

# Introduction to Advance Planning

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**Erin Shahinfar, Esq.**

Staff Attorney, Elder Law Practice, Public Benefits Unit, New York Legal Assistance Group

# ABOUT NYLAG

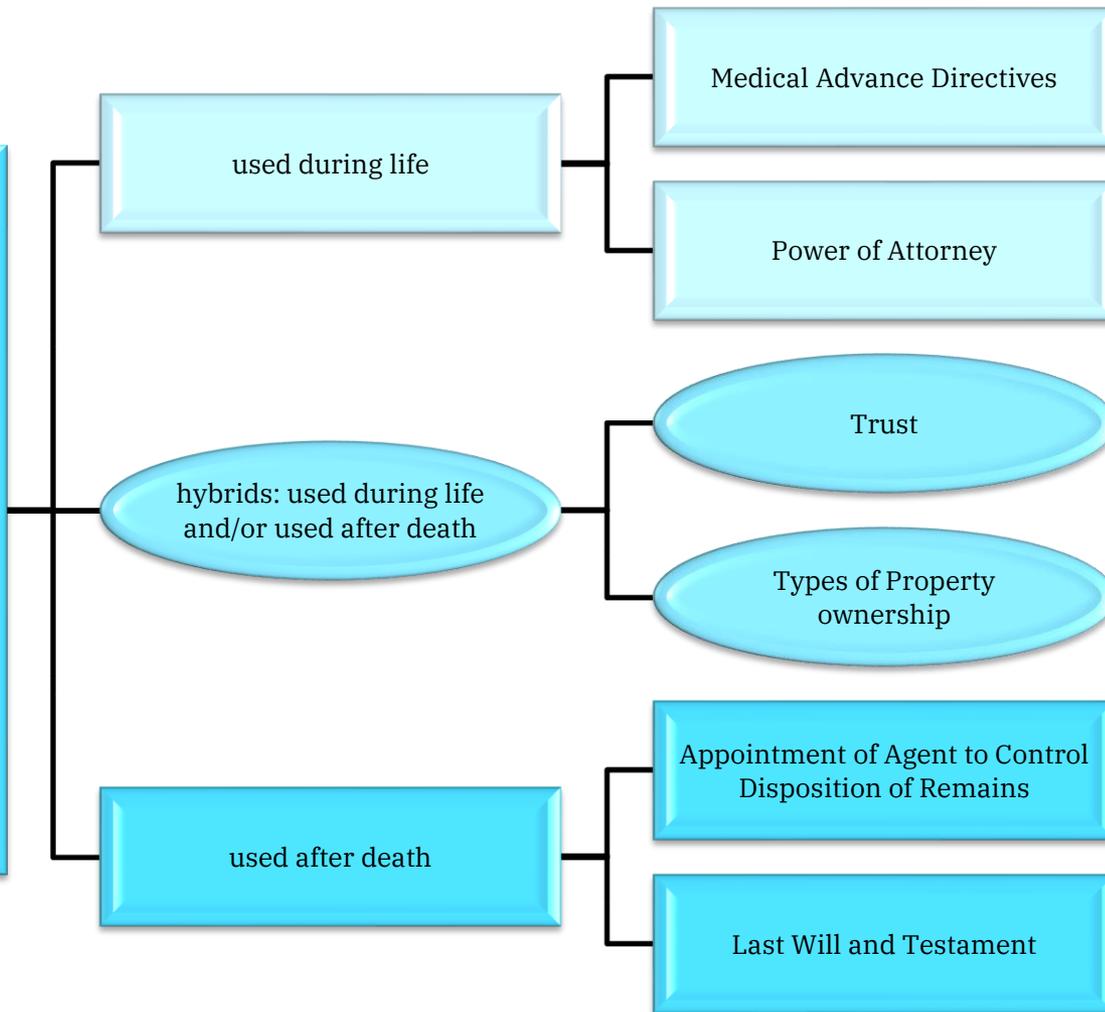
The New York Legal Assistance Group (NYLAG) is a leading non-profit that provides free civil legal services, financial counseling, and engages in policy advocacy efforts to help people experiencing poverty.

# Goals for this Session

By the end of this session, you will know about the most common planning tools available and what would happen if you fail to plan.

