**WHAT TO KNOW ABOUT ESTATE PLANNING DOCUMENTS**

**By: William G. Morris, Esq.**

Estate planning can be confusing. The internet is full of “helpful” information, much of which is wrong. Attorneys sometimes do a poor job of explaining. That can leave a big gap between a person’s intent and ability to make sure the intent is reflected in estate planning documents.

Estate planning is more than preparing a Will. It is a comprehensive approach to make sure the intended recipients of a testator’s assets are protected and benefitted. It also involves planning for protection of a testator during life. Understanding what various documents are and even how they work can help make sure both goals are met.

Perhaps the easiest document to understand is the Last Will and Testament. That document states direction for disposition of assets after the testator’s death. It also appoints someone to administer the estate, known as a Personal Representative in Florida or an Executor in most states. A Will is not effective until the person for which a Will is created dies and can generally be changes at any time.

A valid will in Florida must be written and signed in the presence of two signing witnesses. After death, the will is filed with the court and a formal estate is opened during the process known as probate. Various court filings, accountings and even notice to creditors are involved with probate of a Will. Probate is governed by Florida Statutes and probate rules adopted by Florida’s Supreme Court.

The biggest drawback of a Will is the Will must go through court administration known as probate. That involves delay and expenses that many want to avoid. If the primary purpose of a Will is to give assets to people or entities the testator cares about, forcing them to go to court and administer the estate can reduce what they get by cost of probate and create more work. For that reasons, many prefer to use a revocable trust.

A revocable trust is also known as a revocable living trust or simply a living trust. It is an especially good option when a person owns real estate in more than one state, as real estate must go through probate in the state where it is located. Personal property goes through probate in the state where the decedent domiciled. When a person owns real estate in more than one state, there will be multiple probates. Avoiding the expense of multiple probates is usually a good idea.

A revocable trust could not exist at common law. A trust is when one holds legal title (trustee) for the benefit of another (beneficiary). If legal title and beneficial interest merged, the trust terminated. Under modern statutes, the same person can be both trustee and beneficiary of a trust during his or her life. That means we can draft a trust under which the person creating the trust is both trustee and beneficiary with complete control over the assets in the trust. Assets are then transferred to the trust and, when the individual dies, a successor trustee takes over and the trust is treated as a separate entity. Probate can be avoided, as the assets are considered to be owned by the Trust and not by the decedent. To play it safe, a Will is also drafted known as a pourover Will. The Will is intended only to transfers assets to the Trust which the testator failed to transfer during his or her lifetime.

One important document to protect a person during his or her lifetime is designation of a health care surrogate. That document designates someone to make health care decisions when the principal is unable to do so. The designation can be as broad or limited as the principal desires, and can include specific direction. Under Florida statutes, if a designation does not exist, the spouse of a person is first in line to make health care decisions, followed by children and then other family members if the children are not available. That leaves open the possibility for a court battle between spouse in a second marriage and children of a former marriage or even between the children themselves. It is recommended to designate an alternate to make decisions in case the surrogate is unable or unavailable.

A health care surrogate makes life prolonging or other treatment decisions not end of life. A living will is a person’s direction to withhold or make available medical care, pain relief, nutrition and equipment to assist or replace body functions under end-of-life conditions. A properly prepared living will clarify a person’s intent with respect to medical care when suffering from an end state condition. The statutes authorizing designation of a health care surrogate and living will are an outgrowth of Florida’s policy that an individual have control over decisions concerning his or her medical care. Florida’s Supreme Court has also interpreted Florida’s constitutional right of privacy as protecting an individual’s right to direct his or her future medical treatment.

Authority over one self to make medical decisions is reflected in Florida’s statute allowing Floridians to appoint a preneed guardian, to serve as guardian if guardianship is needed. Guardianship is generally limited to circumstances under which a person is lacking sufficient capacity to deal with one or more aspects of his or her life, coupled with someone else taking advantage of or abusing the person. That is most important when there is a dispute about who shall be guardian. Battle on who is to be a guardian can be started if anyone claims abuse and can be expensive. Appointing a preneed guardian is a disincentive to this battle and may be particularly important in second marriages or where it is possible a person’s children will battle to gain a guardianship position.

Power of attorney is another document that should be considered as part of estate planning. A power of attorney grants another person authority to act as the principal with respect to authorized matters. Powers can be general and broad or limited to a specific transaction or matter. A power of attorney can be an important tool when someone is in the hospital or incapacitated, as designating someone to make medical decisions does not authorize them to speak with insurance companies or other third parties concerning financial aspects. That can mean an insurance company will not even talk to a spouse.

All powers of attorney end with death of the principal. Regular powers also end when the principal is unable to act (i.e. incapacitated). Most powers of attorney in the estate planning area are entered to help provide a safety net for incapacity of the principal. Using language under the statutes, can make such powers durable, which means they work even if the principal is incapacitated.

The Federal government adopted the Health Insurance Portability and Accountability Act in 1996. Part of that law created restrictions on access to medical information. To make sure the health care decision maker will have access to medical care information, it is usually recommended the principal also sign a HIPAA release form in favor of the health care decision maker.

Estate planning is a combination of life planning and death planning. Properly drafted documents make sure a person’s intent is effected. Knowing what documents might be useful and how they work is an important part of the estate planning process.

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