. GOL 5-1502(I)(14) is cause for particular concern for those principals who do not simultaneously execute a statutory gifts rider. This subsection provides the agent authority "to continue gifts that the principal customarily made to individuals and charitable organizations prior to the creation of the agency, provided that in any one calendar year all such gifts shall not exceed five hundred dollars in the aggregate".

If a principal correctly initials this section of the form, but chooses not to execute the statutory gifts rider, the agent is now limited to combined gifts on behalf of the principal of five hundred dollars per year. For many purposes, including Medicaid planning and lifetime gifting, this amount is wholly insufficient. For example, if the principal needs skilled nursing care and has a community spouse, gifts can be made by the agent to the community spouse, and under Medicaid laws, these gifts are considered exempt for Medicaid penalty purposes.[1]

***Practice Tip: If client states they do not wish to execute the statutory gifts rider, it is prudent to have written, informed refusal, signed by the principal, outlining your explanation of the relevance of the gifts rider for future needs, including Medicaid planning. Keep the original on file, and give the client a copy. If authorized by the principal you may decide to include a copy to the agent, to place the agent on notice of the principal's intention.***

Another alternative if the principal is wary about simultaneously executing the gifts rider, the principal could always include a springing provision for gifting to commence at a certain time or event. Modification language in the power of attorney may authorize the agent to act under the power of attorney only if the principal is declared incapacitated, for example;

[1] Social Services Law Section 360-4.4(c)(1)(ii)(b)(1).

**(___) This Power of Attorney shall have no force or effect until I am certified as incapacitated as provided hereunder. All authority granted in this Power of Attorney shall be subject to establishment of incapacity as provided hereunder. After this Power of Attorney becomes effective, it shall not be affected by any subsequent incapacity which I may hereafter suffer or the passage of time. For purposes of establishing incapacity, whenever two (2) licensed, practicing medical doctors who have personally examined me (one of whom shall be my primary care or attending physician) who are not related to me or to any beneficiary or heir at law by blood or marriage certify in writing that I am unable to manage my financial affairs because of mental or physical infirmity and the certificates are personally served upon me, then the agent(s) named herein shall assume all powers granted in this Power of Attorney. However, even after receipt of the doctors' certificates, I retain the right to revoke this Power of Attorney at any time.**

Modifications for gifting purposes may have certain language both in the power of attorney and statutory gifts rider modification sections, however, the gifts rider modifications section is the appropriate venue for gifting instructions and should include essential powers to arrange the principal's assets and estate as needed for a major change in life circumstances, including the relocation of the principal to a skilled nursing facility:

**(___) My agent shall have the authority to make gifts to my spouse, my children and their issue (hereinafter referred to as "my permissible donees") or to a trust for the benefit of any of my permissible donees, including the power for my agent to create and fund an intervivos trust or trusts.**

**(___) My agent shall have the authority to open, close, modify, transfer or alter any bank account, financial account, annuity, life insurance policy, stock or security, mutual fund, bond or bond fund in the best interest of the principal, including adding a joint tenant to any account, adding, changing or removing any named beneficiary from such account;**

**(___) My agent shall have the authority to add, modify, change or remove any named beneficiary of any pension plan, deferred compensation plan, life insurance policy, bank**

**account or financial account, annuity, individual retirement account, qualified or unqualified retirement account or death benefit owned by or for the benefit of such principal in the principal's best interest.**

Powers of attorney serve a useful function, when used appropriately. The power of attorney may be a wonderful tool at our clients' disposal to make sure their property, financial, and/or legal decisions are made effectively and efficiently by the party(ies) they trust and to whom they have delegated the responsibility for making these important decisions.

Occasionally, you may need the agent to complete an affidavit that the power of attorney being offered to a third-party bank or financial institution is still in effect, or if you are recording a deed executed by an agent under a power of attorney;

***STATE OF NEW YORK***

***COUNTY OF _____***

***AFFIDAVIT OF FULL FORCE AND EFFECT FOR POWER OF ATTORNEY***

**I, _____ ( name of agent), being duly sworn, deposes and states:**

**I am the agent for (name of principal). The principal executed the attached power of attorney on (date), naming me as agent.**

**As agent for the principal and under this power of attorney, I have executed this affidavit on (date). As of this date, I have no knowledge or information that the attached power of attorney has been revoked, altered, modified or terminated in such a way that would alter or terminate my authority to engage in this transaction.**