- Planning for your physical being:
  - Health Care Proxy and Living Will
  - Medicaid Considerations
  - Appointment of Agent to Control Disposition of Remains
  
- Planning for your finances:
  - Powers of Attorney
  - Types of Property Ownership
  - Trusts
  - Last Will and Testaments

# Planning Tools



# Medical Advance Directives

- Overview of available documents:
  - Health Care Proxy
  - Living Will
  - Do Not Resuscitate Order (DNR)/Do Not Intubate Order (DNI)
  - Medical Order for Life-Sustaining Treatment (MOLST)
- **Default:** Depending on need/circumstances:  
Family Health Care Decisions Act or  
Guardianship.

# What is a Health Care Proxy?

- A legal document (governed by New York Public Health Law § 2981) for anyone 18 years or older.
- Allows you to appoint a trusted person (your Health Care Agent/ Proxy) to make medical and health care decisions on your behalf if you're not able to make them yourself.
- Takes effect only in the event that you are not able to make your own decisions or communicate your wishes in relation to your health care.
- It is important for you to discuss your wishes with your Health Care Agent/ Proxy concerning all issues (including end of life).
- How do you choose among your children / siblings / friends?

# How to Complete Your Health Care Proxy

- Only one proxy / agent at a time
- You may not appoint your attending doctor.
- You also may not choose an employee of a hospital or nursing home if you are a patient or resident of such facility.
- If you have special instructions for your Health Care Agent(s), you may insert them under Item (4) in the form or add additional pages.

# How to Complete Your Health Care Proxy

- You must date and sign your Health Care Proxy before two witnesses, who are over the age of 18.
- Your Health Care Agent(s) may not sign as your witnesses.
- Special rules about who can witness a health care proxy when a person is residing in a hospital that is licensed by the Office for Mental Health.
- Do not need an attorney to make this document.

# Health Care Proxy

(1) I, [Client's name, if AKA, insert AKA name(s) as well]

hereby appoint [Agent's name, if AKA, insert AKA name(s) as well]  
(name, home address and telephone number)

[Agent's address and all phone numbers]

as my health care agent to make any and all health care decisions for me, except to the extent that I state otherwise. This proxy shall take effect only when and if I become unable to make my own health care decisions.

## (2) Optional: Alternate Agent

If the person I appoint is unable, unwilling or unavailable to act as my health care agent, I hereby appoint:

If I Alternate Agent, insert Agent's name, AKA name(s), address, and all telephone #s. If more than 1 Alternate,  
(name, home address and telephone number)

insert after Alternate #1, "If my 1<sup>st</sup> Alternate Agent is unable to act, I hereby appoint [Insert name, AKA, address, and all telephone #s of 2<sup>nd</sup> Alternate Agent] as my 2<sup>nd</sup> Alternate Agent.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

as my health care agent to make any and all health care decisions for me, except to the extent that I state otherwise.

(3) Unless I revoke it or state an expiration date or circumstances under which it will expire, this proxy shall remain in effect indefinitely. (Optional: If you want this proxy to expire, state the date or conditions here.) This proxy shall expire (specify date or conditions):

[It is NOT recommended to insert an expiration date – Clients may create new MAD if they wish to change agents].

(4) I direct my health care agent to make health care decisions according to my wishes and limitations, as he or she knows or as stated below. (If you want to limit your agent's authority to make health care decisions for you or to give specific instructions, you may state your wishes or limitations here.) I direct my health care agent to make health care decisions in accordance with the following limitations and/or instructions (attach additional pages as necessary):

If Client did a Living Will, insert: "See my Living Will dated [Insert date]." If client did not do a Living Will, insert: "I have discussed my wishes concerning artificial nutrition and artificial hydration with my [Insert: Agent/Alternate]. Be sure to refer to the appropriate person or persons. Be sure that your client has had a conversation with their Agent and Alternate Agents prior to executing the document.

Please note that in order for your agent to make health care decisions for you about artificial nutrition and hydration (nourishment and water provided by feeding tube and intravenous line), your agent must reasonably know your wishes. You can either tell your agent what your wishes are or include them in the above section. See instructions for sample language that you could use if you choose to include your wishes on this form, including your wishes about artificial nutrition and hydration.

