

**ELDER LAW**

**ESTATE PLANNING**

**AND**

**VETERANS BENEFITS**

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Mr. Okrent concentrates in the Elder Law, Tax, Estate Planning, Administration, Special Needs Planning and Asset Protection. Mr. Okrent has more than 36 years experience in both the legal and accounting fields. He has received The Long Island Coalition for the Aging, Inc. "Man of Spirit" Award for his commitment to the field of Aging, in 2006, was honored by the L.I. Alzheimer Foundation as an "Angel of Spirit" in 2010, by Day Haven, and in 2012 a "Leadership in Law" award by the Long Island Business News.

Mr. Okrent is a frequent lecturer and author. He has appeared on Channel Twelve's TV program titled "Best Years" and was a Co-host of WEVD's morning "Elder Law and Senior Forum" radio program. His bar association service includes acting as a member of the Executive Committee, a former Member-At-Large, Co-Chair many of sub committees, a District Delegate, & Co-Chief Editor of the "Elder and Special Needs Law Journal" of the NYSBA's Elder Law Section, a past Co-Chair of the Suffolk County Bar Associations Elder Law Committee, Legislation Committee, Tax Committee and Member of it's Academy of Law, a past member of the National Academy of Elder Law Attorneys, the Alzheimer's Association, Long Island Chapter Legal Committee, Nassau County and American Bar Associations, and the Trust and Estate Committee of the New York State Bar Association..

Currently he is a Member of the Board of Directors of the Suffolk County Bar Association His past positions include Board Membership of the Foundation of St. Charles Hospital and Huntington Arts Council, Chair of the Legal Advisory Board of the Long Island Alzheimer's Foundation, member of the former Planned Giving Council of Good Samaritan Hospital, member of the Advisory Board of Friends of Karen, Vice President and Education Co-Chair of the L.I. Eastern Chapter of the National Conference of CPA's, member to the Legislation Committee of the MS Society & YAI/NIPD's Autism Advisory Board, Officer of the Association of Professional Financial Consultants and Alumnus Liaison for the Tax Institute of the School of Professional Accountancy at L.I.U., C.W. Post Campus. He has served on the N.Y. State Society of CPA's Estate Planning Committee, the American Institute of CPA's, and the National Republican Congressional Committee's Business Advisory Counsel, the Suffolk Local Early Intervention Coordinating Council and the Steering Committee for Assemblyman Englebright's Sr. Law day.

Mr. Okrent was formerly associated with a Leading Elder Law Firm. Prior to that, he was a Revenue Agent with the Internal Revenue Service, responsible for litigation support and audit examinations of individuals, corporations and partnerships. While with the IRS, he taught financial statement analysis as an Adjunct Professor at Nassau County Community College. Before joining the IRS, Mr. Okrent was an accountant with KPMG/Peat Marwick.

At St. John's University School of Law, Mr. Okrent received his Juris Doctor, graduating Cum Laude in the top fifth (5th) percentile of his class. He received his B.S. degree in Accounting, Cum Laude, from the School of Professional Accountancy at Long Island University, C.W. Post Campus and the Faculty Award for Academic Excellence in Accounting. Finally, his experience includes judicial internships with The Honorable Judge Cecelia H. Goetz at Hauppauge Bankruptcy Court and The Honorable Judge Raymond C. Radigan at Nassau County Surrogate's Court.

## **I. ISSUES IN ELDER LAW**

### **A. WILL MEDICARE COVER THE COST OF A NURSING HOME or HOME CARE?**

If an individual has received 3 days skilled care in a hospital and is admitted to a nursing home within 30 days, where they are receiving skilled, rehabilitative care then Medicare will pay for the first 20 days in full. From day 21-100 a co-insurance payment of \$194.50 per day in 2022 is required. After day 100 there is no coverage. The three days begins on the day admitted but does not count the day of discharge. Also note if your break in skilled care lasts for at least 60 days in a row, this ends your current benefit period and renews your SNF benefits.

Medicare will provide some skilled need benefits, i.e. physical therapy, wound care, etc. in the home. These services are usually only provided for a few weeks after a hospital admission. In general, there are no Long Term Custodial Home Care benefits through Medicare.

