Present

Remote Pro Bono Estate Planning
Wills and Powers of Attorney

Thursday, April 7, 2022
2:30 p.m. – 5:00 p.m.
Fordham Law School | CLE Program
via Zoom Webinar

CLE COURSE MATERIALS
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**Biographies of Presenters**

**Moderators:**

**Dora Galacatos**, Esq., the Executive Director to the Feerick Center for Social Justice, is a Fordham Law alumna (1996), with experience working in city government, the not-for-profit sector, and legal services. Prior to coming to Law School, Dora worked for the New York City Department of Juvenile Justice and the New York City for Mayor's Office of Drug Abuse Policy from 1989 to 1993, where she focused on program development, program evaluation, and policy analysis. As part of a Skadden Fellowship (1997-98), Dora helped establish a family day care network at Northern Manhattan Improvement Corporation, in Washington Heights, Manhattan. Dora had served as Staff Director to the New York City Family Homelessness Special Master Panel, working alongside former Fordham Law School dean, Professor John D. Feerick. Dora also served as a law clerk to the late-Honorable Milton Pollack (1996-97) and to the Honorable Paul A. Crotty (2005-2006), both District Judges in the Southern District of New York. Dora is a graduate of the University of Pennsylvania, where she received her Bachelor of Arts in History (1987), and the New School for Social Research, where she was a Jacob M. Kaplan Fellow and received a Master of Science in Urban Policy (1993). In 2009, Dora was honored by The New York County Lawyers Association with their Public Service Award. In 2011, Manhattan Legal Services awarded her its Medal of Honor. In 2013, MFY Legal Services, Inc. recognized Dora with its Partner in Justice Award. Dora is a former chair of the New York City Bar Civil Court Committee and currently serves on the Board of Directors of Terra Firm.

**Kelly McGovern**, Esq., is the Director of Pro Bono Affairs at Legal Assistance of Western New York, Inc.® (LawNY), where she manages pro bono initiatives and opportunities, internship programs, and volunteer engagement across LawNY’s fourteen counties. Kelly graduated from Hobart and William Smith Colleges in 2003 with a Political Science degree. She received her JD from Syracuse University School of Law with a Concentration in Global Law and Policy in 2006, and was admitted to practice in New York State in 2007. Kelly was previously a LawNY Staff Attorney, and she handled primarily public benefits and eviction prevention cases. She represented clients at unemployment insurance benefits and other administrative hearings for 13 years, and continues to supervise LawNY staff members who practice in this substantive legal area. Kelly has also convened LawNY work groups focused on employment law, regional pro bono work, and assisting limited English proficient clients. Kelly serves on the New York State Bar Association’s Committee on Legal Aid, the 6th and 8th Judicial Districts’ Pro Bono Committees, and the New York State Chief Judge’s Attorney Emeritus Advisory Council. She is also the co-chair of the Pro Bono Coordinators’ Network meeting and is on the Steering Committee for the New York State Bar Association’s 2022 Partnership Conference. Kelly works closely with pro bono attorneys, legal services providers, and academic institutions on pro bono matters.
Speakers:

Teresa McNamara, Esq., is the Attorney Pro Bono Coordinator of External Affairs at Legal Assistance of Western New York, Inc.® (LawNY). Prior to joining LawNY as a full-time employee, Teresa volunteered for 2 years as a pro bono attorney for the organization, assisting clients with uncontested divorces, estate planning, and legal name changes. In 2018, Teresa received the President’s Pro Bono Service Award for the 6th Judicial District from the New York State Bar Association and was recognized by the Finger Lakes Women’s Bar Association for outstanding pro bono service. Teresa received her JD from Syracuse University School of Law with a Concentration in Family Law in 2007 and was admitted to practice in New York State in 2011. Teresa is the President of the Tompkins County Bar Association and a past CLE Chair and Treasurer to the Finger Lakes Women’s Bar Association and serves on the Tompkins County Access to Justice Committee.

Jeffrey P. Nieznanski, Esq., has been employed by Legal Assistance of Western New York, Inc.® since 2007. Starting as a staff attorney with LawNY® in Bath, NY, he handled employment, disability, and education law cases for clients in Steuben and Allegany counties, prior to moving back to Rochester, NY in 2012. A graduate of Albany Law School and the National Labor College, he was a labor union representative in Rochester, NY and Washington, DC prior to joining LawNY. Since joining LawNY, he has filed a wage theft case that resulted in 15 employees recovering over $300,000 in damages. As a supervising attorney in Rochester, Jeff supervises attorneys working on behalf of children with special education needs, seniors, crime victims, and elder abuse victims. Jeff also provides direct legal representation to Monroe County Seniors, and initiated a Seniors Legal Information Line for Monroe County residents in 2018. Jeff co-chairs the Monroe County Bar Association’s Elder Law Committee, and is an original member of the Monroe County Enhanced Multi-Disciplinary Team. The Monroe County E-MDT is comprised of professionals from various disciplines and has focused on investigation, intervention, and prevention of financial exploitation of older adults since 2012. Jeff was admitted to practice in New York State Courts in 2007 and in the United States District Court Western District of New York in 2010. Jeff is a member of the New York State Bar Association, the Monroe County Bar Association, and the National Lawyers Guild.

Randye Retkin, Esq., is the Director and Founder of LegalHealth, a Division of the New York Legal Assistance Group (NYLAG). LegalHealth is the country’s largest medical-legal partnership. Prior to joining NYLAG, Ms. Retkin served as Director of Legal Services for the Gay Men’s Health Crisis, the nation’s oldest and largest organization serving people with HIV/AIDS. Ms. Retkin served as a staff attorney with New York Lawyers for the Public Interest and Volunteers of Legal Service (VOLS) where she established the VOLS Immigrants’ Rights Project. She is a founder of the New York Immigration Coalition and the National Cancer Legal Services Network. She is a co-author of New York States’ Standby Guardianship law and helped spearhead the expansion of the law to assist immigrant families. She is also an author of
New York’s States Health-Related Legal Services law. Ms. Retkin is a former member of the OneCityHealth Executive Committee and the New York City Bar Association Ethics Committee and is a frequent presenter on Ethics.

**Gavin Reynolds**, Esq., is a Supervising Attorney with Legal Assistance of Western New York, Inc., having joined the agency in 2014. LawNY provides free legal aid to people with civil legal problems in Western New York, across 14 counties in seven offices. Gavin is based in LawNY's Geneva office. Gavin's primary focus for the past 8 years has been in the realm of elder law, advocating for clients over the age of 60. In addition to helping older individuals with a variety of legal matters, Gavin also has handled and supervised cases in many of LawNY's core practice areas, including housing, public benefits, and LGBTQ+ advocacy. Gavin also has previously served as the Managing Attorney of the Geneva office. Currently, Gavin is back focusing on client-centered advocacy as the Supervisor of Geneva's elder law unit. Prior to joining LawNY, Mr. Reynolds was a litigation and family wealth planning associate with a large private law firm in Rochester, NY. He is a 2008 graduate of Fordham University School of Law.

**Beth Schwartz**, Esq., was a full time professor at Fordham Law School from 1987 through 2021, teaching a variety of in-house clinics, including the Litigation Skills Clinic, Children’s Disability Clinic, Family Advocacy Clinic, and Mediation Clinic. In addition, Beth served as the Faculty Director of Fordham’s Fundamental Lawyering Skills Program, Externship Program and Pro Bono Scholars Program. In July 2021, Beth retired from Fordham Law School and began performing pro bono legal work with New York’s Attorney Emeritus Program. She currently volunteers with the City Bar Justice Center’s Federal Pro Se Legal Assistance Project and with LawNY. Beth is also a volunteer dog walker with PAWS NY, a New York City non-profit dedicated to keeping pets in their homes.
Ethical Issues in the Provision of Remote Lawyering – Wills and Powers of Attorney

April 7th, 2022
ABOUT LEGALHEALTH

LegalHealth, a division of NYLAG, provides free legal assistance and develops policy to help New Yorkers who are experiencing financial hardship and have serious or chronic health problems. We bring together legal and medical professionals in the healthcare setting.

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.
Reference Material

- The New York Rules of Professional Conduct (“Rules”)
- The ABA Model Rules
- Bar Opinions
- ABA Handout – “Why am I left in the waiting room?”
Case Example One – Pt. 1

You are a long-time pro bono attorney working with a legal organization that provides free legal services to people with cancer. A social worker calls to refer someone who has advanced brain cancer and needs a will and a POA. Her name is familiar, and you are fairly certain you have spoken to her before. Since you were told that the patient’s prognosis is poor you know there is some urgency.

You call the client the next day and her daughter answers the phone and says, “I have all the information you need”. You insist that Mom be put on the phone. When you speak to Mom, she cannot answer basic questions such as her address and what is wrong with her. You hear her daughter coaching her from the next room. When you are finally sure she is alone, she keeps repeating “she is my angel I trust her and she can have everything”.

The social worker calls the next day to ask how it went. You do not want to breach confidentiality, but you say not well. She tells you to try in the mornings as Mom is usually better.

You do call again another morning and Mom is more coherent but sadly, she is also expressing suicidal ideations.

What can you do?
Who is the client? Do you have a client?

• The first question is who is the client? It is important to explain upfront the mission of your organization and who you are here to serve.

• Can you form an attorney-client relationship with Mom or in other words can Mom retain you?

Capacity

• Where a prospective client’s capacity is in doubt, the lawyer must make a threshold determination of whether she has the capacity to consent to the lawyer’s representation.

• There isn’t much guidance on how to make the initial determination on a client and their capacity to enter into a relationship, but it is helpful to look to Comment 6 to Rule 1.14 which offers some guidance to help attorneys assess client decision-making capacity for existing clients.
Capacity

NY Rule 1.14

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Comment [6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.
Levels of Capacity - “What Lawyers Need to Know about Capacity” (Nassau Academy of Law)

• Testamentary Capacity – or capacity to sign a will
  – A testator must be of “sound mind.” He or she must know what they own, i.e. the nature and extent of their property, and who they want to give it to. Capacity is required at the time of signing. Thus a lucid interval is sufficient.

• Contractual Capacity
  – For contractual capacity, courts have looked at the individual’s ability to understand the nature and effect of the contract and the business being transacted
Levels of Capacity, cont.

• **Capacity to execute a power of attorney**
  – The standard has on occasion been considered to be the same as contractual capacity, but some courts have held it to be more similar to testamentary capacity

• **Decisional Capacity in Healthcare**
  – This capacity is rooted in the concept of informed consent
Practical Considerations

- Arrange for a video conference if possible. The prospective client may live with a family member who can assist with this.
- Allow for extra time.
- Call when you yourself are at ease and able to be extra patient.
- Call at a time of day when the prospective client is most alert.
- Speak slowly.
- If English is not the prospective client’s first language, arrange for an interpreter from your organization’s resources.
- Conduct a second phone call if necessary, if possible with a colleague.
Practical considerations, cont.

- Variables such as language, immigrant status, economic status, perceptions of institutions such as hospitals, as well as perceptions of disability and the role of family in care and decision making, are important to consider when thinking through how the patient is presenting themselves.
Informed Consent

NY Rule 1.0.: Terminology

- (j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision and after the lawyer has adequately explained to the person the material risks of and reasonably available alternatives to the proposed course of conduct and reasonably available alternatives.
Diminished Capacity

• Rule 1.14(b) states: “When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases seeking the appointment of a guardian.

• Protective action is permissive, not mandatory.
Examples of Protective Action

• Comment (3) Having family member or other persons participate, the lawyer must consider whether such persons will affect the attorney client relationship

• Comment (5) Consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances....
Confidentiality and Rule 1: 14

Rule 1.14(c) goes on to state: “Information relating to the representation of a client with diminished capacity is protected by Rule 1.6 (Rule of Confidentiality). When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.”
Confidentiality of Information

NY Rule 1.6

(a) A lawyer should not knowingly reveal confidential information, as defined in this rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) The client gives informed consent, as defined in Rule 1.0 (j);

(2) The disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) The disclosure is permitted by paragraph (b) ....
Confidentiality

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary;

   (1) to prevent reasonably certain death or substantial bodily harm:....
New York City Bar Formal Opinion – 2018-1

The New York City Bar Association Formal Opinion 2018-1 which concluded that a lawyer may take reasonably necessary protective action when a prospective client has seriously diminished capacity, cannot adequately act in his or her own interest, and is at risk of substantial physical, financial or other harm unless action is taken. When taking protective action, the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the prospective client to the extent reasonably necessary to protect the client’s interests. The lawyer must make clear that they are not the prospective client’s representative, and no client-lawyer relationship exists with the prospective client.
Diligence

Model Rule 1.3: Diligence

- A lawyer shall act with **reasonable diligence** and promptness in representing a client.
- The New York Rule goes on to state that a “lawyer shall not neglect a legal matter entrusted to the lawyer.”

Comment [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or **personal inconvenience to the lawyer**, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.
Your Role as an Advisor

Rule 2.1

• In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering candid advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client’s situation.
Recap

• Who is the client?
• Capacity
• Client or Prospective Client?
• Confidentiality
• Diligence
Case Example - Part 2

Suppose Mom has no capacity issues and instead asks you to help with a POA and Will, which you agree to do. During the course of your telephone discussions to prepare the documents, she tells you that her apartment has been infested with mice for years. She cannot stand it anymore and asks that you help her bring a housing conditions case. You typically don’t represent in such cases, but you feel bad for her. You tell her that you will try to assist her.

What do you do?
Limited Scope Representation

NY 1.2.: Scope of Representation & Allocation of Authority between Client & Lawyer

- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

*emphasis added*
Limited Scope Representation

1.2, Comment [7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely...
Legal Information v. Legal Advice

• Legal Information
  – Factual, generic, and does not address any one particular cause of action.

