VOLS
VOLUNTEERS of LEGAL SERVICE

Training Manual

Preparation of Life-Planning Documents for VOLS Senior Law Project Clients

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Staff Profiles

Peter Kempner is the Legal Director at Volunteers of Legal Service (VOLS), where he has worked since May 2018. Mr. Kempner's work focuses on a population-based approach to legal services.

Prior to working at VOLS he was the Director of the Veterans Justice Project and Deputy Director of the Housing Unit at Brooklyn Legal Services, where he worked from September 2001 until May 2018. Mr. Kempner was a Senior Staff Attorney and Government Benefits Specialist in the Comprehensive Rights/HIV Unit from 2001 until 2011 where he provided general legal services to HIV positive clients. In May 2011, Mr. Kempner helped create the Veterans Justice Project at Brooklyn Legal Services, an innovative general legal services practice focusing on veterans, active-duty military personal and their families. He became Director of the Veterans Justice Project and Deputy Director of the Housing Unit in March 2015.

He received his J.D. from the Benjamin N. Cardozo School of Law at Yeshiva University in 2001 and was admitted to the New York State Bar in 2002. He received his B.A. in Political Science from the State University of New York College at Purchase in 1996 and he received an M.A. in Political Management from the Graduate School of Political Management at the George Washington University in 1998.

He has served as a member of the Social Welfare Law Committee of The Association of the Bar of the City of New York from 2007 until 2013 and served as the Chairperson of the Committee from 2013 until 2016. Mr. Kempner is admitted to practice in the Eastern and Southern Districts of New York and is accredited to practice before the United States Department of Veterans Affairs. He served on the Advisory Committee to the Brooklyn Veteran Treatment Court from 2012 until 2018, was a member of the New York State Bar Association's Committee on Veterans from 2013 until 2017. In 2022 he was appointed by the Chief Judge of the State of New York to serve on the Attorney Emeritus Advisory Council. In 2022 he was a recipient of the Legal Services Award from the Association of the Bar of the City of New York.

Mr. Kempner is also an adjunct clinical professor at New York Law School where he created and has co-taught their Veterans Justice Clinic since 2015. Pete can be contacted at (347) 521-5704, or pkempner@volsprobono.org.

Alyssa Villareal, Staff Attorney for the Senior Law Project, received her J.D. from the Benjamin N. Cardozo School of Law, where she served as President of the Cardozo Trusts and Estates Association and worked with the Cardozo Guardianship Clinic. Prior to joining VOLS, Alyssa worked for Manhattan law firms specializing in elder law and estate law, where she focused on estate planning, probate and administration, and adult

guardianships. Alyssa also served as a long-term volunteer with the New York Legal Assistance Group's Total Life Choices Program. In this position, she worked extensively on advance planning matters, including last wills and testaments, medical advance directives, and powers of attorney, as well as matters pertaining to adult guardianships, guardianship alternatives, and probate and administration. Alyssa can be contacted at (347) 521-5709, or avillareal@volsprobono.org.

Elisa M. Tustian, Supervising Attorney for the Senior Law Project and the Extensión Comunitaria para Adultos Mayores received her J.D. from Fordham Law School and her B.A. from Columbia University. Elisa's work as a student aide at the New York State Attorney General's Office during undergrad and law school inspired her to become a Stein Scholar at Fordham Law School and she received the Archibald R. Murray Public Service Award cum laude upon graduating. Before joining VOLS, Elisa worked in the Capital Markets group at the London Office of White & Case LLP. She qualified as a Solicitor of England and Wales in 2010 and is currently on the Roll but does not maintain a Practising Certificate for her current work. Elisa most recently worked at Northeast New Jersey Legal Services as a multi-practicioner in the Senior Citizen Law Project. Elisa is currently admitted as an attorney in New Jersey and New York and serves as the co-secretary of the New York City Bar Association Puerto Rico Task Force. Elisa's work at VOLS focuses on Latine seniors and language access. Elisa can be contacted at (347) 521-5713, or etustian@volsprobono.org.

Jim Fenton, Senior Staff Attorney for Housing Rights & Special Populations received his J.D. From St. John's University School of Law and his B.A. from LeMoyne College. Prior to joining VOLS, James worked for the Urban Justice Center's Safety Net Project as both a staff and supervising attorney representing tenants in housing matters primarily in the Bronx. Jim can be contacted at (347) 521-5713 or jfenton@volsprobono.org.

Introduction

The Volunteers of Legal Service (VOLS) Senior Law Project serves low-income seniors aged 60 and older by providing them with essential life planning documents that function to protect their legal, financial, and health care related decisions. These documents ensure that our clients' rights and decisions will be protected should they become incapacitated, and that their wishes will be adhered to in the event of their passing.

VOLS works with pro bono attorneys to counsel the clients to direct the drafting of their documents in a way that reflects their wishes. Volunteer attorneys also counsel clients on how to properly execute their documents if circumstances like the COVID Pandemic require the clients to do so independently. Proper counseling ensures that the client's legal rights and wishes are fully protected and enforceable.

Outside of our work with pro bono partners, the Senior Law Project also provides general legal advice and counsel, as well as referrals where appropriate, to low-income seniors, as well as to their service providers and caretakers. If during the representation of your client, you discover that your client has a need for legal advice or assistance outside of the realm of life planning documents, please notify one of the VOLS Senior Law Project staff attorneys so that we can provide any needed advice and/or referrals.

About VOLS

Volunteers of Legal Service (VOLS) supports pro bono in order to provide low-income and under-resourced New Yorkers with free, civil legal services. VOLS was founded as a nonprofit organization in 1984, when leaders in the private bar responded to severe federal government budget cuts to legal services. They committed through VOLS to dramatically increase pro bono service in New York City's underserved communities.

Across decades and through crises such as the 1980s HIV/AIDS epidemic, 2008 financial crisis, and COVID-19 pandemic, VOLS' legal services have helped to anchor the safety net in our city. Today, VOLS harnesses the power of New York City's private bar and community-based organizations to provide free, civil legal services through six VOLS law projects and initiatives:

- Childrens Project;
- Immigration Project;

- Incarcerated Mothers Law Project;
- Microenterprise Project
- Senior Law Project
    - La Extensión Comunitaria Para Adultos Mayores;
    - Veterans Initiative; and
- Benefits Law Project.

We sere New Yorkers who are unable to access legal support due to low household income or underserved socioeconomic background. Our legal services are inclusive of age, race, ability, gender and LGBTQIA+ identity, veteran and immigration status.

Overview of Life Planning Documents ("LPDS")

VOLS provides three documents that are important during a client's lifetime, and two that are important after their death.

Planning for Incapacity During Your Lifetime

1. Durable Power of Attorney ("POA");
2. Health Care Proxy ("HCP"); and
3. Living Will ("LW").

Planning for Death

1. Last Will & Testament ("LW&T" or "Will"); and
2. Appointment of an Agent to Control Disposition of Remains ("Control of Remains Form," "Disposition of Remains," or "AACDR").

Why These Documents Are Important

- **Planning for Incapacity**

The Durable Power of Attorney, Health Care Proxy, and Living Will protect one's financial and health-related decisions in the event that they become incapacitated.

Absent a Durable Power of Attorney, if one becomes physically and/or cognitively incapacitated, they may not have a legal or practical mechanism to handle financial transactions, like paying bills, applying and recertifying for benefits, or signing leases. Once someone becomes cognitively incapacitated it is too late to execute a power of attorney because doing so requires such capacity. In such an instance, a guardianship petition under Article 81 of the NYS Mental Hygiene Law ("MHL") may need to be filed in State Supreme Court to secure appointment of a guardian of the person and/or

property of an incapacitated person. This is a lengthy and invasive court-driven legal process that strips a person of any legal autonomy, and which may not be resolved in time to allow someone to act on their behalf with respect to time-sensitive financial matters. Furthermore, the availability of free legal services is virtually nonexistent for family members seeking to commence MHL Article 81 proceedings, which may be prohibitively costly for people of limited means and too complex for most people to pursue without legal assistance.

