



GLEASON, DUNN, WALSH & O'SHEA

Attorneys at Law

40 Beaver Street
4th Floor
Albany, NY 12207
(p) 518 432 7511 (f) 518 432 5221

JulieAnn Calareso, Of Counsel
518-432-7511 ext. 7579
jacalareso@gdwo.net
www.gdwo.com

Advance Directives

Health Care Proxy - Legal document signed by someone (you, the Principal) appointing someone else (your Health Care Agent) to make medical decisions if a doctor determines you are unable to make them for yourself

- Only allowed to name one person at a time, although it is advisable to name alternate(s)
- Two witnesses, over age 18, who are not named in document

Living Will - Written expression of wishes for care

- Not a legally binding contract but clear and convincing evidence that your Health Care Proxy Agent can use to bolster his/her decision-making authority

Agent to Handle Disposition of Remains OR Prearranged Funeral

Organ and Tissue Donation or Anatomical Gift

<https://donatelifenys.org/>

https://amsny.org/wp-content/uploads/2019/03/AlbanyMed_Info.pdf

Medical Orders for Life Sustaining Treatment (MOLST) - designed for last year of life; standing medical order signed by doctor (renewed every 90 days) for the specific type of medical treatment to be used

https://www.health.ny.gov/professionals/patients/patient_rights/molst/

Power of Attorney - Legal, binding contract where someone (you, the Principal) appoints someone else (the Agent, or Agents, as you are allowed to have multiple persons act) to manage financial matters

- Valid upon your and your Agent's signing (does not require finding of incapacity)
- Does not take away your rights to act
- Can be used for convenience or in the event of incapacity
- Broad powers, or tailored, narrow powers depending on purpose
- This is a legal contract and therefore requires greater mental capacity than is needed than to do a Will and certainly more than is needed to do a Health Care Proxy
 - Single biggest mistake: WRONG FORM or, RIGHT FORM, COMPLETED INCORRECTLY

Guardianship under Article 81 of the Mental Hygiene Law

- Legal proceeding wherein a Judge appoints a person (the Guardian) to make personal decisions (Guardian of the Person) or financial decisions (Guardian of the Property) for another (called the Allegedly Incapacitated Person before the hearing, and the Incapacitated Person after the hearing if the Judge finds incapacity)
 - Petitioner is the person bringing the proceeding
 - Competence is *presumed* and the party asserting incapacity bears the burden of proving incompetence
 - Family members, facility in which AIP resides (if any), and anyone or any agency that has an “interest” in the AIP’s wellbeing has a chance to participate
 - Designed to be expeditious and least restrictive means for caring for someone
 - Can be expensive, but often is necessary
 - Consider mediation as an alternative
 - Mental Hygiene Law § 81.02 says (a) Court may appoint a guardian for a person if the court determines: 1. that the appointment is ***necessary*** to provide for the personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person; and 2. that the person ***agrees*** to the appointment, ***or*** that the person ***is incapacitated*** (as defined in the law).

Medicare

- Federal health insurance (age 65+ or younger persons with disabilities)
- Part A, Part B, Part D (Part C and other packages available to bundle services)
- Original Medicare pays 80% of costs (the cost is the negotiated rate with doctors; the patient remains responsible for 20%)
 - Consider a “Medi-gap” policy to cover the 20%
 - Private insurances, varying costs and copays
 - VERY LIMITED long term care benefits – 100 day cap if in patient in hospital for 3 midnights (first 20 days paid in full; days 21-100 have co-pay)

Medicaid

- Administered by County Department of Social Services;
- Provides two basic types of Medicaid long term care benefits: Community Based Medicaid and Chronic Care Medicaid (Nursing Home)
 - Eligibility for either chronic care or community Medicaid is two prong: Financial **and** Medical
 - Asset Levels
 - Single individual = \$30,182 in assets + personal property + funeral (+ home if Community Medicaid)
 - Married couple = \$30,182 in assets + personal property + funeral for applicant; \$74,820 in assets + personal property + funeral + car + home (equity cap of \$1,033,000)

