

NCJW Center for Women Presents a
Women's Workshop on Estate Planning
WHAT YOU NEED TO KNOW ABOUT ESTATE PLANNING

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PRESENTED BY:

JONATHAN BRESSMAN, ESQ.
LAW OFFICES OF JONATHAN BRESSMAN LLC
135 Columbia Turnpike, Suite 301
Florham Park, NJ 07932
(973) 660-1919
www.estatelawnj.com

LIFETIME PLANNING

Many people recognize the importance of having an estate plan for when they die. However, it is also important to do "lifetime planning" to deal with aging, illness or incapacity, including the potential need for long-term care.

Other professionals

You should consult with a financial advisor on your retirement plans and meeting your other financial goals. Be sure to consult with your estate planning attorney to make sure you coordinate your beneficiary designations with your estate plan.

You should consult with a life insurance agent to assess what your life insurance needs are. The independent advice of your financial advisor if he or she does not also sell life insurance can be helpful in making sure you do not pay for more insurance than you need. You should also consult with your estate planning attorney to (1) discuss whether a life insurance trust is appropriate so that the life insurance proceeds will not be taxed in your estate and (2) make sure you coordinate your beneficiary designations with your estate plan.

You should consider obtaining long term care insurance to cover in home and nursing home care in case you should ever require that kind of care.

You should consult with your accountant on ways to minimize your income taxes. Your accountant may also be helpful in determining retirement and insurance needs and may also be helpful in reviewing and formulating your estate plan.

While other professionals play important roles, there are issues you should address with your attorney.

Power of Attorney

You should have a durable power of attorney to allow a designated person or people to handle legal, tax and financial matters for you if you become partially or

completely unable to handle your own affairs due to age, diminished capacity or absence (such as an extended trip).

The alternative to a power of attorney is a costly court proceeding to declare you incapacitated or as having diminished capacity. A guardianship requires filing a complaint in the Superior Court of New Jersey, having 2 qualified psychiatrists examine you and certify that you are incompetent or have diminished capacity, a Court appointed attorney to represent you, meet with you and give a report to the Court, and possibly a hearing with all these professionals present. The Court will then decide if a guardian is to be appointed and if so, who is to be guardian and what the guardian can and cannot do. There may be a dispute among your relatives as to who should serve and the Court will then decide who to name, including an attorney or other person not related to you. The guardian must post a bond (essentially an insurance policy) with annual premiums and must give an annual accounting to the Court of all income and expenses and your health. The guardian is entitled to be paid for his or her services. All of these Court costs, professional fees, guardian's fees and expenses are paid from your assets.

A properly drafted durable power of attorney avoids these hassles and expenses. In addition to saving time and money by avoiding court proceedings, a power of attorney lets you choose the person or people who will act on your behalf rather than the Court. You can revoke your power of attorney at any time during your lifetime as long as you are competent. The power of attorney ends on your death.

The person granting the power is called the "principal." The person you appoint is called the "attorney-in-fact" or "agent."

There are different types of powers of attorney:

A. Limited versus General: A power of attorney can be general or limited. A limited power of attorney only lets the person you name do specific things. It can be limited to one bank account or signing documents for you at a real estate closing. A general power of attorney permits the agent to handle all financial matters. Despite stating that the attorney-in-fact may do anything that you could do, certain powers need to be specifically provided. These include banking powers, the ability to deal with real estate, signing tax returns and otherwise dealing with the IRS and other tax authorities, gifting, and Medicaid planning.

B. Durable versus Non-durable: A "durable" power of attorney expressly survives the principal's future incapacity. A non-durable power of attorney ends when the principal is incapacitated and therefore personally unable to revoke the power.

C. Springing versus effective immediately: A power of attorney can be set up so that it only takes effect when you are incapacitated. This is called a "springing" power of attorney. The power of attorney can also be made effectively immediately.

Each power of attorney is one from A, one from B and one from C. For example, a general, durable power of attorney that is effective immediately.

If you have a power of attorney for “lifetime planning” it should be a general, durable power of attorney. The big question is should it be springing or effective immediately.

