A Guide to Estate Planning in New York

ROSENBLUM LAW

About Rosenblum Law

Rosenblum Law is a law firm serving estate planning clients throughout New York and New Jersey. Our experienced attorneys are dedicated to simplifying the estate planning process for clients and helping them create comprehensive plans that meet their unique needs and goals. Visit us online at www.rosenblumlaw.com.

Disclaimer

This publication is intended as a general education guide to estate planning in New York. This publication does not constitute legal advice. Each estate is unique and must be considered based on its own specific details. This publication is for informational purposes only and is based upon New York law at the time it was published. For specific legal advice regarding your estate, it is advisable to consult an experienced New York estate planning lawyer who will be able to review your situation and the specific details of your estate and provide custom-tailored legal advice.

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Chapter 1: Introduction to Estate Planning in New York

When it comes to estate planning, procrastination is the norm. In fact, according to the results of one survey, only 33% of Americans have an estate plan. This isn't surprising. Few people are eager to think about what will happen if they die or become incapacitated. Without a clear deadline for estate planning, it's also easy to put it off in favor of more immediate tasks.

The problem of procrastination is often magnified by the fact many people believe estate planning is complicated and expensive. Another common misconception is that estate planning is only necessary for people who are older, wealthy, or ill.

The truth is, estate planning is important for every adult — regardless of age, wealth, or health status. Incapacity or death can happen unexpectedly. In either scenario, having an estate plan can help ensure your wishes are respected and your loved ones are cared for. It will save time, stress, and expenses for those left behind as well. For most people, the process is also not as costly or difficult as they might think.

This guide provides general information about estate planning in New York. However, a proper estate plan should be tailored to your unique situation. A New York estate planning lawyer can review your estate, ask the right questions, and craft a plan that makes sense for your needs and circumstances.

What is estate planning and why is it important?

In general, "**estate planning**" refers to the process of making arrangements for how your assets will be protected, managed, and distributed upon your death. It also involves planning for what will happen if you become mentally or physically unable to handle your own affairs (called "**incapacitation**").

Death or incapacitation can happen at any age and to anyone. By planning in advance, you can exercise more control over what happens to your assets and provide support and stability for your loved ones.

All estate plans should include a will. However, there are also many other strategies for achieving specific goals. For example, you may want to use trusts to control when and how your property is distributed. Or you may want to gift assets during your lifetime. Your estate plan can also provide for the financial support and guardianship of any minor children or elderly parents or siblings who might depend on you.

To plan for incapacity, a basic estate plan should at least include a durable financial power of attorney and advance directives as well. These documents appoint people you trust to make important decisions on your behalf. They also provide clear instructions about the types of medical care you do or do not want to receive.

If you don't have an estate plan, upon your death the court will distribute your property according to New York's intestacy laws. The court will also appoint a guardian for any minor children. If you become incapacitated without the right legal documents in place, the court will appoint someone to make financial, medical, and other decisions on your behalf as well.

If you wish to have a say in any of the above matters, estate planning is essential. Intestacy laws rarely distribute property exactly the way someone would have wanted. Court appointees also may not be who you would have preferred to make decisions on your behalf or care for your children. This is especially true if the appointees are not familiar with your wishes.

A well-crafted estate plan can help you achieve many other goals as well, such as:

- Making it faster, easier, and less costly for those left behind to manage your affairs and wind up your estate
- Reducing taxes on your estate
- Shielding assets from potential creditors
- Securing inheritances for children from prior marriages

- Ensuring the smooth transition of business interests
- Disinheriting family members while safeguarding against potential claims

For more information about basic estate planning documents, see *Chapter 3: Basic New York Estate Planning Documents* and *Chapter 4: Using Trusts in a New York Estate Plan.* For more information about the estate planning process, see *Chapter 5: The New York Estate Planning Process.*

Overview of New York intestacy laws

If you die without a will in New York, any property you leave behind will be distributed according to New York's intestacy laws set forth in New York's Estates, Powers & Trusts Law ("EPTL") Sec. 4-1.1.

These laws prioritize spouses and children. If you don't have a spouse or children, your closest relatives will inherit your property. If you have no family at all, your property will go to New York State.

Below is a summary of the most common scenarios under New York intestacy laws:

Your surviving family member(s)	Who inherits your property
Spouse and no children	Spouse gets everything
Children but no spouse	Your children get everything
Spouse and children	Your spouse gets the first $50,000 plus half of the remaining balance, and your children get everything else
Parents but no spouse and no children	Your parents get everything, even if you also have siblings
Siblings but no spouse, children, or parents	Your siblings get everything

Note that if your child died before you and had children of their own (your grandchildren), those grandchildren would be entitled to inherit in place of your child. In addition, a child will only inherit from you under New York's intestacy laws if they are your legal child. This generally includes:

- Biological children
- Legally adopted children
- Children for whom legal paternity has been established

Intestacy laws rarely distribute property exactly the way someone would have preferred. The court-led process of determining who's legally entitled to your property can also take a lot of time and money to resolve. It can become contentious among family members as well. As a result, relying on intestacy laws to distribute your property upon your death is rarely a good idea.

The probate process in New York

When a New York resident dies, the Surrogate Court in the county in which the person lived will oversee the legal process of winding up the person's estate. This process is called "**probate.**"

If there's a will, the person named in the will to administer the estate (called the "**executor**") starts the probate process by taking the original will and a death certificate to the court. The court will then confirm the validity of the will. Anyone who would be negatively affected by probating the will then has the chance to object.

If there are no objections and the court believes the will is valid, it will be formally admitted to probate. The court will also appoint the executor named in the will, unless it finds such individual is unfit to serve.

If there's no will, or the named executor isn't available to serve, the court will appoint an "**administrator**" to serve the same functions as an executor in what's called an "**administration proceeding.**" The administrator will typically be the closest surviving relative, such as the spouse.

Once an executor or administrator is appointed, they will be responsible for settling your estate. This includes, among other tasks:

- Identifying, locating, and securing assets
- Notifying beneficiaries named in the will
- Notifying creditors of any right to file claims against the estate
- Filing and paying taxes
- Distributing assets to your beneficiaries in accordance with your will or intestacy laws

Note that some assets don't have to go through the probate process. See *Chapter 3: Basic New York Estate Planning Documents — Last will and testament — Non-probate assets in New York.*

In addition, certain smaller estates may be able to go through a process called "**voluntary administration**" rather than probate. An estate generally qualifies for voluntary administration if it consists of less than $50,000 of *personal* property. The estate cannot include any *real* property (such as a house or land) solely in the deceased person's name.

