Tax Minimization Tactics: Portability, Step-Up Basis and More

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ESTATE PLANNING: TOP 7 TOOLS TO KNOW

TAX MINIMIZATION TACTICS: PORTABILITY, STEP-UP BASICS AND MORE

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FEDERAL TAX PLANNING AND CREDIT SHELTER TRUSTS

When meeting with a client, the attorney should ascertain the value of all of the client's assets, because upon death, the gross estate includes the date of death value of all of the decedent's property, which also includes, life insurance owned by the decedent regardless of whether paid to the estate or individuals, and the value of property transferred within three years before death. The decedent's taxable estate is the gross estate less allowable deductions as follows.

- Applicable exclusion amount.
- Funeral expenses paid out of the estate.
- Debts of the decedent.
- Administration expenses, which include expenses allocable to tax-exempt income, expenses incurred in preserving and distributing the estate such as appraiser's fees, accountant fees, court costs, storing and maintaining assets.
- The marital deduction, which is the value of property passing to a spouse either outright or in a qualified terminal interest trust (QTIP Trust).
- The charitable deduction which is the value of property that passes to one or more charitable organizations or charitable trusts.
- The state death tax deduction which is any estate or inheritance tax paid to any state or the District of Columbia.
- Executor commissions taken or expected to be taken. These commissions are then treated as taxable income by the Executor and must be reported on the Executor's Form 1040, U.S. Individual Income Tax Return.
- Legal fees paid or expected to be paid.

The typical estate plan provides that the residuary estate pays any estate owed on the decedent's taxable estate greater than the current value of the applicable exclusion amount, or unified current, as indexed for inflation so that the beneficiaries inherit the full bequest. A Will can be drawn to allocate estate tax to specific bequests which results in the beneficiary owing the estate tax on the amount received. Typically, that amount would be deducted from the amount distributed to the beneficiary so that the beneficiary doesn't actually have to write a check for estate tax.

When the date of death value of the decedent's assets plus any adjustable taxable gifts is greater than the applicable exclusion amount, then the Executor must file a Form 706. Additionally, the Form 706 also must be filed to make a portability election even if

the value of the gross estate is less than the unified credit (see discussion earlier in this Article under the heading "Claiming Estate Tax Portability"). Estate taxes are reported on the Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. If the Form 706 is required to be filed whether for taxes or to make a portability election, the return and payment of any tax is due within nine months after the date of the decedent's death. An automatic extension of six months will be granted to file the return and/or pay the tax due by filing Form 4768, Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes. When that Form is filed, estimated estate tax must be paid.

Internal Revenue Code of 1986, as amended (the "Code" or "IRC") § 6166 provides an exception to the rule that estate taxes are due within nine months of the decedent's date of death in order to alleviate the burden of paying estate tax where at least 35% of the decedent's estate is an interest in a closely-held business. Without this law, the executor would need to sell the family business or farm in order to pay the tax. U.S. v. Askegard, 291 F. Supp. 2d 971 (D. Minn. 2003); Snyder v. U.S., 630 F. Supp. 182 (D. Md. 1986). This rule applies to a sole proprietorship, or a partnership or corporation:

- With 45 or fewer owners; or
- In which the decedent owned an interest of 20% or more. "All stock and all partnership interests held by the decedent or by any member of his family (within the meaning of Code §267(c)(4) shall be treated as owned by the decedent." 26 U.S.C.A. § 6166.

Under IRC §6601(i), interest on the installment payments is charged at 2% on the tax attributable to the first $1,430,000 of the decedent's estate (see Rev. Proc. 2012-41.26). The estate must make the payments in at least two but not more than ten equal installments. The first payment is not due until the fifth anniversary of when the tax was initially due. However, interest is due during those first five years. Therefore, the total deferral result in 14 years. This election is only available to "the estate of a decedent who, at the date of death, was a United States citizen or resident." Rev. Proc. 98-15 Section 2.01(1). Interest

paid on the installment payments of estate tax is not deductible for income or estate tax purposes.

A distribution, sale, exchange, disposition, or withdrawal of at least 50% of the decedent's interest in the business will accelerate all unpaid tax. However, if the share redemption is in connection with paying for estate tax, funeral expenses, and administrative expenses, there will be no acceleration of the unpaid tax. If the business liquidates shares but uses the proceeds to further the business, no acceleration will occur. If instead, the business distributes the proceeds to the shareholders then acceleration will occur.

Disclaimers are a form of post mortem planning which allow for altering the beneficial interests of the beneficiaries by the beneficiary refusing to accept the bequest. Disclaimers are often used to balance out estates for estate tax purposes and to pass wealth to a lower generation due to the wealth of the intervening generation. The reasons for wanting to make a disclaimer are numerous. Chief among them is the need to utilize the decedent's unified credit.

Currently, the applicable federal exclusion amount, or unified credit, is $10,000,000, indexed for inflation, resulting in an amount equal to $11,180,000 in 2018 under Section 11061 of the Tax Cut and Jobs Act, Pub. L. No. 115-97, which expires on December 31, 2025. At that time, absent new legislation, the unified credit will return to its 2017 level, as indexed for inflation at approximately $5.6 million. The available applicable exclusion upon death will be reduced by the amount used to shelter lifetime gifts from federal gift tax. An example of a plan using a Disclaimer Trust is below. The numbers are rounded in example below for easier illustration and are based on the sunset of The Tax Cut and Jobs Act, Pub. L. No. 115-97 on December 31, 2025 which reduces the unified credit to ~$5,600,000.

Plan without Disclaimer Trust

Husband	Wife
$5,000,000	$ 5,000,000
Husband dies first and his $5,000,000 moves to Wife's column	$ 5,000,000 – no tax
	$10,000,000
Wife dies 2nd; unified credit (u.c.) is applied & amt passes to kids	($5,000,000) – no tax
Balance subject to NY and Federal estate tax	$5,000,000
Approximate combined tax rate 50%	($2,500,000) – tax
Balance passing to children	$ 2,500,000
Children receive	**$ 7,500,000**

Plan with Disclaimer Trust

Husband	Disclaimer Trust	Wife
$5,000,000		$ 5,000,000
Husband dies first and wife disclaims the $5,000,000 so that it moves to trust column - – no tax because husband's unified credit (u.c.) is applied	$ 5,000,000	
Wife dies 2nd; unified credit (u.c.) is applied & amt passes to kids		($5,000,000) – no tax
Balance subject to NY and Federal estate tax		$ 0
Balance of Disclaimer Trust passes to kids	($5,000,000) – no tax	
Children receive		**$10,000,000**

The illustration shows that the plan with the Disclaimer Trust results in more assets passing to the children and less estate tax being paid.

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Plan with fully funded Disclaimer Trust and increase in value of assets

Husband	Trust	Wife
$5,000,000		$ 5,000,000
Husband dies 1st u.c. applied	$5,000,000 - no tax	
Many years pass & assets grow	$10,000	
Wife dies 2nd; u.c. applied; goes to kids		($5,000,000) – no tax
Balance subject to NY and Federal estate tax		$ 0
Balance Trust pass to kids	$10,000,000 - no tax	
Children receive		**$ 15,000,000**

The illustration shows that through the use of the Trust, the appreciation escapes estate tax and more money passes to the children and less is paid in estate tax.

Some clients may prefer to create a mandatory trust as part of the estate plan to utilize this applicable federal exclusion amount. A Will can contain a Credit Shelter Trust (or Bypass Trust), which is a trust created in an amount equal to an individual's available applicable exclusion amount (unified credit), indexed for inflation, that is exempt from estate tax upon Testator's death. Because the estate tax law is so much in flux, many estate planners are using the optional Disclaimer Trusts in place of the mandatory Credit Shelter Trust. Fully funding a Credit Shelter Trust may have an adverse financial impact on the surviving spouse. These Disclaimer Trusts offer the same benefit of the Credit Shelter Trust but have the added benefit of allowing the surviving beneficiaries, usually the spouse, to decide how much to protect from estate tax after first spouse dies.

The disclaimer of assets into the Disclaimer Trust must be made within nine months of the Grantor's date of death. The Will may include a provision that allows the surviving spouse to disclaim inherited property, real or otherwise (whether by operation of law or through the Will), so that it can be added to a Disclaimer Trust or Credit Shelter Trust which would use the testator's applicable exclusion amount.

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The Credit Shelter Trust or Disclaimer Trust is often created for the benefit of surviving spouse but can be created for the benefit of children or grandchildren or a class of beneficiaries consisting of the spouse and children. The amount placed in this Trust (and any growth on those assets) will pass free of estate tax on both the decedent's death and the spouse's death (if created solely for the spouse). This trust will not pass through probate on the death of the surviving spouse (if created solely for the spouse). There is also ease administration of assets if the spouse is disabled or elderly.

In both the Credit Shelter Trust and in the Disclaimer Trust, the Will can provide that the spouse has a limited power to withdraw principal, such as a 5/5 power. A 5/5 power gives the surviving spouse the non-cumulative right to withdraw from the principal, the greater of $5,000 or 5% of the principal each year (or a lesser amount) (Code §2041(b)(2)). The spouse has the freedom to withdraw funds with "no questions asked" by Trustees. In that way, the spouse will still have access to the assets without having to always ask the Trustee for a "hand-out." However, on the death of the surviving spouse, 5% of the principal will be included in the surviving spouse's estate.

This type of Trust also enables issue to receive assets sooner as both trusts can incorporate a "sprinkling power" for the benefit of the surviving spouse and issue which would allow for distributions to spouse and/or issue based on differing needs of family members.

These Trusts can also hold retirement accounts. The benefit to this beneficiary designation is that it allows for the application of the decedent's unified credit against retirement assets. Also, it ensure that assets pass to specific beneficiaries upon death of spouse (i.e., children from first marriage) as opposed to the surviving spouse rolling over the retirement assets into his or her name and leaving uncertainty as to whom the spouse will name as beneficiary of this account. In this way, the retirement assets will be protected in case the surviving spouse remarries.

The requirements for a qualified disclaimer are contained in New York Estates, Powers and Trusts Law ("EPTL") §2-1.11(c)(2), IRC §2518(b) and in Treas. Reg. §25.2518-2 and a form of disclaimer is attached hereto as Exhibit A:

- Irrevocable
- In writing.
- Within 9 months of taxable transfer.
- No acceptance of interest or benefits
- Disclaimed interest passes without direction and pass to someone other than disclaimant (unless it is for the benefit of the surviving spouse).

A beneficiary may elect to disclaim his or her right to inherit (EPTL §2-1.11 and IRC §2518). The final treasury regulations were issued on December 31, 1997. A qualified disclaimer must be made in writing and filed within nine (9) months of the decedent's date of death or nine (9) months after the taxable transfer occurs in the case of a disclaimer not related to the death of a decedent (EPTL §2-1.11(b)(2) and §25.2518-2(c)). A beneficiary can disclaim interests under the decedent's Will or any other non-testamentary assets (i.e. trust agreement, life insurance, retirement accounts and plans, joint or totten trust accounts, etc.). Additionally, powers of appointment can be disclaimed as can a distributive share under EPTL §4-1.1 and Treas. Reg. §20.2041-3(d). Such an interest can be pecuniary (Treas. Reg. §25.2518-3(c)), an interest in a trust, a specific asset, life insurance and retirement benefits (PLR 200105058). See also, EPTL §2-1.11(b)(1).

A qualified disclaimer must be in writing. The writing must identify the interest in property being disclaimed and be signed either by the disclaimant or by the disclaimant's legal representative (Treas. Reg. §25.2518-2(b)(1)). It must be delivered to the transferor of the interest, the legal representative of the transferor or the holder of legal title to the property to which the interest related (Treas. Reg. §25.2518-2(a)(3) and (b)(2).

The effect of a qualified disclaimer for a Federal estate, gift and generation-skipping, transfer tax, is that the property is treated as if it had never been transferred to the person making the qualified disclaimer. Instead, it passes directly from the transferor of the property to the person entitled to receive the property as a result of the disclaimer. Treas. Reg. §25.2518-1(b).

Once the completed gift is made, the disclaimant has nine (9) months to make the disclaimer (see Treas. Reg. §25.2518-2(c)(3) and (c)(5) at example 6 and

EPTL §2-1.11(c)(2).) When the beneficiary is a minor, the disclaimer must be filed within nine (9) months after the disclaimant attaining the age of twenty-one (21) years (see Treas. Reg. §§§25.2518-2(c)(1)(ii), (d)(3) and (d)(4) at examples (9) and (11)). The Courts have held that an extension of time to file an estate tax return does not extend the nine (9) month period for filing a disclaimer. This nine (9) month time frame is hard and fast for filing qualified disclaimers. It is important to note that a disclaimer can be made after the nine (9) month period by filing a petition with the court showing reasonable cause for the extension (EPTL §2-1.11(c)(2)). However, it will not be considered a qualified disclaimer and a taxable gift will occur upon the passing of the interest from the disclaimant to the next interested party.

Disclaimers are irrevocable once they are made (EPTL §2-1.11(h) and Treas. Reg. §25.2518-2(a)(1)). The beneficiary cannot disclaim any asset which such beneficiary already accepted (Treas. Reg. §25.2518-2(d) and EPTL §2-1.11(g)). Accepting income from the property also will disqualify the disclaimer (see PLR 9243024). However, continuing to live in the residence which was jointly held does not constitute the acceptance of the decedent's half of the joint interest, whether as tenants-by-the-entirety or as tenants-in-common (Treas. Reg. §25.2518-2(d)(4) at example (8), PLR 8508079). The IRS has found that in the case where the residence was owned solely by the decedent and the surviving spouse continues to live it, such continued residency constitutes acceptance of the asset (PLR 8817061).

In general, under Treas. Reg. §25.2518-2(c)(4)(i), a disclaimer of an interest in joint tenancy must be made within nine (9) months of the transfer creating the joint tenancy not at its vesting (see also, Estate of Edward J. O'Brien, T.C. Memo 1988-240 (May 26, 1988). However, a qualified disclaimer can still be made of the survivorship interest passing by operation of law upon the death of the first joint tenant so long as it is within nine (9) months of the death of the joint tenant and is severable. This result was due to the IRS issuing an Action On Decision 1990-06 when it acquiesced in McDonald v. Comm'r, 853 F.2d 1494 (8th Cir. 1988). In this Decision, the IRS stated that:

> Where a joint tenant has the right to sever the joint tenancy or cause the property to be partitioned under state law, the Service will no longer litigate

> that the transfer relative to which the timeliness of the disclaimer of a survivorship interest is measured refers to the transfer creating the joint tenancy. The Service will also no longer contend that a joint tenant cannot make a qualified disclaimer of any portion of the joint interest attributable to consideration furnished by that joint tenant.

The final regulations reiterated this decision in Treas. Reg. §25.2518-2(c)(4)(i)-(iii) and adopted the rationale of the Fourth, Seventh and Eight Circuits laid out in Kennedy v. Commissioner, 804 F.2d 1332 (7th Circuit 1986), McDonald v. Comm'r, 853 F.2d 1494 (8th Cir. 1988) and Dancy v. Commissioner, 872 F.2d 84 (4th Circuit 1989). Additionally, tenancy-by-the-entirety was given the same treatment as a joint tenancy with right of survivorship because of the concern that couples do not focus on the impact of their decision on their future ability to disclaim when they buy a home (see also Treas. Reg. . §25.2518-2(c)(4)(ii)).

