# ESTATE PLANNING AFTER DIVORCE - A MANUAL

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## INTRODUCTORY STATEMENT

It is very important to address estate planning issues when one is getting divorced or has become divorced. This manual has been prepared in order to familiarize you, as a layperson, with some estate planning ramifications of divorce. This article may also be used as a manual for the numerous terms and phrases used in the planning and drafting of Wills and Trusts; and, to briefly deal with Health Care Proxies, Living Wills and Durable Powers of Attorney.

The expressions which this manual defines are extremely technical and they encompass statute law, case law and tax law. No attempt will be made to provide an "in depth" analysis, but only elemental definitions and descriptions thereof.

## DIVORCE'S IMPACT ON ESTATE PLANNING

Sound estate planning effectuates a smooth and tax-conscious transition to your intended heirs. Every individual who is getting a divorce or has gotten divorced should have estate planning and a new Last Will and Testament prepared and properly executed (or have a Will done for the first time!). This will help ensure that 1) the spousal elective share amount, which is governed by your state's elective share statute, is

the maximum that your soon-to-be ex-spouse will get if you die before the judgment of divorce is official; and 2) that the spouse one divorces will not stand to inherit your estate due to your failure to effectuate a proper estate plan. Please do not permit procrastination to stand in the way of your estate plan wishes.

Some areas within your estate plan which must be addressed include the following:

1. Change joint ownership and/or beneficiary designations to remove the to-be-divorced or ex-spouse as beneficiary on EVERYTHING you own, e.g. Life Insurance, All Financial Accounts (including, but not limited to bank accounts, IRAs, pensions, stocks, mutual funds, bonds, etc.), Safe Deposit Boxes, Revocable Trusts and Irrevocable Trusts (consider dissolving or not funding irrevocable trusts in which you cannot change the beneficiary).
2. Change fiduciary designations, i.e. Executor/Personal Representative; Lifetime or Testamentary Trustee; Guardian for minor children, Agent-in-Fact for your Power of Attorney; and your Health Care Proxy or Agent (if your ex-spouse is not the one you would continue to wish be your agent to decide whether the "plug is pulled" or not, if you are not capable of making the decision for yourself.)

Trusts for children become even more important upon divorce. It is necessary to consider the amount of wealth you will transfer at your death in order to evaluate 1) the necessity of a trust and 2) the period of trust duration. Many a client appreciates the suggestion of her or his child receiving one-third of the principal of a trust at age 22, one-half of the balance at age 25, and the balance at age 28 or 30. I always recommend

that my clients be aware and caution their children about the importance of keeping the child's inherited assets separate from his or her (eventual) spouse's assets so as not to commingle the assets in the event of the child's divorce. It is imperative to not put earnings into an account derived from an inheritance. Having just been through a divorce, you can readily understand the significance of avoiding the commingling assets!

## GENERAL ESTATE PLANNING DISCUSSION

A "Will" (formally, "Last Will and Testament") is a written instrument wherein an individual (the "Testator", if male, "Testatrix", if female) directs the disposition of his or her property upon death, appoints the fiduciaries who will administer the terms of the Will, and sets forth declaratory and explanatory instructions. It is important to note that a Will does not dispose of all of a decedent's property, since oftentimes a decedent's property is owned in such a manner that upon the death of a decedent the property automatically passes to a third party without reference to the Will. As described before, where a decedent owns property jointly with another person (with right of survivorship), upon death such property is automatically owned by the survivor. Another example of property passing "outside of Will" or by "operation of law", is insurance payable to a named beneficiary (i.e. other than to the decedent's estate). Yet another example of the foregoing, is property, which is held in trust or a trust bank account, such as a decedent having a trust account for the benefit of a child. Upon the death of the decedent, the bank account would belong to the child. The terms used to differentiate between property of a decedent passing through the Will, or outside the Will, are "probative assets" and "non-probative assets", the former being the property that the Will provisions dispose of, and the latter being the property not subject to the Will.

Beneficiary designations are inferior to Will clauses because they lack the latitude and breadth of Will language. You can be more explicit in a Will and thus accomplish more in the event of contingencies, such as, a predeceasing beneficiary.

