

## MACEDONIA BAPTIST CHURCH, ALBANY, NY, 9/12/20 WEBINAR ON ADVANCE HEALTH CARE AND ESTATE PLANNING

### FAQs & RESOURCE GUIDE

*Disclaimer: These FAQs are based on New York and Federal law and draw from various publications and the knowledge and experience of the presenters of the Macedonia Baptist Church's Webinar on Advance Health Care & Estate Planning. The information communicated in the Webinar, the FAQs and Resource Guide is intended to inform, not to advise. No attorney-client relationship is established by this presentation. No one should attempt to interpret or apply any law without the aid of an attorney.*

#### SOME KEY QUESTIONS TO CONSIDER

1. What happens if the unexpected happens – you become incapacitated or seriously ill? Do you have Advance Care Directives and a Power of Attorney?
2. If you become seriously ill with a terminal condition, do you have an End-of-Life Care Plan?
3. What happens to your estate when you die? Do you have a Will and/or Trust? Are your beneficiaries for contractual assets (life insurance, pension, 401K, bank accounts, etc.) up-to date?

#### ADVANCE DIRECTIVES / HEALTH CARE PROXY AND LIVING WILL

##### *What is an Advance Directive?*

- An Advance Directive, also referred to as an Advance Care Directive or Advance Health Care Directive, is a legal document that explains:
  - how you want medical decisions about you to be made if you cannot make the decisions yourself; and
  - who you want to make decisions for you when you cannot.
- Health Care Proxies and Living Wills are the most common types of Advance Directives. Some other types of Advance Directives are Do Not Resuscitate Orders (DNR) and Medical Orders for Life Sustaining Treatment (MOLST).
- Advance Directives only apply to health care decisions and do not affect financial or business matters.

### ***What is the Patient Self-Determination Act (PSDA)?***

- A federal law enacted in 1990 that encourages everyone to decide ahead of time about the types and extent of medical care they want to accept or refuse if they become unable to make those decisions due to illness.
- The PSDA requires hospitals, skilled nursing facilities, home health agencies, hospice programs and Health Maintenance Organizations (HMOs):
  - To inform patients about Advance Directives and their rights to have Advance Directives.
  - To never discriminate against patients based on whether they have filled out an Advance Directive or not.

### ***What is a Living Will?***

- A document that states your wishes about medical care in the event that you develop an irreversible condition that prevents you from making your own medical decisions. Stated simply, it's your expression of how you want to be treated in certain medical circumstances.
- New York has no statute providing for a Living Will but its highest court (Court of Appeals) has approved of Living Wills.

### ***What is a Healthcare Proxy?***

- A document that allows you, the principal, to appoint another person as your health care agent to make health care decisions on your behalf if you are no longer able to do so.
- New York has a Health Care Proxy law set forth in statute.

### ***Is a Healthcare Proxy and Durable Medical Power of Authority the same thing?***

- Both documents serve the same purpose. In New York it's called a Health Care Proxy. In other states it's called a Durable Medical Power of Attorney.

### ***When does the appointment of the Health Care Proxy become effective?***

- In New York, your health care agent cannot act under the Proxy until a determination is made by two doctors that you are not able to make your own health care decisions.
- Note, don't confuse "effective" with validity. A Health Care Proxy and Living Will are legally valid upon execution by you and proper witnessing by two adults.

***Can your health care agent make all medical decisions for you when authorized to act?***

- **Yes**, however, in regard to some decisions, like the administration of artificial feeding, your agent must have specific knowledge of your wishes, otherwise the agent has no authority to make such decisions.

***Can you appoint more than one person to act as agent at a time?***

- **No**. The New York State Department of Health has stated that each person can appoint only one agent to act at a time.
- You can appoint an alternate agent to become the successor agent if the original agent refuses to act or can't act.

***Can you choose to have both a Living Will and a Health Care Proxy?***

- **Yes**. You may create both a Living Will and a Health Care Proxy.

***How specific should you be in your Living Will?***

- Your Living Will should express your general wishes, but it should also be as specific as reasonably possible. Some examples of specific matters typically covered are your wishes concerning:
  - Artificial nutrition and hydration,
  - Cardiac resuscitation,
  - Mechanical respiration,
  - Antibiotics,
  - Pain medicine, etc.