Absent a Health Care Proxy and/or Living Will, specific wishes regarding one's health care may not be carried out, especially about end-of-life health care treatment choices.

- **Planning for Death**

Absent a Last Will and Testament, real or personal property, money, and household possessions will be distributed according to the New York State laws of intestacy, which may be contrary to the decedent's wishes. For example, in New York State, the laws of intestacy generally have the effect of giving gifts from one's estate to their closest family members – this may or may not be what one wants to happen after they pass. Having a Last Will and Testament ensures that one's wishes with respect to the distribution of their estate are carried through.

Absent an "Appointment of Agent for Disposition of Remains," an individual's personal choices and wishes regarding burial, body or organ donation, or cremation may not be carried out. If the client wishes a distant or non-relative to claim their bodily remains for disposition, they may not be able to do so without difficulty or possibly a court order.

Ethical Issues

Client Capacity and Confidentiality

Capacity

It is important to note that separate and distinct legal definitions of capacity exist for the creation/execution of various documents. Capacity is a continuum that can change with time and circumstances. Voluntary choice of a competent adult is a core value and ethic in law, medicine, and other realms of life. The validity and enforceability of your client's documents requires your client to have the required level of capacity to execute each document they are seeking to obtain.

Capacity consists of four decision-making abilities: Appreciation, Understanding, Reasoning, and Expressing Choice.[1]

Chronologic age is one of the chief risk factors for developing cognitive impairments. A diagnosis of dementia, brain damage or mental illness may be relevant, but non-determinative of an individual's actual abilities and functional capacity. Other short-term and long-term factors that can produce signs of incapacity include anxiety, grief, depression, bereavement, pain, side effects of prescription medications, time of day, hearing or vision loss, education level, etc.

Although VOLS has assessed your client's capacity to execute their life planning documents, because capacity can change over time and circumstances, you should confirm your client's capacity to execute their documents. If you have any concerns about your client's capacity, Rule 1.14 of the NY Rules of Professional Conduct states:

[1] Practical tools and techniques have been developed for ascertaining a client's capacity and to guide the practitioner in asking probing and open-ended questions and avoiding questions calling for an acquiescent response. An excellent guide is the "Assessment of Capacity for Everyday Decision-Making" (ACED) developed by Dr. Jason Karlawish, MD and Dr. James Lai, MD, which provides guidelines for a structured conversation/interview with the client, designed to evaluate the four categories of decision-making abilities. See also the ABA/APA's "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers" (2005). Please also see the 2021 updated version available at Assessment of Older Adults with Diminished Capcities (apa.org)

> *When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall as far as reasonably possible, maintain a conventional relationship with the client….When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.*

Comment #6 to Rule 1.14 of the NY Rules of Professional Conduct says:

> *In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: (i) the client's ability to articulate reasoning leading to a decision; (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.*

If you have concerns about your client's capacity, please contact VOLS. Please assess your client's capacity to execute according to the below laws:

- **Power of Attorney**

"Capacity" means ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney or the authority of any person to act as agent under a power of attorney." NY GOL § 5-1501(3).

- **Health Care Proxy**

"For the purposes of this section, every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent" (or unless a court has appointed a guardian of the person under Article 81 of the NY Mental Hygeine Law or Article 17-A of the Surrogate's Court Procedure Act). NY PHL § 2981(1)(b).

- **Last Will & Testament**

Testator must:

(1) Understand the nature and consequences of executing a will;
(2) Know the nature and extent of the property being disposed of; and
(3) Know the natural objects of their bounty and relationship to them.

*See In re Estate of Kumstar, 66 N.Y.2d 691, 692 (1985), *citing* In re Will of Slade, 106 A.D.2d 914, 915 (4th Dep't 1984).

Confidentiality

We attorneys are accustomed, from initial conversations to retainer agreements, to letting our clients know that we will maintain confidentiality. In our VOLS practice, this can be tested by the adult children and other helpers associated with the file. You will often see an adult child or social worker listed at the top of the client's intake form. Please discuss this person with your client and get clearance from the client about whether they want this person to be permitted to inquire about the status of the documents or any other communication. Please note the outcome of the discussion in your case notes.

Cross-Cultural Lawyering

Almost every attorney-client relationship is a cross-cultural one. Culture and cultural awareness play a significant role in communication, problem-solving, and rapport building.

Consider the context in which your client is seeking your help.

A leading voice on the topic of cross-cultural lawyering is that of CUNY Professor Susan Bryant, who wrote *The Five Habits: Building Cross-Cultural Competence in Lawyers*.[2]
One of the *Five Habits* which Bryant calls "Degrees of Separation & Connection," encourages lawyers to develop an awareness of the similarities and differences between themselves and each client and the impact they may have on the communications between them. Another, called "Parallel Universe Thinking" stems from the idea that cultural norms and practices may result in multiple interpretations of

[2] 8 CLINICAL L. Rev. 33 (2001), by Law Professors Susan Bryant at CUNY and Jean Koh Peters at Yale.

the same actions; this habit focuses on the need to avoid assumptions and consider alternative explanations for clients' words and actions.

It is important to remember the context within which your client is seeking these services. Unfortunately, older New Yorkers of limited means often do not have access to the internet at home, and/or they do not have access to and/or knowledge of how to use technological equipment like a laptop with a webcam, or a smartphone with videoconferencing capability. Some clients use only a landline and/or regular mail to communicate; many of our clients do not use email. Please take this into consideration and remember that your client may not be able to be as communicative with you as a corporate client might. Please familiarize yourself with your client's situation and bear these things in mind through the course of your representation.

Facilitating Proper Execution of Documents

Pro Bono Representation Checklist

The below checklist is a step-by-step guide for your representation of your client:

☐ Visit the VOLS Pro Bono Library (volsprobono.org/probonolibrary) and carefully **review** the documents therein, as well as any emails sent to you by VOLS about your client. Materials you should review include:

- Document Templates
- This Manual
- Client Execution Instructions
- Any information contained in or attached to emails you receive from VOLS about your client
- Any training videos posted by VOLS

☐ **Call** your client.

- Introduce yourself to them. Explain that VOLS has placed their case with you and that you are working on drafting their life planning documents.

- Obtain any necessary substantive information that you need in order to be able to draft your client's documents.

- Determine if your client is in need of interpretation and/or translation assistance, help with reading the documents, help with signing the documents, and/or a home visit due to limitations on their ability to travel.

- With respect to the Power of Attorney, discuss each item that calls for initials with your client. Advise and explain the pros and cons of each option and ask your client whether or not they would like to initial each one.

- With respect to the living will, discuss each item that calls for an "X" with your client and have them tell you which lines they do and do not want to place an "X" next to.

☐ **Draft** your client's documents.
Engage in additional conversations with your client as necessary. If your client uses email and they wish to review their documents, send them electronic copies for review. Otherwise, send hard copies to your client for review. Confirm the accuracy of all information contained in each document with your client.

☐ **Send drafts** of your client's documents to **lifeplanningdocuments@volsprobono.org** for review, and inform VOLS as to the details of how your client will execute. After you make edits based on VOLS' feedback, please send final versions to VOLS for final review.

☐ **Finalize** and print your client's documents. Staple the Last Will & Testament, the affidavit of attesting witnesses and any additional relevant affidavits together. (You may staple the other documents as well but stapling of other documents is not required and can make scanning & copying difficult.)

We strongly recommend in-office execution as the best option. But if your client is executing outside of your presence due to COVID or another reason, attach the Client Execution Instructions as appropriate to the first page of each document. Mail or email your client's documents to them along with a cover letter that also contains any explicit instructions as as far as where your client should/should not initial or sign on each document. If your client was listed as requiring a home visit, these same steps are useful as you prepare for the home execution.