### **B. WILL MEDIGAP INSURANCE COVER THE COST OF A NURSING HOME?**

If the individual qualifies for Medicare then this insurance will pay the \$194.50 in 2022 co-insurance payment. But make sure your plan covers, most plans C, D, F G, AND M and N will cover, but double check with your company to make sure! Though this policy typically stops paying when Medicare stops. Therefore, there is no coverage after day 100. *Alert as of 1/1/2020:* Medigap Plans C and F became unavailable to new subscribers. If you currently are enrolled in Plans C and F, you will still have access to those plans. For those who are eligible for Medicare prior to Jan. 1, 2020, Plans C and F will remain available options, including coverage of the Part B deductible. For those who become eligible for Medicare on or after Jan. 1, 2020, Plans C and F will not be an option. However, Plans D and G will be available and will have similar coverages to Plans C and F (except for coverage of the Part B deductible of \$203).

### **C. SHOULD YOU BUY LONG TERM CARE INSURANCE?**

Long Term Care Insurance is recommended, but may be unavailable due to health, age

and/or cost.

## **D. LONG TERM CARE AND MEDICAID.**

### **1. General limits.**

#### **a. For individuals**

For individuals to be eligible for long term care Medicaid in 2022, they are allowed to have the following resources: *\$16,800.00 in assets, certain retirement assets in pay status, a prepaid funeral and a home with \$955,000 in equity or less if they are living in the home (so they must be applying for home care).* With respect to income, an individual is permitted to have \$50 a month if they are in a nursing home. If they are applying for home care they are allowed *\$934.00 a month in income plus a \$20 unearned income credit* if applicant or recipient is over 65 years old or disabled. Whether the individual is in the nursing home or at home they are also allowed to keep enough income to cover the cost of medical expenses such as health insurance. If the individual is applying for home care and has more income than allowed it must either be spent down or contributed to a special trust, commonly referred to as a “Pooled Trust.”

#### **b. For Married couples**

For *married couples* the numbers change and can become very complex.

### **1. Home Care Medicaid**

**i.** If they are both are applying for Home Care Medicaid the monthly income allowance for them is \$1,367.00 plus a \$20.00 unearned income credit, as well as, any medical expenses including the cost of health insurance. Any income in excess of this must either be spent down or contributed to a special trust, commonly referred to as a “Pooled Trust.” In addition, they are allowed up to \$24,600.00 in resources, certain retirement assets in pay status, prepaid funerals, and the home.

**ii.** If only one is applying for Home Care Medicaid the applying spouse can have \$433 a month in income and the non-applying spouse can have \$3,435 for a combined total of \$3,868, plus medical expenses including the cost of health insurance. If their income exceeds this it may either be spent down or the couple can choose to have the non-applying spouse refuse to contribute their income and then the applying spouse will use the

income rules of a single person described in i. above, including the option of a “Pooled Trust”. As to resources, the applying individual is allowed to have the resources of a single individual and the non-applying spouse is permitted to have a home, of any value, and between \$74,820 and \$137,400 in assets, and certain retirement assets in pay status and a prepaid funeral.

## **2. Nursing Home**

Continuing with Married couples if only one is applying for Nursing home the applicant can have income and resources of an individual. The Spouse living in the community can keep \$3,868 as to income a home, of any value, between \$74,820 and \$137,400 in assets, and certain retirement assets in pay status and a prepaid funeral.

### **c. The Home, Annuities and Qualified Retirement Assets.**

#### **1. The Home**

An individual is allowed to have a home if they are living in it, or certain relatives are in it. The Deficit Reduction action which took affect February 8, 2006 under certain circumstances further limits the exemption on the home and annuities. This law, together with New York’s action, provides that a home whose *equity value* is equal to or less than \$955,000 is exempt. However, the entire home is exempt if the spouse, child who is under age 21, or is blind or permanently and totally disabled, and is lawfully residing in the individual's home. The effective date is for applications filed on or after January 1, 2006.