**On this date, the principal of this power of attorney is alive, and to the best of my knowledge, I represent he/she has not revoked this power of attorney, and that this power of attorney is in full force and effect.**

**This affidavit has been made to induce (name of third party or institution) to accept delivery of this power of attorney, as executed by me as the agent under such power of attorney and with the full knowledge that the (third party name) is relying on this affidavit when accepting this power of attorney.**

_____

**Signature of Agent**

**NOTARY PUBLIC**

**c. <u>Granting Authority to the Agent</u>.**

**1. <u>From an Estate Planning POV</u>.**

A qualified Estate Planning attorney knows that part of his or her client's concerns in connection with his or her estate planning is losing control. Many clients – and attorneys – are concerned with the grant of too much authority in the Power of Attorney, and especially in the Statutory Gifts Rider ("SGR"), because they see it as giving away too much control.

**2. <u>From an Elder Law POV</u>.**

The typical estate plan mostly covers what might happen when the client passes away. How will the client's estate be distributed to his/her loved ones? Who is going to be in control of the process? What issues will the family be left with or have to face? This type of planning may be short-sighted. A full and comprehensive plan should contemplate what might happen to the client in the event of his mental and/or physical disability. The well-reasoned and well-provisioned Power of Attorney will assist the client in this circumstance. If the powers are too narrow and the client suffers a mental incapacity, then the Power of Attorney may become useless.

The qualified Elder Law attorney knows that, sometimes, the path to a successful long-term care plan is through the use of a valid and effective Power of Attorney. Reality dictates that sometimes the client we assist with long-term care does not always have the independent capacity to make decisions for him or herself. As such, having the necessary and appropriate authority within a valid Power of Attorney will assist the agent/family member/decision-maker make the decisions to put the plan together and put it in place.

Leaving off the SGR will potentially subject the client to greater difficulty in the future. If the client eventually needs the SGR, under current law, the client will have to execute a new Power of Attorney to add the SGR. Moreover, if the client needs the SGR in his or her Power of Attorney, but suffers a mental incapacity, it will be too late to fix the Power of Attorney.

**d. A Dangerous Financial Weapon.**

**1. From an Estate Planning POV.**

The Power of Attorney can be a dangerous weapon in the hands of an agent who is not trustworthy and does not act in the best interest of the principal.

**2. From an Elder Law POV.**

If the client is worried about the rogue agent, the fault may lie in the choice of agent or the effective date of the Power of Attorney, more than the powers themselves.

**C. Medicaid Irrevocable Income-Only Trusts**. The Medicaid Irrevocable Income-Only Trust (or otherwise called the Medicaid Asset Protection Trust or Medicaid Trust) is a legal instrument which allows individuals with assets and income over the institutional care program limits qualify for institutional care services or for home and community based services assistance.

**1. Too Much Control.**

**a. From an Estate Planning POV.**

Hypothetically, the Grantor transfers his or her available resources to the Medicaid Trust and retains only the right to income. From an Estate Planning point-of-view, this is a drastic shift of control from the Grantor to the Trustees of the Medicaid Trust.

For many clients, the assets being contributed to the Medicaid Trust were obtained over years of hard work. The accumulation of those assets represents independence versus dependence, control over choice versus desperation, self-effectuation versus resignation. Now, for planning purposes, an Elder Law attorney might suggest contributing those assets to a Medicaid Trust which the client cannot control nor have any right over or entitlement to the principal. The Elder Law attorney would be wrong to not take the aforementioned considerations into account in the attorney's planning recommendations.

**b. From an Elder Law POV.**

The Medicaid Trust is a precise tool for qualifying an individual for Medicaid benefits. The drafter must be careful not to be liberal or too generous with discretionary provisions in a Medicaid Trust without first and foremost thinking of the Medicaid qualification ramifications. For example, drafting the Medicaid Trust so as to give the Grantor a right to the principal of the Medicaid Trust, even if at the discretion of the Trustee, will expose the principal of the Medicaid Trust as an available resource for Medicaid purposes. The Estate Planning attorney would be wrong to be liberal with the Trustee's discretion over principal distributions to any beneficiary.

**2. Funding.**

**a. From an Estate Planning POV.**

For long-term care planning purposes, the Elder Law practitioner will advise creating and funding the Medicaid Trust as soon as possible so as to minimize and, potentially, avoid problems with a potential look-back period. However, clients may not be comfortable with such a permanent loss of control over the principal transferred to the Medicaid Trust. From an Estate Planning point-of-view, it may be better to do long-term care planning when the client needs long-term care.