A. Dispositive Provisions.

The manner by which a testator may dispose of property under a Will is subject to great variation. For example, the gift (as any disposition under the Will may generally be referred to) may be made "outright", or "in trust", or a combination thereof. In addition, the nature of the gift, bequest, or devise, may be specific or general, conditional or unconditional, etc.

1. "Outright Gift" – A simple example of an outright gift is: "I give and bequeath the sum of $1,000.00 to John Jones". Such gift is unconditional, unencumbered by trust, and upon the death of the testator "John Jones" his heirs would receive the sum of $1,000.00, assuming that the probate estate had sufficient funds to pay such gift.

2. "In Trust" – In contrast to the "outright" gift, a gift "in trust" disposes of the property involved by giving the legal title to the property to a "Trustee", and the equitable title to a "Beneficiary". The Trustee holds the property (the principal), which can be tangible, intangible, real, personal, or mixed, pursuant to the directions of the testator, and pays or applies interest or principal, or a combination thereof, to the Beneficiary, all pursuant to the terms of the Will. An example of a simple gift "in trust" is:

> "I give and bequeath to my Trustee the sum of $10,000.00. My Trustee shall pay the income therefrom to my son, Jim, until he is twenty-one years old, and at the time my said son reaches the age of twenty-one years, my Trustee shall pay over the principal of the Trust to my son".

As will be noted from the foregoing example, the Trustee is made the owner of a $10,000.00 gift until the son reaches the age of twenty-one years. During the period of the Trust, the Trustee is obligated to pay the son all the income derived from the trust property, but the principal (the $10,000.00) is only delivered to the Beneficiary upon the Beneficiary attaining the age of twenty-one years. Details as to how the Trustee may invest the principal, etc., are covered in the "Fiduciary" provisions of the Will (see below).

3. "Conditional Gifts" – Whether a gift is made outright or in trust, the same may be "conditional". Examples of "conditional" provisions are as follows:

> (a) "I give and bequeath to my daughter, Joan, if she is married at the time of my death, 1,000 shares of my A.T.& T. stock"; or
>
> (b) "I give and bequeath to my son, John, the sum of $10,000.00, provided my estate, for tax purposes, exceeds $100,000.00".

In the first of the above examples, the gift of the stock is conditioned upon the marriage of the testator's daughter. In the second example, if the testator's estate were only $99,000.00, the testator's son, John, would receive no part of the gift of $10,000.00.

4. "Specific Bequests" – Specific bequests involve gifts of definitely ascertainable property, such as a gift of a particular piece of jewelry, or a

certain antique, or enumerated stock certificates and bonds, or a certain parcel of real property, etc. This class of gifts, pursuant to law, is the last to be applied to the debts of the decedent or taxes of the estate and to this extent is favored by the law. However, where the specific gift is not owned by the decedent at this death, or is insufficiently described, then the gift is "adeemed" (lost), and no substitution is made therefor. It is imperative to the success of a specific bequest that the property be adequately described and that the testator actually owns such property at the time of death.

5. "Demonstrative Bequests" – The "demonstrative" legacy is a bequest of a certain sum, stock, or the like, payable out of a particular fund or security, i.e.: bequest of $1,000.00 payable out of the proceeds of a specific bond and mortgage. If the fund pointed out for the payment of the legacy fails, resort may be had to the general assets of the estate.

6. "General Bequests" – This type of bequest is exemplified by a gift of $1,000.00 or a fractional portion of the testator's estate, to wit:

> "I give to my son one-half of my estate";
> "I give my personal belongings to my son," etc.

From the examples given, it will be observed that the subject of the gift is not particularized in the same manner as the "specific bequests", discussed above. Where the assets of an estate are insufficient to pay the debts of the decedent and the estate taxes, the law requires that the general gifts be applied first to the payment of such obligations, and where such payments are necessary, the gifts are "adeemed" to the extent that they are reduced thereby. The law further differentiates between personal property, that is,

all property other than interests in real estate, and real property. General bequests of personal property are "adeemed" prior to general devises of real property.

