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ESTATE PLANNING DOCUMENTS FOR EVERYONE

This handout explains the four (4) common estate-planning documents most everyone should have. These documents are intended for every level of wealth as they do more than provide for disposition of your assets upon death, but can also greatly add to the quality of your life, and the quality of life for your loved ones. While this information may be common knowledge to most (i.e. everyone knows what a "Will" is), not everyone knows their various options and reasons for having them.

LAST WILL AND TESTAMENT - WHY DO I NEED ONE?

Your will is a legally binding statement directing who will receive your probate property at your death. It nominates the personal representative to carry out your directions and represent your estate.

Importantly, your will covers only probate (estate) property. Probate property only includes assets that are in your own individual name. Many types of property pass outside of probate. Jointly-owned property, property in trust, life insurance proceeds and property with a named beneficiary, such as IRAs or 401(k) plans, all pass outside of probate and thus, without the need for a will.

With a will you can direct where and to whom your estate (what you own) will go after your death. If you died intestate (without a will), your estate would be distributed according to Florida's laws of intestacy, going to your family members in an order of distribution. Such distribution may or may not accord with your wishes. Contrary to popular belief, if you die without a will, all of your assets do not go to the state.

Many try to avoid probate by holding all of their property jointly with their children. While this can work in some situations, it can also be a recipe for disaster. These efforts can be defeated by a long-term illness of the parent or the death of a child. A will can be a much simpler means of effecting one's wishes about how assets should be distributed. There are also various tax reasons for not creating jointly help property, as well.

The second reason to have a will is to make the administration of your estate run smoothly. Often the probate process can be completed more quickly and at less expense to your estate if there is a will. With a clear expression of your wishes, there are unlikely to be any costly, time-consuming disputes over who gets what.

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Your Last Will & Testament provides the opportunity to name your personal representative(s). This is the person who will take your assets through probate and make final distributions to your heirs. Your personal representative should be completely trustworthy and impartial, with the ability to avoid conflicts. Your personal representative should have the time and desire to act. Thus, naming an out-of-state child may not be the most efficient selection when there are other options available.

You have a variety of options for distributing your assets upon your death:

Separate Writing: This option allows you to make dispositions of personal items such as furniture, china, collections, etc., to individual persons. This allows an uncluttered will that may necessitate many changes. The separate writing can be freely amended during your life. The only limitation is that this writing cannot distribute specific sums of money, investments or real property.

Hold Assets in Trust: If minor children receive outright distributions of over $15,000, a guardian of the property will need to be appointed. A guardianship is an expensive and inefficient system that should be avoided. After the minor turns eighteen (18), any assets held by the guardian are distributed to him or her outright. As many have recognized, eighteen (18) is still a very young age for distribution as many would spend this money unwisely. Your will enables you to create a testamentary trust that can delay distribution until the age that your children are more likely to be responsible, such as age twenty-five (25). This could also protect the assets from your children's creditors. There are a wide variety of options for testamentary trusts and we will take the time to discuss them with you.

Disinheritance: A Will can be used to disinherit your relatives, leaving them little to nothing, if that is your desire. Particular care needs to be used in doing this and an experienced attorney can take the proper precautions to guard against a challenge from a disgruntled heir.

Contrary to popular belief, your will does not make your estate avoid probate – your will merely directs where your probate assets are distributed through the probate process. Please see our handout on the probate process for more information.

DURABLE POWER OF ATTORNEY

A Durable Power of Attorney (DPOA) gives financial and legal authority to the agent of your choice in the event of your incapacity. A DPOA is a substitute for a court-appointed guardianship, a time consuming and inefficient process. As the DPOA can help your family avoid a guardianship, it can be the most important estate planning document available.

Generally speaking, a DPOA delegates your financials powers to a designated agent. This grant does not limit your own ability to act and override your agent. You can authorize your agent to do almost anything that you can do yourself. Typically, your agent has a broad list of powers that enable them to sign checks, open bank accounts, sell assets, prepare tax returns, apply for loans, etc.

