Ask the Top Lawyer with Joseph A. Marra of The Law Offices of Joseph A. Marra, PLLC

**Q&A Topic: Everything You Need to Know About Estate Planning**

Let’s talk about a couple of areas in estate planning.

**What are the basics of Estate Planning?**

There are certain basic Estate Planning documents we all should have: a Last Will and Testament, a Power of Attorney, a Living Will, a Health Care Proxy, and an Advanced Directive with Respect to Funeral Arrangements.

In light of the court delays caused by Covid-19, which I believe will last long after the pandemic is over, I strongly suggest that a Trust be considered.

If there’s a possibility that you or your spouse could be going into a nursing home sometime in the future, or if your estate could be subject to Federal or New York State estate tax, you should seriously consider more aggressive Estate Planning techniques.

If you have assets, protect them.

**What happens if I don’t have a Will?**

To the extent that you have a named beneficiary, or hold assets jointly in a certain manner, those assets will pass as you direct. Whether or not you have a Will, the issue is only relevant with respect to assets in your name alone. Having asset in your name alone means assets titled without a beneficiary or a joint account designation.

Some people think that if you don’t have a will, property that is solely in their name alone goes to the State of New York. That is true only in a very small percentage of the circumstances. If you don’t have a Will, New York State essentially writes one for you. It’s called the Intestacy Statute.

What the statute does is look at your family tree and directs that assets be distributed as per that tree. The statute prompts you to ask certain questions. For example, are you married? Assuming the answer is “Yes” and you have no children everything goes to your spouse

There is one result under the statute that may surprise you.

If you don’t have a Will, the spouse gets the first $50,000 of your assets and 50% of the rest of your assets. The children get the other 50%.

The statute looks to distribute assets as far out on your family tree as first cousins once removed. If you do not have relations that close, then the money goes to New York State.

**What does the Will control?**

As stated above, one’s Will only controls assets in one’s name alone after the passing of that person.

What does that mean? Well, if you have a joint bank account, or if you have an asset that has a specific beneficiary named on it those assets pass as you direct.

If these designations are not consistent with your Estate Plan as set in your Will and/or Trust, unforeseen problems could result.

For example, if you have joint accounts with one person, but your Will directs that all your assets go to another person, at the very least that is going to cause confusion. It could also lead to a Will Contest.

However, generally speaking one’s Will does not trump joint account and beneficiary designations. Likewise, if you have set up a Trust and have properly funded it, the Trust only directs the disposition of the assets titled in the name of the Trust, not assets outside the trust.

That is why you need to have a good, coherent and consistent estate plan. Not only do you need to have properly drafted and executed documents, you need to make sure that the title to your assets is consistent with your estate plan.

Unfortunately, when people leave the attorney’s office, they sometimes don’t follow through and execute on the plan.

For example, I set up a Trust for a gentleman and transferred his real estate to the Trust. I specifically instructed him to have all his other accounts retitled in the name of the Trust. He failed to do that, leading to his Will having to be probated and a Will contest.

**How do I make sure that the right people get the right assets?**

Number one, you need to figure out what you want.

The next thing is to set up a plan and have Estate Planning Documents drafted according to your wishes. Then you have to make sure you sign the documents! You would be surprised that how many people retained me, and never came back to sign their estate planning documents.

Once you know what you want and have the legal documents drafted and signed, make sure the assets are titled appropriately, whether that be in your name alone, in the name of the Trust or with a specific beneficiary designation.

You need to make sure that beneficiary designations on assets, such as your retirement accounts and your life insurance policies, conform with what you want to have happen to those assets upon your passing.

Know what you want to have happen, then make sure your plan will make it so upon your passing.

We are able put some protections in place in certain circumstances. For example, if you have a Trust and wish all of your assets to be disposed of pursuant to the terms of the Trust, but you fail to change the title to those assets to the name of the trust, we prepare a Will known as a “pour-over” Will. What this “pour over” Will basically states that: “If I missed transferring title to any assets into the Trust, assets in my name alone go into the Trust after I die.”

Optimally when one has a Trust prepared and intends for it to control the disposition of their assets the “pour-over” Will need not be probated.

**Where does The Law Offices of Joseph A. Marra, PLLC come into that picture?**

We help you formulate your plan and draft the necessary legal documents to help you execute your plan.

