

Guide to Estate Planning and Elder Law



Ettinger Law Firm

ESTATE PLANNING • ELDER LAW

Protecting your assets



Definitions:

Estate Planning: Planning for death to get the assets to whom you want, when you want, the way you want, with the least amount of taxes and legal fees possible.

Elder Law: Planning for disability to get the persons you want to handle your affairs and to protect your assets from being depleted for long-term care.

Introduction to Estate Planning and Elder Law

Practicing estate planning and elder law is one of the most enjoyable and professionally rewarding careers an attorney may choose. Imagine a practice area where your clients respect your knowledge and treat you with kindness and courtesy. They pay your fees in a timely fashion and tell their friends how much they have enjoyed working with you and your firm. At the same time, you are rarely facing the pressure of a deadline, much less an adversarial attorney on the other side of a matter trying to best you. In most instances, you are acting in the capacity of a counselor at law (trusted advisor) rather than an attorney at law (professional representative).

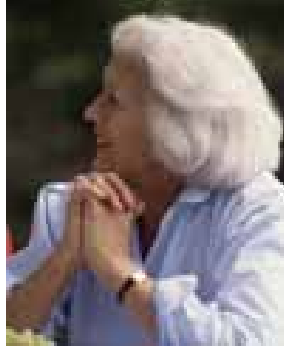


We spend our days meeting with clients, discussing their lives and their families and addressing their fears and concerns. Through our knowledge, training, experience and imagination, we craft solutions, occasionally elegant ones, to the age old problem of passing assets from one generation to another as quickly and painlessly as possible. At the same time, we also seek to protect those assets from being depleted by taxes, legal fees and nursing home costs to the extent the law allows.

The end result of this process is a client who feels safe and secure in the knowledge that, in the event of death or disability, they have all their bases covered. Having achieved peace of mind that their future is well planned and in good hands, they can get on with the business of enjoying their lives. For the attorney, a happy and satisfied client has been added to the practice and another potentially lifelong and mutually rewarding relationship has begun. Let's look at the strategies and techniques we use to achieve this enviable state of affairs.

Major Issues Facing Senior Clients Today

One of the ways that we help clients is in setting up a comprehensive plan so they may avoid court proceedings upon death or in the event of disability. Trusts are used in place of wills for older persons since they do not require court proceedings to settle the estate. Trusts also avoid the foreign probate proceeding required for property owned in another state, known as ancillary probate. This saves the family time in settling the estate as well as the high costs of legal proceedings. In addition, since revocable living trusts, unlike wills, take effect during the grantor's lifetime, the client may stipulate which persons take over in the event of their disability. Planning ahead helps maintain control in the family or with trusted advisors and avoids a situation that may not be in the client's best interest. For example, in the event of a disability where no plan has been put in place, an application to the court may be required in order to have a legal guardian appointed for the disabled person.



This may not be the person the client would have chosen. In such a case, assets may not be transferred to protect them from being spent down for nursing home costs without court permission, which may or may not be granted.

Another area in which we assist the client is in saving estate taxes, both state and federal, for married couples by using the two-trust technique. Assets are divided as evenly as practicable between each of the spouse's trusts. While the surviving spouse has the use and enjoyment of the deceased spouse's trust, the assets of that trust bypass the estate of the surviving spouse and go directly to the named beneficiaries when the second spouse dies. Tens to hundreds of thousands of dollars, or more, in potential estate taxes may be saved, depending on the size of the estate. Furthermore, the revocable living trust avoids the two probates that would occur were the clients to use wills, as the couple's estate must be settled after the death of each spouse in order to save estate taxes. We also help to protect assets from being depleted due to nursing home costs. Irrevocable Medicaid trusts may be established, subject to a five-year look-back period, to protect the client's home and other assets from having to be spent down due to the high cost of nursing home care. We use Medicaid asset and transfer rules to protect assets in the event a client requires nursing home care but has done no pre-planning. Through the use of Medicaid qualifying annuities, promissory notes, and housing and

care agreements, significant assets may be protected despite the five-year look-back, even when the client may be on the nursing home doorstep.

