

# **ESTATE PLANNING**

## **INTRODUCTION:**

Estate planning is a process that involves individuals, their assets, and their wishes. Estate planning is something that many people do not want to think or talk about, but is something that everyone should consider in order to be prepared. Estate planning is necessary if an individual wants to make sure that their wishes are carried out. Individuals should consider how their assets will be managed for their benefit if they are unable to, when certain assets should be transferred (e.g., during their lifetime, at their death, or sometime later), and to whom those assets should be left. If an individual has specific wishes about the distribution of their assets, it is important to document those wishes to ensure they are fulfilled. Even if individuals think that everyone knows what they want, if it is not in writing, then it may not be sufficient.

Estate planning is not just about writing a will. Regardless of the amount or value of individuals' assets, it is important to have a basic plan in place. When planning, it is important for individuals to consider their medical, personal, emotional, spiritual, and financial needs and those of their family and friends. Such a plan ensures that those needs are met. Remember, laws vary from state to state, so it is important to consult with an estate planning attorney familiar with the laws in each state or contact the CLRC.

Individuals should start by taking an inventory of their assets and debts. Individuals can use the CLRC's Personal Records File and Taking Care of Business Form (see **APPENDICES EP1 and EP2**). Assets typically include bank accounts, investments, personal possessions, real estate, and business interests. Assets that have beneficiary designations (when you name a person who will receive the money at your death), such as life insurance policies, IRA's, qualified retirement plans, and some annuities are important parts of an estate, which require coordination with other assets in developing a complete estate plan.

Additionally, individuals should ask themselves a series of questions:

- Who would you want to inherit your assets?
- Who do you want to handle your financial affairs if you are ever unable to do so yourself?
- Who do you want to make your medical decisions if you could not make them for yourself?

For example, if an individual was injured in a car accident and had to spend a few weeks in the hospital recovering, the individual should consider:

- Who would pay my rent and other bills?
- Who would feed my pets?
- Who would pick up my children from school?
- If I were unconscious, whom would I want to make medical decisions for me?

Remember, estate planning is based on the idea that when individuals prepare in advance, they can prevent problems down the road.

There are four important documents to consider when planning an estate:

1. Advance Health Care Directives (including living wills, powers of attorney for health care, and organ donation)
2. Powers of Attorney for Financial Affairs
3. Wills
4. Trusts

## **I. PATIENT SELF-DETERMINATION ACT**

- A. The 1990 Patient Self-Determination Act (PSDA) encourages all people to make choices and decisions now about the types and extent of medical care they want to accept or refuse should they become unable to make those decisions due to illness. The PSDA also requires that all hospitals, long-term care facilities, and home health agencies that receive Medicare and Medi-Cal reimbursement to ask individuals whether they have an advance health care directive and requires them to recognize it.

## **II. ADVANCE HEALTH CARE DIRECTIVES**

- A. **What is an Advance Health Care Directive?:** An advance health care directive (AHCD) is a set of written instructions communicating an individual's wishes about the medical care and treatment they would like to receive if they are no longer able to make decisions for themselves. AHCD's are written in advance to inform doctors and other health care providers about patients' thoughts concerning their medical treatment. Although patients are not required to have an AHCD, nor will they be denied medical care if they chose not to have one, it may help to ensure that patient gets the treatment that they want. Through this document, an individual can make legally valid decisions about their future medical care. Every state recognizes advance directives, but the law governing directives vary from state to state.

- 1) **Taking Effect:** AHCD's only go into effect when individuals can no longer make their own health care decisions. As long as they are able to give "informed consent," health care providers will rely on the patient and not on the advanced directive. When the doctor determines that the patient has regained capacity to make or communicate health care decisions, then the AHCD's authority will end and the patient's consent will be required again for any treatment.

- (i) **Informed Consent:** Informed consent means that an individual is able to understand the nature, extent, and probable consequences of proposed medical treatments and they are able to make rational evaluations of the risks and benefits of those treatments. It also means that an individual is able to communicate this understanding.

- B. **Parts of an Advance Health Care Directive:** Typically there are four parts, but laws vary from state to state:

- 1) **Power of Attorney for Health Care:** This part of the AHCD is where a patient names someone they trust (e.g., a relative or friend) to be an "agent," to make medical decisions for the patient when the patient is unable to do so. An agent makes all medical decisions unless the patient decides to limit the agent's power. For example, an agent will have access to the patient's medical records, unless the patient limits that right. It is also important to keep in mind that an individual is allowed to name an alternate agent. This means that if the first agent is not available, then an alternate agent can step in and can make decisions on their behalf. However, it is generally not a good idea to name two agents together. There is the potential for the two agents to disagree and the individual's wishes may not be carried out.