If the person funding a joint bank account can withdraw all of the money then there is no completed gift to the other joint tenant (Treas. Reg. §25.2518-2(c)(4)(iii)). The surviving joint tenant can disclaim the entire account within nine (9) months of the death of the funding joint tenant (Treas. Reg. §25.2518-2(c)(5) example (9)). However, if the surviving joint tenant contributed assets to such account, then such contributed property may not be disclaimed. Under Treas. Reg. §25.2518-3(b), the disclaimant can disclaim an undivided portion. EPTL §2-1.11(c)(1) covers disclaimers of jointly held interests.

The final component to the disclaimer is that the disclaimed interest must pass without any direction on the part of the disclaimant (Treas. Reg. §25.2518-2(e)). Also, it cannot pass in any form to the disclaimant. For example:

> $100,000 is left in trust for John but if he predeceases, the bequest lapses and becomes part of residuary. The residuary is left to the Decedent's two children, one of whom is John.
>
> If John disclaims the $100,000 trust, then John cannot receive his share of the $100,000 as part of the residuary. He would need to file a second renunciation disclaiming his interest in the $100,000 under the residuary clause.

There is an exception to this criteria and that is if the disclaimant is the spouse (Treas. Reg. §25.2518-2(e)(2)). For example:

The residuary is left entirely to the surviving spouse. If the spouse disclaims some or all of the residuary, then the disclaimed amount passes into the Disclaimer Trust for the benefit of the surviving spouse. However, the surviving spouse cannot retain the right to direct the beneficial enjoyment of the property. Therefore, the Disclaimer Trust cannot contain a power of appointment exercisable by the spouse. Treas. Reg. §25.2518-2(e)(2) and §25.2518-2(e)(5) example (4) and EPTL §2-1.11(f).

Disclaimers are filed in Surrogate's Court and must be accompanied by an affidavit of the disclaimant that he or she has not received any consideration for making such disclaimer from someone whose interest is accelerated by the disclaimer (a copy of which is attached hereto as Exhibit B). Notice of the renunciation, including a copy of the renunciation, must be served personally on the fiduciary directed to make the disposition or upon the person or entity having custody of the disclaimed asset(s) and by mail on all persons interested in the matter (a copy of which is attached hereto as Exhibit C together with an affidavits of service). Once the disclaimer is accepted by the Court, the filing of the disclaimer has the same effect as if the disclaimant had predeceased the creator of the interest or the decedent, as the case may be (EPTL §2-1.11(e)).

In addition to the person with the interest in the asset to be disclaimed, when authorized by the Court, a renunciation may be made by the guardian of an infant, a committee of an incompetent, the conservator of a conservatee, a guardian under MHL Article 81 and by the personal representative of a decedent (EPTL §2-1.11(d)) (a copy of a Petition requesting permission to file a disclaimer on behalf of a decedent is attached hereto as Exhibit D). Additionally, if a power of attorney gives the attorney-in-fact the authority to make a disclaimer, then such a disclaimer is authorized. However, if the grantor of the power of attorney is disabled at the time of the disclaimer, then Court permission is required under EPTL §2-1.11(d)(6).

Treas. Reg. §25.2518-3(a) covers partial disclaimers as does EPTL §2-1.11(c)(1) and (f). Also, a disclaimant may accept one disposition and disclaim another. Renouncing a fractional interest only serves to renounce that specific part of the interest and not the entire interest. For example:

> $100,000 is bequeathed to John but if he predeceases, the bequest lapses and becomes part of residuary. John can renounce $50,000 and accept $50,000.

Additionally, if an income interest and a remainder interest are bequeathed to a person, such person can disclaim the income interest and keep the remainder interest. If the beneficiary disclaims an income interest and a remainder interest in specific trust property, then those specific assets must be removed from the Trust in order for the disclaimer to be qualified (Treas. Reg. §25.2518-3(a)(2)). The examples found at Treas. Reg. §25.2518-3(d) illustrate the provisions of partial disclaimers.

In addition to planning using the applicable exclusion amount, married couples have the advantage of the marital deduction whereby assets left to a surviving spouse are not subject to estate tax (IRC §2056). In addition to outright transfers to the surviving spouse, the decedent can pass assets to the surviving spouse in a qualified terminable interest trust ("QTIP"). The Executor must elect QTIP status on the Form 706 which causes these assets to be includable in the surviving spouse's estate on the second death and therefore, subject to estate tax. The QTIP Trust is a trust which provides that at a minimum all income is given to the surviving spouse, the spouse is the sole beneficiary of the trust, the spouse can direct the Trustee to invest in income producing assets and the trust provides that the Executor must make a QTIP election. The QTIP Trust is used for many reasons including to ensure that assets pass to children (especially in cases where there are children from a prior marriage), prevent assets from passing to new spouse if spouse remarries following Grantor's death and to ease the administration of assets if the spouse is disabled or elderly.

Prior to 1988, assets passing to a non-citizen spouse were not eligible for the marital deduction. However, the Technical & Miscellaneous Revenue Act of 1988 (TAMRA) created the Qualified Domestic Trusts ("QDOT"), effective for decedents dying after November 10, 1988. The purpose of this new Trust was to provide a method for passing property to the non-citizen spouse that would qualify for the unlimited marital deduction. Therefore, in place of the QTIP Trust, when the Testator is married to a non-citizen spouse, the Will must contain a QDOT to secure marital deduction for assets passing to non-citizen

spouse (IRC §2056A and Treas. Reg. §20.2056A). Here too, the Executor must make election. If the Will does not provide for a QDOT, the executor or the surviving spouse may elect to create a QDOT and transfer the inherited assets to the QDOT before the date on which the estate tax return is due. The Executor must elect QDOT status on the Form 706.

There are very stringent restrictions on the QDOT. At least one trustee must be a USA citizen and that trustee has the right to withhold from the distribution the IRC §2056A(b) tax. The Trust must meet the requirements set by regulations to collect tax. In addition, it must satisfy requirements under IRC §2056(b). Distributions of income and hardship distributions of principal (immediate and substantial financial need relating to health, maintenance or support when other funds are not available) are not subject to estate tax. Any other distributions are subject to estate tax and the Trustee must withhold the tax to ensure it is paid. If the QDOT has assets in excess of $2,000,000, the Will must provide for one of the following scenarios: (1) the U.S. trustee must be a bank, (2) the individual U.S. trustee must furnish a bond for 65% of the date of death value of the QDOT assets, or (3) the individual U.S. trustee must furnish an irrevocable letter of credit to the U.S. government for 65% of the date of death value of the QDOT assets. Non-probate assets may be transferred to the QDOT at any time before the estate tax return is due to be filed. If these assets are not transferred, then the Testator's applicable credit amount will be allocated to these non-probate transfers.

In both the QTIP Trust and the QDOT, other provisions that can be included are an exclusive special power of appointment to the surviving spouse to allow for flexibility in distributing assets to surviving issue upon the death of the spouse (EPTL §10-3.2). The Will can alternatively provide for a general power of appointment to the surviving spouse to allow for flexibility in the spouse's estate plan since the trust assets will be includable in spouse's estate upon such spouse's death (EPTL §10-3.2).

The Generation Skipping Transfer ("GST") Tax was originally enacted in 1976 in an effort to prevent passing assets to grandchildren to escape estate tax owed at the child level. The GST Tax is applied in three situations: Direct Skip, Taxable Termination, or

Taxable Distribution. A direct skip occurs when a transfer is made directly to a "skip person" who is a person assigned to a generation that is two or more generations below the donor's generation, or a trust whose beneficiaries are all skip people or if no person holds an interest in the trust (for example in the case of a charitable lead trust) but at no time after the transfer of assets to the trust can the Trustees distribute assets to a non-skip person. A noted exception is the spouse who will not be deemed to be a skip person even if more than 37 ½ years younger than the donor. IRC §2651. In the situation of a testamentary transfer where the testator's child predeceases and the grandchild inherits in place of the child, the grandchild stepping up a generation is not considered to be a skip person. The child is deemed to have predeceased if the child did not survive the testator by at least 90 days. The 90-day rule applies to transfers occurring on or after July 18, 2005. See Treas. Reg. §26.2651-1(a)(2)(iii). There is no direct skip in this case. IRC §2612(c)(2). In the case of a disclaimer, there is no step up, despite the fact that a grandchild is not receiving the inheritance.

The second scenario is a taxable termination which occurs when the interest of a nonskip person ends in a trust and the assets then pass to a skip person. For example, upon the death of the child who was the trust beneficiary, the trust assets pass to the grandchild. The third situation is a taxable distribution which occurs when a distribution is made from a trust to a skip person in a scenario other than a direct skip or a taxable termination.

The GST Tax does not apply in the following situations:

1) Transfers made prior to September 25, 1985. Any trust created before that date is considered "grandfathered" for GST Tax purposes and distributions from such a trust would not be subject to the GST Tax. However, if additions are made to a grandfathered trust, the trust becomes partially taxable unless GST Tax exemption is allocated to this new transfer.

2) Transfers under a will or revocable trust if the will or trust was executed before October 22, 1986, and the decedent died before January 1, 1987.

3) Annual exclusion gifts. IRC §2611(b)(2). The annual exclusion is defined at Code, §2503(b), and provides that up to $15,000 (indexed for inflation) can be gifted

annually during a client's lifetime to as many individuals as the donor desires. There is no limit on to how many people or to whom you may benefit. The gift must be gift of present interest (right to immediately enjoy the gift) and applies only to gifts between individuals. If the annual exclusion gift is made to a trust, then under the Technical Corrections and Miscellaneous Revenue Act of 1988 (TAMRA), the exception is limited to transfers that are direct skips which in this context must satisfy three criteria: a) the trust is for only one beneficiary who is a skip person; 2) no one else can receive distributions during the beneficiary's lifetime; and 3) if the beneficiary dies before the trust terminates, the trust estate must be included in the beneficiary's estate for tax purposes.

4) Transfers made directly to education institutions or healthcare providers, which are also exempt from gift tax under IRC § 2503(e). IRC §2611(b)(2).

Under the current law, each person has a GST tax exemption amount which can be used during lifetime or upon death to avoid payment of federal GST tax (current rate is 40% and is usually paid by donor). Currently, up to $11,180,000 can be gifted during lifetime to a grandchild or more remote descendant, or to an individual 37 1/2 years younger than the donor who is not a family member. Upon death, the rules provide that up to $11,180,000 can be transferred to a grandchild or more remote descendant, or to an individual 37 1/2 years younger than the donor who is not a family member. However, this amount will be reduced by any amount used to shelter lifetime gifts to such type of person from federal GST tax. See IRC §2631.

GST planning takes many forms. Outright gifts to grandchildren can accomplished. However, in planning for use of a donor's GST tax exemption during lifetime, the attorney should inform the donor that assets can be transferred during lifetime to a trust and still qualify for the exemption. Therefore, the donor has more gifting options available than simply outright gifts to grandchildren. In addition to trusts created just for grandchildren, the donor can apply the GST Tax exemption against a Trust for the benefit of the spouse and issue or spouse then issue. If the intent is not to use the GST Tax exemption on a particular trust, issue can be given general power of appointment in a trust in case of death before trust terminates to avoid application of GST tax.

By using the Grantor's GST Tax exemption as part of the plan, the testator can protect grandchildren from creditors, preserve assets in the case of divorce, shield assets in the event of a business failure and assist the grandchildren in asset management. This Trust also preserves assets and prevents grandchildren from rushing to sell them upon inheritance. Using a GST Trust also enables the testator to ensure that there are sufficient funds available for education if the grandparent dies before the grandchild's education is completed.

The Federal U.S. Gift (and Generation-Skipping Transfer) Tax Return (Form 709) must be filed in April of the year following the date of the gift if more than the annual exclusion is gifted or if a discount was taken when valuing annual exclusion gifts. On the Form 709, the donor reports the fair market value of the gift on the date of the transfer, the tax basis (as donor) and the identity of the recipient and allocates the GST Tax exemption to the gift. The donor must attach supplemental documents to support the valuation of the gift, such as financial statements and appraisals.

Treas. Regulation §20.2031-1 defines fair market value as:

> The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate.

There is no joint gift tax form. If a husband and a wife each make a taxable gift, each spouse must file a Form 709 to report the gift and allocate the GST Tax exemption. If husband and wife are splitting an annual exclusion gift, then each of them must file a Form 709 to reflect the split gift.

The gift tax is a tax on the transfer of any type of property by one individual to another while receiving nothing, or less than full value, in return. The taxable transfer

includes a gift of the use of or income from property, the sale of an asset for less than its full value and an interest-free or reduced-interest loan. The tax applies once the donor has exhausted his lifetime applicable credit amount.

By filing the Form 709, the three year statute of limitations begins to run on the transaction. If the donor chooses not to file a gift tax return, the IRS can question the valuation of the transferred property at any time in the future. Therefore, even in the case of a transfer limited to the annual exclusion or sale of property for full fair market value, the transferor may still wish to file a Form 709 if the value of the transfer could be contested in the future (such as in the case of hard to value assets like heirlooms, business interests and artwork).

The Form 709 should be prepared by the donor's attorney or by the donor's accountant with review by his attorney. A copy of the Form 709 should be keep in the donor's file at the attorney's office since copies will be needed upon the death of the donor and in the event the donor intends to make future gifts. Additionally, in order to calculate any GST Tax that may be owed at the time the Trust terminates, the Trustees will need to know when the original gift was made in order to apply the appropriate tax rate upon termination.

In addition to lifetime gifts, the GST tax exemption can be applied against testamentary bequests. In an estate plan using a Marital Trust, the executor can make a Reverse QTIP Election on the Estate tax return under IRC §2652(a)(3). This election is made when the decedent's GST tax exemption exceeds the decedent's available unified credit. Therefore, there would be wasted GST tax exemption upon the decedent's first death. The reverse QTIP election is made against the Marital Trust causing the decedent's remaining GST tax exemption to be applied to some or all of the Marital Trust. This election causes the assets in the Marital Trust to be treated as passing from the first spouse for GST tax purposes only despite the fact that this Trust is includable in the second spouse's estate.

When a donor contemplates gifts to grandchildren to be used for expenses in addition to education expenses or wants greater investment options for the gift, instead of

making a gift to the §529 Plan (or in addition to), the donor may wish to make a gift to 2503(c) Trust (see Code §2503(c)). The Trust is created to receive annual exclusion gifts for a grandchild, which as discussed previously is $15,000, indexed for inflation. The Trust can also be used for larger gifts that utilize the Grantor's applicable exclusion amount. Placing interests in LLCs or LLPs may be the best way to pass shares of a business to the next generation and secure a discount for the transfer of a minority interest in the business. By holding these interests in the Trust, the beneficiary will not be able to control the entities while still a minor or even into adulthood.

Upon the beneficiary attaining the age of 21, the beneficiary must be given at least 30 day notice of right to withdraw all trust assets. If beneficiary chooses not to withdraw trust assets, the trust can continue for the benefit of the beneficiary. This trust passes money to the next generation and avoids probating these assets. The beneficiary's enjoyment of the proceeds is not tied into waiting for the donor to die or for appointment of an Executor or Testamentary Trustee. Additionally, the use of such a trust passes assets outside of the donor's estate before the donor dies causing there to be less available assets subject to estate taxes and probate upon the donor's eventual death. However, there is a risk inherent with this plan that the beneficiary will take the assets at 21 and not leave them in the trust. Careful guidance must be given to the donor and the beneficiary as to why leaving the assets in the trust is beneficial.

Upon making the gift to this Trust, the Grantor files a Form 709 to report the gift and allocate the GST Tax Exemption to the gift.

Upon the death of the business owner, the business is valued as the fair market value on the decedent's date of death (26 C.F.R. § 20.2031-1(b)). Therefore, the executor will need to get an appraisal to ascertain its value. If the decedent was a minority shareholder or the shareholder restricts transfers, then the value of the business interests may be subject to a valuation discount. Discounts are commonly applied for the following reasons:

- Lack of control.
- Lack of marketability.

