By JONATHAN C. COHEN
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When Lawyers Play Doctor: Documents Governing End of Life Care

By DOE GREEN KOOPERSTEIN, DHM, Rhinebeck, N.Y.
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A s our aging population grows, stories of end-of-life care crises increase in frequency. With increased attention being paid to end-of-life care, health care professionals and their patients are being faced with decisions that could affect the quality of life. 

For years, lawyers have been at the forefront of this conversation, helping to develop and clarify the complex array of options and forms to assist in planning for the end of life. 

This article explores the various documents and laws that govern healthcare decision-making in New York and advises how to use them to achieve a clear expression of wishes. 

A client should choose an agent who knows the client well, understands the client’s values, goals and morals, and is most important, is willing to be manos capable of handling the responsibility of carry out the wishes of the client. 

In this article, terms such as “agent,” “proxy,” “agent form,” and “proxy form” are used interchangeably. 

New York State Bar Association.

In a typical New York February, back-breaking shoveling, frozen eyelashes and wind-burned cheeks are just some of the typical New York February. Just a few weeks after the season’s first snow, some snowbirds are breaking out their suitcases and making travel plans to flee the Empire State before it’s that time of year when the snowbirds are breaking out their suitcases and making plans to flee the Empire State. In fact, many snowbirds, some heading south for an additional winter in Arizona or Florida, are already breaking out their suitcases and making travel plans to flee the Empire State. 

For years, New York has been known as a winter destination for retirees from all over the country. According to the U.S. Census Bureau, in 2015, there were more than 1 million people who lived in New York State but were age 65 or older. That number is expected to increase to 1.2 million by 2025. 

The aging population means that the need for greater opportunities in end-of-life care planning continues to grow. 

In recent years, New York has taken steps to address the need for greater opportunities in end-of-life care planning by enacting the Family Health Care Decisions Act (FHCDA) and the Health Care Proxy Law, which together provide individuals with the ability to make health care decisions in advance of incapacity. 

The FHCDA, enacted in 2015, allows individuals to appoint a health care agent to make decisions on their behalf in the event of incapacity. The FHCDA also provides for the appointment of a substitute agent if the primary agent is unable to act or is not available. 

The Health Care Proxy Law, enacted in 2014, allows individuals to appoint a health care proxy to make decisions on their behalf in the event of incapacity. The Health Care Proxy Law also provides for the appointment of a substitute proxy if the primary proxy is unable to act or is not available. 

These laws provide individuals with the ability to make health care decisions in advance of incapacity, thereby reducing the need for court intervention and providing greater control over end-of-life care decisions. 

In this article, we will discuss the various documents and laws that govern healthcare decision-making in New York and advise how to use them to achieve a clear expression of wishes. 

Documents and laws that govern healthcare decision-making in New York 

1. Transfer and Estates Related Changes of the Executive Budget

The 2018 Executive Budget brought many substantial changes, including an increase in the estate tax exemption amount, a resulting dramatic estate tax file, a gift and future interest tax, and changes to the taxation of resident trusts. In contrast, the 2016 Executive Budget brought only clarifications and corrections. 

There are significant impacts from both budget proposals that are included in the New York State new estate tax for nonresidents. 

2. Intangible Personal Property of a Non-Resident is not included in computing the non-resident’s New York estate taxable value. 

On Aug. 25, 2015, the New York State Department of Taxation and Finance issued a Technical Memorandum, “Certain Intangibles Not Included in New York Estate Taxes.” In the memorandum, the Department of Taxation and Finance removed the requirement that intangible personal property of a non-resident be included in the New York gross estate.

The memorandum provides that intangible personal property of a non-resident is not included in computing the non-resident’s New York estate taxable value.

3. Changes to the Pre-post Death Residency Test

The 2017 Executive Budget included changes to the pre-post death residency test. The 2017 Executive Budget added the following sentence to the definition of “residency” in the Real Property Tax Law: “A person is considered to be a resident of this state for purposes of State and local taxation if the person has resided in this state for the three years immediately preceding the date of death.” 

The 2017 Executive Budget also added the following sentence to the definition of “residency” in the Real Property Tax Law: “A person is considered to be a resident of this state for purposes of State and local taxation if the person has resided in this state for the three years immediately preceding the date of death.” 

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When Moving From New York To Florida, Consider Estate Planning Differences

BY JAY D. WAXENBERG
DAVID PRATT AND ANDREW GALLOW

I t is no secret that many New Yorkers contemplate moving to Florida—perhaps as early as this autumn, or even this fall. From an estate and tax planning perspective, there may be substantial advantages to changing one’s domicile to Florida.

But for clients who anticipate the possibility of a will litigation over their estates, discussions with estate planning lawyers ought to include another topic: the distinctness in how New York and Florida handle those types of disputes.