If an estate qualifies for voluntary administration, the court will appoint a "**voluntary administrator.**" If there's a will, the court will generally appoint the executor named in the will to this role. If there's no will, the court will generally appoint your closest relative who's willing and able to serve. The court will then issue a certificate for each asset in the estate. The voluntary administrator will collect all of the assets and distribute them according to the law.

Generally, the larger an estate is, the more time-consuming and expensive it will be to complete the probate process. However, it can take much longer than expected to wind up modest estates as well. This is especially true if there are complications or legal challenges.

As a result, many people want to ensure the process goes as smoothly as possible. A carefully crafted estate plan can help achieve this goal.

Estate planning tax considerations

When creating an estate plan, it's important to take into account both New York state and federal taxes. This can help guard against unexpected tax bills that affect the amount of inheritance your heirs receive.

Below is a brief overview of key taxes relevant to estate planning. Note that neither New York nor federal law imposes an "**inheritance**" tax. This is a tax paid by a person receiving property from the estate. However, both New York and federal tax law have an "**estate**" tax. This a tax on the estate of a person at the time of their death.

Tax laws are notoriously difficult to navigate and are subject to change. An estate planning attorney can help you understand the current tax landscape and reduce any negative impact on the value of your estate.

New York taxes

As noted above, New York State doesn't have an inheritance tax. However, it does have an estate tax.

New York's estate tax is often called a "**cliff tax**." This is because assets up to a certain threshold are fully exempt ($6.11 million for individuals in 2022). However, the exemption phases out if the estate's value surpasses the threshold, and no amounts are exempt if the total value is more than 5% over the threshold ($6.415 million in 2022).

New York also doesn't have a separate **gift tax.** Even so, the value of gifts made within three years before death are generally included in the value of the estate for purposes of New York's estate tax.

For tax purposes, a "**gift**" is generally any irrevocable transfer of assets during your lifetime. While some gifts are obvious, others may not be. For example, selling property for less than fair market value or giving an interest-free loan may be a "gift" for tax purposes. As a result, each transfer of property should generally be analyzed for tax implications.

Federal taxes

Although federal law doesn't have an inheritance tax, there are a few other federal taxes relevant to estate planning:

- Estate tax
- Gift tax
- Generation-skipping transfer ("**GST**") tax

The **federal estate tax** is imposed on a person's estate upon their death if the gross value of their estate is more than the **lifetime estate & gift tax exemption** amount. The exemption amount is adjusted annually for inflation ($12.06 million for individuals and $24.12 million for married couples in 2022).

The federal estate tax rate will depend on the value of the taxable estate, but currently tops out at 40%. Deductions can reduce the value of your taxable estate. Such deductions may include:

- Costs for administering your estate
- Funeral expenses
- Debts and liabilities
- Charitable giving
- Marital deduction for transfer of property to your U.S. citizen spouse

The **federal gift tax** applies to gifts above the estate & gift exemption amount. As noted above, a "**gift**" is generally any irrevocable transfer of assets during your lifetime.

This means that under federal tax law, you can generally give gifts to as many people as you want each year without having to pay gift tax, so long as the gift to each person doesn't exceed the **annual gift tax exclusion amount** ($16,000 per individual in 2022). However, you will have to pay gift taxes (currently up to 40%) once your lifetime gift amount exceeds the lifetime estate & gift tax exemption.

The **GST tax** applies to transfers to family members more than one generation below you. This would include grandchildren and lower generations. However, you don't have to pay GST tax until the value of transferred property exceeds the **GST tax exemption amount** ($12.06 million for individuals and $24.12 million for married couples in 2022). The GST tax rate is currently a flat 40% on the value of the transferred property over the exemption amount.

Given the large exemptions under both New York and federal tax law, most estates will not have to pay any estate, gift, or GST taxes. Still, it's worth discussing with a lawyer how taxes may affect your estate planning. This can help account for any changes in tax law and avoid unexpected tax bills. If you have a larger estate or your estate is growing in size and could ultimately exceed the exemption amounts, an estate planning lawyer can also help you plan appropriately to protect as much of your estate's value as possible.

Chapter 2: Finding a New York Estate Planning Lawyer

As discussed in Chapter 1, estate planning has many important benefits. Just about every adult should have one. To ensure the process is as quick, efficient, and stress-free as possible, it's worth getting the help of a lawyer.

In particular, an experienced estate planning lawyer can help:

- Clarify your wishes and goals
- Ask the right questions to make sure you don't miss important details
- Identify strategies for achieving your goals
- Evaluate all aspects of your estate, such as taxes, long-term care requirements, insurance, asset protection, family dynamics, and other issues many people overlook
- Draft estate planning documents and ensure they meet all legal requirements

How to choose a New York estate planning attorney

If you're looking for an attorney to help plan your estate, you'll likely have plenty of options. However, it's best to choose an attorney with specific experience and knowledge in New York estate planning.

Such an attorney is more likely to have a deep understanding of current federal and New York laws relevant to estate planning. They will also be better able to identify potential issues and offer practical strategies for meeting your estate planning needs.

Some estate planning lawyers, including the team at Rosenblum Law, offer a free introductory consultation. During this brief initial conversation, your attorney will ask questions to get an overview of your situation and goals. Based on this information, they may propose a tentative estate planning strategy.

You can also take advantage of this meeting to learn more about the attorney. For example, you can ask about their estate planning qualifications and how they conduct the estate planning process. It's a good idea to evaluate how you feel about working with the attorney on a personal level as well. Estate planning involves discussing many private issues. Working with a lawyer who listens to you and makes you feel comfortable can make the process much easier.

After the free initial consultation, you can decide if you want to hire the lawyer to create your estate plan. Your attorney will then work with you to gather information and confirm the details of your estate plan.

However, note that not all estate planning lawyers offer free consultations. Instead, they charge for a longer initial consultation. If you decide to hire the attorney, this fee will usually apply towards the estate planning services.

Talk to a New York estate planning lawyer today

At Rosenblum Law, our knowledgeable estate planning lawyers can help you create a New York estate plan tailored to your unique needs and goals. We understand that estate planning can feel overwhelming, so our goal is to make the process as simple and stress-free as possible. We'll walk you through every step, from clarifying your goals to executing your documents. By using estate planning technology, our clients typically spend just a few hours on the estate planning process.