***Can a Health Care Proxy be combined with a Power of Attorney (POA) in a single document?***

- **No**. The New York Health Care Proxy law specifically requires you to execute a Health Care Proxy to appoint your health care agent. A POA is a different document provided for in the New York General Obligations law that authorizes a person to attend to your legal, financial, and/or personal affairs.
- The agent appointed by you in your POA may, but need not be, the same person who is the Health Care Agent in your Health Care Proxy.

***What happens if you are declared incapable of making medical decisions and do not have a health care proxy?***

- Then the **New York Family Health Care Medical Decisions Act**, enacted in 2010, applies. It provides for the designation of a surrogate decision-maker to make medical decisions for you. This law establishes a prioritized list of those who may act as surrogate. The priority order of who can serve as a surrogate are court-appointed guardians, spouses, adult children, parents, adult siblings, or friends.
- The surrogate has authority to make all health care decisions that the patient would have been able to make prior to becoming incapacitated.

***What is capacity?***

The ability of a patient to understand the benefits and risks of, and the alternatives to, a proposed treatment or intervention (including no treatment).

***How is incapacity determined?***

- The initial determination of incapacity must be made by an attending physician.
- Under certain circumstances, New York requires a concurring determination from a second physician to declare a patient incapable of making health care decisions.

***How is incapacity determined in cases of mental illness or disability?***

- New York sets out specific requirements for determining incapacity caused by mental illness or developmental disability.
- Those determinations must be made by a physician who is qualified to work with those populations and cannot be made by an ordinary attending physician.

***Is there any difference between a Health Care Proxy and a Surrogate?***

- **Yes**, the main difference is, with a Health Care Proxy you choose and appoint the agent, versus a surrogate who is designated by a court or is determined according to the priority order set forth in the New York Family Health Care Medical Decisions Act.

### ***Whom should you appoint as your proxy in your Health Care Proxy?***

- Selection of a proxy is one of the most important decisions you will make. The person you name as your proxy must be 18 years or older and should clearly understand your wishes and be willing to accept responsibility for making health care decisions for you.
- You can appoint a second person as your alternate proxy, but you can't designate more than one proxy to act at a time.

### ***What are the types of Life-Sustaining Treatments (LST) available?***

- LST is any treatment that serves to prolong life without reversing the underlying medical condition. LST includes:
  - CPR (cardiopulmonary resuscitation) including use of an AED (automated external defibrillator).
  - Mechanical ventilation (breathing machines/ventilators).
  - Intravenous medications such as antibiotics.
  - Nutrition and hydration (food and liquids) given through feeding tubes or IVs.

### ***What is End-of-Life Decisions?***

- Those decisions about how you wish to be cared for and treated when you are dying. End-of-Life Decisions can include whether to accept or refuse treatments that might prolong your life.

### ***Do Advance Directives expire?***

- An Advance Directive remains in effect until you change it. If you complete a new Advance Directive, it invalidates the previous one, however, you should take steps to make sure it is known there is a new Directive (see next FAQ on cancellation).

### ***How do I cancel an Advance Directive?***

- You may revoke your Advance Directive by notifying your agent or health care provider orally or in writing, or by any other act that clearly shows your intent to revoke the document (such as tearing up your Advance Directive or signing a written revocation).
- Communicating that an Advance Directive has been replaced with a new one is critical to avoid confusion and ensure the Advance Directive is recognized.

***Will emergency medical technicians honor Living Wills or Health Care Proxies?***

- **No**, once emergency personnel have been called, they must do what is necessary to stabilize a person for transfer to a hospital, both from accident sites and from a home or other facility. After a physician fully evaluates the person's conditions and determines the underlying conditions, advance directives can be implemented.

***Does the doctor have to follow your Advance Directive?***

- **Yes, except** where the decision goes against the individual doctor's conscience or the medical institution's policy.

***Does having an Advance Directive or not affect the quality of health care that you receive?***

- **No**. Federal law (the 1990 Patient Self Determination Act) prohibits discrimination against patients based on whether they have filled out an Advance Directive or not.

**COVID-19 PANDEMIC**

***Is there a COVID-19 Advance Directive?***

- **Yes**, you may execute an Advance Directive that is only intended to provide instructions in the event that you have COVID-19. If you have a Living Will already in place, the COVID-19 directive can be added as an addendum - make sure the witness and signing protocol as required for execution of an original Living Will is followed.

***Can Health Care Directives, Powers of Attorney, Wills and Trusts be witnessed remotely?***

- **Yes**, in response to the Covid-19 pandemic Governor Andrew Cuomo signed Executive Orders permitting remote video witnessing of these and other documents, and remote notarization.
- These Orders were issued under temporary emergency powers invoked by the Governor and should be checked for continuing effect in the future.