(5) I also grant authority and power to my agent(s) to serve as my personal representative for purposes of the Health Insurance Portability and Accountability Act (HIPAA). My agent is authorized to execute any and all releases and other documents necessary in order to obtain disclosure of my patient records and other medical information subject to and protected by HIPAA.

## (6) Your Identification *(please print)*

Name [Client's Name(s)]

Signature \_\_\_\_\_ Date [Today's Date]

Address [Client's Address]

(7) **Witnesses:** Two witnesses must be 18 years of age or older and cannot be the health care agent or alternate.

I declare that the person who signed this document appeared to execute the Health Care Proxy willingly and free from duress. He or she signed (or asked another to sign for him or her) this document in my presence.

### *Witness 1:*

Name *(please print):* [Name of Witness #1]

Signature: \_\_\_\_\_

Address: [Witness #1's Address]

Date: [Same date as Client's signature]

### *Witness 2:*

Name *(please print):* [Name of Witness #2]

Signature: \_\_\_\_\_

Address: [Witness #2's Address]

Date: [Same date as Client's signature]

# What is a Living Will?

- A document that describes end-of-life wishes in the case of terminal illness or incapacity with no reasonable expectation of recovery.
- Can be used to support the decision-making of the Health Care Proxy agent if the principal feels strongly about avoiding life-sustaining treatment.
- Medical treatment might include:
  - Artificial nutrition and hydration (tube feeding)
  - CPR
  - Help with breathing
  - Statement of goals, values, and preferences (further explained later in this presentation)

# What happens if you do not have Advance Directives and can no longer make decisions?

- **For medical decision making:** If you have not appointed a Health Care Agent, New York Public Health Law § 2994-d (the Family Health Care Decisions Act (FHCDA)) states that if you are admitted to a hospital or nursing home, the following people, in this order, will make your decisions for you:
  1. a court appointed guardian,
  2. your spouse or domestic partner,
  3. a son or daughter 18 years or older,
  4. a parent,
  5. a brother or sister 18 years or older,
  6. a close friend.

# What is a Power of Attorney?

- Document that authorizes a trusted person to manage financial and banking matters, as well as Medicaid planning, during the **lifetime** of the Principal.
- Not giving up power/rights.
- Agent: over the age of 18.
- The crux of a POA: Trust.
- **Default:** Depending on need/circumstances: specific remedies available or Guardianship. Guardianship proceedings are invasive, can be costly and time-consuming

# Power of Attorney – Statutory Short Form

- A new statutory short form became effective June 13, 2021
  - POAs validly executed in accordance with the law at the time of execution will continue to be effective
- Agent owes fiduciary duty to the principal and must act according to principal’s instructions or in principal’s best interest
- Must avoid conflicts of interest
- Must disclose nature of relationship when signing for the principal (example: signing “James Smith as Power of Attorney/agent for Julia Smith).
- POA can be revoked at any time by a principal who is competent
- POA is not effective after the death of the principal

# Power of Attorney – Statutory Short Form

- Principal can give broad or limited authority to the agent
- Principal can appoint a monitor to monitor agent’s activities (optional)
- Financial institutions and other third-parties must accept properly drafted statutory forms. If a financial institution rejects a POA, it must do so within 10 days of receipt and provide a valid reason in writing.
- There are “durable,” “nondurable” and “springing” POAs
  - The statutory form is durable and effective immediately upon execution by principal and agent.

# Power of Attorney – Statutory Short Form

(f) GRANT OF AUTHORITY:

To grant your agent some or all of the authority below, either

- (1) Initial the bracket at each authority you grant, or
- (2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

- |  |   |
|--|---|
| <input type="checkbox"/> (A) real estate transactions;   | <input type="checkbox"/> (J) benefits from governmental programs or civil or military service;  |
| <input type="checkbox"/> (B) chattel and goods transactions;   | <input type="checkbox"/> (K) financial matters related to health care; records, reports, and statements;  |
| <input type="checkbox"/> (C) bond, share, and commodity transactions;  | <input type="checkbox"/> (L) retirement benefit transactions;   |
| <input type="checkbox"/> (D) banking transactions;   | <input type="checkbox"/> (M) tax matters;   |
| <input type="checkbox"/> (E) business operating transactions;  | <input type="checkbox"/> (N) all other matters;   |
| <input type="checkbox"/> (F) insurance transactions;   | <input type="checkbox"/> (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select; |
| <input type="checkbox"/> (G) estate transactions;  | <input type="checkbox"/> (P) EACH of the matters identified by the following letters _____.   |
| <input type="checkbox"/> (H) claims and litigation;  |   |
| <input type="checkbox"/> (I) personal and family maintenance: If you grant your agent this authority, it will allow the agent to make gifts that you customarily have made to individuals, including the agent, and charitable organizations. The total amount of all such gifts in any one calendar year cannot exceed five thousand dollars; |   |