To learn more about how simple estate planning can be, call us today for a **free consultation** at (888) 235-9021 or or click here to send us a message. Most of our clients qualify for flat-fee estate planning, but we're also prepared to handle more complex estates at custom pricing.

Chapter 3: Basic New York Estate Planning Documents

While every estate plan is unique, certain documents should be included in even the most basic estate plan. These documents include:

- Last will & testament
- Durable financial power of attorney
- Advance directives

A brief overview of each of these documents is below.

Last will and testament

A last will and testament (or more simply, a "**will**") is a legal document that states who should receive your property upon your death. If you have minor children or others who might be dependent on you, your will should also name a guardian who you would like to care for them.

Role of your will's executor

When creating a will, you'll need to choose an "**executor**." You should also choose a back-up executor who can step in if your first choice is unavailable for any reason. The executor is responsible for winding up your estate. This includes:

- Filing for probate
- Collecting your assets
- Paying debts
- Filing and paying taxes
- Distributing the assets according to your will

Under New York law, your executor must be a competent adult who is:

- a U.S. citizen, *or*
- a non-U.S. citizen residing in New York.

In other words, you generally can't choose a non-U.S. citizen living outside of New York. A possible exception is if the court approves a co-executor who's a New York resident.

Otherwise, you can generally choose any adult who's willing and able to serve as your executor. Still, your executor will carry significant responsibilities. So when making your decision, it's wise to consider factors such as:

- whether you fully trust the individual to handle the responsibilities of an executor
- family dynamics, including the person's ability to be impartial with other beneficiaries
- whether their geographic location will negatively impact their ability to carry out their duties as executor
- whether they're likely to live longer than you

Before you name anyone in your will as an executor, you should confirm they're willing to take on the role. If the executor and back-up executor you name in your will are unable or unwilling to serve, the court will have to appoint someone else to administer your estate.

Executors are generally paid for their services, unless they waive them. You can provide for specific fees in your will. Otherwise, under New York's Surrogate's Court Procedure Act (SCPA) Sec. 2307, the executor can generally receive the following commissions:

- 5% of the first $100,000 of the estate
- 4% on the next $200,000
- 3% on the next $700,000
- 2.5% on the next $4,000,000
- 2% on the value above $5,000,000

Requirements for creating a valid will in New York

Under EPTL Sec. 3-1.1, anyone 18 or over who is of sound mind and memory can create a will in New York. For your will to be valid, under EPTL Sec. 3-2.1 it must generally be:

- in writing
- signed by you
- signed by two witnesses within one 30-day period

Just about any competent adult can serve as a witness. However, you should avoid using "interested" witnesses.

Interested witnesses are persons who stand to benefit under your will. Under EPTL Sec. 3-3.2, interested witnesses are permitted in New York, but they will not be allowed to receive dispositions under the will unless at least two disinterested witnesses also signed the will. Even so, it's best to avoid interested witnesses altogether to avoid challenges to your will.

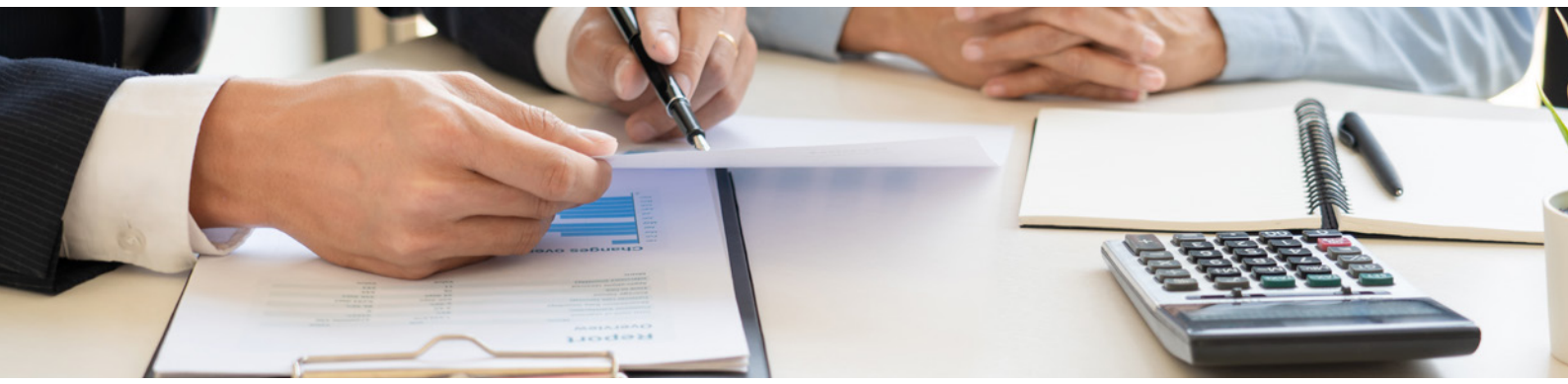
When a will is submitted for probate, the court will call on the witnesses to attest to the validity of the will unless the will is "self-proving." Under SCPA Sec. 1406, a will is "**self-proving**" if it has a notarized self-proving affidavit attached. Given the possible difficulties in locating witnesses as time passes, all wills should include a self-proving affidavit.

Note that in New York, "**nuncupative wills**" and "holographic wills" are rarely valid. A "nuncupative will" is an unwritten will with provisions that can be clearly established by at least two witnesses. A "**holographic will**" is a will that is handwritten by you and does not meet the formal requirements described above.

In New York, a nuncupative or holographic will is generally only valid if it's made by:

- A member of the armed forces during war or armed conflict
- Another person who serves with or accompanies an armed force engaged in actual service during war or other armed conflict
- A mariner while at sea

Even when such a will is initially valid, it often becomes invalid after a certain time period (typically 1-3 years).



Revoking or changing a New York will

Under EPTL Sec. 3-4.1, you can revoke your will by burning, tearing, cutting, canceling, obliterating, or otherwise mutilating or destroying it (or by directing someone else to do so in your presence, as attested to by two other witnesses).

You can also revoke or change all or part of your will by:

- making a new will, or
- writing a clear intention to revoke or change your will, executed with the same formalities required for a will.

Note that if you want to change part of your will, it's possible to create a "**codicil**" instead of an entirely new will. A "codicil" is a formal supplement to your will that alters your will, but does not completely revoke it. However, it's usually best to expressly revoke your previous will and make an entirely one. Recreating a will is fairly simple when working with a lawyer. This will also help avoid potential confusion or conflicts in language.