- (i) Keep in mind that the power of attorney for health care does not authorize anyone to make legal or financial decisions. That is done through a separate power of attorney for financial affairs (see below).

- (ii) Under some state laws, an individual's health care agent cannot make certain decisions for them. For example, California law prohibits an agent from committing someone to a mental health treatment facility, or authorizing convulsive treatment therapy, psychosurgery, sterilization, or abortion.
- 2) **Living Will:** The second part of an AHCD is commonly referred to as a living will, which outlines a patient's desires regarding life-sustaining or life-prolonging medical treatment.
- (i) **Life Treatments:** These are treatments or procedures that are not expected to cure a terminal condition or make an individual better. They only prolong one's life. Examples include mechanical respirators to help an individual breathe, kidney dialysis to clear the body of waste, or cardiopulmonary resuscitation (CPR) to restore a heartbeat.
  - (ii) **Terminal Condition:** A terminal condition is defined as an incurable condition for which medical treatment will only prolong the dying process and without that treatment, death will occur in a relatively short period of time.
- 3) **Organ Donation:** This part of an AHCD allows a patient to express their wishes about donating specific organs or tissue.
- 4) **Primary Physician:** This part of an AHCD provides a space for a patient to record the contact information for their primary physician.

### **III. DO NOT RESUSCITATE FORM**

- A. **What is a Do Not Resuscitate (DNR) Form?:** This is a written order to medical personnel that resuscitation should not be attempted if an individual suffers from cardiac or respiratory arrest. A DNR can also be made using an advance health care directive in some states.

### **IV. POWER OF ATTORNEY FOR FINANCIAL AFFAIRS**

- A. **What is a Power of Attorney for Financial Affairs?:** When making decisions about an estate plan, individuals may also consider appointing someone to make financial decisions on their behalf if they are unable to do so. A power of attorney for financial affairs is a legally binding document that designates a trusted person to act on a patient's behalf if they become incapacitated (incapacity is determined by a doctor or a judge). This document must be signed and notarized in most states. The power of attorney ends upon the individual's death, at which point their will or trust would take effect. It is important to keep all of the insurance information (health, long-term care, life insurance, and special needs policies) in an accessible place for the power of attorney to locate.
- 1) **Durable Power of Attorney:** This document goes into effect at its signing, and continues through any period of time when an individual is determined unable to make decisions on their own behalf.
  - 2) **Springing Power of Attorney:** This document only goes into effect when an individual is determined to be unable to make decisions on their own behalf.

## V. CONSERVATORSHIPS

A. **What is a Conservatorship?:** A conservatorship is a court proceeding in which the court supervises the management of an incapacitated person's finances and/or personal care, including health care. A conservatorship is usually necessary because a patient did not previously appoint someone to act as their representative through an AHCD or Power of Attorney for Financial Affairs. As a consequence of not planning ahead, a court will decide who will act on the patient's behalf, and it may not be who the patient would have wanted. This process can also be expensive, and can cause family disputes, so it is better if the patient plans in advance.

- 1) **Who is the Conservator?:** A conservator is the person appointed by the court to make decisions for the patient who is not competent.
- 2) **Who is the Conservatee?:** The conservatee is the person who is determined to not be legally competent to make decisions on their own behalf.

## VI. WILL

A. **What Is a Will?:** A will is a legal document, drafted and executed in accordance with state law, which cannot be changed after one's death. In a will, individuals can determine what will happen to their estates (property that is the subject of a probate or trust proceeding) after they die by naming beneficiaries (people or organizations who will receive their assets). Individuals can also name a guardian for minor children (a person(s) who will care for their child until he/she turns 18 years old), a guardian of the estate (person appointed by the court to manage the assets and finances of a child under 18 years old), and an executor (a person who manages and distributes their assets according to their wishes). It is important to note that a will does not cover everything that the individual owns. Wills do not cover life insurance policies, retirement plans, assets owned as a joint tenant, living trusts, or a spouse's half of any community property (generally, income or property acquired by either spouse during a marriage, except by gift or inheritance, in community property states only, including California).

- 1) **Ways to Make a Will:** There are many ways to make a will. It is a good idea to consult with an attorney to ensure that estate planning documents comply with state laws.
  - (i) **Handwritten or Holographic Will:** Some states allow individuals to make holographic wills. A holographic will is a will completely written in one's own handwriting that is signed, dated, and expresses intent on how various assets should be distributed. This document does not need to be notarized or signed by witnesses; however, any typed material may invalidate the will.
    - Note: Handwritten or holographic wills are not accepted in every state. For example, California accepts holographic wills, but Florida does not. For more information the validity of handwritten or holographic wills in a state, contact the state's bar association or the CLRC.
  - (ii) **Statutory Will:** Statutory wills, also known as fill-in-the-blank will forms, may be sufficient for an individual who does not have a large or complicated personal estate. For more information on a state's law regarding statutory wills contact the state's bar association or the CLRC.

