



A WILL IS NOT ENOUGH

by
Kelly A. Thompson
kelly@twplc.com

DISCLAIMER: This outline is for information purposes only and is not a substitute for legal counsel. THOMPSON WILDHACK, PLC assumes no liability for errors or admissions, or for damages resulting from the use of the information in this outline.

I. THE DURABLE POWER OF ATTORNEY

- A. The Durable Power of Attorney is a legal document in which a competent adult, who is called the "principal," gives written authority to a specific person or people, called either the "agent" or the "attorney-in-fact," to act on behalf of the principal.
- B. The principal should have trust and confidence in the person(s) to whom he or she grants decision-making authority. The agent has a fiduciary duty to act in the best interests of the principal, but the principal is bound by the acts of the agent. A Power of Attorney can be revoked if the principal loses confidence in the agent, provided the principal remains competent to act.
- C. A Power of Attorney may terminate in several ways, including upon the incapacity of the principal. A Durable Power of Attorney has language in the document which indicates that the authority of the agent shall continue and not terminate upon the disability or incapacity of the principal.
- D. A Springing Durable Power of Attorney grants the agent authority to act upon the occurrence of a specified event, such as the incapacity of the principal. The

power should specify the procedure for determining incapacity (e.g., when certified by two physicians). A Springing Power may result in difficulty insuring the acceptance of the agent.

- E. The authority delegated to the agent can be narrow, limited to specific duties, or it can be broad, allowing the agent to make almost any decision which could be made by the principal. It may be more difficult to have people accept the authority of the agent when the powers of the agent are not stated specifically and clearly.
- F. Documents granting the agent broad powers may not be appropriate in all situations. It is important, however, to discuss and determine what powers to give the agent. Specific powers to cover include:
 - 1. all banking transactions;
 - 2. access to safety deposit box or vault;
 - 3. stock, bond, securities and commodity transactions;
 - 4. private employment and retirement benefits;
 - 5. other government benefits;
 - 6. insurance;
 - 7. taxes;
 - 8. estate transactions, including disclaimers and transfers to trusts;
 - 9. personal financial transactions, including gifts and the continuation of charitable contributions;
 - 10. real property transactions;
 - 11. commencement and defense of lawsuits;
 - 12. authority to name successor.

THOMPSON WILDHACK, PLC

6045 WILSON BLVD, SUITE 101, ARLINGTON, VA 22205 TEL: 703-237-0027

© THOMPSON WILDHACK, PLC; All rights reserved

- G. Health care decision-making may be delegated. In some cases this power may be given in a Durable General Power of Attorney, but in most cases it should be placed in a document about health care choices.
- H. Limitations of the Power of Attorney.
 - 1. Banks, stock transfer agents, title insurance companies, doctors, hospitals and others may not always comply with an agent's directions, even with a properly drafted power of attorney.
 - 2. An agent cannot force the principal to do what he does not want to do, e.g., an agent cannot force a competent principal to remain in a nursing home if the principal does not want to stay there.

II. HEALTH CARE DECISIONS, LIVING WILLS & ADVANCE DIRECTIVES

- A. There are several potential documents to use:
 - 1. Durable General Power of Attorney.
 - 2. Durable Medical Power of Attorney.
 - 3. Advance Directive, also known as a Living Will or Health Care Declaration.
- B. Documents with different names may achieve different results. In health care decision-making, people generally want to accomplish two things:
 - 1. State their choices about medical treatment, and
 - 2. name an agent to make decisions if the principal is unable to make decisions when one is needed.

The Advance Directive evolved from several documents which accomplished part of each goal to one document. An Advance Directive seeks to accomplish all the goals in one document.

- C. An Advance Directive is a written statement of choices about medical care, including personal choices in the event of a serious, incurable or terminal condition. The Advance Directive also names an agent who has authority to

THOMPSON WILDHACK, PLC

6045 WILSON BLVD, SUITE 101, ARLINGTON, VA 22205 TEL: 703-237-0027

© THOMPSON WILDHACK, PLC; All rights reserved

make all health care decisions when the principal is incapable of making decisions.

1. Under an Advance Directive, a person may choose under certain circumstances to receive treatment or forego treatment and be allowed to die.
 2. Most statutes authorizing "Advance Directives" limit enforcement to terminal conditions. Pre-printed forms strictly following statutes may not address patients' rights extending beyond the statute, and often fail to advise about choices available under the law.
 3. Advance Directives, whatever their content, should be signed with the specific formalities required by law to ensure the document will be legally recognized.
- D. Patients should discuss their wishes with their physician to determine the physician's willingness to honor the patient's wish. Health care providers are not obligated to follow the declaration, but those who act upon a declaration are immune from criminal prosecution or civil liability for their actions. Physicians unwilling to carry out the patient's wish must make a good faith effort to transfer the patient to a physician who will honor the request.