Non-probate assets in New York

A big part of creating a will is surveying your assets and deciding how to dispose of them. However, not all assets should be included in your will.

"**Probate" assets** are those that will be distributed according to your will or intestacy law. They therefore must go through the probate process.

"**Non-probate" assets** are those that generally don't pass according to your will or intestacy law. They can therefore bypass the probate process. Non-probate assets typically have a designated beneficiary or co-owner. These individuals automatically receive such assets directly upon your death.

Common examples of non-probate assets in New York include:

- **Life insurance proceeds** payable to a designated beneficiary, in which case such beneficiary will receive the proceeds directly from the insurer
- **Certain financial accounts** with designated beneficiaries (such as payable-on-death or transfer-on-death accounts, IRAs, 401(k)s, or other retirement or financial accounts), in which case such beneficiary will get the assets directly from the financial institution
- **Jointly owned property** if it's owned with "rights of survivorship," in which case the other owner or owners will automatically receive the property
- **Assets held in trust**, in which case the assets will be distributed according to the trust document as described in *Chapter 4: Using Trusts in a New York Estate Plan*

Note that if a non-probate asset doesn't have a designated beneficiary, it may still go through the probate process. When planning your estate, you should review both probate and non-probate assets and ensure that your beneficiaries are current.

In addition, the value of non-probate assets will still be included in the total value of your estate for tax purposes. For example, the value of financial assets that pass directly to a designated beneficiary upon your death will generally still count towards your estate's total value for purposes of assessing potential estate tax. If you want to move assets out of your estate to minimize taxes, an irrevocable trust may be a good option.

Durable financial power of attorney

A **financial power of attorney** is a legal document that allows another person, called an "**agent**" or "**attorney-in-fact**," to act on your behalf with respect to your financial and business affairs.

This document is an important part of planning for potential incapacitation. Even young and seemingly healthy individuals can suddenly become incapacitated. So regardless of your age or health status, a financial power of attorney is an essential part of a basic estate plan.

So long as your power of attorney is "**durable**," your agent can handle your affairs in the event you become incapacitated. In New York, a valid power of attorney is automatically "durable" unless the document specifically states otherwise.

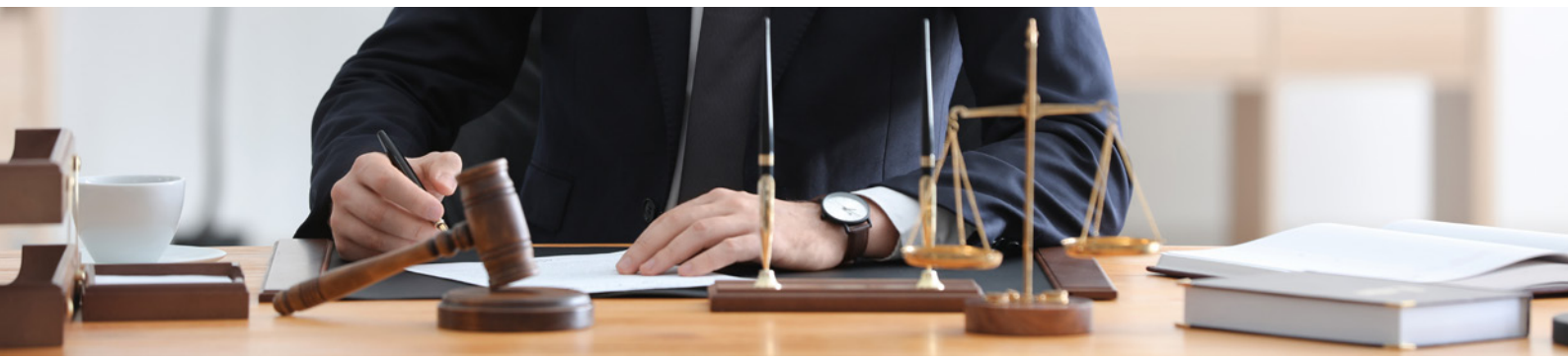
Note that you may wish to create a financial power of attorney for other reasons as well. For example, if you're leaving the country for an extended period, you may need someone to operate your business in your absence.

When making a financial power of attorney, you'll have to decide what powers you want your agent to have. You may grant broad power, or you may limit the powers to specific decisions. However, when planning for potential incapacity, it's generally better to give broad authorization. This will make it easier for your agent to handle affairs on your behalf, including important matters that you may not have foreseen.

Examples of powers granted to your agent may include, among other things:

- Making real estate, banking, securities, and other transactions
- Managing government benefits
- Filing and paying taxes
- Conducting business operations
- Accessing safe deposit boxes

If you don't have a durable financial power of attorney and become incapacitated, the court may appoint someone to manage your affairs for you. This can be a contentious, costly, and stressful process for those involved. The agent the court appoints may also not be who you would have chosen.



Choosing an agent for your financial power of attorney

Under New York law, you can generally choose any competent, willing adult to act as your agent. However, a typical financial power of attorney grants the agent control over many important and financial matters, either immediately or if you become incapacitated. This means you should not take the decision lightly.

Whoever you choose should be someone you trust completely to handle your affairs. Many people choose a spouse, child, or close friend. However, when making your decision, you should also take into account factors such as:

- their familiarity with your wishes and financial philosophies
- their understanding of your business and financial matters
- whether their geographical location will hinder their ability to effectively manage your affairs

Before creating your financial power of attorney, you should talk to your chosen agent about their duties and confirm they are willing to take on this responsibility. You should also pick a back-up agent who can step in if your first choice is unavailable.

Requirements for creating a valid financial power of attorney in New York

In New York, any adult who understands the nature and consequences of a financial power of attorney may create one.

To be valid, under New York's General Obligations Law Sec. 5-1501B a financial power of attorney must generally be:

- legibly typed or printed (if typed, in no less than 12-point font size)
- signed, initialed, and dated by you in front of a notary (called "**notarization**")
- witnessed and signed by at least two people who are not agents

In addition, the document must include certain statutory language. Such language is included in a statutory short form created by the state legislature.

Before an agent can act under a power of attorney, that agent must also generally sign the document in front of a notary, acknowledging their duties and obligations.

In New York, a valid power of attorney is automatically "durable," unless the document specifically states otherwise. A "durable" power of attorney will remain effective even if you become incapacitated.

Note that it is possible to create a power of attorney that only becomes effective once certain conditions are satisfied (such as your incapacitation). This is called a "**springing**" **power of attorney**.

