TAMPA ESTATE PLANNERS
Law Firm

THE CLIENTS ROLE IN ESTATE PLANNING

The role of Tampa Estate Planners is to serve your life and estate planning needs. It is important that you have the right and current documentation to meet your legal needs both before and after your death.

This writing is to help laypeople better understand the estate planning process and to assist them in making the decisions necessary to establish their own customized life and estate plan.

Attorneys can draft the proper and necessary legal documents, but much of the decision-making in the life and estate planning process rests on the shoulders of the client.

None of us want to think about dying, but death is inevitable for all of us. Our job is to make sure that you are prepared for both a long life, but to be ready for death at anytime.

Sometimes death comes slowly and results in diminished (mentally incompetent) capacity over a period of time. For that, we all need to be prepared legally for both life and death.

Every good estate plan is built upon the foundation of the essential estate planning documents that cover all three phases of your life: while you're alive and well, if you become disabled, and after you die.

Below are the various documents Tampa Estate Planners will prepare for you and the information we need from client's to do so:

DURABLE POWER OF ATTORNEY

The Durable Power of Attorney (DPOA) is an important part of planning for incapacity as it ensures someone can handle an incapacitated person's assets, the same as the grantor could, without the need to create a guardianship. Specific powers must be granted. At Tampa Estate Planners, we customarily write DPOA's with broad powers, so our clients need to decide if there are powers they do not want to grant.

A Durable Power of Attorney is a statutorily enhanced agency agreement by which a principal designates an agent to act for him or her in a limited or general capacity.

A Durable Power of Attorney is different than a common law power of attorney, which may be given for a specific purpose, such as signing for a real estate closing and terminates in the event of the principal's mental incapacity. The Durable Power of Attorney remains in effect (unless specifically revoked by the principal) until the principal's death. Unless restricted by the principal, DPOA provides that the designated attorney-in-fact may do all things legally that the principal might do. In other words the designated attorney-in-fact stands in the place of the principal person.

The Durable Power of Attorney must be in writing and executed with the same formalities required for the conveyance of real property. To be effective as a Durable Power of Attorney, the instrument must contain specific language evidencing that it is intended to remain effective despite the principal's incapacity.

Florida substantially re-wrote the DPOA law in 2012, so most DPOA's written prior to that date are probably ineffective and should be reviewed.

Those who may serve as an attorney-in-fact are:

- **Any natural person who is 18 years or older.**
- **A financial institution with trust powers having a place of business in Florida and that is authorized to conduct trust business in Florida.**

Client's Role:

- **Designate who or whom will serve as your attorney-in-fact. You may grant multiple persons.**
- **Determine if the client wants any restrictions on actions that can be taken by the attorney-in-fact.**
- **Determine any special instructions.**

DESIGNATION OF HEALTH CARE SURROGATE

This document allows a competent individual to designate another person (the Surrogate) to make health care decisions if he or she becomes unable to make (or express) those decisions. The Health Care Surrogate Designation must be signed by two witnesses and the principal person. The person designated as the Surrogate cannot act as a witness and at least one of the witnesses cannot be the principal's spouse or a blood relative.

The Surrogate's authority commences upon the determination that the principal lacks the capacity to make health care decisions. If the attending physician and a second

physician agree that the principal lacks such capacity to provide informed consent, those findings are recorded in the principal's clinical record and the Surrogate assumes responsibility for health care decisions.

The Surrogate is required to make all health care decisions for the principal, consult expeditiously with appropriate health care providers, and provide consent for all medical procedures and treatment. The Surrogate must be provided access to the principal's clinical records and all information regarding the principal's income and assets, including banking and financial records, to the extent necessary to apply for public benefits. The Surrogate may also authorize release of the principal's medical information and clinical records to other appropriate persons to assure the continuity of the principal's care, and may authorize the transfer and admission of the principal to or from a health care facility.

Client's Role:

- **Determine who or whom will have the power to serve as their Surrogate.**
- **Designate alternates in case the designated person cannot serve.**

LIVING WILL

A Living Will evidences a person's choices with regard to the withholding or withdrawing of life prolonging procedures in the event of incapacity, a terminal condition, a persistent vegetative state, or an end-stage condition. A Living Will must be signed by the principal and two witnesses, one of whom must not be the spouse or a blood relative of the principal person. The Living Will may designate an individual to provide consent for withholding, withdrawing, or continuing of life-prolonging procedures.

In the absence of a Living Will, decisions could be made by the person's Health Care Surrogate, but it is extremely helpful to have evidence of the person's desires if a "life-prolonging" situation arises.

Client's Role:

- **Determine what provisions you want to select regarding end of life care, such as life support, etc.**

DESIGNATION OF PRENEED GUARDIAN

The Declaration Naming Preneed Guardian allows a competent individual to name someone to serve as his or her guardian in the event of incapacity. The written declaration must identify the declarant and the preneed guardian, and must be signed by the declarant in the presence of at least two attesting witnesses. The declarant can file the designation with the Clerk of Court, who is required to produce the declaration to the Court if a Petition for Incapacity is filed. Under Florida Law, the Designation creates a rebuttable presumption that the person named is entitled to serve as guardian; however, the court is not bound to appoint that person if he or she is not qualified to serve as guardian.