#### **2. Non-qualified Annuities**

The law provides the following with respect to non-qualified annuities:

"..the purchase of an annuity shall be treated as a transfer of an asset for less than fair market value unless...the State is named as the remainder beneficiary up to the amount of Medicaid paid out...in the first position for at least the total amount of medical assistance paid on behalf of the annuitant under this title; or the second position after the community spouse or minor or disabled child...."

#### **3. Qualified Retirement Assets have a special place.**

The most common qualified asset is an IRA and/or 401(k). If these assets are paying out monthly amounts based upon the owner’s life expectancy, according to Medicaid’s life expectancy requirements (which may be different from the requirements for

required minimum distributions for tax purposes) then the balance in the IRA, 401(k) etc. will be exempt and the monthly distribution will be counted as income.

## **2. The Medicaid Transfer Penalty.**

If an individual transfers assets for less than adequate consideration there is a period of time that the individual will not be eligible for Nursing Home Medicaid. This is commonly referred to as a Transfer Penalty.

The penalty period is determined using the following formula: Value of Transfer/the average cost of care in the community on Long Island is \$14,012. There is no cap on the penalty. However, the Local Department of Social Services is only permitted to “look back” and penalize you for transfers made in the 60 months prior to being institutionalized and applying for Nursing Home Medicaid. This “look back” has become known as the five (5) year rule.

## **3. Recovery rules: Watch out Medicaid can at times recover everything they have paid out!**

Most planners focus on Medicaid Eligibility without considering the rights Medicaid has to recover what it has paid out. For example a person can own a home with equity of less than \$955,000 and apply for Home Care Medicaid. If the person dies owning the home, Medicaid can recover everything they paid out on behalf of that person after they attained age 55. When planning for Medicaid eligibility, attention must also be directed toward Medicaid's liens and right to recover benefits paid. Medicaid will seek reimbursement from a “*probate estate*” of an applicant, from a “*refusing spouse or a refusing spouses estate*”, or attempt to enforce a Medicaid recipients surviving spouse “right of election” if their spouse should die first.

## **E. HOW WILL YOUR ASSETS BE MANAGED UPON YOUR INCAPACITY?**

### **1. Durable Powers of Attorney**

A Power of Attorney allows a designated person, referred to as an “agent” to make financial decisions for an individual. A Durable Power of Attorney is one that will last upon the incapacity or incompetency of an individual. When Durable Powers of Attorney are prepared gifting authority may be inserted, however such broad authority to permit an agent to make gifts may cause that individual an estate tax problem, therefore the tax issue should be

addressed. Also, giving the agent gifting power may circumvent your estate plan and therefore it must be drafted very carefully.

## **2. Trusts**

Although Powers of Attorney permit a designated person to handle your financial affairs, in practice they may be hard to use. Financial institutions view these documents with skepticism, etc. and it may not be honored, although required to be by law. A better tool with respect to asset management is a Trust (of which you can be in complete control). Serious consideration should be given to formation of a Trust for asset management. A Trust is an agreement between the person or persons creating it referred to as the Settlor, Creator or Grantor, and a person(s) or institution known as a Trustee. The terms of the trust dictate the Tax, Medicaid and asset protection affect.

## **3. Medical Decisions**

For medical decisions a Health Care Proxy should be executed, and when appropriate a Living Will. No statutory law allows for a Living Will in New York, however, it is still recommended and can serve as the best evidence of your wishes and guidance to your family or Health Care Proxy. Although we now have the Family Health Care Decision Act which allows for a surrogate to make certain medical decisions for a person who is in a hospital if no Health Care Proxy Exists, it should not be relied upon. In addition, under proper circumstances a Medical Order Life Sustaining Treatment form (a "MOLST") should be completed and kept at home.

## **F. VETERANS: ELIGIBILITY FOR THE AID & ATTENDANCE PENSION**

The Aid and Attendance (A&A) Pension provides benefits for veterans and surviving spouses who require the regular attendance of another person to assist with eating bathing, grooming, dressing, toileting or medication management. It also includes individuals who are blind or a patient in a nursing home because of mental or physical incapacity. Assisted care in an assisted living facility and home care also qualifies.