The most important matter is naming the correct agent. Clearly, the person must be someone in whom you have implicit faith and trust. But this alone may not be enough. Is the person you have in mind available, and if so, would he or she be willing to serve if called upon? Does he or she have the specific experience required to manage your business or investments? What if the person you have in mind is unable to serve when called upon even though expressing a willingness to serve now? Picking the first person who comes to mind is not always the answer.

Some potential nominees, such as a son or daughter, may have a legal conflict of interest to your own interests. This should not present an obstacle if you know they can be trusted to protect your interests and you are willing to waive the conflict. Once you have finalized your selection, you should ask the person if he or she is willing to serve if called upon to do so. If that person is unable or unwilling to act, then alternate agents can also be named.

Once signed, a power of attorney is active. The power of attorney ends upon your death or until it is revoked. For this reason, you must trust the nominated agent completely.

The use of a Durable Power of Attorney can be difficult at times. Financial institutions do not like durable powers of attorney – the power effectively gives someone the ability to steal. A certain amount of caution on the part of financial institutions is understandable. When someone steps forward claiming to represent the account holder, the financial institution wants to verify that the attorney-in-fact indeed has the authority to act for the principal. Still, some institutions are too stringent, some not even obeying any power of attorney at all. This is why your power of attorney should be updated in frequent intervals, at least ever ten (10) years, if not more frequently.

In conclusion, the Durable Power of Attorney provides a flexible means of dealing with financial and personal decisions and may avoid the expense of guardianships. This is the first step in incapacity planning, though further options are available such as the revocable living trust.

ADVANCED DIRECTIVES – LIVING WILLS AND HEALTH CARE SURROGATES

An “Advanced Directive” is a generic term for the family of documents that include your health care decisions and the right to die. The most important Advanced Directives are the Health Care Surrogate and the Living Will, though Do Not Resuscitates (DNRs) can be extremely important in the right situation. The DNR is signed by your physician and is used in very limited circumstances.

A **Living Will** is a poorly named document because it is neither a “Will” nor a living trust, both of which involve the transfer and care of property upon death. The living will is actually a “dying declaration” that states your specific intentions on when you would like your life to end.

A living will announces the maker’s intent that life support measures can be withdrawn or withheld in many circumstances, usually involving a terminal condition. There are many ways to state your desires and the Florida Statutes provide direction in the event a person suffers from: 1) a terminal condition; 2) an end-stage condition; and/or 3) being in a persistent vegetative state. These three conditions allow the withdrawal of life-support. Two physicians must separately examine the patient,

certify the condition as terminal and document the same on the patient's records to allow enforcement of a living will.

The burden is on the patient or surrogate to provide your treating doctor with the living will. You should give copies of your living will to each designated health care surrogate. It is suggested that copies be given to the patient's hospital and doctor in the event of incapacity, injury or disease. A living will is best used when a doctor knows of its existence and is fresh in his or her mind.

A **Health Care Surrogate** gives the agent of your choice the ability to make health care decisions for you at any time you are unable to make those decisions yourself, or when you are unable to communicate a willing and knowing health care decision. This is very important to the privacy laws that exist today.

Naming the correct agent should not be a decision taken lightly. As many have experienced, the decision to withhold life-sustaining treatment can be extremely difficult. Your agent must have the will-power and fortitude to follow through with your wishes, even against the objections of family members. Again, you need to discuss your wishes with your agent to make sure they are clear on your health care desires.

CONCLUSION.

We hope that the above information was presented in a clear manner and you learned some practical information. There are many options to discuss and our goal is to provide you with the best information possible to help any problems that may arise.

LEGAL DISCLAIMER: This handout is provided for informational purposes only. It is not to be considered or construed as rendering legal advice and it does not constitute a binding legal opinion. The reader should consult an experienced estate-planning attorney to review his or her own specific situation.