☐ **Schedule an execution ceremony** at which you and others from your firm will be present to act as witnesses and to notarize. This ceremony can take place at your firm or at your client's home, or at another mutually agreed-upon location. Your client should leave this meeting with their executed, witnessed, and notarized documents in hand. While you are not required to provide executed copies to VOLS, we appreciate you sending them over so that we can review them and any possible errors in execution can be promptly corrected.

☐ **Congratulate yourself** for providing such a necessary service to an older New York with limited resources and, please reach out to VOLS when you are ready to take on another case.

Considerations for Clients Executing Without the Presence of an Attorney (non-preferred route)

We strongly recommend and prefer that pro bono attorneys meet in-person with their clients to walk them through the execution of documents and to provide required parties (notary and/or witnesses). If that isn't possible, clients can execute their documents without the presence of an attorney. Because these documents are difficult to properly execute, and improper execution can render a document invalid and unenforceable, it's extremely important to equip your client to properly execute their documents without your presence.

Use "Stickies"

For all documents, we'd recommend putting stickies above or below each line where your client should initial or sign before you send finalized hard copies to your client. If you are emailing your client's documents to them, indicate with electronic "stickies" (such as highlighting, a comment, etc., but make sure that clients are instructed to remove the highlighting or comments before printing and executing).

Include Your Own Instructions

If your client will be executing without your presence, we'd also recommend writing your own cover letter with explicit and specific instructions to your client regarding where they should and should not initial or sign with respect to each document. Proper execution is not as straightforward as one might expect. There are multiple signature lines in many of these documents, some for your client, others for agents, others for witnesses, others for notaries. With respect to the Power of Attorney, there are multiple places where your client's initials should and should not go. The easier you make it for your client to know which signatures and initials go, the more likely they are to execute their documents properly without your presence. Improperly executed documents can be deemed legally invalid and unenforceable.

Discuss VOLS' Client Execution Instructions With Your Client

We'd also recommend that you review the client execution instructions for each document prior to sending your client's finalized documents to them, so that you are familiar with each step your client will need to take to execute their documents properly. You should discuss these instructions in detail with your client. We'd also recommend that you send your client these instructions ahead of completing and sending them their finalized documents so that they have the information in writing ahead of time – *in addition to* having detailed conversations with them about each step they will need to take to execute their documents properly. Your client should know that improper execution can result in unintended negative consequences, including rendering all or part of a document invalid and unenforceable.

Mailing Your Client's Documents

Many of our clients live in buildings that do not have secure mailboxes, and/or that have unreliable mail delivery in general. The documents that you will be sending them contain highly sensitive personal information and it's important to ensure that they will be received by your client.

Please discuss with your client their ability to receive mail. It may be possible or necessary to make alternative arrangements as far as where you send their documents to, in order to ensure your client receives them.

Blue Ink

With all documents, if possible, your client and their agent/s, notary/s, and witnesses should use blue ink pens so that original documents are easily distinguishable from copies.

Addressing Improper Execution

You should try to obtain executed copies of your client's documents so that you can notify your client as to any issues that may jeopardize the enforcement of their documents. In the event that your client executes their documents improperly, you can re-send such documents to them so they can execute it properly.

Notarization & Witness Requirements

Each Life Planning Document ("LPD") that we provide carries its own requirements with respect to whether a notary is required, and whether the document must be witnessed by two people.

- **Notarization Requirements**

The principal's signature on the Power of Attorney must be notarized in real time. (Agent's signatures must also be notarized, however pro bonos are not responsible for facilitating signing by agents.) The witnesses' signatures on the Affidavit of Attesting Witnesses for the Last Will and Testament must also be notarized at the time the witnesses sign it. If an affidavit of reading and/or translation is being done, they will also need to be notarized.

- **Witnessing Requirements**

All of the documents we provide must be witnessed by two people. Witnesses should be competent adults and should not be named in the document they are witnessing.

With respect to the POA and LW&T, witnesses can either watch the client sign in real time and sign within 30 days, or the client may sign without the witnesses watching and then acknowledge their signature separately in-person to two witnesses within 30 days of signing. Under this 2nd scenario, the client must show each witness their signature, acknowledge that it is their signature, and then ask each witness to sign.

With respect to the AACDR, HCP, and LW, acknowledging one's signature to two witnesses within 30 days of signing is not an option – 2 witnesses must actually watch the client sign[3] and then sign themselves.

[3] With respect to the Last Will & Testament, Power of Attorney, Health Care Proxy, and Control of Remains form, the principal/testator can also direct someone else to sign on their behalf. The signor should also execute an Affidavit of Signing in such a scenario.

A Helpful Table of Notary and Witness Requirements

	Must this document be notarized?	Must this document be witnessed by 2 people?	Can principal acknowledge signature to witnesses *after* signing?	Restrictions on who can witness?
Last Will & Testament	NO	YES	YES	Drafting attorneys should not witness. But translator or reader can if there are no other available witnesses. See also EPTL 3-3.2.
Aff. of Attesting Witnesses	YES	No, but both witnesses must sign.	N/A	N/A
Power of Attorney	YES	YES	YES	Agent cannot witness. But attorney, notary, and translator can.
Health Care Proxy	NO	YES	NO	Agent cannot witness. But attorney and translator can.
Living Will	NO	YES	NO	NO
Apt. of Agent for the Disp. of Remains	NO	YES	NO	NO

Durable Power of Attorney

A POA is a revocable, written document by which a principal with capacity designates an Agent or Agents to act on their behalf during the principal's lifetime with respect to financial, legal, and other matters (not including health care decision making). In New York, Powers of Attorney are regulated by the General Obligations Law, Article 5, Title 15. The 2021 amendments to the statute made changes that POA forms. These changes include the elimination of the exact wording requirement; elimination of the statutory gifts rider; changes to the statutory short form; changes to the construction sections of the statute; requirements for acceptance by third parties; penalties for unreasonable non-acceptance; the allowance for signing by another at the direction of a principal; and new witnessing requirements. The new Power of Attorney rule amendments went into effect on June 13, 2021.

Rather than the exact wording previously required, language substantially conforming to that of the statute must be used for a POA to be considered a statutory form; without it, there is no guarantee that banks and others will accept it. The POA template provided to you by VOLS comports with the statutory requirements. Certain parts of the text are modifiable and these parts have been indicated by VOLS in the template. None of the other text in the provided template should be modified.

Who Are the Players?

- **Principal**

The Principal ("Principal") is the person designating agency under a POA to another person. At VOLS, the Principal is the client. Principals must be a minimum of 18 years of age.[4]

- **Agent/Co-Agent/Successor Agent**

The agent is the person receiving the powers under a POA from the Principal. This is usually a relative or close friend of the Principal. An agent acting under the POA has a fiduciary relationship to the Principal.[5] There is no age minimum for an agent, but the person chosen should be someone of suitable age and discretion. We recommend witnesses be competent adults (age 18 or older). Any and all agents, co-agents, and

[4] See GOL §5-1501.
[5] See GOL §5-1501

successor agents must also sign the original POA before a notary in order for their appointments to be effective.

A Principal may designate two or more persons to act as co-agents. Unless the Principal provides otherwise in the POA, co-agents must act jointly. The Principal can initial an option in the POA form to allow co-agents to be able to act separately, which is recommended for most VOLS clients. Requiring co-agents to act together could create logistical problems if they are not able to agree, or to be in the same place at the same time. Unless the Principal provides otherwise in the POA, if a vacancy occurs because of the death, resignation, or incapacity of a co-agent, the remaining agent or agents may continue to act for the Principal.[6]

A Principal may designate one or more successor agents to serve, who may act if the original agent(s) "is unable or unwilling to serve." Unless the Principal provides otherwise in the POA, a successor agent has the same authority as that granted to an initial agent. A Principal may provide for specific succession rules.[7]

Persons named as agent or alternate agent cannot act as a witness to the POA or the POA may be invalid.