To qualify for A&A, it needs to be established by your physician that you require daily assistance by others to dress, undress, bathe, cook, eat, put on or take off prosthetics, leave home, etc. You DO NOT have to require assistance with all these. There simply needs to be adequate

medical evidence that you cannot function completely on your own.

The A&A Pension can provide up to \$2,050 per month to a veteran, \$1,318 per month to a surviving spouse, or \$2,431 per month to a couple, in 2022.

### **1. Eligibility for the Aid & Attendance Pension**

Any War-Time Veteran with 90 days of active duty, 1 day beginning or ending during a period of War, is eligible to apply for the Aid & Attendance Improved Pension. A surviving spouse (marriage must have ended due to death of veteran) of a War-Time Veteran may also apply. The individual applying must qualify both medically and financially.

To qualify medically, a War-Time Veteran or surviving spouse must need the assistance of another person to perform daily tasks such as, eating, dressing, undressing, toileting, etc.

To qualify financially, an applicant must have on average less than \$80,000 in assets and at this time there is no look back period or penalties for transfers of assets. Homes and vehicles are excluded as well.

### **2. How to Apply for the Aid & Attendance Improved Pension**

You will need the following documents. Prepare these before making your filing:

- Discharge/Separation Papers (DD-124)
- Copy of Marriage Certificate and all marital information
- Copy of the Death Certificate (surviving spouses only).
- Copy of current Social Security Award Letter (the letter that Social Security sends at the beginning of the year stating what your monthly amount will be for the following year).
- Net worth information, including bank accounts, CDs, Trusts, Stocks, Bonds, Annuities, etc.
- Proof of all income from pensions, retirement, interests income from investments, annuities, etc.
- If you are a court-appointed guardian of the veteran or surviving spouse, a certified copy of the court order of the appointment is required.
- Proof of insurance premiums, medications, medical bills or any other medical expenses that are not reimbursed by insurance, Medicare, or Medicaid.



- Physician statement that includes current diagnosis, medical status, prognosis, name and address, ability to care for self, ability to travel unattended, etc.
- Banking information for Direct Deposit of A&A monthly payments (include a voided check)
- Employment history (does not apply if you are over 65).
- List all doctors and hospitals visited in the last year

### **G. Disability Compensation (Service connected disability)**

Disability Compensation pays a monthly, tax-free amount to eligible Veterans for disabilities that are service-connected. A disability is considered “service connected” by the VA when it was sustained during the Veteran’s active duty military service, or when a pre-existing condition was aggravated by service beyond its natural progression. Additionally, the condition cannot have been caused by the Veteran’s own misconduct, and it must interfere with the Veteran’s ability to earn gainful employment.

Some diseases and disabilities are presumptively related to a Veteran’s service, if the service meets certain criteria. For example, Vietnam era Veterans who served “in country” from January 9, 1962 through May 7, 1975, who have specified diseases which the VA has recognized as being related to exposure to Agent Orange, need only prove that they have a diagnosis of that disease and that they served in country in Vietnam during the requisite period. Such diseases include ischemic heart disease, diabetes type 2, multiple myeloma, and certain cancers. There are also presumptions that apply to former prisoners of war and some Gulf War Veterans.

The amount of monthly compensation can range depending on how many service-connected disabilities a Veteran has, the severity of the disabilities, and whether the Veteran has dependents. In order to qualify for Disability Compensation, Veterans with service-connected disabilities must also have been discharged under “other than dishonorable” conditions as determined by the VA. Compensation is counted as income by Medicaid.

### **H. Special Monthly Compensation**

A Veteran whose service-connected disabilities render the Veteran housebound or necessitate the aid and attendance of another person, may be eligible for an additional monthly

amount referred to as special monthly compensation.

### **I. Non-Service Connected Benefits**

Veterans or widow(er)s of Veterans are entitled to an Improved Pension which also provides a Special Monthly Pension (“SMP”) to offset the cost of necessary health care. The following criteria are necessary before a Veteran or widow(er) of a Veteran can receive Improved Pension benefits:

1. The Veteran must have served at least 90 days of active duty service, one day of which must have been during a war-time period:

World War II - Dec. 7, 1941 - Dec. 31, 1946,

Korean War - June 27, 1950 - Jan. 31, 1955,

Vietnam Conflict - Aug. 5, 1964 - May 7, 1975

Gulf War - August 2, 1990 through date to be set by law by Presidential Proclamation.

