

Elder Law Update: Advance Planning Directives

By Remo A. Hammid, Esq.

Bring up the subject of estate planning with clients and they immediately conjure up an image of a Last Will and Testament. However, even more basic than a Last Will, and arguably more important, are a set of documents that we refer to collectively as "Advance Planning Directives."

There are three basic Advance Directives that any New York estate plan should include: a Power of Attorney, Health Care Proxy and a Living Will. Without these instruments, there is no one authorized to make legal, financial or medical decisions on your behalf.

Clients are surprised to hear this – many have long thought that, in the event of their incapacity, a spouse or their adult children can handle their affairs. The law states otherwise: no one, not a spouse, a child or parent, can act on behalf of another unless appointed by the incapacitated individual or by a court of competent jurisdiction.

I say that these documents are more important than a Last Will because they potentially have a direct bearing on the quality of your life. This is because Advance Planning Directives are effective during your lifetime, whereas a Last Will takes effect only upon your death. While important to administer and distribute your assets, a Last Will has no bearing on the quality of your life. Advance Planning Directives, on the other hand, are effective

during your lifetime and directly impact the quality of your life.

Example: Mary and Jim, are a married elderly couple. They hold all of their assets jointly with each other as beneficiary and their children as contingent beneficiaries. Mary develops dementia and is no longer lucid. She requires more care than Jim can provide.

Medicaid would be willing to provide the care she requires (home care attendants, medical equipment, etc.) were she to simply transfer her assets to her husband, Jim. However, because she never executed Advance Planning Directives, no one, not even Jim, is authorized to transfer Mary's share of their assets.

Jim's only option is to petition the Supreme Court and ask that he be appointed the legal guardian of the person and property of Mary – an expensive and emotionally draining experience.

Basic estate planning documents, i.e., Powers of Attorney, Health Care Proxy and a Living Will would have prevented the need for a guardianship.

Powers of Attorney. A Power of Attorney appoints another, usually a spouse and/or child, to act on your behalf for legal and financial matters. The authority granted allows the agent to carry out acts such as banking, paying bills, making gifts, etc. Everyone that has the capaci-

ty to (and has someone that they can rely on) should execute a power of attorney. Powers of attorney can range from simple documents to very complex instruments. An in-depth discussion of the various types of Powers of Attorney is the subject of a future column.

Health Care Proxy. Here again, many people operate on the assumption that a family member such as a spouse or an adult child can communicate with doctors and medical facilities, make decisions regarding treatment and/or end of life decisions. In New York, however, an individual may not make these types decisions on behalf of another unless they have been appointed through a health care proxy.

Living Will. A living will, which is a medical directive, should be distinguished from a Last Will. If it helps, think of a Living Will as being effective while you are alive. A Last Will, by contrast, is an expression of your last wishes and takes effect upon your death. While the Health Care Proxy is the primary document in New York, we encourage our clients to execute a Living Will to provide additional guidance to their family regarding crucial medical decisions. For example, a Living Will may state that an individual does not wish to receive artificial nutrition or hydration under certain circumstances.

Without these Advance Planning Directives, you risk

putting your loved through an emotionally draining and financially costly procedure. Preparing these instruments and having a sound estate plan in place can be a simple matter with the guidance of a qualified estate planning or elder law attorney.

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