However, springing powers of attorney typically aren't a good idea for estate planning purposes. Verifying that the necessary conditions have been satisfied can cause delays. In the meantime, your agent may not be able to carry out the powers granted to them as you intended.

Revocation and expiration of a New York financial power of attorney

You can revoke your financial power of attorney at any time, so long as you're mentally competent at the time of revocation. If you want to revoke your power of attorney, you should provide written notice of the revocation to:

- your agents, and
- any third parties that have relied on the power of attorney (such as financial institutions).

Your durable financial power of attorney will otherwise automatically expire upon your death.

A court can also invalidate a financial power of attorney if it determines:

- you weren't mentally competent at the time of making the power of attorney
- you were the victim of fraud or undue influence when making the power of attorney
- you are no longer of sound mind and an agent has acted improperly

If your spouse is named as your agent and you get divorced, their ability to act as your agent will terminate as well. However, if you named a back-up agent, that agent will still be able to carry out the powers granted to them under your power of attorney.

Otherwise, your financial power of attorney will expire upon your death. At that point, the executor or administrator of your estate will begin managing your affairs.

Advance directives

"**Advance directives**" are legal documents in which you state your health care wishes in the event you become incapacitated. A New York estate plan should include at least two types of advance directives:

- a health care proxy form
- a living will

A "**health care proxy form**" is sometimes also called a "**medical power of attorney**" or "**health care power of attorney**." This document appoints someone, called your "**health care agent**" or "**health care proxy**" to make medical decisions on your behalf if you're not able to do so yourself. This may be the case if:

- You're in a coma
- You're under anesthesia and something unexpected happens
- You're in a persistent vegetative state
- You have some form of dementia, such as Alzheimer's disease
- You are otherwise unable to communicate due to injury or illness

Your appointed proxy will be able to make medical decisions for you as soon as your doctor determines that you can't make such decisions for yourself. This includes major decisions regarding:

- Treatment options
- Medication
- End-of-life care

Note that if you wish, you can limit the types of decisions a health care proxy can make on your behalf.

A "**living will**" is a separate document in which you state instructions regarding the type of medical treatment you do or do not want to receive if you're unable to consent to them yourself. Your health care proxy must generally follow the instructions in your living will.

Having advance directives helps ensure that your wishes and religious restrictions are respected. Clear instructions can also help safeguard against potential conflicts regarding your care.

If you don't have advance directives and become incapacitated, generally the closest available family member will make decisions for you. If no family members are available, the attending medical staff will decide what to do based on what they believe is in your best interests. This can cause problems, especially if there are disagreements among family members about your wishes and the right course of action.

For example, in one high profile case, a 26-year-old woman, Terri Schiavo, fell into a persistent vegetative state after suffering from cardiac arrest. Her husband wanted to remove her feeding tube because he believed that she would not want to continue living under such circumstances. However, other family members opposed removing the tube, as they believed that Ms. Schiavo would have wanted to continue living.

Since Ms. Schiavo didn't have advance directives, her husband was initially appointed as her guardian. However, her family challenged his appointment, and a years-long court battle ensued. It ultimately took 15 years to resolve the case. At that time, a court ordered the removal of Ms. Schiavo's feeding tube, and she died.

There are many similar cases that show why advance directives and planning for incapacity is important, regardless of your age or health status. These documents help eliminate any speculation about what you have wanted. They also allow you to designate someone you trust to make decisions for you.

Choosing a health care proxy

Your health care proxy can generally be any competent, willing adult *other than*:

- your attending doctor; or
- an operator, administrator, or employee of the hospital or nursing home in which you are a patient or resident unless they're a relative and you appointed them prior to admission.

However, your health care proxy will be making serious health care decisions for you. Sometimes, such decisions are a matter of life or death. So whoever you choose should be someone you trust fully to follow your wishes, regardless of their own views. Often, this is a family member or close friend.

You should also consider factors such:

- the person's ability to evaluate medical options and effectively communicate with medical staff
- the person's ability to serve as a strong advocate on your behalf
- the person's geographic location and whether they're close enough to effectively make decisions on your behalf

Once you choose a potential proxy, you should have an honest conversation with them about your preferences and values and confirm that they're willing to serve in this role. You should also choose a back-up proxy who can step in if your first choice is unavailable.
Note that if you appoint your spouse as your proxy and you later divorce or legally separate, your former spouse will no longer be your proxy unless:

- you state otherwise on your health care proxy form, or
- create a new one naming your former spouse.

Requirements for valid advance directives in New York

In New York, a valid health care proxy must be signed by you and two adult witnesses other than your proxy. While a health care proxy form is a type of power of attorney, it doesn't have to be notarized. New York state has a health care proxy form that you can use, but using this specific form is not required.

New York doesn't have specific rules regarding living wills. However, New York's highest court has stated that a living will is valid so long as it provides "clear and convincing evidence" of your wishes. Generally, your living will should be:

- signed by you
- signed by two witnesses
- notarized, so that it can be recognized in states that require notarization

Changing or canceling advance directives in New York

You can change your health care proxy or living will at any time by creating new documents as described above.

In addition, you can cancel a health care proxy by written or oral notification to your agent, doctor, or others who have copies of your health care proxy. You can also indicate that a health care proxy expires on a certain date or under certain conditions.

You can cancel a living will by destroying the document. While you don't have to notify anyone you are canceling it, it's good practice to inform anyone who is aware of its existence.

Otherwise, your advance directives will generally remain in effect indefinitely. As noted above, one exception is if you appoint your spouse as your health care proxy and later divorce or legally separate. In this case, their appointment is automatically canceled unless you note otherwise in your health care proxy or create a new one naming your former spouse.

Chapter 4: Using Trusts in a New York Estate Plan

Depending on your goals, you may create one or more trusts as part of your estate plan. A "**trust**" is a legal arrangement in which a **trustor** transfers assets to a **trustee** to hold and manage for the benefit of one or more third parties called **beneficiaries**.

A trust that you establish while you're still alive is called a "**living trust**" or "**inter vivos trust**." Living trusts are created through a trust document or agreement. This document also states how the trust assets will be held, managed, and distributed. A living trust can be **revocable** or **irrevocable**.

A trust that is only formed upon your death is called a "**testamentary trust**." The terms of a testamentary trust are included in your will.

Each type of trust is described in more detail below.

Revocable living trusts in New York

A revocable living trust allows you to determine how and when certain property is distributed upon your death, while still retaining control over that property during your lifetime.

