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I advise all of my clients to consider the following documents as part of their estate planning portfolio in order to avoid or minimize the necessity of having to commence a Guardianship or other Court proceeding:

1] **Durable Power of Attorney**

This is primarily a **FINANCIAL DECISION MAKING** document. As a general rule, I advise people I speak to and my clients, to have a Comprehensive New York State Durable Power of Attorney. The person or persons you designate to act for you are called "agents" or "attorneys-in-fact". This document empowers your agent to make financial, administrative and estate planning decisions on your behalf, if and when it is necessary in the future. A Comprehensive Durable Power of Attorney is also a critical component of a plan to protect and preserve assets. This planning tool is essential in avoiding a Guardianship proceeding. Please note that a Power of Attorney should be one that is **DURABLE**. The word "durable" simply means that your designated agent continues to have authority to act even after incapacity or incompetence.

2] **Health Care Proxy**

A New York State Health Care Proxy document allows you to designate a trusted person, typically a family member, to make all health care decisions in the event you were not able to make such decisions yourself. I always advise that in addition to the primary agent you choose, a successor should be appointed in the event the primary agent should be unable or unavailable to act.

Without a Health Care Proxy document, your family members do not have the legal right to speak for you regarding health care decisions.

The current available Health Care Proxy forms allow you to specify your desires with regard to not being kept alive by artificial life sustaining medical treatments.

Although such desire can be placed on the Health Care Proxy document, I generally advise that a separate and distinct Living Will document be executed.

3] **Living Will**

I always advise that a Living Will be considered. A Living Will is a document which is a written expression of your wishes concerning prohibition or termination of life sustaining medical treatment when there is no reasonable prospect of recovery from:

- (a) Suffering from extreme physical or mental disability.
- (b) Terminally ill.
- (c) Persistent and permanent vegetative condition.
- (d) Brain death.

In your Living Will you clearly express that under the above circumstances you be allowed to die and that no medication, artificial means, or any extraordinary life sustaining medical treatment be used to prolong our life. In addition, you would generally state that if such treatment were being provided, that it be withdrawn.

You may also specify in detail those types of life prolonging measures you specifically refuse under the above circumstances.

It is important to note that there is no statute in New York which specifically allows a person to have a Living Will. New York State, however, has case law which states that a person should express their clear desires in writing in order to have the best chance of having their wishes carried out.

This document, in most cases, greatly alleviates the sense of uncertainty and guilt that caring family members have at a time which such critical decisions need to be made.

Without a Living Will, it becomes much more difficult for a family member to attempt to carry out your true desires to avoid unnecessary suffering when it becomes evident that there is no reasonable prospect of recovery.

4] **Last Will and Testament**

A Last Will and Testament, is a formal document that governs the transfer of property at death. It is a testament to the decedent's intent to transfer property on death, often

called a “testamentary disposition.” A person who executes a will dies “testate,” and a person who dies without a will is said to have died “intestate.”

If a person dies intestate, his or her property is distributed according to state statute (unless it is governed by a “will substitute” discussed below). In such event your assets are divided among your next of kin, the “distributees.”

A will is important not only for the transfer of property but also serves the following functions:

- (a) Naming an executor to represent the decedent in the administration of the decedent’s estate.
- (b) Naming a guardian for the decedent’s minor children, if applicable.
- (c) Avoiding the necessity of your executor posting an expensive bond.
- (d) Preventing unintended persons from inheriting your assets.
- (e) Providing for funeral arrangements.
- (f) Providing for the establishment of testamentary trusts.
- (g) Reducing or eliminating estate taxes.
- (h) Arranging for charitable contributions,
- (i) Arranging for the care of an adult who is incapacitated or unable to handle his or her affairs.

Upon your death, and prior to distribution of your property your Will must be probated. Probate is the process by which your Will is submitted to the Surrogate’s Court to ensure that it conforms with the applicable legal requirements. The process requires:

- (a) The filing of a Probate Petition with your Will and other documents.
- (b) The payment of filing fees.
- (c) Notification of relevant heirs and interested parties.

After all requirements are met and assuming no heir objects and the will was drafted and executed in accordance with legal requirements, the Surrogate's Court will issue Letters Testamentary granting the Executor legal authority over your assets. It could take approximately 30 to 90 days before the will would be accepted for probate. The entire administration could take six to nine months to complete. In addition, whenever a will is probated anyone who would have an interest in your estate has the right to contest the probate. Such a contest could extend the above time periods considerably.