• Legal Advice
  – Proposes a specific course of action that a client should take.
  – Requires legal knowledge, skill, education, and judgment.
  – Applies specific law to a particular set of circumstances.
Competence

1.1: Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Comment [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.
Rule 1.4, Communication

a) A lawyer shall:

1) Promptly inform the client of:
   i. Any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by these rules;
   ii. Any information required by court rule or other law to be communicated to a client; and
   iii. Material developments in the matter including settlement of plea offer

2) Reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
3) Keep the client reasonably informed about the status of the matter;
4) Promptly comply with a client’s reasonable requests for information; and....
THANK YOU

More information at legalhealth.org

Search “NYLAG” or “New York Legal Assistance Group” on these social media platforms.
Will Drafting and Execution

Beth Schwartz, Esq.
Gavin Reynolds, Esq.
Teresa McNamara, Esq.
What is a Last Will and Testament?

- Governs the management and ultimate distribution of certain types of assets *after* death

- Governs assets solely owned by Testator (the person making the Will) and their personal possessions
  - Real property, bank accounts, automobiles and belongings
What is not included in a Will as part of the Estate?

Anything with a *Beneficiary Designation*:

- 401K
- IRA
- Brokerage Accounts
- Life Insurance Policies
- Joint Bank Accounts
- Joint Real Estate
Why have a Will?

- Allows assets and savings to pass in accordance with Testator’s wishes, and not in accordance with the statutory scheme established by the legislature.

- Provides a plan for distribution of real and personal property upon a client’s death.

- Ensures that a spouse, children, other family members, friends, and even pets are taken care of after the testator’s death.

- Allows Testator to designate an individual whom they trust to administer their estate—an Executor.
Intestate

- Someone who dies without a Will is “intestate,” and the laws of intestacy determine the distribution of their estate.

- In New York, if a Decedent (deceased testator) is survived by a spouse but no children, the spouse inherits everything.

- Alternately, if the decedent is survived by children but no spouse, the children inherit everything.

- If the decedent has a spouse as well as descendants, the spouse gets the first $50,000 plus one-half of the remaining property, and the descendants inherit the rest.

- If the decedent is survived by parents, but no spouse or descendants, their parents inherit everything.

- If the decedent is survived by only siblings, their siblings inherit everything.

- The laws continue down family lines and, and include grandparents, cousins, and provisions for descendants of different generations.

- The laws also include different legal classifications of children, including, but not limited to, biological, adoptive and foster children.
Exceptions to Property Distribution

- Only property titled in Testator’s name, and their name only, at the time of their death may be distributed according to a New York Will (i.e., jointly held property may not be distributed).

- Life insurance proceeds may pass to a beneficiary outside the Will, or the Testator may designate the Estate as the beneficiary, in which case the proceeds pass via the Will.

- New York also gives surviving spouses a “right of election” to take a share of the decedent's estate. The elective share is the monetary amount “equal to the greater of
  - (i) fifty thousand dollars or, if the capital value of the net estate is less than fifty thousand dollars, such capital value, or
  - (ii) one third of the net estate.”
Exceptions, cont.

- New York has a long list of exempt property that is not considered part of the estate if a person dies leaving a surviving spouse and children. In this instance, items pass directly to the surviving spouse.

- Alternately, if the decedent has only minor children but no surviving spouse—or a disqualified spouse—certain items pass directly to the children.

- Such items include, but are not limited to, one motor vehicle not worth more than $25,000.
Communicating Expectations and Process

- Discuss with the client/Testator the reasons that they may (or may not) need a Will.
- Determine the Testator’s goals in drafting a Will.
- Explain principles in non-legal language.
- Advise client that family cannot be present during meetings or during will execution. Explain that the client needs to be the one to communicate their wishes to the lawyer.
- If representing spouses, each needs to sign a waiver of conflict
  - Example of potential conflict: Spouses in their second marriage each have children of their own they wish to provide for in their will.
Testator Should Consider:

- Who will inherit their personal belongings?
- Who will inherit their financial assets?
- What do they want to do with their home or other property (if they own real estate)?
- Do they need estate tax planning?
- Do they have a disabled child?
- Who do they want to nominate as their Executor and successor Executor?
Coercion and Undue Influence

- Ensure the client is acting free of coercion and undue influence.

- Testator must be exercising their own judgment and free will (i.e. no undue influence by another).

- Note: New York State does not condemn all influence— only undue influence that destroys Testator’s own judgment and free will.

- Conduct competency assessment.  (See documents on Assessing Capacity.)

- Testator (who is at least 18 years old) must be of sound mind at the time of execution of the Will.
Coercion and Undue Influence, cont.

- Testator must generally understand three things:
  - The nature of the property he or she owns.
  - The natural objects of his or her bounty, meaning the people to whom the testator would normally leave property to, usually close relatives.
  - The property disposition being made.

- Note: Testator is presumed to be competent.

- Furthermore, a New York Testator’s mental capacity and memory does not have to be perfect. They can suffer from a condition that could limit those powers, like dementia, and still be of sound enough mind at the time of execution.
Confidentiality of Communications

- The attorney-client privilege preserves the confidentiality of communications between lawyers and clients.

- This privilege endures after the professional relationship has ended – and even after death.

- However, the attorney-client privilege is not absolute. Courts have noted several exceptions, including inheritance disputes.

- Attorney-client privilege is automatically waived during a Will contest, because the law presumes that the Decedent wants to protect their intended distribution scheme.

- In other words, if the Decedent’s attorney has documentation concerning the Decedent’s testamentary intent, then the attorney must supply that information if subpoenaed and cannot invoke attorney-client privilege.
Will Drafting

It is strongly recommended that an attorney drafts a Testator’s Will and oversee the execution of the Will, but this is not required.

1. Fiduciary Clause

Example:

“I name my son, ______________, currently residing at ______________, as the Executor of my Last Will and Testament. If ______________ predeceases me or is unable to serve as Executor, then I name my niece, ______________, currently residing at ______________, as Alternate Executor of my Last Will and Testament. My Executor shall have all the express and implied powers granted to Executors by the laws of the State of New York in effect at the time of my death and shall not be required to post any bond or security.”
2. Real Property Clause

Example:

“I give, devise, and bequeath all of my right, title, and interest in my real property located at 
________________________, in the County of 
__________, to my aforementioned daughter, 
____________________, and my aforementioned son, 
____________________, as joint tenants with rights of survivorship.”
Will Drafting, cont.

3. Tangible Personal Property Clause

“My Executor shall make specific bequests of the following tangible property, if owned by me at the time of my death:

a. My pearls to my daughter-in-law, ____________, currently residing at ____________.

b. My diamond engagement ring to my daughter, ____________, currently residing at ____________.

c. The furniture and other tangible property in my apartment to appropriate charitable organizations.”
Will Drafting, cont.

Tangible Personal Property (TPP) Clause Generally

Drafting Tip: In addition to specific TPP provisions, also include a general TPP clause:

Example: All my tangible personal property, which shall mean all property that is not real estate and whose value is its own substance or uniqueness, such as my clothing, automobiles, jewelry or a coin collection and other personal effects and all household furniture and furnishings and other household equipment owned by me at the time of my death, together with any transferable rights and pending claims I may have under any insurance policy pertaining to any such property, I give and bequeath to those of my children who survive me, to be divided among them as nearly as possible in equal shares per capita in such manner as they agree upon. In the event my surviving children do not reach agreement on the distribution of such tangible personal property, then I authorize my Executor, in the exercise of his or her sole and absolute discretion, to make divisions of the property in approximately equal shares among those of my children who survive me. Alternatively, the Executor may sell such property and distribute the proceeds similarly.
Will Drafting, cont.

4. Residuary Estate Clause

Example:

“All other property owned by me at the time of my death, including but not limited to real property, personal property, and other assets, and any property or assets that pass to my estate by reason of my death, is hereinafter referred to as my Residuary Estate. My Residuary Estate shall be distributed as follows:

- My Executor shall first pay, as an expense of administration and without apportionment: all estate taxes, both federal and state, imposed by reason of my death with respect to any property included in my estate for tax purposes; all funeral expenses and debts that I have at the time of my death; and all expenses related to the administration of my estate.
- The remainder of my Residuary Estate shall be distributed in equal shares to my two grandchildren, __________, if he/she survives me, and ______________, if he/she survives me, both of whom currently reside at ______________(or DOB).”

Drafting tip: Specify what happens if a named beneficiary predeceases. For example, as above, specify what happens to a beneficiary’s share if that person predeceases the Testator. Some clients want the share to go to another surviving beneficiary, while others want it to go to the beneficiary’s issue (descendants).
Drafting Tip

- State if the Testator is currently married, and to whom; if the Testor is not married state whether they are divorced or a widow/widower.

- Make sure to list children, alive and deceased.

- If a client is disinheriting a child they need to state they are knowingly and intentionally doing so. There is case law that supports need for this disclaimer.

- Optional memo that is not binding but instructive:
  “I may, however, leave written instructions in which I identify certain items and individuals that I wish to receive such items. While not legally obligated to do so, it is my hope and desire that my Executor follow such directions and give such identified items to the identified individuals in accordance with my written instructions.”
General Tips for Representation

- If the client is transferring real property in the Will, it is recommended that you obtain a copy of the deed(s) to confirm the client owns the home in their name.

Issues to be aware of:

- The client has a child who receives means-tested government benefits, such as SSI, discuss the option of sheltering that child’s share of the estate in a Supplemental Needs Trust.
- You discover that the client has significant assets that may implicate the need for more detailed estate and Medicaid planning.
- If the client has engaged in prior estate planning that involved the establishment of a revocable or irrevocable trust.
Will Execution

- NY Estates, Powers and Trusts Law (EPTL) Section 3-2.1 provides the requirements for execution and attestation of a Last Will and Testament.
- The Will must be signed at its physical end by one of the following:
  - Testator; or
  - Some other person in the Testator’s name in the Testator’s presence, by the Testator’s direction.
    - This said person must also sign their own name and address on the Will (although the lack of a listed address will not invalidate the Will).
    - This person does not count as a witness.
- Only people who possess “testamentary” mental capacity can sign a Will.
- The Testator must declare the Will to be theirs.
Other Considerations for Due Execution

- If the client cannot read or write, the entirety of the Will needs to be read to the client and the self-proving witness affidavit must be updated to reflect that.

- If the client does not speak English, the Will still needs to be written in English and a certified or staff translator must verbally translate the entirety of the Will for the client AND the self-proving witness affidavit must be updated to reflect that. It is recommended that the translator sign a separate affidavit explaining the signing.

**BEST PRACTICE TIP**

- Any drafts of the Will should also be read to the client as described above, when applicable. The Attorney should keep case notes that state that any drafts were read to the client (on the phone or in person), and the client had a physical copy of the draft, as well.
Witnesses to the Will Signing

- The Testator must also sign the Will in the presence of two attesting witnesses, or acknowledge their signature to the witnesses, either at the same time or separately.

- Requirement of two attesting witnesses:
  - Testator signs in their presence or acknowledges their signature to the witnesses
  - They then sign their names and residence addresses at the end of the Will (although failure to provide an address will not invalidate a Will)

- The witnesses must sign the Will within a 30 day period.
Disinterested Witnesses

- Witnesses must be disinterested. NY EPTL § 3-3.2.

- If an attesting witness receives a disposition under the Will, they forfeit their bequest unless two other witnesses sign, neither of whom received a disposition under the Will.

- If a witness is interested, and there are not two other attesting witnesses, their disposition is void.

- Under EPTL 3-3.2 (“Competence of attesting witnesses who is beneficiary”):
  - If a disposition to an attesting witness is void because they are interested, they are nevertheless entitled to receive a share of the estate if they are a family member who would take under intestacy.
    - In that case, their void disposition becomes part of the Residuary Estate and they will take the lesser of their share of the Residuary Estate or their Intestate Share.
    - Accordingly, if an interested witness is a friend, he or she will be purged (not someone who takes under intestacy).
Disinterested Witnesses, cont.

- Note: Interested witnesses are determined at the moment of attestation.

- If there are three witnesses and only one is interested, there is no need to purge interested witnesses, because the court can count on the other two disinterested witnesses.

- The interested witness would be deemed a supernumerary witness.
Notarization

• A notary is NOT required to make a valid Will in New York; only two witnesses are required.

• A notary is only required to make a Will self-proving, which is highly recommended, but can be done at any time, even after the Testator’s death.

• A self-proving affidavit is a form added to a Will, in which the person making the Will and their witnesses swear under oath that they have signed and witnessed the last Will.

• Usually, a notary public will oversee the swearing and signing. When a Will is probated (or attempted to be probated), the affidavit is treated as sworn testimony, and can be extremely helpful if a witness dies or cannot remember specifics of the Will execution.
Safekeeping of Executed Will

- The Testator may choose to pay a small fee to file the Will with the Surrogate’s Court to ensure the Will is found at the time of death.

  Note: filing the Will with the Surrogate’s Court can hinder the client’s ability to destroy the Will.

- “The court of any county upon being paid the fees allowed therefor by law shall receive and deposit in the court any will of a domiciliary of the county which any person shall deliver to it for that purpose and shall give a written receipt therefor to the person depositing it.” N.Y. Surr. Ct. Proc. Act Law § 2507 (McKinney).

- The Testator should be advised to keep the original Will in a safe place. The Testator should review their Will periodically, and/or after major life events, to be sure it aligns with their wishes and situation.
Will Possession and Copies

- Even if the Will is filed with the County Clerk’s office, the client may want an executed copy of the Will.

- Danger of having more than one executed Will:
  - If any executed copy of the Testator’s will cannot be found at time of death, there is a rebuttable presumption that it was revoked (if it was last in Testator’s control). The presumption is rebuttable, but it is hard to overcome.
  - Matter of Lewis: When the wife died, the husband tried to have her Will probated. The husband said there were four executed copies of the Will. Court latched onto that statement and held that he needed to produce the other three executed copies, or all executed copies would be presumed to have been destroyed with intent.