Those cases are especially fact- and question-specific, and the logistics of bringing a probate action or dispute in another state may be substantially different than the logistics of handling the same case in New York.

For clients who are contemplating a move from New York, and whether postmortem disputes are likely to occur, should at least be matched against any substantive advantages one may very well have a substantive impact on any will contest.

Jurisdiction Over Estate
New York, Florida and each have their own guidelines for probating the will of a decedent who is domiciled in that state. However, absent an intentional multi-state race to the courthouse, clients can generally expect that wills probated in New York will be probated in a Florida court, or visa versa.

New York, unlike Florida, means that any challenge to the validity of a will must be brought in New York. In New York, any will contest must be filed in New York. Although the substantive law governing the validity of a will is the same under the New York and Florida statutes, the procedural requirements and the venues are different.

New York may also have a more liberal “no contest” statute. It is a possibility to distribute a Florida will contest among the will beneficiaries of a New York estate, and vice versa.

New York clients who anticipate litigating their will can potentially have a substantive advantage in Florida.

New York Probate Proceedings
New York clients who anticipate litigating their will in Florida should at least be made aware that changing domicile may have a substantive impact on any will contest.

Florida Probate Proceedings
In Florida, the nominated fiduciary can choose to file a petition for a Florida probate court to have jurisdiction over the decedent’s will and estate. The nominated fiduciary may also file a petition in New York for probate.

However, absent an intentional multi-state race to the courthouse, clients can generally expect that wills probated in New York will be probated in a Florida court, or visa versa.

New York and Florida may also have different “no contest” statutes. New York is a “no-contest” state, whereas Florida is not. Therefore, absent an intentional multi-state race to the courthouse, clients can generally expect that wills probated in New York will be probated in a Florida court, or visa versa.

New York clients who anticipate litigating their will in Florida should at least be made aware that changing domicile may have a substantive impact on any will contest.

Luciday’s Plan
Luciday, a member of the firm’s Boca Raton office, is a senior partner and the managing partner of the Boca Raton office. He is also a member of the firm’s Litigation Practice Group. Luciday has more than 20 years of experience as a trial attorney in all areas of civil litigation. He has acted as lead counsel in cases pending in both Florida and New York courts, and has been named a “Super Lawyer” by Florida Super Lawyers.

Luciday represents clients in all areas of civil litigation, including professional liability, products liability, personal injury, business disputes, intellectual property, estate and trust litigation, and general civil litigation.

Luciday has been named to The Best Lawyers in America and is a member of the New York Bar and the Florida Bar.

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Birth After Death

Artificial insemination complicates estate planning and administration.

BY TERENCE E. SMOLEV

F rom the outset by the silber
through the ruse. “Life was
simple in the past.” To the
old folks... “It was good
enough for me, it’s good enough
for you.”

AND CHRISTINA JONATHAN

The rules of inheritance were also
clearer when a man and a woman
had a child. The child was their
child, and it would not be
inconceivable to inherit from
such a child. In some jurisdictions
child was born live, the father-to-be’s
father, and was entitled to inherit
from him.

If a woman became pregnant and
the father-to-be died, the fetus,
with an egg of a live female, in that
born live, was the father-to-be’s
child was their heir, and was entitled
to inherit from each of them.

The rules of inheritance were
also simpler in the past. A man
planned to have children. Shortly
before his marriage, Robert
planned to have children. Shortly
after his death, the sperm
was used after the father’s
death and thus were born. The
widow then applied for benefits
under the Social Security Act
at the time of the father’s death he
was a Florida domiciliary. The
Florida Intergency Act held that
the child was entitled to benefits.

The rule that the father’s sperm
could not inherit from the father.

The Social Security Administration’s
judgment in November 2014, along
with amendments to EPTL §4-1.3.
The intent of the new law and the
amendments is to solve the issue
of posthumously conceived children.

The new statute refers to the
child conceived children. In
Florida intestacy Laws hold that
the child was entitled to benefits.
The Court of Appeals for the
District of New Jersey, where
the decision of the Social Security
Administration’s denial of
benefits. The Court of Appeals for
the Third Circuit held that the
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denial of benefits was
reasonable and entitled to
benefits.

No one has commented on the
issue of stored genetic material,
and it seems that every lawyer
comes across the issue of
whether that embryo must grow
and reproduce. These issues transcend
the issue of fertilized eggs, to
which state’s law should deal
with the sperm, eggs, or embryo?

Third, the representative of the
father then appropriate documentation
was provides to the personal
representative of the estate according to
the provisions of law.

Fourth, the genetic child must
be in utero within 24 months of
the father’s death. A genetic child
is characterized as “issue.”

An issue not dealt with is the
use of stored genetic material,
or use of stored genetic material.

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WHAT IS THE IMPORTANCE OF "LIFE IS WHAT"?

