

Common Words & Phrases

Estate planning guide to some of the most commonly used and difficult to understand words and phrases.



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Law terms can sometimes start to blend together. The list below describes some of the most common terms that we may use together in our work, listed in alphabetical order.

Accounting

With an accounting, a fiduciary of an estate or trust must account to those individuals and entities entitled to certain assets.

In regard to a trust, there should be monthly and/or annual accountings throughout the term of the trust as well as a final accounting to close the trust. When a Trustee no longer acts in his or her role, for whatever reason, an accounting should be completed to provide to the successor Trustee. All activities of the Trustees should be accounted for so as to make sense to all who review the accountings and want to know the financial story of the trust, from beginning to closure.

In regard to an estate, there will be various financial activities from the estate's inception to closure. Initially, assets may be liquidated with proceeds deposited into an estate checking account. Throughout the course of the estate administration, there will be various administration expenses that may be paid out which the account will cover. As well, there may be any number of concerns regarding an estate that the accounting can provide information and detail on to make sense of what has transpired within the estate administration process.

Depending on the size and circumstances of the estate, the accounting may be simple or quite complex. The goal is to provide clear and sufficient information to show how all assets and income were collected, how expenses and distributions were paid out, what assets remain on hand, how the balance remaining shall be distributed and any other helpful facts that will illuminate what has emerged in the administration of the estate.

Administrator

The Administrator is the person or persons who become appointed by Surrogate's Court to handle the administration of a decedent's estate. As there is no Will, these persons have a right to act, according to a certain priority under New York law.

The priority for granting letters of administration is in the following order: the surviving spouse, children, grandchildren, father or mother, brothers or sisters and other persons who are distributees who are eligible and qualify with preference being given to the person entitled to the largest share in the estate, with certain exceptions. A person seeking appointment as an Administrator must be eligible and qualify.



Appropriate consideration should be made in regard to the necessity of filing a bond when an administration proceeding is commenced.

Article 17-A Guardianship

Article 17-A guardianship is a proceeding commenced pursuant to the Surrogate Court Procedure Act that addresses guardianships for individuals who are born with limited capacity and need assistance with respect to personal decision making, including health care, and/or finances.

This proceeding is commenced by filing a verified petition, usually by a parent, or by an interested person. The petition may be filed when the individual is around seventeen and a half years of age so that by the time he or she turns age eighteen the guardianship is in place.

Surrogate's Court requires two certifications by physicians in regard to the underlying condition and its manifestations or one certification from a physician and one affidavit from a licensed psychologist. There are other requirements which must be discussed and worked through in this proceeding.

Article 81 Guardianship

Article 81 Guardianship is a proceeding commenced pursuant to the Mental Hygiene Law which sets forth the standards

for the appointment of a guardian for a person. This proceeding may be commenced in Supreme Court or Surrogate's Court, but, typically is handled in Supreme Court.

A court may appoint a guardian for a person after certain determinations, including the appointment being necessary to provide for the personal needs of the person including food, shelter, health care or safety and/or to manage the property and financial affairs of the person. The person may agree to the appointment or there may be a finding that the person is incapacitated.

A finding of incapacity must be based on clear and convincing evidence and must consist of a determination that the person is likely to suffer harm because he or she is unable to provide for his/her personal needs and/or property management and the person cannot adequately understand and appreciate the nature and consequences of such inability. Other considerations and requirements must be reviewed.

Beneficiary Designation Review

Beneficiary designation review is extremely important. Clients can be quite surprised when an asset with a beneficiary designation does not fit with their overall estate plan. It is important to review all assets and determine the current beneficiary designations and ensure the



designations appropriately fit with the overall estate plan and the estate planning documents, such as the Will, Power of Attorney and any potential trust. An asset may need to have a different beneficiary designation due to a Testamentary Trust, a Lifetime Trust, a change in circumstances or a form being improperly filled out or not appropriately filed with the institution holding the asset. It is so important to keep beneficiary designations up to date, but, often thought of as a nuisance. I work with clients to make this a priority.