- Note: an unexecuted copy (i.e. a copy without the requisite formalities: the Testator’s signature and/or witnesses’ signature) is simply a copy and has no legal value. An executed copy is a legally binding Will.
Will Administration

- After the Testator’s death, the Executor will file the original will in Surrogate’s Court to being probate of the estate.

- If the Testator has assets that do not pass by operation of law, their Will has to be administered in Surrogate’s Court.

- If there is no real property and less than $50,000 in assets, the estate is considered small and administration is much less costly.

- If the Testator owned real property, or they have probate assets in excess of $50,000, then their Will has to be admitted for probate.
POWERS OF ATTORNEY

- Drafting Instructions,
- Ethical considerations,
- Practical Pointers, and
- Case Examples

Jeffrey P. Nieznanski, Esq.
Drafting Powers of Attorney

- After identifying a potential client & agent(s), determine client’s:
  - Capacity
  - Desire for Service

- Explain & Draft Documents - USE OUR CHECKLIST

- Witness, Notarize & Deliver Completed Documents
Powers of Attorney

- In a POA, a Principal gives their Agent legal authority to act for them.

- An Agent designated in a POA shall mean an “attorney-in-fact” for the purposes of this title.
Principal

- Principal: the person who is giving authority to another person. (Importantly, the principal does not lose their ability to act for themselves when creating a POA).
- If a Principal lacks capacity to understand what he or she is signing, the Principal cannot legally create a POA.
- A Guardianship may be needed in such cases. A guardianship will require extended legal services and a court filing.
Agents Defined

- Agent: the person receiving authority. Co-agents can also be named.
- Successor agent: person(s) the principal chooses to be their “backup agent” should the original agent or agents be unwilling or unable to continue in their role.
- The Agent has a fiduciary duty to the Principal. Matter of Griffen, 160 Misc.2d 871 (Surr Ct Bronx Co 1994).
Selecting an Agent

Beware of Signs of:

- Undue Influence
- Coercion
- Incapacity
What Is Capacity?

“Capacity” means ability to:

- comprehend the nature and consequences of 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.
Determining Capacity

- Meet with the client alone, free from influence
- Ask: “Do you understand that your agent can spend your money without telling you?
- When in doubt:
  - Use ABA’s Capacity Worksheet for Lawyers (handout)
  - Enlist a colleague
  - Consider medical opinions
  - Consider supported decision making (handout)
Selected Capacity Case Law

In a special proceeding commenced to compel acceptance of a power of attorney, the Court examined whether a valid power of attorney existed.

Merrill Lynch asserted that the Principal may have lacked capacity at the time the power of attorney was executed. She had been admitted to a facility suffering from moderate to severe Dementia.

In re Imre B.R., 980 N.Y.S.2d 276 (Dutchess Co. Sup. Ct. 2013)
Supported Decision Making

Decision supports happen when one person helps another person make a choice. (see handout)

- Explain in a way that the person can understand
- Explain risks and benefits
- Help the person as requested or needed
- Make recommendations, offer options
Ethical Considerations: Client Communications

Differentiate situations where:

- information can be provided that is appropriate for a client who is a comprehending and responsible adult, from where
- the client suffers from diminished capacity, so that fully informing the client according to this standard may be impracticable.

See Rule 1.4 comment 6. (Communication).
Clients with Diminished Capacity

- When a client’s capacity to make decisions is diminished . . . the lawyer shall, as much as possible, maintain a conventional relationship with the client.

- The client may wish to have family members participate in discussions with the lawyer. The lawyer should consider whether the presence of such persons will affect the attorney-client privilege.

- Client’s interests must be foremost, and, except for protective action authorized under Rule 1.14 (b), client, and not family members, must make decisions. Rule 1.14 Comment 3.
Clients with Diminished Capacity, cont.

- When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and the client cannot adequately act in his or her own interest:
  - the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. Rule 1.14(b).
Ethical Considerations: Fiduciary Duty

In re Estate of Ferrara, 7 N.Y.3d 244, 852 N.E.2d 138 (2006)

“On this appeal, we hold that an agent acting under color of a statutory short form power of attorney that contains additional language augmenting the gift-giving authority must make gifts pursuant to these enhanced powers in the principal's best interest.”

“[t]his Power of Attorney shall enable the Attorneys in Fact to make gifts without limitation in amount to John Ferrara and/or Dominick Ferrara.”
Drafting the POA

- Read the Caution to the Principal.
- Discuss choice of agent(s).
- Insert the legal names_addresses of the principal and agent(s).
- Insert the legal names_addresses of the successor agent(s), if any.
  - If multiple agents, discuss whether agents can act alone or together.
  - If agents may act separately, principal must initial next to "My agents may act SEPARATELY."
Drafting the POA, cont.

- Advise the principal that the Power of Attorney will survive his/her incapacity, unless stated otherwise in Section (h) (“Modifications”).
- Advise the principal that if he/she wants to revoke prior powers of attorney, he/she must so state in section (h) (“Modifications”).
Validity of Powers of Attorney

- To be valid, (except as otherwise provided in section 5-1512), a statutory short form power of attorney, or a non-statutory power of attorney, executed in this state by a principal, must:
  - Be typed or printed using letters which are legible or of clear type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof.
  - Be signed, initialed and dated by a principal with capacity, or in the name of such principal by another person, other than a person designated as the principal's agent or successor agent, in the principal's presence and at the principal's direction,
  - Be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.
Validity of Powers of Attorney, cont.

- To be valid, the POA must “substantially conform” to the wording of the:
  - (1) “Caution to the Principal” in section 5-1513 of this title; and
  - (2) “Important Information for the Agent” in section 5-1513 of this title.

- Insubstantial variation in the wording of the “Caution to the Principal” of paragraph (a) of subdivision one of section 5-1513 of this title or of the “Important Information for the Agent” of paragraph (n) of subdivision one of section 5-1513 of this title shall not prevent a power of attorney from being deemed a statutory short form power of attorney or a non-statutory power of attorney.
What is Substantial Compliance?

- A POA substantially conforms even if the form:
  - contains an insignificant mistake in wording, spelling, punctuation or formatting, or the use of bold or italic type; or
  - uses language that is essentially the same as, but is not identical to, the statutory form, including utilizing language from a previous statute.

- The determination of whether there is substantial conformity with the form set forth in section 5-1513 of this title shall not depend on the presence or absence of a particular clause.
POA Effective Date

- The Power of Attorney goes into effect on the date on which the Agent's signature is acknowledged (notarized).
- However, if two or more co-agents are designated to act together, the Power of Attorney takes effect when all of the co-agents have signed the Power of Attorney, with acknowledgement.
- The POA becomes valid even if there a lapse of time between the date of acknowledgment of the signature of the principal and the agent or agents.
Grant of Authority

- Ask the principal about the authority to be granted using the list in this section.
- Initials are required, **do not use an “X” !!!**
- The Principal can authorize the agent to conduct:
  - Real Estate Transactions (A) covering simple real estate matters such as signing a lease, selling property, doing a release of mortgage, gifting property, executing deeds, and more complex matters involving partitioning property, releasing or enforcing liens on property, or dealing with encumbrances on property.
Grant of Authority, cont.

- **Chattel and Goods Transactions** (B) allows the agent to buy, sell or pawn belongings.

- **Bonds, Shares, and Commodities Transactions** (C) allows the agent to carry out stock, bond and commodity transactions.

- **Banking Transactions** (D) gives the agent the ability to modify, terminate, and to make deposits to and withdrawals from bank accounts, and certain other banking arrangements.
Grant of Authority, cont.

**Business Operating Transactions (E)** grant the agent authority to handle transactions involving any businesses the principal may own.

**Insurance Transactions (F)** gives the agent the ability to pay premiums, to modify, rescind, or terminate any contract of life, accident, health, disability, or liability insurance or any combination of such insurance on behalf of the principal.
Grant of Authority, cont.

Estate Transactions (G) generally authorize an agent to act for a principal in handling the property and affairs of a deceased person.

- Note, this clause does not give the agent authority to handle the principal’s estate after the principal’s death because the POA is terminated upon the death of the principal.
Grant of Authority, cont.

Claims and Litigation (H) authority permits the agent to assert and prosecute before any court, administrative board, etc., any cause of action, claim, counterclaim, offset or defense, which the principal has, or claims to have, against any individuals, businesses, or government.

- This also includes the ability to submit to alternative dispute resolution, to settle the case, and to propose or to accept a compromise with respect to any claim existing in favor of or against the principal.
Grant of Authority, cont.

Personal and Family Maintenance (I) permits an agent to do all acts necessary for maintaining the customary standard of living of the spouse and children, and other dependents of the principal, and

To continue gifts that the principal has customarily made to individuals and charitable organizations prior to the creation of the agency, provided that in any one calendar year all such gifts shall not exceed five thousand dollars ($5,000).
Grant of Authority, cont.

Benefits from governmental programs or civil or military service (J) authorizes the agent to enroll in or discontinue a benefit or program on the principal's behalf. It also allows the agent to prepare, file, and prosecute a claim of the principal to any benefit to which the principal is or claims to be entitled, including veterans VA benefits.

Matters related to health care (K) authorizes the agent to make decisions relating to the past, present, or future payments for the provision of health care; to keep records of all cash received and disbursed for the principal’s health care accounts.
Grant of Authority, cont.

*Retirement benefit transactions (L)* authorizes the agent to contribute, withdraw from, and deposit funds in any type of retirement benefit or plan.

*Tax Matters (M)* authorizes the agent to prepare, sign, and file federal, state, and local tax forms, and put in claims for refunds, requests for extensions of time, petitions regarding tax matters, and other matters.
Grant of Authority, cont.

All Other Matters (N) is meant to cover all remaining possible matters that have not been authorized. If this is selected it should be noted that the principal authorizes the agent to act as an alter ego of the principal with respect to matters and affairs which are not enumerated in any of the other sections.

(O) Full and unqualified authority to agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agents select.
Grant of Authority, cont.

(P) Allows for the option of initialing just Section P and simply writing any or all of the letters for the authorities granted in the small space available. It is a way to prevent the principal from having to initial several lines.

The principal can initial Section P and write in the letters for the authorities they wish to grant their agent OR

Initial all the authorities individually they wish to grant. Do not do both.
Financial Matters Related to Health Care

Under 5-1502K, Authority with respect to “matters related to health care” means that the principal authorizes the agent to:

- Receive “protected health information” as defined in federal and state law, from “health care providers” and “health plans,” in order to ascertain the benefits to which the principal is entitled and to determine the legitimacy and accuracy of charges for health care provided to the principal.
- Act as the principal's personal representative with respect to matters pertaining to the principal's health care including benefit entitlements and payment obligations.
Gifting

- Gifting powers and authority to change property interests must be expressly granted in the Modifications Section.
- An agent’s authority to makes gifts to themselves must be explicitly stated.
- Model language for modifications from NYSBA.
Reasons to Elect Gifting

- Medicaid considerations and Estate Recovery that allow Medicaid dollars to be clawed back after death
  - Keeping money in family
- Allows agent broadest power
Gifting: Suggested Modifications from NYSBA

- Guardianship Language
- Banking transactions;
- Changing beneficiary or modifying life insurance;
- Changing beneficiary or modifying retirement accounts;
- Funding trusts or joining and funding a pooled trust;
- Conveyance of specific real property;
- Control over digital assets.
Enforcing Acceptance of POAs

- A Special Proceeding can be filed with a Court against third parties to compel acceptance of the statutory short form POA.
- Damages including attorneys fees can be assessed by the Court for unreasonably refusing to honor the agent’s authority under the statutory short form POA.
Major Changes to POA Law

- An agent’s authority to make gifts has been increased from $500 annually to $5,000 annually.

- Gifts in excess of the $5,000 maximum allowed in the personal and family maintenance section must be expressly authorized by the principal in the modifications section.

- Optional Sections of the form may be omitted — However, the section letter and title should remain with the words “Intentionally Omitted” added.
Major Changes to POA Law, cont.

Two Witnesses Now Required for All New POAs

- The POA must be witnessed by two persons not named as agents or as gift recipients
- The notary may be one of the witnesses
Major Changes to POA Law, cont.

- Changes to Banking and Health Matter Powers
- Damages and Attorney Fees
- Changes to the Form
- Acceptance and Reliance Rules
Signing at the Direction of the Principal

- A POA can now be initialed, signed, and dated in the principal’s name (by a person other than an agent), in the principal’s presence and at the principal’s direction.
- The person signing at the direction of the principal writes or prints the principal’s name, and prints and signs his or her own name as well.
- The signature of the person signing at the direction of the principal must be notarized.
Acceptance and Reliance

A person who in good faith accepts a notarized and witnessed power of attorney without actual knowledge:

- that the signature is not genuine may rely upon the presumption that the signature is genuine;
- that the power of attorney or that the agent's authority is invalid, or terminated (or that the agent is exceeding or improperly exercising the agent's authority) may rely upon the power of attorney as genuine, valid and still in effect.
Accepting the Completed POA Form

A person who is asked to accept a power of attorney may request and rely upon:

- An agent's certification under penalty of perjury of any factual matter concerning the principal, agent or power of attorney; and
- An opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.
- The principal bears the cost for an opinion of counsel unless the request is made more than ten business days after the POA is presented.
Timeline for Accepting POAs

Not later than the tenth business day after presenting an original or attorney certified copy of a statutory short form power of attorney, the recipient shall either

- honor the statutory short form power of attorney, or
- reject the statutory short form power of attorney in writing, explaining the reasons for such rejection, or
- request the agent to sign an affidavit stating that the power of attorney is in full force and effect.
Timeline for Accepting POAs, cont.

If the third party requests the agent to sign an FFE affidavit, the third party shall either:

- Honor such statutory short form POA within seven business days after receipt by the third party of the affidavit stating that the power of attorney is in full force and effect, (unless reasonable cause exists to refuse to accept it), or
- Issue a final rejection notice that explains the rejection.
Rejecting the POA

Valid Reasons to Reject the POA Form Include, but are not limited to:

- Form does not substantially conform with statute;
- Missing signatures, initials;
- Invalid notarization;
- It is not an original or a certified copy (here, the third party must identify any other reason that would cause the POA to be rejected).
Rejecting the POA, cont.

