



THE ELDER PLAN
STRATEGIES & DOCUMENTS
Guide

RUSSO LAW GROUP, P.C.

Estate Planning, Elder Law & Special Needs



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FINANCIAL DECISION MAKING

Every person should have a comprehensive New York State DURABLE POWER OF ATTORNEY which can be executed in favor of one or more individuals (ex: spouse, children).

This will enable the attorney-in-fact to make financial decisions on your behalf, if and, when it is necessary. A comprehensive Durable Power of Attorney is a critical part of your plan to protect and preserve your assets. This document should contain expanded powers, such as the authority to make gifts and to sign tax returns, as well as provide for successor agent(s). In addition, this planning tool is essential in avoiding a Guardianship proceeding which can be time consuming, costly and restrictive.

HEALTH CARE DECISION MAKING

Every adult individual should have the following Health Care Decision Making documents:

- A. A New York State HEALTH CARE PROXY, which will allow a family member (such as your spouse or child) or another individual of your choosing to make health care decisions on your behalf if you are unable to do so. Only one agent can be appointed to act at a time. It can also state your wishes regarding organ donation.
- B. A LIVING WILL, which specifies your desires as to life sustaining treatment in the event there is no reasonable prospect of recovery. This document provides guidance to your agent under the Health Care Proxy as to your desires regarding extraordinary life sustaining treatment.
- C. A MEDICAL AUTHORIZATION, referred to as a HIPAA Authorization, which allows for the disclosure or release of your health information to the individuals that you have selected to make health care decisions for you. This allows your health care agent(s) or other designated individuals to access your health care information to make the most informative decisions about your care.

These Health Care Decision Making documents can be modified according to your personal needs and wishes. Further, if you execute the Health Care Proxy, Living Will and Medical authorization, you should provide a copy of these documents to your agent(s) and to your family physician so that these documents can be made part of your medical records.

GUARDIANSHIPS

There are many individuals who cannot make financial and personal decisions for themselves. If an individual has not legally selected someone to make these decisions using a comprehensive Durable Power of Attorney and Health Care Proxy, then upon incapacity he or she will need a COURT-APPOINTED GUARDIAN to do so. Individuals seeking to petition the court to be legal guardian in an Article 81 proceeding should retain legal counsel to represent him/her.

For individuals that are intellectually challenged and hence are unable to sign Advance Directives such as a power of attorney and health care proxy, an Article 17A Guardianship should be commenced so the court can appoint a legal guardian.

LAST WILL AND TESTAMENT

A Last Will and Testament provides for the administration of your estate and the orderly disposition of your assets upon your demise. There are three areas of consideration in terms of your Will: (i) your decision as to the ultimate distribution of your assets, (ii) appointment of fiduciaries, such as an Executor and a Trustee, and (iii) estate tax consequences based upon the value of your estate.

In your Will you are able to set forth your intentions in writing, so that your wishes are carried out upon your demise. These intentions may include all or some of the following:

1. Are there specific bequests that you wish to leave to a certain person? These items may include jewelry, dinnerware, artwork, a car.
2. To whom do you wish to leave your remainder estate to? For example, your spouse, your children, your nieces and nephews, or a charity.
3. If your child(ren) are minors, you may wish to have his or her share held in a trust until an age you feel they are mature enough to have access to it.
4. If your child(ren) are minors, you should consider who will be his or her guardian(s) and trustee(s), if needed.
5. Who will be the Executor of your estate to carry out the terms of your Will?
6. If you are leaving assets to an individual with special needs, your Will can leave those assets in a protective way.
7. If you are in a second marriage, your Will makes sure to specify how the estate is to be handled after your passing, including your children and the children of your spouse.
8. Your will may also address long term care planning needs.

Set forth below are examples of Wills that can be drawn up to meet some of these scenarios:

MARRIED COUPLES IN THE CONTEXT OF LONG TERM CARE PLANNING

There are two alternatives which should be considered.

A. One alternative is for your Wills to provide for a Trust for the surviving spouse's benefit during the spouse's lifetime. This plan will allow your trustee (i.e., children) to manage the Trust Assets for your spouse's benefit to supplement his or her care, but at the same time protect the assets from creditors and/or Medicaid reimbursement in the event your spouse receives medical assistance under the Medicaid program. The ultimate disposition of the Trust Assets would be to your children.