- **Monitor (Optional)**

A person appointed in the POA to have the authority to request, receive, and seek to compel the agent to provide a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the Principal. Principals are more likely to appoint a Monitor when they have considerable assets and when there is an issue of trust in the agent.[8]

Key Elements of a Power of Attorney

- **Delineated Powers**

The Principal can choose to give the agent limited or broad powers; given life's unpredictable nature (Principal may not own now but may inherit real property or may win the lottery) and the need for flexibility, it is often a good idea to give the agent broad powers.

[6] see GOL §5-1508
[7] see GOL §5-1508
[8] see GOL §5-1501

- **Revocation**

By explicit language in the document, the POA does not automatically revoke prior POAs. The Principal can do this in the "Modifications" section (see below).

- **Durability**

By explicit language in the document, the POA is durable; that is, it remains valid until it is explicitly revoked, even and especially if the Principal becomes incapacitated. The Principal can opt out of durability by including a "Modification" terminating POA upon incapacity (see below).

- **Optional Modifications**

Optional modifications include but are not limited to:

- Revocation of one or more prior POAs
- Making the POA non-durable
- Allowing agents to make gifts in excess of $5,000

- **Other Unused "Optional" Provisions**

Aside from modifications, unused optional provisions should not be deleted. The 2021 POA law amendments permit a placeholder of "Intentionally Omitted", but we encourage you to simply leave them in.

Where Should Your Client Initial and Sign?

Sections where your client's initials can and/or should go are found in the left-hand margins of the POA and look like this: **(___)**. Please inform your client that *only initials* should be written on such lines, not an "X" or a"√" or a " 😊 ".

You should have a detailed discussion with your client about each of the below provisions before you meet with your client for execution, or before mailing documents to your client if an in person meeting isn't possible.

If your client is executing without your presence, you should include stickies to indicate where they should initial and/or include your own cover letter that makes it clear as to which lines they should and should not initial based on your conversations. Your client should not be left to decide on their own at the time of execution which lines should and should not be initialed. It should be clear to them when they sit down to execute their POA where exactly their initials should and should not go based on your conversations with and instructions to them.

The agent/s' authority to act on your client's behalf begins when the agent signs the document before a notary. You are not responsible for facilitating the agent's signature.

- **Section (b)**

If your client has only one agent listed in this section, they may disregard this bullet point (but remember, do not delete this line), If your client has more than one agent listed in this section, they may initial the brackets to allow their agents to act separately. Allowing one's agents to act separately is logistically the most practical option. For example, if a banking transaction needs to occur on your behalf, initialing here would allow one agent to go to the bank themselves, whereas otherwise, both agents would be required to go to the bank together, which creates logistical difficulties, especially if agents live far apart.

- **Section (c)**

Same as above but with respect to your client's successor agent/s (if any).

- **Section (f)**

The concept behind all powers (A) through (O) is not whether your client actually has such a thing that needs to be handled currently, nor whether your client even realistically expects to have such a thing needing to be handled in the future. Rather the idea is: If your client had this thing that needed to be handled, would your client trust their agent to have the same authority as they do to help them with it?

Allowing co-agents to act separately is best.

Most people, if they trust their agent/s, give them all powers. If your client wishes to give their agent all powers (A) - (O), they may initial only (P) where you should type all of the above letters individually (so not "A-O" or "A

through O" but "A, B, C,.." etc. through the letter O). If you do not wish to give your agent/s all of these powers, initial only the ones you wish to give.

Discuss each and every item with your client. While the POA is particularly *useful* in the event of your client's incapacitation, it is *effective* as soon as their agent executes it before a notary. Is your client comfortable with the fact that their agent could empty out their bank account under the authority of this *document whether or not they are incapacitated*? If not, such person should not be your client's agent.

Please make sure your client is aware that their agent's power is not effective until the agent signs the document before a notary. Notarization can be performed in accordance with Executive Order 202.7 if your client's agent is able to facilitate same.

- **Section (g)**

Section g gives your agent the authority to make gifts on your client's behalf in excess of $5,000. Take note of the modifications that mention gifting and which supplement this option.

- **Section (h)**

The template provided to you includes "Optional Modifications". In this section, you may delete any item that your client does not wish to initial.

Make sure your client knows how powerful this document is.

If your client has one or more POAs that they wish to revoke, they should initial that modification. If this is the case, a written revocation of POA should also be prepared.

If your client wishes for their agent to be authorized to engage in medical or estate planning involving Medicare, Medicaid, Social Security and "other government programs" affairs (other government programs include HRA, NYCHA, OTDA, DOF, HPD, HCR, etc.) they should initial the modification allowing for same. Due to the fact that our clients have low income and little to no financial assets/resources, they are often recipients of government subsidies through any number of City and/or State agencies that they are required to remain in regular contact with at peril of losing their benefits – this modification is essential to most of our clients.

If your client wishes to allow their agent to handle matters relating to their domicile or residence, they should initial the line for same. This includes activities such as signing

leases, paying rent, relocating from a private home to a long-term care facility or vise versa, etc. This modification is also essential to most of our clients.

If your client wishes to authorize their agent to have access to their digital property and assets, they should initial the line for same.

If your client wants their agent to be able to make gifts in excess of $5,000 to the client's spouse, children, remote descendants, and parents, they should initial the modification indicating same, in addition to having initialed Section (g). This will allow agent/s to make gifts in excess of $5,000 but not more than the federal gift tax exclusion amount if gifting to the principal's spouse, and not more than twice the federal gift tax exclusion amount if gifting to children, more remote descendants, or parents. If your client wants their agent/s to be able to gift in this fashion in an amount less than $5,000, they need not initial this modification or Section (g). They should, however, initial the "personal & family maintenance" item (I) under Section (f) (or line P inclusive of line I).

If your client wants their agent to be able to open, modify, or terminate a financial account on behalf of the agent and other joint tenants, they should initial the modification regarding same.

If your client wishes for their agent to have the authority to change the beneficiary/s on any life insurance policies or annuity contracts, they should initial the modification regarding same.

If your client wishes for their agent to designate or change the beneficiary/s on their retirement plan, they should initial the modification reflecting same.

If your client wishes for their agent to be able to make gifts to themself out of the client's account in excess of $5,000, they can initial the modification reflecting same, in addition to having initialed Section (g). They should write the name/s of the agent/s they wish to give this power to on the blank line. If your client wishes to authorize their agent to gift in this fashion in an amount less than $5,000, they need not initial this modification or Section (g). They should, however, initial the "personal & family maintenance" item (I) under Section (f) (or line P inclusive of line I).

Lastly, if your client wishes to make gifts/contributions to individuals, religious institutions, educational and other charitable organizations consist with the client's customary pattern of giving in excess of $5,000, they should initial the last modification indicating same, in addition to having initialed Section (g). If your client wishes to authorize their agent to gift in this fashion in an amount less than $5,000, they need not

initial this modification or Section (g). They should, however, initial the "personal & family maintenance" item (I) under Section (f) (or line P inclusive of line I).

- **Section (i)**

Monitors are generally appointed only where there is a concern of trust with agent/s. Generally, we advise our clients not to appoint anyone they don't fully trust as an agent. However, if your client wishes to do so, they may initial this section and designate a monitor to oversee the actions of their agent.

- **Section (j)**

Your client can initial here if your client wishes to compensate their agent for their service.

- **Section (m)**

This is where your client will sign and date their POA. A third party may sign for the Principal at the Principal's discretion (this provision is intended to be used by a Principal who has capacity but has a physical disability that stops the Principal from signing). If someone else is signing for the principal, they should sign by writing or printing the principal's name, and printing and signing their own name as well. Note this person cannot also sign as a witness.

- **Section (n)**

This is where the witnesses will sign and date the POA. The witnesses will also provide their addresses. The witnesses can be present at the time your client signs, but they do not have to be if your client obtains their signatures within 30 days. The witnesses must not be named in the POA as agents or as permissible recipients of gifts. The person who takes the acknowledgment may also serve as one of the witnesses, in other words the notary may serve as one of the witnesses. If a person signs for the principal under section (m) that person may not also serve as one of the witnesses. Have the witnesses read the acknowledgments out loud prior to signing.