2. The Veteran must have received a discharge other than dishonorable.

3. The claimant must have limited income and assets available.

4. The claimant must have a permanent and total disability at the time of application.

5. The disability was caused without willful misconduct of the claimant; and

6. The Veteran or widow signs an application and provides the application to the Veteran’s Administration.

### **J. Special Monthly Pension Benefits –Low Income combined with disability**

#### **1. Housebound Benefits**

Housebound benefits are available to a Veteran or widow(er) of a Veteran who is determined to be disabled and is essentially confined to the home.

The two ways to prove entitlement include:

(1) a single permanent disability rated as 100% disabling under the VA schedule and confined to the dwelling, or

(2) a 100% disability with another 60% disability, regardless of whether or not the person is confined to the dwelling.

A disability rating is not required for people aged 65 or older. People aged 65 or

older are presumed to be disabled; however, the VA will require a physician's affidavit regarding the claimant's condition.

The maximum permissible income limits for Housebound Pension benefits are detailed below.

## **2. Income Limits**

The claimant will be denied benefits if the Veteran's or widow(er)'s countable income exceeds the Maximum Annual Pension Rate ("MAPR"). Please consult the VA website for updates: [www.va.gov](http://www.va.gov). With regard to income requirements, the applicant will be denied benefits if the Veteran's or widow(er)'s countable income exceeds the maximum permissible family income limits.

Countable income is all income attributable to the applicant, the applicant's spouse, and the applicant's dependent children. Although most Veterans have income that exceeds the permissible family income limits, unreimbursed medical expenses paid by the claimant may be used to reduce the claimant's countable income. Unreimbursed medical expenses that may reduce income include: doctor's fees, dentist's fees, prescription glasses, Medicare premium deductions and co-payments, prescription medications, health insurance premiums, transportation to physician offices, therapy, and funeral expenses.

The most beneficial unreimbursed expenses that may reduce countable income are the costs of home health care, assisted living facilities, or skilled nursing homes.

**As of October 18, 2018, the Federal Regulations were amended so the "Deductible Medical Expenses" are determined as follows:** Payments for meals, lodging, health care, custodial care and other services provided by a facility (assisted living, independent living, etc.) are deductible medical expenses as long as the Veteran:

- Resides in a facility that is staffed 24 hours/day
- Needs assistance with 2 Activities of Daily Living (ADLs)

Payment for assistance with Activities of Daily Living by an in-home attendant are medical expenses as long as the attendant provides the Veteran with health care or custodial care.

## **3. Asset Requirements**

The VA considers the net worth of the individual seeking benefits, excluding the value of the person's home, furnishings, and car. The standard as to whether a person will be eligible for benefits is whether the person has "sufficient means" to pay for their own care. The net worth of both the Veteran and the Veteran's spouse are considered when determining eligibility.

**Presumption of Sufficient Means** The VA assigns no specific dollar amount, rather stating, "[w]hen the corpus of the estate of the Veteran or, if the Veteran has a spouse, the corpus of the estates of the Veteran and of the Veteran's spouse is such that under all the circumstances, including consideration of the annual income of the Veteran, the Veteran's spouse and Veteran's children, it is reasonable that some part of the corpus of such estate be consumed for the Veteran's maintenance". 38 C.F.R. § 3.27(b). Excessive net worth is a question of fact for resolution after considering the facts and circumstances in each case. A number of variables must be taken into consideration when making a net worth determination: 1. income from other sources; 2. family expenses; 3. claimant's life expectancy; and, 4. convertibility into cash of the assets involved." 38 USCS § 1522, § 1543 A commonly used measure for assets and an amount specifically listed in the M21-1, is \$80,000 or less in assets, whether married or single, but see below for after October 18, 2018.