***Is there a central registry where you can place your Advance Directive?***

- There's no government sponsored registry. However, there are registries in the marketplace accessible by health care providers where you can register your Advance Directive for a fee.
- Under New York law, any doctor who is given a Health Care Proxy must arrange for a copy to be put in your medical record.

**ORGAN DONATION**

***Can you specify your wishes related to organ donation in your Health Care Proxy or Living Will?***

- **Yes**, or you can choose to fill out an Organ/Tissue Form provided by the New York State Department of Health. You may also enroll in the New York State Organ and Tissue Donor Registry electronically, or at DMV or the Board of Elections.

***Can your Health Care Agent consent to an organ/tissue donation?***

- **Yes**, unless he or she has notice of opposition, or reason to believe that the donation is contrary to your religious or moral beliefs.

**RACIAL DISPARITIES**

***Is it true that African Americans are less likely to engage in Advance Health Care planning?***

- **Yes**, the percentage of individuals in the US who engage in advance care planning is approximately 60%, while among African American individuals the percentage is less than 25%. \*

***What drives this disparity?***

- According to studies\*, the two most well-documented barriers to advance care planning among underserved populations are mistrust of the health care system and reluctance to discuss dying.

*\*See Advance Care Planning Behavior and Perspectives Among African American Individuals, Journal of American Medical Association (JAMA) Network Open, May 8, 2020.*

**POWER OF ATTORNEY (POA)**

***What legal powers does a POA grant to an Agent?***

- Any and all of the following:

- Buy or sell your real estate.
- Manage your property.
- Conduct your banking transactions.
- Invest or not invest your money.
- Make legal claims and file lawsuits on your behalf.
- Manage your tax and retirement matters.

***Does a POA continue when you become mentally or physically incapacitated?***

- **Yes**, this is one of the main reasons to have a POA.

***How long is a POA effective?***

- POA lasts until cancellation by you or upon your death or the death of your agent(s).

***Can you revoke your POA?***

- **Yes**, as long as you have the capacity to do so. You may revoke the POA by delivering a written, signed and dated revocation of the POA to the agent(s) and any third party you have reason to believe has received, retained or acted upon the POA.

***Can you have more than one agent?***

- **Yes**. You can appoint more than one agent to handle your affairs. If you do appoint more than one, then you have the option of deciding whether they will work jointly or separately. Allowing agents to work separately should be carefully circumscribed as the potential for duplication and confusion increases.
- It's a good idea to name a successor agent. He or she can act if the first agent resigns, dies, becomes incapacitated, is not qualified to serve or declines to serve.

***I've heard that having a POA is like handing over a signed blank check to your agent. Is that true?***

- Your agent has a fiduciary responsibility to act in your best interest. However, your agent does not necessarily need to ask your permission to do what you have given him or her the power to do or inform you of their plans ahead of time. This is one of the reasons it is so important to choose your agent wisely, making sure you trust whoever it is.

- As a guard against fraud and abuse, New York law allows you to appoint someone to act as monitor. A monitor has the power to watch over the actions of your agent.
- You can also require your agent to provide accountings as frequently as you wish to you or your monitor.

***If you're married and your spouse becomes disabled, don't you have authority to make decisions for your disabled spouse?***

**Not necessarily.** New York courts have found that an agency between husband and wife is not unequivocally established from the mere fact of marriage. Therefore, spouses may want to consider appointing each other as their Power of Attorney.

***If you have a POA, does that mean you can no longer handle your own affairs?***

- **No**, having an agent just means that he or she can also act for you. You are not precluded from acting if you choose to.

***Is my POA valid in New York if it was executed in another state?***

- **Yes**, as long as your POA was validly executed in the other state, it is valid in New York.
- Note, however, even when there is a legally valid POA in place, some entities, like financial institutions, will insist that a POA be executed on their form. (This gets resolved on a case-by-case basis.)

***Does a POA have to be filed anywhere?***

- You are not required to file your POA unless you are using it for a real estate transaction.

## **WILLS & TRUSTS**

### ***What is a Will?***

- A Will is a legal document that expresses your wishes as to how your property is to be distributed after your death.

### ***What is a Trust?***

- A Trust is an entity or an agreement that allows you, as the grantor (also known as the settlor, donor or creator) to transfer property to someone known as the trustee for the benefit of a third party, called the beneficiary.