- Environmental hazards.
- Loss of key person.
- Litigation risks.

In order to leverage market value discounts, clients may wish to create a Family Limited Partnership (FLP) or Limited Liability Company (LLC) under state law to carry on a business purpose can be used to shield client from personal liability by transferring ownership of the property from individual names into the FLP or LLC. In general, family members are the limited partners. The general partner (GP) is liable fully for all partnership debts and controls the partnership. The GP can be a corporation or a limited liability corporation to minimize exposure. The liabilities of the limited partners are limited to interest owned and they are not personally liable for partnership debts.

Gifts or sales of the partnership interests to the family members qualify for minority interest and lack of marketability discounts because the limited partners have minority interests, lack control of the entity and have restrictions on transferability. Proposed legislation has been introduced to deny discounts for Family Limited Partnerships and Limited Liability Companies funded with marketable securities. The law will not be retroactive. The attractive feature of this gifting strategy is that successful leveraging of annual exclusion gifts can transfer greater interests in the FLP to family members each year. However, the IRS has successfully challenged some of FLPs under the argument the donor still retained control of the transferred assets so no completed gift was made. Therefore, the assets are includable in the donor's estate. Caution should be used with this plan because of the great risk of audit.

When a client gives away or sells a partial interest in an asset such as real estate, a partnership or a limited liability company, the donor is able to take a discount for lack of marketability and/or control. This gift of this minority interest allows the donor to give away more of the asset without having to use more of his or her annual exclusion, lifetime gift tax exclusion and Generation Skipping Transfer tax exemption. For example:

> Partnership is valued at $1,000,000. Donor wishes to give his three children and five grandchildren annual exclusion gifts of his interest in the partnership. Therefore, the donor can give this class of beneficiaries a total

of $120,000 in annual exclusion gifts ($15,000 x 8). He can split this gift with his wife and give away a total of $240,000.

However, if the donor has the partnership appraised and the appraisal values the effect of the lack of marketability and the lack of control present in the gifted interests to the donor's children and grandchildren, then the appraisal will show that the donor is entitled to take as much as a 35% discount with respect to the transfer. The donor can now give away an interest valued at $184,615 (before the discount is applied) to this class of beneficiaries and for split gift purposes he and his wife can give away $369,230. By utilizing this discount technique, the donor and his wife are able to gift an additional $129,230 to their children and grandchildren without having to use any of their lifetime gift tax exemption or lifetime GST tax exemption.

As part of a corporate governing agreements, there can be requirements to appraise the business every 5 years, typically based on highest and best use. An operating agreement or lease should provide that the appraisal should be based on current use versus best use to avoid risk of over valuation. The client should use a reputable company in case of an audit.

There are three main ways to value a business: Asset Approach, Earning Value Approach and Market Approach. The Asset Approach totals the corporations underlying assets. It can use a going concern asset-based approach that lists the net balance sheet value of its assets and subtracts the business's liabilities. The liquidation asset-based approach determines the cash resulting from a sale of all assets and paying off all liabilities. The Earning Value Approach calculates what the business will be worth. The appraiser can capitalize past earnings by determining the expected cash flow based on past earnings. These earnings are then normalized for unusual revenue or expenses, and multiplied by a capitalization factor which is a determination of what rate of return a purchased would expect on the investment coupled with the risk that the return will not be realized. The appraiser can instead take an average of the predicted future earnings and divide by the capitalization factor. Strong businesses which are well established may use a capitalization rate of 12% to 20%. Unproven business might use a capitalization rate of 25% to 50%. The Market Value Approach compares the business to other businesses in the same industry which have recently been sold. Sometimes appraisers combine these approaches

in order to more accurately value the business. Corporate agreements can specify which methodology to use in different circumstances such as for sales, death or withdrawal.

STATE TAX PLANNING

Since New York and the Federal governments have different taxable estate thresholds, attorneys must focus on the risk of estate tax being owed on the first death for state purposes. The top New York estate tax rate is 16% which applies when the taxable estate is over $10,100,000. Amounts below that threshold are subject to estate tax at graduated rates, starting at 3.06% for the first $500,000.

Presently, there is a disconnect between the Federal and the New York applicable exclusion amounts. New York law is as follows:

For deaths as of April 1, 2017 and before January 1, 2019, the exemption is $5,250,000.

As of January 1, 2019 and after, the exemption amount will be linked to the former federal amount ($5,490,000), indexed for inflation. We do not know if New York will revise this law now that the federal amount has changed.

If the estate plan ties the Credit Shelter Trust into the amount of the federal applicable exclusion amount, then there will be New York estate tax owed on the first death. Rather than just be owed on the difference between the New York amount and the federal amount, instead the entire estate is taxed. The reason is because of the "cliff." If the amount of the client's taxable estate is more than 5% of the New York exclusion amount, then the client loses the ability to take advantage of New York's exclusion. Attorneys refer to this event as falling off the estate tax cliff. The estate will be subject to New York estate tax starting from dollar one. For example,

> Client dies on October 23, 018 with a taxable estate of $5,000,000. No New York estate tax is due because New York's estate tax exclusion is $5,250,000 which exceeds this amount.

> Client dies on October 23, 018 with a taxable estate of $5,525,000. New York estate tax is due on the entire $5,525,000 because this amount exceeds the exclusion by $275,00. This $275,000 is more than 5% greater than $5,250,000. The estate tax will be $453,800 because the full $5,525,000 is subject to estate tax instead of just the overage of $275,000.

See "Understanding New York's Estate Tax "Cliff, Nicole Hart, March 26, 2018.

Therefore, in order to avoid falling off the cliff, the client may wish to utilize a Disclaimer Trust in the estate plan to shelter only an amount up to the New York exclusion in the event that the federal and the New York exclusions are different. Another option is to have an amount equal to the New York exclusion pass into a Credit Shelter Trust and the excess pass into a Marital Trust.

PORTABILITY ESSENTIALS

As an alternative to planning using the Credit Shelter Trust or the Disclaimer Trust, beginning in 2011, a surviving spouse can make a portability election and use the Deceased Spousal Unused Exclusion ("DSUE") amount. The portability election is made on the deceased spouse's Form 706 which includes a computation of the DSUE amount (Sections 302(a)(1) and 303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296, 3302 (2010), IRC §2010(c)). IRC §2010(c)(2) defines the applicable exclusion amount as the sum of the basic exclusion amount ($10,000,000 adjusted for inflation IRC §2010(c)(3)(C)) and, in the case of a surviving spouse, the DSUE amount. IRC §2010(c)(4) defines the DSUE amount as the lesser of (A) the basic exclusion amount or (B) the excess of the basic exclusion amount of the last deceased spouse of the surviving spouse over the amount with respect to which the tentative tax is determined under section 2001(b)(1) on the estate of such deceased spouse. In 2018, the basic exclusion amount is $11,180,000 as discussed earlier in this Article at "Proper Use of Disclaimers and Valuation Discounts."

For example, if a husband predeceases his wife and leaves everything to his wife, then before portability, he would forfeit his ability to give money to the next generation free of estate tax. The legislation changed that result, in effect giving the benefit of tax

planning to those who may not have gone to an attorney or tax advisor. With portability, the unused federal estate exemption is "portable." In other words, upon her death, the wife's estate can use the husband's unused federal estate exemption. There would be no need for a Credit Shelter Trust or Disclaimer Trust in this example. Numbers rounded in example below for easier illustration and are based on the sunset of The Tax Cut and Jobs Act, Pub. L. No. 115-97 on December 31, 2025 which reduces the unified credit to ~$5,600,000.

Plan without Portability

Husband	Wife
$5,000,000	$ 5,000,000
Husband dies first and his $5,000,000 moves to Wife's column	$ 5,000,000 – no tax
	$10,000,000
Wife dies 2nd; unified credit (u.c.) is applied & amt passes to kids	($5,000,000) – no tax
Balance subject to NY and Federal estate tax	$5,000,000
Approximate combined tax rate 50%	($2,500,000) – tax
Balance passing to children	$ 2,500,000
Children receive	**$ 7,500,000**

Plan with Portability

Husband	Wife
$5,000,000	$ 5,000,000
Husband dies first and his $5,000,000 moves to Wife's column	$ 5,000,000 – no tax
	$10,000,000
Wife dies 2nd; unified credit (u.c.) is applied & amt passes to kids	($5,000,000) – no tax
Balance subject to NY and Federal estate tax	$5,000,000
Husband's u.c. applied using Portability & amt passes to kids	($5,000,000) – no tax
Balance subject to NY and Federal estate tax	$ 0
Children receive	**$10,000,000**

The illustration shows that the plan with portability results in more assets passing to the children and less estate tax being paid. However, there are some significant problems with "portability."

1. Although portability remains effective, we do not know how long this legislation will be extended.
2. Portability of the unused exemption is lost if the surviving spouse remarries and predeceases the new spouse. So, in the above hypothetical, if husband predeceases wife, wife could theoretically use husband's unused exemption when she dies. However, if wife remarries, that option will be lost if her second husband dies before she does.
3. Portability does not protect against appreciation in value. Again, in the above hypothetical, assume that husband predeceases and leaves everything to wife. Wife's estate is now over $5,600,000 but she can use husband's unused exemption assuming she does not remarry. Now, assume that wife outlives husband by 20 years and that on wife's death, husband's former assets have grown to $10,000,000. Husband's unused exemption will cover only $5,600,000, possibly leaving assets that would be subject to a federal estate tax. Had wife used his exemption with the use of a Credit Shelter Trust or Disclaimer Trust, the increased value would remain part of husband's estate and not be taxed on wife's death.
4. Portability is just a federal concept and will not protect against New York estate tax on the second death.

Plan with Portability and increase in value of assets

Husband	Wife
$5,000,000	$ 5,000,000
Husband dies first and his $5,000,000 moves to Wife's column	$ 5,000,000 – no tax
	$10,000,000
Many years pass and assets have grown	$15,000,000
Wife dies 2nd; unified credit (u.c.) is applied & amt passes to kids	($ 5,000,000) – no tax
Balance subject to NY and Federal estate tax	$10,000,000
Husband's u.c. applied using Portability & amt passes to kids	($ 5,000,000) – no tax
Balance subject to NY and Federal estate tax	$ 5,000,000
Approximate combined tax rate 50%	($ 2,500,000) – tax
Balance passing to children	$ 2,500,000
Children receive	**$12,500,000**

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Plan with fully funded Disclaimer Trust or Credit Shelter Trust and increase in value of assets

Husband	Trust	Wife
$5,000,000		$ 5,000,000
Husband dies 1st u.c. applied	$5,000,000 - no tax	
Many years pass & assets grew	$10,000	
Wife dies 2nd; u.c. applied; goes to kids		($5,000,000) – no tax
Balance subject to NY and Federal estate tax		$ 0
Balance Trust pass to kids	$10,000,000 - no tax	
Children receive		**$ 15,000,000**

The illustration shows that through the use of the Trust, the appreciation escapes estate tax and more money passes to the children and less is paid in estate tax.

STEP-UP BASIS MUST HAVES

A new basis reporting requirement was enacted in 2015 with the passage of Section 2004 of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015. The new law requires the Executor of an estate required to file for a Form 706 filed after July 31, 2015 to report the estate tax value of property to both the IRS and to the beneficiary in order to ensure that the proper basis is used for capital gains tax purposes. The Executor does so by filing Form 8971, Information Regarding Beneficiaries Acquiring Property From a Decedent, with attached Schedules A to the IRS, and by providing a copy of the beneficiary's Schedule A to that beneficiary within 30 days of the earlier of the due date (including extensions) or filing of Form 706 (see Exhibit E). Because of confusion regarding the new law and the rollout, the reporting and filing requirement was delayed until June 30, 2016. See Notice 2016-27, 2016-15 I.R.B. 576. The requirement to file Form 8971 is waived if the return was filed only for the purpose of making a portability election or generation skipper transfer tax election. In general, the basis of property is

either the fair market value of the property on the date of the decedent's death or on the alternate valuation date (six months following the decedent's death).

By gifting undervalued assets in today's market at the lower values, the donor is able to transfer what would otherwise highly valued assets, at reported values well under expected future be worth. Additionally, the donor can gift assets that are expected to appreciate in the future. The donor will use less of his or her annual exclusion, lifetime gift tax exclusion and GST tax exemption on the gift. The donor can minimize gift and GST taxes by taking advantage of these lower values. Additionally, the donor can give away a larger percentage of that asset or additional assets by gifting the asset at its depressed value.

Assets do not receive a step-up in basis on the date of the gift but do receive a step-up in basis if transferred upon death. Therefore, the donor must weigh benefit of giving away highly appreciated assets during lifetime to reduce potential estate tax against the loss of the step-up in basis the donee would have received had the donor passed the same asset to the donee upon death (IRC §1014). In general, the capital gains tax the donee will have to pay upon sale of the asset will be less than the estate tax owed on the same asset if the donor's estate will be subject to estate tax. However, with the unified credit at $11,180,000, indexed for inflation through 2025, the likelihood of paying federal estate tax during this period has decreased dramatically. Since, the estate tax laws are so much in flux, a client may still wish to make lifetime gifts by gambling that the credit will revert to its former level of ~$5.6 million in 2026 and the asset will appreciate in value.

In planning for a gift of an appreciated asset to an irrevocable trust, the donor should obtain an appraisal of the asset. Appraisals are essential for hard to value assets such as real estate, art, collectibles and closely held business interests. These appraisals will be the basis for determining the fair market value of the gift and can be challenged by the IRS. Therefore, the donor should work with the attorney to consult a valuation expert knowledgeable about the specific asset to be gifted.

Gifting highly appreciated assets makes sense when the donor is in a higher tax bracket than the donee. By doing so, the donee can sell the asset and be taxed in a lower

tax bracket than the donor. Conversely, when an asset depreciates, the donor should first sell the asset if the donor can take advantage of the capital loss on his own return. Following the sale, the donor then gifts the sale proceeds to the donee.

Since the gift is valued as of the date of the gift for gift tax purposes, any post-gift increase in the value of the property escapes the donor's estate which will reduce estate tax owed upon the donor's death. Therefore, in deciding which assets to gift, consideration should be given to how much the asset is expected to appreciate in the future in addition to the present value of the gift and its appreciation to date. Again, with the applicable exclusion so high, the risk of estate tax is greatly reduced, so that this concern becomes less motivating.

The basis of property inherited from a decedent is used to calculate capital gains tax when assets are sold following the decedent's death. Any inherited capital property that is sold results in a long term capital gain (or loss) regardless of how long the estate or beneficiary held the property. For capital gains tax purposes, the basis of appreciated property received by the decedent as a gift within one year of the decedent's death that passes back to the spouse following the death of the decedent does not get a step up in basis. Appreciated property is property that had a fair market value greater than its basis on the day it was transferred prior to death. Additionally, the basis of inherited S corporation stock is reduced by Income in Respect of a Decedent ("IRD").

With regard to jointly held property, the decedent's half receives a step up in basis while the spouse's does not. Therefore, if the couple held an asset purchased for $50,000 that upon the decedent's death was valued at $100,0000, the new cost basis is calculated as follows: spouse's basis = $25,000 (1/2 of $50,000) and decedent's basis = $50,000 (1/2 of $100,000). Therefore, the new combined cost basis used for calculating capital gains tax when the asset is sold is $75,000 ($25,000+$50,000).

If the estate is the owner of a decedent's residence and the Executor sells the house, the tax treatment of gain or loss depends on how the estate uses the decedent's residence. If the house is not used for business and investment use, then any gain on the sale is capital gain but any loss is not deductible. In all other instances, the residence is deemed a capital

asset held for investment. Therefore, the gain or loss is capital gain or loss which may be deductible.