7. "Marital Bequests" – When one is married, one can pas an unlimited amount of property during lifetime or at death, without taxation. This is due to the doctrine known as the "marital deduction". Pursuant to the federal estate tax statutes, all bequests made by the testator to the testator's surviving spouse, are deductible from the adjusted gross estate of the testator. For example, if a testator's gross estate were $1,600,000.00, after deducting administrative and funeral expenses of $100,000.00, the adjusted gross estate would equal $1,500,000.00. If the testator made a bequest to his or her surviving spouse in the amount of $500,000.00 or more, then the taxable estate would be reduced to $1,000,000.00. If there was a "unified credit trust", the Federal Estate Tax would be zero. Obviously, the "marital deduction" is one of the most important devices for estate and tax planning. The marital deduction includes property passing through the Will (probate assets), as well as property passing outside the Will. A bequest to qualify for the marital deduction must meet the technical requirements of the estate tax statutes, and great care must be taken that such requirements be met. The marital bequests may be made either "outright" or "in trust" (see above – Dispositive Provisions) provided, however, that the marital bequest, if made via a trust, must be drafted to provide that the trust principal, upon the death of the surviving spouse, may be freely conveyed by or according

to instructions of the surviving spouse. In most cases, where the estate exceeds the federal exemption amount, a qualifying marital bequest is almost an automatic requirement, in order to reduce estate taxes. For such amounts, see Schedule "A" entitled "Annual Federal Exemption Amounts" hereinbelow. However, in certain instances where the surviving spouse's estate is equal to or greater than the testator's estate, the amount of the marital bequest should be reduced to avoid "double taxes" upon the death of the surviving spouse. The marital deduction may be achieved in a variety of forms.

If there is no spouse, then there can be no marital deduction. There will be no postponement of the paying of estate taxes. The only "saving grace" as far as estate taxes are concerned, will be the application of the "unified credit".

**SCHEDULE A**
**Annual Federal Exemption Amounts**
**("Unified Credit", Generation Skipping Tax ("GST") and Gift Tax Exemptions)**

| Calendar Year | Estate Tax Exemption | GST Tax Exemption | Gift Tax Exemption |
|---|---|---|---|
| 2002 | $1 Million | $1.06 Million* | $1 Million |
| 2003 | $1 Million | $1.06 Million* | $1 Million |
| 2004 | $1.5 Million | $1.5 Million | $1 Million |
| 2005 | $1.5 Million | $1.5 Million | $1 Million |
| 2006 | $2 Million | $2 Million | $1 Million |
| 2007 | $2 Million | $2 Million | $1 Million |
| 2008 | $2 Million | $2 Million | $1 Million |
| 2009 | $3.5 Million | $3.5 Million | $1 Million |
| 2010 | (tax repealed) | (tax repealed) | $1 Million |
| 2011 and thereafter | $1 Million | $1.06 Million** | $1Million |

* Adjusted for inflation.
** Adjusted for inflation from 2001.

8. "A Unified Credit or Federal Exemption" – A unified credit offsets gift and estate taxes. An estate tax is imposed on a decedent's estate based on the value of the estate assets. Schedule A depicts the varying amounts of the Federal Exemption under the recently enacted Federal Law (The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, 1.5 Stat. 38). The value of assets, which will escape Federal estate taxes in 2008, for example, is $2 million. The applicable unified credit amount will be applied against $2 million of assets to produce a zero federal estate tax. (This does not include state estate taxes, as applicable) See Schedule "B" for the Estate and Gift Tax Rates hereinbelow:

**SCHEDULE B**
**ESTATE AND GIFT TAX RATES**

| | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| $ 1,000,000 - $ 1,250,000 | 41% | 41% | 41% | 41% | 41% | 41% | 41% | 41% | 41% | * | 41% |
| $ 1,250,001 - $ 1,500,000 | 43% | 43% | 43% | 43% | 43% | 43% | 43% | 43% | 43% | * | 43% |
| $ 1,500,001 - $ 2,000,000 | 45% | 45% | 45% | 45% | 45% | 45% | 45% | 45% | 45% | * | 45% |
| $ 2,000,001 - $ 2,500,000 | 49% | 49% | 49% | 48% | 47% | 46% | 45% | 45% | 45% | * | 55% |
| $ 2,500,001 - $ 3,000,000 | 53% | 50% | 49% | 48% | 47% | 46% | 45% | 45% | 45% | * | 53% |
| $ 3,000,001 - $10,000,000 | | 55% | 50% | 49% | 48% | 47% | 46% | 45% | 45% | 45% | * 55% |
| $10,000,001-$17,184,000 | 60%** | 50% | 49% | 48% | 47% | 46% | 45% | 45% | 45% | * | 60% |
| $17,184,0001 and higher | 55% | 50% | 49% | 48% | 47% | 46% | 45% | 45% | 45% | * | 55% |

* Although the current law provides for no federal estate tax rate in 2010, gifts shall continue to be taxed. The rate shall be the top individual income tax rate.