Reasonable cause to refuse acceptance includes, but is not limited to:

- the third party's good faith referral of the principal and the agent or a person acting for or with the agent to the local adult protective services unit;

- actual knowledge of a report having been made by any person to the local adult protective services unit alleging physical or financial abuse, neglect, exploitation or abandonment of the principal by the agent or a person acting for or with the agent.
Rejecting the POA, cont.

- Notice Exceptions For Accepting or Rejecting a POA
- If the POA is rejected because of a referral to APS, notice to the agent shall not be sent until after a determination is made by adult protective services.
- 10 Day deadline to accept or reject does not apply to the New York State:
  - Dep’t of Health, including Social Services districts administering Medicaid or other public health insurance programs;
  - The NYS Retirement System; and
  - The NYS Dep’t of Audit and Control.
Option to Appoint a Monitor

Designating a Monitor allows the principal to appoint an individual to:

- Request, receive and compel the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal,
- Request and receive such records held by third parties,
- Request and receive a copy of the power of attorney.
Option for Agent Compensation

- An agent is not entitled to receive compensation from the assets of the principal for responsibilities performed under a power of attorney unless the principal specifically provides for compensation in the power of attorney.

- An agent shall be entitled to receive reimbursement from the assets of the principal for reasonable expenses actually incurred in connection with the performance of the agent's responsibilities.
Completing the POA Form

After Principal signs and dates form:

- Review the Important Information for Agent with the Agent
  - Agent shall disclose the principal and agent relationship when signing
  - Agent must keep records of transactions
  - Agent must act according to instructions or in best interest
- Print agent’s name on form and have agent sign and date
- Have signatures notarized (principal’s and agent(s))
Completing the POA Form

- Check to make sure initials, signatures, notarizations are correct and complete

- Check to see if Principal initialed:
  - Grants of Authority, and
  - If electing any of these options
    - Agents may act SEPARATELY
    - Gifting
    - Monitor
Terminating the POA

A power of attorney terminates when:

- (a) the principal dies;
- (b) the principal becomes incapacitated, if the power of attorney is not durable;
- (c) the principal revokes the power of attorney;
- (d) the principal revokes the agent's authority and there is no co-agent or successor agent, or no co-agent or successor agent who is willing or able to serve;
- (e) the agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve;
- (f) the authority of the agent terminates and there is no co-agent or successor agent or no co-agent or successor agent who is willing or able to serve;
- (g) the purpose of the power of attorney is accomplished; or
- (h) a court order revokes the power of attorney as provided in section 5-1510 of this title or in section 81.29 of the mental hygiene law.
Terminating an Agent’s Authority

- Termination of an agent's authority or of the power of attorney is not effective as to the agent until the agent has received a revocation.
- An agent is deemed to have received a revocation when it has been delivered to the agent in person, or within a reasonable time after it has been sent by mail, courier, electronic transmission or facsimile.
- An agent may resign by giving written notice to the principal and the agent's co-agent, successor agent or the monitor, if one has been named, or the principal's guardian if one has been appointed.
Revoking a POA

- A principal may revoke a power of attorney:
  - by delivering a revocation of the power of attorney to the agent in person or by sending a signed and dated revocation by mail, courier, electronic transmission or facsimile to the agent's last known address.
  - The agent must comply with the principal's revocation notwithstanding the actual or perceived incapacity of the principal (unless the principal is subject to an Art. 81 guardianship).
  - Where a power of attorney has been recorded pursuant to real property law, the principal shall also record the revocation.
Special Proceedings

A special proceeding may be commenced:

- (a) to determine whether the power of attorney is valid;
- (b) to determine whether the principal had capacity at the time the power of attorney was executed;
- (c) to determine whether the power of attorney was procured through duress, fraud or undue influence;
- (d) to determine whether the agent is entitled to receive compensation or whether the compensation received by the agent is reasonable for the responsibilities performed;
Special Proceedings, cont.

A special proceeding may be commenced:
(e) to approve the record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal;
(f) to remove the agent upon the grounds that the agent has violated, or is unfit, unable, or unwilling to perform, the fiduciary duties under the power of attorney;
(g) to determine how multiple agents must act;
(h) to construe any provision of a power of attorney;
(i) to compel acceptance of the power of attorney in which event the relief to be granted is limited to an order compelling acceptance.
What Else About POAs?

- A POA executed in another state in compliance with the law of that state is valid in this state
- POAs validly drafted under prior law (pre-2021) remain valid
Other Planning Documents That May Come Up

An **Advance Medical Directive** is the general term for a legal document that allows you to name *agents* and state your *wishes* concerning your health care and end of life decisions.

A **Health Care Proxy** is a document that lets you name another person to make decisions about your medical treatment in the event such individual is unable to make those decisions for themselves.

A **Living Will** is a supplement to your HCP that sets forth your wishes concerning end of life care. A Living Will is not the same as a Last Will and Testament.

A **DNR or MOLST** is *not the same as* a Health Care Proxy or Living Will.
Other Planning Documents That May Come Up

Disposition of Remains

Public Health Law § 4201(2) provides for the designation in a written instrument of a person who shall shall have the right to control the disposition of the remains of a deceased person. Under Public Health Law § 4201(3), the written instrument may be in substantially the following form, and must be signed and dated by the decedent and the agent and properly witnessed.

Standby Guardianship

If a parent is concerned about being in a position to not be able to care for their child(ren) he or she can name a "standby guardian." The standby guardian will have the same powers as a guardian but the guardianship will not begin until the parent says it will. For example, the parent may specify that the standby guardianship starts when the parent dies or becomes too sick to take care of the children. A standby guardian can be appointed by the Court or by written designation.
QUESTIONS???
Ready to Volunteer for LawNY’s Wills and POAs Clinics?
We are excited to launch our new volunteer platform to improve the way our volunteers can engage in Pro Bono at Legal Assistance of Western New York, Inc.

PRO BONO PORTAL

Scan the QR code or visit https://doprobono.lawny.org to create your profile, view upcoming CLE offerings, check out available case or clinic opportunities and more!
Attorneys Who Take Pro Bono Cases...

- Assist members of their community who need legal assistance but cannot afford it
- Provide virtual pro bono services from home or office
- Receive CLE training and credits-- LawNY is an accredited CLE provider.
- Earn 1 CLE credit/2 hours of pro bono case work (only 10 hours of CLE credit may be earned in a two-year reporting period for performing pro bono legal services pursuant to CLE Board regulations)
- Are covered by LawNY’s malpractice insurance
- Receive volunteer recognition
- Can assist in legal areas beyond their experience with training and support
New York State Unified Court System Attorney Emeritus Program (AEP)

- Experienced attorneys provide services on behalf of legal services agencies
- AEP volunteers must be 55 years of age, in good standing with the Bar, and currently registered in New York State
- AEP volunteers are registered with the court and required to complete at least 30 hours of pro bono service each year
- Certificate of recognition from NYS Chief Judge Janet DiFiore upon completion of 60 biennial hours
- Pro bono legal services provided under the AEP can be counted toward CLE requirements, and you may earn up to a total of 15 CLE credit hours with an AEP host organization
- Attorneys are covered by malpractice insurance
- Website: [Home - Attorney Emeritus Program | NYCOURTS.GOV](http://www NYCOURTS.GOV)
Please fill out this worksheet to the best of your ability.
It is important for the attorney to have this information in order to assist you.*
Please mark the sections that do not apply to your situation “N/A.”
Thank you!

PLEASE COMPLETE AND RETURN THIS WORKSHEET AS SOON AS POSSIBLE. A LAWNY STAFF MEMBER OR VOLUNTEER WILL CONTACT YOU ABOUT THIS INFORMATION.

Name: __________________________________________________________
Address: __________________________________________________________________________
Village or City: _________________ County: _______________ State: ______
Telephone number: _______________ cell or other? ______________
Alternate number: __________________

Do you have internet access? Yes ____ No ____

Some things to consider prior to estate planning:

❖ Why do you want or need a will?

❖ What do you hope to achieve with the document?

❖ Have you made your wishes known to your friends, family, beneficiaries, or are there any matters you still need to discuss? For example, funeral arrangements.

*Please Note: This worksheet is designed to gather information. It does not constitute
legal advice, nor does it create a client-attorney relationship.

The person seeking estate planning should fill out this questionnaire, if able to do so. If you are not the person seeking estate planning but are filling it out for the person who is, please explain why:

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Instructions

For Will ........................................ Review and complete sections I to V
For Power of Attorney ................. Review and complete section VI
For Health Care Proxy ................. Review and complete section VII
For Estate Administration Assistance ... Review and complete section VIII

I: Personal and Family Information

1. Full Legal Name:

2. Date of Birth:

3. Address:

4. Do you already have a will? yes no

If yes, do you have any codicils (addenda/modifications) to the will? yes no

Please have any current will and codicil(s) available at your appointment.

5. Current Marital Status:

   Married_____ Single_____ Widowed_____ Separated_______

   If currently married, when did marriage take place?

6. Spouse’s Full Legal Name:
Spouse’s Date of Birth:

Spouse’s Address: (if different than your address):

7. Have you been married previously?  yes  no

If yes, please give dates of marriage(s) and how marriage(s) ended:

8. What is your current state of health?

9. If you are married, what is your spouse’s current state of health?

10. Provide the information below for each of your children and indicate whether the child is from your current marriage, a past marriage, an adoption, or born out of wedlock.

   a. Full Name:

      DOB:

      Address:

   b. Full Name:

      DOB:

      Address:

   c. Full Name:

      DOB:

      Address:

   d. Full Name:

      DOB:

      Address:

   e. Full Name:
DOB:
Address:
f. Full Name:
DOB:
Address:

11. If you have grandchildren, other family members, or friends you want to name in your will, provide information for each person and indicate their relationship to you.

a. Full Name and Relationship:
DOB:
Address:

b. Full Name and Relationship:
DOB:
Address:

c. Full Name and Relationship:
DOB:
Address:

d. Full Name and Relationship:
DOB:
Address:
e. Full Name and Relationship:

DOB:

Address:

f. Full Name and Relationship:

DOB:

Address:

II: Property and Asset Information

12. Real Property within New York State: Describe all real estate you own in general terms (house, land, etc.), whether you own the property with someone else and, if so, who the person is.

a. Type of Property:

Address:

Owned with:

Do you know how you hold the property? If so, please circle:

Tenancy in the entirety Joint tenancy Tenancy in common

b. Type of Property:

Address:

Owned with:

Do you know how you hold the property? If so, please circle:

Tenancy in the entirety Joint tenancy Tenancy in common
c. Type of Property:
Address:
Owned with:
Do you know how you hold the property? If so, please circle:
Tenancy in the entirety  Joint tenancy  Tenancy in common

13. Real Property Outside of New York State: Describe all real estate you own that is located outside New York, whether you own the property with someone else and, if so, who the person is.

a. Type of Property:
Address:
Owned with:
Do you know how you hold the property? If so, please circle:
Tenancy in the entirety  Joint tenancy  Tenancy in common

b. Type of Property:
Address:
Owned with:
Do you know how you hold the property? If so, please circle:
Tenancy in the entirety  Joint tenancy  Tenancy in common

c. Type of Property:
Address:
Owned with:
Do you know how you hold the property? If so, please circle:

<table>
<thead>
<tr>
<th>Tenancy in the entirety</th>
<th>Joint tenancy</th>
<th>Tenancy in common</th>
</tr>
</thead>
</table>

14. Financial Assets

**Savings Account:**
- Is this a joint account? yes
- If yes, with who? Name of Financial Institution:

<table>
<thead>
<tr>
<th>Checking Account:</th>
<th>Joint tenancy</th>
<th>Tenancy in common</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is this a joint account?</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>If yes, with who?</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>Name of Financial Institution:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Certificates of Deposit:**
- Is this a joint account? yes
- Name of Financial Institution:

<table>
<thead>
<tr>
<th>Stocks:</th>
<th>Joint tenancy</th>
<th>Tenancy in common</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is this a joint account?</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>Name of Financial Institution:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Bonds:**
- Is this a joint account? yes
- Name of Financial Institution:

<table>
<thead>
<tr>
<th>Retirement Accounts:</th>
<th>Joint tenancy</th>
<th>Tenancy in common</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is this a joint account?</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>Name of Financial Institution:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Beneficiary(ies):</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

15. Describe any other assets of value that you want to include in your will (for example, coin collection, musical instrument, boat, family heirloom):

16. Have you transferred any assets of value in the last 3 years? yes no

If yes, please describe each transferred asset and explain the circumstances:
III: Creation of Last Will and Testament

17. Personal representative or executor – the person who will administer your estate.

Name of Executor:

Relationship to you:

Address:

If you have a spouse and you are not naming them as executor, what is the reason?

Name of Alternate Executor:

Relationship to you:

Address:

18. Do you want your executor or alternate executor to be bonded? *A bond ensures that the representative will fulfill their duty to manage your estate. It is not a fee; rather, it acts as a type of insurance policy, protecting heirs in the event the personal representative makes any improper distributions.*  yes  no

19. List below the specific gifts you wish to make and the recipient of each gift. Provide names and addresses for all recipients. *A specific bequest is a gift of an item of property that can be easily identified and distinguished from all other property in the estate.*

Please keep in mind that you need not itemize every personal item unless you have strong feelings about who any items should go to. It’s up to you!

a. Gift:
   Leave to:

b. Gift:
   Leave to:
c. Gift: Leave to:
d. Gift: Leave to:
e. Gift: Leave to:

20. List the general gifts you wish to make and the recipient of each. Provide names and addresses for all recipients. A general gift is a gift of an amount of money or a category of property in the estate. A general gift does not require transfer of a particular item or that an item come from a particular source.

a. Gift: Leave to:
b. Gift: Leave to:
c. Gift: Leave to:
d. Gift: Leave to:
e. Gift: Leave to:

21. Distribution of Remaining Assets – Where should the rest of your estate go? The “residue” of an estate is everything that is left after all debts, bills and taxes have been paid and all specific and general gifts have been distributed. Leaving the residue of an estate to a named beneficiary is called making a “residuary gift.” Residuary gifts are a common way to ensure that all remaining property passes to your chosen beneficiaries.