**b. From an Elder Law POV.**

All practitioners must avoid not following through with a plan. The Medicaid Trust cannot protect assets that are not owned by it. Moreover, the purpose of the Medicaid Trust is to protect the assets transferred to it and, in essence, "begin" the look-back period. The look-back period may be drastically affected by postponing the funding of the Medicaid Trust.

**3. Budget planning.**

**a. From an Estate Planning POV.**

Planning with the Medicaid Trust contemplates the Grantor having to live within a budget of sorts. After all, a fully-funded Medicaid Trust means the Grantor

contributed his/her available resources to the Medicaid Trust and no longer has a right to receive or enjoy the principal thereof. For many Grantors who rely on being able to dip into their savings now and then, this may be problematic. The Elder Law attorney does not always appreciate this nuance in the planning.

**b. From an Elder Law POV.**

There are three (3) general ways to pay for long-term care: (1) long-term care and other insurance benefits, if the client thought ahead and purchased this type of insurance; (2) the client's own income and/or assets; and (3) to the extent the client does not have insurance and does not want to use his or her income and/or assets, government benefits. Medicaid benefits, for one, are intended only for those who qualify. To qualify for Medicaid benefits, for example, an applicant cannot have more than the threshold amount in available resources. Moreover, to qualify for Medicaid benefits, an applicant who has available resources in excess of the threshold levels, must properly plan with the available resources he or she has. This may require changes in the applicant's budget planning. For many Estate Planning attorneys, a compromise may be to partially fund the Medicaid Trust in the interim and contribute the remaining assets when long-term care is needed. However, this type of planning postpones the full funding of the Medicaid Trust, the eligibility for Medicaid benefits, and the "start" of the look-back period.

**D. The Homestead and other Real Property**. Generally, a homestead is exempt as long as it is the applicant's primary residence. When the applicant-recipient is absent from his/her homestead, the homestead is evaluated to determine if it is a countable resource. For 2017, the home equity limit for Medicaid purposes is $840,000.00.

**1. Medicaid's Right of Recovery.**

**a. From an Estate Planning POV.**

If the primary residence is exempt because its equity value is $840,000.00 or less, then there is nothing more to do. The home can be left to the client's loved ones in his or her Will or through intestacy. Right?

**b. From an Elder Law POV.**

Yes, but not quite.

Even if the primary residence has an equity value of $840,000.00 or less, when the applicant-recipient is absent from his/her homestead and not reasonably expected to return, with limited exceptions, a lien may be placed on the homestead. So, it is not always sufficient to rely on the home equity exemption. Additional planning may be appropriate to avoid the imposition of a lien or other negative effects.

Additionally, Medicaid has the statutory right after death to recover Medicaid benefits paid to someone over the age of 55, but only from his or her probate or intestate estate. This means that Medicaid's right of recovery is limited to a person's assets that pass under his or her valid Last Will and Testament or by the laws of intestacy, but does not include any property that passes to someone without the court's involvement in a probate or administration proceeding or "by operation of law", such as through a beneficiary designation or other non-probatable form of property ownership. Allowing the applicant-recipient's homestead to pass pursuant to his or her Will, thus subjecting the asset to probate, may expose the homestead to Medicaid's right of recovery against the applicant-recipient's estate. On the other hand, contributing the homestead to a properly drafted Revocable Trust (a/k/a Revocable Living Trust) should (a) avoid probate of the homestead, (b) mirror the dispositive provisions the applicant-recipient would otherwise have in his or her Will, and (c) not affect the applicant-recipient's eligibility for Medicaid benefits.

**2. Retaining the Right to Live in the Premises.**

As stated above, the homestead is excluded as an available resource when and if its equity value is less than $840,000. However, what happens if the equity value is greater than $840,000? Or, even if the equity is below $840,000, what happens if the applicant-recipient wants to transfer the homestead? In those events, there are a few options when dealing with the homestead. Such as: (a) selling the homestead, (b) deeding/transferring the homestead and retaining a life estate, (b) deeding/transferring the homestead without retaining a life estate, (c) contributing the homestead to a Medicaid Trust (discussed above). However, each of these

situations has its own pitfalls and perils so each has to be reviewed and analyzed for its advantages and relevancy.