** Shows the applicable 55% highest rate plus the 5% surcharge to offset the advantages of lower rates for smaller estates.

Lifetime gifts in excess of the "annual exclusion amounts" generate a gift tax in addition to the estate tax. The amount of the annual exclusion

from gift tax is currently $12,000 or $24,000 for combined spousal gifting. For gifts made after 12/31/01, the applicable total lifetime gift tax exclusion amount is $1,000,000.00. No increases are scheduled. If gifts are made after 12/31/09, the top gift tax rate will be the same as the highest individual income tax rate.

9. "Residuary Bequests" – The residuary disposition is that part of a testator's estate not disposed of elsewhere, either by specific or general bequests. Usually, this provision is the last of the dispositive clauses, and the same is intended to include not only all property not otherwise disposed of, but in addition, conditional gifts that fail to take effect, and legacies, which are renounced. The residuary bequest may be made outright or in trust, and in a majority of Wills, the residuary bequest is in the form of an extended trust arrangement wherein the testator provides for his surviving spouse, his children, and grandchildren.

B. Fiduciary Provisions.

A Fiduciary is a general term for a person named as either an Executor, Trustee, or Guardian under a Will. Fiduciaries may be individuals or banks, one person or several persons, acting in the same capacity. Every testator must name an Executor, and if the Will contains any trust provisions, a Trustee. Guardians are normally appointed only where the testator leaves minor children. In addition to naming the initial fiduciaries, the testator should also name substitute fiduciaries in the event the fiduciary originally named has either died or is incompetent, or is unwilling to serve at the time the Will becomes effective, or thereafter.

1. "Executor" – The Executor is the fiduciary named in a Will who has the responsibility to cause the Will to be probated, to collect the assets of the estate, and dispose of same pursuant to the provisions of the Will. The Executor has the responsibility of filing Federal and State estate tax returns, and income tax returns, filing a final accounting, disposing of claims against the estate, and many other details, as set forth in the Will, sometimes even including the funeral arrangements for the decedent. Where the testator is the owner or partner in a business or businesses, the Executor may have the additional responsibility of running the business or disposing of same. The duties of an Executor may extend from a minimum of seven months to a period of several years, depending upon the assets of the estate and the latitude given by the testator to the Executor. The feminine of Executor is "Executrix".

2. "Trustee" – A Trustee is the fiduciary who is given legal title to property disposed of by trust. The Trustee has the obligation of obtaining the trust property from the Executor of the Will, and thereafter investing the same in accordance with the powers granted to the Trustee by the testator in the Will. The trustee must periodically account for the trust assets and must pay over or apply the interest or profits earned by the trust principal and the principal itself at the time specified and to the person specified in the trust provision. Oftentimes, a Trustee is given discretionary powers by the testator. An example of the foregoing is a situation where the testator makes a gift in trust for the benefit of a minor, with direction to the Trustee to pay only the income earned by the trust principal to the minor until such time as the minor reaches majority (age depends on state law), with the additional authorization that if the Trustee

believes it for the best interests of the health and welfare of the minor, he may pay portions of the principal to the minor prior to the applicable age of majority. The foregoing authority is common where the testator is particularly concerned with the education of an infant beneficiary, and is referred to as an "invasionary power".

3. "Guardian" – The Guardian is the fiduciary who is appointed by the testator to take custody of the decedent's minor children and the children's property. Where the decedent leaves a surviving spouse, such spouse, except in instances of incompetency and other unusual circumstances, is by law the Guardian of the decedent's infant children. Where the spouse of the decedent fails to survive, or where the spouse, having survived the decedent, thereafter dies, it is essential that the testator appoint Guardians and alternate Guardians. Extreme care must be taken in the appointment of Guardians, since, in effect, the Guardians will replace the decedent as the parent of the decedent's children, and the children will usually reside at the Guardian's household and become a member of the Guardian's immediate family. Therefore, in selecting a Guardian, consideration must be taken that the Guardian will be of proper age, will have similar views on education as the testator, will be able physically to cope with the testator's children, and will accept the responsibility of the position.