Agent's Signature

Section (o) is titled "Important Information for the Agent". This is followed by Section (p), "Agent's Signature & Acknowledgment of Appointment". Your client's agent's authority will not be valid until after they have printed and signed this page in the physical or virtual presence of a notary. Your client's agent need not sign on the same

day as your client. Co-agents need not sign on the same day as the Principal or as each other.

Section (q) must be signed by any successor agent/s in the presence of a notary in order for the successor agent/s to have the authority to act on the Principal's behalf. Successor agent/s need not sign on the same day as the Principal or the primary agent/s. Co-successor agent/s need not sign on the same day as each other.

Rules of Proper Execution of POA

1. A notary must be physically present at the time of signing
    - Your client's agent ***should not*** be present. This will avoid any presumption of undue influence.
    - The notary has to be close enough to be able to see your client sign. You, the attorney, can act as the notary if you are so-licensed.
2. Your client, or someone acting on their behalf, must initial each line in Sections (b) through (i) that you have predetermined and predesignated that they should initial.
3. Your client, or someone acting on their behalf, must sign and date Section (m). If someone is signing on the client's behalf, they should also print and sign their own name.
4. The notary must notarize the client's signature.
5. You must also obtain the signatures of two witnesses. Witnesses can be present at the time your client signs, but they do not have to be if your client obtains their signatures within 30 days. The witnesses must not be named in the POA as agents or as permissible recipients of gifts. The person who takes the acknowledgment (the notary) may also serve as one of the witnesses.

- Use and Storage of the POA

Your client or their agent should *present* the *original* POA – including their own notarized signature at Section (m) of the POA and their agent's notarized signature at Section (p) of the POA - to the bank or other place where they wish for their agent to act on their behalf, but they should not *submit* the original to the bank – they should only *submit* a copy.

After your client or their agent has presented the original and submitted a copy to necessary parties, your client should keep their original POA and store it in a safe and easily accessible place. They should also notify one other trusted person as to the location of the POA to ensure it can be found and accessed in the event that your client

loses capacity to recall where it is or how to access it. They should give copies to their agents, their bank/s, and any other agency at which they may wish for their agents to conduct a transaction on their behalf.

If your client wishes to revoke their POA, they can do so by

(1) Executing a simple signed & dated written statement of revocation; ***or***
(2) Executing a new POA that includes a statement in the "Modifications" section that the prior POA is revoked; ***and***
(3) Giving notice to all concerned (this is critical).

Please instruct your client to contact VOLS should they wish to revoke their POA.

Health Care Proxy and Living Will

Patient self-determination and informed consent are fundamental elements of medical care in the United States. A person with capacity to make medical decisions may consent to a specific medical order prior to losing capacity, including an order to withhold or withdraw life-sustaining treatment. If the capacity to make medical decisions is lost, securing informed consent and carrying out a patient's wishes raise complex legal and ethical issues, especially when end-of-life is near and decisions must be made about whether or not to provide life-sustaining treatment. We are all encouraged to make decisions concerning life-sustaining treatment in advance so that, in the event we lose decision-making capacity, our wishes can be honored.[9] Clients should be encouraged to consult with their doctors, family, friends, and clergy about their health care planning choices, which may be influenced by religious and moral beliefs.

Health Care Proxy

A Health Care Proxy ("HCP") allows an agent, "proxy", to make medical – not financial - decisions on behalf of the Principal. HCPs in New York are governed by PHL Article 29-C. The NYS Department of Health distributes the statutory form; use of this exact form is not mandatory, but health care providers are familiar with it. VOLS uses our own version of a form that comports with statutory requirements.

[9] The 1991 federal Patient Self-Determination Act, 42 U.S.C. § 1395 cc(f) requires hospitals, nursing homes, hospice programs and home health agencies to inform patients about their decision-making rights, ask them about advance health care directives, and document those directives in their medical records.

An agent under HCP can make decisions to withhold or withdraw life-sustaining treatment even where patients have not left clear and convincing evidence of their wishes. The agent must make decisions in accordance with the Principal's wishes, or if the Principal's wishes are not reasonably known and cannot be ascertained with reasonable diligence, in accordance with the Principal's "best interests." It is important for the Principal to talk to their agent(s) about wishes, most importantly with regard to withholding or providing "heroic" measures.

Unlike the POA, which is effective once the agent executes it regardless of the Principal's capacity or incapacity to act on their own behalf, an agent's authority to act under a HCP is effective only when the Principal becomes incapacitated in a way that prevents them from communicating what their wishes are with respect to their health care.

Your client may only have *one* agent. They may appoint one or more successor agents. Co-agency or co-successor agency is prohibited.

- **Preparing Your Client's HCP**

You should type in all requested information in Sections 1 through 6 with the exception of the signature and date lines. With respect to revocation, our general practice is to also make our client's HCP's durable. However, your client may choose to terminate their HCP on a certain date for instance if they are completing the form to have in place for a specific medical procedure.

With respect to Section (4), the template VOLS provided to you includes the line "I have discussed my wishes with my health care agent, and they know my wishes, including those about artificial nutrition and hydration." Please discuss this with your client and inform them that they should have a detailed discussion with and provide clear instructions to their agent to ensure that the above quoted language is in fact the case.

With respect to Section (6), if your client chooses to complete this section, they should sign and date it in addition to signing and dating Section (4). If your client chooses not to complete Section (6) you may delete it entirely, you may leave the number and title and replace the body with language such as "I do not wish to make an anatomical gift" or you may hand write such wish in the limitations line.

- **Proper Execution of a Health Care Proxy**

1. Two witnesses must be physically present and actually see the client sign the document in real time (no acknowledging within 30 days like with an LW&T or POA). A notary is not required.

2. Your client must then sign and date Section 5, or direct someone to do so on their behalf. If someone else signs for your client, they should also execute an Affidavit of Signing.
3. If your client wishes to donate organs, they should then sign and date Section 6, or ask someone else to do so on their behalf.
4. Witnesses should sign.

- **Using and Storing a HCP**

Your client should give copies of their document to their agent and alternate agent (if any). They should also give a copy of their document to each of their health care providers. Your client should keep the original and several extra copies.

Living Will

A Living Will ("LW") is a document which expresses a Principal's wishes with respect to certain kinds of medical treatment in the event of incapacity and a terminal or chronic illness. It can cover views/wishes on nutrition (feeding) and hydration (fluids), pain medication, and life-prolonging machines such as respirators. An LW can express wishes to continue to receive treatment as well as to discontinue treatment. An LW is not as flexible as an HCP (it is hard to draft a document that provides specific instructions with regard to all possible future events) but is especially important and useful for someone with clear ideas about their wishes but no one to appoint as HCP.

An LW can be executed in addition to an HCP and given to the agent for guidance. Some people who execute an HCP also feel it is still important to also execute an LW in case the agent or alternate agent(s) appointed under the HCP cannot be located when needed.

When both an HCP and an LW are prepared, every effort should be made to avoid inconsistencies or conflicts between the two documents. For those people who execute both an HCP and an LW, VOLS includes the following in our template:

The Living Will and Health Care Proxy can work together.

"This declaration is intended to serve as a guide to assist my duly appointed health care agent in making medical decisions on my behalf. However, it is not intended to limit my health care agent's sole discretion to interpret this document and to make medical decisions in good faith after full

consideration of my medical condition and prognosis. If my health care agent is unable to serve for any reason, my attending physicians shall comply with my directions."

The LW, unlike the other Life Planning Documents, has no governing statute. Rather, LWs are recognized through case law. As with the HCP, in New York State there is a standard LW form, available to the public on various websites including that of the NYS Bar Association. The form provided to you by VOLS is our own.

As with the HCP – copies are as good as the original. The client should be provided with sufficient copies to distribute to agents and doctors.

Type your client's name into the line provided on the first page. You should discuss with your client each of the options they may choose to consent to in their LW starting with "I do not want cardiac resuscitation…" through "Other Directions". Customize the "Other Directions" line, if any. You should then type in Xs next to each item your client wishes to consent to.