If the applicant-recipient sells the homestead, he or she may (a) need a new place to live, (b) have an income tax issue if the homestead is sold at a capital gain in excess of the present capital gain exclusion[2], (c) have net sales proceeds that will disqualify him or her for Medicaid eligibility, subject to subsequent planning with the net sales proceeds and a possible penalty period.

If the applicant-recipient deeds/transfers the homestead and retains a life estate, while the value of the retained life estate will not be an available resource, the gift of the remainder interest will be a disqualifying transfer. Moreover, if the homestead is sold during the applicant-recipient's life, the net sales proceeds allocated to the value of the applicant-recipient's life estate (calculated in accordance with Medicaid's tables) will be deemed an available resource. On the other hand, if the homestead is retained by the applicant-recipient until his/her death, then the homestead will receive a "step-up" in basis allowing the applicant-recipient's loved ones to sell the homestead for potentially no capital gain following the death of the applicant-recipient.

If the applicant-recipient transfers the homestead outright, then the gift of the entire value of the homestead will be a disqualifying transfer and the calculation of the penalty period, if any, will be based on the fair market value of the homestead at the time of the transfer.[3] The donee(s) of the homestead takes the applicant-recipient's basis in the homestead and a subsequent sale of the homestead may result in a capital gain, subject to the donee(s) eligibility for the IRC § 121 capital gain exclusion.

If the applicant-recipient contributes the homestead to a Medicaid Trust (discussed above), then the applicant-recipient still has an issue dealing with the transfer of the homestead being a disqualifying transfer for Medicaid purposes, potentially subject to a penalty

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[2] If a taxpayer has a capital gain from the sale of his/her primary residence, he/she may qualify for an exclusion of up to $250,000 (married couples filing a joint return may qualify for an exclusion of up to $500,000) of that gain from the taxpayer's income. IRC § 121.

[3] Subject to the "caretaker child" exemption to the Medicaid transfer penalty rules.

period. However, because the Medicaid Trust is included in the applicant-recipient's taxable estate upon his/her death (because of his/her retention of the right to income in the Medicaid Trust agreement), then the Medicaid Trust/beneficiary(ies) of the Medicaid Trust will be entitled to a "step-up" in the basis of the homestead for capital gain purposes. Additionally, while the income from the Medicaid Trust will be included in the applicant-recipient's budget for Medicaid purposes, it will not disqualify the applicant-recipient for Medicaid. Moreover, unlike the sale of a homestead subject to the applicant-recipient's life estate, a sale of the homestead will not affect the applicant-recipient's qualification for Medicaid. And, a sale of the homestead in a properly drafted Medicaid Trust should still get the benefit of the applicant-recipient's IRC § 121 capital gain exclusion.

**a. <u>From an Estate Planning POV</u>.**

If the primary residence is exempt because its equity value is less than $840,000.00, and we do not want to allow the homestead to pass through the client's Will or through intestacy, then we should figure out what transfer makes the most sense. However, clients (and their loved ones) are often worried about whether or not a transfer of the homestead triggers a "due on sale" clause in the mortgage, as well as basis and tax issues, including being able to deduct property taxes and mortgage interest. So, whatever planning option is contemplated, we need to make sure we are not over-complicating the issue and/or the applicant-recipient's ownership of the homestead, nor ruining any future tax ownership or benefit.

**b. <u>From an Elder Law POV</u>.**

From an Elder Law point-of-view, we need to take into account all of the issues expressed from an Estate Planning point-of-view but also make sure we are maximizing the client's Medicaid eligibility/qualification.

**E. <u>Wills and Testamentary Trusts</u>**. Wills are by far the most used method of transferring property from one generation to the next. In practice, we see wills from other states, homemade wills and internet wills. Many general practitioners, without the requisite experience,

draft wills without proper execution requirements or requisite legalities, and without the options a knowledgeable draftsperson would include.

**1. <u>Minor Child Provisions for Guardian</u>**. If your client is a parent to a minor child, you will want to include a paragraph nominating the person or persons to be the guardian of your client's minor child or children. Clients often ask if they have to pick someone from their family. The answer, of course, is no. Often, parents live a great distance from their blood relatives, and if the parent or parents pass away, they may not want their children to suffer the loss of their parent(s) and of their school and social community. The older the children are, the more likely they would prefer to stay in their school and their community. Whoever the parent(s) chooses, they should discuss their choice to ensure the nominated guardian is willing and able to accept this responsibility.