Please see Section V below for more information about different methods for distributing assets. The attorney will discuss these options with you, but it is important that you consider them prior to your appointment.
Name and address of primary residuary beneficiary(ies):

Name and address of alternate residuary beneficiary(ies) in the event that the primary beneficiary does not survive you.

22. If you want to exclude anyone from inheriting under your will, provide their name and explain why you want to exclude them:

IV. Other Information

23. Do you have a safe deposit box?  yes  no

24. Do you have life insurance?  yes  no

If yes, provide the type and amount of insurance, the name of the insurance company, and the name of the beneficiary(ies):

25. If you have any physical or mental disabilities, please describe:

26. Special Instructions – describe any special instructions for your executor:

27. Any other information you think is important to your estate planning:

V. Methods for Distributing Assets

There are three different methods for distributing assets to linear descendants (children, grandchildren, great grandchildren): per capita, per stirpes and per representation. Your choice matters if one or more of your children dies before you do. The best way to describe these methods is by example.
Example 1:
You have 4 children: A, B, C & D
A has 2 children: X & Y
B has 1 child: Z
C & D have no children.
A dies before you do.

*Per capita* distribution would mean that B, C & D take equally and nothing goes to A’s children, X & Y. The estate is distributed only to descendants in the first generation.

*Per stirpes* distribution would mean that B, C & D each take 1/4 and X & Y take A’s share (1/4), which they split, each taking 1/8.

Example 2:
Same as above, except B also dies before you.

Under *per stirpes*, C & D get 1/4 each, X & Y get 1/8 each, but Z takes 1/4 (what B would have taken).

*Per representation* distribution would mean that C & D each take 1/4, but instead of X, Y & Z taking their parent’s share, the grandchildren equally split the remaining 1/2. In other words, members of the second generation all receive equal amounts, regardless of the number of children in each family – A, B, C, and D.

**VI. Power of Attorney**

*If you prepare a power of attorney, your agent will be able to do certain tasks for you if you become unable to do so. You decide in advance when and how your agent can act.*

1. Name and address of agent:

2. If you wish to name an alternate agent, provide their name and address:

3. Have you previously executed a Power of Attorney? Yes  no
   If yes, do you need assistance revoking the prior Power of Attorney?
VII. Health Care Proxy

*Your Health Care Agent is the person who will make medical decisions for you if you become unable to do so.*

1. Name and address of health care agent:

2. If you wish to name an alternate health care agent, provide their name and address:

3. If you wish to place any limitations on the health care agent’s authority, please specify:

VIII. Estate Administration

*If you have questions about administering an estate, please bring a copy of the will to your appointment. If there wasn’t a will or there was but you don’t have a copy of it, please share that information with the attorney before the appointment.*

1. Name of decedent (person who died):

2. Your relationship to the decedent:

3. What is your question or issue?

4. Please give a brief description of the situation that has given rise to your estate administration issue or question:
I, __________________________________________________________________________________________________________

(Your name and address)

being of sound mind, willfully and voluntarily make known my desire that, upon my death, the disposition of my remains shall be controlled by

_________________________________________________________________________________________________________

(name of agent)

With respect to that subject only, I hereby appoint such person as my agent with respect to the disposition of my remains.

SPECIAL DIRECTIONS:
Set forth below are any special directions limiting the power granted to my agent as well as any instructions or wishes desired to be followed in the disposition of my remains:

_________________________________________________________________________________________________________

_________________________________________________________________________________________________________

_________________________________________________________________________________________________________

_________________________________________________________________________________________________________

_________________________________________________________________________________________________________

Indicate below if you have entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law for funeral merchandise or service in advance of need:

☐ No, I have not entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law.

☐ Yes, I have entered into a pre-funded pre-need agreement subject to section four hundred fifty-three of the general business law.

_________________________________________________________________________________________________________

(Name of funeral firm with which you entered into a pre-funded pre-need funeral agreement to provide merchandise and/or services)

AGENT:

_________________________________________________________________________________________________________

(Name)

_________________________________________________________________________________________________________

(Address)

_________________________________________________________________________________________________________

(Telephone Number)
SUCCEDEES:
If my agent dies, resigns, or is unable to act, I hereby appoint the following persons (each to act alone and successively, in the order named) to serve as my agent to control the disposition of my remains as authorized by this document:

1. First Successor:___________________________________________________________
   (Name)
   ____________________________________________________________
   (Address)
   ____________________________________________________________
   (Telephone Number)

2. Second Successor:___________________________________________________________
   (Name)
   ____________________________________________________________
   (Address)
   ____________________________________________________________
   (Telephone Number)

DURATION:
This appointment becomes effective upon my death.

PRIOR APPOINTMENT REVOKED:
I hereby revoke any prior appointment of any person to control the disposition of my remains.

Signed this____________________day of__________,____________.

(Signature of person making the appointment)

Statement by witness (must be 18 or older):
I declare that the person who executed this document is personally known to me and appears to be of sound mind and acting of his or her free will. He or she signed (or asked another to sign for him or her) this document in my presence.

Witness 1: _________________________________________________________________________________________________
   (Signature)
   ____________________________________________________________
   (Address)

Witness 2: _________________________________________________________________________________________________
   (Signature)
   ____________________________________________________________
   (Address)

ACCEPTANCE AND ASSUMPTION BY AGENT:
1. I have no reason to believe there has been a revocation of this appointment to control disposition of remains.
2. I hereby accept this appointment.

Signed this____________________day of__________,____________.

(Signature of Agent)
About the Health Care Proxy Form

This is an important legal document. Before signing, you should understand the following facts:

1. This form gives the person you choose as your agent the authority to make all health care decisions for you, including the decision to remove or provide life-sustaining treatment, unless you say otherwise in this form. “Health care” means any treatment, service or procedure to diagnose or treat your physical or mental condition.

2. Unless your agent reasonably knows your wishes about artificial nutrition and hydration (nourishment and water provided by a feeding tube or intravenous line), he or she will not be allowed to refuse or consent to those measures for you.

3. Your agent will start making decisions for you when your doctor determines that you are not able to make health care decisions for yourself.

4. You may write on this form examples of the types of treatments that you would not desire and/or those treatments that you want to make sure you receive. The instructions may be used to limit the decision-making power of the agent. Your agent must follow your instructions when making decisions for you.

5. You do not need a lawyer to fill out this form.

6. You may choose any adult (18 years of age or older), including a family member or close friend, to be your agent. If you select a doctor as your agent, he or she will have to choose between acting as your agent or as your attending doctor because a doctor cannot do both at the same time. Also, if you are a patient or resident of a hospital, nursing home or mental hygiene facility, there are special restrictions about naming someone who works for that facility as your agent. Ask staff at the facility to explain those restrictions.

7. Before appointing someone as your health care agent, discuss it with him or her to make sure that he or she is willing to act as your agent. Tell the person you choose that he or she will be your health care agent. Discuss your health care wishes and this form with your agent. Be sure to give him or her a signed copy. Your agent cannot be sued for health care decisions made in good faith.

8. If you have named your spouse as your health care agent and you later become divorced or legally separated, your former spouse can no longer be your agent by law, unless you state otherwise. If you would like your former spouse to remain your agent, you may note this on your current form and date it or complete a new form naming your former spouse.

9. Even though you have signed this form, you have the right to make health care decisions for yourself as long as you are able to do so, and treatment cannot be given to you or stopped if you object, nor will your agent have any power to object.

10. You may cancel the authority given to your agent by telling him or her or your health care provider orally or in writing.

11. Appointing a health care agent is voluntary. No one can require you to appoint one.

12. You may express your wishes or instructions regarding organ and/or tissue donation on this form.

Health Care Proxy

(1) I, ____________________________, hereby appoint ____________________________, (name, home address and telephone number) 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 ____________________________, (name, home address and telephone number) 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):

(4) Optional: 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):

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 this 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.
Health Care Proxy

Appointing Your Health Care Agent in New York State

The New York Health Care Proxy Law allows you to appoint someone you trust — for example, a family member or close friend — to make health care decisions for you if you lose the ability to make decisions yourself. By appointing a health care agent, you can make sure that health care providers follow your wishes. Your agent can also decide how your wishes apply as your medical condition changes. Hospitals, doctors and other health care providers must follow your agent's decisions as if they were your own. You may give the person you select as your health care agent as little or as much authority as you want. You may allow your agent to make all health care decisions or only certain ones. You may also give your agent instructions that he or she has to follow. This form can also be used to document your wishes or instructions with regard to organ and/or tissue donation.

(5) Your Identification (please print)

Your Name

Your Signature ___________________________ Date ________________

Your Address

(6) Optional: Organ and/or Tissue Donation

I hereby make an anatomical gift, to be effective upon my death, of:
(check any that apply)

☐ Any needed organs and/or tissues

☐ The following organs and/or tissues ____________________________

☐ Limitations ________________________________________

If you do not state your wishes or instructions about organ and/or tissue donation on this form, it will not be taken to mean that you do not wish to make a donation or prevent a person, who is otherwise authorized by law, to consent to a donation on your behalf.

Your Signature ___________________________ Date ________________

(7) Statement by Witnesses (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 is personally known to me and appears to be of sound mind and acting of his or her own free will. He or she signed (or asked another to sign for him or her) this document in my presence.

Date ___________________________ Date ___________________________

Name of Witness 1 ___________________________ Name of Witness 2 ___________________________

(print) ___________________________ (print) ___________________________

Signature ___________________________ Signature ___________________________

Address ___________________________ Address ___________________________
POWER OF ATTORNEY
NEW YORK STATUTORY SHORT FORM

(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your “agent”) authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. “Important Information for the Agent” at the end of this document describes your agent’s responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to any third parties who may have acted upon it, including the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a “Health Care Proxy” to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.nysenate.gov or www.nyassembly.gov.

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) DESIGNATION OF AGENT(S):

I, ___________________________ ___________________________
(name of principal) (address of principal)

hereby appoint:

____________________________ ___________________________
(name of agent) (address of agent)

____________________________ ___________________________
(name of second agent) (address of second agent)

as my agent(s).
If you designate more than one agent above and you do not initial the statement below, they must act together.

(____) My agents may act SEPARATELY.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)

If any agent designated above is unable or unwilling to serve, I appoint as my successor agent(s):


If you do not initial the statement below, successor agents designated above must act together.

(____) My successor agents may act SEPARATELY.

You may provide for specific succession rules in this section. Insert specific succession provisions here:

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under “Modifications”.

(e) This POWER OF ATTORNEY DOES NOT REVOKE any Powers of Attorney previously executed by me unless I have stated otherwise below, under “Modifications.”

(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:

(____) (A) real estate transactions;
(____) (B) chattel and goods transactions;
(____) (C) bond, share, and commodity transactions;
(____) (D) banking transactions;
(____) (E) business operating transactions;
(____) (F) insurance transactions;
(____) (G) estate transactions;
(____) (H) claims and litigation;
(____) (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;
(____) (J) benefits from governmental programs or civil or military service;
(____) (K) financial matters related to health care; records, reports, and statements;
(____) (L) retirement benefit transactions;
(____) (M) tax matters;
(____) (N) all other matters;
(____) (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;
(____) (P) EACH of the matters identified by the following letters _____________________________.

You need not initial the other lines if you initial line (P).

(g) CERTAIN GIFT TRANSACTIONS: (OPTIONAL)

In order to authorize your agent to make gifts in excess of an annual total of $5,000 for all gifts described in (I) of the grant of authority section of this document (under personal and family maintenance), and/or to make changes to interest in your property, you must expressly grant that authorization in the Modifications section below. If you wish to authorize your agent to make gifts to himself or herself, you must expressly grant such authorization in the Modifications section below. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. Your choice to grant such authority should be discussed with a lawyer.

(____) I grant my agent authority to make gifts in accordance with the terms and conditions of the Modifications that supplement this Statutory Power of Attorney.

(h) MODIFICATIONS: (OPTIONAL)

In this section, you may make additional provisions, including, but not limited to, language to limit or supplement authority granted to your agent, language to grant your agent the specific authority to make gifts to himself of herself, and /or language to grant your agent the specific authority to make other gift transactions and/or changes to interests in your property. Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. In this section, you may make additional provisions if you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, and you may define “reasonable compensation.”

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

If you wish to appoint monitor(s), initial and fill in the section below:

(____) I wish to designate ____________________ , whose address(es) is (are) __________________ , as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.
(j) **COMPENSATION OF AGENT(S):**

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, and/or you wish to define “reasonable compensation”, you may do so above, under "Modifications".

(k) **ACCEPTANCE BY THIRD PARTIES:**

I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) **TERMINATION:**

This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law.

Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) **SIGNATURE AND ACKNOWLEDGMENT:**

In Witness Whereof I have hereunto signed my name on __________, 20__

PRINCIPAL signs here: =========

STATE OF NEW YORK )
COUNTY OF __________) ss:

On the ___ day of __________, 20__, before me, the undersigned, personally appeared ________________, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Notary Public

(n) **SIGNATURE OF WITNESSES:**

By signing as a witness, I acknowledge that the principal signed the Power of Attorney in my presence and in the presence of the other witness, or that the principal acknowledged to me that the principal’s signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Power of Attorney reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as an agent or as a permissible recipient of gifts.