The capital gain analysis becomes very important when planning with a Qualified Personal Residence Trust ("QPRT"). Therefore, the attorney should be sure to ascertain the basis of the house when discussing the transaction with the client. While previously when the risk of state tax was high, transferring a residence into the QPRT was a smart move even if it triggered estate tax. In the current climate, where the likelihood of estate tax is much less, transferring the house into a QPRT may trigger a capital gains tax in a nontaxable estate. If the house was kept in the decedent's estate, then no estate tax or capital gains tax would be owed. If the goal is to avoid probate, especially if the residence is a vacation home in a different state, then a residence could be transferred to a Revocable Trust. In this vehicle, the residence retains the Grantor's basis since the house is not removed from the Grantor's taxable estate. Yet, the house will pass outside of probate.

EXHIBIT A

SURROGATE'S COURT OF THE STATE OF NEW YORK

COUNTY OF WESTCHESTER

PROBATE PROCEEDING, Estate of JOHN DOE, Deceased.	RENUNCIATION AND DISCLAIMER OF INTEREST IN ESTATE File No. _____

I, MARY SMITH, residing at 123 Main Street, West Harrison, New York 10604, do hereby irrevocably renounce, disclaim and refuse to accept the bequest that would otherwise be payable to me due to the death of JOHN DOE on _____ under Paragraph THIRD (I) of the Will of JOHN DOE dated _____ and admitted to probate on _____ (the "Will").

This renunciation and disclaimer is made with the understanding and expectation that it is irrevocable and will be treated as a qualified disclaimer under §2518 of the U.S. Internal Revenue Code and an effective renunciation under §2-1.11 of the New York Estates, Powers and Trusts Law so that all such property that is includable in the decedent's gross estate for estate tax purposes and that would otherwise be payable to me shall be distributed in accordance with the terms of the Will as if I had predeceased JOHN DOE, the decedent herein.

I hereby execute and acknowledge this renunciation and disclaimer in the presence of a notary public and direct that it be filed in the Surrogate's Court of New York, New

York, which has jurisdiction of the estate of JOHN DOE, within nine (9) months of his death.

The remaining beneficiaries under the Will, JANE DOE and BOB SMITH (collectively, the "Beneficiaries"), will personally gain an interest by reason of this renunciation and disclaimer, as these renounced and disclaimed interests will become available assets to be distributed under the Will. I hereby direct that a copy of this renunciation and disclaimer be served upon each of the Beneficiaries as persons who will gain an interest by reason of this renunciation and disclaimer and upon JANE DOE as the Executor of the Estate of JOHN DOE. I hereby further direct that such service shall be made within nine (9) months after the death of the decedent.

_____, 20___

_____
MARY SMITH

STATE OF NEW YORK)
) SS:
COUNTY OF WESTCHESTER)

On the _____ day of _____, 20___ before me, the undersigned, personally appeared MARY SMITH, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the attached Renunciation and Disclaimer of Interests in Estate and acknowledged to me that she executed the same and that by her signature on the instrument she executed the instrument.

_____
Notary Public

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EXHIBIT B

SURROGATE'S COURT OF THE STATE OF NEW YORK

COUNTY OF WESTCHESTER

PROBATE PROCEEDING, Estate of JOHN DOE Deceased.	AFFIDAVIT IN SUPPORT OF RENUNCIATION AND DISCLAIMER File No. _____

STATE OF NEW YORK)
) SS:
COUNTY OF WESTCHESTER)

MARY SMITH, residing at 123 Main Street, West Harrison, New York 10604, being duly sworn, deposes and states: I have executed simultaneously herewith an irrevocable renunciation and disclaimer of the bequest that would otherwise be payable to me due to the death of JOHN DOE on _____ under Paragraph THIRD (I) of the Will of JOHN DOE dated _____ and admitted to probate on _____ (the "Will").

I hereby affirm that I have not received and will not receive any consideration in money or money's worth for such renunciation and disclaimer from any person or persons whose interest is created or accelerated by reason thereof.

_____
MARY SMITH

Sworn to before me this _____
day of _____, 20___.

_____
Notary Public

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EXHIBIT C

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

PROBATE PROCEEDING,
Will of
JOHN DOE,

NOTICE OF
RENUNCIATION
File No. _____

Deceased.

----------X

TO:

NAME	ADDRESS
Jane Doe	456 North Street Ossining, New York 10562
Bob Smith	123 Main Street West Harrison, New York 10604

PLEASE TAKE NOTICE, that by the annexed Renunciation and Disclaimer of Interest in Estate signed and acknowledged on _____, 20____, MARY SMITH, pursuant to EPTL §2-1.11, irrevocably renounced the bequest that would otherwise be payable to her due to the death of JOHN DOE on _____ under Paragraph THIRD (I) of the Will of JOHN DOE dated _____ and admitted to probate on _____.

Dated: _____, 20___

Cuddy & Feder LLP
445 Hamilton Avenue
14th Floor
White Plains, New York 10601
(914) 761-1300

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EXHIBIT D

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application for Permission to File Renunciation by the estate of JOHN DOE, Deceased.	PETITION FOR PERMISSION TO FILE RENUNCIATION EPTL §2-1.11 File No. _____

To the Surrogate's Court of the County of Westchester:

It is respectfully alleged that:

1. The name, citizenship and domicile of the petitioner are as follows:

Name: Jane Doe
Domicile: 456 North Street, Ossining, New York 10562
Citizen of: United States

2. a. Pursuant to ITEM II of the Will of Jill Smith dated _____, the Decedent, John Doe (the "Decedent"), inherited one-half (1/2) of the estate of his mother, Jill Smith, a domiciliary of 123 Main Street, Shohola, Pennsylvania, due to her death on _____ (copy of Will attached as Exhibit A; copy of Death Certificate attached as Exhibit B). The petitioner inherited the remaining one-half (1/2) interest.

b. Letters of Admr. Pendente Lite were issued to Jane Doe by the Register for the Probate of Wills and Granting Letters of Administration in and for Pike County, Commonwealth of Pennsylvania, on _____ (copy attached as Exhibit C).

3. No distributions from the Estate of Jill Smith have been made to the Decedent since the death of Jill Smith.

4. The petitioner is the executor and the sole beneficiary under Article FOURTH of the Will of John Doe dated _____ and admitted to probate on _____ (the "Will") (copy attached as Exhibit D).

5. Pursuant to the Internal Revenue Code of 1986, as amended, section 2518(b)

> the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if --
>
> (1) such refusal is in writing,
>
> (2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after . . .
>
> (A) the date on which the transfer creating the interest in such person is made.

Therefore, the qualified disclaimer of the Decedent's interest in the Estate of Jill Smith must be filed by _____, the date which is nine (9) months after Jill Smith's date of death.

6. Pennsylvania Probate, Estates and Fiduciaries Code §6202 provides that

> A disclaimer on behalf of a decedent . . . may be made by his personal representative . . . if . . . the court having jurisdiction of the estate authorizes the disclaimer after finding that it is advisable and will not materially prejudice the rights of creditors, heirs or beneficiaries of the decedent . . .

7. Pennsylvania Probate, Estates and Fiduciaries Code §6204(a) provides that "the disclaimer shall be filed with the clerk of the orphans' court division of the county where the decedent died domiciled . . . a copy of the disclaimer shall be delivered to any personal representative . . . in possession of the property."

8. The petitioner requests authorization from this Court to file the attached Renunciation and Disclaimer on behalf of the Decedent with regard to the estate of his mother, Jill Smith, in Orphans' Court of the Commonwealth of Pennsylvania, Pike County, as such disclaimer will not materially prejudice the rights of creditors, heirs or beneficiaries of the Decedent (copy of Renunciation and Disclaimer attached as Exhibit E).

WHEREFORE your petitioner prays that the Court grant authorization to file the disclaimer on behalf of the Decedent, in Orphans' Court of the Commonwealth of Pennsylvania, Pike County.

Dated: _____, 20_____

Signature of Petitioner:

_____
Name: Jane Doe

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

JANE DOE, being duly sworn deposes and says that I am the petitioner above named. I have read the foregoing petition and the same is true of my own knowledge except as to matters therein stated to be alleged upon information and belief and as to those matters I believe them to be true.

_____
JANE DOE

On _____, 20__, before me, the undersigned, personally appeared MARY SMITH, 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 she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Sworn to by me this
_____ day of _____, 20_____

_____
Notary Public
Commission Expires:
(Affix Notary Stamp or Seal)

Signature of Attorney: _____

Print Name: Leslie Levin, Esq.

Firm Name: Cuddy & Feder LLP

Address of Attorney: 445 Hamilton Avenue, 14th Floor, White Plains, New York 10601

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EXHIBIT E

Form 8971, Information Regarding Beneficiaries Acquiring Property From a Decedent, with attached Schedule A

3896183.1

Form **8971**
(January 2016)
Department of the Treasury
Internal Revenue Service

Information Regarding Beneficiaries Acquiring Property From a Decedent

▶ Information about Form 8971 and its separate instructions is at *www.irs.gov/form8971*.

OMB No. 1545-2264

Check box if this is a supplemental filing ☐

Part I Decedent and Executor Information

1 Decedent's name	2 Decedent's date of death	3 Decedent's SSN
4 Executor's name (see Instructions)	5 Executor's phone no.	6 Executor's TIN

7 Executor's address (number and street including apartment or suite no.; city, town, or post office; state or province; country; and ZIP or foreign postal code)

8 If there are multiple executors, check here ☐ and attach a statement showing the names, addresses, telephone numbers, and TINs of the additional executors.

9 If the estate elected alternate valuation, indicate the alternate valuation date: _____

Part II Beneficiary Information

How many beneficiaries received (or are expected to receive) property from the estate? _____ For each beneficiary, provide the information requested below. If more space is needed, attach a statement showing the requested information for the additional beneficiaries.

A Name of Beneficiary	B TIN	C Address, City, State, ZIP	D Date Provided

Notice to Executors:

Submit Form 8971 with a copy of each completed Schedule A to the IRS. To protect privacy, Form 8971 should not be provided to any beneficiary. Only Schedule A of Form 8971 should be provided to the beneficiary. Retain copies of all forms for the estate's records.

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, all information reported herein is true, correct, and complete.

▶ Signature of executor _____ Date _____

May the IRS discuss this return with the preparer shown below? See Instructions . . . . . ☐ Yes ☐ No

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
Firm's name ▶			Firm's EIN ▶	
Firm's address ▶			Phone no.	

For Privacy Act and Paperwork Reduction Act Notice, see the separate instructions. Cat. No. 37794V Form **8971** (1-2016)

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SCHEDULE A—Information Regarding Beneficiaries Acquiring Property From a Decedent

▶ **Information about Form 8971 (including Schedule A) and its separate instructions is at *www.irs.gov/form8971*.**

Check box if this is a supplemental filing ☐

Part 1. General Information

1 Decedent's name	2 Decedent's SSN	3 Beneficiary's name	4 Beneficiary's TIN

5 Executor's name	6 Executor's phone no.

7 Executor's address

Part 2. Information on Property Acquired

A Item No.	B Description of property acquired from the decedent and the Schedule and item number where reported on the decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. If the beneficiary acquired a partial interest in the property, indicate the interest acquired here.	C Did this asset increase estate tax liability? *(Y/N)*	D Valuation Date	E Estate Tax Value *(in U.S. dollars)*
1	Form 706, Schedule _____ , Item _____ Description —			

Notice to Beneficiaries:

You have received this schedule to inform you of the value of property you received from the estate of the decedent named above. **Retain this schedule for tax reporting purposes.** If the property increased the estate tax liability, Internal Revenue Code section 1014(f) applies, requiring the consistent reporting of basis information. For more information on determining basis, see IRC section 1014 and/or consult a tax professional.

Form 8971 (1-2016)

SCHEDULE A—Continuation Sheet

Use only if you need additional space to report property acquired (or expected to be acquired) by the beneficiary.

Check box if this is a supplemental filing ☐

Part 1. General Information

1 Decedent's name	2 Decedent's SSN	3 Beneficiary's name	4 Beneficiary's TIN

5 Executor's name	6 Executor's phone no.

7 Executor's address

Part 2. Information on Property Acquired

A Item No. *(continue from previous page)*	B Description of property acquired from the decedent and the Schedule and Item number where reported on the decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. If the beneficiary acquired a partial interest in the property, indicate the interest acquired here.	C Did this asset increase estate tax liability? *(Y/N)*	D Valuation Date	E Estate Tax Value *(in U.S. dollars)*

Notice to Beneficiaries:

You have received this schedule to inform you of the value of property you received from the estate of the decedent named above. **Retain this schedule for tax reporting purposes.** If the property increased the estate tax liability, Internal Revenue Code section 1014(f) applies, requiring the consistent reporting of basis information. For more information on determining basis, see IRC section 1014 and/or consult a tax professional.

This presentation is for informational purposes only and is not intended as a substitute for legal, accounting or financial counsel with respect to your individual circumstances.

Under IRS regulations we are required to add the following IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding any penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction(s) or tax-related matter(s) addressed herein. This communication may not be forwarded (other than within the recipient to which it has been sent) without our express written consent.

3896183.1

Advance Directive Tips:
Making Healthcare Wishes Explicit

Submitted by Leslie E. Levin

NBI National Business Institute, Elmsford, New York

ESTATE PLANNING: TOP 7 TOOLS TO KNOW

ADVANCE DIRECTIVE TIPS: MAKING HEALTHCARE WISHES EXPLICIT

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LIVING WILLS

In addition to Wills and Trust which cover scenarios when they pass away, clients should also focus on documents needed while they are alive. Health care documents are vital documents which cover making medical decisions.

New York does not have a Living Will statue but does have a Health Care proxy statute (Article 29-C of the New York Public Health Law ("PHL")). In a Living Will or Health Care Declaration a client specifies his or her wishes concerning the continuance and discontinuance of medical treatments. The agent will carry out these wishes when the client is not able to make medical decisions for himself or herself. These rights stem from the New York Court of Appeals case, Matter of Westchester County Medical Center on Behalf of O'Connor, 72 NY2d 517 (1988) wherein the Court determined that a person has the right under the New York Constitution to make health care decisions using a Living Will. The Court further held that the "clear and convincing" standard is needed for making end of life decisions. For example, when there is no meaningful hope of recovery and the client is in a persistive vegetative state, the agent can inform the doctors to discontinue lifesaving treatment and take no further heroic measures. In New York, the agent cannot make decisions regarding nutrition and hydration unless the agent knows the client's wishes. The form should be witnessed by at least two adults who are not named as the person's agent under the Health Care Proxy and who are not providing medical care to the principal. A sample form can be found at Exhibit A.

In a Health Care Proxy, the client designates someone as health care agent to act for him or her in connection with specified medical treatment and the decisions described, if the client is unable to act and such person cannot be the attending physician (PHL §2981). The attending physician must make a determination that the "principal lacks capacity to make health care decisions." PHL §2981(4). Such decision must be made in writing "to a reasonable degree of medical certainty" and when the decision must be made to withdraw or withhold life sustaining treatment, the physician must first consult with a second doctor. PHL §2983(1)(a). In order to ensure that the agent can make medical decisions such as to which hospital an ambulance should transport the principal, the Health Care Proxy can contain language authorizing the agent to do so.

Without such language, the emergency responders will not be required to honor the agent's authority to make such designation.