- **Execution and Use & Storage of a Living Will**

In order to properly execute their living will, as with the Last Will & Testament and POA, witnesses can either watch your client sign in real time, or your client can acknowledge their signature to two witnesses in-person separately within 30 days of signing.

1. Client should sign and date page 2 in the physical or virtual presence of two witnesses.[10]
2. Witnesses should sign.

If your client has a Health Care Proxy, they should give copies to their agent under their HCP. If this is the case, please also review the above section regarding the interplay of HCPs and LWs. Otherwise, they should give copies to their primary health care providers.

Other Health Care Related Documents and Points of Information

[10] Because the Living Will arises out of common law there is no clear statutory authority that explicitly allows another person to sign the document on the principal's behalf. Therefore, we do not recommend that a third party signs a living will on the principal's behalf.

- **2010 Family Health Care Decisions Act (PHL Art. 29-CC)**

Before NYS enacted the Family Health Care Decisions Act ("FHCDA"), the right to make health care decisions for another incapacitated adult absent an HCP was unclear. The FHCDA establishes a hierarchy of family members, friends, and others to make health care decisions – including the decision to withhold or withdraw life-sustaining treatment – where a patient lacks decisional capacity and did not leave prior instructions or execute an HCP appointing an agent for health care decisions. The FHCDA is effective only for patients who are in general hospitals and residential health care facilities (nursing homes); it does not apply for at-home care.

- **DNR – Do Not Resuscitate Order**

NYS Law provides that where there is no direction from the individual or surrogate health care decision-maker under an HCP or under the FHCDA, there is a presumption for resuscitation.

A DNR Order instructs medical personnel not to undertake resuscitation measures for a patient who has a terminal condition; or who is permanently unconscious; or for whom resuscitation would be medically futile or would impose and extraordinary burden on the patient in light of the patient's medical condition and the expected outcome of resuscitation for the patient.

A DNR Order is prepared and signed by the patient's attending doctor and applies only when a patient is in cardiac or respiratory arrest – i.e. when a patient has no pulse and/or is not breathing. In the hospital setting, the DNR Order has been replaced in large part by the FHCDA (above). The non-hospital DNR Order directs emergency medical services and hospital personnel not to attempt cardiopulmonary resuscitation on someone suffering from cardiac or respiratory arrest.

- **MOLST – Medical Orders for Life Sustaining Treatment**

A MOLST form is signed by a patient's physician and contains the patient's medical orders for life-sustaining treatment. The MOLST is generally for patients with serious health conditions, and is completed based on the patient's current medical condition, values, wishes, and the MOLST instructions. MOLSTs are recorded on a portable, easily identified form (bright pink), based upon conversations between the physician and patient (or patient's health care agent) regarding prognosis, benefits and burdens of life-sustaining treatment, and the patient's personal goals for care.

Studies have shown that the MOLST process is useful in initiating conversations about end-of-life care, preventing unwanted resuscitations and hospitalizations and documenting a range of treatment options.

These orders are effective both in the community and in health care facilities, and are intended to accompany the patient from one setting to another.

- **2011 Palliative Care Information Act (PHL § 2997-c)**

"Palliative Care" is defined as health care treatment, including interdisciplinary end-of-life care, and consultation with patients and family members, to prevent or relieve pain and suffering and to enhance the patient's quality of life, including hospice care.

The Palliative Care Information Act ("PCIA") is New York's patients' rights law which recognizes a clearly defined right of terminally ill patients to receive information and counseling about their palliative care and end-of-life options. The law requires medical providers to offer terminally ill patients information and counseling about the range of options appropriate to the patient; the prognosis, risks, and benefits of the various options; and appropriate palliative care and end-of-life options such as hospice programs and pain and symptom management medications.

Last Will & Testament

Overview

A Last Will & Testament is a formal document with formal execution requirements. If a decedent dies "intestate" – leaving no Will - EPTL § 4-1.1 dictates who inherits their estate. If a Last Will & Testament is not drafted and executed properly, those who would inherit under the rules of intestacy may succeed in challenging it.

Below are the rules that would govern the distribution of your client's estate in the absence of a Will. These are important to note because, among other reasons, if a specific bequest or anything that's not in the residuary estate winds up having no beneficiary or alternative beneficiary, that bequest will go into the residuary estate unless stated otherwise. With respect to such a bequest, if there is no beneficiary or alternative beneficiary for the residuary estate, then it will be distributed according to the rules of intestacy.

(1) If client has a spouse and issue[11] [children, grandchildren, etc.], $50,000 + ½ to spouse, balance to issue "by representation";
(2) If client has a spouse and no issue, the whole to the spouse;
(3) If client has issue and no spouse, the whole to the issue by representation;
(4) If client has one or both parents and no spouse and no issue, the whole to the surviving parent(s).

Intestacy extends only as far as children of first cousins (great grandchildren of grandparents).

Persons or Person Surviving	**Distributive Share**
1. Spouse and no issue	Surviving spouse takes all
2. Spouse and children	$50,000 + ½ of residue to surviving spouse; balance to issue by representation
3. Children or their issue (no surviving spouse)	All to the issue by representation
4. One or both parents (no issue or surviving spouse)	All to the surviving parent or parents
5. Siblings (no issue, surviving spouse or parent)	All to the brothers or sisters by representation
6. Grandparents or their issue (and none of the above)	½ to surviving paternal grandparents or if none surviving to their issue by representation and ½ to surviving maternal grandparents or if none surviving to their issue, by representation. Issue no more remote than grandchildren
7. Great-grandchildren of grandparents (no surviving spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents)	½ to great-grandchildren of paternal grandparents per capita; ½ to great-grandchildren of maternal grandparents, per capita

[11] "Issue" means "descendants in any degree from a common ancestor" (EPTL § 1-2.10) and includes half- & whole-blood relatives; relatives conceived prior to death but born after; adopted children (EPTL § 4-1.1(b), (c) & (d). Issue does not include step-children or adopted-out children.

Interviewing the Client

While VOLS will gather and provide basic information from the client about how they would like their Will to be drafted, you should have an in-depth discussion with your client about the distribution of their estate to ensure that you have all necessary information required to understand the client's needs and draft their Will appropriately. Each client's estate plan, from the initial client meeting through the Will execution, has the potential for a Will contest, regardless of whether any red flags emerge during the process. Taking precautions with every client should reduce the likelihood of a Will contest.

It's important to avoid assumptions. For example, when a client tells you they are married, separated, or divorced, they may not mean legally – what's important is what the client's marital status is *legally*. When a client tells you they were never married, that does not mean they don't have children. When a client tells you, they want to leave something to a "cousin", that may not mean an actual cousin. It's important to confirm these details. The Executor will need to have this information in order to fulfill the Surrogate's Court's requirement of "due diligence" in locating and placing family members, as well as other interested parties, on written notice in order to commence probate proceedings.

Note that if your client is legally married and seeking to disinherit their spouse, they should pursue getting a waiver from their spouse ("Spousal Waiver"), in which they will waive their right to their elective share. If a Spousal Waiver cannot be obtained, your client is nevertheless not required to explicitly bequeath anything to their spouse. However, the absence of a waiver may leave the Will open to being challenged by your client's spouse after your client passes away.

Ask your client if they have any particular pieces of tangible personal property they want to devise in specific bequests. Note that pets are property and should be provided for as a specific bequest.

Ask your client about the types and approximate values of their financial assets (bank accounts, contents of a safe deposit box, stock certificate for co-operative apartment, etc.). If your client owns real property, ask them how they own such property (individually, joint tenancy with rights of survivorship, tenants by the entirety, tenancy in common) and counsel and draft accordingly. If doing so would be helpful and would not be burdensome for your client, you may ask them to provide you with documentation as to such property. However, this should not serve as a barrier to your client obtaining their Will.