**As of October 18, 2018, the Federal Regulations were amended so the "Net Worth" allowed and is determined as follows:**

- Asset limit: 2022 is \$138,489 - estimated (this is set equal to the Medicaid maximum community spouse resource allowance).
- Net worth includes monthly income. Monthly income is multiplied by 12 and added to total assets.
- Certain medical expenses can be deducted from income (see above).
- Real Property:
  - Primary residence is excluded from net worth
  - Acreage limit: Primary residence plus 2 acres is excluded. Additional acreage will be counted toward net worth unless it is unmarketable.
  - Proceeds from the sale of real property, after benefit entitlement, will not be counted as an asset as long as the proceeds are used to purchase

another property within the same calendar year.

***In addition, transfers on or after this date now will incur a transfer penalty period as follows:***

- 3 year (36 month) look-back period.
- Penalty period assessed on asset transfers made during 3 year look-back by dividing the value of the asset by the MAPR, defined above.
- Applicant can return assets and un-do a penalty period (in whole or in part) within 60 days of a penalty period decision.
- Penalty period cannot exceed 5 years.
- Transfers to a trust for a disabled child will not be penalized.

#### **K. Qualifying Family Members**

There are three main categories that qualify as “family members” of a Veteran for VA benefit purposes: Spouses, Children, and Parents. Spouses must be able to provide proof that they were validly married to the Veteran at the time of the Veteran’s death, which generally requires no more than a written statement but can sometimes require production of a marriage license or certificate, or other documentation that would prove the marriage was valid. A surviving spouse must have been married to the Veteran for at least one year prior to the Veteran’s death and must not have remarried after the Veteran’s death. A surviving child can be either the biological, adopted, or step-child of the deceased Veteran, as long as there is adequate proof or documentation of the parent-child relationship. Surviving parents are eligible for a very limited subset of benefits that require them to have been financially dependent on the Veteran and require the aid and attendance of another person due to their advanced age or failing health.

#### **L. Accrued Benefits**

Due to the length of time it can take from the time a Veteran files an application for benefits to the time when the VA makes a decision on the claim, the Veteran may pass away before receiving a decision or award. In such cases, the VA may subsequently review the deceased Veteran’s claim file and determine that the claim would have been granted if the Veteran were still alive. The benefits the Veteran would have been awarded are called Accrued

Benefits, and can be paid directly to a surviving family member instead as long as the qualifying survivor files a claim to substitute into the place of a Veteran. The VA will only consider the evidence that was in the file at the time of the Veteran's death.

### **M. Dependency and Indemnity Compensation (DIC)**

When a Veteran's death is service-connected, monthly benefits may be paid to a qualifying surviving family member. A Veteran's death will be considered service-connected if it occurred in the line of duty, resulted directly or contributorily from a service connected disability, or was the result of negligent VA medical treatment. DIC benefits may also be due where a Veteran's death was not related to his or her service but the Veteran was service connected for his/her disabilities at a rate of 100% for the 10 or more years preceding death or since the Veteran's release from active duty and for at least five years immediately preceding death, or for at least one year before death if the Veteran was a former prisoner of war who died after September 30, 1999. A qualifying surviving spouse is considered "first in line," to receive DIC benefits. However, in cases where there is not surviving spouse, the benefits may be awarded to a qualifying surviving child.

### **N. Long Term Health Care Benefits**

**1. Residential Care** in a New York State Veterans Homes. New York State owns and operates four homes, recognized by the VA, and receive some VA aid to cover a portion of the cost of a Veteran's care. These state-run facilities are called state Veterans homes and are located in Genesee, Chenango, Westchester, Queens and Suffolk counties. Some state Veterans homes may also provide care to spouses and surviving spouses of Veterans. The aid provided by the VA to state homes is called per diem aid. The per diem aid must not be greater than one-half of the cost of caring for the Veteran. Veterans, their families, or Medicaid are responsible for the remaining charges because the VA will only pay a portion of the cost of daily care of the Veteran. The state may collect from any other income of the Veteran, with the following exception: Medicaid beneficiaries receiving aid and attendance pension benefit cannot be required to use that money to pay toward the cost of care. CMS State Medicaid Manual 3705(A). NYS Veterans homes also provide day care programs— these can benefit Veterans of

all ages especially younger Veterans with traumatic brain injuries.

