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A GUIDE TO THE NORTH CAROLINA LIVING WILL

Recent developments in the news have brought the need for a Living Will back to the forefront of estate planning. Most notably is the *Schiavo* case. While its outcome will have a significant impact on "Right-to-Die" legislation, an underlying point concerns the Living Will. A valid and properly executed Living Will can prevent disputes among family members and make the wishes of the Living Will-maker known even though the maker is unable to speak for him or herself. Although a Living Will may reduce the likelihood of a dispute among family members, the first and most important step in creating a Living Will is to discuss your wishes and desires with your family.

THE LIVING WILL

Despite its name, a Living Will is not a "will" in the traditional sense. Although the term Living Will may indicate that it is a will, in reality, it is more similar to a Power of Attorney ("POA") than a will. The Living Will is designed to address healthcare issues while wills and trusts deal with financial and legal issues. A Living Will is not a substitute for a will, nor is a will a substitute for a Living Will. The purpose of a Living Will is to allow you to make decisions about life support and directs others to implement your desires in that regard. Generally, a Living Will directs medical and healthcare personnel to not make attempts to prolong your life should you become permanently incapacitated or in a terminal and incurable state. In North Carolina, the Right to a Natural Death Act says you can execute a Living Will and it will be honored by the healthcare personnel taking care of you. If you do not have a Living Will and you are unable to make your medical decisions, someone else must decide for you. Before life support treatment can be withheld or withdrawn, two doctors must agree in writing that you are terminally and incurable ill or in a persistent vegetative state. Then, extraordinary means or artificial nutrition or hydration may be withheld or stopped with the permission of:

- a) your guardian,*
- b) your healthcare agent,*
- c) your spouse, or*
- d) the majority of your parents and children, if available*

Creating and executing a Living Will gives you power and control over the healthcare services you receive and expresses your desire to be treated in the event of incapacitating injury.

THE DURABLE POWER OF ATTORNEY FOR HEALTHCARE

Another document often executed contemporaneously with a Living Will is the Durable Power of Attorney for Healthcare ("DPOAHC"). It is a good idea to have both a Living Will and a DPOAHC because of the different role each instrument plays. A Durable Power of Attorney ("DPOA") is a document that people have drawn up to give someone else the power to handle their business affairs for them should they become unable to act for themselves. A DPOAHC does the same thing as a DPOA, but specifically regarding your medical care. The DPOAHC allows your agent to begin making your healthcare decisions for you when your physician determines that you are unable to make or communicate them yourself.

A Durable Power of Attorney for Health Care is used to appoint an agent to make health care decisions for you and usually includes the power of the agent to make decisions regarding terminal conditions and whether to prolong life. However, if you have a Living Will, the directions of the Living Will control over the Durable Power of Attorney, because you have already made the decision of what is to be done under certain circumstances. Many people use a Durable Power of Attorney for Health Care and a Living Will because they do not want to place the agent in the position of making decisions regarding choice in dying. The agent still has authority to make other health care decisions for you when you cannot make the decision yourself in situations where you need medical attention but are not terminally ill or in a permanent coma.

THE NORTH CAROLINA LIVING WILL

Like most other states, North Carolina recognizes the Living Will. However, for a Living Will to be valid, it must comply with the North Carolina statutes. North Carolina requires the following for a Living Will to be valid:

- 1) *You must be at least 18 years old and of sound mind when you sign it.*
- 2) *You must express your desire that you do not want your doctor to use extraordinary means or artificial nutrition or hydration to keep you alive if your condition is terminal and incurable or if you are in a persistent vegetative state.*
- 3) *You must state that you know your Living Will allows your doctor to withhold or stop extraordinary medical treatment or artificial nutrition or hydration.*
- 4) *You must sign your Living Will in the presence of two qualified witnesses.*
- 5) *Your Living Will must be certified by either a notary public or clerk of superior court.*

WITNESSES TO THE LIVING WILL

You must sign your Living Will in the presence of two witnesses:

- a) *who are not related to you or your spouse;*
- b) *who will not inherit property from you, either under your will or under the laws that determine who will get your property if you do not have a will;*
- c) *who are not your doctor, your doctor's employees, or the employees of your hospital, nursing home or group-care home; and*
- d) *who do not have a claim against you.*

A notary public or a clerk or assistant clerk of superior court must certify your Living Will.

EFFECT OF A NORTH CAROLINA LIVING WILL

The Living Will gives your doctor permission to withhold or discontinue life support systems under two conditions:

- a) *You must be terminally and incurably ill, or*
- b) *you must be diagnosed as being in a persistent vegetative state.*

If two doctors diagnose one of these conditions, your doctor may withhold or discontinue extraordinary medical treatment or artificial nutrition or hydration as directed by your Living Will. A terminal and incurable condition is defined as a condition for which the administration of medical treatment will only prolong the dying process and, without administration of these treatments or procedures, death will occur in a relatively short period of time. You are considered to be in a persistent vegetative state if you have had a sustained, complete loss of self-aware cognition, and you will die soon without the use of extraordinary medical treatment or artificial nutrition or

hydration. Extraordinary means or medical treatment includes any medical procedure which artificially postpones the moment of death by supporting or replacing a vital bodily function. Artificial nutrition or hydration describes the use of feeding tubes or other invasive means to give someone food or water. The North Carolina Right to a Natural Death Act specifically states that the withholding or discontinuance of any extraordinary means of keeping a patient alive, or the withholding or discontinuance of artificial nutrition and hydration, shall not be considered the cause of death for any civil or criminal purpose, nor shall it be considered unprofessional conduct.

REVOCATION OF A NORTH CAROLINA LIVING WILL

You may revoke your Living Will by communicating this desire to your doctor. You may use any means available to communicate your intent to revoke. Your mental or physical condition is not considered, so you do not need to be of sound mind. Someone acting on your behalf may also tell your doctor that you want to revoke your Living Will.

Revocation is effective only after your doctor has been notified.

Destroying the original and all copies of your Living Will may revoke your Living Will as a practical matter. However, if you have discussed this issue with your doctor, be sure to tell your doctor that you have revoked your Living Will. If you sign a new Living Will, be sure to revoke all prior Living Wills that may be inconsistent with your new Living Will.

STORING YOUR LIVING WILL

Keep the original in a place where you or your family members may find it easily. Some lawyers suggest that you sign several copies and have each one witnessed and certified. Then, you may give an original to each of the appropriate people. However, if you change your mind and revoke your Living Will, make sure that you destroy all the original copies. (Note: In North Carolina, signing a new Living Will does not revoke a previously signed Living Will.)

If you have named a healthcare agent, give him or her a copy of your Living Will. You may appoint a healthcare agent with a healthcare power of attorney or with a general durable power of attorney. Ask your lawyer for details.

Give a copy of your Living Will to your doctor and any medical facility where you have regular appointments. Give a copy of your Living Will to your family so they understand your wishes. Also, carry a wallet card stating that you have a Living Will, where the original is located, and who to contact to get the original.

If you put the original of your Living Will in a lock box or safe deposit box, make sure someone knows where it is and has access to it. Otherwise, your Living Will may be found too late.

Decisions about your healthcare are very important and very personal. Neglecting to adequately plan for unforeseen events that affect your medical well-being can result in others making choices for you that may not coincide with your desires. The first, and most important, step towards avoiding this is discussing your wishes with family or those who could be charged with making this type of decision for you. Once this has been discussed, you are ready to document your desires in a legally effective instrument. A skilled attorney can help to make certain that your desire will be communicated if you become unable to speak for yourself.

For more information, please contact our office to learn how we can help plan your Living Will, as well as your other estate planning needs.