Fives Steps to Estate Planning for Seniors



1. Understanding the Family Dynamics

The first step in an elder law trusts and estates matter is to gain an understanding of the client's family dynamics. If there are children, which is usually the case, we need to determine whether or not they are married. Is it a first or second marriage? Do they have any children from a previous marriage or do their spouses? What kind of work do they do, and where do they live? Do they get along with each other and with the parent clients? We are looking to determine which family members do not get along with which others and what the reasons may be. This goes a long way toward helping

us decide who should make medical decisions and who should handle legal and financial affairs. Should it be one of them or more than one? How should the estate be divided? Is the client himself in a second marriage? Which children, if any, are his, hers, or theirs? Sometimes all three instances may occur in the same couple. Here, further exploration of the family functioning will be needed as the potential for hurt feelings, conflicts of interest, and misunderstandings multiplies. In addition, great care must be taken to develop a plan for management, control, and distribution of the estate that will not only be fair to the children from a previous marriage but will be seen to be fair as well. At times, the assistance of the professional advisor in acting as trustee may be invaluable in helping to keep the peace between family members. Finally, this step will also flesh out whether there are any dependents with special needs and which family members and assets might be best suited to provide for such children.

2. Reviewing Existing Estate Planning Documents

The second step in an elder law trusts and estates matter is to review any prior estate planning documents the client may have, such as a will, trust, power of attorney, health care proxy and living will, to determine whether they are legally sufficient and reflect the client's current wishes or whether they are outdated. Some basic elder law estate planning questions are also addressed at this time such as:

- a. Is the client a US citizen? This will impinge on the client's ability to save estate taxes.
- b. Is the client expecting to receive an inheritance? This knowledge helps in preparing a plan that will address not only the assets that the client has now but what they may have in the future.
- c. Does the client have long-term care insurance? If so, the elder law attorney will want to review the policy and determine whether it provides an adequate benefit considering the client's other assets and income, whether it takes inflation into account, and whether it is upgradable. This will allow the practitioner to decide whether other asset protection strategies may be needed now or later.



- d. Does the client need financial planning? Many clients that come into the elder law attorney's office have never had professional financial advice or are dissatisfied with their current advisors. They may need help understanding the assets they have or with organizing and consolidating them for ease of administration. They may also be concerned with not having enough income to last for the rest of their lives. The elder law attorney will typically know a number of capable financial planners who are experienced with the needs and wishes of the senior client, including (1) secure investments with protection of principal, and (2) assets that tend to maximize income.

3. Reviewing the Client's Assets

The third step is to obtain a complete list of the client's assets, including how they are titled, their value, whether they are qualified investments, such as IRA's and 401(k)'s and, if they have beneficiary designations, who those beneficiaries are. Armed with this information, the advisor is in a position to determine whether the estate will be subject to estate taxes, both state and federal, and may begin to formulate a strategy to reduce or eliminate those taxes to the extent the law allows. This will often lead to shifting assets between spouses and their trusts, changing beneficiary designations, and, with discretion, trying to determine which spouse might pass away first so as to effect the greatest possible tax savings. Ideally, the attorney should have the client fill out a confidential financial questionnaire prior to the initial consultation.

4. Developing the Estate Plan

The fourth step is to determine, with input from the client, who should make medical decisions for the client if they are unable to and who should be appointed to handle legal and financial affairs through the power of attorney in the event of the client's incapacity. Next, we will consider



what type of trust, if any, should be used, whether a simple will would suffice, who should be the trustees (for a trust) or executors (for a will), and what the plan of distribution should be. In order to avoid a conflict, the trustees who are chosen in lieu of the grantor should be the same persons named on the power of attorney. At this point, great care should also be taken to ensure that

the feelings of the heirs will not be hurt. Good estate planning looks at the client's estate from the heirs' point of view as well as the client's. For example, if there are three children, it may be preferable that one be named as trustee or executor, as three are usually too cumbersome and if the client chooses only two, then they are leaving one out. If there are four or five children, we prefer to see two trustees or executors chosen. This way, the pressure will be reduced on just the one having to answer to all the others. More importantly, the others will feel far more secure that two siblings are jointly looking after their interests.