# Power of Attorney – Statutory Short Form

- You can add modifications to a POA to tailor it to the principal's needs (public benefits, authority to open safe deposit box, designation of guardian, etc.)
- Modifications are required to authorize agent to make gifts and transfers on behalf of the principal (including self-gifting to the agent)
- Authority to create trusts and make transfers can be necessary even for relatively low-income clients for potential future Medicaid planning (Medicaid limit for 2021 is \$884/single, \$1300/couple)
- Executing a POA requires a high level of capacity.
  - “Ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.” *See* GOL §5-1501(2)(c)

# A Word about Medicaid

- Medicaid has income and asset limits.
  - Medicaid income limit for 2021 = \$884/single, \$1300/couple
  - Last minute planning can be done with POA
- Medicaid is the only provider of free Long Term Care (LTC) assistance for Activities of Daily Living.
- LTC may be provided in the community (home) or in an institution (nursing home).
- Nursing homes cost over \$100,000/year, home health care aides are paid on an hourly basis (\$25-50/hour).
- All NY nursing homes accept Medicaid payment.

# What is a Trust?

- A Trust is an agreement and involves one or more Grantors, Trustees and Beneficiaries.
- Examples of Trusts: Supplemental Needs Trusts, Age Terminating Trusts, Pooled Trusts (For income only – to qualify/ benefit from Medicaid)
- A Trust may be Revocable or Irrevocable
- For Medicaid planning, always Irrevocable
- Attorney needed

# Property Ownership

- How do you own your property?
  - Payable on Death (POD), Transferrable on Death (TOD), Beneficiary (BNF)?
  - Joint ownership?
  - Tenancy by the entirety?
- Each type of ownership will have repercussions during your lifetime and after your death.

# What is an Appointment of Agent to Control Disposition of Remains?

- Appoint someone to take care of remains.
- Special instructions.
- <https://www.health.ny.gov/forms/doh-5211.pdf>
- Pre-Plan or Pre-Pay your Funeral
- **Default:** NY Law provides an order within which persons may handle a person's remains. They will make decisions for you & funding will have to be found. If no one, Public Administrator will handle. Funeral costs get paid before creditors of estate. If no funds, Hart Island burial.

# What is a Last Will & Testament?

- Allows a person (Testator) to set forth how and to whom their belongings will be given after their death.
- Testator chooses an Executor to take care of distribution and carry out the instructions of the Will.
- Appoint a guardian (property/person) to look after minor children.
- Testator's spouse has a right of election (50K or 1/3 of the Testator's net estate (whichever is greater)).
- Will takes effect when it is submitted to Surrogate's Court
- Attorney needed.
- **Default:** Laws of Intestacy in New York State

# Assets that Bypass your Estate

- Life Insurance (with designated beneficiary).
- Pension/ Retirement plans (with designated beneficiary).
- Payable on death/ Transfer on death/ Totten Trust bank accounts.
- Joint accounts (but not convenience accounts).
- Property held jointly with right of survivorship.

# Conclusion

- It is not too late to plan.
- Planning documents should be completed sooner rather than later.
- Consult with an attorney.
- Ensure that your planning documents are up-to-date.
- If appropriate, have a conversation with your family members/friends.

**ERIN SHAHINFAR, ESQ.  
STAFF ATTORNEY  
ELDER LAW PRACTICE / PUBLIC BENEFITS UNIT  
100 PEARL STREET, 19<sup>TH</sup> FL. | NEW YORK, NY 10004  
T: 212.613.5062 | F: 212.714.7402**

# THANK YOU

More information at [nylag.org](http://nylag.org)