If one becomes divorced, absent circumstances to the contrary, the surviving parent will usually be the Guardian "of the person" for the couple's children. However, you can designate whom you wish to be the Guardian of your children's property which they are inheriting from you. This Guardian is known

as the "Guardian of the Property". This Guardian does not have to be your Ex-Spouse.

4. "Bonds" – The law provides that unless the testator makes contrary provision in the Will, each of the fiduciaries named must file a bond, upon appointment, and maintain such bond until the fiduciary is released by the Surrogate's Court from responsibility. Since the premiums for bonds and the costs of obtaining same are properly chargeable by the fiduciary against the estate, in many instances the testator provides that the fiduciaries shall serve without bond, especially where the fiduciaries are related or have close personal ties with the testator. Therefore, it is discretionary with the testator as to whether one or more of the fiduciaries shall serve with or without bond.

5. "Commissions" – Fiduciaries are entitled to receive certain fees and commissions for performing their duties. The statute specifically provides the method by which such fees and commissions are to be computed, and if the testator does not provide in the Will to the contrary, the fiduciaries are entitled to receive the statutory fees and commissions. In certain circumstances, a testator may desire to make a gift under the Will to a named fiduciary in lieu of fees and commissions, and in the provision appointing said fiduciary, the testator may specifically provide that such gift is intended in payment of the statutory commission. Under the current New York Law (§ 2307 of the Surrogate's Court Procedure Act), for example, rates of commissions for Executors are:

| For receiving and paying out all sums of money | |
|---|---|
| Not exceeding $100,000 | 5% |
| Additional sums not exceeding $200,000 | 4% |
| Additional sums not exceeding $700,000 | 3% |
| Additional sums not exceeding $4,000,000 | 2½% |

| | |
|---|---|
| All sums over $5,000,000 | 2% |

In New York, for example, an executor is not entitled to commissions on non-probate assets and specific devises of real property.

6. "Powers of Fiduciaries" – The manner in which the Executor and Trustee may deal with the assets of the estate and trust principal is set forth in a provision in the Will referred to as the "Powers Clause". The testator may give the fiduciaries very limited powers or, conversely, may empower the fiduciaries to invest in all kinds of securities (whether listed on stock exchanges or not), to operate the testator's businesses, and, in certain instances, to handle the assets of the estate and principals of trust in a "speculative" manner. Irrespective of the latitude granted by the testator, the fiduciaries are required by law to act in a "prudent and reasonable" manner, and even though a fiduciary has been given wide powers, his counsel will advise the investments be limited to the least speculative ventures. Aside from the general "powers", fiduciaries are sometimes given additional powers, such as the power of a Trustee to invade the principal of a trust. An even wider discretionary power, which may be conferred upon a Trustee, is the power to "sprinkle" the income of a trust amongst the several beneficiaries thereof.

C. Declaratory and Explanatory Provisions.

In addition to the disposition of a testator's property and the appointment of fiduciaries, the testator includes provisions in his Will declaring his intent regarding certain transactions or explaining reasons for directions in the Will.

i. "Burial" – The testator may desire a certain funeral procedure, or may request that his body be cremated, or that his grave be given perpetual care, etc. In the same light, a testator may desire that his body of certain parts thereof, be given to science, or scientific foundations, or the "Eye Bank". Such provisions should be contained in the testator's Will and his driver's license, for example, in New York.

ii. "Explanatory Provisions" – The inclusion of such provisions helps to avoid extended attempts to "break" Wills and prolonged litigation. Examples of "explanatory" provisions include suggestions to Trustees regarding reasons for invasion of trust principal; scope of reference to testator's children (in the Will); and reasons for omitting a child or children from the Will.