When you form a revocable living trust, you'll be the trustor *and* the beneficiary during your lifetime. You'll generally serve as the initial trustee as well, but this isn't required. You'll also name:

- a **successor trustee** who will step in upon your death or incapacity, and
- the **beneficiaries** who will receive the trust property upon your death.

During your lifetime, you'll retain full ownership and control over the assets in the trust. You can manage and use them however you'd like. You can also change the trust terms or revoke the trust at any time.

However, once you die, the trust becomes irrevocable. This means the trust terms can generally no longer be changed. The successor trustee will step in to administer the trust and distribute the trust property to the beneficiaries you named in the trust document.

Advantages of creating a revocable living trust

A revocable living trust can be useful for a few reasons. First, assets transferred into a living trust don't go through the probate process. Property that must go through probate can be held up for months or even years. This process can also be costly and stressful, and it also becomes public record.

By passing assets through a trust instead of probate, you can help ensure:

- Your beneficiaries receive assets much more quickly
- Funds will be immediately available for funeral costs, legal fees, and medical bills
- Probate and administrative fees are kept to a minimum
- The process is kept private

Another major benefit of trusts is that you can exercise greater control over how and when property is distributed upon your death. In your trust document, you can specify any conditions for distributing property. This allows you to plan for special circumstances.

For example, if you're concerned about your child's ability to handle a large inheritance responsibly, you can create a trust that pays out the inheritance:

- upon reaching a certain age
- upon reaching a certain milestone, such as graduation from college
- over time in multiple installments

Finally, a trust can help plan for incapacitation as well. If you become incapacitated, the successor trustee of your revocable living trust will step in. The trust terms can provide for distributing assets to you, your family, and other beneficiaries while you are incapacitated.

Keep in mind that because you retain ownership and control over assets in a revocable living trust during your lifetime, those assets will still be considered part of your estate. As a result, moving assets into a revocable living trust will not help reduce any potential estate taxes.

Using a will in combination with a revocable living trust in New York

Although a revocable living trust can provide many benefits, it can never completely replace a will. Instead, any trusts you create will work along with your will to ensure your property is distributed the way you would like.

In practice, it's nearly impossible to transfer every single asset into a trust during your lifetime. Sometimes, you may leave assets outside of a trust intentionally. Or you may leave assets outside of the trust accidentally, such as if you overlooked them at the time of creating the trust or acquired them later.

In these cases, you'll need a will to distribute those assets according to your wishes. If you don't have a will, those assets will be distributed according to New York's intestacy laws.

If you want to ensure all assets ultimately make it into a trust, you can also create a "**pour-over will**." This type of will automatically transfers any property outside of the trust into the trust upon your death. This can help "catch" any assets you didn't transfer into the trust during your lifetime. The property will then be distributed to beneficiaries according to the trust terms.

Lastly, having a will is especially important if you have minor children. In your will, you'll designate a guardian to care for them. If you don't have a will or you don't name a guardian in your will, the court will choose one. The court will also choose one if the guardian you name isn't available or willing to serve, or if they determine your chosen guardian is inappropriate.

Because every estate plan should have a will, it's not possible to bypass the probate process completely. Still, creating trusts can keep many assets outside of probate, reducing the time and costs required to complete the process.

Creating a revocable living trust in New York

To create a revocable living trust in New York, you'll need to:

- Identify which assets to transfer into the trust
- Choose a successor trustee (and if using a professional trustee, formally engage them)
- Decide who will receive the trust assets upon your death
- Decide when and how the assets will be distributed
- Draft and sign a trust document
- Formally transfer the assets to the trust

Under EPTL Sec. 7-1.17, living trust documents must be:

- in writing
- signed by the trustor and at least one trustee (sometimes this is the same person)
- notarized or signed by two witnesses

Note that if you don't properly transfer assets into the trust, they will go through the probate process. So once your trust document is executed, you should take any necessary steps to formally transfer property into the trust. This may include retitling real property, such as real estate.

You can change or revoke a revocable living trust at any time and for any reason. However, upon your death, it will become irrevocable and can no longer be changed.

Choosing a trustee

The trustee will be responsible for administering your trust as stated in the trust document. For a revocable living trust, you will generally serve as the initial trustee. However, you'll also need to choose a "successor trustee" who will take over the role upon your death or incapacity. This should be someone who you believe understands the trust document and their duties as trustee and who is willing to carry them out.

In New York, you have many choices when it comes to choosing an trustee, such as:

- a close family member or friend
- a professional trustee
- a New York estate planning lawyer

When choosing a trustee, you should take into account:

- whether you fully trust them to administer the trust responsibly and with good judgment
- their understanding of your financial values and philosophies
- their investment, recordkeeping, and legal compliance knowledge
- family dynamics and their ability to be neutral in administering the trust
- their geographic location and availability

Before naming a trustee in your document, you should discuss the appointment with them. If you choose a professional trustee, you'll also need to formally hire them.

Under SPCA Sec. 2309, the trustee can receive commissions of 1% of the property the trustee pays out, plus annual commissions calculated as follows:

- $10.50 per $1,000 on the first $400,000 of principal in the trust
- $4.50 per $1,000 on the next $600,000 of principal in the trust
- $3.00 per $1,000 on all additional principal

Irrevocable living trusts in New York

An irrevocable living trust is a trust created during your lifetime that generally can't be changed or revoked once the trust document is executed. This includes the assets to be put into the trust and the beneficiaries who will receive them. You'll also have to appoint a suitable trustee as described above under *Revocable living trusts in New York — Choosing a trustee.*

Unlike a revocable living trust, you generally won't serve as the initial trustee of an irrevocable trust. In most cases, the trust also won't be for your benefit during your lifetime. Once you create an irrevocable trust, you *permanently* give up ownership and control of any assets you put into the trust. This is a serious decision that you should only make after careful consideration, ideally with the help of a lawyer.

Even so, irrevocable trusts can make sense for certain estate plans. For example, they can be helpful for:

- Decreasing the value of your estate to minimize potential estate tax
- Protecting assets from potential creditors
- Making gifts contingent upon the fulfillment of certain conditions (for example, requiring a minor to turn 18 before they can access the assets)

The process for forming an irrevocable living trust is similar to creating a revocable trust:

- Identify which assets to transfer into the trust
- Choose a trustee (and if using a professional trustee, formally engage them)
- Decide who will receive the trust assets
- Decide when and how the assets will be distributed
- Draft and sign a trust document
- Formally transfer any assets to the trust

Testamentary trusts in New York

A testamentary trust is created under a valid will. This means it only comes into existence upon your death and after a court validates your will in the probate process. The court overseeing the probate process will also oversee the trustee's administration of a testamentary trust.