III. ESTATE PLANNING

A. Intestacy - Death Without a Will.

1. You have done estate planning! By doing nothing, you have agreed to a distribution scheme set by Virginia law.

B. Considerations in Deciding to Have a Will.

1. A Will may be executed by anyone at least 18 years of age and of sound mind when the will is signed.
2. The Will controls the "Probate Estate." This does not include:
 - a. all property (real & personal) held jointly with right of

THOMPSON WILDHACK, PLC

6045 WILSON BLVD, SUITE 101, ARLINGTON, VA 22205 TEL: 703-237-0027

© THOMPSON WILDHACK, PLC; All rights reserved

- survivorship;
 - b. insurance paid to a named beneficiary;
 - c. IRA accounts paid to a named beneficiary;
 - d. retirement benefits paid to a named beneficiary;
 - e. P.O.D. Accounts;
 - f. certain trust assets.

- 3. By writing a Will, you determine:
 - a. to whom your estate will be distributed;
 - b. how your estate will be distributed:
 - (1) outright gift.
 - (2) trust.
 - (3) life estate.
 - (4) other.
 - c. who will be Guardian for your minor children
 - d. who will be the Executor/Personal Representative to settle your estate.
 - e. how to minimize or defer estate tax.

- 4. Wills can be revoked or amended by codicil. Both acts require certain formalities, so check with an attorney to make sure these changes will be valid.

- 5. Review and update a Will as circumstances change - births, deaths, marriages and divorces - or at least every 3 - 5 years.

C. Tax Aspects of Estate Planning

- 1. The Taxable Estate includes all assets the decedent could pass. It includes the following:
 - Probate estate +
 - (1) face value of life insurance.
 - (2) residence.
 - (3) actuarial value of survivor annuity.
 - (4) joint property interests.

2. Federal Estate Tax
 - a. Only estates of over \$2,000,000 are subject to Estate Tax.
 - b. Unlimited Marital Deduction - transfers to a surviving spouse are not subject to Federal Estate Tax if made in proper form. (NOTE: Exception for non-citizen spouses)
 - c. The individual estate must carefully select appropriate tax planning strategies.
3. Virginia Estate Tax is a thing of the past. As of July 1, 2007, Virginia eliminated its estate tax.

IV. TRUSTS

A. Goals.

1. There are a variety of trusts which can be created to meet a variety of planning goals. Before establishing a trust carefully review:
 - a. the purpose for establishing the trust;
 - b. the needs of the beneficiary;
 - c. the value and type of assets available for the trust;
 - d. the tax consequences of the trust options;
 - e. the impact of the trust on government benefit eligibility for the grantor and beneficiary.
2. Five goals where trusts may be appropriate:
 - a. alternative asset management;
 - b. deferral or reduction of estate and/or income tax;
 - c. alternative to probate distribution of assets;
 - d. maintenance/preservation of public benefits.
 - e. safeguard assets for minor, incapacitated or irresponsible beneficiary.

B. Types of Trusts.

1. Basic types
 - a. Testamentary - takes effect at death under terms of the Will;
 - b. Inter Vivos /Living - takes effect now.

THOMPSON WILDHACK, PLC

6045 WILSON BLVD, SUITE 101, ARLINGTON, VA 22205 TEL: 703-237-0027

© THOMPSON WILDHACK, PLC; All rights reserved

2. Choose from a variety of trust options:
 - a. revocable or irrevocable living trust;
 - b. funded or unfunded living trust;
 - c. discretionary or mandatory distribution of income or principal to the beneficiary .

3. Basic trust advantages:
 - a. alternative asset management;
 - b. may avoid appointment of guardian of estate;
 - c. terms may control assets beyond grantor death;
 - d. probate avoidance;
 - e. terms may allow modifications for changes in circumstances;
 - f. potential favorable tax treatment.

4. Basic trust disadvantages:
 - a. cost of establishing and maintaining;
 - b. complexity of many trust arrangements;
 - c. adverse consequences if unable to adapt to changing law or unforeseen circumstances.

THOMPSON WILDHACK, PLC

6045 WILSON BLVD, SUITE 101 , ARLINGTON, VA 22205 TEL: 703-237-0027

© THOMPSON WILDHACK, PLC; All rights reserved