ANCILLARY DOCUMENTS TO CONSIDER IN YOUR ESTATE PLAN

ADVANCED MEDICAL DIRECTIVES

Advanced medical directives are written documents instructing ("directing") in advance of an incapacity issue, a person's health care wishes. Under the US Constitution and Florida law, every competent adult has a fundamental right of self-determination regarding decisions pertaining to their own health—including the right to choose or even refuse medical treatment.

The primary concern here is to ensure that your fundamental right is not lost or diminished by virtue of a later physical or mental incapacity. The secondary concern is to establish clear authority on who is making decisions of your medical care. By having advanced medical directives—you can assure that your medical treatment preferences will be honored by a person or persons you direct in advance of an incapacity issue.

Advanced Directives can include**:** Designating health care surrogates; directing medical care desires; and providing instructions for end of life care (such as refusing life-prolonging medical procedures).

THE HEALTH CARE POWER OF ATTORNEY

A health care surrogate is a person who makes medical decisions for a person when that person is unable to make those decisions for themselves. Designating your health care surrogate is most often accomplished via a Health Care Power of Attorney. It is important to remember that when we are able to speak for ourselves, we get to determine all of our health care decisions. And we can overrule any surrogate we may have previously appointed.

However, if we are not able to communicate, doctors need permission from someone to perform medical treatments—and without clear directions this can lead to (1) bitter arguments among family members and (2) paralyzing uncertainty about which medical choices to make (delaying or hamstringing a doctor from employing the best possible treatments). Further, without clear direction, a court-appointed guardianship may be necessary to appoint a single medical surrogate for decision making purposes—and we always want to avoid a court-ordered guardianship.

Florida law provides that in absence of naming a health care surrogate, the default rule is that our next of kin make health care decisions, in this order: Our spouse; then our adult children; then our parents; then our siblings; and then our grandparents. Sometimes this "next of kin" default works fine, but oftentimes one or more of our next of kin is not the best candidate to act as our health care advocate.

Creating a Health Care Power of Attorney allows us to choose our medical surrogates and alternate surrogates as well as directing specific treatment plans—such as declining further chemotherapy or perhaps exploratory surgeries. Some important side notes to know: All advanced directives are revocable (as long as you still have mental capacity); Florida recognizes advance directive executed in another state; health care surrogates may also be responsible for funeral/burial arrangements; and finally, health care surrogates can be appointed for minor children.

THE LIVING WILL

A living will is a written statement to your doctor declaring that you do not want life-prolonging medical procedures (often inaccurately referred to as "life support") if you are dying. Sometimes the application of such life-prolonging procedures only serves to prolong the natural process of dying. End of life medical care can range from minimal medical care such as palliative (or "comfort") care to full life-prolonging procedures such as artificial hydration and nutrition (*i.e.,* "tube feedings") and ventilatory supportive care.

It is important to understand that in absence of a living will, instituting life-prolonging medical procedures is the default—meaning unless you direct in advance that you do NOT want life-prolonging procedures—the medical community is required to provide full care.

Florida has three broad medical conditions which are covered by living wills and they are: End stage conditions (such as kidney failure, heart failure and the like); terminal conditions (such as cancer); and persistent vegetative conditions (like irreversible coma, and even advanced end-stage dementia).

If you have been diagnosed with one of these medical conditions and, importantly, two doctors have determined that there is no reasonable medical prognosis of recovery from that condition, you may decline life-prolonging procedures as part of your end of life medical care.

Finally, it is critical to understand that by signing a living will medical care will still be provided. The living will only declines life-prolonging medical procedures. All other medical care will still be provided such as administration of medications or the performance of any medical procedure that is deemed necessary to provide palliative care.

DURABLE POWER OF ATTORNEY

A durable power of attorney is one of the most important legal documents a person can have. It allows a person (Principal) to appoint another as his or her attorney-in-fact to do certain things for the principal. What those things are depend upon what the document says. It can be made to include very broad powers, or it can limit the attorney-in-fact to certain acts.

A power of attorney can be used to give another person the right to make health care decisions, do financial transactions, or sign legal documents that the Principal cannot do for one reason or another. With few exceptions, a power of attorney can give others the right to do any legal acts that the Principal could do himself or herself.

The thing that distinguishes a durable power of attorney from a regular power of attorney is special wording that states that the power survives the principal's incapacity. The durable power of attorney is effective as soon as the principal signs it, unless it states that it is only to be effective upon the happening of some future event such as incapacity. These are called "Springing" powers and, if done, it is very important that the standard for determining the event and triggering the power of attorney be clearly laid out in the document itself. Any competent person 18 years of age and older can serve as Attorney-in-Fact. It should be drafted to include an alternate if the first chosen person is unable or unwilling to serve as attorney-in-fact.

DECLARATION OF PRENEED GUARDIAN

A declaration of preneed guardian is another useful tool used in estate planning. This document designates who will serve as a person's guardian if he or she ever is determined to be incapacitated. Parents may also nominate a preneed guardian of the parent's minor child if the minor's last surviving parent becomes incapacitated or dies. While the court has the final say when it comes to who should act as a person's guardian, the document creates a strong legal presumption to be used in court.

Typically, a designation of preneed guardian has you include an alternate if the first designee is unable or unwilling to serve as a guardian. Florida statutes state who is prohibited from serving. Disqualified persons include anyone who has been convicted of a felony and anyone that is incapable of serving as guardian due to illness or incapacity. Florida courts will thoroughly review a proposed guardian's past acts in its determination.

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) AUTHORIZATION FORM

The medical record information release is included in each person's medical file whenever the person is admitted to the hospital. However, waiting to sign the authorization until you are at the hospital is many times too late. Because we may be unable to sign these forms in the medical setting due to illness, injury or incapacity, attorneys often draft this proactive authorization form as part of their estate planning documents.

The authorization form allows a patient to list the names of family members, friends, clergy, health care providers or other third parties, to whom they wish to have their medical information available. If anyone would ask for medical information regarding a specific patient and their name is not listed on the authorization form, they would not be privy, by law, to any of the patient's information. HIPAA violations can be expensive and in the form of monetary penalties for noncompliance.

As always, if you have questions about any of these matters, we welcome your call.