iii. "Common Disaster" Clause – The law of the State of New York, for example, sets forth that in the event a decedent and a person named in the decedent's Will, die at the same time, or under circumstances where it is impossible to ascertain which of the persons survived the other, it will be deemed, unless the Will provides to the contrary, that the testator survived the other party. In the case of a married couple, the intended marital deduction bequests would be lost, since there would not be a surviving spouse. On the other hand, if the Will provides that in the event of the simultaneous death of a testator and his wife, the wife is presumed to survive the testator, for the purposes of the Will, then, even though the testator's wife died simultaneously with the testator, the marital deduction would be available. A declaratory provision may also be made with respect

to common disaster with any other person or persons named in the Will. In the alternative, the testator may provide that if his wife (or any other legatee) does not survive him for a period of, for example, three months, she will not be deemed to have survived him for the purposes of the Will, and her bequest would be paid to some other person. In contrast to the common disaster clause, the extended provision is called a "time" clause.

iv. "Tax Apportionment" – The testator has the option to mandate which parts of his property will bear the imposition of the estate taxes. To preserve specific gifts, and to avoid reduction of the marital and charitable deductions, it is important that the Will be drafted in a manner so that the foregoing categories of gifts do not have estate taxes allocated against them. To the same effect, administration expenses may be allocated among the various assets.

v. "Business Continuation" – Declaratory and instructional advice to the fiduciary regarding continuation of a testator's business and the carrying out of a buy-sell agreement the testator may have entered into with the respect to this corporation or partnership, are important elements of a Will. In this regard, the testator may recommend that the Executor consult with certain people concerning the sale of a business interest, or to employ certain persons to continue the business of the testator.

vi. "Non-hypothecation" – The phrase "non-hypothecation" refers to provisions in a Will, which restrict legatees and beneficiaries from sale or assignment or pledging of their interests in the Will. This provision is a form of insurance that the legatee or beneficiary will not squander or

dispose of the testator's gift prior to the receipt thereof, and in the case of a trust, that the beneficiary will not discount in advance his interest in the trust principal.

vii. "In terrorem" Clause" – This provision is used in situations where the testator may reasonably expect a legatee or beneficiary to contest the terms and provisions of the Will. The provision provides that any person who asserts any other claim against the Will, or contests the Will, shall forfeit all bequests, devises, and appointments to him. The clause, in effect, places the party who desires to contest the Will, in peril of losing the gift made to him under the terms of the Will, if such person actually contests the Will.

"Miscellaneous Definitions" – (Proviso: Check relevant state law – the following definitions are specific to New York law.) In addition to the main body of terms and definitions discussed hereinabove, certain words of art are frequently used in connection with the Will, and the following are their definitions:

**"Devise"** – A gift of real property.

**"Bequest" or "Legacy"** – A gift of personal property.

**"*Per Stirpes*"** – "*Per Stirpes*" is used to define a system of distribution among heirs, and is contrasted in definition to the phrase "per capita". "*Per Stirpes*" means "by right of representation" rather than "by right of number". For example, if a testator made a gift of $100,000.00 to his children, in equal shares, *per stirpes*, and the testator had a son and a daughter, the son having four children of his own and the daughter having

one child of her own, and both the son and daughter died prior to the death of the testator, under the "*per stirpes*" system, the son's children would each receive $12,500.00 and the daughter's child would receive $50,000.00. In short, pursuant to a gift "*per stirpes*", the persons next in the lineal descent divide the share to which their parent would have been entitled. Under the same example, if the bequests were made "per capita", each of the testator's five grandchildren would equally receive $20,000.00, i.e. according to the total number of legatees.

**"Per Capita"** – (See "*Per Stirpes*" above.)

**"Corpus"** – The term "corpus" is synonymous with "principal" when referring to a trust. The phrase "trust corpus" is also used quite frequently.

**"Crummey Power"** – A power held by a beneficiary of a trust to withdraw his or her representative share from the principal of a trust. This enables the grantor or settlor of the trust to take a corresponding amount of the gift tax "annual exclusion".

**"Issue"** – The child or children of the particular person referred to.

**"Child"** – Under New York law, for example, the term "child" is deemed to include both children of the blood and adoptive children.

**"Intestacy"** – The phrase used to define the situation wherein a person dies without making a Will, or a person makes a Will, which cannot be probated. The assets of such person would be distributed

pursuant to the laws of "intestacy" of the State where such person is domiciled, and the fiduciary who would be appointed by the Surrogate is called an "Administrator".

