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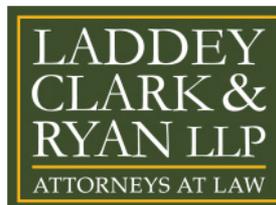
# AN ESTATE PLANNING CHECK-UP DURING COVID-19

MAY 14, 2020 AT 10:00 A.M.

**PRESENTED BY:**

**RENATA A. MIZAK, ESQ.**

**PRACTICE LEADER:  
WILLS, TRUSTS & ESTATES**



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PERSONAL INJURY / GOVERNMENT SERVICES / EMPLOYMENT AND LABOR / BUSINESS LAW / COMMERCIAL LITIGATION / ENVIRONMENTAL LAW / WORKERS' COMPENSATION / LAND USE AND ZONING / TRUSTS, ESTATES AND WILLS

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# Cover your Basics: Fundamental Documents

As Estate Planning practitioners, we strongly encourage all individuals over the age of 18 to have, at minimum and even without a looming health threat, the following three estate planning documents:

1. **Will**
2. **Power of Attorney**
3. **Advance Directive for Healthcare**



# Fundamental Document #1: The Will

**A Will is a legal document that sets forth your wishes regarding the administration of your Estate and the distribution of your assets.**

The individual who signs the Will is called the Testator.



The Testator will name “fiduciaries” as follows:

- Executor
- Trustee (for minor or disabled beneficiaries)
- Guardian (for minor children)
- Funeral Agent

The Testator also names the beneficiaries in the Will. A beneficiary can also be a Trust.

# Fundamental Document #1: The Will (Cont.)

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Formality Requirements: Under New Jersey law, a Will must be in writing and signed by the Testator before 2 witnesses to be admissible to probate with the Surrogate's Court.

Additionally, notarizing the Will makes it self-proving (in which case the Witnesses do not need to be contacted after the Testator dies to assist with the probate the Will).

Also, under New Jersey law, a Will can be holographic, in which case no witnesses are needed. In this case, the entire Will must be written in the Testator's hand.

Best Practices: The Will should be signed before 2 witnesses plus a Notary to ensure a smooth probate process.

# Fundamental Document #1: The Will (Cont.)

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The Probate Process: After a person dies, the Executor must take the necessary steps to locate and secure the original Last Will and Testament of the Decedent. The Will must then be officially proven by the Surrogate's Court, so "probate" is the court process by which a Will is proved as valid. The Surrogate's Court with jurisdiction will depend on the County of Residence of the Decedent (as per the Death Certificate). The Will cannot be probated by the Surrogate's Court until at least 10 days from the date of death. The Executor also provides the Death Certificate, proof of the identity, and a fee, as well as any other forms required by that particular Surrogate's Court. Once the Will is validated, the original Will is recorded with the Surrogate's Court and the Executor is qualified, receiving Surrogate Certificates as proof of the Executor's authority.

Duties of the Executor: The Executor has many duties: securing and managing the assets, filing tax returns, determining all debts by reviewing creditor claims, and paying taxes and debts; and distributing the assets and making bequests, whether personal or charitable in nature, as directed under the Will. This role typically takes about 9 months to 2 years.

## Fundamental Document #2: The Power of Attorney

**A Power of Attorney is a legal document that gives authority to act for another person in specified legal or financial matters.**



The individual who signs the Power of Attorney is the “Principal.” The Power of Attorney is a “living document.”

When the Principal dies, so does the Power of Attorney.

The individual who is given the authority to act for the Principal is the “Agent” or “Attorney-in-Fact”

A Power of Attorney may be designated as either: Effective Upon Disability or Effective Immediately.

A Power of Attorney is typically “very” outdated if it was executed prior to 2014, as NJ Banking Transaction provisions passed in 2013.

## Fundamental Document #2: Power of Attorney (cont.)

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Formality Requirements: The requirements to legally execute a Power of Attorney may depend on the specified powers being conveyed. In most cases, the Power of Attorney must be in writing, signed before at least 1 witness, and notarized or acknowledged by an attorney or Officer who can take an acknowledgment. Most other States (and many financial institutions) require 2 witnesses and a notary to accept a Power of Attorney.

Best Practices: The Power of Attorney should be signed before 2 independent witnesses plus a Notary to be acceptable everywhere and by every entity.

# Fundamental Document #3: Advance Directive for Healthcare

The “Advance Directive for Healthcare” allows you to designate a Healthcare Representative and to provide your end-of-life instructions.



This document goes by many names: Living Will, Medical Power of Attorney, Healthcare Directive. There are 3 major components:

## 1. Proxy Directive

- This allows you to designate your Healthcare Representative.
- The Healthcare Representative can only make decisions for you if your physician has evaluated you and determined you are unable to understand your diagnosis, treatment options, or the harms and benefits of treatment options.
- If you regain your ability to make decisions, your physician must obtain your consent for all treatments and your Healthcare Representative no longer has authority to make decisions for you.
- You cannot name more than one person as your primary Healthcare Representative. You can name alternates. This avoids conflicts.
- You can name anyone (spouse, parent, adult child, friend, religious advisor) as your Healthcare Representative, except: your attending physician or an employee at a healthcare facility where you are a patient or resident.