**2. Community Based Care.** Home care benefits are available as an alternate to nursing home care or when the Veteran needs assistance but does not meet nursing home level of care. Community based services available to Veterans, depending on need, include: hospice, palliative care, community residential care, personal care, community residential care, adult day health care and geriatric evaluation and management. Medicaid covers the cost for individuals eligible for adult day health care, hospice, personal care and palliative care.

### **O. Death Pension**

There are technically three types of death pension programs, but only one of the three is available for claims filed after January 1, 1979. Called the "Improved Pension Program" or IPP, these benefits are meant to help surviving spouses of Veterans whose deaths are not service-connected. The Veteran must have served at least 90 days of active duty if he or she entered service prior to September 7, 1980, or at least 24 months of continuous active duty if enlistment was after September 7, 1980. Like Disability Pension for Veterans, Improved Pension is based on the survivor's financial need, which is determined by the VA by calculating the survivor's income and net worth. Although Improved Pension benefits are generally only available to the Veteran's surviving spouse, they can sometimes be awarded to the guardian of the Veteran's surviving child when the guardian is an individual other than the surviving spouse.

## **II. ISSUES IN ESTATE PLANNING.**

### **A. GOALS**

The goal of Estate planning is to plan your affairs in such a manner so that upon your incapacity and death you and your loved ones are provided for. A good estate plan should address minimizing taxes and costs, making your assets available as quickly as possible for your needs upon incapacity or to your loved ones upon your death, the possibility of avoiding probate, and most important, giving yourself peace of mind.

### **B. WHAT DOES THE "ESTATE" INCLUDE?**

The estate includes all tangible and intangible assets as well death benefits from life insurance. Included in the definition of assets is genetic material and frozen embryos. There are differences between state law definition of an estate and a tax law definition of an estate.

### **C. HOW IS YOUR ESTATE HANDLED UPON YOUR DEATH?**

Upon your death assets will pass to your heirs either through probate or automatically by law depending on how your affairs are arranged. Probate is a costly and time-consuming process. To avoid probate the following may be used: (a) Joint Ownership with right of Survivorship; (b) In-Trust-For (ITF); (c) Designated Beneficiary (IRA, Pension, Life Insurance Policy); and a Revocable Living Trust or Irrevocable Trust.

Who has rights in your Estate? The law in New York is that certain family members have a right to part or all of your estate unless you state otherwise in a Will or as designated if the assets are to avoid probate. To probate a Will these people have to consent, if they do not litigation will begin. When children are born using Assisted Reproduction careful attention needs to be paid to these rights. Both the intended parent and unintended parent's estates may be impacted. The definition of "is this my child, issue or the like" may be brought into question when Assisted Reproduction is used to conceive a child. It may come up for the donors of the genetic material who is not acting as/or intended to be a parent as well as for the intended Parent who does not donate genetic material. When drafting an estate plan careful consideration must be given to these facts. Another issue to consider is that of the use of embryos after the death of an individual who contributed genetic material to it. In New York children conceived and born after the death of a person generally have no rights, but there have been some interesting decisions in New York granting some rights.

### **D. UPON YOUR DEATH YOUR FAMILY MAY PAY**

Depending upon your planning, your family may have to pay Federal and State Estate Taxes, in addition to Probate fees.

### **E. WAYS TO PAY AND REDUCE THESE EXPENSES**

The best way to reduce estate taxes is to plan. A good plan should recognize the



following methods of paying these expenses; cash from estate, sell or mortgage property, purchase life insurance to provide liquidity. A good estate plan should also recognize the effect of gifts.

#### **F. ESTATE AND GIFT TAX SYSTEM.**

The Federal estate and gift tax exemption is increased for estates of decedents dying and gifts made after Dec. 31, 2017, and before Jan. 1, 2026. The basic exclusion amount provided in Sec. 2010(c)(3) increased from \$5 million to \$10 million and will be indexed for inflation occurring after 2011. All assets, probate and non-probate, are included and are valued on the date of gift or death. The excess gift or estate is subject to tax. The Exemption amount in 2022 is \$12,060,000.00

As of January 1, 2000 New York State no longer had a gift tax. As of February 1, 2000 New York State had an estate tax, very similar to Florida, in that its tax is equal to the amount of any credit allowed against a Federal Estate Tax for State death taxes (This credit was calculated by reference to a Federal Table as in effect in 1998, however, note this credit was being reduced over time but New York State still was collecting the tax equal to the credit that would have been allowed under the 1998 Federal Table). New York's estate tax exemption equivalent up to March 31, 2014 was \$1,000,000.