The client is naming an agent to make substituted health care decisions. These issues can cover medications, treatments, therapy, choosing doctors and any other issue connected with the client's medical care. The Proxy must be signed and dated by the principal in the presence of at least two witnesses who are not named in the form and they shall state "that the principal appeared to execute the proxy willingly and free from duress." (PHL §2981(2)(a)). No notarization is required. The client should also designate an alternate health care agent to act if the primary health care agent is unable to serve. PHL §2981(6)(a).

While this form is not used for stating medical wishes, because of New York's requirement regarding nutrition and hydration, good practice is to also include a statement, "My agent does know my wishes regarding artificial nutrition and hydration" on the Proxy. The requirements for the Form and a sample form can be found at PHL §2981(5) and at Exhibit B. New York does not require that the principal use this statutory form but New York does provide that the Health Care Proxy cannot be part of the Power of Attorney. PHL §2981(5)(e). Out of state forms are also valid in New York so long as the form was validly executed in the other jurisdiction. PHL §2990. The benefit to using the New York statutory form is that doctors and hospitals will be more familiar with the form and therefore, may be quicker to honor it.

The statute also provides that one cannot name more than one agent at a time. One can imagine the scenario where two or more agents were named and they give conflicting advice to the doctor. One can add precatory language that the principal desires that the agent consult with other named individuals before making decisions. We do not recommend that this provision require that the agent consult with others as such a requirement may provide impractical to honor and providing proof that the agent did in fact consult with these other named individuals may also prove to be difficult to provide.

Health Care Proxies can be revoked orally or in writing by communicating such revocation to the health care provider or by executing a new form. PHL §2985. Divorce or legal separation also revokes the designation of spouse (or former spouse) as agent.

The Organ/Tissue Donation Form allows the client to indicate whether or not he or she wishes to be an organ donor. The client can enroll in the New York State Donate Life Registry which is the confidential database administered by the New York State Department of Health that records legally binding consent for organ, eye and tissue donation. To do so, the client can register at the DMV, the Board of Elections or contact the Department of Health. The organ donation wishes can be included in the Health Care proxy. PHL §2981(5)(f). A sample form can be found at Exhibit C.

Some clients give a copy to the primary care physician or to the agents to keep on file. Our standard practice is to keep the original for safekeeping in case the original is ever needed at the hospital. We have found that hospitals will act on photocopies, faxes, scans, etc.

The Family Health Care Decisions Act (FHCDA) can be found at PHL Article 29-CC which was added to the PHL effective June 1, 2010. This provision allows family members or friends to make health care decisions for an incapacitated person without a Health Care Proxy or Living Will when such person is in a hospital or residential health care facility. As with use of a Health Care Proxy, the doctor must make a determination that the person lacks capacity and such determination must be made to a degree of reasonable certainty. Additionally, such determination must be made in consultation with a second physician. FHCDA at PHL §2994-d(1) provides that a person can act in the following order:

(a) Article 81 Guardian

(b) Spouse or domestic partner

(c) Adult child

(d) Parent

(e) Sibling age 18 or older

(f) A close friend

A prioritized person can designate any other person on the list when there is no objection by a person in a higher class of priority

The designated person acts in accordance with the patient's known wishes using a "best interests" standard. PHL §2994-d(4)(b). Life sustaining treatment can only be

withheld upon a determination that (a) treatment would be an extraordinary burden on the patient and that death will occur within six months regardless of whether such treatment is provided or the patient is permanently unconscious, or (b) providing such treatment would cause pain, suffering and would be inhumane and that patient has an irreversible or incurable condition. A second doctor must agree with either of these determinations. PHL §2994-d(5)(a). If the patient is in a residential health care facility, then the ethics review committee or a court must review the decision. If in a hospital and the doctor disagrees with the decision made, then the hospital's ethics review committee can review the decision. PHL §2994-d(5)(b) and (c).

Clearly having a Health Care Proxy and Living Will is preferred, but there is some relief to knowing that even if the person does not have these crucial documents, medical decisions can be made. Clients should be made to understand the difference course of action and the ease of an agent in making decisions when the documents are in place versus when documents are not in place in the event that a client is uncertain if he or she wants the documents. A memo outlining what these medical documents do and why they are important can be given to the client with the drafts. See Exhibit D. We also keep the original forms for safekeeping and provide several copies to the client. We stamp them to show that we have the original. We recommend that the client give copies to the agent named, primary care physician, specialists, etc. In our experience, hospitals and doctors will act using photocopies, scans, emails, faxes, etc. However, should the original ever be needed, we know that we have it safe and sound.

POWER OF ATTORNEY

Using the form of Powers of Attorney created under the New York General Obligations Law Article 5, Title 15, the client designates someone as attorney-in-fact to act for him or her, whether or not the client is competent, in connection with a broad variety of matters, including real estate, banking and other financial transactions, retirement benefits, gifts and tax matters. The client should also designate an alternate attorney-in-fact if attorney-in-fact is unable to serve. New York General Obligations Law ("GOL") §5-1508. The Power of Attorney is revocable by the client.

In 1948, New York adopted the short form non-durable power of attorney. In 1975, the GOL was amended to provide for a statutory short form of durable power of attorney to allow a principal to appoint one or more agents to handle financial transactions in the event of the principal's incapacity. In 1996, the amendments to the GOL allowed the principal to give gift making powers to the agent and to change the beneficiary on a retirement account. These gifting powers were limited to an amount not to exceed the then annual exclusion of $10,000 to the principal's parents, spouse, children and descendants. In order to allow for greater gifting provisions, many attorneys created custom forms of powers of attorney which contained gifting provisions that permitted gifts in excess of the $10,000 often used for Medicaid planning.

In 2006, the New York Court of Appeals found that when making gifts, the agent must act in the best interest of the principal and in this case found that the transfer of $820,000 for Medicaid purposes was not consistent with Mr. Ferrara's estate plan (Matter of Ferrara, 6 NY3d 861, 850 NE2d 12, 817 NYS2d 198 (2006)). This ruling triggered investigation into claims of elder abuse with the power of attorney and the Law Revision Commission was tasked of recommending changes to the statutory form of power of attorney. See also, Matter of Absolut Care of Three Rivers v. Shah, 955 N.Y.S.2d 706, 101 A.D.3d 1327 (App. Div. 3d Dep't 2012). Because of these concerns of elder financial fraud and abuse due to the simplicity of executing the power of attorney, the legislature replaced the statutory form of power of attorney with a new effective form as of September 1, 2009. The GOL was repealed and replaced with a new GOL §5-1501, §5-1501A and §5-1501B. However, technical corrections were made at new GOL §5-1501C and that made the new form effective September 12, 2010. These corrections included removing the incorporation of certain powers that that related to business transactions. They also added provisions that previous powers of attorneys were not automatically revoked unless specified in the Modifications section. GOL §5-1503 and §1511(3)(a). The former standard two page form was replaced with several pages and complex execution procedures including witnesses and notarization requirements. While the complexity of the form and its execution requirements curb abuse, these new requirements have created forms which are too complicated for the elderly to understand

in some cases. Extra time must be taken to review the power of attorney with elderly clients (and really all clients) to ensure that they understand this more complex form and that they understand the power that they are giving to the agents named.

The new form requires that all Powers of Attorney must be signed and acknowledged by both the principal and the agent. GOL §5-1501B(1). However, they do not need to sign at the same time. Additionally, all Powers of Attorney are durable, meaning that they are effective when signed and survive incapacity unless specified in the documents. GOL §5-1501A1). In order to trigger what we would call "Springing Power of Attorney," the principal must indicate such preference in the "Modifications" section of the form. New York no longer has a separate Spring Power form.

Gifting is now covered by the Statutory Gifts Rider which effectively is the second half of the document and is "attached" by initialing next to "SGR" earlier in the form (GOL §5-1514). The first part of the Rider provides for gifts limited to the annual exclusion to spouse, parents, children, and more remote descendants. The next section allows custom gifting. In this section this form must specify that the agent can create and fund trusts in order to effectively transfer assets into (and create) the many types of trusts discussed previously in these materials. The last section allows the agent to make gifts to himself or herself.

While best practice is to have the Power of Attorney in place before the client becomes ill, there are times when the client or the client's family will approach the attorney when signs of dementia or other illness have already begun. Capacity is defined as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney." (GOL §5-1501(2)(c)). The attorney should use professional judgement when asked to prepare power of attorney for clients with questionable capacity. We recommend securing a doctor's letter stating that the client has capacity to enter into legal and financial transactions before preparing a power of attorney for a client with known mental deficiencies.

The statutory form allows for modification of both the standard powers and the powers under the Statutory Gifts Rider. While these modifications are crucial to ensuring that the agent has maximum flexibility to act on behalf of the principal., the client should realize that effectively the agent is walking in his or her footsteps. The old Annie Get Your Gun song, "Anything You Can Do I Can Do Better" applies here. Therefore, the attorney should caution the client and ensure that the client understands how broad the powers are in this document. Certain provisions are essential to include for Medicaid planning such as the ability to enter into pooled income trusts. Many charities which run these trusts will not allow the agent to sign the joinder agreement unless the power is enumerated in the power of attorney. Additionally, while certain powers are covered in the statute, many financial institutions will not act unless they see the power enumerated in black and white. For example the power to enter into a safe deposit box is covered by the banking provisions, but without it spelled out in the power of attorney, some banks will not allow the agent to enter the safe deposit box. GOL §5-1502D. While ultimately, legal at the bank would affirm that the power is covered, by the time that approval is given, the urgency for getting into the safe deposit box has long since passed.

Pursuant to GOL §5-1512, a Power of Attorney executed in another state is valid in New York if the document was valid where executed or if it meets the requirements of the GOL §5-1501B or both. See Exhibit E for a sample form of Power of Attorney.

The common law principles of agency are generally applied to the relationship between the parties in the Power of Attorney setting. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." See Restatement (Third) Of Agency §101 (2006). Under New York's form of Power of Attorney,

> the Agent must act with the standard of care "of a prudent person dealing with the property of another." The Agent owes the Principal a fiduciary duty, including the obligation to act according to the Principal's instructions, or in the absence of those instructions, in the best interest of the Principal. The Agent must avoid conflicts of interest. The Agent must keep assets separate. The Agent must keep a record of all receipts, disbursements, and transactions

> entered into by the Agent on behalf of the Principal and to make such record available at the request of the Principal. In addition, another class of persons may request the records kept by the Agent, including the Monitor (if any), a co-agent or successor agent under the power of attorney; court-appointed person, or the Executor of deceased Principal's estate. "Problems/Benefits of the New Power of Attorney Statute: Three Years Later," Julieann Calareso, Esq., Burke & Casserly, P.C., Albany www.nysba.org/workarea/downloadasset.aspx?id=45145

The problem inherit with the agent acting under the Power of Attorney is that there is no formal supervision or oversight which can lead to abuse of the power by the agent. The abuse can come in the form of the agent using the principal's assets for the agent's own benefit and to achieve an unequal disposition of the principal's assets when there are multiple children involved.

> The relationship of an attorney-in-fact to his principal is that of agent and principal (*see, Cymbol v Cymbol*, 122 A.D.2d 771, 772; *Matter of De Belardino*, 77 Misc.2d 253, 256, *affd* 47 A.D.2d 589) and, thus, the attorney-in-fact "must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing" (*Matter of De Belardino, supra*, at 256; *see, Elco Shoe Mfrs. v Sisk*, 260 N.Y. 100, 103-104). Consistent with this duty, an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship (*see, Moglia v Moglia*, 144 A.D.2d 347, 348; *Matter of De Belardino, supra*, at 257; 3 NY Jur 2d, Agency, § 195, at 23). "Such a gift carries with it a presumption of impropriety and self-dealing, a presumption which can be overcome only with the clearest showing of intent on the part of the principal to make the gift" (*Matter of De Belardino, supra*, at 257). Semmler v. Naples, 563 NYS2d 116 (3rd Dept. 1990).

Therefore, the last section is the Statutory Gifts Rider must be initialed in order to allow an agent to gift to himself or herself. Time should be taken to explain this section to the client to ensure that the client understands the magnitude of this power. The hope is of course, that the principal would not be naming such person as agent if the principal did not have complete trust in the agent. Therefore, one hopes that the risks of abuse will be lessened by this fact.

An additional problem can be the powers allowing the agent to handle estate transactions and amend trusts, etc. These powers can be abused by the agent to effectively rewrite the principal's estate plan to the detriment of other family members. A six year statute of limitations applies for violations of the Agent's fiduciary duties. See Matter of Hiletzaris, 962 N.Y.S.2d 623, 105 A.D.3d 740 (App. Div. 2d Dep't 2011) (where the Court investigates whether such statute of limitations can be tolled).

This document is a less expensive alternative to bringing a Guardianship Proceedings and when combined with Health Care Proxy and Living Will, can accomplish many of the same objectives as Guardianship. We recommend having the client sign five originals. We keep two and give the client three. We suggest that the client consider give one to the agent so that the agent is at the ready. We also recommend that the agent take the original and a photocopy to the bank when planning to act as agent. The agent should offer the photocopy which should be accepted pursuant to GOL §5-1504 (one of the changes made to the statute). If the photocopy is rejected, then the agent should ask if the bank can copy the original and then return it. This is the moment for an Academy Award performance "If I give you my original what will I do when I have to go to a different bank?" If the bank still insists on keeping the original, then the agent should not worry, because there are four more originals.

DO NOT RESUSCITATE (DNR) ORDERS, DO NOT INTUBATE (DNI) ORDERS, ETC.

Medical Orders for Life-Sustaining Treatment (MOLST) (DOH-5003) is the only authorized New York form for both nonhospital Do Not Resuscitate (DNR) and Do Not Intubate (DNI) orders and should be transported with client as he travels to different health care settings. The MOLST form should be printed on bright "pulsar" pink, heavy stock paper, which is why it is often called the "Pink Form." Hard copies of the card stock pink form (with all four pages printed landscape/double-sided on a single 11" X 17" sheet folded in the middle) can be ordered at http://www.compassionandsupport.org (see Exhibit F). In order to make the MOLST form more user friendly, the Department of Health updated the MOLST form in June of 2010. The revisions also ensured that the

MOLST was aligned with the FHCDA (discussed in the Living Will section of this Article) and other provisions of Chapter 8 of the Laws of 2010 that went into effect on June 1, 2010. The Department of Health has not yet approved proposed revisions to the MOLST form which reflect changes in the PHL that stemmed from medical professional feedback who regularly use MOLST. These changes will improve quality, reduce patient harm, and add MOLST Instructions.

MOLST is intended for patients who:

- Want to avoid or receive any or all life-sustaining treatment;
- Reside in a long-term care facility or require long-term care services; and/or
- Might die within the next year.

This form does not replace a Health Care proxy or Living Will. The form should be used in conjunction with these forms. Typically, these forms should be used by terminally ill patients. These medicals orders are made under the doctor's specific orders and are considered actionable medical orders. The Department of Health developed checklists for doctors to use when completing the MOLST. While these checklists are not mandatory, if a doctor chooses not to use them, the doctor "must use an alternative method for assuring that they adhere strictly to all legal requirements for completing the form, including requirements related to securing informed consent to the medical orders from the proper person, making the clinical judgments necessary to support orders withholding or withdrawing life sustaining treatment and, where applicable, securing ethics committee approval and witnesses to the consent." https://www.health.ny.gov/professionals/patients/patient_rights/molst/

Emergency responders will honor these pink forms. Some clients will keep them on the refrigerator so that they are easily accessible and can be found easily if the principal is home alone and requires medical assistance.

