FINANCIAL PLANNING

Preparing a living will and other directives in advance can provide comfort to the individual and direction for the family in the event of an individual's incapacitation.

The Living Will—Do You Really Have One? A Look at Various Directives

By Michael E. Leonetti

I have often found when asking individuals whether or not they have a living will that they reply in a positive manner–"Yes, I most certainly have one."

However, after reviewing their documents, I find that they actually have a testamentary will, and sometimes a testamentary will combined with a living trust. But often they do not have a living will and many times they have confused the two concepts.

The purpose of this article is to explain what a living will is, discuss its uses, and also briefly discuss the other types of documents often associated with—or confused with—a living will, as well as other steps that may need to be considered, including the appointment of a guardian in the absence of any directives. Please note, however, that the concepts and documents discussed here involve legal issues that vary from state to state and with individual circumstances, and I highly recommend that you seek legal advice prior to addressing these areas.

The Benefits of Living Wills

The recent deaths of Richard Nixon and Jackie Onassis, the debate over healthcare reform, and the actions of Dr. Kevorkian, have resuscitated interest in a legal instrument that nearly all adults should have: a living will.

A living will is basically an individual's written declaration of the life-sustaining medical treatments he or she will allow or not allow in the event that individual becomes incapacitated. Both Nixon and Onassis had signed living wills. Onassis, terminally ill with cancer, returned to her home from the hospital in her last days in accordance with the instructions in her living will. Nixon had signed his living will before he suffered a massive stroke. His family did not have the burden of making choices without knowing his personal wishes.

Healthcare reform also has sparked renewed interest in living wills because of the high cost of dying. Approximately 30% of the total U.S. healthcare bill each year is racked up in the last six months of patients' lives. Often, treatment is given even though the patient's family and doctor know the life-sustaining efforts are futile. The family is reluctant to "pull the plug" and the doctors are reluctant to do so for fear of being sued by some member of the family.

What Is a Living Will?

The current state of medical-ethical opinion largely supports a patient's right to refuse extraordinary life-sustaining treatment in cases where the patient is terminally ill.

However, in some situations when a physician fears civil or criminal liability, he or she will not abide by the patient's wishes without a court order requiring such—often a time-consuming, costly, and emotionally draining situation for the patient and family.

The situation becomes worse when the patient is unconscious, comatose, or otherwise incompetent to participate in medical treatment decisions. Physicians are particularly reluctant to withhold life-sustaining treatment without prior court approval in such cases.

Individuals who wish to specify treatment decisions and have those decisions followed in the event they become unable to act should use one or both of the following two methods to accomplish this:

- Treatment directive, also know as a living will;
- Healthcare durable power of attorney.

Absent supportive legislative or judicial approval, a treatment directive or medical decision power of attorney is not legally binding. Nevertheless, the documents offer evidence to family, physician, and the court that the patient contemplated the situation when competent, gave serious thought to the consequences, and made a decision concerning what should be done.

The treatment directive, or living will, is a document executed at a time when

Michael Leonetti, CFP, is the president of Leonetti & Associates (708/520-0999), a fee-for-service financial planning firm based in Buffalo Grove, Ill.

the patient was competent to make such decisions. It directs that no extraordinary life-sustaining medical procedures are to be used to prolong life when it is medically determined that no hope of recovery remains.

Most states have enacted living will statutes. The details vary from state to state, but in general the document must be in writing, witnessed, notarized, and made while the adult individual is competent. The state statutes may spell out in some detail the circumstances for implementing the living will. For example, two doctors might have to certify a patient's terminal condition, the patient can't be pregnant, or if the patient is in a coma, it must have been at least seven days before life-sustaining treatment can be stopped.

Living will forms may be obtained from hospitals, or organizations such as Choice in Dying (200 Varick St., New York, N.Y. 10014). If you have special interests, see a local attorney about having a custom document prepared.

Healthcare Durable Power of Attorney

Because living wills cannot anticipate every type of medical circumstance or may be restricted by state statute, a recommended companion document is the healthcare durable power of attorney, or healthcare proxy.

This legal document allows an individual (principal) to appoint someone (agent) to make healthcare decisions on their behalf should they become unable to do so themselves. This allows more flexibility to deal with a wide variety of circumstances.

While a healthcare proxy is a form of a power of attorney, the agent is not authorized to make financial or business decisions for the principal. Usually that power is assigned to someone else through a separate document (discussed below).

Another important item one may wish to include in the medical decision power of attorney is the appointment of a person to be guardian of children in the event both parents are rendered incompetent during the same period of time. While the document may not be legally binding, it would be evidence of intent. It is important that the medical directive power of attorney appoints the same person named in the individual's will as guardian of the children in the event of common death. Of course, the will does not take effect until death but, again, the provision concerning guardianship will be evidence of intent.

The treatment directive and healthcare durable power of attorney should contain clear, unambiguous language specifically stating an individual's desires. The healthcare durable power of attorney should make reference to the treatment directive, or they may be incorporated into one document. It is recommended that you seek the advice of an attorney as to the precise language to be included in the treatment directive and healthcare durable power of attorney as well as the proper method of execution of these documents.