Business Succession Planning

Business succession planning is about creating a plan for the future when it comes to your business interests. Without any planning, there could be disruption in your business operations, an inability of others to continue on with the business, fighting between various parties, unintended owners and various other problems.

If you are a sole owner of a business, you want to look into the future and think of your options. Should the business continue on? Who may want to continue the business? Are there family members or key employees who would like to continue the business? It may make sense to add an additional owner in the near future through a buy-in or a gift or series of gifts. Thereafter, a buy-sell arrangement may be entered into between the parties. Wills and Power of Attorney documents should also

complement this planning.

If you are one of other owners of a business, you also want to look into the future and think of your options. The business owners should benefit from all the hard work and dedication put into the business and not let potential problems enter into the fray by means of disability, death, bankruptcy, creditor or other problems with one of the owners. Life insurance may be key to funding any appropriate buy-sell arrangement and I work with professionals as a team to make this work.

Estate & Income Taxes

The Federal and New York State estate taxes used to be a concern for middle class New Yorkers and estate planning often meant dividing assets between a married couple so as to take advantage of each individual's estate tax credit upon passing or such other estate tax planning. However, estate taxes have become much less of a concern for the majority of New Yorkers as the estate tax thresholds have dramatically changed. The New York State threshold is \$5,490,000 in 2019 which will increase with inflation each year. The Federal threshold is \$11,400,000 per person through December 31, 2025. Use of various trusts in Wills, including Disclaimer Trusts, Credit Shelter Trusts and Bypass Trusts, along with utilizing what is called the "portability election" upon the first spouse to pass, and other lifetime planning options, can certainly be utilized in regard to estate tax concerns. As always,



any changes in the laws or your personal circumstances (i.e., you won the lottery!), would require review and update of your estate planning documents. Moving to another state must be considered among the change in your personal circumstances as other states have different estate tax and/or possible gift tax or inheritance tax concerns that should be considered.

Now, income tax concerns, including capital gains and losses, have largely replaced estate tax concerns within the estate planning context. Estate planning encompasses passing assets in such a manner as to produce tax-favorable consequences while balancing other goals and desires. Assets transferred during life may be done in such a manner so as to achieve a “step-up” basis upon the transferor’s (the person transferring the asset) death. A new basis valued as of the date of the transferor’s death is then used by the person receiving the asset. For example, a power retained by a transferor in a lifetime transfer, such as a “power of appointment” can be considered good because this actually causes the asset to be included within the transferor’s estate, in a tax sense, when the transferor passes so that the asset “steps-up” to a new basis at the transferor’s death. Although, it is possible an asset could actually “step-down”, for the most part assets will increase in value through time. Various considerations in regard to income tax planning are crucial to any estate plan.

A quick overview of tax brackets provides

that there are eight income tax brackets for New Yorkers and seven income tax brackets for Federal taxes. Trusts may have their own tax identification number and pay taxes as a separate entity. Trusts taxed under New York income taxes are taxed according to eight income tax brackets with base amounts due as well as Federal income taxes according to four brackets with base amounts due.

Executor

An Executor is the person or persons or entities, nominated in a Will, who become appointed by Surrogate’s Court to handle the administration of the decedent’s estate.

Once Letters Testamentary are issued to the Executor, the Executor then has the authority to deal with banks, stock companies, real estate agents, etc. and should locate and handle all assets of the decedent appropriately.

The Executor will work closely with the attorney to handle the estate administration. There are any number of items to complete depending on the facts and circumstances of the estate. I provide my clients with an overview of the process in a document entitled, Duties and Responsibilities of an Executor.

Guardian ad Litem

Guardian ad Litem is a person appointed by



a Surrogate Judge to act in a proceeding where a necessary party may be unknown, their whereabouts unknown or otherwise be unable to act on their own behalf.