# Fundamental Document #3: Advance Directive for Healthcare

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## 2. Instructive Directive (End-of-Life Decisions)

- You can state whether you want life-sustaining treatment withheld or withdrawn in any of the following situations:
  - a. You are permanently unconscious;
  - b. You are in a terminal condition;
  - c. The life-sustaining treatment would likely only prolong an imminent death;
  - d. The life-sustaining treatment would likely be ineffective; or
  - e. You have a serious irreversible condition and the life-sustaining treatment would likely be more harmful than beneficial.
- By having this Instructive Directive, your physician and family will know the situations in which you would want or not want to have life-sustaining treatments. You can include a statement about your beliefs, values, and general preferences for care and treatment. This may also prevent conflicts amongst your family and care providers.

## 3. Organ Donation

## Fundamental Document #3: Advance Directive for Healthcare (Cont.)

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Formality Requirements: An Advance Directive for Health Care must be in writing, signed and dated by the Principal either (a) before 2 witnesses, in which case the Health Care Representative cannot be a witness; or (b) notarized or acknowledged by an attorney.

Best Practices: The Healthcare Directive should be signed before 2 independent witnesses plus a Notary to be acceptable everywhere and by any entity, especially if you are out-of-State.

Forms: Developed by the New Jersey Commission on Legal and Ethical Problems in the Delivery of Health Care:

<https://www.state.nj.us/health/advancedirective/ad/forums-faqs/#3>

Outdated: If your Healthcare Directive is older than 1996 or does not have HIPAA provisions, it is extremely outdated.

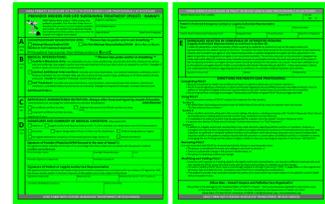
Reminder: Everyone over age 18 should have this document!

## Fundamental Document #3: Advance Directive for Healthcare (Cont.)

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### The Advance Directive for Healthcare should be consistent with the Practitioner Orders for Life-Sustaining Treatment (POLST)

- POLST is a set of medical orders that help give seriously ill or frail elderly patients more control over their end-of-life care.
- POLST is completed by the doctor/APN and patient/surrogate, and is produced on a distinctive green form.
- POLST forms include:
  - Goals of care for the patient;
  - Preferences regarding cardiopulmonary resuscitation; the use of intubation and mechanical ventilation for respiratory failure; artificially administered nutrition and hydration; and other specific preferences regarding medical intervention.
- If the POLST and Advance Directive conflict, care should be provided in accordance with the more recent document.



# Check Your Other Estate Planning Documents

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1. Personal Property Memorandum (must be referenced in Will)
2. Funeral Memorandum (must be referenced in Will)
3. Applicable Trusts
  - Revocable Living Trust
  - Supplemental Needs Trust (for “Disabled” Beneficiaries)
  - Children’s Trusts (Under 30, typically)
4. Planning Pertaining to Non-Probate Assets:
  - Beneficiary Designations;
  - Payable on Death (POD) or Transfer on Death (TOD)
  - Joint Assets with Right of Survivorship.

# Who Should Consider a Revocable Living Trust

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A Revocable Living Trust is a popular estate planning tool that can be used to determine who will get your property after you pass away. The most common benefits of the RLT:

1. RLTs are private. Unlike Wills, RLTs are not probated with the Surrogate's Court, at which point they become public record. Trustees of RLTs do not need to qualify with the Surrogate's Court.
2. RLTs are extremely protective of beneficiaries:
  - under a certain age (often 25 or 30) to preserve the assets for education, health, maintenance and support.
  - Who are disabled, so that such beneficiaries are still eligible for government benefits and are not disqualified.
  - who may be: undergoing a financial crisis such as divorce, a lawsuit, or bankruptcy; battling addiction or illness; are detained or outside the United States; or beneficiaries who otherwise cannot receive funds directly for any reason.
3. RLTs allow for quicker and more efficient distributions of assets. Under a Will, distributions usually are not made until 9+ months after date of death.

## Who Should Consider a Revocable Living Trust (Cont.)

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3. RLTs can “avoid probate” or minimize administration. Assets held in an RLT are not subject to Estate Tax Liens, are not frozen when a grantor dies, and are readily available to the Trustee.
4. RLTs can avoid Ancillary Probate if clients transfer their out-of-State properties into the Trust’s ownership. The same applies if the client moves out of New Jersey, but owns a home in New Jersey – we recommend transferring the home to the RLT.
5. RLTs can allow for easy coordination of Beneficiary Designations on non-probate assets (such as life insurance, payable on death or transfer on death, retirement accounts, etc).
6. RLTs are more difficult for a disinherited or excluded heir to challenge or contest, as opposed to a Will.
7. RLTs are not interrupted if a Grantor becomes mentally incompetent, thereby avoiding the need for a Guardianship and/or Conservatorship in most cases.