The MOLST form has been approved by the Office of Mental Health (OMH) and the Office for People with Developmental Disabilities (OPWDD) for use by persons with developmental disabilities or persons with mental illness, including persons who have a guardian of the person appointed pursuant to Article 81 of the Mental Hygiene Law or

Article 17-A of the Surrogate's Court Procedure Act. The official OPWDD Checklist must be attached to the MOLST form. This Checklist has not been approved to be used by persons with mental illness in mental hygiene facilities, who are incapable of making their own health care decisions or who have a guardian of the person appointed pursuant to Article 81 of the Mental Hygiene Law or Article 17-A of the Surrogate's Court Procedure Act.

In addition to completing the pink form, a client can use eMOLST which allows for electronic completion of the current New York State Department of Health-5003 MOLST form. This New York eMOLST Registry, allows health care providers, including emergency responders, to have immediate access to a patient's MOLST form. https://nysemolstregistry.com/Account/Login?ReturnUrl=%2f

IN New York, there is a presumption that everyone has the capacity to make a decision regarding DNR. PHL §2963 and §2994-cc. A decision that the patient wants a DNR should become part of the medical record. PHL §2964 and §2994-dd. Such a decision may be revoked in wring or orally to a doctor or a nurse at the hospital. PHL §2969 and §2994-dd. The FHCDA eliminated the part of the DNR law that applied to patients in hospitals and nursing homes. Instead, these institutions are to ensure that decisions are made in accordance with FHCDA's standards for terminating life sustaining treatment. FHCDA does provide at PHL §2994-i that a DNR shall be written in a patient's medical record. Again, as discussed previously, having a Health Care proxy and Living Will avoids these difficulties.

HIPAA ISSUES

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") was enacted to give a person privacy rights over his or her health information, including the right to get a copy of such information, make sure it is correct, and know who has seen it (see 45 CFR Parts 160 and 164) and is enforced by the Department of Health and Human Services, Office for Civil Rights ("OCR"). New York has adopted HIPAA regulations at PHL §18 and has a mental health confidentiality statute (section 33.13 of the Mental Hygiene Law). HIPAA required the federal Department of Health and Human Services

to develop regulations to implement these privacy requirements. This Privacy Rule became effective on April 14, 2003. The American Recovery and Reinvestment Act of 2009 ("ARRA," commonly known as "the stimulus package"), enacted on February 17, 2009, also enacted provisions that affect HIPAA. Because the HIPAA Privacy Rule was enacted before much of the cyber security regulations, New York's regulations offer more protection over electronic PHI.

These Privacy Rights apply to both paper records and electronic health records. The medical information includes medical history, notes, symptoms, diagnoses, medications, lab results, vital signs, immunizations, and reports from diagnostic tests. The idea is that there is Protected Health Information (PHI) which is, "individually identifiable health information." 45 C.F.R. §160.103. This PHI can also include information collected by non-medical personnel such as social workers. See Gratton v. United Parcel Service, Inc., 2008 WL 4934056 (E.D.N.Y. 2008).

A person can indicate that this information can be shared by a health care provider or health plan with family members or friends in person, over the phone or in writing. The health care provider (i.e., doctors, clinics, hospitals, nursing homes, pharmacies and dentists), health plans (i.e., insurance companies, vision plans, dental plans, HMOs and government programs like Medicare and Medicaid) and health care clearinghouses are call "covered entities" under HIPAA. 45 C.F.R. §160.103. A group health plan with less than 50 participants, administered only by the employer who established and maintains the program, is not covered by HIPAA. 45 C.F.R. §160.103.

Business associates and subcontractors of covered entities (i.e., billing companies, companies that process health care claims, companies that administer health plan, companies that store/destroy medical records, and professionals like lawyers and accountants) must allow follow certain HIPAA regulations. 45 C.F.R. §160.102, §160.103 and §164.502(e). Certain organizations which may have access to a person's medical information do not have to follow HIPAA regulations such as life insurers, employers, schools, law enforcement agencies, state agencies like child protective services, municipal offices and workers compensation carriers. HIPAA also does not apply to government-funded programs whose principal purpose or activity is unrelated to

the provision of health care. 45 C.F.R. §160.103. Helpful information can be found at: https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html. Additionally, effective March 1, 2017, with full compliance required by March 1, 2019, the New York State Department of Financial Services issued regulations to help protect against breaches of cyber security which would apply to Covered Entities. Compliance with the cybersecurity regulations will be transitioned over a two-year period. See "New York's New Cybersecurity Regulations and its Impact on your Sensitive Health Information" by Farrell Fritz P.C., August 7, 2017, https://www.nyhealthlawblog.com/hipaa-and-privacy/.

When a person wants to give permission to someone to access HIPAA information, they can use New York State Office of Court Administration Form 960 which can be found at: https://www.nycourts.gov/forms/Hipaa_fillable.pdf (see Exhibit G). Another form that can used is the New York State Department of Health Authorization for Release of Health Information (Including Alcohol/Drug Treatment and Mental Health Information) and Confidential HIV/AIDS Related Information and can be found at https://www.health.ny.gov/forms/doh-5032.pdf (see Exhibit H). There is also the New York State Department of Health Authorization for Release of Health Information AIDS Institute and Confidential HIV-Related Information Form DOH-2557: https://www.health.ny.gov/forms/doh-2557.pdf. (Exhibit I). Finally, a person can execute a form To Execute HIPAA Medical Record Authorization Forms pursuant to NY Public Health Law §18(1)(g) as amended 10/26/04 which can be found at: http://www.wnylc.com/health/afile/118/161/. (Exhibit J). Additionally, HIPAA also applies to the PHI of someone who has died. 45 C.F.R. §164.502(f). However, a Covered Entity must recognize the authority to access PHI by any person with the authority to act on the behalf of the deceased individual or such person's estate. 45 C.F.R. § 164.502(g)(4). The Legal Aid Society in "The HIPAA Privacy Rule" August 18, 2009, at page 6, outlines the elements that any HIPAA compliant authorization must contain in order to be valid:

• A specific description of the information to be used or disclosed For example, any records related to a particular treatment period or provider

• The name of the person(s) or organization who will be authorized to release the information

• The name of the person(s) or organization to whom the information is authorized to be released

• A description of the purpose of the use or disclosure OR the statement, "at the request of the individual"

• A date or event of expiration

• The signature of the individual/ patient and date (If signed by a personal representative, the authorization should include a description of the person's relationship to the patient). . . .

• A patient's right to revoke authorization

• The potential for redisclosure by the person who receives the information

Any revocation of HIPAA authorization does not apply to information already shared. 45 C.F.R. §164.508(b)(5). See Exhibit K for a form of HIPAA Authorization.

If a person feels that PHI was improperly disclosed, then such person can file a complaint with the U.S. Department of Health and Human Services, Office for Civil Rights (OCR) within 180 days of the disclosure. 45 C.F.R. §160.306(b)(3). If there was a violation and there is a finding of "willful neglect," then the Covered Entity may be fined. No fine is imposed when a violation is due to reasonable cause and the Covered Entity corrected the violation within 30 days of when it knew (or should have known) of the violation. Jail time can also be imposed if a person knowingly obtains or discloses individually identifiable health information in violation of HIPAA. Lengthier sentence are imposed for wrongful conduct involving false pretenses or the intent to sell, transfer, or use individually identifiable health information "for commercial advantage, personal gain, or malicious harm." See NYS Office of Mental Health "HIPAA Privacy Rules for the Protection of Health and Mental Health Information" at https://www.omh.ny.gov/omhweb/hipaa/phi_protection.html A Covered Entity cannot retaliate against the person who filed a complaint. 45 C.F.R. §§ 160.316, 164.530(g).

The standard OCR complaint form can be found at: https://www.hhs.gov/sites/default/files/civil-rights-complaint-form-0945-0002-exp-04302019.pdf

EXHIBIT A

NEW YORK LIVING WILL

I, _____, residing at _____, being of sound mind, make this statement as a directive to be followed if I become permanently unable to participate in decisions regarding my medical care. These instructions reflect my firm and settled commitment to decline medical treatment under the circumstances indicated below:

I direct my attending physician to withhold or withdraw treatment that serves only to prolong the process of my dying, if I should be in an incurable or irreversible mental or physical condition with no reasonable expectation of recovery.

These instructions apply if I am (a) in a terminal condition; (b) permanently unconscious; or (c) conscious but have irreversible brain damage or deterioration and will never regain the ability to make decisions and express my wishes.

I direct that treatment be limited to measures to keep me comfortable and to relieve pain, including any pain that might occur by withholding or withdrawing treatment.

While I understand that I am not legally required to be specific about future treatments, if I am in the condition(s) described above I feel especially strongly about the following forms of treatment:

I do not want cardiac resuscitation.
I do not want mechanical respiration.
I do not want tube feeding.
I do not want any other medicine, including but not limited to antibiotics, or medical procedures that may be available to prolong my life.
I do not want artificial nutrition.
I do not want artificial hydration.
I do want maximum pain relief, irrespective of whether such pain medication or the frequency thereof may shorten my life.

These directions express my legal right to refuse treatment, under the law of New York. I intend my instructions to be carried out, unless I have rescinded them in a new writing or by clearly indicating that I have changed my mind.

I specifically direct that my directives set forth herein shall not limit the powers given to my health care agent whom I have designated in my Health Care Proxy. I instruct all persons involved in my medical care to take direction from my health care agent and hereby expressly hold harmless and waive any claims I or my heirs might otherwise have against any health care provider, including but not limited to doctors,

nurses, hospitals and all hospital personnel, arising out of or relating in any way to any actions taken at the direction of my health care agent, including but not limited to actions which hasten my death.

Signed: _____ Date: _____, 2018

Witness 1 _____

Address _____

Witness 2 _____

Address _____

EXHIBIT B

From PHL §2981(5)(d)

Health Care Proxy

I, _____, hereby appoint _____, residing at _____, and whose telephone number is _____, as my health care agent to make any and all health care decisions for me, except to the extent I state otherwise.

This health care proxy shall take effect in the event I become unable to make my own health care decisions.

NOTE: Although not necessary, and neither encouraged nor discouraged, you may wish to state instructions or wishes, and limit your agent's authority. Unless your agent knows your wishes about artificial nutrition and hydration, your agent will not have authority to decide about artificial nutrition and hydration. If you choose to state instructions, wishes, or limits, please do so below:

_____

I direct my agent to make health care decisions in accordance with my wishes and instructions as stated above or as otherwise known to him or her. I also direct my agent to abide by any limitations on his or her authority as stated above or as otherwise known to him or her.

In the event the person I appoint above is unable, unwilling or unavailable to act as my health care agent, I hereby appoint _____, residing at _____, and whose telephone number is _____, as my health care agent.

I understand that, unless I revoke it, this proxy will remain in effect indefinitely or until the date or occurrence of the condition I have stated below:

(Please complete the following if you do NOT want this health care proxy to be in effect indefinitely):

This proxy shall expire: _____
(Specify date or condition)

Signature _____

Address _____

Date: _____

C&F: 3853753.1

I declare that the person who signed or asked another to sign this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed (or asked another to sign for him or her) this document in my presence and that person signed in my presence. I am not the person appointed as agent by this document.

Witness _____

Address _____

Witness _____

Address _____

HEALTH CARE PROXY

(1) I, _____, residing at _____, hereby appoint my _____, _____, residing at _____, whose telephone number is _____, 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 when and if I become unable to make my own health care decisions.

(2) Optional instructions: I direct my proxy to make health care decisions in accordance with my wishes and limitations as stated below, or as my proxy otherwise knows. It is my wish, but not direction, that each of _____ and _____ consult with _____ before making any major health care decisions for me.

My agent knows my wishes about artificial nutrition and hydration.

I also wish that my health care agent and _____ have complete access to my medical records, including, but not limited to, all entries by hospital staff and all laboratory test results, on demand in a timely fashion. In accordance with this wish, I direct that my physician shall write a clear order in my chart that such access be provided to my health care agent and to _____ and that all those people involved in my care be made aware of the existence of this order. In the event that I am (a) in a terminal condition; (b) permanently unconscious; or (c) conscious but have irreversible brain damage or deterioration and will never regain the ability to make decisions and express my wishes, I direct that my health care agent consult and seek three (3) medical opinions before discontinuing medical procedures that prolong my life.

(3) **HIPAA RELEASE AUTHORITY:** I acknowledge that my health care providers and other persons authorized to possess, handle, and/or disseminate my medical information ("Subject Persons") may be limited by the provisions of the Health Insurance Portability and Accountability Act of 1996, and the regulations promulgated thereunder (collectively, "HIPAA") from disclosing certain matters (such matters, collectively, the "Protected Information"). By my signature below, I appoint my health care agent as my "personal representative" within the meaning of HIPAA. Requests for Protected Information made by my health care agent to any and all Subject Persons shall be treated as if they were made by me for purposes of HIPAA and I intend for my agent to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. In accordance with this wish, I direct that my physician shall write a clear order in my chart that such access be provided to my health care agent and that all Subject Persons involved in my care be made aware of the existence of this order.

If the person I appoint is unable, unwilling or unavailable to act as my health care agent, I appoint in such person's place, my _____, _____, residing at _____ whose telephone number is _____, and then _____, _____, residing at _____, whose telephone number is _____, in that order.

(4) This proxy shall remain in effect indefinitely unless I revoke it or until the date or condition stated: None

Signature _____ Date:_____, 2018
Address

_____

Statement by Witnesses (must be 18 or older): I declare that _____ who signed this document, is personally known to me and appears to be of sound mind and acting of his/her own free will. He/She signed this document in my presence.

Witness _____

Address _____

Witness _____

Address _____

EXHIBIT C

ORGAN/TISSUE DONATION FORM

Upon my death, I, _____, residing at _____, hereby

_____ **DO NOT** make an anatomical gift
_____ make this anatomical gift of:

_____ Any needed organs or parts
_____ Body
_____ Bone
_____ Bone Marrow
_____ Cornea
_____ Heart and valves
_____ Kidneys
_____ Liver
_____ Lungs
_____ Pancreas
_____ Skin
_____ Small Bowel
_____ Tissue
_____ Veins
_____ Other
_____

To be used for:

_____ Any purpose authorized by law
_____ Medical Education
_____ Research
_____ Therapy of another person
_____ Transplantation
_____ Transplantation only if it is to save one life or several lives
_____ Transplantation only if it is to save the life or lives of my relatives

Special Wishes and/or Limitations:

_____ I do not allow the above indicated organs and tissues to be donated to an organ/tissue storage bank. They must be donated to a living person or persons.

_____ In keeping with the belief that the human body is to be accorded sanctity even after death, please see that all appropriate steps are taken on my

behalf to maintain honor to the deceased. As soon as needed organs or tissues are retrieved in accordance with my instructions, see that the rest of my remains are appropriately disposed of, in accordance with my wishes and that funeral arrangements are not delayed on account of my donation of the above indicated organs and tissues.

_____ Other _____

_____

_____

I understand the purpose and effect of this document and sign it after careful deliberation, this ____ day of _____, 2018.

_____

_____

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/her own free will. He/She signed this document in my presence.

Witness 1

_____

Address

_____

Witness 2

_____

Address

_____

C&F: 3853753.1

EXHIBIT D

_____ LLP

MEMORANDUM

To

From _____, Esq.

Subject Health Care Proxy, Living Will and Organ/Tissue Donation Form

Date _____

Your Health Care Proxy, Living Will and Organ/Tissue Donation Form make known your wishes concerning the use of life-sustaining medical treatment and designate another person, known as a "health care agent," to make decisions about your health care if you are not able to do so. It also permits the selection of alternates. Our forms give your agent the broadest possible authority to end life-sustaining treatment. The decision to execute these documents will be based on your medical, ethical and/or religious considerations.