There may be any number of proceedings in which a guardian ad litem may be appointed such as the following: kinship proceedings, probate proceedings, administration proceedings, accounting proceedings, wrongful death compromises, a construction proceeding to obtain a determination as to the validity or effect of a Will provision, a reformation proceeding to change a Will or other instrument in some way, an advice and direction proceeding, a discovery proceeding, a right of election proceeding, proceedings in regard to Supplemental Needs Trusts or a renunciation requiring court authorization.

Health Care Proxy

A Health Care Proxy is the document in which you name an agent and alternate agent to make medical decisions for you in the event you cannot make them or communicate them for yourself. If you do not have a health care agent and there is a need for someone to make decisions on your behalf, New York State law will fill in the gaps with a law called the Family Health Care Decision Act. But, there can be delays in determining who the appropriate person should be at the time or fighting between family members. As well, the person acting on your behalf, by default through this law, may not know your wishes or have different

religious or other beliefs than you do in regard to medical treatment. As well, this law is effective only if the individual is in a hospital or nursing home. Again, I have seen too many instances where a simple Health Care Proxy was not part of a person's estate plan which then required a guardianship proceeding in Supreme Court costing time, headache and aggravation.

Life Insurance Trusts

Life Insurance Trusts can be set up if there is a desire to keep certain control over the life insurance and/or to avoid estate tax. Life Insurance Trusts may have served a more prominent role in estate planning when estate taxes concerned more individuals. However, this type of trust can factor in nicely to an overall estate plan to effectively manage life insurance (and other assets) during a person's life with the trust document then acting as a Will substitute upon the person's passing.

As well, given the Secure Act, the use of life insurance as an effective investment and financial planning device may come into play more as the trust allows the Trustee to manage, invest and reinvest the trust estate, collect the income and distribute the income and principal according to the trust document.

Even if life insurance is not used to fund the trust initially, the Trustee may be authorized to invest trust assets in life insurance upon the life of the donor (the person transferring



the asset initially). Split-dollar agreements may also be authorized allowing the Trustee to join with other owners to own certain portions of the life insurance policies with payments of premiums being shared, as appropriately determined.

Life insurance is a clean way to distribute assets, according to the trust document, at the death of the donor and can help in any number of situations, including spouses who are separated but not divorced, blended families and in other situations where probate may be less desired.

This type of planning should be thought of well-in advance so life insurance can be obtained, as appropriate.

Living Will

A Living Will allows you to clearly state your wishes in writing about end of life treatment so there is no confusion or controversy over what is wanted at a time you cannot communicate.

New York does not have a Living Will law even though New York does have a Health Care Proxy law. Although New York courts honor the instructions in a Living Will, it is imperative to communicate your wishes to your health care agent so as to support your stated wishes in your Living Will.

A separate Living Will can be quite crucial when a person does not have a trusted family member or friend to act as a health

care agent as this document can then express the person's wishes about end of life treatment at a time when he/she cannot communicate those wishes and there is no appointed health care agent.

As well, when conflict is foreseeable among family members, a Living Will can be incredibly important.

Power of Attorney

Power of Attorney documents can be set up as durable, springing or non-durable. The majority of individuals need New York State's statutory durable Power of Attorney set-up. This is a very powerful document and appropriate considerations must be given with only trustworthy individuals named as agents. The Power of Attorney can include various provisions, including naming one or two primary agents who can act jointly or separately, naming one or more successor agents who can act jointly or separately, naming a monitor, providing for compensation and a whole list of potential modifications to the statutory form.

The reason for the Power of Attorney is to ensure there is an agent who can handle certain financial matters for an individual in the event he or she is unable to act or simply needs your assistance for any number of reasons, including sickness, travel, cognitive inabilities or otherwise. I have seen too many instances where a simple Power of Attorney was not part of a



person's estate plan which then necessitated a guardianship proceeding in Supreme Court costing time, headache and aggravation.

Proactive Medicaid Planning

Proactive Medicaid planning is important in looking ahead and protecting assets from potential Medicaid exposure. Lifetime transferring of assets is an important component of this kind of planning and all circumstances must be considered.