It's important to discuss these issues in advance with your family and your financial professional. Thinking about the unthinkable, and taking action, can prevent much heartache and agony for everyone involved.

Naming Someone to Act for You

While living wills deal with medical issues, what about personal finances during periods of incapacitation? Insurance records reveal that a 35-year-old is four times as likely to become disabled than to die before reaching age 65.

If you were struck by injury or illness, could your family gain access to bank accounts and the safe deposit box? Is someone empowered to cash checks payable to you? How would they pay pressing bills? Could they take care of your investments, make claims on your behalf, or otherwise manage your assets? A guardian, or conservator, could be appointed by a local court, of course, but the legalities might consume time and money.

Those who have done a great deal of work with older citizens recommend granting a power of attorney to a trustworthy individual, authorizing that person to act in your place in such a situation. However, an ordinary power of attorney will not be sufficient, because it becomes ineffective just when it is needed most, when the grantor becomes incapable of independent actions.

Either a durable power of attorney ("valid notwithstanding my incapacity") or a spring power of attorney ("becomes effective only when I become incapacitated") is needed. A living will or medical power of attorney is a different matter, having to do with medical decisions, and does not replace the critical need for a durable or spring power of attorney. And older people are not the only ones who need this power of attorney. Younger persons can also be struck with disabling afflictions or accidents.

It is important to give a power of attorney only to someone who can be trusted completely. The power of attorney can be canceled upon recovery, but in practice, you would have to get back all copies. That may not be easy, considering there can be copies of which you may be unaware. If the person who held the canceled power were to go to your bank to take out your savings, it is possible that bank officials may not have received notice stating that the arrangement had been voided.

Finally, it is extremely important that the power of attorney be recognized by those who are asked to honor it, such as banks and transfer agents. The well-drawn durable power of attorney will contain an exculpatory clause that frees persons who rely on it from any liability due to revocation, lack of mental competence, or death, without actual notice of such events. Such a clause will induce otherwise conservative financial institutions to accept the durable power of attorney without hesitation.

It is very important to consult your own legal counsel to determine the appropriate form, since most states have different rules.

Guardianship for the Elderly

Alzheimer's disease, while still in early stage, causes increasingly frequent memory lapses. Soon the patient will be unable to make important personal and financial decisions. Merely the onset of advanced years causes many who have managed their own business affairs for years to forget to pay major creditors, seem confused about stock portfolio, or spend large amounts of money frivolously. Naturally, heirs feel they might mismanage and dissipate the estate.

Victims might be in a coma, and likely to remain unconscious for some time. Doctors advise that immediate surgery is necessary.

What are the remedies under these circumstances in the absence of any legal directives by the individual—do these people need a guardian?

A guardian is a court-appointed surrogate decision-maker authorized to make some or all of the decisions about the care and finances of those no longer able to make such decisions for themselves. A guardianship is a drastic intervention and is usually invoked only as a last resort when surrogate decision making is clearly needed.

Once placed under a guardianship, the person (ward) typically loses many rights we take for granted, such as the right to marry, vote, hold a driver's license, and make a will. For this reason, obtaining a guardian for an incapacitated person is a complex process requiring, at a minimum, a court hearing. The laws vary from state to state, and a lawyer's help is advisable.

Unlike a power of attorney, which you must create before becoming incapacitated, a guardian cannot be appointed until after someone has become incapacitated. Although you cannot name your own guardian before one is needed, you can make your wishes known in writing and ask that they be taken into consideration should a court ever need to appoint a guardian for you. Always let those who are close to you know your wishes for future care.

The first step in determining whether a family member needs a guardian is to learn whether he or she is capable of making decisions. This usually requires examination by a physician or psychologist experienced in competency determinations.

The physician's findings should be based on a determination of functional incapacity, not on stereotypes about old age, mental illness, or physical handicaps. The examiner must recognize that everyone has a right to make questionable decisions. An elderly gentleman's desire to spend money on a woman friend does not mean he has become incapacitated.

Next, if the examination finds that a disability exists, the concerned parties may file a petition asking a court to declare someone incapacitated and to appoint a guardian. At this stage, the court may appoint an investigator to interview the alleged incapacitated person and make a report. The proposed ward must be informed of his or her rights and notified that a hearing has been scheduled.

At the hearing, the judge will review the petition, the court investigator's report, and the medical report. The judge may also hear testimony from the person filing the petition. If the alleged incapacitated person is there, he or she may be asked questions.

Proposed wards always have the right to retain an attorney and inform the court of their desire to remain in control of their lives. They are entitled to object to the petition even if they are incapable of attending the hearing.

What if it turns out that, although a person cannot handle a large estate, he is perfectly capable of meeting everyday expenses? And what if a patient comes out of a coma after a guardian has already been appointed for her? These are reasons you need the services of an attorney both upon seeking guardianship and maintaining it.

Conclusion

Hopefully, the above information sheds some light on the definition of a living will, along with the often associated legal documents when using this vehicle. Once again, however, I cannot stress enough the importance of legal counsel in this area if you feel this type of planning is of value and interest to you.