_____________________________  ______________________________
Signature of Witness 1                Signature of Witness 2
(o) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

1. act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;
2. avoid conflicts that would impair your ability to act in the principal's best interest;
3. keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;
4. keep a record of all transactions conducted for the principal or keep all receipts of payments and transactions conducted for the principal; and
5. disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manners: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).

You may not use the principal's assets to benefit yourself or anyone else or make gifts to yourself or anyone else unless the principal has specifically granted you that authority in the modifications section of this document or a Non-Statutory Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest.

You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent: The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.
(p) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I/we, ____________________________, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as agent(s) for the principal named therein.

I/we acknowledge my/our legal responsibilities.

In Witness Whereof I have hereunto signed my name on __________________________ 20

Agent(s) sign(s) here: ==> ____________________________________________

STAGE OF NEW YORK  )

COUNTY OF ____________ ) ss:

On the _____ day of __________, 20__, before me, the undersigned, personally appeared __________________________, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

______________________________
Notary Public

(q) SUCCESSOR AGENT’S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT:

It is not required that the principal and the SUCCESSOR agent(s), if any, sign at the same time, nor that multiple SUCCESSOR agents sign at the same time. Furthermore, successor agents can not use this power of attorney unless the agent(s) designated above is/are unable or unwilling to serve.

I/we, ____________________________, have read the foregoing Power of Attorney. I am/we are the person(s) identified therein as SUCCESSOR agent(s) for the principal named therein.

In Witness Whereof I have hereunto signed my name on __________________________ 20

Successor Agent(s) sign(s) here: ==> ____________________________________________

==> ____________________________________________
STATE OF NEW YORK )
COUNTY OF ___________ ) ss:

On the _____ day of __________, 20__, before me, the undersigned, personally appeared
__________________, personally known to me or proved to me on the basis of satisfactory evidence to be
the individual whose name is subscribed to the within instrument and acknowledged to me that he/she
executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the
person upon behalf of which the individual acted, executed the instrument.

______________________________
Notary Public
SUGGESTED LANGUAGE FOR PERMISSIBLE MODIFICATIONS

Cut and paste the desired modifications into the Modification Section (h) of the Power of Attorney. If the modification involves gifting, then the principal must also initial Section (g) CERTAIN GIFT TRANSACTIONS.

GUARDIAN PROVISION
If it becomes necessary to appoint a guardian of my person or property, I hereby nominate pursuant to New York Mental Hygiene Law § 81.17 __________ to serve as guardian. If __________ is for any reason unable or unwilling to serve as guardian, I nominate __________ to serve as guardian.

GIFTING PROVISIONS

NB: If you’re doing this for planning purposes for either health care coverage or for estate planning, please make the required provisions in the Modifications Section. Be aware that gift equalizing provisions could conflict with later planning requirements.

[Choose one provision only as they are inconsistent with each other]

I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code.

or

I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

- (a) make gifts up to a specified dollar amount $_________
- (b) make gifts unlimited in amount;
- (c) make gifts to any person or persons;
- (d) make gifts to the following persons and/or organizations;

Gift Recipient Name or Class
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
[Make sure to exclude the witnesses]

• (d) I grant specific authority for the following agent(s) to make the following gifts to himself or herself: This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

[Make sure to include the names of agents and successor agents that can make gifts to themselves]

Make gifts in any of the following ways (edit where necessary):

1. Gifting through banking transactions
Opening, modifying or terminating a deposit account in the name of the principal and other joint tenants; opening, modifying or terminating any other joint account in the name of the principal and other joint tenants; with respect to joint accounts existing at the creation of the agency, the authority granted hereby shall/shall not include the power to change the title of the account by the addition of a new joint tenant or the deletion of an existing joint tenant; opening, modifying or terminating a bank account in trust form as described in § 7-5.1 of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account; with respect to totten trust accounts existing at the creation of the agency, the authority granted hereby shall/shall not include the power to add, delete, or otherwise change the designation of beneficiaries in effect for any such accounts; opening, modifying or terminating a transfer on death account as described in part four of article thirteen of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account;

2. Gifting by changing beneficiary or modifying life insurance
Changing the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal; with respect to life insurance contracts existing at the creation of the agency, the authority granted hereby shall/shall not include the power to add, delete or otherwise change the designation of beneficiaries in effect for any such contract; procuring new, different or additional contracts of insurance on the life of the principal or annuity contracts for the benefit of the principal and designate the beneficiary or beneficiaries of any such contract; to apply for and to receive any available loan on the security of the contract of insurance, whether for the payment of a premium or for the procuring of cash, to surrender and thereupon to receive the cash surrender value, to exercise an election as to beneficiary or mode of payment, to change the manner of paying premiums, and to change or to convert the type of insurance contract, with respect to any contract of life, accident, health, disability or liability insurance as to which the principal has, or claims to have, any one or more of the powers described in this section; the authority granted hereby with respect to the contract of insurance shall/shall not include the power to add, delete or otherwise change the designation of beneficiaries in effect for any such contract;

3. Gifting by changing beneficiary or modifying retirement accounts
Designate or change the beneficiary or beneficiaries of any type of retirement benefit or plan; the authority granted hereby with respect to retirement benefits or plans shall/shall not include the authority to add, delete, or otherwise change the designation of beneficiaries in effect for any such
retirement benefit or plan; creating, amending, revoking or terminating an inter vivos trust; and; opening, modifying or terminating other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.

4. **Gifting by establishing and funding a revocable or irrevocable lifetime trust or joining and funding a pooled trust**
Create trusts, whether revocable or irrevocable, on my behalf; fund such trusts on my behalf or make transfers and additions to any trusts already in existence; withdraw income or principal on my behalf from any trust; exercise whatever trust powers or elections which I may exercise; This grant of authority shall include the ability of my agent(s) to create trusts or accounts naming himself, herself, or themselves, as the case may be, as the beneficiary(ies) of such trusts.

5. **Conveyance of specific real property or a cooperative apartment**
Convey all of my right, title and interest in the real property known as ____________ and the cooperative apartment known as ________________, paying off any liens of the said premises, paying all expenses related to the sale of the said premises, including but not limited to filing fees, maintenance adjustments and legal fees, receiving all moneys resulting from the sale of the premises executing all documents necessary to accomplish the foregoing and doing all things necessary to effect the conveyance.

6. **Making loans and executing promissory notes**
Make loans and executing promissory notes.

**A gift to an individual authorized by this subdivision may be made:**
Outright, by exercise or release of a presently exercisable general or special power of appointment held by the principal; to a trust established or created for such individual; to a Uniform Transfers to Minors Act account for such individual (regardless of who is the custodian); or to a tuition savings account or prepaid tuition plan as defined under section 529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account).

1. **Grant specific authority for agent(s) to make the following gifts to himself or herself**
I grant specific authority for the following agent(s) to make the following gifts to himself or herself:

Agents: ____________________________________________

Gifts to the agents under this provision include all the powers, methods and manners as provided for gifting above.

2. **Control over digital assets**
The agent(s) shall have (a) the power to access, use, and control my digital devices, including but not limited to, desktops, laptops, tablets, storage devices, mobile telephones, smartphones, and any similar digital device that currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets, including any content contained in an electronic communication therein, (b) the power to access, modify, delete, control, and transfer my
digital assets, including the content contained in any electronic communication therein, wherever located and including but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops, and (c) the power to obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my digital devices and digital assets described above. This authority is intended to constitute “lawful consent” to a service provider to divulge the contents of any communication under The Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et seq.), to the extent such lawful consent is required, and as agent acting hereunder shall be an authorized user for purposes of applicable computer-fraud and unauthorized-computer-access laws.

COMPENSATION OF AGENT
The agent(s) shall be compensated for services in handling my financial affairs at the same rate as that of an executor or administrator of an estate and may pay said compensation from the funds in his/her hands following the close of each calendar year or more frequently. The commission shall be calculated upon the amount of money received by him/her as income and upon income paid out, whether such income is derived from the corpus of the estate or from any other source, and also a commission for receiving and paying out corpus of the estate paid out during the period. The commissions on income and principal shall commence each year at the initial bracket. If agent is an attorney and performs any legal services for me, agent shall be entitled to reasonable attorney’s fees apart from and in addition to the compensation provided for herein.

or

The agent(s) shall be compensated at a rate of $_____/hr. for services rendered pursuant to this power of attorney.

MONITOR
Unless reasonable cause exists to require otherwise, the agent(s) shall not be obligated by the monitor to provide financial details or accountings more frequently than annually.
Power of Attorney Drafting Checklist
for
_________________________________________________________ (client name)

I. Capacity Issues: (Use this section to document that you have assessed capacity)

   ___ Document in Legal Server, utilizing information from interactions with the client and, at times, information from other sources like family members, social workers and, if necessary, from medical personnel.
   ___ Bring another staff member to the client meeting with you, if necessary.
   ___ Staff Member's Name _____________________________
   ___ The additional staff member has documented their interactions in Legal Server.
   ___ The Capacity Worksheet is completed and in the file.
   ___ You have met with the client alone, free from undue influence.

Client HAS capacity. Client DOES NOT have capacity. (Circle the appropriate conclusion)

II. To assist client in preparing and understanding their Power of Attorney, ask:

   ___ 1. What kind of property do you have and what is its approximate value?

<table>
<thead>
<tr>
<th>Type of Property</th>
<th>Value</th>
</tr>
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<tbody>
<tr>
<td></td>
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</tbody>
</table>

   ___ 2. Do you have dependents, and if so, are you aware of support obligations owed to your dependents (and who are they, if any – children, spouse, parents)?
   YES  NO

   Notes: ____________________________________________________________

   ___ 3. Do you understand that by using your POA, your agent can spend your money or sell your property without telling you?  YES  NO
   ___ 4. Do you know that your Power of Attorney must account for his/her dealings with your property?  YES  NO
   ___ 5. Do you know that you may revoke the Power of Attorney at any time (while of sound mind)?  YES  NO
   ___ 6. Do you understand that unless your Power of Attorney manages your property prudently, its value may decline?  YES  NO
   ___ 7. Do you understand that it is possible that your Power of Attorney could misuse the authority given to him or her?  YES  NO

Power of Attorney Drafting Checklist
III. POWER OF ATTORNEY: NEW YORK Statutory Short Form

1. Section a. Review the Caution to the Principal & discuss the principal's choice of agent(s).

2. Section b. Insert the names.addresses of the principal and agent(s). If multiple agents, discuss whether agents should act alone or together. You may need to discuss practicality of agents’ ability to act together. If agents may act separately, principal must initial next to “My agents may act SEPARATELY.”

3. Section c. Insert the names.addresses of the successor agent(s), if any. If multiple agents, discuss whether agents should act alone or together. You may need to discuss practicality of agents’ ability to act together. If agents may act separately, principal must initial next to “My agents may act SEPARATELY.”

4. Section d. Advise the principal that the Power of Attorney will survive his/her incapacity, unless he/she states otherwise in Section (h) (“Modifications”).

5. Section e. Advise the principal that if he/she wants to revoke prior powers of attorney, he/she must so state in section (h) (“Modifications”).


7. Section f. The principal has initialed each box next to the separate power he/she wants to grant OR the principal has initialed next to section (P) and the powers he/she wants to grant are written separately (ex. A, B, C, D) at the end of section (P)

8. Section g. CERTAIN GIFT TRANSACTIONS (Optional)
The principal has declared that he/she wants to give the agent the power to make gifts [over and above the power to make gifts of up to $5000 per year (in the aggregate) under power I in section (f)] and has initialed next to Section g, OR, has declined authorizing agent to have gifting powers.

GIFTING AUTHORITY, IF ANY, MUST BE INCLUDED IN THE MODIFICATION SECTION

9. Section h. MODIFICATIONS (OPTIONAL)

SUGGESTED LANGUAGE FOR PERMISSIBLE MODIFICATIONS

Cut and paste the desired modifications into the Modification Section (h) of the Power of Attorney. If the modification involves gifting, then the principal must also initial Section (g) CERTAIN GIFT TRANSACTIONS.

GUARDIAN PROVISION
If it becomes necessary to appoint a guardian of my person or property, I hereby nominate pursuant to New York Mental Hygiene Law § 81.17 ______________ to serve as guardian. If ______________ is for any reason unable or unwilling to serve as guardian, I nominate ______________ to serve as guardian.
OPTIONAL GIFTING PROVISIONS

NB: If you’re doing this for planning purposes for either health care coverage or for estate planning, please make the required provisions in the Modifications Section. Be aware that gift equalizing provisions could conflict with later planning requirements.
[Choose one provision only as they are inconsistent with each other]

I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code.

OR

I grant the following authority to my agent to make gifts pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:
(a) make gifts up to a specified dollar amount $_________
(b) make gifts unlimited in amount;
(c) make gifts to any person or persons;
(d) make gifts to the following persons and/or organizations;

Gift Recipient Name or Class
________________________________________________________________________________________________________
________________________________________________________________________________________________________
[Make sure to exclude the witnesses]

(e) I grant specific authority for the following agent(s) to make the following gifts to himself or herself: This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.
[Make sure to include the names of agents and successor agents that can make gifts to themselves]

Make gifts in any of the following ways (edit where necessary):

1. Gifting through banking transactions
Opening, modifying or terminating a deposit account in the name of the principal and other joint tenants; opening, modifying or terminating any other joint account in the name of the principal and other joint tenants; with respect to joint accounts existing at the creation of the agency, the authority granted hereby shall/shall not include the power to change the title of the account by the addition of a new joint tenant or the deletion of an existing joint tenant; opening, modifying or terminating a bank account in trust form as described in § 7-5.1 of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account; with respect to totten trust accounts existing at the creation of the agency, the authority granted hereby shall/shall not include the power to add, delete, or otherwise change the designation of beneficiaries in effect for any such accounts; opening, modifying or terminating a transfer on death account as described in part four of article thirteen of the estates, powers and trusts law, and designate or change the beneficiary or beneficiaries of such account;
2. Gifting by changing beneficiary or modifying life insurance
Changing the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal; with respect to life insurance contracts existing at the creation of the agency, the authority granted hereby shall/shall not include the power to add, delete or otherwise change the designation of beneficiaries in effect for any such contract; procuring new, different or additional contracts of insurance on the life of the principal or annuity contracts for the benefit of the principal and designate the beneficiary or beneficiaries of any such contract; to apply for and to receive any available loan on the security of the contract of insurance, whether for the payment of a premium or for the procuring of cash, to surrender and thereupon to receive the cash surrender value, to exercise an election as to beneficiary or mode of payment, to change the manner of paying premiums, and to change or to convert the type of insurance contract, with respect to any contract of life, accident, health, disability or liability insurance as to which the principal has, or claims to have, any one or more of the powers described in this section; the authority granted hereby with respect to the contract of insurance shall/shall not include the power to add, delete or otherwise change the designation of beneficiaries in effect for any such contract;

3. Gifting by changing beneficiary or modifying retirement accounts
Designate or change the beneficiary or beneficiaries of any type of retirement benefit or plan; the authority granted hereby with respect to retirement benefits or plans shall/shall not include the authority to add, delete, or otherwise change the designation of beneficiaries in effect for any such retirement benefit or plan; creating, amending, revoking or terminating an inter vivos trust; and; opening, modifying or terminating other property interests or rights of survivorship, and designate or change the beneficiary or beneficiaries therein.