### ***Is a Living Will and a Will the same thing?***

- **No**, a Living Will is an advance health care directive that is in effect while you are alive. A Will is an estate planning document that governs disposition of your assets after you die.

### ***What makes up your Estate?***

- Your Estate is everything you own – all your property and property rights and includes assets with loans against them.

### ***How about digital assets?***

- Digital assets form part of your estate though the law is still emerging, and it's unsettled as to how best to handle their transfer. They include items such as credits accrued with online retailers, balances in online trading accounts, PayPal accounts, Bitcoin accounts, frequent flyer miles, cash-back reward balances from credit card companies, etc. Also included are non-monetary value items such as your digital photo collection or your Facebook log which may have personal meaning for your love ones.
- In addition to online accounts and assets, your personal digital devices such as your computer or laptop as well as your tablet, e-reader, cell phone or smartphone and all manner of offline storage form part of your digital estate.

### ***What is Probate?***

- The legal process conducted under the authority of a court by which ownership of your property is transferred to living beneficiaries.
- The court also uses the probate process to confirm the executor and establish the validity of a Will.

### ***Does dying intestate (without a Will) avoid a court proceeding?***

- **No**. Intestate estates still require probate through the court; the process is called administration.

### ***What are Probate and Non-Probate assets?***

- Non-Probate Assets are assets that transfer automatically because they're contractual in nature – you designated a beneficiary who will take ownership when you die. They include life insurance proceeds, annuities, many retirement accounts, bank accounts with payable on death

provisions. They also include jointly held assets with right of survivorship, like real estate. **Note**, Non-Probate assets even if listed in the Will transfer outside of probate directly to the beneficiary. Therefore, it is important to make sure beneficiaries named in such agreements are kept up to date.

- Probate Assets are everything else such as real estate property (land, houses) not owned jointly and personal property (cars, boats, heirlooms, cash, bank accounts, securities, art, etc.).

### ***Can a will be probated outside of court?***

- **No**. Testate estates, as well as intestate estates, are required to be probated through the courts. However, in New York, “Small Estates” may qualify for an alternative form of probate (called Voluntary Administration) that is faster than formal probate.
- Note, this alternative may be used even if there is no Will.

### ***What is a Small Estate?***

- When a decedent had less than \$50,000 of personal property then it’s considered a small estate. If the decedent owned real property, like a house or land, in their name alone then it’s not a Small Estate anymore regardless of value. The process for administering Small Estates is called a Voluntary Administration.

### ***How long does probate take?***

- Pre-COVID, formal probate estate administration would take on average about a year. **Note**, in New York creditors have a period of 7 months to file claims against the estate, so the estate must remain open for at least that period.
- Intestate administration often takes longer than testate administration.

### ***If you have a Trust, do you still need a Will?***

- Depends on how comprehensive the Trust is. A challenge with a Trust is that all assets must be titled in the name of the Trust in order to avoid probate and often the grantor (creator) of the Trust fails to title assets in the Trust acquired by him or her after initial set-up. Any untitled assets that don’t pass directly to your heirs by contract or operation of law would be subject to probate and, therefore, a Will may still be advisable.

### ***What are the advantages of a Trust over a Will?***

- Privacy. Wills must be probated in court and become public record. A Trust is not a matter of public record and is administered privately by the named trustee.
- Control over the assets and income. A Trust allows the grantor to establish a series of instructions for the trustee to follow about how the property should be used.
- Probate Avoidance - which often helps a person's estate be handled much more efficiently without the added expenses and time-consuming nature of the probate process.
- Quicker Disposition.
- Flexibility. Trusts can be readily amended. Trusts may be more helpful when assets are also in other states. With a Will, there may be a need to establish a probate case in each state where property is situated.
- Taxes. There may be structuring opportunities to reduce taxes.

### ***What if you live in New York and own real estate outside of the state, do you need a Will for both New York and the other state?***

- If your domicile is in New York, a New York Will is usually sufficient. However, real estate owned in another state must be probated in that state through what is known as ancillary probate. This is a situation where placing the property in trust would avoid ancillary probate.

### ***What is a Living Trust?***

- A Trust created during your lifetime and provides a way for you to preserve and retain control over your assets even if you should become incapacitated.
- Living Trusts are either revocable or irrevocable.

### ***What happens to a Revocable Trust when you die?***

- It becomes irrevocable upon your death because you're no longer available to amend or revoke it.