Many states allow competent adults to designate a third person, the health care agent, to make health care decisions for them when they cannot do so. That designation is made by executing a Health Care Proxy. Also, many states will not allow the removal of artificial nutrition (food) and hydration (water) unless you have specifically expressed your feelings about such treatment and authorized your agent to withhold or withdraw such treatment. Therefore, we have included this authorization in our Form.

The decision to accept or refuse medical treatment is a constitutionally protected right of every competent adult. Most states require doctors to follow your decision, whether stated orally by you to a doctor when medical treatment is proposed, or, where you are not able to express your wishes when treatment becomes necessary, written by you at an earlier time in a Living Will. In sum, the Living Will states that you do not want to be kept alive by any means when there is no reasonable expectation of recovery. This document includes a waiver and indemnity clause so that your health care agent and the doctors treating you will be able to act upon the health care agent's instructions without fear of being sued (most states provide this indemnification by law).

The Organ/Tissue Donation Form is designed to allow you the greatest choices as to your organ/tissue donation wishes. Please review this Form carefully and give serious thought as to what your wishes are with regard to this "final gift."

As you consider signing these documents, the following points should be kept in mind:

1. **Consult Others:** The intentions or requests spelled out in such documents should be completely understood by other family members, your doctor and perhaps your religious advisor. They will be carrying out and living with the consequences of your decision and must know your thoughts and beliefs on these life and death issues with certainty.

2. **Ensure That Your Agent Will Act:** Before you appoint a health care agent, you must make sure that your health care agent not only understands your intentions, but is willing to act upon them. Many people have religious beliefs or strong feelings that will not allow them to withhold or terminate life-sustaining treatment even if you authorize them to do so.

3. **Flexibility:** Very few of the provisions in these Forms are required by law. Therefore, we can tailor the document to remove those provisions you feel do not apply and add others which you feel strongly about, such as specific medical procedures or your general intentions. If you are already suffering from a serious illness, it may be advisable to refer specifically to your condition.

4. **When It Becomes Effective and How It Is Used:** If you lose the capacity to make health care decisions for any reason, this document becomes effective, and the health care agent will be called upon to make medical treatment decisions. The agent will make those decisions in accordance with the intentions spelled out in the Living Will (and based upon knowledge or other evidence which the agent has received from you). The agent's decision should be the conclusive interpretation of your wishes.

EXHIBIT E

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.senate.state.ny.us or www.assembly.state.ny.us.

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,_____, residing at _____

_____

[name and address of principal]

hereby appoint:_____, residing at _____

_____

[name(s) and address(es) of agent(s)]

as my agent(s).

If you designate more than one agent above, they must act together unless you initial the statement below.

( ) 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):

_____, residing at _____

_____

[name(s) and address(es) of successor agent(s)]

Successor agents designated above must act together unless you initial the statement below.

( ) 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."

If you do NOT intend to revoke your prior Powers of Attorney, and if you have granted the same authority in this Power of Attorney as you granted to another agent in a prior Power of Attorney, each agent can act separately unless you indicate under "Modifications" that the agents with the same authority are to act together.

(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 hundred dollars;
( ) (J) benefits from governmental programs or civil or military service;
( ) (K) health care billing and payment matters; 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 above matters identified by the following letters: (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (K), (L), (M), (N), (O)___

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

(g) MODIFICATIONS: (OPTIONAL)

In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Gifts Rider.

(h) CERTAIN GIFT AND TRANSACTIONS: STATUTORY GIFTS RIDER (OPTIONAL)

In order to authorize your agent to make gifts in excess of an annual total of $500 for all gifts described in (I) of the grant of authority section of this document (under personal and family maintenance), you must initial the statement below and execute a Statutory Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make gifts. The preparation of the Statutory Gifts Rider should be supervised by a lawyer.

( ) (SGR) I grant my agent authority to make gifts in accordance with the terms and conditions of the Statutory Gifts Rider that supplements this Statutory Power of Attorney.

(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): (OPTIONAL)

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, initial the statement below. If you wish to define "reasonable compensation," you may do so above, under "Modifications."

( ) My agent(s) shall be entitled to reasonable compensation for services rendered.

(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 _____, 2018.

PRINCIPAL signs here: _____[L.S.]

(Acknowledgment)

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

On the _____ day of _____, 2018, 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 or entity upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

C&F: 3853753.1

(n) 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 or all receipts, 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 this document, which is either a Statutory Gifts Rider attached to a Statutory Short Form Power of Attorney 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.

(o) 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.

Agent(s) sign(s) here: _____[L.S.]

_____

(Acknowledgment(s))

STATE OF NEW YORK)
) ss.:
COUNTY OF)

On the _____ day of _____, 2018, 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 or entity upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

C&F: 3853753.1

(p) 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.

I/We acknowledge my/our legal responsibilities.

Successor Agent(s) sign(s) here: _____[L.S.]

_____

(Acknowledgment(s))

STATE OF NEW YORK)
) ss.:
COUNTY OF)

On the _____ day of _____, 2018, 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 or entity upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

C&F: 3853753.1

POWER OF ATTORNEY
NEW YORK STATUTORY GIFTS RIDER
AUTHORIZATION FOR CERTAIN GIFT TRANSACTIONS

CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make gifts in excess of an annual of $500 for all gifts described in (l) of the Grant of Authority section of the statutory short form Power of Attorney (under personal and family maintenance), or certain other gift transactions during your lifetime. You do not have to execute this rider if you only want your agent to make gifts described in (l) of the Grant of Authority section of the statutory short form Power of Attorney and you initialed "(l)" on that section of that form. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Certain gift transactions" are described in section 5-1514 of the General Obligations Law. This Gifts Rider does not require your agent to exercise this authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.

This Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make gifts, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property. If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

( ) 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. This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) 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. 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. If you wish to authorize your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

I will not question the sufficiency of any instrument executed by my attorney-in-fact pursuant to this Power of Attorney notwithstanding that the instrument fails to recite the consideration therefor or recites merely a nominal consideration. Any person dealing with the subject matter of such instrument may do so as if full consideration therefor had been expressed therein.

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE GIFTS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

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

My instructions are if there is more than one acting agent, all acting agents have to agree to any gifts or transfers.

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(d) 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 Statutory Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on _____, 2018.

PRINCIPAL signs here: _____

_____

(Acknowledgment)

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

On the _____ day of _____, 2018, 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 or entity upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Statutory Gifts Rider in my presence and 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 Statutory Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of gifts.

_____	_____
Signature of witness 1	Signature of witness 2
_____	_____
Date	Date
_____	_____
Print name	Print name
_____	_____
Address	Address
_____	_____
City, State, Zip Code	City, State, Zip Code

(g) This document prepared by: _____, Esq. _____

C&F: 3853763.1

EXHIBIT F

Medical Orders for Life-Sustaining Treatment (MOLST) (DOH-5003)

NEW YORK STATE DEPARTMENT OF HEALTH

Medical Orders for Life-Sustaining Treatment (MOLST)

THE PATIENT KEEPS THE ORIGINAL MOLST FORM DURING TRAVEL TO DIFFERENT CARE SETTINGS. THE PHYSICIAN KEEPS A COPY.

LAST NAME/FIRST NAME/MIDDLE INITIAL OF PATIENT

ADDRESS

CITY/STATE/ZIP

DATE OF BIRTH (MM/DD/YYYY) ☐ Male ☐ Female

eMOLST NUMBER **(THIS IS NOT AN eMOLST FORM)**

Do-Not-Resuscitate (DNR) and Other Life-Sustaining Treatment (LST)

This is a medical order form that tells others the patient's wishes for life-sustaining treatment. A health care professional must complete or change the MOLST form, based on the patient's current medical condition, values, wishes and MOLST Instructions. If the patient is unable to make medical decisions, the orders should reflect patient wishes, as best understood by the health care agent or surrogate. A physician must sign the MOLST form. All health care professionals must follow these medical orders as the patient moves from one location to another, unless a physician examines the patient, reviews the orders and changes them.

MOLST is generally for patients with serious health conditions. The patient or other decision-maker should work with the physician and consider asking the physician to fill out a MOLST form if the patient:

- Wants to avoid or receive any or all life-sustaining treatment.
- Resides in a long-term care facility or requires long-term care services.
- Might die within the next year.

If the patient has a developmental disability and does not have ability to decide, the doctor must follow special procedures and attach the appropriate legal requirements checklist.

SECTION A Resuscitation Instructions When the Patient Has No Pulse and/or Is Not Breathing

Check one:

☐ **CPR Order: Attempt Cardio-Pulmonary Resuscitation**
CPR involves artificial breathing and forceful pressure on the chest to try to restart the heart. It usually involves electric shock (defibrillation) and a plastic tube down the throat into the windpipe to assist breathing (intubation). It means that all medical treatments will be done to prolong life when the heart stops or breathing stops, including being placed on a breathing machine and being transferred to the hospital.

☐ **DNR Order: Do Not Attempt Resuscitation (Allow Natural Death)**
This means do not begin CPR, as defined above, to make the heart or breathing start again if either stops.

SECTION B Consent for Resuscitation Instructions (Section A)

The patient can make a decision about resuscitation if he or she has the ability to decide about resuscitation. If the patient does NOT have the ability to decide about resuscitation and has a health care proxy, the health care agent makes this decision. If there is no health care proxy, another person will decide, chosen from a list based on NYS law.

SIGNATURE ☐ Check if verbal consent (Leave signature line blank) DATE/TIME

PRINT NAME OF DECISION-MAKER

PRINT FIRST WITNESS NAME PRINT SECOND WITNESS NAME

Who made the decision? ☐ Patient ☐ Health Care Agent ☐ Public Health Law Surrogate ☐ Minor's Parent/Guardian ☐ §1750-b Surrogate

SECTION C Physician Signature for Sections A and B

PHYSICIAN SIGNATURE PRINT PHYSICIAN NAME DATE/TIME

PHYSICIAN LICENSE NUMBER PHYSICIAN PHONE/PAGER NUMBER

SECTION D Advance Directives

Check all advance directives known to have been completed:

☐ Health Care Proxy ☐ Living Will ☐ Organ Donation ☐ Documentation of Oral Advance Directive

HIPAA permits disclosure of MOLST to other health care professionals & electronic registry as necessary for treatment.

THE PATIENT KEEPS THE ORIGINAL MOLST FORM DURING TRAVEL TO DIFFERENT CARE SETTINGS. THE PHYSICIAN KEEPS A COPY.

LAST NAME/FIRST NAME/MIDDLE INITIAL OF PATIENT | DATE OF BIRTH (MM/DD/YYYY)

SECTION E — Orders For Other Life-Sustaining Treatment and Future Hospitalization When the Patient has a Pulse and the Patient is Breathing

Life-sustaining treatment may be ordered for a trial period to determine if there is benefit to the patient. If a life-sustaining treatment is started, but turns out not to be helpful, the treatment can be stopped.

Treatment Guidelines No matter what else is chosen, the patient will be treated with dignity and respect, and health care providers will offer comfort measures. *Check one:*

☐ **Comfort measures only** Comfort measures are medical care and treatment provided with the primary goal of relieving pain and other symptoms and reducing suffering. Reasonable measures will be made to offer food and fluids by mouth. Medication, turning in bed, wound care and other measures will be used to relieve pain and suffering. Oxygen, suctioning and manual treatment of airway obstruction will be used as needed for comfort.

☐ **Limited medical interventions** The patient will receive medication by mouth or through a vein, heart monitoring and all other necessary treatment, based on MOLST orders.

☐ **No limitations on medical interventions** The patient will receive all needed treatments.

Instructions for Intubation and Mechanical Ventilation *Check one:*

☐ **Do not intubate (DNI)** Do not place a tube down the patient's throat or connect to a breathing machine that pumps air into and out of lungs. Treatments are available for symptoms of shortness of breath, such as oxygen and morphine. (This box should ***not*** be checked if full CPR is checked in Section A.)

☐ **A trial period** *Check one or both:*

- ☐ **Intubation and mechanical ventilation**
- ☐ **Noninvasive ventilation (e.g. BIPAP), if the health care professional agrees that it is appropriate**

☐ **Intubation and long-term mechanical ventilation, if needed** Place a tube down the patient's throat and connect to a breathing machine as long as it is medically needed.

Future Hospitalization/Transfer *Check one:*

☐ **Do not send to the hospital unless pain or severe symptoms cannot be otherwise controlled.**

☐ **Send to the hospital, if necessary, based on MOLST orders.**

Artificially Administered Fluids and Nutrition When a patient can no longer eat or drink, liquid food or fluids can be given by a tube inserted in the stomach or fluids can be given by a small plastic tube (catheter) inserted directly into the vein. If a patient chooses not to have either a feeding tube or IV fluids, food and fluids are offered as tolerated using careful hand feeding. *Check one each for feeding tube and IV fluids:*

☐ **No feeding tube**	☐ **No IV fluids**
☐ **A trial period of feeding tube**	☐ **A trial period of IV fluids**
☐ **Long-term feeding tube, if needed**	

Antibiotics *Check one:*

☐ **Do not use antibiotics.** Use other comfort measures to relieve symptoms.

☐ **Determine use or limitation of antibiotics when infection occurs.**

☐ **Use antibiotics** to treat infections, if medically indicated.

Other Instructions about starting or stopping treatments discussed with the doctor or about other treatments not listed above (dialysis, transfusions, etc.).

Consent for Life-Sustaining Treatment Orders (Section E) (Same as Section B, which is the consent for Section A)

SIGNATURE ☐ Check if verbal consent (Leave signature line blank) DATE/TIME

PRINT NAME OF DECISION-MAKER

PRINT FIRST WITNESS NAME | PRINT SECOND WITNESS NAME

Who made the decision? ☐ Patient ☐ Health Care Agent ☐ Based on clear and convincing evidence of patient's wishes
☐ Public Health Law Surrogate ☐ Minor's Parent/Guardian ☐ §1750-b Surrogate

Physician Signature for Section E

PHYSICIAN SIGNATURE | PRINT PHYSICIAN NAME | DATE/TIME

This MOLST form has been approved by the NYSDOH for use in all settings.

THE PATIENT KEEPS THE ORIGINAL MOLST FORM DURING TRAVEL TO DIFFERENT CARE SETTINGS. THE PHYSICIAN KEEPS A COPY.

LAST NAME/FIRST NAME/MIDDLE INITIAL OF PATIENT

DATE OF BIRTH (MM/DD/YYYY)

SECTION F Review and Renewal of MOLST Orders on This MOLST Form

The physician must review the form from time to time as the law requires, and also:

- If the patient moves from one location to another to receive care; or
- If the patient has a major change in health status (for better or worse); or
- If the patient or other decision-maker changes his or her mind about treatment.

Date/Time	Reviewer's Name and Signature	Location of Review (e.g., Hospital, NH, Physician's Office)	Outcome of Review
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form

THE PATIENT KEEPS THE ORIGINAL MOLST FORM DURING TRAVEL TO DIFFERENT CARE SETTINGS. THE PHYSICIAN KEEPS A COPY.