New York changed its Estate Tax effective April 1, 2014. As of April 1, 2014, the New York Estate tax exemption and phase in is as follows:

- April 1, 2014 the exemption will go to \$2,062,500
- April 1, 2015 the exemption will go to \$3,125,500
- April 1, 2016 the exemption will go to \$4,187,500
- April 1, 2017 – December 31, 2019 the exemption will go to \$5,250,000 and thereafter equal to the Federal basic original exclusion amount of \$5,000,000 adjusted for inflation as in effect when originally enacted, in 2022 it is \$6,110,000.
- During this phase in period all gifts in excess of the annual exclusion and between April 1, 2016 and January 1, 2019 are pulled back into the New York Taxable Estate. Alert: On April 12, 2019, Governor Andrew Cuomo signed into law the

New York Fiscal Year 2020 Budget (the “Budget Bill”). Included within the Budget Bill is an amendment to retroactively extend the three-year “clawback” provisions of Section 954(a)(3) of the New York Tax Law (the “NYTL”) to certain taxable gifts made by New York residents within three years of death up through the new expiration date of December 31, 2025 (the “three-year claw back”), but due to timing issues of this provisions any gifts made the first 15 days of January 2019 are excluded.

In addition to the above exemptions, each person, for Federal and New York tax purposes, may give, in 2020, \$15,000 (\$30,000 for a married couple), in 2022 the number rose to \$16,000 (\$32,000 for a married couple) to any person in any year (set to increase for inflation).

The estate is allowed to deduct the following items: (a) Debts, funeral and estate expenses; (b) Unlimited marital deduction; (c) Unlimited charitable deduction.

#### **G. ESTATE PLANNING TOOLS AND TECHNIQUES.**

The first tool used is the By-Pass or Credit Shelter Trust. This is used with spouses whose combined assets exceed the tax exemptions for New York and Federal Law. It avoids use of unlimited marital deduction and loss of the unified credit equivalent amount on first spouse to die and has basis impact. In your Will or Revocable Trust a provision is inserted (with other appropriate insertion) that upon the death of the first spouse a trust will be created for the surviving spouse intending it to hold no more than the unified credit equivalent amount. The surviving spouse can receive income and other benefits from the trust. This can be coordinated with other techniques to add flexibility in case the law changes ie. Disclaimer provision or full Disclaimer trusts (this adds flexibility) QTIP Trust (used to insure assets will pass according to wishes of a deceased spouse, instead of the survivor, commonly used in second marriages). Care must be taken in determining the assets available for these trusts, i.e. cash, bonds, real estate, etc., in the event the estate consists primarily of qualified investments (i.e. Ira's), then the trusts must be specially drafted to insure that income tax benefits are not forfeited upon death.

The next tool is an Insurance Trust. This is used to eliminate life insurance proceeds from estate tax. An irrevocable trust can be used for existing policies but you must live 3 years after transferring the policy for it to be excluded from your estate. New Policies can be

purchased by the Trustees without a 3-year requirement.

With respect to existing insurance, in the event we want to eliminate this three-year period a Family limited partnership coupled with an insurance trust can be set up to purchase the policy and the three-year period will be avoided.

Charitable Giving techniques can be used to accomplish the following: (a) Acquire an income tax deduction; (b) Avoid Capital Gain tax; (c) Improve quality of Life; and (d) Leave same amount to family via life insurance (e) possibly avoid the 3.8% tax on some income.

Family Limited Partnerships are another very effective estate planning technique and may be used to reduce value of the Gross Estate, keep donor in control of the asset(s), and simplify gift giving.

Also now popular are various "estate freeze" techniques.

**III. CONCLUSION.** As life is so uncertain; please don't plan to fail - by - failing to plan.

We wish you the very best in health and happiness.