If your client owns a co-op or shares of a co-op, you and your client should review the bylaws of the co-op in order to determine whether there are any restrictions on your client's ability to transfer title to the co-op or shares. Many of our clients live in limited-equity co-ops that restrict their ability to transfer shares after death in one way or another. If your client owns a co-op or shares of a co-op, first determine what type of co-op they own (a traditional co-op or a limited-equity co-op). Well-known examples of limited-equity co-ops include Mitchell-Lama co-ops and Housing Development Fund Corporation (HDFC) co-ops. Limited equity co-ops contain many restrictions, including restrictions on transfer and succession, that may not be overridden through a Will. Regardless of the type of co-op, review its bylaws, especially the portions dealing with transfer and succession. If the client's wishes as to the disposition of their co-op conflict with the bylaws, contact us for guidance.

While the execution of a new Will invalidates any previously executed Will, you should also instruct your client to physically destroy any prior Wills after the execution of their new Will.

Who are the players?

These are the necessary players in a Will that is not executed in the presence of an attorney:

- **Testator**

Your client, the person making the Will is the testator ("Testator"). The Testator must have testamentary capacity which is defined as knowing the "nature and extent of property being distributed and natural objects of their bounty."

- **Beneficiaries**

Whomever the Testator wants to name. If your client does not name their legal spouse as a beneficiary, unless their spouse signs a Spousal Waiver, waving their right to their elective share or if there is a valid prenuptial agreement specifically stating that their spouse waive the right of election, their spouse will still be entitled to an elective share of the greater of $50,000 or 1/3 of the net estate, unless they and your client lived apart for many years or their spouse failed to provide support despite having the ability to do so. It is ideal to include sufficient alternate/back-up beneficiaries (perhaps a favorite charity) to provide for possibility that named beneficiaries may predecease the client. "Exclusion" clauses should be used to indicate where someone who would otherwise be entitled to distribution under the laws of intestate was intentionally left out of the Will.

- **Executor**

The person responsible for collecting/distributing probate property in accordance with your clients Will. The executor can also be a beneficiary. Your client should consult and choose someone willing and able to serve. Your client's executor cannot be a minor; an incompetent; a non-domiciliary non-citizen; a felon; someone otherwise unfit for the role.

- **Custodian**

Responsible for bequests left to for beneficiaries who are minor children.

- **Witnesses**

Two are needed, both 18+ and competent. Neither of them should be interested (that is, neither of them should stand to receive something from your client's estate either as a named beneficiary or as an unnamed beneficiary who might nevertheless receive something in accordance with intestate distribution due to a lapsed gift to a named beneficiary). Having one or two interested witnesses will not render your client's Will invalid. However, EPTL 3-3.2 holds that a gift to an interested witness is void in the absence of two additional disinterested witnesses. That said, an interested witness whose gift is voided by the absence of two additional uninterested witnesses will still be entitled to receive their intestate share (if any) up to, but not exceeding the value of the gift made in the Will. Please discuss this with your client.

- **Translator**

If your client has limited English proficiency, someone will need to verbally translate their will to them. Include an affidavit of translation. The translator should not also act as a witness unless there are no other available witnesses.

Types of Bequests

- **Specific**

A specific bequest is the disposition of a specified item of property, using a clear description of the property and designation of the beneficiary ("my Rolex watch to my son John X. Smith, Jr."; "my pewter box currently on my bedside table to my friend

Mary Q. Jones"). A specific bequest may also be a demonstrative bequest, which is the direction to make payment to a beneficiary out of a specified or identified fund or property ("I direct that my 1995 Honda Accord be sold and from the proceeds thereof I bequest the sum of $2,000 to my brother Paul if he survives me").

- **General**

A general bequest does not designate the source of its payment; it is payable out of the general assets of the probate estate remaining after payment of debts, administration expenses, and specific and demonstrative bequests.

- **Charitable**

A charitable bequest can be a cash bequest to a 501(c)(3) charity; make sure to use the proper corporate name and address of the organization. Many charities include suggested language for bequests on their websites.

- **Residuary**

A residuary bequest is the disposition of all or a portion of the residuary estate (the probate estate remaining after payment of debts, administration expenses, and specific/demonstrative/ general legacies). Even if a Testator believes that entire probate estate is disposed of by way of specific/general legacies, a residuary bequest – with at least one alternate - should be included to avoid intestacy as to omitted or after-acquired assets.

- **Lapsed**

A lapsed bequest occurs when the beneficiary predeceases the Testator. Lapsed bequest fail to take effect. Anti-Lapse Rules kick in where a testamentary disposition is made to issue or to a sibling of the Testator without providing for an alternate beneficiary, and where beneficiary dies during Testator's lifetime leaving issue surviving such beneficiary. In such an instance, the disposition does not lapse but vests in such surviving issue, by representation.

- **Ademption**

Ademption occurs when a bequest does not take effect because the property listed in a specific or demonstrative bequest is not in existence at death.

- **Per Stirpes**

The estate is divided at the nearest generation to the decedent where there is issue then living, with equal shares to both (1) the surviving members of that generation and (2) deceased members of that generation who left surviving issue. The shares of those deceased members leaving issue are each then similarly divided to their issue.

- **Per Capita**

A disposition or distribution of property is per capita when it is made to persons each of whom is to take in their own right an equal portion of such property.

- **By Representation**

By representation means equal division at each generational level where there are issue then living: First, the estate is divided in the same manner as a per stirpes bequest (at the nearest generation to decedent where there are issue then living, with each surviving member in such nearest generation allocated one share). Then, at each generational level where there are issue then living, the remaining shares are combined and then divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent without issue. Intestate dispositions are "By Representation".

- **Notes on Gifts to Certain People**

Specific bequests to minor children can be directed to be controlled by a custodian. Other gifts to minors can be directed into a trust, a custodial account, or be paid to a parent or guardian.

Gifts to devisees who are disabled and in receipt of (or likely to receive in the future) needs-based benefits like Medicaid and SSI, bequests should be left to them in trust.

Drafting Your Client's Will

Generally speaking, a Will must be written.[12] You should use clear, simple everyday language to spell out your client's wishes.

VOLS has provided a Will template to you that includes boiler plate provisions regarding payment of debts (note that if Testator leaves no money, debts die with them), devisees who are minors, devisees who receive or are likely to receive means-tested government benefits such as SSI and Medicaid, and simultaneous death. This boiler plate language should not be changed.

As you edit your client's Will, article designations may change – please make sure that in-text Article references reflect any changes to the ordinance of the articles. Please also be mindful of gendered-pronoun designations and ensure that they reflect the gender of the person to whom they refer. While binary language is suggested in the template, such designations should only be used if they actually reflect the gender of the person to whom they refer. When in doubt, use they/them/their.

Remember to keep in mind the question of what your client wants to happen to a certain gift in the event that their beneficiary predeceases them, and to spell that out (who do they want to get that gift instead?).

Proper Execution of the LW&T

Like the POA, your client can sign and then acknowledge their signature separately in-person to two witnesses within 30 days (and recite the language below at step 1 when they do), or they can sign in the presence of two witnesses. The LW&T must be stapled together before your client signs.

If you are meeting with your client in person to execute:

1. Ask your client the following questions (this is required by law):
    - What is this document?
    - Whose will is this?
    - Have you read this will?
    - Does this will express your wishes?
    - Would you like for [Witness 1] and [Witness 2] to witness your will?

[12] NY does not recognize an oral ("nuncupative") Will unless it is made by a member of the Armed Forces while in actual military or naval service during war or armed conflict, or by a mariner while at sea. Note that these Wills become invalid one year after the testator's discharge from the Armed Forces and three years after the mariner makes the Will at sea. EPTL § 3-3.2(b).

2. Your client must then sign their name, or ask someone else to do so on their behalf, on the signature line at the end of the body of the Will. If someone else signs on the client's behalf, they should also complete an Affidavit of Signing.
3. Witnesses must sign within 30 days.

If your client is executing without your presence, they must state aloud to the witnesses: *"This is my Last Will and Testament. I have read its contents. It reflects my wishes. I would like [state the names of the witnesses] to witness my Will."* Then follow steps 1 and 2.

