

IMPORTANT LEGAL DOCUMENTS TO HAVE IN NEW YORK

Are You Prepared? Because Things Happen!

- Under New York law, do you know what important legal documents you should have?
- Do you have all your important legal documents prepared?
- Do you know if your loved ones will know what to do in case of an emergency?
- Do your loved ones have the legal authority to take care of you and make decisions for you?
- Which one of your loved ones should have the ultimate authority to make a decision?
- If you have no one to help you, what should you do?

This handout was written by Yan Lian Kuang-Maoga, Esq., a Borchard Foundation Center on Law & Aging 2009-2010 Fellow, in conjunction with the New York State Bar Association (NYSBA) as a part of her fellowship project. Ms. Kuang's fellowship project is sponsored by Main Street Legal Services, the clinical program at CUNY School of Law, under the supervision of Professor Joseph Rosenberg, Supervising Attorney. The translation into traditional Chinese characters was done by, Meng Zhang, a Queens College student who graciously volunteered her services. It is intended to be used as an informational handout specifically for Chinese elders as part of NYSBA's Decision Making Day Program.

INTRODUCTION

We all know that planning ahead for certain major life events is the best way to reduce stress and to ensure the best possible outcome. We prefer to plan for happier events and leave the grim ones until the last possible moment or just take the risk. However, for some important life events, planning ahead is also necessary to prevent possible legal problems. Many of us believe our loved ones will “take care of it” or “know what to do.” But what does the law say? Will the law be a problem for your loved ones? Also, what should you do if there is no one that can help you?

This handout will help you and your loved ones learn more about legal documents that you may want to create. It is also a helpful way to start a conversation about issues that are hard to bring up but can be very important. Share this with your loved ones or talk to a social worker or lawyer.

This handout provides basic information about the following legal documents that can help you prevent future legal problems:

- Health Care Proxy
- Living Will
- Power of Attorney

In addition, many people are interested in knowing how property is distributed after a person passes away and whether a will is necessary. At the end of this handout is a small section that provides some basic information about the following:

1. How will a person’s property be distributed when the person passes away?
2. Do I need a will?

HEALTH CARE PROXY

Purpose: If a person becomes unable to express her wishes, either due to a physical or mental condition, a named health care agent will have the legal authority to make health care decisions on behalf of that person.

Why is it important?

- It ensures that loved ones do not have to go to court to get the proper authority and then have to report to the court every year.
- It prevents family disagreements about who makes the decisions and what types of medical treatment the person should or should not get.
- It prevents loved ones from feeling guilty or unsure about their choices when making a decision about the medical care of their family member who is not able to express her wishes.
- It allows a person to ensure that life-sustaining treatment is not used when it is merely to prolong the dying process and discomfort of the person (or to ensure such treatment is used).
- It ensures that organ and/or tissue donation is not allowed (or allowed but with specific directions).

How can I create this document?

- You do not need a lawyer to create this form.
- The most important thing to do is to talk to your agent about your wishes first.
- You can then fill out a simple Health Care Proxy form yourself or get help from your loved ones or a social worker or lawyer.
- The form and its instructions are available in English and Chinese on the internet.
- If you do not have access to the internet, you can have your loved one or a senior center social worker help you get a copy from the internet.
- It is suggested that you fill out the English version.
- For the English and Chinese versions, go to www.nysba.org, click on “For the Community” on your left hand column and you will see an option for “Living Will & Health Care Proxy Forms”.

Other important things to know about naming a Health Care Proxy:

- A person will continue to make her own health care decisions after she names an agent. The agent will only make health care decisions on behalf of the person when her doctor determines she cannot express her wishes.
- The agent must be at least 18 years old and is someone the person trusts.
- There should be an alternate agent.
- Two witnesses who are at least 18 years old are required and they cannot be your agents.
- The Health Care Proxy form can be cancelled at any time.

Write your own notes here:

LIVING WILL

Purpose: If a person has no one she trusts or wants to name as health care agent but she wants to be sure that her health care wishes are known and followed by doctors if she becomes unable to express her wishes, either due to a physical or mental condition, the person can write all her wishes about health care on a living will.

Why is it important?

- It allows a person who does not have someone she trusts or wants to name as health care agent to be sure that her wishes about health care are known and followed by doctors.
- It gives doctors instructions on how to care for a person without having to go to court to get someone with legal authority to make a health care decision for the person.
- It prevents family disagreements about who makes the decisions and what types of medical treatment the person should or should not get.
- It prevents loved ones from feeling guilty or unsure about their choices when making a decision about the medical care of their family member who is not able to express her wishes.
- It allows a person to ensure that life-sustaining treatment is not used when it is merely to prolong the dying process and discomfort of the person (or to ensure such treatment is used).
- It ensures that organ and/or tissue donation is not allowed (or allowed but with specific directions).

How can I create this document?

- You can write a living will without a lawyer.
- A living will can be written in Chinese but preferably in English.
- You can write a living will following a sample or write one using words specific to your situation.
- A sample living will in English is available on the internet.
- If you do not have access to the internet, you can have your loved one or a senior center social worker help you get a copy from the internet and help you write one.
- For a sample living will, go to www.nysba.org, click on “For the Community” on your left hand column and you will see an option for “Living Will & Health Care Proxy Forms”.

Other important things to know about writing a Living Will:

- You do not need a living will if you have a Health Care Proxy because you can have all your specific wishes about health care written on the Health Care Proxy.
- You should have two witnesses, who are at least 18 years old, see you sign and then have each sign their name on the living will as your witnesses.

