

Avoid Chaos with Advanced Care Planning

Presented by
Florida Bar Board Certified Elder Law Attorney Kathleen Flammia

Estate Planning: What is it and why do we need it?

- I. **Ancillary Documents: What gives my family members the power to act on my behalf during my lifetime?**
 - **Durable Power of Attorney (DPOA) (sometimes referred to as a Financial Power of Attorney)**
 - A durable power of attorney is a legal document by which you can delegate someone to manage your affairs for you.
 - It can allow another person to act for you to make health care decisions, to handle property, to deal with financial issues, and to do almost everything you can do.
 - A person must be competent to sign this document.
 - The agent only has the specific powers given in the DPOA.
 - What powers do you give your agent? Ability to sign contracts for you, sell and buy property, etc.
 - Durable Power of Attorney (DPOA) survives incapacity and avoids the need for a guardianship.
 - If you do not have long term care insurance, the language in the DPOA is especially important to allow your agent or attorney in fact to do crisis planning.
 - **Advance Directives**
 - **Living Will**
 - A written declaration of your end of life choices if you are both mentally and physically incapacitated and your treating physician and another consulting physician determine that there is no reasonable probability of recovery.
 - **Designation of Health Care Surrogate (sometimes referred to as a Health Care Power of Attorney or Health Care Proxy)**
 - If you have been determined to be incapacitated to provide informed consent for medical treatment, this document designates who can make medical decisions on your behalf.

- **HIPAA Release and Authorization (Health Insurance Portability and Accountability Act)**
 - This document designates who is authorized to discuss your health information and who your health care provider can disclose medical records to.
- **Declaration of Preneed Guardian**
 - This document tells the court who you wish to be the guardian of your person and property if you ever need to have one appointed.

II. Last Will and Testament

- A Will is a written direction to dispose of your property at your death. Once admitted to probate, the Will directs the change of the title of assets in your name to someone else's name.
- What is probate? Probate is the legal process by which a deceased person's property and assets are transferred to the people named in the Will or if there is no Will to his or her heirs.
- *What does a Will do?* A Will allows YOU to decide who gets your property after you die. Without a Will the court decides who gets your property based on the state laws.
- *What are the requirements of a Will?*
 - If you make a Will, you are the testator.
 - You must be of sound mind and at least 18 years of age.
 - Your Will must be in writing and witnessed pursuant to the requirements of the law.
- *Frequently asked questions*
 - If I made a Will in another state and moved, is it valid? Yes, if it was executed with the same requirements as the new state you are living in.
 - Where do I keep it now that I have one? In either a safe deposit box at the bank or a fire proof filing cabinet at home.
 - After I die, what happens to my Will? If you have a Will, it should be recorded in the clerk's office within ten days of your death. This is Florida law. You will need to check with your current state laws for filing deadlines.
 - If necessary, the Will will be admitted to probate, a personal representative (also referred to as the executor) will be appointed and the probate process begins.

III. Revocable Living Trust

- A Trust is a legal entity which holds title of your assets. You can think of it as a bucket in which your assets are held. An example of how John Smith's assets would be titled in the name of his trust would be "John Smith, Trustee of the John Smith Revocable Living Trust dated January 1, 2000."
- You, the Grantor, establish the trust during your lifetime. This trust is controlled by you, and if you are physically or mentally unable to handle your affairs, the successor trustee you named in the trust document will take over.
- While you are alive and competent, you can amend or revoke the trust at any time. Once you die, the trust becomes irrevocable.

- Two huge benefits of a trust are that it avoids a guardianship proceeding because someone else can handle your financial affairs and your property passes without the time or expense of a probate proceeding.
- Caveat: Make sure your trust isn't "dry." Once a trust is established and executed, you must fund the trust, i.e. you must transfer your assets from your name to the name of the acting trustee of your trust. Note: not all assets should be titled in the name of your trust.

IV. Irrevocable Asset Protection Trusts

- An Irrevocable Asset Protection Trust is a trust that allows for assets to be placed into the trust, and after satisfying the Medicaid (5 year) or VA (3 Year) lookback period, the assets placed in the trust will not be counted as available resources for long-term care costs.
- The Grantor transfers assets to the Trust and gives up the rights of ownership to the asset. The assets are owned by the Trustee (who must not be the Grantor or their spouse), who will have the legal authority to distribute the assets during the Grantor's lifetime to designated beneficiaries.
- There are many benefits in creating an irrevocable asset protection trust, including providing protection for family assets.

V. Special Needs Trusts

- Are you concerned about the well-being of a special needs child or other dependent after you are gone? If you leave an inheritance outright to someone on public benefits, such as Medicaid or SSI, he or she could lose government benefits.
- A Special Needs Trust protects an individual with special needs from being disqualified from public benefits.

VI. Heritage Trusts

- Do you have concerns with a family member inheriting a large sum of money? Do you have concerns about a family member divorcing their spouse and having the inheritance you left them be at risk of being lost?
- A heritage trust may protect an inheritance from "outlaws," from creditors, and from a spendthrift beneficiary.

VII. Involuntary Planning

- If you do not complete your estate planning documents and you become physically or mentally incapacitated or unable to handle your health care decisions or your finances, what happens?
- Someone must go to court to establish a guardianship. A guardianship case is a court supervised proceeding in which the ward or the incapacitated person loses all or some of his or her rights.
- The Court will award those rights to a guardian and the Court will supervise the decisions the guardian makes in handling the ward's affairs.
- Guardians are professional or they could be a family member or friend.
- Guardianship proceedings are expensive and time consuming. They are easily avoided by having estate planning documents in place.