**In the event I die before any of my children are of majority age, I appoint _____, as the Guardian of the person and property of my minor children, subject to the trust provisions and the appointed Trustee for my children in this Last Will and Testament contained in ____. If ____ ceases to qualify or fails to act, I appoint _____, as the Guardian of the person and property of my minor children, subject to the trust provisions and the appointed Trustee for my children in this Last Will and Testament contained in ____. I direct that no bond or other security shall be required for my Guardian in any jurisdiction for the faithful performance of the Guardian's duties.**

**a. <u>From an Estate Planning POV</u>.**

Nominating the desired guardian in the client's will is not sufficient, as the will has no force until after it is probated.

**b. <u>From an Elder Law POV</u>.**

The guardian language in the will should be supplemented by also executing a Standby Guardianship (in substantially the form below) to allow the minor children to reside with the named guardian until the will is probated and the courts can name a permanent guardian:

## Designation of Standby Guardian

**(Note: As used in this form, the term "parent" shall include a parent, a court-appointed guardian of an infants' person or property, a legal custodian or a primary caretaker, and the term "children" shall include the dependent infant of a parent, court-appointed guardian, legal custodian or primary caretaker).**

**I, _____, residing at _____, hereby designate _____, residing at _____, as the Standby Guardian of the person and property of my minor daughter, _____.**

**The Standby Guardian's authority shall take effect (1) if my doctor concludes in writing that I am mentally incapacitated and thus unable to care for my children; (2) if my doctor concludes in writing that I am physically debilitated and thus unable to care for my children and I consent in writing, before two witnesses, to the Standby Guardian's authority taking effect; or (3) upon my death.**

**I also understand that my Standby Guardian's authority will cease sixty days after commencing unless by such date they petition the court for appointment as guardian.**

**I understand that I retain full parental, guardianship, custodial or caretaker rights even after the commencement of the Standby Guardian's authority, and may revoke the Standby Guardianship at any time.**

**I have made this Designation of Standby Guardian on _____ in the presence of these two witnesses.**

**_____**
**Parent**

**_____**
**Witness:**

**_____**
**Witness:**

**** If the client is not the only parent of the minor child, there should be references to the other parent of the minor child in both the will paragraph and the standby guardianship form.**

**2. Minor child trust provisions**. Another important component of drafting documents for clients with minor children is the opportunity to control when the children will receive funds from the estate. One commonly used method is a testamentary minor trust built into the will. There are a few frequently used types of testamentary minor trusts. If property is paid to a minor through a will without instructions in the will, and the amount exceeds $10,000.00, the money should be distributed to the minor's property guardian. The property may also be given to a custodian under the Uniform Gifts to Minors Act under EPTL 7-6.3.

**a. From an Estate Planning POV.**

Parents planning for the distribution of their estate to their children often agree to drafting mandatory age distributions. For example, the testamentary minor trust may mandate the trustee pay 1/3 of the trust at age 25, 1/3 at 30, and 1/3 at 35.

**b. From an Elder Law POV.**

Mandatory age distributions are fraught with uncertainty. What if the child, at 25, has an addiction or has serious financial problems? They may still be in school and need to qualify for financial aid, but the mandatory distribution will result in the elimination of any future aid.

Rather, if the testator trusts the trustee to distribute the trust pursuant to the trustee's discretion, these issues could be avoided. The trustee could still contribute toward other expenses while the child is continuing their education. If the trustee distributes as she or he deems appropriate, they may wait until there is an event or need for a wise principal distribution, such as attending graduate school, purchasing a residence or investing in a business.

In the same will, there should be a trustee named for the testamentary minor trust who has a cooperative and positive relationship with the person named as guardian so that the two fiduciaries can interact. Often, these may be the same individuals.

**3. <u>Testamentary Special Power of Appointment</u>**. Often in trust documents, practitioners grant the Grantor a testamentary power of appointment to change the beneficiaries of a trust. The testamentary power of appointment is included in the trust language, and often directs the trustees to wait for the Grantor's will to be offered for probate. The practitioner simultaneously drafts a will for the same client, stating the client executed a trust document and thereby exercises his or her power of appointment over the trust property (or some portion thereof).

**a. <u>From an Estate Planning POV</u>.**

From an estate planning point-of-view, this may be unnecessary or, at least, unclear why a Grantor of a trust may need to appoint such property in his or her will.