Instruct your client that they *cannot* use corrective tools like Wite-Out® to make corrections to their Will or it may be invalidated. If anything is incorrect in the typed text, you will need to provide a corrected version to your client. Also instruct your client not to make any handwritten changes to their Will, like changing names or addresses, because handwritten changes will not be valid. If your client and their witnesses do anything other than sign and date as appropriate, your client may need to start over, in which case you will need to reprint and resend your client's Will to them.

Affidavit of Attesting Witnesses

It is common practice with Will execution for witnesses, in addition to signing the witness signature page, to also sign a witness affidavit ("Affidavit of Attesting Witnesses"). This document is handy at the probate phase – it prevents each witness from being called into court to swear to the validity of the entire Will execution. This document can be executed at any time up until probate begins. The witnesses' signatures on the Affidavit of Attesting Witnesses for the Last Will and Testament must be notarized at the time the witnesses sign it. According to the Surrogate's Court Procedure Act Section 1406:

> *"In addition to other procedures prescribed for the proof of wills, any or all of the attesting witnesses to a will may at the request of the testator or after his death, at the request of the executor named in the will or of the proponent or the attorney for the proponent or of any person interested, make an affidavit before any officer authorized to administer oaths stating such facts as would if uncontradicted establish the genuineness of the will, the validity of its execution*

and that the testator at the time of execution was in all respects competent to make a will and not under any restraint."

A Last Will & Testament without an Affidavit of Attesting Witnesses is still valid, and obtaining one will require additional legwork by your client to obtain (both witnesses must sign before a notary). However, having such an affidavit in place can make things smoother during the probate phase and it is our standard practice to include one.

Use and Storage of the LW&T

Your client's **original** Will must be submitted to the court in order to be probated. Otherwise, there is a presumption that the Will was destroyed, with limited exceptions. The original should be kept in a safe and dry place that will be accessible to others once your client passes. For example, we do not recommend keeping it in a safety deposit box, because their executor will not be able to access it because safety deposit boxes are sealed after the owner passes away. Clients can also file the original Will with the surrogate's court for a small fee. Again, the **original** is the only version that the court will accept and the only version that the court will probate.

Your client should make copies and give them to their executor/s. They may also give them to their beneficiaries, and anyone else they so-choose. Please make sure your client is aware that they **should not remove the staples for any reason**. Copies will need to be made page by page, not fed through a feeder, for this reason.

A Will is revocable by a Testator with capacity, and can be revoked by an act of burning, tearing, cutting, cancellation, or other mutilation or destruction performed by the testator, or by another person at the direction of the Testator. Additionally, under New York law, execution of a subsequent Will revokes all prior Wills. If after executing a Will the testator executes a later Will which revokes or alters the prior one, a revocation of the later Will does not automatically revive the prior Will.

Probating a Will

A Will does not become legally effective, and the estate will not be distributed until the Will has been probated: its validity must be proved before the Surrogate's Court and any objections to the probate by interested parties have been heard. Note that simplified procedures exist under the Surrogate's Court Procedure Act ("SCPA") for Small Estates (up to $50,000 in personal property with no individually owned real property; any real property which the decedent may own jointly with another person is not included and

does not interfere with the administrator's ability to follow the simplified procedures for the decedent's personal property).

Challenging a Will

The grounds for challenging a Will are as follows (and note that they do not include, "you left me out!" other than for a spouse who has the right to an elective share):

- Lack of testamentary capacity
- Technical error - improper/invalid execution
- Undue influence, especially where there is any hint of diminished capacity
- Fraud
- Mistake ("Mom thought I was dead")
- Duress
- Divorce decree or other contract

Who raises these grounds? Generally, someone left out of the Will.

Non-Probate Property

Non-probate property passes to the named beneficiary outside of the Will. Examples of non-probate property include:

- Life Insurance proceeds (although the estate can be named as beneficiary)
- IRAs and other retirement accounts with named beneficiaries
- Trusts – revocable or irrevocable
- In Trust For/Payable on Death Bank Accounts (aka "Totten Trust")
- Jointly-held bank accounts with rights of survivorship (**CAUTION**: this arrangement gives each joint tenant a present legal right to withdraw ½ the balance); sometimes these are set up as "convenience accounts," so that joint tenant can pay bills; client may not realize they have given the joint account holder a currently effective gift of ½ the balance
- Jointly-held real property and other interests, with rights of survivorship

Clients may benefit from counseling about (a) changing title (if possible to do so) if current arrangements do not effectuate the client's intent and (b) other ways to avoid probate.

Appointment of Agent for Control of Disposition of Remains

Section 4201 of the NYS Public Health Law states who oversees a funeral if no directive exists. The statute creates a hierarchy, starting with the person designated in a written instrument drafted and executed under the statute, followed by surviving spouse, surviving domestic partner, any child of the deceased aged 18 or older, surviving parents, siblings, guardian under SCPA Art. 17-A or Mental Hygiene Law Art. 81, an heir under Estates, Powers and Trusts Law § 4-1.1, a duly appointed fiduciary of the decedent's estate, a close friend or relative "who is reasonably familiar with the decedent's wishes," the county public administrator, "or any other person acting on behalf of the decedent."

The "written instrument" referred to in PHL § 4201 is the Appointment of an Agent for Control of Disposition of Remains Form (or "Control of Remains form" or "AACDR"). In it, the Principal designates an agent to be responsible for carrying out their wishes with respect to their bodily remains.

Burial, cremation, body donation, prepaid options, etc. are all things that can be included in AACDR forms. A Principal can also indicate the contact information for any funeral home they may have a pre-paid, pre-need irrevocable funeral arrangement. You should discuss the options with your client to predetermine which option you should type an "X" next to, and to type in any other additional information that may be necessary.

If the Principal has purchased funeral insurance, it is appropriate to name the funeral home as one's agent under an AACDR. On the other hand, if a Principal cannot afford to prepay for their funeral, or if they do not know anyone whom they would choose to be their agent, it is appropriate to name the Public Administrator of the County in which they reside.

Proper Execution of an AACDR

Below are the rules for proper execution of an AACDR:

1. Two witnesses must be physically present.

2. Your client must date and sign, or ask someone else to sign and date on their behalf as appropriate on page 2. If someone else signs on your client's behalf, they should also complete an Affidavit of Signing.
3. Witnesses must sign.

Use and Storage of an AACDR

Once your client has executed their AACDR, they should make themselves a copy and provide their agent with the original. They should instruct their agent **not** to sign and date on page 3 until the Principal has passed. The agent's authority to act under the AACDR will not be effective until the Principal has passed, and the agent has signed and dated it.

NYS Standby Guardianship for Future Care and Custody

If you are advising a parent or guardian of minor children, you may want to help your client make a plan to ensure the future care and custody of their children by appointing a **Standby Guardian**.

What is Standby Guardianship

Standby guardianship allows parents and guardians to designate a standby guardian who will only assume guardianship if a "triggering event" occurs.

Parents or guardians of minor children can designate a standby guardian in the following cases:

- If the client suffers from a progressively chronic illness.
- If the client has been diagnosed with an irreversibly fatal illness.
- If the client is at risk of an immigration action such as arrest, detention or deportation that would separate the client from their child/children.

A standby guardian will step in if a triggering event occurs, such as incapacity, administrative separation, or death. Designating a standby guardian does not terminate a parent's parental rights. The standby guardianship only goes into effect if a triggering event occurs. The parent or guardian can revoke a standby guardianship designation at any time.

How to designate a standby guardianship

VOLS has a standby guardianship template attorneys can use to help their clients name a standby guardian. The form is signed by the parent, the standby guardian, and two witnesses. If a triggering event occurs, the standby guardian can step in to act as guardian of the minor child/children.

After the triggering event, the standby guardian must go to court to petition for guardianship because only the court can appoint a permanent guardian. The standby guardian should petition the court for appointment as guardian within 60 days. The designation is proof of parental consent.