

HOW TO PROTECT YOUR LOVED ONES

WITH ESTATE PLANNING DOCUMENTS

By

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Concentrating In Family Law

Estate Planning

We all want to assure that, if we are unable to care for ourselves or die, that our families are spared as much of the emotional, psychological, and financial trauma of that as possible. We can protect our families with some simple *estate planning*. This is the process of preparing for disposing of your assets at death, as well as managing your assets and stating your health care wishes if you become physically or mentally incapacitated. Some of the tools used in estate planning are wills, trusts, and powers of attorney. The goals of estate planning are to:

- transfer an owner's assets to the people or organizations selected by the owner;
- minimize the effects of taxes; and
- allow the owner to choose an agent or trusted person who will carry out the owner's plan.

Advanced Directives

As medical advances extend our lives, but not always with our full faculties, the legal issues as to who should make our care decisions have become more complex. But, it's not just older people who needs these documents. Among Ohioans under the age of 45, traffic accidents are the leading cause of death. Thus, everyone should prepare for unexpected situations to assure our wishes are followed. The Terry Schiavo case case illustrates the importance of these documents.

In 1990, Ms. Schiavo entered into a vegetative state, where she remained for 15 years. While her husband tried to remove her feeding tubes to allow her body to die along with her brain, which was already dead, her parents challenged his decision in court. When the courts

agreed that it was her husband's decision, the Florida legislature intervened, allowing the governor to order her feeding tubes reinserted. No one wants their family to go through this trauma.

As a result of cases like this, states have developed legal documents for you to state your wishes about medical and end of life treatment before such treatment may be needed. Advanced directives are the *Living Will*, *Medical Durable Power of Attorney*, *Mental Health Declaration*, and a *Do Not Resuscitate Order*.

• **Living Will**

The *Living Will* is your statement of choice about the specifics and extent of treatment you wish to receive when you are in a terminal condition and/or permanently unconscious state and no longer able to make and communicate those decisions. It takes effect only when:

- your attending physician and a second physician determine that you (the *declarant*) are in a terminal condition or a permanently unconscious state; and
- your attending physician determines you are not able to make informed decisions regarding treatment, and there is no reasonable possibility that you will regain the capacity to make these decisions.

A *Living Will* may include organ donations upon death. If you wish to make such donations, you should also complete a *Donor Registry Enrollment Form* and send it to the Ohio Bureau of Motor Vehicles so your name can be added to Ohio's official donor registry.

To be a valid document, the *Living Will* must be:

- executed by a competent adult;
- signed and dated by the person granting the power; and
- witnessed by two disinterested and legally competent individuals OR

acknowledged before a notary public who will attest the individual appears to be of sound mind and not under or subject to duress, fraud, or undue influence.

If the *Living Will* is to be acted upon by medical personnel, they must make reasonable efforts to notify the people specified by you to be notified before following your instructions to withdraw life-support. No one can change or overrule your living will if it was freely and correctly executed.

• **Health Care Power of Attorney (HCPOA)**

A *Health Care Power of Attorney* permits your designated agent to make health care decisions for you, if your physician has determined that you are unable to make and communicate your own health care decisions. You grant this power in the event that, sometime in the future, you are unable to make such decisions. The HCPOA gives your agent guidance on what to do.

Unlike with the living will, the agent's powers are not limited to the time of your terminal illness or permanently unconscious state. Rather, your agent may be given broad powers over every type of medical or medically related situation or decision (provided that you are unable to make and communicate your own health care decisions).

The law does impose certain restrictions, however. For example, your agent cannot authorize the removal of treatment that you have previously authorized unless circumstances

have changed substantially. Also, your agent cannot authorize the removal of life-sustaining treatment unless you are in a terminal condition or permanently unconscious state.

Even if you have a living will, you may also want to have a medical durable power of attorney. Many people will want to have both documents, because a living will only applies in limited end-of-life circumstances, whereas a health care power of attorney covers all other situations concerning your medical care whenever you cannot make health care decisions for yourself. This document is particularly helpful for people who are not married, so the family members know who you want to make these decisions.

To be valid, an HCPOA must be executed with the same formalities as required for a living will. While you may appoint any adult you wish to be your power of attorney, it cannot be your doctor, the administrator of a health care facility in which you are being treated, or any of their employees.

• **Mental Health Declaration**

A Declaration of Mental Health Treatment allows you to state your preferences regarding mental health treatment and to appoint a person to make mental health care decisions when you are unable to do so. A regular HCPOA can address both physical and mental health issues, and is sufficient for many Ohioans.

