

The Three Documents Everybody Needs

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The mere thought of disability or even death is unpleasant and often pushed into the back recesses of the mind. Unfortunately, all of us will have to grapple with these issues in some form during our life. The three documents discussed in this article: Advance Health Care Directive, Durable Power of Attorney and a Will or Will/ Trust Combination will help you and your loved ones when these issues arise.

Advance Health Care Directive

What is it?

The Advance Health Care Directive deals with health care issues, both during life and at the end of life. For many years, estate planners used a Durable Power of Attorney for Health Care to safeguard their client's wishes during life and a Living Will to handle end-of-life issues. California has consolidated the Durable Power of Attorney for Health Care and a Living Will into one simple document: The Advance Health Care Directive. In all cases, the person executing the Advance Health Care Directive is called a principal and the appointed representative is called the agent.

The Advance Health Care Directive contains provisions expressing the principal's treatment preferences in the event that the principal is unable to communicate effectively with medical personnel. The provisions take effect upon the principal's or a doctor's decision that the principal in question can't communicate with or understand the doctor sufficiently to consent to a particular medical treatment. In that event, guided by the provisions of the Directive, medical personnel are authorized to speak with an appointed agent to obtain consent for treatment. Specially drafted provisions outlining the principal's wishes also assist the agent and medical personnel to make decisions that are more in keeping with what the principal would like to have happen in certain situations.

The Living Will component deals exclusively with end-of-life decisions and takes effect when the principal is determined to be close to death. The provisions in this section deal with matters such as the extent of life supporting machinery used, the amount of pain relief desired, and, in some circumstances, even the location of death, i.e. at home, hospice care, or the like. Most Directives will also address topics such as organ donation and burial requests.

What happens if you don't have one?

It is a common misconception that your spouse or, if you are not married, your parents or adult children have control over your health care if you are unable to speak for yourself. While many doctors and hospitals will take family members' directions into consideration, there are no laws requiring that spouse's, parent's, or adult children's

opinion be honored. Often, doctors will comply if the decision is to prolong life or if the decision is the least likely to do any real harm.

But what if that decision isn't what you want to have happen? What if you don't want to be attached to life-saving machines indefinitely or in a vegetative state? Then what? The only option available is to have someone appointed as a court-ordered guardian and convince a judge what your true wishes are. This is not the path of least resistance as we recently discovered in a heated Florida case that led from Southern Florida all the way to the halls of Congress.

The facts of the Florida case are simple but tragic. On February 25, 1990, 26 year old Terri Schiavo collapsed at her Florida home and her brain was cut-off from oxygen for a period of time. Within a short time, she was able to breathe, maintain a heartbeat and blood pressure, move her limbs, and see on her own. However, she never fully recovered and was dependent on a feeding tube to survive. At the time of her collapse, she had no written documents expressing a desire for or against any health-care related wishes, such as life-saving machines and feeding tubes.

In 1998, her husband, Michael Schiavo began court-action to allow him to have the feeding tube removed, claiming that Terri Schiavo verbally expressed an opinion that she would not want to be kept alive through artificial means. Terri Schiavo's parents and siblings disagreed, claiming that she believed in the sanctity of life and would want to be kept alive through whatever means possible. The Court found for Michael Schiavo, but legal and political wrangling kept the case alive in the courts and Terri Schiavo living on a feeding tube. Finally, on March 18, 2005, the feeding tube was removed and Terri Schiavo passed on March 31, 2005.

The loss of a young woman is always tragic. The fact that it took a seven year court battle to decide who should make a decision for her care was a preventable tragedy.

Durable Power of Attorney

What is it?

A Durable Power of Attorney is to your financial life what an Advance Health Care Directive is to your health. This document allows someone you appoint to take care of any financial issues that may arise when you are unable to do so. While this document can take many different forms and can be customized to your particular wishes, most planners advise you to have a durable general power of attorney for both ease of use and long-term protection.

What if you don't have one?

If you are married and have most of your property in joint accounts with your spouse, your spouse can usually deal with most financial issues that crop up. However, there are some issues that even a spouse may not be able to handle, such as receiving

paychecks, changing insurance policies, and dealing with any property or accounts not held jointly. Another thing to consider is who will take care of your finances if both you and your spouse are unable to do so.

If you are not married, then you definitely need to think about who will maintain your financial affairs if you are unavailable, through accident, illness, or other cause, to do so yourself for any length of time. For many things financial, any delays in payments to landlords, creditors, and utilities can leave you in a very precarious situation.

A Will or Will and Trust Combo

What is it?

A Will is simply a document that states where you want your property to go after you die. It can also spell out conditions for inheriting property, help decide who you want to raise your kids, settle any disputes arising from dividing your property, and decide who is in charge of divvying up your estate.

A properly drafted Will can take several forms, but the most common form is a Will that works in tandem with a Trust. Trusts are considered independent legal entities and can buy, sell, and hold most kinds of property in the same way as an individual can.

Many estate planners are vocal advocates of Trusts as a cure-all for all things estate related but that is not necessarily true. While Trusts offer substantial benefits, such as avoiding probate, minimizing estate taxes, allowing more significant direction in splitting assets and providing some protection from creditors, they are not for everyone. As with many things legal and financial, there is no one size fits all solution.

What if you don't have one?

Every state has special provisions dealing with distributing the property of the deceased. However, the process, called probate, can be time-consuming, overwhelming, and costly if mistakes are made. Frequently, the services of a law firm are needed to coordinate the tax returns, asset collection, bill payment, and ultimate distribution of property according to the state guidelines. People with property in different states may need to go through the process in every state where they have property. Even more, state guidelines focus primarily on marital and family relationships, treating members of unmarried relationships as if they were single. Because of these considerations, a Will or Will/Trust combination should be in every adult's file of important documents.

Reviewing and Updating the Above Documents - General Guidelines:

1. Advance Medical Directive - Every 3-5 years as part of a comprehensive review or whenever any changes to appointed agents or health requests are desired.
2. Durable Power of Attorney - Every 3-5 years as part of a comprehensive review or whenever appointed agents need to be changed.

3. Will or Will/Trust Combination - Every 3-5 years as applicable laws are constantly changing. The documents should also be reviewed whenever there is major life change such as birth, death, marriage, divorce, or substantial increase/decrease in assets.

The above article is general in scope and educational in nature. It does not purport to cover every situation. For specific questions regarding Estate Plans or what kind of Estate Plan would be appropriate in your particular circumstances, please contact the attorneys of Green & Campbell, LLP at 805-306-1100, via e-mail at Audrey@gdclawyers.com, or visit our website at www.gdclawyers.com.