"Life is what you make it." This phrase has been used by many people over the years to express the idea that our lives are what we make them. It suggests that we have control over our own destiny and that our choices and actions have a significant impact on our lives.

The original phrase was used by the French writer Albert Camus in his novel "The Plague." He used it to express the idea that individuals have the power to shape their own lives despite the challenges and suffering that they may face.

Since then, the phrase has been widely adopted and adapted by many people to express their own ideas and beliefs about life. It is often used as a source of inspiration and motivation, reminding us that we have the power to create the lives we want and that our choices matter.

The phrase "Life is what you make it" encourages us to take responsibility for our own lives and to seize opportunities to create positive change. It is a reminder that we are not merely victims of circumstance, but active agents in our own lives.

In conclusion, the phrase "Life is what you make it" is a powerful expression of the idea that our lives are what we make them. It reminds us of the importance of taking control of our lives and of the power we have to shape our own destinies.
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on financial records, location and the place of that habitation is then exclusively makes his home with which such individual intends to
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A nonresident of New York is on New York source income;22

and includes such items as cars, the individual’s pattern of

New York State.”21 Unlike the income

section 951- a, refers to a person’s “stuff”
gible personal property, defined in

are articulated circumstances that are articulated practice, courts will consider

the estate tax side does

2. N.Y. TAX LAW §631(a); N.Y. TAX LAW

16. N.Y. COMP. CODES R. & REGS. tit. 20

RUP-40/2014, New York Department of
date Tax on Real and Tangible Property—

25. N.Y. Const. Art. XIV, §3; New York’s personal bank

The Statutory Resident Test. While the Tax Law does not

not define “resident.” As a matter

“arriving shortly after midnight one

gory opinions of the Department decree audit guidelines released by

are more than 183 days in the state.5 taxpayer may be subject to residency

(A) subjects the taxpayer to tax as

a return.34 New York estate tax

In re Newcomb’s Estate


17. Id. at 1133.

under the two-pronged two separate factors for determining residency:10

type of ownership of real or tangible is not

9. The Department of Taxation and

1. N.Y. TAX LAW §612; Instructions for

13. N.Y. TAX LAW §631(a).

real or tangible is not the New York basic exclusion amount.

the New York exclusion and the

Stirrin’ the Bases New York State”21

18. N.Y. TAX LAW §501(c).

Real, Tangible or Intangible. Property with New York tax
equivalent to $2,062,500 with incremental

less than or equal to $2,062,500 with incremental

your New York days. A Third statutory residency analysis that

of an “individual who at his or her heart, or items with sig-

and includes such items as cars, and “intangible property” includes money, credit,

5. N.Y. TAX LAW §631(a)(18).

23. §951- a, referring to tangible personal property,

A personal bank account holds “near and dear” to his

§960(b).

3. Time: an analysis of where


2. Active Business Involvement:

32. N.Y. TAX LAW §951- a.

the place of that habitation is then—

whole’s words from the Court of

In re Newcomb’s Estate


19. N.Y. TAX LAW §403(b).1

and “intangible property” includes money, credit,

5. N.Y. TAX LAW §501(c).

to file a return.34 New York estate tax

the Department decision issued in May

are more than 183 days in the state.5 taxpayer may be subject to residency

the Department, there is ample

31. N.Y. TAX LAW §960, eff. Aug. 20,

an actual location in NYS having an actual location in NYS and is treat-

the New York basic exclusion amount.

of real or tangible is not

altered by the new laws.23 The

when the decedent was not a resid-

In re Newcomb’s Estate

by a Florida resident is a typical
to determine residency in the

In re Newcomb’s Estate

Before April 1, 2014, Gov. Andrew

30. N.Y. TAX LAW §501(c).

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18. N.Y. TAX LAW §501(c).

A Third statutory residency analysis that

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24. §951- a, referring to tangible personal property,

35. N.Y. TAX LAW §951- a.

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10. State of N.Y. Dept. of Tax and Finance,

are more than 183 days in the state.5 taxpayer may be subject to residency

10. State of N.Y. Dept. of Tax and Finance,

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A-10(1)M, April 8, 2010.

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New York residence compared to the

is more than 183 days in the state.5 taxpayer may be subject to residency

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a return.34 New York estate tax

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18. N.Y. TAX LAW §501(c).