Your will should include all the trust terms, including:

- The trustee
- The assets to be placed in the trust
- The beneficiaries to receive such assets

To change or revoke a testamentary trust, you have to change your will. Upon your death, a testamentary trust becomes irrevocable. This means it generally cannot be changed. The trust will generally terminate once all or most of the assets in the trust have been distributed to the beneficiaries.

Like a living trust, a testamentary trust allows you to decide when and how your assets are distributed. This can allow you to provide for family members, charities, or even pets in the manner that you wish. For example, you might want to hold a car in trust for your child until they're 18, or you may wish to ensure care over time for special needs children.

Chapter 5: The New York Estate Planning Process

For many people, getting started is the most difficult part of estate planning. While it can seem overwhelming at first, with the right guidance it's often much easier than many people expect.

Below is a general overview of the steps you'll need to take to plan your estate. Getting the help of an experienced New York estate planning lawyer can make the process as smooth as possible. Your attorney will be able to guide you through every step and address any questions or concerns you have along the way.

Step 1. Gather information about your estate

Before creating an estate plan, you'll need to get a full picture of your estate. This includes gathering information about:

- Real property, such as homes or land
- Personal property, such as jewelry, automobiles, collectibles, and even sentimental items
- Cash and cash equivalents
- Investments
- Insurance policies
- Business assets
- Expected inheritances
- Any other assets
- Debts and liabilities

You'll also want to evaluate your family situation and gather information about:

- Your spouse or domestic partner
- Previous marriages
- Your children (biological, adopted, and step-children)
- Deceased children and their surviving spouses or children, if any

Working with an estate planning attorney can help ensure you gather all necessary information for creating an effective estate plan. At Rosenblum Law, we take advantage of technology to make gathering information quick and easy. We use a custom online portal in which you can enter all your details. You can also enter information in pieces, so that the process is more manageable.

Step 2: Identify special circumstances and make decisions

After gathering all relevant information, you'll need to start making decisions. This includes:

- Who you want to leave property to
- When and how you want to pass on property
- Who you want to serve as your executor, financial agent, health care proxy, and guardian for any minor children (and back-ups for each)
- Your preferences with respect to medical treatment if you become incapacitated
- Funeral and burial preferences

Making these decisions will require identifying your estate planning goals and any special considerations in your life. Examples of such goals and considerations may include:

- Providing financial support and a guardian for minor children

- Ensuring children from previous marriages receive inheritance
- Providing for disabled beneficiaries while maintaining their ability to receive government benefits
- Protecting assets you wish to leave to loved ones who lack financial responsibility, have unstable marriages, or are at risk of lawsuits
- Safeguarding against potential claims by family members you wish to disinherit
- Minimizing taxes, legal fees, or costs and delays of probate
- Maintaining privacy
- Ensuring the smooth transition of business interests
- Providing for pets, including naming a caretaker and setting aside money for veterinary costs and other expenses
- Charitable giving

Note that in New York, a surviving spouse is generally entitled to receive at least one-third of the deceased spouse's estate. Your estate planning documents won't affect this legal right. In other words, you can't disinherit your spouse through your estate plan.

If your estate plan leaves less than one-third of the estate to your spouse, your spouse will still generally have the option to take the one-third outright. There are only narrow exceptions to this rule, such as if the surviving spouse waived the right in a martial or other agreement or abandoned the deceased spouse.

A New York estate planning attorney can help you define your goals, clarify your wishes, and create a plan that suits your needs.

Step 3: Draft and execute estate plan documents

After confirming what you want your estate plan documents to say, you'll need to draft and execute them in accordance with legal requirements. While there are many estate planning forms available, an attorney can help make sure your documents are tailored to your needs and valid under New York law.

Before you sign any estate plan documents, read them carefully. If you're working with a lawyer, don't hesitate to ask questions or ask for changes if you don't believe something properly reflects your wishes.

After drafting your documents, you'll need to properly execute them. This may require witnesses and/or notarization. An attorney can make sure you meet these requirements. If you create a trust, you'll also have to make sure you formally transfer the trust assets into the trust. Otherwise, the property will not be passed on in the way you intended.

For more information about estate planning documents, see *Chapter 3: Basic New York Estate Planning Documents* and *Chapter 4: Using Trusts in a New York Estate Plan*.

Step 4. Safeguard your original estate plan documents

After finalizing your estate plan documents, you should make copies and put the originals in a safe place, such as with your attorney or in a fireproof box in your home. You should also let your fiduciaries (executor, trustee, financial agent, and health care proxy) know how to access these originals if needed.

While many people think a safe deposit box is a good place to keep estate planning documents, this is usually not the case. Safe deposit boxes can be difficult to access in an emergency. If you're the only one authorized to access the box and die or become incapacitated, someone will need to get a court order to access it. This can cause significant delays.

It's also a good idea to prepare a document for your fiduciaries that includes information that may be relevant to them. For example, your executor may need to know:

- Where to find your original will and other important documents
- Who should be notified of your death
- Important telephone numbers
- Security codes
- Insurance policy information
- Information about assets, such as retirement and financial account information and the contents of any safe deposit boxes
- Information about debts and liabilities
- Login information for digital assets, such as email and social media accounts

Step 5. Regularly review and update your estate plan

Once you have estate plan documents in place, you should review them on a regular basis. This is particularly important when there are major life events for you or family members, such as:

- Marriages and divorces
- Deaths and births
- Relocation to a new state or abroad

Even if you don't experience any major life changes, you should still review your estate plan every few years. You may find that your preferences have changed, or that you need to make updates to account for changes in tax or other law.

Chapter 6: FAQs About New York Estate Planning

If you're ready to plan your estate, you likely have many questions about the process. Below are answers to some common questions about estate planning in New York. However, everyone's situation is unique. This means every estate plan is also unique. You should consult a lawyer if you have any questions about planning your own estate.

1. What documents do I need for my New York estate plan?

A basic New York estate plan should at least include:

- A last will and testament
- A durable financial power of attorney
- Advance directives (health care proxy and living will)

Depending on your goals and assets, you may also create one or more trusts. An attorney can help determine what makes sense for your particular situation.

See *Chapter 3: Basic New York Estate Planning Documents* and *Chapter 4: Using Trusts in a New York Estate Plan*. for more information about basic estate plan documents.