**b. <u>From an Elder Law POV</u>.**

EPTL 7-1.9 effectively states that the grantor of an irrevocable trust may amend (or revoke) the trust upon the consent of "all persons beneficially interested".[4] The courts have said that minor beneficiaries cannot give legal consent to an amendment/revocation (nor can their guardians).[5] However, the Court of Appeals has said that a beneficiary's consent is unnecessary if the amendment is clearly favorable to him or her.[6] However, lower courts have subsequently decided that the Court of Appeal's decision will prevail only when the amendment is an obvious benefit to the minor, and conversely, if the amendment does not benefit the minor, the courts will not allow it.

If a trust includes minor beneficiaries, then it cannot be revoked under EPTL 7-1.9. So, what are the client's options? The client could leave out minor

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[4] EPTL §7-1.9.

[5] See **<u>Whittemore v. Equitable Trust Co.</u>**, 250 N.Y. 298 (1929) ("All the adult parties to the deed of trust have consented to the revocation; the children of the settlors, however, being minors, have not and could not consent."). See also **<u>Matter of Dodge</u>**, 25 N.Y.2d 273 (1969).

[6] See **<u>In re Cord</u>**, 58 N.Y.2d 539 (1983) ("[T]hough an irrevocable trust ordinarily cannot be modified except by consent of all those who may be adversely affected thereby, that did not prevent the settlor-testatrix here from undertaking to pay trust tax obligations out of a different fund. The product of this action could only have added to and not cut down on the benefits available to the beneficiaries.").

beneficiaries, thus preserving the option to revoke the trust under EPTL 7-1.9. However, this would not be appropriate for the client who wants to include his or her minor loved ones as beneficiaries of the trust.

To resolve this conundrum, the trust language could give the Grantor the power to appoint the trust property in the Grantor's will. The will could then exercise this power of appointment to mirror the Grantor's dispositive plan, including the minor beneficiaries (or trusts for their benefit). Here is a sample paragraph from a MIIT:

**The Grantor has the limited power to appoint the remainder of this trust to the Grantor's descendants. This power shall be exercisable by the Grantor's Will and the power granted must be specifically referred to in the Grantor's Will in order to be exercised. This appointment may be outright or in further trust, and need not be equal or proportionate. If the Trustees have not received actual notice of the existence of the Grantor's Will, within ninety (90) days of the Grantor's death, and if no Will has been offered for probate in the appropriate Court of the county and state of the Grantor's residence at death, then this trust may be finally distributed as if the Grantor had not exercised the power of appointment granted in this trust, and the Trustees will be released from any liability for distributing and terminating the trust. Such powers may not be exercised in favor of the Grantor, her estate, her creditors, or the creditors of her estate.**

In the will of the same Grantor, language to exercise the power of appointment could read as follows:

**By Article__, Section ___ of the CLIENT IRREVOCABLE TRUST, executed contemporaneously with the execution of this Will, I retained a limited power of appointment and I direct that the property subject to such power shall be distributed to my issue, per stirpes.**

Additionally, in the representation of a client who wishes to execute a will for their disposition of their property, it is important to discuss how their estate plan should be amended should they ever require Medicaid assistance. If and when the client requires Medicaid, most attorneys experienced in Medicaid planning would advise the client, if they are competent, or the client's representative, to avoid using the will for the distribution of the client's property, as the property passed through the will would be subject to estate recovery in New York. If such a client, or his or her representative, was advised to modify the titling of the remaining assets to assure they were jointly held or passed directly to a beneficiary, and not to the estate, the beneficiaries would receive the asset without the reach of estate recovery by Medicaid. It is important for practitioners to revisit the estate plan of any client who has been accepted by Medicaid not only to assure their estate plan no longer contains assets which would pass through a will, but that the client is no longer a beneficiary of assets passing to them from family members, including insurance policies, annuities or other assets which would pass to the Medicaid recipient by operation of law and trigger a penalty period for the client.

**4. <u>Supplemental Needs Trusts</u>.** A Supplemental Needs Trust is a trust established for the benefit of a person with a severe and chronic or persistent disability and which *supplements*, but does not *supplant*, impair, or diminish the government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving. Such benefits may include Supplemental Security Income (SSI), Medicaid, vocational rehabilitation, subsidized housing, and other benefits based upon need.