If the distribution is to be unequal, it may need to be discussed with the affected children ahead of time to forestall any ill will or even litigation after the parents have died. By considering the relative ages of the children, where they live, and their relationships amongst each other and with their parents, the advisor will generally find a way to craft a plan that accommodates the needs and desires of all parties concerned. Some of the techniques we find useful in this context are to offer a delayed distribution, such as twenty percent upon the death of the grantor, one-half of the remaining balance after five years, and the remainder after ten years. These same percentages may also be used at stated ages, such as thirty, thirty-five, and forty. Also, when leaving percentages of the estate, unless it is simply to the children in equal shares, it is often useful to determine the monetary value of those percentages in the client's current estate. This will allow the client to see whether the amount is truly what they wish to bequeath. Percentage bequests to charities should be

avoided so that the family may avoid having to account to the charity for the expenses of administering the estate.

In terms of the type of trust, we are generally looking at several options for most clients. It is important to determine whether there should be one trust or two. In order to avoid or reduce estate taxes, there should be two trusts for spouses whose estates exceed or may at a later date exceed the state and/or federal estate tax threshold. Should the trust be revocable or irrevocable?

The latter is important for protecting assets from nursing home expenses subject to the five-year look-back period. Primary features of the irrevocable Medicaid trust are that neither the grantor nor the grantor's spouse may be the trustee and that these trusts are income-only trusts. Most people choose one or more of their adult children to act as trustees of the irrevocable trust. Since principal is not available to the grantor, the client will not want to put all of their assets into such a trust. Assets that should be left out are IRA's, 401(k)'s, 403(b)'s, etc. The principal of these qualified assets are generally exempt from

Medicaid and should not be placed into a trust, as this would create a taxable event requiring income taxes to be paid on all of the IRA. If the institutionalized client has a community spouse, up to about one hundred thousand dollars may also be exempted. Notwithstanding that the home is exempt if the community spouse is living there, it is generally a good idea to protect the home sooner rather than to wait until the first spouse has passed, due to the five-year look-back period. It should be noted that the look-back means that from the time assets are transferred to the irrevocable trust, it takes five years before they are exempt, or protected from being required to be spent down on the ill person's care before they qualify for Medicaid benefits. What if the client does not make the five years? Imagine that the client must go into the nursing home four years after the trust has been established. In such a case, by privately paying the nursing facility for the one year remaining, the family will be eligible for Medicaid after just the remaining year of the five-year penalty period has expired.



Although the Medicaid trust is termed irrevocable, the home may still be sold or other trust assets traded. The trust itself, through the actions of the trustees, may sell the house and purchase a condominium in the

name of the trust so that the asset is still protected. The trust may sell one stock and buy another. For those clients who may wish to continue trading on their own, the adult child trustee may sign a third party authorization with the brokerage firm authorizing the parent to continue trading on the account. The trust continues to pay all income (i.e., interest and dividends) to the parent grantor. As such, the irrevocable trust payments should not affect the client's lifestyle when added to any pensions, social security, and IRA distributions the client continues receiving from outside the trust. It should also be noted that while no separate tax return is needed for a revocable trust, the irrevocable trust requires an "informational return" which advises the IRS that the income is "passing through" to the grantors and will be reported on their individual returns.

If there is a disabled child, consideration will be given to creating a supplemental needs trust, which will pay over and above what the child may

be receiving in government benefits, especially social security income and Medicaid, so that the inheritance will not disqualify them from those benefits.



Finally, with the size of estates having grown today to where middle class families are leaving substantial bequests to their children (depending, of course, on how many children they have), the trend is toward establishing trusts for the children to keep the

inheritance in the bloodline. Variously termed inheritance trusts, heritage trusts, or dynasty trusts, these trusts may contain additional features, such as protecting the inheritance from a child's divorce, lawsuits, creditors, and estate taxes when they die. The primary feature of all of these trusts for the heirs, however, is to provide that when the child dies, in most cases many years after the parent, the hard-earned assets of the family will not pass to a son-in-law or daughter-in-law who may get remarried, but rather to the grantor's grandchildren. On the other hand, if the client wishes to favor the son-in-law or daughter-in-law, they may choose to provide that the trust, or a portion of it, continue as an "income only" trust for their adult child's surviving spouse for their lifetime, and only thereafter to the Grantor's grandchildren.