The major concerns with a springing power of attorney are:

- (1) The powers can be misused;
- (2) determining when you are incapacitated and getting a doctor to certify that you are incapacitated;
- (3) it is not effective unless you are incapacitated so it is not effective if you have diminished capacity or just need help doing your banking or paying bills; and
- (4) people and banks may be reluctant to accept it without a recent certification that you are (or are still) incapacitated.

The major concern with a power of attorney that is effective immediately is that it may be used before you intended and that it may be misused.

Living Will (Health Care Declaration) and Medical Power of Attorney

1. From one of my articles in the West Essex Tribune:

Schiavo case illustrates importance of a living will

The case of Terri Schiavo is truly a double tragedy. First, Terri collapsed in 1990 when she was only 26 years old. Second, her family has fought for years over what her wishes were for life support. Yet this second tragedy could have been easily avoided and her true wishes followed if Ms. Schiavo had a living will (health care declaration). This legal document lets you express your desires regarding your medical treatment and whether or not to withhold life support and nutrition. You also appoint someone to make sure your wishes are followed if you become unable to make those decisions yourself. Terri could have saved her family the added agony by having a living will expressing her wishes.

2. From the Bergen County Surrogate’s Office:

ADVANCE DIRECTIVES FOR HEALTH CARE

Instruction Directives

All adults have the fundamental right to control their own medical care, including the decision to utilize or terminate artificial, extraordinary or heroic medical treatments that only prolong the process of dying. This right is normally exercised by competent patients giving (or withholding) consent for treatment when such treatment is proposed by their physicians or the facility in which they are receiving care.

Unfortunately, many patients lack the mental capacity or physical ability during the course of their medical treatment to communicate with their physicians. These patients are no longer able to make their own health care decisions directly.

In New Jersey pursuant to N.J.S.A. 26:2H-53 an advance directive for health care can be drafted and executed prior to a disabling illness or accident, providing a mechanism for health care decisions when the person lacks capacity to make those decisions. This Instruction Directive must be in writing witnessed by two adults or acknowledged by a Notary Public. The directive contains the persons personal wishes regarding health care in the event of a loss of decision making ability. The directive becomes effective when transmitted to the attending physician or to the hospital and the person is medically determined to lack capacity to make health care decisions. An attending physician's determination that a patient lacks decision making ability must be confirmed by another doctor.

If you regain your ability to make medical decisions at a later time you may resume making your decisions directly. The Instruction Directive is in effect only as long as a person is unable to make health care decisions. The Instruction Directive may be modified in whole or in part at any time by a legally competent individual. You should review your directive periodically and update it whenever you feel it no longer accurately reflects your wishes. The directive should also be revisited if a serious health issue develops which should be addressed. An Instruction Directive regarding health care may be revoked in writing or orally.

Proxy Directives - Appointing a Health Care Representative

Another way to control your future medical care is to designate a person, whom you trust understands your health care wishes, to act as your agent. This designee, known as a proxy, is granted the legal authority to make medical decisions for you if you are unable to make such decisions for yourself. If you become incapacitated and cannot make your own decisions, your chosen proxy (also known as your "Health Care Representative") will serve as your substitute. The proxy is your representative in discussions with your physician and others responsible for your care when you are unable to communicate your wishes. In order to be effective in New Jersey, the Proxy Directive appointing the health care proxy must contain clear language stating that it is to be used for such an appointment.

Many medical powers of attorney found at stationery stores, discount supply houses and bookstores do not meet these requirements. Therefore, you should be cautious about signing any such documents without professional oversight.

This Proxy Directive, as in an Instruction Directive, must be witnessed by two individuals, or acknowledged before a Notary Public.

The completed Proxy Directive should be treated as any other important legal document. It is important that copies be given to physicians, family members and friends, but care should be taken that the original document be readily available and its whereabouts known to family members. A safe deposit box is not an appropriate place to keep an Instruction Directive or Proxy Directive, as it cannot be retrieved except during banking hours.