Usually when people retain our office for Estate Planning, I start off by asking them what they want to accomplish. I then provide them with a checklist of questions I need answered. The checklist also contains a list of documents that I would like them to bring to our consultation.

During the consultation I ask some very direct questions, trying to get my clients to think of things they might not otherwise have thought of. I have seen many things during my many years of practice. I bring my experience to the table when interviewing my clients.

Is your estate above $5.85 million? If it is, you might want to consider planning to protect against the New York State estate tax. If it’s over $11.7 million you definitely want to consider planning to shelter your assets from the Federal estate tax, as well and the New York State Estate Tax.

If your estate is more modest and you do not wish it to be eaten up by nursing home costs in the event you or your spouse require extended nursing home care, there are techniques we can utilize to help you protect some, or possibly all of your assets

After we draft the estate planning documents, whether it be the Will and/or the Trust, we review the rest of the plan with our clients and direct them how to title their assets, designate their beneficiaries, and set up their joint accounts so everything is consistent with their estate plan.

**What happens if I cannot manage my own affairs, due to injury or sickness?**

One should not minimize the importance of Powers of Attorney, Living Wills, Health Care Proxies and Advanced Directives with respect to Funeral Arrangements. They are extremely important estate planning tools.

Many people have a better chance of becoming disabled before they die than they ever did before. Because people are living longer, and succumb to hideous diseases such as Alzheimer’s Disease, they need to have these documents.

A Power of Attorney gives someone the power over your financial affairs. The good thing about the Power of Attorney is that by signing a well drafted Power of Attorney the person you designate as your agent has the same power over your finances as you do. That could also potentially be a very bad thing.

One must choose their agents very carefully. Agents have to be people that you have complete faith and trust in.

There’s something in the law known as a Springing Power of Attorney, which only takes affect when one becomes disabled and is incapable of managing their own affairs. Many potential clients find this option very attractive.

We refuse to prepare these Springing Powers of Attorney as we find them to be very impractical. A physician will be required to state in writing that you are incapable of managing your own affairs in order to activate the Spring Power of Attorney. Once this writing is obtained your agent then has to get the financial institution to honor the document. As one can imagine doctors can be reluctant to make such a certification or to do it a manner that is both timely and satisfactory to the financial institution. There is quite a bit of bureaucracy one has to go through in order to get the Springing Power of Attorney honored.

You really want the agent you choose to have the same power over your financial affairs as you do at a time when you are competent since the Power of Attorney can be revoked by you at any time.

If the agent acts inappropriately you can take action if you are still competent. This is in a sense a trial period for the agent. If you are utilizing a Springing Power of Attorney you are in essence giving up this trial period. If the agent does something inappropriate when the they become agent through a Springing Power of Attorney you will be unable to cancel their authority. A third party would have to petition to be your guardian and get the power of attorney canceled.

My advice is to pick someone as your agent you trust implicitly and put the Power of Attorney into effect immediately. Let the agent know what you’re doing and the trust you are placing in them.

I also usually recommend that two people be appointed as agents who can act separately, and that a third person be appointed to step in if both of the first two named agents cannot act for any reason.

A Power of Attorney ends on death or when it is canceled by the principal. It can be cancelled by the principal at any time for any reason or no reason at all.

**What is Health Care Proxy?**

An agent pursuant to Power of Attorney has no control over your medical decisions and health care issues if you become unable to make decisions about your health care. In order to give someone the power to make health care decisions for you when you are unable to do so you need a separate document called a Health Care Proxy. I suggest that the Health Care Proxy be executed along with a complementary document known as a Living Will.

**What is a Living Will?**

A Living Will is basically a statement or declaration by you that says: “If I’m brain dead, pull the plug.”

I usually add language to the effect that all extraordinary means to keep you alive, as well as nutrition and hydration, be withdrawn and that only pain medication should be provided to you in a situation where a physician has determined that you have no meaningful brain function.

**What is a Trust and how does it differ from a Will?**

A Trust is similar to a Will in that it is a legal document that directs the disposition of one’s assets. How it differs is that a Trust can be set up while you are alive and, if properly set up and funded, the probate process can be avoided.

Living Trusts can be revocable or irrevocable. The classic revocable trust is set up to avoid the probate process. Irrevocable trusts can be utilized for many different purposes, including for estate tax planning and Medicaid planning.