B. The second alternative is for your Wills or Revocable Living Trusts (see discussion below) to provide for the distribution of your assets directly to your children. In this approach, your children may have greater flexibility as to the management and expenditure of the assets, but you are relying on them to provide for the supplemental needs of your spouse.

C. The benefit of either approach is to protect assets of the deceased spouse in the event the surviving spouse is in need of long term care.

Notwithstanding either alternative, please note that the surviving spouse is entitled to the greater of \$50,000 or one-third of the deceased spouse's net estate, pursuant to the surviving spouse's statutory right of election. If the surviving spouse is on Medicaid, then the Department of Social Services can make a claim on behalf of the spouse for Medicaid reimbursement against the deceased spouse's estate.

PLANNING FOR THE SPECIAL NEEDS OF A BENEFICIARY

A Will can also provide for the special needs of a beneficiary who is someone other than a spouse (such as a family member who collects disability benefits). All or a portion of your estate can be placed into a Supplemental Needs Trust under your Will. The trustee can be given broad discretion to expend income and/or principal for the special needs of a beneficiary, without affecting the beneficiary's eligibility for governmental benefits, such as Medicaid.

POUR OVER WILL

In the event that you decide upon utilizing a Living Trust (as discussed below), then as a precautionary measure, you should have a Will which provides for your personal property tangible assets to pass directly to your surviving spouse or children and the balance of any other assets outside of your trust to be paid over to the Trust for ultimate distribution in accordance with the Trust provisions.

LIVING TRUSTS

REVOCABLE LIVING TRUST

A funded REVOCABLE LIVING TRUST can be utilized to achieve asset management, financial decision making, and avoidance of probate. This plan will allow you to place your assets into the Trust to be managed by you, either alone or with a Co-Trustee (i.e., spouse and/or children).

MANAGEMENT OF ASSETS AND INCOME. You would receive the income and/or principal from the Trust at your discretion. You would also have direct access to the principal of the Trust at any time. Further, you would retain the power to alter, amend, or terminate the Trust at your sole discretion. Upon your demise, the Trust Estate avoids probate and allows for the distribution of your Trust Assets according to your desires as stated in the Trust.

AVOIDANCE OF PROBATE. Unlike assets passing under a Will, the Trust Assets will not be subject to a probate proceeding. This step can save legal fees and court filing fees for your family and avoids any unnecessary delay in the distribution of the Trust Assets.

MEDICAID AVAILABILITY. The Trust Assets would be considered available for purposes of determining Medicaid eligibility. In the event that Medicaid planning is desired after the trust is established, we would have to review your situation at such time.

GIFT AND ESTATE TAXATION. There would be no gift tax upon the funding of the Trust. Upon your demise, the value of the remaining Trust assets would be included as part of your estate for estate tax purposes.

BENEFITS OF REVOCABLE LIVING TRUSTS:

- Asset Management
- Avoids Delays in Distribution
- Avoids Disputes
- Lower Estate Settlement Costs
- Assures Privacy
- Grantor Can Observe the Estate Plan in Action

MEDICAID ASSET PROTECTION TRUST

A MEDICAID ASSET PROTECTION TRUST, which is an Irrevocable Trust, can be used to protect assets for Medicaid purposes, while providing for asset management. Unlike the Revocable Trust, the Trust assets will not be considered available for purposes of determining Medicaid eligibility (see above).

MANAGEMENT OF ASSETS AND INCOME. The assets placed in trust would be managed by your Trustee (i.e., your children) according to the Trust provisions. The Trust can provide for you to receive the income from the Trust assets. In the alternative, the Trust can state that you will not receive the income so as to protect the income for Medicaid purposes.

You would not have direct access to the principal of the Trust at any time. Further, you may retain a limited Power of Appointment, exercisable by you under your Will, Trust or other written instrument, so that you can alter the ultimate disposition of the Trust assets, if you so desire.

AVOIDANCE OF PROBATE. The assets held in trust will not be subject to a probate proceeding of your Will. This step will save legal fees and court filing fees for your family and avoids any unnecessary delay in the distribution of the Trust Assets.