LAST NAME/FIRST NAME/MIDDLE INITIAL OF PATIENT | DATE OF BIRTH (MM/DD/YYYY)

SECTION F Review and Renewal of MOLST Orders on This MOLST Form *Continued from Page 3*

Date/Time	Reviewer's Name and Signature	Location of Review (e.g., Hospital, NH, Physician's Office)	Outcome of Review
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
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			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form
			☐ No change ☐ Form voided, new form completed ☐ Form voided, ***no*** new form

EXHIBIT G

New York State Office of Court Administration Form 960

OCA Official Form No.: 960

AUTHORIZATION FOR RELEASE OF HEALTH INFORMATION PURSUANT TO HIPAA

[This form has been approved by the New York State Department of Health]

Patient Name	Date of Birth	Social Security Number
Patient Address		

I, or my authorized representative, request that health information regarding my care and treatment be released as set forth on this form:

In accordance with New York State Law and the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), I understand that:

1. This authorization may include disclosure of information relating to **ALCOHOL** and **DRUG ABUSE, MENTAL HEALTH TREATMENT**, except psychotherapy notes, and **CONFIDENTIAL HIV* RELATED INFORMATION** only if I place my initials on the appropriate line in Item 9(a). In the event the health information described below includes any of these types of information, and I initial the line on the box in Item 9(a), I specifically authorize release of such information to the person(s) indicated in Item 8.
2. If I am authorizing the release of HIV-related, alcohol or drug treatment, or mental health treatment information, the recipient is prohibited from redisclosing such information without my authorization unless permitted to do so under federal or state law. I understand that I have the right to request a list of people who may receive or use my HIV-related information without authorization. If I experience discrimination because of the release or disclosure of HIV-related information, I may contact the New York State Division of Human Rights at (212) 480-2493 or the New York City Commission of Human Rights at (212) 306-7450. These agencies are responsible for protecting my rights.
3. I have the right to revoke this authorization at any time by writing to the health care provider listed below. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization.
4. I understand that signing this authorization is voluntary. My treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditioned upon my authorization of this disclosure.
5. Information disclosed under this authorization might be redisclosed by the recipient (except as noted above in Item 2), and this redisclosure may no longer be protected by federal or state law.
6. **THIS AUTHORIZATION DOES NOT AUTHORIZE YOU TO DISCUSS MY HEALTH INFORMATION OR MEDICAL CARE WITH ANYONE OTHER THAN THE ATTORNEY OR GOVERNMENTAL AGENCY SPECIFIED IN ITEM 9 (b).**

7. Name and address of health provider or entity to release this information:

8. Name and address of person(s) or category of person to whom this information will be sent:

9(a). Specific information to be released:

- ☐ Medical Record from (insert date) _____ to (insert date) _____
- ☐ Entire Medical Record, including patient histories, office notes (except psychotherapy notes), test results, radiology studies, films, referrals, consults, billing records, insurance records, and records sent to you by other health care providers.
- ☐ Other: _____

Include: (*Indicate by Initialing*)

_____ **Alcohol/Drug Treatment**
_____ **Mental Health Information**
_____ **HIV-Related Information**

Authorization to Discuss Health Information

(b) ☐ By initialing here _____ I authorize _____
Initials — Name of individual health care provider

to discuss my health information with my attorney, or a governmental agency, listed here:

_____
(Attorney/Firm Name or Governmental Agency Name)

10. Reason for release of information: ☐ At request of individual ☐ Other:	11. Date or event on which this authorization will expire:
12. If not the patient, name of person signing form:	13. Authority to sign on behalf of patient:

All items on this form have been completed and my questions about this form have been answered. In addition, I have been provided a copy of the form.

_____ Date: _____
Signature of patient or representative authorized by law.

* **Human Immunodeficiency Virus that causes AIDS. The New York State Public Health Law protects information which reasonably could identify someone as having HIV symptoms or infection and information regarding a person's contacts.**

Instructions for the Use of the HIPAA-compliant Authorization Form to Release Health Information Needed for Litigation

This form is the product of a collaborative process between the New York State Office of Court Administration, representatives of the medical provider community in New York, and the bench and bar, designed to produce a standard official form that complies with the privacy requirements of the federal Health Insurance Portability and Accountability Act ("HIPAA") and its implementing regulations, to be used to authorize the release of health information needed for litigation in New York State courts. It can, however, be used more broadly than this and be used before litigation has been commenced, or whenever counsel would find it useful.

The goal was to produce a standard HIPAA-compliant official form to obviate the current disputes which often take place as to whether health information requests made in the course of litigation meet the requirements of the HIPAA Privacy Rule. It should be noted, though, that the form is optional. This form may be filled out on line and downloaded to be signed by hand, or downloaded and filled out entirely on paper.

When filing out Item 11, which requests the date or event when the authorization will expire, the person filling out the form may designate an event such as "at the conclusion of my court case" or provide a specific date amount of time, such as "3 years from this date".

If a patient seeks to authorize the release of his or her entire medical record, but only from a certain date, the first two boxes in section 9(a) should both be checked, and the relevant date inserted on the first line containing the first box.

EXHIBIT H

New York State Department of Health Authorization for Release of Health Information (Including Alcohol/Drug Treatment and Mental Health Information) and Confidential HIV/AIDS Related Information Form 5032

NEW YORK STATE DEPARTMENT OF HEALTH

Authorization for Release of Health Information (Including Alcohol/Drug Treatment and Mental Health Information) and Confidential HIV/AIDS-related Information

Patient Name	Date of Birth	Patient Identification Number
Patient Address		

I, or my authorized representative, request that health information regarding my care and treatment be released as set forth on this form. I understand that:

1. This authorization may include disclosure of information relating to ALCOHOL and DRUG TREATMENT, MENTAL HEALTH TREATMENT, and CONFIDENTIAL HIV/AIDS-RELATED INFORMATION only if I place my initials on the appropriate line in item 8. In the event the health information described below includes any of these types of information, and I initial the line on the box in Item 8, I specifically authorize release of such information to the person(s) indicated in Item 6.
2. With some exceptions, health information once disclosed may be re-disclosed by the recipient. If I am authorizing the release of HIV/AIDS-related, alcohol or drug treatment, or mental health treatment information, the recipient is prohibited from re-disclosing such information or using the disclosed information for any other purpose without my authorization unless permitted to do so under federal or state law. If I experience discrimination because of the release or disclosure of HIV/AIDS-related information, I may contact the New York State Division of Human Rights at 1-888-392-3644. This agency is responsible for protecting my rights.
3. I have the right to revoke this authorization at any time by writing to the provider listed below in Item 5. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization.
4. Signing this authorization is voluntary. I understand that generally my treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditional upon my authorization of this disclosure. However, I do understand that I may be denied treatment in some circumstances if I do not sign this consent.

5. Name and Address of Provider or Entity to Release this Information:

6. Name and Address of Person(s) to Whom this Information Will Be Disclosed:

7. Purpose for Release of Information:

8. Unless previously revoked by me, the specific information below may be disclosed from: _____ (INSERT START DATE) until _____ (INSERT EXPIRATION DATE OR EVENT)

☐ All health information (written and oral), except:

For the following to be included, indicate the specific information to be disclosed and initial below.	Information to be Disclosed	Initials
☐ Records from alcohol/drug treatment programs		
☐ Clinical records from mental health programs*		
☐ HIV/AIDS-related Information		

9. If not the patient, name of person signing form:	10. Authority to sign on behalf of patient:

All items on this form have been completed, my questions about this form have been answered and I have been provided a copy of the form.

SIGNATURE OF PATIENT OR REPRESENTATIVE AUTHORIZED BY LAW _____ DATE _____

Witness Statement/Signature: I have witnessed the execution of this authorization and state that a copy of the signed authorization was provided to the patient and/or the patient's authorized representative.

STAFF PERSON'S NAME AND TITLE _____ SIGNATURE _____ DATE _____

This form may be used in place of DOH-2557 and has been approved by the NYS Office of Mental Health and NYS Office of Alcoholism and Substance Abuse Services to permit release of health information. However, this form does not require health care providers to release health information. Alcohol/drug treatment-related information or confidential HIV-related information released through this form must be accompanied by the required statements regarding prohibition of re-disclosure.

*Note: Information from mental health clinical records may be released pursuant to this authorization to the parties identified herein who have a demonstrable need for the information, provided that the disclosure will not reasonably be expected to be detrimental to the patient or another person.

DOH-5032 (4/11)

New York State Department of Health
AIDS Institute

Authorization for Release of Health Information and Confidential HIV-Related Information*

This form authorizes release of health information including HIV-related information. You may choose to release only your non-HIV health information, only your HIV-related information, or both. Your information may be protected from disclosure by federal privacy law and state law. Confidential HIV-related information is any information indicating that a person has had an HIV-related test, or has HIV infection, HIV-related illness or AIDS, or any information that could indicate a person has been potentially exposed to HIV.

Under New York State Law HIV-related information can only be given to people you allow to have it by signing a written release. This information may also be released to the following: health providers caring for you or your exposed child; health officials when required by law; insurers to permit payment; persons involved in foster care or adoption; official correctional, probation and parole staff; emergency or health care staff who are accidentally exposed to your blood; or by special court order. Under New York State law, anyone who illegally discloses HIV-related information may be punished by a fine of up to $5,000 and a jail term of up to one year. However, some re-disclosures of health and/or HIV-related information are not protected under federal law. For more information about HIV confidentiality, call the New York State Department of Health HIV Confidentiality Hotline at 1-800-962-5065; for more information regarding federal privacy protection, call the Office for Civil Rights at 1-800-368-1019. You may also contact the NYS Division of Human Rights at 1-888-392-3644.

By checking the boxes below and signing this form, health information and/or HIV-related information can be given to the people listed on page two (and on additional sheets if necessary) of the form, for the reason(s) listed. Upon your request, the facility or person disclosing your health information must provide you with a copy of this form.

I consent to disclosure of (please check all that apply):

- ☐ My HIV-related information
- ☐ My non-HIV health information
- ☐ Both (non-HIV health and HIV-related information)

Name and address of facility/person disclosing HIV-related information:

_____

_____

Name of person whose information will be released: _____

Name and address of person signing this form (if other than above):

_____

_____

Relationship to person whose information will be released: _____

_____

Describe information to be released: _____

Reason for release of information: _____

Time Period During Which Release of Information is Authorized: From: _____ To: _____

Exceptions to the right to revoke consent, if any:

_____

_____

Description of the consequences, if any, of failing to consent to disclosure upon treatment, payment, enrollment, or eligibility for benefits
(Note: Federal privacy regulations may restrict some consequences):

_____

_____

Please sign below **only** if you wish to authorize all facilities/persons listed on pages 1,2 (and 3 if used) of this form to share information among and between themselves for the purpose of providing health care and services.

Signature _____ Date _____

*** This Authorization for Release of Health Information and Confidential HIV-Related Information form is HIPAA compliant. If releasing only non-HIV related health information, you may use this form or another HIPAA-compliant general health release form.**

Complete information for each facility/person to be given general information and/or HIV-related information. Attach additional sheets as necessary. It is recommended that blank lines be crossed out prior to signing.

Name and address of facility/person to be given general health and/or HIV-related information:

Reason for release, if other than stated on page 1:

If information to be disclosed to this facility/person is limited, please specify:

Name and address of facility/person to be given general health and/or HIV-related information:

Reason for release, if other than stated on page 1:

If information to be disclosed to this facility/person is limited, please specify:

The law protects you from HIV-related discrimination in housing, employment, health care and other services. For more information, call the New York City Commission on Human Rights at (212) 306-7500 or the NYS Division of Human Rights at 1-888-392-3644.

My questions about this form have been answered. I know that I do not have to allow release of my health and/or HIV-related information, and that I can change my mind at any time and revoke my authorization by writing the facility/person obtaining this release. I authorize the facility/person noted on page one to release health and/or HIV-related information of the person named on page one to the organizations/persons listed.

Signature _____ Date _____
(SUBJECT OF INFORMATION OR LEGALLY AUTHORIZED REPRESENTATIVE)

If legal representative, indicate relationship to subject:

Print Name _____

Client/Patient Number _____

*** This Authorization for Release of Health Information and Confidential HIV-Related Information form is HIPAA compliant. If releasing only non-HIV related health information, you may use this form or another HIPAA-compliant general health release form.**

Complete information for each facility/person to be given general information and/or HIV-related information. Attach additional sheets as necessary. It is recommended that blank lines be crossed out prior to signing.

Name and address of facility/person to be given general health and/or HIV-related information:

Reason for release, if other than stated on page 1:

If information to be disclosed to this facility/person is limited, please specify:

Name and address of facility/person to be given general health and/or HIV-related information:

Reason for release, if other than stated on page 1:

If information to be disclosed to this facility/person is limited, please specify:

Name and address of facility/person to be given general health and/or HIV-related information:

Reason for release, if other than stated on page 1:

If information to be disclosed to this facility/person is limited, please specify:

If any/all of this page is completed, please sign below:

Signature _____ Date _____
(SUBJECT OF INFORMATION OR LEGALLY AUTHORIZED REPRESENTATIVE)

Client/Patient Number _____

*** This Authorization for Release of Health Information and Confidential HIV-Related Information form is HIPAA compliant. If releasing only non-HIV related health information, you may use this form or another HIPAA-compliant general health release form.**

EXHIBIT I

New York State Department of Health
Authorization for Release of Health Information AIDS Institute
and Confidential HIV-Related Information Form DOH-2557

EXHIBIT J

Power Of Attorney

To Execute HIPAA Medical Record Authorization Forms Pursuant To NY Public Health Law §18(1)(G) As Amended 10/26/04.

I, _____

of _____
(insert your name and address)

do hereby appoint: _____, with offices at _____, New York _____ my attorneys-in-fact to act (each agent may act separately) in my name, place and stead in any way which I myself could do, if I were personally present **to execute HIPAA medical record authorization forms pursuant to NY Public Health Law §18(1)(g) as amended 10/26/04.** This power of attorney may be revoked by me at any time. This Power of Attorney shall not be affected by my subsequent disability or incompetence.

To induce any third party to act hereunder, I hereby agree that any third party receiving a duly executed copy or facsimile of this instrument may act hereunder, and that revocation or termination hereof shall be ineffective as to such third party unless and until actual notice or knowledge of such revocation or termination shall have been received by such third party, and I for myself and for my heirs, executors, legal representatives and assigns, hereby agree to indemnify and hold harmless any such third party from and against any and all claims that may arise against such third party by reason of such third party having relied on the provisions of this instrument.

In Witness Whereof I have hereunto signed my name this ____day of _____, 2018

_____ (SIGNATURE)

ACKNOWLEDGEMENT

STATE OF NEW YORK
COUNTY OF _____

On this ____day of _____, 20185 before me the undersigned, personally appeared _____, personally known to be 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 executed the same in his capacity, and that by his signature on the instrument, the individual, or the person who acted on behalf of the individual, executed the instrument and that such individual made such appearance before the undersigned at _____, New York.

_____
Notary

C&F: 3853753.1

EXHIBIT K

HIPAA RELEASE AUTHORITY

I acknowledge that my health care providers and other persons authorized to possess, handle, and/or disseminate my medical information ("Subject Persons") may be limited by the provisions of the Health Insurance Portability and Accountability Act of 1996, and the regulations promulgated thereunder (collectively, "HIPAA") from disclosing certain matters (such matters, collectively, the "Protected Information"). By my signature below, I appoint my health care agent, and any successor identified on my Health Care Proxy of even date herewith, as my "personal representative" within the meaning of HIPAA. Requests for Protected Information made by my health care agent to any and all Subject Persons shall be treated as if they were made by me for purposes of HIPAA and I intend for my agent to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. In accordance with this wish, I direct that my physician shall write a clear order in my chart that such access be provided to my health care agent and that all Subject Persons involved in my care be made aware of the existence of this order.

Signature: _____ Date: _____
Name

Address: Principle's Address _____

WITNESSES:

_____

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C&F: 3853753.1

This presentation is for informational purposes only and is not intended as a substitute for legal, accounting or financial counsel with respect to your individual circumstances.

Under IRS regulations we are required to add the following IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding any penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction(s) or tax-related matter(s) addressed herein. This communication may not be forwarded (other than within the recipient to which it has been sent) without our express written consent.

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