I recently wrote an [e-book on estate planning in times of COVID](https://marralaw.com/estate-planning/) which explains why the utilization of Trusts in one’s estate plan is more important than it has ever been. For example, in light of the delays in the probate and administration processes caused by Covid 19, and which are expected to continue long after the pandemic ends, it makes sense to try and avoid the probate process and the administration process.

In the past, if you had a Will that was properly drafted and properly executed, none of your beneficiaries was under a disability, there was harmony among your beneficiaries, you knew where those who would take from you if you had no will resided, you did not have real property in another state or country, then a Will could be probated relatively quickly. Now what used to take the court system weeks to process is taking months and what used to take months is now taking years.

**What are Letters Testamentary and how many does an Executor of an estate need?**

When one is named an Executor in another’s Last Will and Testament they do not get authority to act until the Surrogate’s Court in the county where the person lived at the time they died issues Letters Testamentary.

When the court issues Letters Testamentary the Executor is given the power to gather assets, pay the expenses of the estate and distribute the balance of the assets in accordance with the terms of the Will.

Some people think that if there are bank accounts in four different banks, four Letters Testamentary are needed. This is not accurate. The court only issues one Letters Testamentary.

However, the Executor will need to get four certificates from the Probate Clerk, which is located in the offices of the Surrogate's Court proving that Letters Testamentary have been issued by the court, one for each financial institution.

**What are Letters of Administration?**

If one dies without a Will an Administration proceeding, (as opposed to a Probate Proceeding when one has a Will), must be filed with the Surrogate’s Court. Someone, usually a close family member, must step up and volunteer to file the petition and be the Administrator. When the Court approves the Petition it issues Letters Administration to the Administrator.

Bottom line, Letters of Administration are to an Administration Proceeding what Letters Testamentary are to a Probate Proceeding.

**What are estate taxes?**

The government looks at the value of the assets of the decedent at a particular point in time, usually the date of death, and Imposes a tax based upon the value of those assets.

Most people no longer have to plan to avoid estate taxes because the New York State Estate tax doesn’t apply unless one’s taxable estate exceeds $5,850,000.00. The top New York State estate tax rate is 16%.

The Federal Estate Tax does not apply unless one’s taxable estate exceeds $11,700,000.00. The top Federal estate tax rate is 40%.

If you have that kind of money, you really should do some planning or else a significant portion of your estate will be paid to the Federal and/or State government. Sometimes people even don’t realize what they have, because they fail to consider the value of some assets such as real estate, death benefits on life insurance policies, and retirement assets.

There are numerous strategies to legally avoid estate taxes, including but not limited to, the utilization of trusts and gift giving. The type of strategy to use really depends on the circumstances. As I have an advanced law degree in taxation I am uniquely qualified to assist in these circumstances.

**What happens if I or a loved one needs long term care?**

Hopefully you have purchased adequate Long Term Care insurance. But what if you, your spouse, your mother, your father, or even your child, is going need long term care in a facility such as a nursing home, and you don’t have long term care insurance?

There is a very limited Medicare benefit for nursing home care and not everyone is eligible for the benefit. Daily rates at nursing homes are between $350 and $800 a day. How do you pay for it without depleting your assets where you don’t have significant income to cover the costs?

One thing we try to do is help people preserve as much of their assets as possible and still qualify for the Medicaid program. We help you plan so that you can qualify for institutional Medicaid in case you need it.

There are some trade-offs that come with planning for the eventuality of long-term care.

One of the things about Medicaid Planning is that invariably you are going to have to give up control over some, if not all of your assets. Many people don’t like that. However, you can usually retain the income the assets you are trying to protect generate.

Keep in mind that we work on protecting the assets. Once one goes into a nursing home much of their income will be paid to the nursing home, though if the nursing home resident has a spouse at home, there is a bigger income allowance for the stay at home spouse than the $50 per month income allowance Institutional Medicaid recipients are allowed.

One of our specialties is helping people protect their assets in the event they need to go into a nursing home. The earlier you plan for the eventuality of entering a nursing home the more planning options are available to you. However, we can still help people who are on the precipice of entering the nursing home protect some of their assets. Although it is better to plan early, it is never too late to plan, even if the person is already in the nursing home.