5. Applying for Medicaid Benefits

In the event the client requires home care or institutionalized care in a nursing home facility, an application for Medicaid benefits may be required. Due to complex asset and transfer rules, the application should be made with the aid of an experienced elder law attorney. Again, it is useful in this context for a confidential survey of the client's assets, as well as any transfers of assets, to be filled out prior to the initial consultation.

This form of financial survey will be significantly different from the one used for estate planning purposes. As a combined federal and state program, Medicaid asset and transfer rules vary significantly from state to state. A few techniques, nevertheless, will be widely applicable. First, in the event an adult child takes the parent into their home in order to care for them in their later years, a housing and care agreement should be executed so that assets may be legitimately moved from the parent to the child prior to any nursing home care. The adult child will be required to report any payments received under the agreement as earned income on their tax returns. Also, since the family home is usually the most significant asset, consideration will need to be given as to whether the home should be deeded to the client's adult children while retaining a life estate in the parent or whether the irrevocable Medicaid trust should be used to protect the asset.



While the deed with a life estate will be less costly to the client, in most cases it offers significant disadvantages when compared to the trust. First, if the home is sold prior to the death of the Medicaid recipient, the life estate value of the home will be required to be paid towards their care. If the house is rented, the rents are payable to the nursing facility since they belong to the life tenant. Finally, the client loses a significant portion of their capital gains tax exclusion for the sale of their primary residence as they will only be entitled to a pro rata share based on the value of the life estate to the home as a whole. All of the foregoing may lead to a situation where the family finds they must maintain a vacant home for many years. Conversely, a properly drafted irrevocable Medicaid trust preserves the full capital gains tax exclusion on the primary residence and the home may be sold by the trust without obligation to make payment of any of

the principal towards the client's care, assuming we have passed the look back period. It should be noted here that both the life estate and the irrevocable Medicaid trust will preserve the stepped-up basis in the property provided it is only sold after the death of the parent who was the owner or grantor. Upon the death of the parent, the basis for calculating the capital gains tax is stepped up from what the parent paid, plus any improvements, to what it was worth on the parent's date of death. This effectively eliminates payment of capital gains taxes on the sale of appreciated property, such as the home, after the parent dies. Both the revocable and irrevocable trusts also preserve any tax exemptions that the client may have on their home, such as senior and veteran's exemptions.

Finally, even with a client already in a nursing home, significant assets may be saved through advanced techniques that are beyond the scope of this guide. Please consult your elder law attorney for further information if you or a family member is in this situation.

Major Mistakes in Estate Planning and Elder Law

1. Failure to address all of the issues.

A comprehensive review of the client's situation should address planning for disability as well as for death, including minimizing or avoiding estate taxes and legal fees and proceedings. A plan should be in place to protect assets from nursing home costs. Like a chess player, counsel should look ahead two or three moves in order to determine what may happen in the future. For example, attorneys will too often place a majority of the assets in the wife's name or in her trust in light of the husband having significant IRA assets in his account. However, since the husband is often older and has a shorter life expectancy, this may result in the IRA assets rolling over to the wife, all of the couple's assets ending up in the wife's estate, and no estate tax savings effected. Another example would be where the client's children are in a second marriage but have children (the client's grandchildren) from a previous marriage. Unless planning is done with inheritance trusts for the client's children, a situation may occur one day where the client's child predeceases their second spouse, all assets pass to the second spouse, and the client's grandchildren, from a son or daughter's prior marriage, are denied any benefit from the grantor's estate.