MEDICAID ELIGIBILITY. After five (5) years, the Trust Assets would not be considered an available resource for purposes of determining nursing home Medicaid eligibility. However, the income (if payable to you) would be considered available for the payment of medical care, (ex.:, nursing home care).

INCOME TAXATION. The Trust income is taxed to you (the person who set up the trust) under the Grantor Trust rules of the Internal Revenue Code.

GIFT AND ESTATE TAXATION. There would be no gift taxation upon the funding of the Trust. Upon your demise, the value of the remaining Trust assets would be included as part of your estate for estate tax purposes.

MEDICAID AND A SURVIVING SPOUSE. Under New York law, if you pass away and your spouse is on Medicaid nursing home care, then a portion of the Trust assets may be considered available to the surviving spouse which will adversely affect his or her Medicaid eligibility.

FAMILY PROTECTION TRUSTS

You can leave assets to a Family Protection Trust which will allow your assets to be left in a protective way for your beneficiaries. Outright distributions to beneficiaries may leave those assets vulnerable to many circumstances that can lead to the assets being wasted. By establishing a Family Protection Trust, the trust assets will still be available for your loved one but may be protected from unfavorable circumstances such as a bad marriage, creditors, bad asset management, or estate taxes.

RETIREMENT TRUSTS

A Retirement Trust can be created to give the beneficiaries of your retirement account protections that are otherwise not available to them. Rather than naming beneficiaries directly for your IRA accounts, you can establish one or more retirement trusts to protect the funds for your beneficiaries from creditors for a period of up to ten years. In the Retirement Trust, you can designate successor beneficiaries to your IRA, so that you are able to control who inherits the IRA after your primary beneficiary has passed away.

In addition, as to certain beneficiaries (referred to as “eligible designated beneficiaries”), the trust can also provide for the required minimum distributions to be paid to the trust based on

the life expectancy of the eligible designated beneficiary. This type of Trust is referred to as an “Accumulation Trust”. The trust can also provide for prudent financial management of the Trust assets, thus avoiding any poor financial decisions by the beneficiary.

If you are also seeking to protect these assets for the eligible designated beneficiary who is on government benefits, such as Medicaid or Supplemental Security Income (SSI), then a SECURE SNT would be appropriate. This type of trust combines both supplemental needs provisions while allowing for the required minimum distributions to be paid to the trust in a protective way over the lifetime of the eligible designated beneficiary.

THE RESIDENCE

PLANNING TECHNIQUES TO PROTECT AND PRESERVE THE RESIDENCE

There are several options which can be utilized to protect your primary residence such as an outright transfer, transfer with a retained life estate and transfer to a Medicaid Asset Protection Trust. Often, transferring the residence is an important part of the plan.

The major benefit is that, after the period of ineligibility has expired, the residence will not adversely affect the individual's Medicaid eligibility for nursing home care.

There are several disadvantages of an outright transfer: No right to live in the house and No step-up in cost basis upon the transferor's demise. The transferee receives the transferor's adjusted cost basis; Loss of Senior Citizens, Veteran's and/or STAR real estate tax exemptions; Loss of the \$250,000 capital gains tax exclusion upon sale (\$500,000 for a married couple) and you cannot later change the owner of the property.

The disadvantage of a transfer with a life estate is that if you need Medicaid nursing home care, you will not be able to sell your home and protect a 100% of the sales proceeds and you may be adversely affected as to your use of the \$250,000 exclusion of capital gains (\$500,000 for a married couple) as to the interest held by the transferees. Lastly, you cannot later change the beneficiary of your residence.

TRANSFER TO A MEDICAID ASSET PROTECTION TRUST

1. You retain the right to live in your house for as long as you live.
2. May preserve a step-up in cost basis upon the Grantor's demise.
3. May qualify Senior Citizens, Veteran's and/or STAR real estate tax exemptions (if the Trust contains certain provisions).
4. Maintain eligibility for the \$250,000 exclusion of capital gains (\$500,000 for a married couple).
5. Retention of a limited power of appointment to change certain beneficiaries.

FEDERAL AND NEW YORK STATE TAXES
INCOME TAXES

The recently enacted Tax Cuts and Jobs Act (“Act”) may have major implications on your taxes and your budget. While the Act, generally, made favorable changes to the seven income tax brackets and doubled the standard deduction, the Act also made unfavorable changes in the form of limiting or eliminating certain deductions that you may otherwise be accustomed to taking. Most notably the State and Local tax deductions (which includes property tax and income tax) are now limited to \$10,000.