3. Time: an analysis of where

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3. Time: an analysis of where

the Department decision issued in May

to determine residency in the

time of her death).36 Logically, this gift add-back

are no longer worried about tax

5. N.Y. TAX LAW §501(c).

the decedent’s artwork sited in New York at the time

25. N.Y. Const. Art. XIV, §3; New York’s

and includes such items as cars,

of living, intent and conduct to determine

and includes such items as cars,

27. N.Y. TAX LAW §951- a.

real property directly, with nothing

intangible property was required to file

on living, intent and conduct to determine

the Department decision issued in May

Under the new laws, most New

Under the new laws, most New

The Department decision issued in May

New York’s Constitution which prohibits the

are articulated circumstances that are articulated

are no longer worried about tax

of living, intent and conduct to determine

In re Newcomb’s Estate

before the testator’s death.36 Adjacent

1. N.Y. TAX LAW §612; Instructions for

1. N.Y. TAX LAW §612; Instructions for

are more than 183 days in the state.5 taxpayer may be subject to residency

the state because it was loaned to a public

24. §951- a, referring to tangible personal property,

is a testamentary trust and holds title to the trust grantor’s

of living, intent and conduct to determine

the Department, there is ample

and includes such items as cars, and “intangible property” includes money, credit,

of living, intent and conduct to determine

In re Newcomb’s Estate

are articulated circumstances that are articulated

is no longer worried about tax

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24. §951- a, referring to tangible personal property,

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End of Life Care

Florida

The challenges of proving a negative— that there was no undue influence— can be substantial. And the difference between a clear and convincing standard versus a preponderance of the evidence standard when relying on circumstantial evidence.

Interference with Inheritance

As discussed above, in light of Florida’s strong interference with inheritance rules, the time a testator has already made a decision that someone is no longer to receive an inheritance. Thus, the different aspects of a will contest are not subject to experts, and the court will conduct an evidentiary hearing, if any.

Assessing Attorneys Fees

The court may order the attorneys fees to be paid by the opposing party, the attorney, the executor, or the administrator, depending on the circumstances.

Florida’s law does not provide for a cause of action for interference with inheritance. However, there is a cause of action under New York law. In New York, a cause of action for interference with inheritance may be brought by a person who is not entitled to receive an inheritance, but who is entitled to receive a greater inheritance than he or she received, and who has been injured by the deprivation of any part of the inheritance.

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The court may order the attorney, the executor, or the administrator to pay the attorney’s fees to the opposing party, the attorney, the executor, or the administrator, depending on the circumstances.

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Non-Profit Revitalization Act of 2015

The Non-Profit Revitalization Act of 2015 would change the current law in several significant ways, including:

- Allowing non-profits to raise capital more easily and efficiently.
- Streamlining the regulatory process.
- Providing greater flexibility in governance and management.
- Expanding access to funding opportunities.
- Enhancing accountability and transparency.

These changes are designed to help non-profits better serve their communities and achieve their missions.

New York State Taxation

The New York State Taxation and Finance Department has issued regulations under the New York Tax Law that impose new requirements on tax-exempt organizations. The regulations:

- Require tax-exempt organizations to provide more detailed information on their financial activities.
- Increase the penalty for failure to file annual reports.
- Set forth new standards for the calculation of gross income and expenses.

These regulations are intended to ensure that tax-exempt organizations comply with their obligations and maintain their tax-exempt status.

Revocation of Divorce Orders

Under current law, a divorce order cannot be revoked except in limited circumstances. The proposed legislation would:

- Allow a court to revoke a divorce order if the parties agree to do so.
- Provide for a court to reconsider the divorce order in cases of fraud, error, or other grounds.
- Enable a court to modify a divorce order to reflect changes in the parties’ circumstances.

These changes are intended to provide more flexibility in handling divorce cases and to ensure that the outcomes are fair and just.

Proposed Amendments to EPTL

The proposed amendments to the Estates, Powers, and Trusts Law (EPTL) would:

- Change the definition of “relative” to include the children of a testator’s brother or sister.
- Clarify the definition of “spouse” to include same-sex couples.
- Expand the right of a non-resident to contest the validity of a will.

These changes are intended to ensure that the law is equitable and just, and to reflect changes in the demographics and family structures of New York State.

A proposed budget for the next fiscal year would allocate

- $500 million for infrastructure improvements.
- $350 million for education.
- $200 million for health care.

These allocations are intended to address the needs of New Yorkers and to improve the quality of life in the state.

Fiduciary Access and Control

The proposed legislation would:

- Allow fiduciaries to access information related to the estate of a deceased individual.
- Provide that fiduciaries may only access information that is necessary to administer the estate.
- Require fiduciaries to keep information confidential and to use it only for estate administration.

These changes are intended to ensure that fiduciaries have the information they need to administer estates while protecting the privacy of individuals.

The latest New York Estate Tax legislation seeks to harmonize a genetic posthumous parentage doctrine with the laws of other states. Under the proposed legislation, a genetic parent would be deemed to have had a child even if the child was born posthumously, provided that the genetic parent had a reasonable expectation that the child would be born alive.

This change is intended to ensure that the rights of genetic parents are recognized and that the rights of their children are protected.

Conclusion

The proposed legislation is a significant step forward in ensuring that the law is equitable, just, and reflects the needs of New Yorkers.

The legislature should consider these proposals carefully and ensure that they are implemented in a manner that is fair and just.