2. Failure to Regularly Review the Estate Plan

At a minimum, each client's estate plan should be reviewed every three years to determine whether changes in the client's personal life, such as

their health, assets, or family history (births, deaths, marriages, divorces, etc.) impact the plan. It is unrealistic to expect a plan established today to be effective ten, twenty, thirty, or more years in the future. Over time, clients will want to change their back-up trustees or plan of distribution. They may wish to add inheritance trusts for their children. They might, after a number of years, wish to change from a revocable trust to an irrevocable trust because they were unable or unwilling to obtain long-term care insurance. The attorney will benefit from the additional legal work needed, and the client will benefit from having a plan better suited to their current needs at any given time.

Conclusion

Despite the knowledge, earnestness and even charm of some of the finest practitioners in the land, clients occasionally do not act on the advice given. As experienced attorneys, we know not to take it personally when clients choose to ignore our advice or perhaps choose other counsel. We know that people don't always do what they need to. They do what they want to and, even then, only when they want to. Recently, a ninety-three year old client told us that she "wanted to think about it" so far as planning her affairs. Experience tells us that this client is not ready to plan at the present time, despite her advanced years, and we respect that choice. On the other hand, we recently had a client come in to see us eleven years after their initial consultation stating that they were now ready to proceed. We prepared their estate plan.



Perhaps the best approach to the estate planning and elder law practice is to follow the four W's. Some will, some won't, so what, someone's waiting. We move forward, help those who will allow themselves to be helped by us and keep turning towards those to whom our firm's services are appreciated, admired, and sometimes even considered heroic.



Glossary of Estate Planning and Elder Law Terms

Ancillary Probate: Term for probate if decedent had real property in another state.

Annual Exclusion: The amount of property the IRS allows a person to gift to another person during a calendar year before a gift tax is assessed and/or a gift tax return must be filed. The amount is increased periodically. There is no limit to the number of people you can give gifts to which qualify for the annual exclusion.

Assets: All types of property which can be made available for the payment of debts.

Basic/Simple Will: A Will that leaves everything to your spouse upon your death, if living, otherwise in equal shares to your children.

Beneficiary: A person (or institution) who derives benefit from the creation of a trust, proceeds of insurance policy, or property designated by a Will.

Credit Shelter Trust: A trust designed to save the personal estate tax exemption of each spouse while allowing the surviving spouse to have use of the assets of the deceased spouse during the remainder of their lifetime.

Estate: An individual's property and assets, including real estate, bank accounts, stocks, investment accounts as well as personal property such as automobile and jewelry.

Estate Tax: A tax that is imposed upon a person's death, based upon the value of the estate.

Executor: A person named in a Will who is authorized to manage the estate of a deceased person.

Grantor: The individual who establishes a trust (sometimes also known as Trustor or Settlor).

Health Care Proxy: A document appointing an agent to make medical decisions for you if you are unable to communicate your own medical decisions.

Inheritance Trust: A stand-alone, revocable trust which is created to hold a beneficiary's share of their inheritance, offering them protection from creditors, lawsuits and divorces.

Irrevocable Medicaid Trust: A trust created during the Grantor's lifetime to hold assets in order to make them inaccessible for the expense of long-term care and nursing home costs. The grantor is limited to access of income only generated from the trust.

Living Will: A document which expresses your desire not to be kept alive by medical life-support systems in the event of a terminal illness.

Medicaid: A joint federal and state "needs-based" medical insurance program administered by the state to provide payment for health care services, including long-term care.

Medicare: A U.S. government health insurance plan that provides hospital, medical, and surgical benefits for persons age 65 and older and people with certain disabilities.

Pour-Over Will: A document which states that any property left outside of a living trust that does not have specified beneficiaries be poured into a living trust and distributed to the trust beneficiaries.

Power of Attorney: A document appointing an agent to make business and financial decisions for you.

Probate: The legal process in which a court oversees the distribution of property left in a Will.

Revocable Living Trust: A trust created during the Grantor's lifetime to hold assets during that person's lifetime, passing assets to the trust beneficiaries without the expense and delay of probate.

Supplemental Needs Trust (SNT): A trust which enables a person with a disability to maintain eligibility for government benefits [for example, Medicaid and Supplemental Security Income (SSI)]. The purpose of the trust is to enhance the quality of life for a disabled person.