The Act also eliminated the personal exemption, eliminated the deduction for home equity debt (historically capped at \$100,000), and lowered the cap on mortgage debt eligible for deductions from \$1 million to \$750,000. As a result, although you may be subject to a lower tax bracket, when looking at all of the changes in the aggregate, taxpayers in high-tax states like New York may experience higher taxes.

GIFT TAXES

There are potential gift tax consequences when assets are transferred for less than full consideration. In 2023, the annual gift tax exclusion amount is \$17,000 per recipient. Therefore, you can give gifts up to the annual gift tax exclusion without having to file a gift tax return or dipping into your lifetime estate and gift tax exemption. Any gifts in excess of \$17,000 per recipient per year and not between spouses are subject to federal gift tax reporting requirements and may be subject to gift taxation (Unlimited transfers between spouses who are U.S. citizens are also excluded from federal gift taxation).

Other qualifying annual exclusion gifts and transfers between spouses (as discussed above), cumulative lifetime gifts of up to \$12,920,000 in 2023 will be subject to federal gift tax reporting, but no gift tax will be due. If you make gifts in excess of the available annual exclusion, then a federal gift tax return is required to be filed on or before April 15th of the year following the year of the gift (even if no tax is due).

Please note that transfers to third parties, such as trusts and children, may result in adverse income tax consequences. Further planning may be advisable.

FEDERAL INCOME TAX RATES

The following chart outlines the income tax rates for Single and Married filing Jointly:

Income Tax Rate	<u>Filing Status</u>	
	Single	Married (Joint)
2018-2025		
10%	\$0 - \$11,000	\$0 - \$22,000
12%	\$11,001 - \$44,725	\$22,001 - \$89,450
22%	\$44,726 - \$95,375	\$89,451 - \$190,750
24%	\$95,376 - \$182,100	\$190,751 - \$364,200
32%	\$182,101 - \$231,250	\$364,201 - \$462,500
35%	\$231,251 - \$578,125	\$462,501 - \$693,750
37%	\$578,126+	\$693,751+

ESTATE TAXES

Federal Estate Taxes

Under current law, your estate is subject to both federal and New York State estate taxation. The federal estate and gift tax exclusion is \$12,920,000 (\$25,840,000 for married couples) in 2023 and is subject to an annual adjustment. Please note that this increased exemption amount is set to sunset in 2025. In addition, gifts of \$17,000 per person per year can be made without any federal gift taxation.

The Federal estate tax rates commence at eighteen (18%) percent and graduate to forty (40%) percent. The New York State estate tax rates commence at three and six hundredths (3.06%) percent and graduate to sixteen (16%) percent. Any taxable assets in excess of the federal exclusion amount will be taxed at 40% plus the New York State estate tax, effectively a rate of 50% (approximately).

New York Estate Taxes

In New York the basic exclusion amount for dates of death on or after January 1, 2023 and before January 1, 2024, is \$6,580,000. It is scheduled to increase annually for inflation.

These increases will certainly help reduce or eliminate the New York State estate tax liability for those under the exemption level at the time of death.

RETIREMENT ACCOUNTS

When an account owner reaches a certain age, the account owner is required to take a minimum distribution from their IRA. Depending upon one's birth date, required minimum distributions are based on a Table published by the IRS (see Tables below).

The SECURE Act of 2019 changed the age at which RMDs begin from 70½ to 72. The Secure Act 2.0 increases the age at which RMDs begin to age 73 for those individuals who turn 72 on or after January 1, 2023. Notably, an individual who attains age 72 in 2023 is *not* required to take an RMD for 2023. The RMD age changes again in 2033 from 73 to 75.

Take steps now to protect your assets and preserve your dignity. Contact us for a planning meeting today!

Russo Law Group, P.C. advocates for and represents seniors and people with special needs and their families. Call us at (516) 683-1717 or visit us at www.vjrussolaw.com for more information.

RETIREMENT DISTRIBUTIONS

Table for Determining Applicable Divisor

For Account Owners who turned age 70 ½ after 12/31/19

To calculate the required minimum distribution (RMD), divide the account balance on December 31 of the preceding year by the applicable divisor. The applicable divisor is determined based upon the IRA owner's age attained on his or her birthday in the year of distribution.

