When To Share Estate Planning Documents

By Brian V. McAvoy and Geena G. Kandel

Clients often ask when they should share their estate planning documents with their family and fiduciaries. Every situation is unique, so our advice will differ from client to client. In this article we share our general guidelines for sharing documents.

Designation of Health Care Surrogate and Living Will: These two documents are sometimes referred to collectively as the "advance directive." The client is referred to as the "principal" and the person the principal is authorizing to make decisions is the "health care surrogate." The surrogate makes health care decisions when the principal cannot. The Designation of Health Care Surrogate is not the type of document that lends itself to abuse because a principal who has capacity can override the surrogate.

The Living Will only applies in a life-limiting situation. A life-limiting situation is one where the principal has a terminal condition, an end-stage condition, or is in a persistent vegetative state. The Living Will outlines what the principal wants to happen in a life-limiting situation. The surrogate is required to follow the principal's instructions as they are outlined in the Living Will.

We recommend our clients provide a copy of their Designation of Health Care Surrogate and Living Will to each potential health care surrogate. In fact, the Florida law that authorizes health care surrogates directs that "an exact copy of the instrument shall be provided to the surrogate." In the event of a medical emergency, it is critical that your surrogate have these two documents.

Durable Power of Attorney: We typically recommend clients *not* share their Durable Power of Attorney ("DPOA"), unless and until there is a need to implement it. A DPOA is a written document

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in which the client (the "principal") grants legal authority to a third party (the "agent") to handle financial and legal matters on the principal's behalf. The agent named in the DPOA is serving in a fiduciary role, meaning the agent must act in good faith and for the principal's sole benefit. The POA is effective immediately when it is signed, not just in the event of the principal's incapacity. A photocopy can be used unless the POA expressly prohibits use of a photocopy. Because the DPOA gives broad financial powers and is effective immediately, there is always a concern it could be abused by a dishonest agent. To avoid potential abuse, we recommend the DPOA not be given to the agent unless the agent needs to use it. Instead, we recommend our clients simply inform their agent of the existence of the DPOA and to contact the law firm that prepared it in the event the agent needs a copy of the DPOA.

Will/Revocable Trust: Whether to share your Will or Revocable Trust with your beneficiaries depends on your personal situation. Some clients want their beneficiaries to be familiar with their estate plan and may even involve them in the planning process. Other clients want to keep their estate plan confidential for personal reasons. For example, they may be concerned that a beneficiary will be unhappy with the amount of their future inheritance. If so, why tell them? Another reason for keeping the plan confidential is to avoid creating false expectations with a beneficiary, because the client can always change the estate plan. If a client is designating a financial institution to administer their estate, we typically recommend a copy of the Will/Trust be provided to the financial institution so that is aware of the role it will serve in the future.

Brian V. McAvoy, Esq. is a Florida Board Certified Attorney in Wills, Trusts & Estates and Geena G. Kandel, Esq. is an attorney with Roetzel