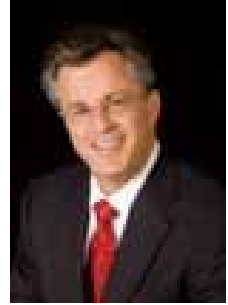
New York State Estate Tax Rates

Gross Esate Less Deduction \$	Tax \$	Effective Tax Rate %
1,000,000	0	
1,012,500	5,125	41.00
1,025,000	10,250	41.00
1,050,000	20,500	41.00
1,075,000	30,750	41.00
1,100,000	38,800	38.80
1,150,000	42,000	28.00
1,200,000	45,200	22.60
1,300,000	51,600	17.20
1,400,000	58,000	14.50
1,500,000	64,400	12.88
1,600,000	70,800	11.80
1,700,000	78,000	11.14
1,800,000	85,200	10.65
1,900,000	92,400	10.27
2,000,000	99,600	9.96
2,500,000	138,800	9.25
3,000,000	182,000	9.10
3,500,000	229,200	9.17
4,000,000	280,400	9.35
5,000,000	391,600	9.79
10,000,000	1,067,600	11.86
20,000,000	2,666,800	14.04

The 41% tax rate applies until \$1,093,785 and declines thereafter

About Ettinger Law Firm

Principal attorney Michael Ettinger has been a member of the New York State Bar Association since 1980 and formed the law firm, dedicated exclusively to estate planning and elder law, in 1991. He is a founding member of both the American Academy of Estate Planning Attorneys and the American Association of Trust, Estate and Elder Law Attorneys.



Ettinger Law Firm has prepared thousands of estate plans using trusts and has also filed thousands of Medicaid applications. Our staff of attorneys and experienced Medicaid professionals provide you with over fifty years of combined experience in estate planning and elder law.

The law firm offers a free, one hour consultation to help you determine whether our services may be of benefit to you and your family. Please call us at 800-500-2525, ext. 10 to schedule your free consultation.

Ettinger Law Firm offices are located throughout New York State in Albany, Fishkill, Nyack, White Plains and Staten Island.

Please also visit our website, trustlaw.com, for directions to our offices and for more information about estate planning and elder law. Thank you for considering Ettinger Law Firm for your estate planning and elder law needs.

Testimonials

“We have nothing but praises for your firm. First class all the way. Thanks!” — R.M.R

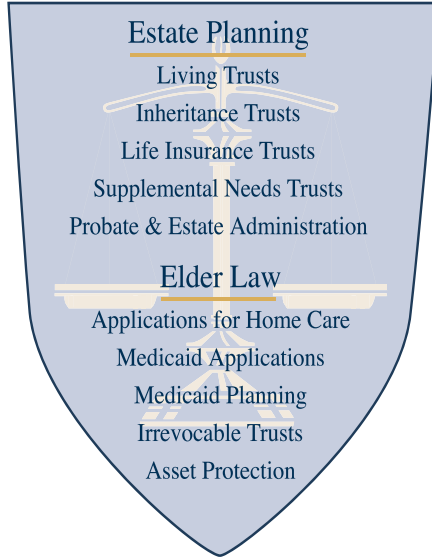
“We were very impressed with the knowledge, expertise and professionalism of your office. We’ve even recommended your firm to other attorneys. Thank you for making a confusing issue much clearer.” — R.W.

“It was important to me to have my children inherit the fruits of our labor instead of the state. Your expertise in elder law and estate planning assures me that my wishes will be carried out.” — R.P.

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Ettinger Law Firm

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FISHKILL
300 Westage Center
Fishkill, NY 12524
845-897-4700

NYACK
99 Main Street
Nyack, NY 10960
845-353-9555

ALBANY
125 Wolf Road
Albany, NY 12205
518-459-2700

WHITE PLAINS
50 Main St., 10th Floor
White Plains, NY 10606
914-682-2600

STATEN ISLAND
900 South Ave., 3rd Floor
Staten Island, NY 10314
718-477-2700