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*What Happens If...*

## Three Estate Planning Documents You Shouldn't Neglect

**Remember: Durable Powers of Attorney, Health Care Surrogate Designations and Living Wills**

You probably have heard of a *Last Will and Testament* and/or a *Living Revocable Trust*, documents which assist in post-death distribution of assets. However, you should also know about three lesser known, but very important *Estate Planning* documents that govern many pre-death decisions: the *Durable Power of Attorney*, *Health Care Surrogate Designation* and *Living Will*.

A *Power of Attorney* is a legal document which authorizes another person to act for you as your *Attorney-in-Fact* ("AIF"). *Powers of Attorney* can be limited in scope - such as when you cannot attend a Real Estate closing where your signature is required and you must name someone to sign for you - and are automatically revoked upon your incapacity.

However, a *Durable Power of Attorney* ("DPA") is much broader. It remains in effect and is not revoked, upon incapacity. Thus, if you become incapacitated, whether physically or mentally, due to accident or illness - such as coma, stroke, Alzheimer's or other debilitating illness - and are then unable to handle your own affairs, a *DPA* would permit your designated *AIF* to act in your stead. Without a *DPA*, an incapacitated person would be unable to, for example, sell or mortgage his/her home because of a then inability to sign the Contract, Deed or Mortgage. In such a situation, *Guardianship/Incompetency Proceedings* would have to be commenced to request that a Guardian be appointed by the Court to represent the interests of the incapacitated person. The *DPA* eliminates, in most cases, the need for costly and time-consuming Court proceedings by granting the *AIF* the power and authority to act on behalf of the incapacitated person.

An *AIF* can be a person of sound mind who is at least 18 years of age; a financial institution with trust powers that has a place of business and is authorized to conduct business in Florida; or a non-profit corporation organized for charitable or religious purposes in Florida. Although you may be conflicted about who you should name as your *AIF*, it is suggested that you name the person whom you most trust, who has the same values as you do, and who would make the same decisions you would have made - **DO NOT** name someone simply to avoid ruffling feathers because you think he/she will be angry if he/she is not named as *AIF*.

### Health Care Surrogate

A *Health Care Surrogate* ("HCS") names someone to make medical decisions for you - including speaking to your doctors, obtaining copies of records and making other health-related decisions - when you

are unable to do so. The Health Insurance Portability and Accountability Act ("HIPAA"), which went into effect in 2005, is a federal privacy law which guards the privacy of your medical information from others, including your spouse, significant other, family members, friends and even the individual(s) previously appointed as your *AIF* and/or *HCS*.

*HIPAA* requires very specific release language to permit your physicians, healthcare professionals, dentists, health plans, hospitals, clinics, laboratories, pharmacies and/or other health care providers to furnish information to your *HCS*. Absent this language, your *HCS* may be denied access to your doctors, records and/or information at the time he/she needs access the most, and, in such an instance, may be forced to pursue *Guardianship/Incompetency Proceedings*.

Both the *DPA* and *HCS* are automatically terminated upon death because, when you die, your *Will* or *Trust* governs any remaining decisions that have to be made on your behalf. **DO NOT** use someone's *DPA* after he/she has died, because you may be subjecting yourself to both Civil and/or Criminal liability for doing so.

### Living Wills

The *Living Will* permits you to declare that, in the event of some terminal injury, illness or disease, **where death is imminent**, you do not want to be force-fed intravenously or otherwise artificially kept alive on a respirator. Affording you *Death with Dignity*, the *Living Will* is an important Estate Planning tool because it allows you, rather than your family, to make the final decision on life-ending or death-delaying treatment and relieves the pressure from family members having to decide what you *would have wanted*.

Most people do not understand the importance of the foregoing documents until a loved one becomes incapacitated - and by then, it may be too late to execute these documents if the incapacitated person does not have the capacity to understand what he/she is signing, thus making it necessary to institute *Guardianship/Incompetency Proceedings* to obtain the Court's authority to transfer assets or make health care or other decisions.

In the 2005 Terri Schiavo case, the patient suffered cardiac arrest at age 25 and was in a persistent vegetative state for 15 years while her husband and parents battled in Court about who had the right to make decisions for her and what decisions she would have made. The case highlights how essential these documents are and why they are so important.

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