However, since mental health issues can be more complex than physical issues, and since their specific treatments (e.g. medications and therapies) generally are not addressed in a general HCPOA, some people need this additional document. These include people who have been diagnosed with mental illness or people who think they might need mental health treatment

at some point (for example, those of advanced age or those who have a progressive illness that is likely to involve mental health issues). The mental health declaration provides health care professionals with your preferences regarding mental health treatment. It also allows your agent to advocate for these choices and make other decisions in your best interest if no preference is stated.

• **DNR Orders**

In medical terminology, “DNR” stands for “do not resuscitate.” A DNR order is a physician order written into a patient’s medical records that says cardiopulmonary resuscitation (CPR) is not to be administered. This means that you do not wish medical personnel to use the various methods to revive people whose hearts have stopped functioning or who have stopped breathing. Examples of these treatments include chest compressions, electric heart shock, artificial breathing tubes, and special drugs.

If you do want to be resuscitated, you need not do anything. Doctors are required by their code of ethics to do everything they can to keep a patient alive, unless 1) the patient will not be able to recover any kind of meaningful life, and 2) the patient specifically requests that he not be revived in the event of a catastrophic illness.

You can obtain a DNR order by asking your physician to write such an order. If, after consulting with the patient, a physician determines that both of the necessary conditions exist, the physician will write the DNR order into the patient’s medical records. It will go into effect immediately. You also can pre-authorize a physician to write a DNR order in the event that you become terminally ill or permanently unconscious. You can use either a living will or HCPOA to

authorize and request a DNR order.

It is important to understand, however, that a person's authorization or request does not constitute an actual DNR order. Such an order is actually in place ONLY when a physician has specifically written a DNR order into your medical records at the time of your terminal illness or permanent unconsciousness. A DNR order that is authorized by a living will cannot be issued until you are determined to be so afflicted in the opinion of two physicians, one of whom must be a specialist. Similarly, you may give your agent the authority, through an HCPOA, to direct your physician to issue a DNR order, but that authority takes effect only when you are unable to communicate your wishes.

The Ohio Department of Health has established two standardized DNR order forms. When completed by a doctor (or certified nurse practitioner or clinical nurse specialist, as appropriate), these standardized DNR orders allow you to choose the extent of the treatment you wish to receive at the end of life. A patient with a *DNR Comfort Care-Arrest Order* will receive all the appropriate medical treatment, including resuscitation, until he has a cardiac arrest (heart has stopped beating) or pulmonary arrest (patient has stopped breathing), at which point only comfort care will be provided.

By requesting a *DNR Comfort Care Order (DNR-CC)*, you reject other measures, such as drugs to correct abnormal heart rhythms. With this order, comfort care or other requested treatment would be provided at a point even before the heart or breathing stops. Comfort care involves keeping you comfortable with pain medication and providing palliative care.

Your advance directives should be updated every few years, for changes in both the law and your personal circumstances. In December 2004, changes were made in Ohio law

regarding advance directives. If you have a living will and/or medical durable power of attorney created before then, they should be reviewed and perhaps revised.

Wills

A will is a document that states how your probate property will be distributed upon death. Any person who is at least 18 years old and of sound mind may make a will in Ohio. With limited exceptions, a will must be written and signed. A will must be witnessed by at least two persons, and it must be executed in accordance with the law.

A will may be changed as often as the person who wrote it wishes. Simple changes can be made by a modification called a *codicil*. Changes to a will often result from changes in circumstances after a will has been made, such as marriage, birth of children, divorce or even a substantial change in the nature or amount of a person's estate. A will is effective as long as it is not revoked. A will is most often revoked by the execution of a new will or codicil replacing the old, or when the person who made the will destroys it with the intent of revoking it.

A will permits an executor to distribute the estate to the parties named in it. When there is no will, your estate is distributed to the nearest family members according to a formula fixed by law. In other words, if you do *not* make a will, you do not have any say about how your property will be distributed. Therefore, everyone who owns any real or personal property should have a will regardless of the present amount of the estate. Remember that a will provides for the way that your probate property will be distributed as you request. The only exception is that Ohio law gives a surviving spouse and minor children certain rights over property that cannot be

defeated by a will. They may, however, be defeated by a trust.

Trusts

In general, trusts are legal agreements in which you transfer property to yourself or another person (a *trustee*) who manages the trust for your benefit and/or for the benefit of third persons, such as your children. A “living trust” is one that you can amend or revoke during your lifetime. Through the terms of the living trust, you keep all the benefits of any property placed into it for the rest of your life. You also can be the trustee. A living trust can be funded with any property such as bank and brokerage accounts, stocks and bonds, a home and other real estate. Some living trusts may not be funded initially, but rather at a later time or at the grantor's death. The latter are known as “pour-over” trusts.

