To Plan or Not to Plan…

That is the Question!

By Lynn B. Aust, Esq.

As an Elder Law attorney, one of the most heartbreaking conversations I often hear sounds something like this….

Daughter: "My widowed dad has been diagnosed with Alzheimer's and I need a Power of Attorney for him."
Attorney: "When was he diagnosed?"
Daughter: "Two years ago. The Alzheimer's has really advanced but he has good days."
Attorney: "Do you know if he has ever signed an older Durable Power of Attorney?"
Daughter: "Dad has always been a private person and has never shared anything about his business with us. We have not been able to find any documents and he doesn't remember."
Attorney: "I'm so sorry but at this point, your only option is Guardianship."

With a little bit of planning, this outcome could have easily been avoided. Unfortunately, many people believe that Estate Planning is only for the wealthy or for senior citizens. Nothing could be further from the truth. If clients own more than a car and the clothes on their backs, they have an estate. If clients want to ensure that their finances are managed properly when they can no longer manage on their own, they need a Durable Power of Attorney. And, most importantly, if clients want to ensure that their healthcare is managed properly when they can no longer do so, they need a Healthcare Surrogate Designation and possibly a Living Will.

If clients own more than a car and the clothes on their backs, they have an estate.

You will often hear professionals refer to these three documents as advance directives. Our office calls these documents the incapacity planning documents. Based on experience, we have also added a HIPAA authorization to our incapacity planning documents. HIPAA is the federal Health Insurance Portability and Accountability Act of 1996. The primary goal of the law was to make it easier for people to keep health insurance, to protect confidentiality, and to keep healthcare information secure; however, we have found that clients not only need a HIPAA compliant Durable Power of Attorney and Healthcare Surrogate Designation but also a stand-alone HIPAA authorization.

A Durable Power of Attorney (which is different from a Power of Attorney), gives authority to another person to handle the signer's finances, even if incapacity occurs to the signer. What makes the Power of Attorney Durable is specific language in the document that refers to Florida Statute Chapter 709. *(Fla. Stat.§709.2104(2014) Durable power of attorney.—Except as otherwise provided under this part, a power of attorney is durable if it contains the words: "This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes," or similar words that show the principal's intent that the authority conferred is exercisable notwithstanding the principal's subsequent incapacity.)*

In Florida, we experienced significant law changes for Durable Power of Attorney documents in 2011. These changes were sweeping and the details are outside the scope of this article. But suffice it to say, if

you have clients with documents older than 2011, they may want to have their estate planning attorney review them for current law compliance. If their documents are older than 2004, these documents will not be HIPAA compliant and clients should definitely have new Durable Powers of Attorney prepared.

A Healthcare Surrogate Designation, as mentioned earlier, permits clients to designate someone to make their healthcare decisions, if they are unable. These healthcare decisions are limited in scope. Some examples include: choosing a medical facility, choosing a doctor, and deciding which medical tests will be performed. Typically, Healthcare Surrogate Designations are not used for end-of-life scenarios but for ongoing healthcare decisions.

A Living Will is a legal document that allows clients to memorialize, in writing, their end of life decisions. Often a Living Will is confused with a Last Will and Testament and a DNR. A Last Will and Testament is the roadmap for the Probate Court that specifies who will inherit the decedent's assets after death. A Do Not Resuscitate, often referred to as a DNR, is a hospital order that is authorized by the family of the person who is ill or injured. A Living Will is directed by a client who typically is not in a life threatening situation. Living Wills do not designate a person to make the decisions for the client but, instead, Living Wills designate a person to institute the client's pre-defined wishes for end-of-life scenarios.

A Living Will becomes effective only when the client is incapacitated *and* one of three end-of-life scenarios exist. The three scenarios are terminal conditions, end-stage conditions, and persistent vegetative states.

- **A terminal condition is** a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.
- **An end-stage condition is** an irreversible condition caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and for which, to a reasonable degree of medical probability, treatment of the irreversible condition would be ineffective.
- **A persistent vegetative state is** a permanent and irreversible condition of unconsciousness in which there is (a) the absence of voluntary action or cognitive behavior of any kind or (b) an inability to communicate or interact purposefully with the environment.

Some law firms combine the Durable Power of Attorney and the Healthcare Surrogate Designation. Our firm does not for three reasons.

1. First, many times the client does not want the same people designated in the power of attorney and the healthcare surrogate documents.
2. Second, for privacy reasons, many clients don't want their healthcare providers to have information about who will handle their finances and vice versa.
3. Finally, if a law change causes the document to be ineffective, the client loses two important safeguards to avoid guardianship.

Guardianship is time consuming, expensive, intrusive, and completely avoidable if clients plans properly while they are still able. The guardianship process is two-fold. The first part is to determine the capacity or lack of capacity of the person needing help, called the *Ward*. The court appoints a three-member panel of mental

continued on page 16

continued from page 15

health experts to evaluate the ward and report back to the court. The court also appoints an attorney for the ward to ensure the ward's rights are protected. Although the court appointed mental health team and attorney are professionals, the ward will have four strangers asking them if he/she knows who the president is, which can be disturbing if he/she has dementia and/or Alzheimer's.

The court requires proposed guardians to complete an application, a fingerprint scan, and a background check. If the proposed guardian is a minor (under 18 years of age), an incapacitated person, or a convicted felon, he/she is disqualified from serving as a guardian. If the ward did not set up a preneed guardian designation and if his/her children cannot agree who will serve, many times the court will appoint a professional guardian for the ward.

It is wonderful that so many people are blessed with longer lives but with longevity comes a higher risk of mental and/or physical incapacity. If the public understood the importance of having valid Durable Power of Attorney and Healthcare Surrogate documents in place, then guardianship cases would be greatly reduced. The cost of these documents compared to the cost of Guardianship is a factor of ten. It is impossible to accurately calculate the enormous benefit to the family and the client when these documents are in place and guardianship is avoided.

Lynn B. Aust established the Aust Law Firm in 2002. Her practice areas include Estate Planning, Probate, Guardianships, Business and Medicaid Planning. She graduated Cum Laude from Stetson University College of Law and received her undergraduate degree in Journalism/Public Relations from the University of Florida. Lynn serves as a Vitas Tax Volunteer for low income individuals, and as a Life Mentor for The Jobs Partnership of Florida. Her office also sponsors a booth at the annual "Make 'M Smile" event hosted by Nathaniel's Hope.

doveattorney@austlaw.biz