**"Marital Right"** – The statute provides that the surviving spouse of a decedent is entitled to a specific share of a decedent's estate, the amount of such share depending upon the other survivors of the decedent. In the event the testator does not make sufficient provisions in the Will and/or the non-probate assets received by the surviving spouse are less than the minimum amount prescribed by statute, then the surviving spouse may make an "election against the Will" and be entitled to the minimum statutory amount, irrespective of the Will terms.

**"Infant"** – Under New York law, a person under twenty-one years of age is considered to be an "infant", and is also called a "minor". When an infant reaches the age of twenty-one years, such person is deemed to have reached his or her "majority".

**"Codicil"** – A "codicil" is an amendment to a Will. Such codicil must be executed in the same manner as the original Will, and upon the death of a testator, the original will and the codicils thereto, are probated together and each must be respectively proved.

**"Sibling"** – Brothers and sisters descended from the same parent.

**"Attestation"** – The clause wherein the witnesses "attest" to the testator's execution of the Will. The law requires that certain procedures are followed regarding the execution of a Will, and to avoid

questions with respect to the validity of a Will, the prescribed procedures should be followed closely. Any person who is named in the Will as a legatee, devisee, beneficiary or fiduciary should not be a witness to the Will's execution by the testator.

**"Testamentary"** – Arising from or relating to a Will. For example, all trusts created under the Will are called "Testamentary trusts" as differentiated from trusts created during the lifetime of a person.

**"Brother and Sister"** – In New York, half brothers and half sisters of a testator are entitled to share in a testamentary gift to be divided amongst his "brothers" and "sisters".

**"Cousin"** – A "cousin" has been interpreted to mean "first cousin" only.

**"Descendant"** – The term "descendant" means only the issue of a deceased person, and does not describe the child of a living parent.

**"Heir", "Next of Kin", "Distributee"** – These terms and those of a like import all mean distributees under the laws of intestacy (the distribution of a decedent's estate where he has no Will).

**"Nephews and Nieces"** – The terms "nephews" and "nieces", in their primary and ordinary sense, do not include grand-nephews and grand-nieces or more remote descendants, unless there is something in the Will that the words were used in a broader sense.

**"Wife/Husband"** – A gift to a spouse is a gift to one who occupies that relationship at the time of the making of the Will. There is

no continuing condition that the marital relationship should persist until death. Therefore, a later annulment or divorce does not destroy the testamentary provision. ADDITIONAL HEALTH CARE/ESTATE PLANNING TOOLS

ººº "Living Will" – A document which confirms that you do not wish to be kept alive by artificial means where there is not a likelihood of recovery to a meaningful life. It may contain organ donation wishes and directions regarding staying in a hospital or at home in the last days of one's life. Some states having living will statutes.

ººº "Health Care Proxy" – A document which appoints an individual(s) as your agent(s) to carry out the health care wishes contained in a Living Will. Some practitioners combine a Living Will and a Health Care Proxy in the same instrument.

ººº "Durable Power of Attorney" – A document which delegates responsibility to another individual or individuals to make gifts, real estate and/or personal property transfers, access your accounts, etc. It should be made "Durable" if you wish it to remain effective in the event of disability. Powers of Attorney can be "Springing", i.e. take effect at a later date or effective immediately. A Power of Attorney is a powerful tool which ends at death. It can be revoked at any time. This instrument can avoid expensive and time-wasting conservatorship/guardianship proceedings.

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## CONCLUSION

This author's recommendation is that you seek the counsel of a skilled trusts and estates attorney to help you with your estate plan. Also, recognize that assets in "joint" names or with beneficiary designations will pass "outside of your Will" or by "operation

of law". Your newly drafted Last Will and Testament or Trust will be thus given no effect!

A thorough inventory of your assets must be shown to your estate planning attorney. I strongly recommend providing your attorney with actual copies of your deeds, account statements, life insurance beneficiary designations, etc. so he or she can help you plan your estate. Without this inventory, your estate plan will exist in a vacuum. There really is no such thing as a "simple will" since life and the law are complex. Please be guided accordingly!

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