- Retirement accounts in payout status are NOT counted as part of assets
- Some chances to keep more than \$74,820 (up to \$123,600)
- Annuities can cause problems
- Income Levels
 - Single individual = \$50 for nursing home; \$1,647 + \$20 disregard for Community Medicaid
 - Married individual = \$50 for applicant; \$3,715.50 for healthy spouse for nursing home Medicaid
 - Community Medicaid budgeting for a married person is highly nuanced and needs to be explored and discussed with experienced practitioner
- The Look Back - NO look back for Community Medicaid yet (possible 2½ year look back starting next year) – do not have to give 5 years of records
 - HOWEVER, transfers now to get Community Medicaid could have serious issues if you go into the nursing home within 5 years (even if you don't need to apply for Medicaid right away)
 - 60 months (5 years) of all records for both applicant and spouse if seeking nursing home care
- The Penalty Period
 - After applicant and spouse are at asset level, and applicant is in nursing home, and applicant submits application, all gifts (unexplained transfers) are aggregated and divided by the "Regional Rate of Care" - \$12,744 in this area. This results in the Penalty Period which begins to run. This means there won't be money to pay. This means nursing homes get picky on who they accept.
 - You MUST have your records in order; you must know your history
 - Stop using cash (\$2,000 withdrawals each month for 'spending money' cause problems unless you have receipts!)
 - Counties have been advised to review transactions of \$2,000 or more but have the right to look at everything!
 - Certain exempt transfers
 - OK to transfer between spouses; caretaker child exception; disabled person exception; etc.
- Crisis Planning – when it is time for the nursing home, consult an experienced elder law attorney because there may still be time to do something!

Asset preservation

- Medicaid Planning comes in three forms:
 - Long Term Planning (5 years or more): Irrevocable Trust; Outright gifts – do not give the house to your kids!; life estate deeds (not advisable anymore; if you have one, we can deal with it; if you do not have one already, do not do one; use a trust)
 - Mid-Range Planning (not immediate but perhaps not 5 years left before care): Exempt transfer to spouse and/or disabled children

- Crisis Planning: Promissory Note/Gift Plan
- Do not try it on your own
- Annual Exclusion Gifts (\$17,000) that are acceptable for tax purposes and that everyone knows about **ARE NOT** acceptable for Medicaid, will not escape the look back and **WILL** cause problems

Estate Planning

- Why do planning? Ensure your standard of living; give instruction for how things get handed out at death; designate someone to do the “handing out”
- What level of capacity is needed to sign a Will?
 - (1) understood the nature and consequences of executing a will; (2) knew the nature and extent of the property she was disposing of; and (3) knew those who would be considered the natural objects of her bounty and her relations with them
- Probate – the legal process by which someone’s Will is offered to the Surrogate’s Court in the county in which that person died a resident
 - Only governs assets held individually by the deceased
- Joint Assets – two or more owners; pass to the surviving owners if “survivorship” designation is there
- Beneficiary Designations – if an asset (life insurance, retirement account) has a beneficiary, that beneficiary designation governs and not the Will
- Transfer of Death or Payable on Death – form of beneficiary designation for investment accounts
- Totten Trust or I/T/F (In Trust For) – form of beneficiary designation for bank accounts
- Last Will and Testament: must be executed with strict formalities; disposes of those things that do not already have joint owner or named beneficiary on it; Will requires acceptance by the Court through the probate process
- Dying without a Will means you die intestate
 - New York law has hierarchy for handing out assets then
- Trusts – if assets are in a Trust, the Will doesn’t control (with certain limited exceptions)
 - Revocable – you are in control and are Trustee; can use all money for yourself; can be changed during your life; no Medicaid protection/asset preservation
 - Irrevocable – you are not the Trustee; you should only have access to income and not principal; can only be changed during your life in limited ways; this is the tool to use to get Medicaid planning/asset preservation