For purposes of applying for nursing home care Medicaid or community home care Medicaid, there are certain resource limits. As well, New York is an "income spend-down" state for purposes of Medicaid eligibility. Some individuals desire to plan far in advance of a potential need and look at ways that may ultimately protect certain assets. There are options to be explored from appropriately spending down assets, transferring assets, purchasing exempt assets and the like. Every situation is different. Even without proactive Medicaid planning, there are ways to spend down assets and/or assess potential other actions to take before a Medicaid application is filed even in a more urgent fashion.

In looking at potential transfers, various options are explored, including gifting, outright transfers, deeds with retained life estate interests and Irrevocable Trusts. When a Medicaid application is ultimately filed, there will be assets that may be

considered exempt and others that are considered non-exempt. Those assets that are exempt will not count toward the resource limits allowed by law.

Probate

Probate is the process of proving a Will in Surrogate's Court. Probate can be simple or more complicated depending on the facts in any given situation. There are necessary parties in a probate proceeding and depending on the circumstances, obtaining jurisdiction over these necessary parties can cause delays. It is important to get a handle on the information and determine how best to proceed forward. In some situations, a preliminary appointment may be desired before the probate proceeding is complete. Ultimately, once Surrogate's Court finds the Will valid with all necessary paperwork filed and jurisdiction over all necessary parties obtained, without other complications, Letters Testamentary will be issued along with a certificate evidencing the Executor's appointment.

Real Estate Transfers

Real estate transfers for estate planning are often desired to avoid probate, plan for the future and plan in the event of future nursing home and Medicaid needs. This requires a review of the estate plan and determining if a lifetime transfer or, potentially a trust, may work best for any given situation. A Grantor (the person



transferring the property) may desire to retain a life estate interest in the real estate, but, this could cause some complications down the road if a grantee (the person receiving the property) passes before the Grantor or if the property is sold during life. Capital gains consequences, gift tax returns and other factors come into play. This is definitely not a “one size fits all” kind of planning. But, it is tremendously important and must be considered along with other estate planning documents, such as the Will, Power of Attorney and potential trust.

Retitling of Assets

Re-titling of assets may be considered for a number of reasons. Whether a Lifetime Trust is being set-up or there is a desire to make an account joint or payable-on-death or transfer-on-death or otherwise, an asset can be re-titled for various reasons. This kind of planning must be reviewed, again, in the context of the overall estate plan and work in conjunction with the Will, Power of Attorney and any potential trust.

It is important to keep in mind the possible ramifications for any potential re-titling of assets through lifetime transfers, both with the person transferring the asset and the person receiving the asset. Such ramifications include the income tax consequences, the personal needs of all the parties and their own plans for the future, the potential loss of control over the asset, the potential consequences of a future sale of the asset, the potential need for filing gift

tax returns and the fact that the person receiving the asset could predecease the person transferring the asset and so on.

Sales & Purchases of Real Estate

Sales and purchases of real estate are transactions involving many parties. Once a real estate contract is executed, there are various actions to take. The following is a general outline of actions that may be taken:

Attorneys will review the contract and have an opportunity to approve or disapprove the contract. There may be contingencies in the contract such as a home inspection or radon inspection, the purchaser obtaining a mortgage commitment and other contingencies. The seller’s attorney will update the title documents (the search and survey). The purchaser will work on obtaining the mortgage commitment, if purchasing with a loan. The purchaser’s attorney will eventually have the title reviewed and provide title requirements to the seller’s attorney which must be reviewed and cleared, as appropriate.

With the purchaser financing with a bank loan, the bank will have various requirements which usually include the title insurance commitment, proof of hazard insurance and various internal requirements in regard to the purchaser’s loan. Once the bank is able to close, a closing date will be scheduled between the



seller's attorney, the purchaser's attorney and the bank's attorney. At closing, the deed package is exchanged for the total monies due the seller. It is a group effort to bring the transaction to closing.

Supplemental Needs Trusts

Supplemental Needs Trusts (SNTs) are incredible trusts that can greatly enhance a disabled person's quality of life. They may be first party SNTs or third party SNTs.