Formality Requirements: A NJ Trust must be in writing and signed.

# How Often Should I Review and Update?

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- Generally, Estate Plans should be reviewed every 3-5 years. You should be reviewing with your attorney, financial advisor, and tax professional.
- You have more children or your children have more grandchildren. Future born or adopted children may be provided for in our documents or under New Jersey Law. However, this would be a situation where you should review your documents to see if they need to be updated.
- Your fiduciaries or beneficiaries die or become incapacitated. You should also review your documents if any of your beneficiaries dies or becomes incapacitated, or if any of your Executors, Guardians, or Trustees dies or becomes incapacitated.
- You move out of New Jersey. If you move to another State, you should also have your documents reviewed by an estate planning attorney admitted to practice law in that State, as each State may have different legal requirements. Under the law, a Will is generally valid, since most States have a law that explicitly allows probate of out-of-State Wills. However, some States are “community property” states where all assets acquired during marriage are deemed martial property, which can affect your Will. Also, some States restrict who you can name as Executor in your Will to those related by blood or marriage only or require that your Executor reside in that State. Finally, in regards to the Advance Healthcare Directives and Powers of Attorney, some States explicitly accept such documents signed in other States, while many others do not. As such, we always recommend you have your documents reviewed in any State beyond New Jersey where you establish domicile or have a second residence, just to be safe.
- Your assets change substantially (increase or decrease). You should review your documents if your assets change significantly. If you review your documents under any of these circumstances, or any other circumstances, and are not sure if they need to be updated, please contact us for advice.

# Estate Planning & Signing Options at LCR

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Laddey, Clark, & Ryan, LLP, remains fully operational during the Coronavirus (COVID-19) pandemic. Most of our services relating to Trusts & Estates, including Estate Planning, can be handled outside the office.

For signings, we are offering our clients 3 options:

1. Drive-By Signing
2. Outside Signing (weather permitting)
3. In-Office Signing (with mask and gloves)

Please rest assured that our attorneys, paralegals, and staff continues to be available to you and to fulfill your evolving legal, business, and personal needs. Throughout this difficult period, you can expect that the team at Laddey, Clark, & Ryan will continue to answer your emails and calls promptly and be completely available to you, exemplifying the client service and responsiveness we have always been committed to providing.

# New Jersey Tax Update

- ❖ On October 14, 2016, Gov. Christie signed that highly controversial “Gas Tax Bill.”
- ❖ As of January 1, 2018, there was no longer a NJ Estate Tax.
- ❖ The Gas Tax law is now being challenged. What will happen if that law is repealed?
  - ❖ Return to the old \$675,000 exemption? Or, there are bills pending with the Legislature to bring the New Jersey Estate Tax exemption back now, between \$2 million or \$3 million.
  - ❖ Remember that this possible repeal will affect some of the other tax breaks, including:
    - ❖ Retirement Income Exemptions – The exemptions for certain retirement income (401Ks, IRAs, etc) will increase over the next 4 years, from \$20,000 to \$100,000 for married filers and from \$15,000 to \$75,000 for single individuals.
    - ❖ Veterans Exemption – There is a new income tax exclusion of \$3,000 for honorably discharged veterans, in addition to any other applicable personal exemptions.

# What About the Federal Estate Tax?

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❖ President Trump's administration, through the Tax Cuts and Jobs Act, has increased the Federal Estate Tax from \$5.49 million in 2017 to \$11.2 million in 2018 and 2019. However, in 2026, the exemption limits will revert back to 2017 amount.

❖ When the Federal Estate Tax Exemption was \$5.49 million per person in 2017, an estimated 0.2% of U.S. Estates were subject. That was about 5,500 Estates.

❖ With the \$11.2 million exemption, less than 0.1% of U.S. Estates, or 1,700 Estates, will be subject to the Federal Estate Tax Exemption.

# Tips for Everyone

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1. Get organized
2. Have your Team of Advisors (Financial Planner, Accountant, Insurance Advisor, and Attorney)
3. Review/Update your Estate Planning documents frequently
4. Review/Update your Beneficiary Forms frequently
5. Consider the Long-Term Care implications on your Estate
6. Consider any Tax Implications on your Estate

# LCR's Wills, Trusts, and Estates Group

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- Estate and Tax Planning, including Asset Preservation
- Probate, Estate and Trust Administration, including Estate Taxation
- Estate and Trust Litigation
- Elder Law
- Health and Long-Term Care Planning, including Medicaid
- Retirement Planning and Benefits
- Public Benefits (Social Security, Medicare, Medicaid)
- Surrogate Decision-Making (Power of Attorney, Healthcare Directives, Guardianships, Conservatorships)
- Special Needs and Disability Planning

# Questions?

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**Please feel free to reach out to me at:**

**973-729-1880, Extension 226**

**or**

**[rmizak@lcrlaw.com](mailto:rmizak@lcrlaw.com)**

**Materials will be available on our website:**

**[www.lcrlaw.com](http://www.lcrlaw.com)**

**THANK YOU!**