2. What happens if you don't have a will in New York?

If you die without a will, a court will appoint an administrator to wind up your estate. This is usually your closest living relative, such as your spouse. The administrator will then administer your estate, including collecting and distributing your property in accordance with New York's intestacy laws.

Often, intestacy laws don't distribute property exactly the way someone would want their property to be distributed. In addition, the process of determining who's entitled to your property under these laws can be time-consuming and costly. Relying on such laws also increases the chances of disputes. As a result, it's best to have a will in place.

Note that a will is especially important if you have minor children. In your will, you should name a guardian for such children. If you don't name a guardian in your will, the court will choose someone. The court may also choose a different guardian if it determines your chosen guardian is inappropriate.

See *Chapter 1: Introduction to Estate Planning in New York — Overview of intestacy laws in New York.*

3. What are the requirements for a will to be valid in New York?

Under New York law, anyone 18 or over who is of sound mind and memory can create a will. For a New York will to be valid, it must also generally be:

- in writing
- signed by you
- signed by two witnesses within one 30-day period

If you have a self-proving will, your witnesses don't have to appear to attest to the validity of the will during probate. A will is "self-proving" if it has a notarized self-proving affidavit attached.

See *Chapter 3: Basic New York Estate Planning Documents — Last will and testament* for more information about creating a will in New York.

4. Who can be the executor of a will in New York?

Under New York law, your executor must be a competent adult who is:

- a U.S. citizen, or
- a non-U.S. citizen residing in New York.

In other words, you generally can't choose a non-U.S. citizen living outside of New York. A possible exception is if the court approves a co-executor who's a New York resident.

Otherwise, you can generally choose any adult who's willing and able to serve as your executor. Still, your executor will carry significant responsibilities. So when making your decision, it's wise to consider factors such as:

- whether you fully trust the individual to handle the responsibilities of an executor
- family dynamics, including the person's ability to be impartial with other beneficiaries
- whether their geographic location will negatively impact their ability to carry out their duties as executor
- whether they're likely to live longer than you

Before you name anyone in your will an executor, you should confirm they're willing to take on the role. If the executor and back-up executor you name in your will decline to serve, the court will have to appoint someone else to administer your estate.

See *Chapter 3: Basic New York Estate Planning Documents — Last will and testament — Role of your will's executor* for more information.

5. Is it better to have a will or trust in New York?

Every estate plan should include a will. In some cases, it may also make sense to form one or more trusts. Trusts can help you exercise greater control over how and when your assets are distributed. It can also reduce time and expenses spent on the probate process, while maintaining privacy.

However, forming a trust does not mean you no longer need a will. You may leave assets out of the trust intentionally or unintentionally. In these cases, you'll need a will to distribute those assets according to your wishes. If you don't have a will, those assets will be distributed according to New York's intestacy laws.

Having a will is especially important if you have minor children. In your will, you'll designate a guardian to care for them. If you don't have a will or you don't name a guardian in your will, the court will choose one. This appointee may not be who you would have chosen.

See *Chapter 3: Basic New York Estate Planning Documents — Last will and testament* and *Chapter 4: Using Trusts in Your New York Estate Plan* for more information.

6. What are the trust requirements in New York?

To create a trust in New York, you should:

- Identify which assets to transfer into the trust
- Choose a trustee (and if using a professional trustee, formally engage them)
- Decide who will receive the trust assets
- Decide when and how the assets will be distributed
- Draft and sign a trust document
- Formally transfer any assets to the trust

In New York, living trust documents must be:

- in writing
- signed by the trustor and at least one trustee (sometimes this is the same person)
- notarized or signed by two witnesses

See *Chapter 3: Basic New York Estate Planning Documents — Last will and testament* for more information about creating a will and *Chapter 4: Using Trusts in a New York Estate Plan* for more information about trusts.

7. When does an estate have to go through probate in New York?

Many New York estates will have to go through probate or a similar process.

If there is a will, the executor of the will starts the probate process by taking the original will and a death certificate to the court. The court will then confirm the validity of the will and, if there are no objections, formally admit the will to probate. The court will also formally appoint the executor named in the will.

If there's no will, or the named executor isn't available to serve, the court will appoint an administrator to serve the same functions as an executor in an administration proceeding. An administration proceeding is similar to the probate process.

However, note that some assets (such as jointly owned property and financial accounts with designated beneficiaries) don't have to go through the probate process. In addition, certain smaller estates may be able to go through voluntary administration rather than probate.

An estate generally qualifies for voluntary administration if it consists of less than $50,000 of personal property. The estate cannot include any real property (such as a house or land) solely in the deceased person's name.

If an estate qualifies for voluntary administration, the court will appoint a voluntary administrator. The court will then issue a certificate for each asset in the estate, and the voluntary administrator will collect and distribute the assets according to the law.

See *Chapter 1: Introduction to Estate Planning in New York — The probate process in New York* and *Chapter 3: Basic New York Estate Planning Documents — Last will and testament — Non-probate assets in New York* for more information.

8. Does New York have an estate or inheritance tax?

New York State doesn't have an inheritance tax. However, it does have an estate tax.

New York's estate tax is often called a "cliff tax." This is because assets up to a certain threshold are fully exempt ($6.11 million for individuals in 2022). However, the exemption phases out if the estate's value surpasses the threshold, and no amounts are exempt if the total value is more than 5% over the threshold ($6.415 million in 2022).

Note that while New York doesn't have a separate gift tax, the value of gifts made within three years before death are generally included in the value of the estate for purposes of New York's estate tax.

You should also be aware that some estates have federal tax obligations as well. A lawyer can help you understand any tax obligations and plan accordingly to minimize their impact on your estate's value.

See *Chapter 1: Introduction to Estate Planning in New York — Estate planning tax considerations* for more information.

9. How do I find a New York estate planning attorney?

At Rosenblum Law, our knowledgeable estate planning lawyers can help you create a New York estate plan tailored to your unique needs and goals. We understand that estate planning can feel overwhelming, so our goal is to make the process as simple and stress-free as possible. We'll walk you through every step, from clarifying your goals to executing your documents. By using estate planning technology, our clients typically spend just a few hours on the estate planning process.

To learn more about how simple estate planning can be, call us today for a **free consultation** at (888) 235-9021 or click here to send us a message. Most of our clients qualify for flat-fee estate planning, but we're also prepared to handle more complex estates at custom pricing.

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