4. Gifting by establishing and funding a revocable or irrevocable lifetime trust or joining and funding a pooled trust
Create trusts, whether revocable or irrevocable, on my behalf; fund such trusts on my behalf or make transfers and additions to any trusts already in existence; withdraw income or principal on my behalf from any trust; exercise whatever trust powers or elections which I may exercise; This grant of authority shall include the ability of my agent(s) to create trusts or accounts naming himself, herself, or themselves, as the case may be, as the beneficiary(ies) of such trusts.

5. Conveyance of specific real property or a cooperative apartment
Convey all of my right, title and interest in the real property known as ____________ and the cooperative apartment known as ______________, paying off any liens of the said premises, paying all expenses related to the sale of the said premises, including but not limited to filing fees, maintenance adjustments and legal fees, receiving all moneys resulting from the sale of the premises executing all documents necessary to accomplish the foregoing and doing all things necessary to effect the conveyance.

6. Making loans and executing promissory notes
Make loans and executing promissory notes.

A gift to an individual authorized by this subdivision may be made:
Outright, by exercise or release of a presently exercisable general or special power of appointment held by the principal; to a trust established or created for such individual; to a Uniform Transfers to Minors Act account for such individual (regardless of who is the custodian); or to a tuition savings account or
prepaid tuition plan as defined under section 529 of the Internal Revenue Code for the benefit of such individual (without regard to who is the account owner or responsible individual for such account).

1. Grant specific authority for agent(s) to make the following gifts to himself or herself
I grant specific authority for the following agent(s) to make the following gifts to himself or herself: Agents: ____________________________
Gifts to the agents under this provision include all the powers, methods and manners as provided for gifting above.

2. Control over digital assets
The agent(s) shall have (a) the power to access, use, and control my digital devices, including but not limited to, desktops, laptops, tablets, storage devices, mobile telephones, smartphones, and any similar digital device that currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets, including any content contained in an electronic communication therein, (b) the power to access, modify, delete, control, and transfer my digital assets, including the content contained in any electronic communication therein, wherever located and including but not limited to, my emails received, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, banking accounts, domain registrations, web hosting accounts, tax preparation service accounts, online stores, affiliate programs, other online accounts, and similar digital items which currently exist or may exist as technology develops, and (c) the power to obtain, access, modify, delete, and control my passwords and other electronic credentials associated with my digital devices and digital assets described above. This authority is intended to constitute “lawful consent” to a service provider to divulge the contents of any communication under The Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et seq.), to the extent such lawful consent is required, and as agent acting hereunder shall be an authorized user for purposes of applicable computer-fraud and unauthorized-computer-access laws.

COMPENSATION OF AGENT
The agent(s) shall be compensated for services in handling my financial affairs at the same rate as that of an executor or administrator of an estate and may pay said compensation from the funds in his/her hands following the close of each calendar year or more frequently. The commission shall be calculated upon the amount of money received by him/her as income and upon income paid out, whether such income is derived from the corpus of the estate or from any other source, and also a commission for receiving and paying out corpus of the estate paid out during the period. The commissions on income and principal shall commence each year at the initial bracket. If agent is an attorney and performs any legal services for me, agent shall be entitled to reasonable attorney's fees apart from and in addition to the compensation provided for herein.
or
The agent(s) shall be compensated at a rate of $_____/hr. for services rendered pursuant to this power of attorney.

MONITOR
Unless reasonable cause exists to require otherwise, the agent(s) shall not be obligated by the monitor to provide financial details or accountings more frequently than annually.

Other Optional Modifications:
Revocation: “I hereby revoke (all powers of attorney heretofore executed by me; the power of attorney executed by me on ________, which named ________ as my agent)"

Durability: “This Power of Attorney shall be affected by my subsequent disability or incompetence.”

Springing: “This power of attorney shall take effect upon the signing of a written statement EITHER: By the physician(s) named below: (Insert full name, address and telephone number of physician(s)) or if no physician(s) are named above, or if the physician named above is/are unable to act, by my regular physician, or by a physician who has treated me within one year preceding the date of such signing, or by a licensed psychologist or psychiatrist, certifying that I am suffering from diminished capacity that would preclude me from conducting my affairs in a competent manner.” -OR- By the person(s) named below: (Insert full name and address of certifying person(s) certifying that the following specified event has occurred.

Other modifications: The principal can make any other modifications, including language to limit or supplement powers given to the agent.

_____ 10. Section (i). MONITOR: Ask the principal if he/she wants to designate a “monitor” (who has the authority to request, receive and compel the agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal). If so, check for initials next to Section (i), AND for the name/address of the monitor so that you may complete this section.

_____ 11. Section j. COMPENSATION OF AGENT(S): The principal may define the amount of “reasonable compensation” the agent is to receive in the Modifications section (h).

_____ 12. Section k. Advise the principal of their agreement to indemnify third parties (e.g. a bank) for any claims that may arise against them because of reliance on the power of attorney. Stress the importance of notifying third parties.

_____ 13. Section l. Advise the principal that the power continues until death or revocation.

_____ 14. Section m. Principal has signed on the line indicated and filled in the date.

_____ 15. Section m. The Principal's Signature must be notarized.

_____ 16. Section n. SIGNATURE OF WITNESSES: Have two people sign acknowledging that the principal signed the POA in their presence and in the presence of the other witness, or that the principal acknowledged that the principal’s signature was affixed by him or her or at his or her direction, and that the principal stated that this POA reflects his or her wishes, that he or she has signed it voluntarily, and that they are not named an agent or as a recipient of gifts. The notary can be a witness.

_____ 17. Section o. Read or Instruct the agent to read the Caution to the Agent. Advise the agent of their right to independent counsel.

_____ 18. Section p. AGENT’S SIGNATURE: Fill in the name of the agent(s) and have the agent(s) sign and date.
19. Have the agent's signature notarized. You can notarize the signatures on the Power of Attorney provided you know the identity of the signatories and they personally appear before you or utilize remote notarization.

Leave Section q. SUCCESSOR AGENT SIGNATURE blank unless and until a successor (back-up) agent accepts appointment.

Practice Tips:

The agent(s) need not sign at the same time as the principal, but the power of attorney will not be effective until the principal and at least one agent have signed, and their signatures have been notarized.

Multiple agents need not sign at the same time.

If one multiple agent has signed and another has not, the power of attorney will be effective as to the agent who has signed. However, if two or more agents are designated to act together, the power of attorney takes effect when all the agents so designated have signed such power of attorney with their signatures acknowledged.

Advise how the agent should sign documents on behalf of the principal. Signing "(name of agent) as agent for (name of principal)" or "(name of principal) by (name of agent), as agent."

Talking Points: Grant of Authority/Gifting

Ask the client: As Principal, do you want your agent to have authority to handle your:

(A) real estate transactions (sell your house and/or buy another?)

(B) chattel and goods transactions (sell or pawn your belongings?)

(C) bond, share, and commodity transactions (buy or sell stocks/bonds?)

(D) banking transactions (do your banking for you?)

(E) business operating transactions (run a business for you?)

(F) insurance transactions (handle your insurance matters, other than beneficiary changes?)

(G) estate transactions (handle the estates of others, where you may be a beneficiary or executor?)

(H) claims and litigation (handle lawsuits and claims for you?)

(I) personal and family maintenance (make cash gifts, such as for birthdays, etc., up to $5000 a year?)

(J) benefits from governmental programs or civil or military service (handle gov’t benefit matters, other than certain federal benefits like Social Security?)
(K) health care billing and payment matters; records, reports, and statements (to obtain medical information in order to verify the accuracy of medical bills and to make decisions about paying bills for medical services?)

(L) retirement benefit transactions (other than Social Security, which does not accept POAs)

(M) tax matters (prepare, file, and sign tax returns?)

(N) all other matters (to act as your alter ego, with all other power to do things you yourself can do, but not marry, or divorce for you, or act as a health care proxy, or swear/affirm to personal knowledge that you have)

(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 agents select (not defined by law, may be a good idea to do so in a notarized writing).

GIFTING

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property.

MODIFICATIONS:

Use this section if you wish to authorize gifts in amounts smaller than the gift tax exclusion amount, in amounts in excess of the gift tax exclusion amount, gifts to other beneficiaries or other gift transactions.

For example: “I authorize my agent(s) to make gifts up to $10,000 to my family members,” or “I authorize my agent to make gifts to the United Way of up to $1000 per year.”

Use the Modifications section to allow agents gifting powers for:

(a) opening, modifying or terminating a deposit account [such as a savings or checking account] in the name of the principal and other joint tenants;

(b) opening, modifying or terminating any joint account in the name of the principal and other joint tenants;

(c) opening, modifying or terminating a bank account in trust form as described in section 7-5.1 of the estates, powers and trusts law, and designating or changing the beneficiary or beneficiaries of such account;

(d) opening, modifying or terminating a transfer on death account as described in part four of article thirteen of the estates, powers and trusts law, and designating or changing the beneficiary or beneficiaries of such account;

(e) changing the beneficiary or beneficiaries of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal;

(f) procuring (buying) new, different or additional contracts of insurance on the life of the principal or annuity contracts for the benefit of the principal and designating the beneficiary or beneficiaries of
any such contract;

(g) designating or changing the beneficiary or beneficiaries of any type of retirement benefit or plan;

(h) creating, amending, revoking, or terminating an inter vivos trust; and

(i) opening, modifying or terminating other property interests or rights of survivorship, and designating or changing the beneficiary or beneficiaries therein.

To allow an agent to make gifts to themselves, indicate which agent(s) have such authority and what gifts are allowed.

For example:

“I give my agent ___ authority to make unlimited gifts to herself from all my assets including my house.”

Created by LawNY, Inc., updated 4-2-22, JPN.
**Decision-Making Supports:**
The Role of the Supporter or Advocate

CHAPTER SUMMARY  •  July 2020

David Godfrey, ABA Commission on Law and Aging

**ABA Commission on Law and Aging**

The ABA Commission on Law and Aging is the collaborative and interdisciplinary leader of the American Bar Association’s work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

**Key Lessons**

- Decision-making is a human right. At the core of being human is making choices that impact our lives. Supporting every person’s ability to make choices that impact their lives protects that human right.

- Every person should have an active role in planning and decision-making. Advance planning and empowerment to select help with making these decisions is a core component of decision-making. A variety of informal and formal tools aid in decision-making. The simplest form of informal decision supports is asking for help with decisions. Other more formal legal tools exist, such as appointing agents and court appointed fiduciaries. Every model has an essential role for decision supporters. Every model or tool used for decision-making can be improved by the application of the decision supports that keep the person informed, offer choices, seek input, and provide help as needed.

- While the fiduciary duties are rooted in the law, the role of decision supports are ideal but not necessarily a legal requirement.

**Decision-Making as a Human Right**

Human beings constantly make choices, and our choices define us as individuals. We make choices about what we do, where we live, what we wear, what we eat, how our money is spent, and about our health care. Decision-making, especially by persons with disabilities or who are older, is increasingly being recognized as a human right. The United Nations’ Convention on the Rights of People with Disabilities (CRPD), adopted in 2006, played an instrumental role in affirming the rights of individuals to make decisions with the necessary supports to do so. The CRPD Article 12’s principles serve as a starting point for materials on decision supports around the world, including a core set of values contained in a policy development guideline for aged care, published in Australia.\(^1\)

The key points from the Australian document are:

1. All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

2. Persons who require support in decision-making must be provided with access to the support necessary

for them to make, communicate, and participate in decisions that affect their lives.

3. The will, preferences, and rights of persons who may require decision-making support must direct the decisions that affect their lives.

4. Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

The Basics of Supporting Decision-Making

Decision supports are when one person helps another person make a choice. This starts with communicating so that everyone understands the issue or question. This may require breaking complex issues into smaller, more understandable parts. It is important to let people know that they have options and help them understand risks and benefits of choices. Supporters make recommendations, but allow the person to make their own choice or express a preference. Supporters help as needed to carry out the choices and provide oversight and monitoring as needed to assure that the choices and values of the person are honored.

Informal Supports

Informal supports far outnumber formal or legal supports. An informal support is any step that simplifies life decisions, such as enlisting the help of others or of technology to assure that goals are met.

Direct deposit is a simple informal support that is increasingly mandatory. The payor and financial institution become supporters, assuring that the money is paid and received. The person can select a trusted supporter for help in setting this up and monitoring to assure the correct amounts arrive on time.