These benefits often consider the resources and income of an individual for purposes of determining eligibility for assistance and the level of such assistance. With a Supplemental Needs Trust, however, the disabled person or another person, such as a family member, may establish a trust for a disabled individual without jeopardizing the beneficiary's eligibility for Medicaid and other government benefits.

**a. <u>From an Estate Planning POV</u>.**

A Revocable Living Trust is a trust created by the Grantor during his or her lifetime which, by its terms, gives the Grantor the right to revoke, amend, and/or modify the trust agreement. The Revocable Living Trust is intended to be an alternative to a Last Will and Testament for estate planning purposes. A Revocable Living Trust is intended to offer better protection in three general situations: (i) as a vehicle for asset management while a person is alive and well. If all of the client's assets are owned by his/her Revocable Living Trust and he/she is the Trustee, then the client will have centralized management of his/her assets. (ii) in the event the client becomes mentally disabled. Because the Revocable Living Trust provides centralized management over the assets owned by the Revocable Living Trust, beginning on the date of first funding, in the event the Grantor (or one of the Grantors) suffers a mental disability, then control over the Trust passes from the Grantor to the "Disability Trustee". If the Grantor regains mental ability, then control reverts to the Grantor. The Revocable Living Trust also contains provisions for how assets are to be used for the Grantor's benefit during any period of mental disability. And, (iii) a Revocable Living Trust is intended to avoid probate. A Will guarantees probate -- the process by which the Court is asked to validate the form of the Will, approve its provisions, and control the distributions pursuant to the terms.

**a. <u>From an Estate Planning POV</u>.**

If appropriate, a will should include language to protect a beneficiary spouse's public benefits should that spouse become disabled. If such language is added in a will, in order for the testamentary trust to qualify as a statutory Supplemental Needs Trust, it must meet the requirements of EPTL 7-1.12.

For some estate planning clients, the Revocable Living Trust is preferred because of its non-probate nature. However, sometimes the same client(s) want to create a Supplemental Needs Trust for his or her spouse. The inexperienced Estate Planning attorney may think nothing of creating a Supplemental Needs Trust for the benefit of the client's spouse in the client's Revocable Living Trust.

**b. <u>From an Elder Law POV</u>.**

A Supplemental Needs Trust cannot be created in an inter-vivos trust, such as a Revocable Living Trust, for the benefit of the Grantor's spouse.[7]

**F.** **<u>Designations of Guardian</u>**. Mental Hygiene Law ("MHL") Section 81.17 provides, in pertinent part, "in a written instrument duly executed, acknowledged, and filed in the proceeding before the appointment of a guardian, the person alleged to be incapacitated may nominate a guardian.".

A Designation of Guardian is the client's written instrument nominating the individual or individuals whom the client wants as his/her guardian of the person and/or property, in the event such an appointment is necessary. Obviously, the appointment of such guardian(s) still requires an application for guardianship before the courts, however this allows the client to set forth his/her wishes at a time when he/she presumably has capacity to make such an appointment.

**1.** **<u>From an Estate Planning POV</u>.**

A typical estate plan will include a power of attorney, a health care proxy, and even a living will. A guardianship should not be necessary if the client has a properly drafted and executed power of attorney, health care proxy, and living will.

**2.** **<u>From an Elder Law POV</u>.**

Likely scenarios where it might be helpful to have the client sign a Designation of Guardian even if he/she has a power of attorney, health care proxy, or living will: hospital/nursing home is not getting any assistance from the health care decision-maker and/or the financial decision-maker and seeks the appointment of a guardian to handle medical and/or financial issues; nursing home that has not been paid and is unaware of the resident's financial situation may seek the appointment of a guardian to help with bill payment or to get Medicaid benefits; child or other loved one disagrees with how the health care agent or financial agent is managing their loved one's affairs so brings a guardianship proceeding seeking the revocation of the advance directives and the appointment of a guardian; the issues facing the decision-maker are more complicate and more intricate than can be decided under the client's existing

[7] EPTL 7-1.12(a)(5)(iv).

documents; for whatever reason, the client's existing documents are insufficient (e.g., the power of attorney does not include a Statutory Gifts Rider, or fails to include authority to create trusts, or the gift-giving authority is limited to annual exclusion gifts). In each of these instances, even though none were contemplated when the client executed his/her power of attorney, health care proxy, and/or living will, it would be helpful if the client made known his/her wishes for who should be appointed as his/her guardian.