Client's Role:

- **Determine if you want to do a preneed guardian designation.**
- **If so, determine whom you wish to designate.**

HIPPA RELEASE

In response to growing concerns about keeping health information private, Congress passed the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The legislation includes a privacy rule that creates national standards to protect individuals' personal health information.

HIPAA requires health care professionals to protect privacy and create standards for electronic transfers of health data. HIPAA came about because of the public's concern about how health care information is used. HIPAA gives patients more control over their own health information. HIPAA requires health care providers to follow certain rules to protect the privacy of patients' health information. For instance, employees are not allowed to access information on patients unless they need the information to perform their jobs. You may want to execute a HIPPA release in favor of one or more persons to erase any doubt about the right to gain access to your medical information.

Client's Role:

- **Determine to who or whom you want to give a HIPPA release.**

WILL

A will or testament is a legal declaration by which a person, the testator, names one or more persons to manage his or her estate and provides for the distribution of his property at death. The Will needs to be fully inclusive to cover everything in your estate at the time of death. It will not control assets passing by operation of law or contract. Examples would be jointly held bank accounts or beneficiaries of life insurance policies or designation of beneficiary under annuities or deferred compensation plans. It does not include assets previously transferred to a revocable or irrevocable trust. The Will includes only the assets in the decedent's name at the moment of death.

If an estate's assets are subject to probate, a court proceeding will oversee the wind-up of the decedent's affairs, management of the assets, payment of obligations from estate assets including all fees and debts and then ultimately the distribution of remaining assets to those recipients named in the will.

Client's Role:

- **Determine who or whom will serve as your personal representative (executor) and what, if any restrictions will be placed on their service.**
- **Determine the beneficiaries of your estate and the amount (real or personal property, cash or a percentage of your estate) to be received by each beneficiary.**
- **If a determination is made that you do not want one or more beneficiaries to receive any or all of their respective bequest contained in your will at the close of probate, then you will need to include a pour-over provision to a trust.**

TRUST

A trust is a written instrument which creates a fiduciary relationship in which one party, known as a grantor, gives another party, the trustee, the right to hold title to property or assets for the benefit of a third party, the beneficiary.

There are two types of trusts:

1. **Living Trust (inter-vivos): A trust that is in effect during the grantor's lifetime.**
2. **Testamentary Trust: A trust that is created through the will of a deceased person.**

Living trusts may be made as revocable (which can be altered or revoked by the grantor) or irrevocable (which cannot be altered or revoked by the grantor). Family and tax decisions will drive the revocable vs. irrevocable decision.

Trusts made during lifetime must be funded, either by lifetime transfers of assets or through a pour-over provision in a will to be effective. An unfunded trust is only a hollow shell and of no value in the estate planning process. Studies show that more than three out of four people who have trusts drafted fail to fund them.

Once the grantor of a revocable trust is deceased, the trust becomes irrevocable. That means that it cannot be changed and is controlled by the provisions of the trust and the assets that are included in it.

Funding a trust involves more than merely intending to fund or even a memo or other writing designating assets in the trust. Legal title to things like real property, investment accounts, bank accounts, etc. must actually be changed to the ownership of the trust in order for such assets to be a part of the trust.

Testamentary trusts spring from a will which has a "pour over" provision that provides for all or part of the designated bequests to be managed in trust for later distribution. What that means is that there is not a trust separate and independent of the will. The trust is created by a provision so outlining in the will and providing that all or a portion of the assets of the estate "pour over" into a trust which then continues to exist after the probate of the will has closed. In such situations, only estate assets can be a part of the trust and the drawback is that the estate has to be probated, a process that is lengthy and expensive.

Always remember that a testamentary trust has to be probated. Assets funded into a living trust during a person's lifetime are not subject to probate.

Also, bear in mind that probating a will is a matter of public record. Provisions of a will, the assets in a person's estate and other matters can become known to those who wish to check the public records as to what was said in the will.

The administration of a trust is personal and private.

Client's Role:

- **Determine if a life-time or testamentary trust is desired either to defer the receipt of certain beneficial interests or to avoid probate.**
- **Determine who or whom will serve as initial and subsequent trustees.**
- **Determine the method and assets for funding the trust.**
- **Determine the method and time frame for asset distribution.**

We trust this review has been helpful and will better prepare you to understand the role and scope of your estate planning and to better assist you in the preparation of your custom estate plan.

For any or all of the above, client needs to provide:

1. **Full legal name as it appears on your legal documents and any other alias names, including maiden or previously married names or nicknames.**
2. **Current residential and mailing address**
3. **Date and place of birth**
4. **Social security number**

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