(iii) **Will Prepared by a Lawyer:** A qualified estate planning lawyer can make sure that an individual's will conforms to state law. The lawyer can also offer suggestions about other estate planning options, explain potential tax benefits, and provide information on the many ways property can be transferred, which may be less expensive in the long run for individuals and their beneficiaries.

B. **Does an Individual Need a Will?:** If an individual dies without a will (dying "intestate"), the state's law determines the beneficiaries of their estate. This means that a court decides to whom the individual's assets will be distributed. For example, in some states there is a list of beneficiaries that courts will use to distribute one's belongings. The line of progression is automatic under the law and may not take into consideration what is best or appropriate for the individual's family. According to the line of progression, if the individual was married in a community property state, for example, the spouse will receive all of the community property. The spouse will also receive part of the individual's separate property, then the remainder of the estate would be distributed to the closest kin, including children, grandchildren, parents or siblings (in statutory order). If the individual was not married, their assets would be distributed according to the line of progression.

1) **Note:** The line of progression is automatic except for life insurance policies, joint accounts, and property held in joint tenancy (real property), which all pass without a will because a beneficiary has already been designated for those assets (typically upon purchasing a life insurance policy, opening an account, or signing a deed for the property).

C. **Can a Will be Changed?:** A will can be changed after it is signed. In fact, everyone should review their will periodically because if the will is not current, the estate may not be distributed according to one's current wishes. Individuals should also review their will when there are major changes in the family (such as births or marriages), when they purchase or sell a piece of real estate, or when the value of their assets significantly increase/decrease. If the individual moves to another state, it is a good idea to have an attorney review the will to ensure that it is in compliance with state laws.

1) **How to Change a Will:** A will can be changed through a "codicil," a legal document which must be drafted and executed in accordance with the same state laws that apply to the will. An individual should not change their will by crossing out words or sentences; rather, any changes, additions, or deletions should be done through a codicil.

D. **How is a Will Carried Out?:** The process by which the provisions in a will are carried out following one's death is called "probate." In addition to making sure that the executor correctly distributes all assets to the intended beneficiaries, probate also validates any claims by creditors. At the beginning of a probate administration, a petition is filed with the court, usually by the person named as the executor. After notice is given and a hearing is held, the will is admitted to probate and an executor is officially appointed. One disadvantage to probate is its public nature. The provisions of a will and the value of one's assets become a public record. In addition, because a lawyer's fees and executor's commission are based on a statutory fee, the expenses may be greater than the cost of a comparable estate managed and distributed under a trust.

## VII. TRUST

- A. **What is a Trust?:** Like a will, a trust is a written agreement where individuals can name beneficiaries who will be given, or who will inherit, their assets. A trust is a written agreement between the individual creating the trust (trustor) and the person named to manage the assets held in the trust (trustee). Depending on the type of trust, it can be revoked or changed during one's lifetime. Individuals can be their own trustee's until their death. After death, the terms of the trust cannot be changed or altered in any way. Having a trust can eliminate the need to go through the probate process. Consult with an estate planning attorney for more information about trusts. A certified state or local bar association can refer individuals to attorneys in their area.
- B. **Common Types of Trusts:**
- 1) **Charitable Remainder Trust:** A trust where the remainder of the trust goes to a charity.
  - 2) **Testamentary Trust:** A trust, which is set forth in a will, to provide for children or others who need management of their assets.
  - 3) **Irrevocable Trust:** A trust that cannot be changed during one's life.
  - 4) **Living Trust:** The most common type of trust; created while the individual is alive and allows the individual to act as their own trustee until their death when another trustee takes over. If the individual has a living trust, they may also want to consider drafting a pour over will. For example, an individual may have many possessions that are not individually listed in their trust. A pour over will covers any assets that are not contained in the trust at death.
- C. **Funding a Trust:** Once a trust is created, the trust must also be "funded." The funding of a trust is simply the transfer of assets from the individual's name to the name of the trust. Deeds to real property must be prepared and recorded, bank accounts transferred, and stock and bond accounts transferred.

Whichever estate planning documents individuals choose to have, or decisions that they make, it can be a good idea to discuss their wishes with their family, caregivers, physicians, and other health care providers.

## VIII. RESOURCES

<b>For estate planning information:</b> American Bar Association Estate Planning FAQ <a href="http://www.abanet.org/rpte/public/home.html">www.abanet.org/rpte/public/home.html</a>	<b>To download a state specific AHCD:</b> National Hospice and Palliative Care Organization Caring Connections (800) 658-8898 <a href="http://www.caringinfo.org/stateaddownload">www.caringinfo.org/stateaddownload</a>
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