This table does not apply to: (i) IRA owners who turned age 70 ½ by 12/31/19, (ii) beneficiaries of a deceased IRA owner, or (iii) to an IRA owner with a spousal beneficiary greater than 10 years younger than the IRA owner. There are also other exceptions to the general rule (such as 401k retirement accounts).

Note: The SECURE Act of 2019, which took effect on January 1, 2020, changed the RMD beginning at age 72. In addition, subject to a few exceptions, this law generally requires an inherited to be paid within 10 years following the death of the account holder.

Age of Retiree	Distribution period (in years)	Age of retiree	Distribution period (in years)
72	27.4	97	7.8
73	26.5	98	7.3
74	25.5	99	6.8
75	24.6	100	6.4
76	23.7	101	6.0
77	22.9	102	5.6
78	22.0	103	5.2
79	21.1	104	4.9
80	20.2	105	4.6
81	19.4	106	4.3
82	18.5	107	4.1
83	17.7	108	3.9
84	16.8	109	3.7
85	16.0	110	3.5
86	15.2	111	3.4
87	14.4	112	3.3
88	13.7	113	3.1
89	12.9	114	3.0
90	12.2	115	2.9
91	11.5	116	2.8
92	10.8	117	2.7
93	10.1	118	2.5
94	9.5	119	2.3
95	8.9	120 and older	2.0
96	8.4		

REQUIRED MINIMUM DISTRIBUTIONS

Table for Determining Applicable Divisor

For Account Owners who turned age 70 ½ on or before 12/31/19

To calculate the required minimum distribution (RMD), divide the account balance on December 31 of the preceding year by the applicable divisor. The applicable divisor is determined based upon the IRA owner's age attained on his or her birthday in the year of distribution.

This table does not apply to: (i) IRA owners who turned age 70 ½ after 12/31/19, (ii) beneficiaries of a deceased IRA owner, or (iii) to an IRA owner with a spousal beneficiary greater than 10 years younger than the IRA owner. There are also other exceptions to the general rule (such as 401k retirement accounts).

Age	Applicable Divisor	Age	Applicable Divisor	Age	Applicable Divisor
70	27.4	86	14.1	102	5.5
71	26.5	87	13.4	103	5.2
72	25.6	88	12.7	104	4.9
73	24.7	89	12.0	105	4.5
74	23.8	90	11.4	106	4.2
75	22.9	91	10.8	107	3.9
76	22.0	92	10.2	108	3.7
77	21.2	93	9.6	109	3.4
78	20.3	94	9.1	110	3.1
79	19.5	95	8.6	111	2.9
80	18.7	96	8.1	112	2.6
81	17.9	97	7.6	113	2.4
82	17.1	98	7.1	114	2.1
83	16.3	99	6.7	115+	1.9
84	15.5	100	6.3		
85	14.8	101	5.9		

PLANNING WORKSHEET

What is Your Estate Worth?

Most people underestimate the value of their estates. Completing the following worksheet can help you estimate the value of your gross estate. (Note that other items may also be included).

<u>Assets</u>	<u>Market Value</u>
Certificates of Deposit, Money Market Accounts, and other Cash.....	\$ _____
Stocks, Bonds, and Mutual funds.....	_____
Mortgages and Other Debts Owed to You.....	_____
Other Investments.....	_____
Employer-Sponsored Retirement Plan Benefits.....	_____
Individual Retirement Accounts.....	_____
Personal Residence.....	_____
Vacation Home / Time Share.....	_____
Other Real Estate.....	_____
Business or Partnerships Interests	_____
Life Insurance Face Value.....	_____
Automobiles and Recreational Vehicles.....	_____
Jewelry.....	_____
Collectibles.....	_____
Other (furniture, personal belongings, etc.).....	_____
TOTAL GROSS ESTATE	\$ _____

NOTE: The above is merely informational and not legal advice. This guide was published in January 2023 and based on New York law. You should contact us for any changes or updates in the law or long term care planning. Future changes in law may render the above information inaccurate. If you have any questions regarding this guide, please do not hesitate to call RUSSO LAW GROUP, P.C at (516) 683-1717 or contact us at www.VJRussoLaw.com.

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