Living trusts have become popular in recent years because they have many advantages, including:

- avoiding the cost and difficulties of probate administration;
- avoiding the costs and court intrusions of traditional guardianships, if the grantor should become incompetent;
- providing a vehicle for implementing a tax plan to reduce or eliminate estate taxes; and
- ensuring confidentiality.

These advantages can be overstated, however. Estate planning requires individuals to make informed choices. You must investigate the various tools available and understand their effects. For example, while living trusts are very flexible, they are not cure-alls, nor are they applicable in every situation. For example, although there are expenses involved in the probate administration of a deceased's assets, expenses also are involved in establishing and

administering a living or a testamentary trust.

In addition, a will and, thus, some probate administration, is necessary for most individuals who have a living trust because some assets are not placed in a living trust. Also, probate administration can be helpful in some estates and guardianships because of the probate court's supervision and required regular reports. Also, the court can replace fiduciaries that do not do their jobs.

There are several things a living trust cannot do. It cannot save taxes while you are alive. For all income tax purposes, you, as grantor, will have to pay taxes on the income earned by the assets transferred to the living trust. It cannot protect you from creditors. Creditors are entitled to reach the assets of a living trust during your lifetime. Creditors generally may reach the assets of any trust to the extent that the grantor can enforce his or her own rights to trust assets. However, a surviving spouse may not be able to take their statutory elective share (*forced inheritance*) rights against a living trust as would be available against probate assets. Finally, a trust cannot help you qualify for public assistance programs, such as Medicaid and Supplemental Security Income (SSI).

Public Assistance programs create special estate-planning considerations for individuals who are trying to provide for themselves as senior citizens, or are trying to provide for someone with a disability. Public assistance programs have strict and complex asset and income requirements. To meet these requirements, individuals sometimes transfer assets to their children or to *irrevocable* trusts so that their children will receive an inheritance. The federal government has responded to this kind of transfer by establishing a period after such a transfer in which an individual is ineligible for public assistance (for example, the current waiting period for

Medicaid eligibility is up to five years after a transfer of assets). On the other hand, government rules make it possible for an individual, with proper planning, to go to a nursing facility without impoverishing his or her spouse. In addition, the state of Ohio has made it possible to create an *irrevocable supplemental services trust* for an individual with mental illness or mental retardation, or other developmental disability. The trust allows certain assets to be sheltered for limited purposes but, upon the death of the beneficiary of the trust, a portion of the assets goes to the state of Ohio for the use of other Ohioans with disabilities.

A *revocable living trust* (as opposed to an *irrevocable trust*) is not directly relevant to public assistance planning because it can be revoked or canceled. For this reason, the trust assets are considered to belong to the trust owner for public assistance planning purposes. A living trust might, however, be very useful to, say, a mother who wishes to use it as part of a general estate plan. She could, for example, provide a trust for the care of her disabled son after her death.

Durable Power of Attorney

A *power of attorney* appoints someone as an agent, either for limited purposes or for very broad, all inclusive purposes, to handle your financial affairs when you are unable to do so. The agent will have only the powers you give. The authority or power given to an agent should be stated clearly so that the agent and third parties know what the agent can and cannot do. Oftentimes, when the agent is authorized to do anything that the principal can do, the power of attorney will list examples of the agent's authority, such as the authority to buy, sell, and invest the principal's property.

Powers of attorneys are used to give powers to a spouse or child to assist with your financial affairs if you will be out of town, hospitalized, or become incompetent. In the last

instance, they can prevent the need to file for a guardianship.

There are some powers that cannot be given to an agent. These would include representing you in a lawsuit, such as a divorce, or voting for you.

In a regular power of attorney, the powers take effect as soon as the document is signed. In a “springing” power of attorney, the powers become effective upon a future event, such as when you become unable to handle your own affairs. The problem with this “springing” power is that it may be difficult for the agent to demonstrate that the triggering event has occurred.

Powers of attorney normally end upon your incompetence. However, you may extend the power beyond your incompetence or disability. This is called a durable power of attorney. The powers do end upon death. You may also change or revoke the powers at anytime.

As you can see, there are a number of ways in which you can protect your family by planning for both unexpected events and end of life issues. This way, you will be assured the your wishes are followed, and your family’s stress will be reduced.