Write your own notes here:

POWER OF ATTORNEY

Purpose: For a person who wants or needs someone to help with decisions about property and finances, either now or when she becomes unable to express her wishes or physically unable handle her property and finances. One or more persons named as agents in a Power of Attorney can have the legal authority to make decisions and take actions on the person's behalf or physically help that person with matters relating to money, retirement benefits, health insurance, government benefits and other assets.

Why is it important?

- It ensures that important bills like rent, mortgage, gas and electricity are paid.
- It ensures that someone has the legal authority to apply for or handle problems with Medicaid, Medicare, Food Stamps, retirement benefits, and other government and non-government benefits.
- It ensures that those who will help you do not have to go to court to get the proper authority and then have to report to the court every year.
- It prevents family disagreements about who should be the decision maker and how should your benefits, income, and assets be handled.
- It allows a person to have the help of someone in handling assets without having to add the individual's name to assets such as bank accounts.
- It allows agents to make gifts or transfers of asset for purposes such as Medicaid eligibility planning.

How can I create this document?

- A lawyer should help with this document because you are potentially giving away a lot of power over your money and other assets.
- It is not a simple form to understand nor can it be properly created without a thorough discussion with a lawyer about your particular needs.

Other important things to know about creating a Power of Attorney:

- **REMEMBER THAT YOU CAN BE GIVING AWAY A LOT OF POWER OVER YOUR MONEY AND OTHER ASSETS, SO ONLY NAME SOMEONE YOU TRULY TRUST AND GET YOUR OWN LAWYER!!!!**
- You can have more than one person as power of attorney working together or name one main person and a back up person.
- All persons named as power of attorney must be at least 18 years old.
- The Power of Attorney dissolves and has no effect after a person dies. It does not replace a will.

Write your own notes here:

PROPERTY DISTRIBUTION AFTER DEATH

1. How Will a Person's Property Be Distributed When the Person Passes Away?

Many people want to know if their family will have to go to court to get their property after they pass away. Generally, the process of getting the deceased person's property can be an easy process without a court or a more complicated formal legal process involving court supervision. It depends on whether the person's property is "non-probate" or "probate."

- **Non-probate assets** are those that already say who should get the asset when the person passes away such as when a beneficiary is named on a bank account or life insurance policy or a house is owned jointly with a right of the joint owner to take the share of the deceased.
- **Probate assets** are those that do not say where or to whom the asset should go. Because there is no direction on what to do with the asset, the more formal legal process is usually required to legally transfer legal ownership of the property to those who are entitled either under the person's will or New York law. This means someone will have to go to court, ask the court to decide who is entitled to the property and then the court will authorize the transfer of the property to the right person or persons.

Here are the basic steps to understand how property is distributed after a person passes away:

FIRST – Look at how property is owned (on bank papers, deeds, and other official papers):

- If owned only in the name of the deceased but set up to go directly to a beneficiary, then the property will directly go to the named beneficiary if the beneficiary is still alive.
- If owned jointly with another AND there is language that says when one die the other will get to receive the share of the deceased, then the property will directly go to the joint owner who survived.
- If owned jointly with another but there is NO language that says when one die the other will get to receive the share of the deceased, then half may be considered as SOLELY OWNED by the deceased.
- If SOLELY OWNED by the deceased (without a designation to go directly to another person), then a request to the court is required to distribute the property accordingly.

SECOND – Look to see if there is a will:

- If there is a valid will, the court will distribute SOLELY OWNED property according to the will.
- If there is no valid will, the court will distribute SOLELY OWNED property according to state law (see next section on "Do I Need a Will?").

Important Cautionary Note: You should talk to a lawyer before adding a name on your assets because you are at risk of losing your property in many ways. Set up a Power of Attorney if you want the convenience of someone to help you manage your property. Name a beneficiary if you want to avoid the court process after passing away.

2. Do I Need a Will?

- Many people believe that “the government” will take their money or personal property if they die without a will.
 - This is NOT TRUE.
 - Generally, when a person passes away, everything that is owned solely in the person’s name (unless it is non-probate asset) will be distributed according to either the person’s will or state law. If there is a valid will, property is distributed according to the will. If there is no valid will, property is distributed according to state law. Usually property being distributed according to New York State law means that if there is a spouse and children then, everything will be shared by them. The amount of the shares will depend on the total value of everything the deceased owned. If there is no spouse or children, then the property will be distributed to other relatives such as grandchildren, parents, siblings and more distant relatives. If there are no such relatives at all then it will go to New York State.
- Many people believe they do not need a will because “a will is only for people with lots of money.”
 - This is NOT TRUE.
 - Generally, even if a person only has a small amount of property, a person should make a will if she:
 - (1) Cares about who gets her money OR
 - (2) Cares about what shares are to be given to each person OR
 - (3) Wants a specific trusted person to be the executor OR
 - (4) Wants to set up a trust to manage the inheritance of a family member or friend who is unable to manage her own money.

PLEASE REMEMBER THAT ALL THE INFORMATION HERE IS BASIC AND GENERAL INFORMATION.

IT IS ALWAYS A GOOD IDEA TO TALK TO A LAWYER TO GET MORE SPECIFIC LEGAL INFORMATION ABOUT YOUR OWN CIRCUMSTANCES!

I WISH YOU A HAPPY, HEALTHY, AND LONG LIFE!