In addition to a Last Will and Testament, there are other ways to transfer property at death without a Will to avoid the probate process. In other words by using "will substitutes" certain assets pass to a beneficiary automatically upon your death ("by operation of law"). Will substitutes include IRA's, life insurance, jointly held property, retirement benefits and trusts. It is important to determine who you have listed as beneficiary on insurance and retirement plans and with whom you own joint property. Please remember that a Will does not control property which is subject to a "will substitute." Also please note will substitutes are not always appropriate. Individual circumstances dictate applicability. Hence it is important to inventory your assets to determine whether they qualify as a will substitute and pass outside of your will.

5] **Trusts.**

A popular method of avoiding probate is through a **Revocable Living Trust.** Although a detailed discussion of trusts is beyond the scope of this letter it is important to mention the usefulness of trusts in any estate plan. The Revocable Living Trust is a relatively simple and flexible private trust plan in which you transfer all of your individual assets, cash, stocks bonds, etc., other than your retirement funds to a trustee to hold in trust (you can serve as trustee). The Revocable Living Trust is a trust in which:

- (a) You can serve as trustee.
- (b) You can revoke at any time.
- (c) Contains provisions for the distribution of your assets at death.
- (d) Is irrevocable at your death.

The trustee in turn manages these assets - that is, makes investments and collects and distributes income to you as the grantor.

During your lifetime, you can amend the trust. You can add or withdraw assets, or you can terminate the trust and have all trust property returned to you. You can serve as sole trustee or co-trustee. In this way, you retain control of your trust assets during your lifetime, and you can make changes as circumstances require. Also, you can alter the future disposition of both the income and the property.

For tax purposes, you report the income earned by the trust just as if you owned the assets free of trust. Additionally, at your death - if the trust was not revoked during your lifetime - the value of the trust's assets will be included in your taxable estate.

At your death, in the absence of a Revocable Living Trust, certain assets in your name are subject to probate. Revocable Living Trust assets, however, can pass outside the normal estate settlement process; they are not subject to probate and therefore are not a matter of public record. Your Will, however, should be coordinated with the trust agreement.

Because of the revocability of the trust, there are no gift taxes at the creation of the trust.

Some of the advantages to having a Revocable Living Trust are as follows:

Probate expenses are eliminated with respect to all property owned by the trust. Other administrative expenses are generally minimized.

Successor trustees generally take the place of successor executors, which also tends to minimize probate and administration expenses.

Trust assets are not subject to probate and administration and therefore, are not a matter of public record. There is greater privacy involved with the distribution of estate assets owned by a Revocable Living Trust.

A Revocable Living Trust provides for better management of business interests and other estate assets. Since the assets are already owned by the trust, a trustee can simply continue the management of the assets with a minimum amount of interruption or legal entanglements.

Even if you place all of your assets into the Revocable Living Trust, you should nevertheless have a Will because it is possible that:

- (a) You will have overlooked certain assets and not put them in the Revocable Living Trust.
- (b) Your death will be the result of an accident or medical malpractice.

In either of the above cases, your estate will have assets which are not part of the Revocable Living Trust and which will have to be disposed of by will.

Therefore, it is recommended that if you choose to use a Revocable Living Trust you should also have a will that provides that all assets owned by you at the time of your death, other than the assets in the Revocable Living Trusts, and your retirement funds, be "poured over" into the Revocable Living Trust established as set forth above.

The reason that the will should contain this "pour over" feature is that, in this way, all of your assets will be disposed of by a single instrument, i.e., the Revocable Living Trust, rather

than multiple instruments and will be administered by a single individual acting in a single capacity, i.e., your trustee.

***PLEASE NOTE THAT A REVOCABLE LIVING TRUST DOES NOT
SHIELD YOU FROM ESTATE OR INCOME TAXES.
MOREOVER, ASSETS IN A REVOCABLE LIVING TRUST
ARE CONSIDERED OWNED BY YOU FOR MEDICAID PURPOSES,
AND THEREFORE ARE NOT SHELTERED.***

I hope you all enjoyed this seminar.
Please note that there are other more sophisticated trusts which would require a personal meeting.