First party SNTs are set up with funds of the individual with a disability, whether through an inheritance received from improper estate planning, a personal injury award, a medical malpractice lawsuit, assets accumulated from work, child support or etc. Assets in a properly set-up first party SNT do not count toward the limits allowed by governmental benefits (i.e., Supplemental Security Income and Medicaid), however, upon the death of the beneficiary or early termination of the trust, the assets remaining in the trust must be used, first, to repay the Medicaid program for lifetime benefits paid to the beneficiary.

Third party SNTs are set up with funds that do not belong to the individual with a disability. Funds from parents, relatives or friends, etc. can be used to set-up the third party SNT. This trust can be set up during life or at death, through a Will. The purpose of the trust is to benefit the individual with a disability without jeopardizing public benefits. Many families with a relative with

a disability can benefit from this type of planning.

Transfer-on-Death Accounts, Payable-on-Death Accounts, Jointly Held Assets, and Assets with Beneficiary Designations

Transfer-on-death (TOD) accounts, payable-on-death (POD) accounts, jointly held assets and assets with beneficiary designations must be reviewed. Whether the goal is to establish a TOD/POD account or change the ownership of an asset so that it is jointly held or name a particular beneficiary for an asset - these decisions should be reviewed with the overall estate plan in mind. All assets should be reviewed with a look toward the future to see how any certain arrangements may play out. Unfortunate consequences can unfold when this type of thorough review is overlooked.

Trusts

Trusts may be set up for any number of reasons and in any number of ways depending upon the goals. A Revocable Trust can be a wonderful tool to hold business interests so that in the event of any kind of inability of the business owner to handle his/her business interests, a successor Trustee can immediately take over without any interruption to the business. A trust also keeps those assets in



the trust out of probate so as to create an efficient manner to pass assets upon a person's death and so as to keep such financial affairs out of the public records through Surrogate's Court.

Trusts can also be set up to manage trust assets on behalf of an individual who may need such help. A trust beneficiary may be on government benefits and a Supplemental Needs Trust is required or a trust beneficiary may have drug problems, creditor issues, concerns regarding divorce, gambling addiction, be under a certain age or have other such concerns. A Grantor (a person who sets up the trust) may want certain assets to remain in the family and not be potentially subject to the effects of divorce or remarriage. A Grantor may want to pass assets to beneficiaries only upon certain events or upon beneficiaries obtaining certain ages. A Testator (person writing a Will) may want assets to pass through a trust in the Will for specific reasons, including asset protection. A trust can also be set-up as a Charitable Remainder Trust or Charitable Lead Trust if a person has charitable inclinations.

Trusts can be revocable and irrevocable and create a relationship between Trustee and beneficiaries to last into the future for the benefit of the beneficiaries. If any trust scenario is played out, it should seem a win-win for those involved for it to make sense.

I assist Trustees in helping them act in a prudent manner avoiding rash decisions. I also work on a system for documenting

meetings, phone calls and other actions in order to provide the basis for certain decisions made or actions taken.

Voluntary Administrator

A Voluntary Administrator is a person, permitted by New York law, to act in a small estate proceeding.

A small estate is the estate of a domiciliary or non-domiciliary who has died with personal property having a gross value of \$50,000 or less. This \$50,000 does not include property that may be "set off" for family rights. This proceeding is not available if the decedent passed with interests in real property.

A Voluntary Administrator must qualify and undertake to settle the estate; he or she obtains certificates from Surrogate's Court to handle the assets and affairs of the estate and files paperwork to account for all personal property received and disbursed by him or her.

Wills

Wills can include various provisions including: bequests of personal property, bequests to charities, guardian appointments for minor children, Testamentary Trusts for any number of reasons (such as to benefit minors or disabled individuals, to maintain control, creditor protection, estate tax planning and



etc.), additional provisions with respect to business interests, additional powers with respect to digital assets, simultaneous death provisions and many others. The idea is to make the Will work for your specific situation and with all your other estate planning documents, including those assets with beneficiary designations.