Automatic payment is another support to ensure bills are paid. Auto-payment can be set with the vendor or financial institution. A notice is sent when the bill is due that includes the amount and payment date, and, unless an objection is made, the payment goes through with no further actions taken. Supporters selected by the person can help the person understand the choices, help them with set-up, and provide monitoring to assure that the bills are correct and that all expected bills are being paid on time. Supporters may be called upon to update information or question anything that is not working or does not look correct.

Other informal supports could include financial advisors, bill paying services, housekeepers, personal care assistants, and shopping services. Technology is bringing a wealth of informal supports, such as fall monitors, GPS tracking, and medication management systems. On the cutting edge are autonomous vehicles—while self-driving cars may be a few years off, delivery robots are already utilized in several urban areas.

Formal Supports and Legal Tools

Formal support options are wide ranging, from financial institution tools to legal documents. These supports can be designated for financial decisions, health care decisions, or both.

Creating support for financial decisions:

The most common formal financial support is a joint bank account. Financial institutions require someone with legal authority to make account withdrawals. Adding someone as a signatory on an account is a way to grant this legal authority without creating a right of inheritance. This type of support gives the signatory the authority to transact business but does not create an ownership interest in the account. Most banks treat these as commercial accounts, and many banks charge service fees on these accounts. Finally, an individual can utilize a Power of Attorney for financial decisions. The Power of Attorney support is discussed in more detail in the health care support section below.
In each of these situations, the supporter's role is to act as the agent and as a fiduciary. A fiduciary owes special duties of loyalty, fidelity, and accountability. For a supporter, this starts with maintaining separate accounts. The supporter has a responsibility to the person to always engage the person in decision-making, keep the person informed, keep complete records, avoid conflicts of interest, and follow the directions of the person. The supporter should monitor the account to assure that the person's instructions and values are being honored.

Creating support for health care decisions:

Any adult can name a health care surrogate or agent. Every state allows this to be done in writing, with formalities that vary from state to state. In nearly every state, if a person does not name a health care surrogate, state laws determine who can make health care choices when the person is unable to or declines to do so. All health care agents or health care surrogates should act as health care supporters. Being a supporter requires keeping the person informed and involved in health care decisions. As needed, the supporter should accompany the person when they seek medical treatment. The supporter can help the person make choices and helps communicate those choices. The surrogate or agent acting as a supporter should only make decisions when the person is truly unable or declines to express a preference. When making a decision, the decision should be guided by an understanding of the values of the person. When selecting a health care supporter, it is critical to have conversations about the person's values and preferences.

A Power of Attorney is a document that allows a person to name and legally empower an agent to transact business, make decisions, and manage personal affairs on their behalf. Each state has laws regarding the creation of a Power of Attorney. A Power of Attorney can be essential to empowering supporters to assist. The agent is a fiduciary and should act as a supporter. The agent on a power of attorney acts as a supporter by always making decisions after consulting the person and always seeking their input.

PRACTICE TIP

Draft decision support principles into Powers of Attorney documents and documents appointing health care agents, or include detailed instructions on decision supports in letters of instruction to agents appointed in these documents.

Decision Supports in Involuntary Appointments

Involuntary appointments should always be a last resort, where no planning was done or planning has failed. The appointments should only be made when a person is truly unable to name and empower the persons they most trust to help, and there are decisions that must be made on behalf of the person that require legal authority.

One involuntary financial appointment is the Representative Payee. A Representative Payee is generally appointed by Social Security and charged with receiving and managing the income (benefits) of another person. Though it is possible for a person to voluntarily ask Social Security to appoint a payee, it is extraordinarily rare. It is now possible for a person to pre-designate a person to serve as payee should the appointment of a payee be needed in the future. This allows the person to select the person they most trust, and to provide guidance to that person about how they wish to manage their income.

A representative payee is a fiduciary for the person and is accountable to the person and Social Security (or other payor) for the benefits. A representative payee should always consult with the person about financial decisions and keep the person informed of what is happening with their money.

A guardian or conservator is a court-appointed fiduciary for a person the court has found to be a “person in need of protection.” Guardianship or conservatorship should be a last resort, only to be considered after all alternatives have been exhausted. Guardians and conservators should practice decision support principles.
Examples of decision support principles incorporated into the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act:

- The person subject to a guardianship petition has the right:
  » To an attorney who must advocate for the person’s wishes, and if the person’s wishes are not reasonably ascertainable, advocate for the result that is the least restrictive (§§305 and 406).
  » To petition for termination of the guardianship (§§319 and 431).

- The Court must:
  » Not issue guardianship or conservatorship orders when a less-restrictive alternative is available, such as supported decision-making, technological assistance, or an order authorizing a single transaction. (§§310 and 411).
  » Review annual reports to determine whether the guardianship or conservatorship should continue (§§317(e) and 423(e)).

- A guardian or conservator must:
  » Create an individualized plan that takes into account the person’s preferences, values, and prior directions to the extent known to or reasonably ascertainable (§§316 and 419).
  » Make decisions the guardian reasonably believes the adult would make if able, unless doing so would cause harm to the adult.
  » Promote the self-determination of the adult and, to the extent reasonably feasible, encourage the adult to participate in decisions, act on the adult’s own behalf, and develop or regain the capacity to manage the adult’s personal affairs. (§§313 and 418).

Guardians support decision-making by communicating with the person, keeping the person informed, explaining decision that are being made, explaining options, asking for preference of the person, guiding all decisions based on input from the person or the person’s values or advance instructions, and being accountable to the Court for every decision and asset.

Courts support decision-making by only moving forward with appointment when it is absolutely needed; by careful selection of guardians and conservators; by holding guardians and conservators accountable for decisions and assets; by investigating all complaints of misconduct; by ensuring the judicial system has a robust system for appeals and for investigating bad acts or failure to act by Guardians, Courts, and Judges; and by having a robust system for review, restoration of rights, modification (including removal and replacement of guardians), and termination of appointments.

**Conclusion**

Empowering the right of every person to make decisions requires support for decision-making. The values and preferences of each person should prevail in the choices that are made, and appropriate legal frameworks and safeguards are needed to reduce the risk of abuse and undue influence. At the core of decision supports is communicating with the person, encouraging the person to express preferences, and doing everything possible to help the person understand the consequences of their choices.

**Additional Resources**

- [ABA Resources and Research on Guardianship Reform and Decision Supports](#)
- [ABA Resources and Research on Elder Abuse](#)
- [ACL resources on Supported Decision-Making](#)
• National Center on Elder Abuse
• NCLER training on Supported Decision-Making
• NCLER training on Advance Care Planning
• Supporting Decision-Making Across the Age Spectrum, American Bar Association Commission on Law and Aging, March 2020

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

This Issue Brief was supported by a contract with the National Center on Law and Elder Rights, contract number HHSP233201650076A, from the U.S. Administration on Community Living, Department of Health and Human Services, Washington, D.C. 20201.
ATTORNEY ASSESSMENT WORKSHEET

This worksheet is from Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers (2020)

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Please read and review the Handbook prior to using the worksheet.

Client: ___________________________ Date of Interview: ___________________________

Attorney: ___________________________ Place of Interview: ___________________________

A. OBSERVATIONAL SIGNS

<table>
<thead>
<tr>
<th>Cognitive Functioning</th>
<th>Examples</th>
</tr>
</thead>
</table>
| Short-term Memory Problems                 | ▪ Repeats questions frequently
                                                ▪ Forgets what is discussed within 15-30 min.
                                                ▪ Cannot remember events of past few days                                                        |
| Language/Communication Problems            | ▪ Difficulty finding words frequently
                                                ▪ Vague language, Disorganized
                                                ▪ Trouble staying on topic
                                                ▪ Bizarre statements or reasoning
                                                ▪ Difficulty using phone, email and/or other forms of communication                           |
| Comprehension Problems                     | ▪ Difficulty repeating simple concepts
                                                ▪ Repeated questioning                                                                          |
| Lack of Mental Flexibility                 | ▪ Difficulty comparing alternatives
                                                ▪ Difficulty adjusting to changes                                                                |
| Disorientation                              | ▪ Trouble navigating office
                                                ▪ Gets lost coming to office
                                                ▪ Confused about day/time/year/season                                                             |
| Financial Management Abilities:            | ▪ Problems with Everyday Arithmetic                                                               |
|                                            | ▪ Decreased Understanding of Financial Concepts                                                   |
|                                            | ▪ Decreased Comprehension of Ordinary Financial Documents                                         |
| Financial Management Abilities:            | ▪ More difficulty calculating: Sum of loose change
                                                Feet to inches conversion
                                                Tip in a restaurant                                                                               |
|                                            | ▪ More difficulty understanding: Health care concepts like medical deductible
                                                Terms like interest rate, lien, and joint liability                                              |
|                                            | ▪ More difficulty: Identifying a bill that is overdue and needs prompt attention
                                                Finding details in a bank statement
                                                Completing sections of a check register                                                          |
### Attorney Assessment Worksheet

<table>
<thead>
<tr>
<th>▶ Emotional Functioning</th>
<th>▶ Behavioral Functioning</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diminished Awareness of Financial Risks</td>
<td>Diminished Awareness of Financial Risks</td>
</tr>
<tr>
<td>Trouble identifying key risk in investment proposal</td>
<td>Trouble identifying key risk in investment proposal</td>
</tr>
<tr>
<td>Overly focused on benefits/return, not risk</td>
<td>Overly focused on benefits/return, not risk</td>
</tr>
</tbody>
</table>

#### Emotional Distress
- Anxious
- Tearful/distressed
- Excited/pressured/manic

#### Emotional Lability
- Moves quickly between laughter and tears
- Feelings inconsistent with topic

#### Delusions
- Feels others out “to get” him/her, spying or organized against him/her
- Fearful, feels unsafe

#### Hallucinations
- Appears to hear or talk to things not there
- Appears to see things not there
- Misperceives things

#### Poor Grooming/Hygiene
- Unusually unclean/unkempt in appearance
- Inappropriately dressed

#### Markedly Inappropriate Social Behavior
- Loss of empathy and interpersonal skills
- Lack of judgment; Loss of inhibition
- Lack of interest (apathy), which can be mistaken for depression

### Other Observations + Notes from 3rd parties

#### Mitigating/Qualifying Factors Affecting Observations

<table>
<thead>
<tr>
<th>Stress, grief, depression, recent events affecting stability of client</th>
<th>Medical Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ask about recent events, losses</td>
<td>Ask about nutrition, medications, hydration</td>
</tr>
<tr>
<td>Allow some time</td>
<td>Refer to a physician</td>
</tr>
<tr>
<td>Refer to a mental health professional</td>
<td></td>
</tr>
<tr>
<td>Help find support persons or groups</td>
<td></td>
</tr>
</tbody>
</table>

#### Time of Day Variability
- Ask if certain times of the day are best
- Try mid-morning appointment

#### Hearing and Vision Loss
- Assess ability to read or repeat simple information
- Adjust seating, lighting
- Use visual and hearing aids

### Potential Undue Influence – Use Undue Influence Screen
### Attorney Assessment Worksheet

| Social/Environmental Factors | • High anxiety level in unfamiliar environment  
| | • Presence of others causing stress  
| | • Help find personal/social supports  
| Educational/Cultural/Ethnic Barriers | • Be aware of race, ethnicity, education, long-held values and traditions, and your own implicit biases  
| | • Help find peer supporters  

**What other decision supports does the client need to maximize decision-making abilities?**

### B. RELEVANT LEGAL ELEMENTS - The legal elements of capacity vary somewhat among states and should be modified as needed for your particular state.**What are the Legal Task(s) at Issue?**

| What are the Capacity Elements of the Task(s)?  
| Notes on Client’s Understanding/Appreciation/Functioning Under Elements |
| This requires your state-specific research.  
(See Chapter V.) |

### C. TASK SPECIFIC FACTORS IN PRELIMINARY EVALUATION OF CAPACITY

<table>
<thead>
<tr>
<th>The more serious the concerns about the following factors…</th>
<th>The higher the function needed in the following abilities…</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is decision consistent with client’s known long-term values or commitments?</td>
<td>Can client articulate reasoning leading to this decision?</td>
</tr>
<tr>
<td>Is the decision objectively fair? Will anyone be hurt by the decision?</td>
<td>Is client’s decision consistent over time? Are primary values client articulates consistent over time?</td>
</tr>
<tr>
<td>Is the decision irreversible?</td>
<td>Can client appreciate consequences of his/her decision?</td>
</tr>
</tbody>
</table>
## D. Preliminary Conclusions About Client Capacity

After evaluating A, B, and C above:

<table>
<thead>
<tr>
<th>Evidence Level</th>
<th>Description</th>
<th>Action Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>No or minimal evidence of diminished capacity.</td>
<td>Action: Proceed with representation and transaction</td>
<td></td>
</tr>
</tbody>
</table>
| Mild concerns – Some evidence of diminished capacity, but less than substantial. | Action Options:  
1. Proceed with representation/transaction. An associated note to the file may be helpful to document your conclusion.  
2. Explore decision support strategies to reinforce capacity.  
3. Consider medical referral if medical oversight lacking.  
4. Consider consultation with mental health professional.  
5. Consider referral for formal clinical assessment to substantiate conclusion, with client consent. | |
| More than mild concerns about capacity even with decision supports, or decision-support is not available. | Action Options:  
1. Explore decision support strategies further to reinforce capacity. Clear documentation of concerns and actions contemplated or taken will be important here.  
2. Medical referral if medical oversight lacking.  
3. Consultation with mental health professional.  
4. Refer for formal clinical assessment, with client consent. | |
| Severe concerns – Client clearly lacks capacity to proceed with representation and transaction | Action Options:  
1. The representation cannot proceed, and alternative legal approaches must be taken (for example, working with family members).  
2. Referral to mental health professional to confirm conclusion.  
3. Do not proceed with case; or withdraw, after careful consideration of how to protect client’s interests.  
4. If an existing client, consider protective action consistent with MRPC 1.14(b). | |

**Case Notes:** Summarize key observations, application of relevant legal criteria, conclusions, and actions to be taken: