ESTATE PLANNING FOR

THE INCAPACITY OF THE CLIENT

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A client may be incapacitated in several ways. Usually for the estate planner this means the client can not make either medical decisions or business decisions for himself. Typically someone else must be empowered in advance to make the decisions, or the client must have made the decision in writing in advance, while he was healthy. The estate planners job is to help the client identify which of these techniques the client may want to put into place while the client is healthy.

A. Planning For Health Care Decisions

Health care decisions are generally determined in advance by one of two methods, a power of attorney or a living will.

1. Powers Of Attorney

There are two kinds of power of attorney, a general power of attorney and a durable power of attorney. In both cases the principal, the one giving the power of attorney, must be alive and competent when the power of attorney is signed. IN both instruments, someone is named as the attorney-in-fact or simply attorney, for the principal. This means that the attorney can do anything the principal could with respect to the principal's property or with respect to the principal's health care.

The difference between the two types of powers of attorney is very important in the case of incapacity of the principal. A general power of attorney is only as good as the principal. If the principal becomes incapacitated, for example has a stroke and is unconscious, but alive, the general power of attorney is no longer effective. The attorney has no authority to do anything for the principal, just when the principal needs it most.

The durable power of attorney was created to deal with this problem. The Uniform Durable Power of Attorney Act, 58 O.S. Section 1071 et seq., provides in Section 1702,

"A durable power of attorney is a power by which a principal designates another his attorney-in-fact in writing and the writing contains the words 'This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time'".

The durable power of attorney does survive the principal's incapacity, so the attorney still has the full authority to deal with the principal's property and person as provided in the power of attorney. If the client is nervous about giving someone else the power to buy and sell all his property while he is still competent, the law provides for what is called a springing power. The same section also provides that language can be used which provides, "This power of attorney shall become effective upon the disability or incapacity of the principal".

Section 1071.2 B provides for the attorney to make health care decisions. "B. The power may grant complete or limited authority with respect to the principal's: 1. Person, including, but not limited to, health and medical care decisions on the principal's behalf, but excluding:

a. The execution, on behalf of the principal, of a Directive to Physicians, an Advanced Directive for Health Care, Living Will, or other document purporting to authorize life-sustaining treatment decisions, and

b. To make life-sustaining treatment decisions unless the power complies with the requirements for a health care proxy under the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act" (63 O.S. Section 3101.1 et seq.).

2. Living Will

A living will is not really a will, since a will speaks only at death. A living will speaks for the individual, during the individual's lifetime, when the individual is incapacitated and cannot speak for himself or herself. Typically a living will is used when the individual does not want to have life sustained artificially. The problem arose when medical science developed the ventilator and the NG tube, to keep a patient breathing and taking food and water, even though the individual had no conscious control of those functions, or was entirely unconscious, and not breathing naturally. Now patients and families were faced with new types of decisions. One of the consequences of the decisions often was financial. If the individual was kept on artificial life support in the hospital, the hospital and doctor expenses often ate up the individual's assets and the individual had nothing to leave to his or her children, but huge debts incurred keeping the individual alive. Some individuals felt very guilty about this, and did not want to be kept alive this way. However, medicine is dedicated to saving lives, so if these machines would keep a person alive, the Doctors felt duty bound to do it. They also did not want

to get sued, if they did not provide a readily available way to keep the family's loved one alive.

The answer to all this came in the form of a law, which gave every individual the right and opportunity to state in writing whether life sustaining measures were to be taken, or food and water was to be withheld. In addition the act provided that doctors who followed these directions would not be liable for malpractice or murder. The law, the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act" (63 O.S. Section 3101.1 et seq.), limits its application to two narrow cases. The first is when the individual is terminally ill. Terminal illness is defined as when the individual's attending physician and one other physician have determined that the person will die within six (6) months, regardless of what medical science does. The second case is when the individual is persistently unconscious, so that the individual is unaware of self and environment.

The act provides a form for the living will, which is addressed to the doctors, and states that the individual will be administered medicines for pain. The act requires the individual to separately sign for withholding life-sustaining treatment and for withholding food and water, and provides for other special instructions. These signatures are required separately for the terminally ill case and for the persistently unconscious case. The individual has a large number of choices, and can fit the form to his or her desires.

The next section of the form provides for appointment of a health care proxy, who may be empowered to make these same decisions for the individual. Successor health care proxies can also be appointed. The same signing requirements for the two types of cases are made.

The form provides for some other decisions, including designation of anatomical gifts, if the person so chooses. The individual can designate the whole body or specified body parts.

The form must be signed by the individual, and witnessed by two witnesses, however, it does not need to be notarized. This is an advantage, because it is often difficult to find a notary, when the form needs to be signed. If it is signed in the estate planner's office, there probably will be a notary available, but it is not necessary for this form.

A copy of the full form is included at the end of this chapter as Exhibit "A".

B. Avoiding Probate: Predisability Planning Avenues

Probate can be avoided by use of a trust. The trust describes what is to be done with the decedent's property after the decedent dies. Therefore there is no need for a probate court to decide what to do with the property. We do not need to have a will legally determined by a court to be the official will. We already know that the official writing is the trust , which the decedent set up during his life time. A will does not speak until death, but a trust functions as soon as it is set up. When a trust beneficiary dies, we simply look to the trust instrument to see who is the next beneficiary in line.

There are two general types of trusts that can be used, a revocable trust and an irrevocable trust.

1. Use of Revocable Trusts

All trusts in Oklahoma are revocable, unless specifically, in writing, are made irrevocable, 60 O.S. Section 175.41. When a trust is revocable, it can be

completely undone or revoked, and the property returned to the person who created the trust, the trustor, settlor, grantor, or trust maker. A revocable trust can also be amended by the trustor. This power to amend or revoke, means the trustor has really not given the property away. He still controls it. Therefore when he transfers his assets to the trust, it is not a completed gift, so no gift tax is due. He keeps control of it during his lifetime, so it is included in his gross estate for estate tax purposes at death. In this respect, for tax purposes, a revocable trust is no different from a will.

However, the revocable trust has two big advantages over durable power of attorney and a will. It avoids a living probate and a death probate. The living probate is an expensive guardianship, which may become necessary if the client becomes incapacitated and property must be sold. For example if real property is owned in joint tenancy, and one owner is incapacitated, the property cannot be sold, because both signatures are required. However, if the property is owned by a trust, the trustee or successor trustee can sign the deed. The expensive, public guardianship, living probate, is avoided.

In the case of death, if the individual dies owning the property in his own name, it must be probated, whether there is a will or not. If there is no will, it will be distributed by the probate court according to the law of descent and distribution, 84 O.S. Section 213. However, with a revocable trust, probate at death can be completely avoided. The secret is to be sure all the individual's property has been legally transferred to the revocable trust. Then the trust determines how his property will be distributed. There is no need for a probate court. Even if there is the usual pour-over will, it will not be needed, so it will never be filed in the probate court.

A durable power of attorney is supposed to do as well as a revocable trust in the event of incapacity during lifetime, however there are some practical considerations that favor the revocable trust. The durable power of attorney may work for real estate transactions, but many securities firms will not accept it, fearing it may have been revoked, and they do not know about it. However, the revocable trust has no such difficulty for them. They are used to dealing with revocable trusts and trustees, so securities transactions are routine with w revocable trust. Another benefit, if the client who would be the principal under a power of attorney, instead chooses to set up a revocable trust with himself and the person he would have made attorney-in-fact as co-trustees, then he can watch the other person more closely through the operations of the trust, and perhaps keep tighter control of what happens to his property. He can choose what areas will require one trustee's signature and what areas will require both trustees' signatures.

The client can also provide for what will happen to his property after his death, and have the full range of trust options to control the use of his property long after his death. The length of time he may control in this way varies from state to state, but is usually limited to the perpetuities period or is unlimited. In Oklahoma it is limited to the perpetuities period, "lives of beneficiaries in being at the creation of the estate and twenty-one years thereafter", 60 O.S. Section 175.47.

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2. Role of Irrevocable Trusts

In one important way the irrevocable trust is the opposite of the revocable trust. With a revocable trust, the trustor continues to have control of the trust

property. With an irrevocable trust the trustor loses control of the trust property. Once the trust is set up, it cannot be changed. Once the property is transferred to the irrevocable trust, the trustor cannot get the property back. From then on, the property must be dealt with according to the terms of the trust, not the later ideas of the trustor.

This change of control has important tax implications. With control goes estate tax, but not gift tax. However, if the trustor is going to avoid estate tax by transferring property into an irrevocable trust, he will incur a gift tax, because he has made a completed gift. Usually a client will use an irrevocable trust either for tax purposes, or to be sure no change occurs to the distribution of the property once put into the irrevocable trust.

The most popular irrevocable trust is a credit shelter trust. This trust becomes irrevocable upon the death of the first of a husband and wife to die. Typically it has just enough property in it to completely absorb the federal estate tax unified credit, so although the property in the credit shelter trust is taxable in the decedent';s estate, the unified credit just offsets the tax. The rest of the estate goes to the surviving spouse, and typically qualifies form the marital deduction, so there is no federal estate tax in the first estate. When the second spouse dies, all the property in the credit shelter trust is not included in her taxable estate, because it is in an irrevocable trust over which the surviving spouse has no control.

The part that goes to the surviving spouse can also be put in trust, so the spouse cannot control it, or change it. This involves an irrevocable trust called a qualified terminable interest trust (QTIP). The terms of the trust allow an election to be made on the estate tax return of the first decedent's estate, so that the

property in this trust qualifies for the marital deduction, although eh surviving spouse does not control it. Then the assets of this trust are taxed in the surviving spouses estate as if they had received the marital deduction, because the surviving spouse controlled them.

Another type of irrevocable trust that is popular is an irrevocable life insurance trust (ILIT). This trust is typically used to provide large insurance proceeds upon the death of the client, which are not taxable in the client's estate, because they are owned by the irrevocable trust, over which the client has no control. The insurance proceeds can be used to buy assets out of the decedent's estate, such as illiquid real estate properties or a family farm or family business. The irrevocable trust can have the same provisions as the will or revocable trust, so the property goes to the same people, but without estate tax on the insurance proceeds. Irrevocable trusts can also be used a wealth replacement trusts in connection with a charitable remainder unitrust (which is also an irrevocable trust). The client transfers a large portion of his estate to a unitrust. He and his wife get the income for their joint lives and the life of the survivor, for example, and upon the death of the survivor, the charity gets all the property in the trust, and there is no estate tax. The children might not be too happy with this result, since they get none of the trust property. The ILIT comes to the rescue by providing a large cash payment from insurance proceeds owned by the irrevocable insurance trust. The proceeds are paid to the ILIT upon the death of the survivor of the parents. When the charity is getting the trust assets, the children are getting cash.

There are many uses for both revocable and irrevocable trusts. In small estates, the revocable trust can avoid both kinds of probate, and get the client

and the family used to operating the trust. In larger estates, specific estate planning techniques using additional trusts such a irrevocable insurance trusts and charitable trusts may be indicated. If the client wants to transfer property and avoid estate tax by using grantor retained annuity trusts (GRATS), or qualified personal residence trusts (QPERT), these are also irrevocable trusts that can be very useful in estate planning.

The role of trusts is very important in estate planning. The use of trusts, both revocable and irrevocable is limited only by the imagination of the estate planner and the willingness of the client.

C. Advising The Dying Client

The first concern is to respect the client and his or her struggles with the finality of death. It comes to all, but many are not ready, especially the young, who rarely think seriously about it, and generally prefer to deny that it will happen to them anytime soon. The role of the estate planner is to honor the dying person and to help the client do with property and people what the client wants to be done. If the client is elderly, the client has thought about death many times, and has often come to terms with it. Therefore death is not a scary topic to be avoided. The sensitive estate planner can help the dying client by assuming the same attitude toward death, namely that it is a fact of life, which must be planned for and dealt with just as taxes are. If the estate planner can be comfortable, considerate and professional, even matter-of-fact, in talking about death, this will make it easier for the elderly client to do the necessary estate planning work. Yes death is going to happen soon. Now what can we do to get the property

transferred and the other things accomplished that the client wants done. Focus on doing the estate planning work.

The client may want some special funeral arrangements, or to leave his or her body to science, or make an anatomical gift. The client usually has no idea how to do these things, but earnestly wants them done. It gives them a sense of continuing control even as they are dying. The estate planner can be very helpful.

If the client is still competent, then a living will or advanced directive to physicians should be considered. If there are property considerations as to who should get what property, trusts, or trust amendments or a will or codicil should be considered. If there are estate and gift tax concerns, the estate planner should identify them and show the client ways to deal with them to the extent possible without violating issues involving transfers in contemplation of death, both federal and state. If nothing can be changed, the tax and inheritance results may be able to be changed by disclaimers. If the dying client knows this and the family has planned for it, that may ease the dying client's mind that the estate will turn out as the client wants. That is a reason to talk about disclaimers while the client is still alive and able to understand their effect.

Estate planning for the incapacitated client can be difficult, but there are specific tools and ways to help both the client and the family reach reasonable and desirable results. This is a very valuable service that the estate planner can perform at a difficult time in the life of a family. You can help bring the family to peace about the property, money and tax issues. Then they can concentrate on the personal issues involved in the process of dying, death and the survivors' lives thereafter.

EXHIBIT A

ADVANCE DIRECTIVE FOR HEALTH CARE

I, JOE C. CLIENT, being of sound mind and eighteen (18) years of age or older, willfully and voluntarily make known my desire, by my instructions to others through my living will, or by my appointment of a health care proxy, or both, that my life shall not be artificially prolonged under the circumstances set forth below. I thus do hereby declare:

I. Living Will

a. If my attending physician and another physician determine that I am no longer able to make decisions regarding my medical treatment, I direct my attending physician and other health care providers, pursuant to the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act, to withhold or withdraw treatment from me under the circumstances I have indicated below by my signature. I understand that I will be given treatment that is necessary for my comfort or to alleviate my pain.

b. **If I have a terminal condition:**

(1) I direct that life-sustaining treatment shall be withheld or withdrawn if such treatment would only prolong my process of dying, and if my attending physician and another physician determine that I have an incurable and irreversible condition that even with the administration of life-sustaining treatment will cause my death within six (6) months.

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JOE C. CLIENT

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) that will only prolong the process of dying from an incurable and irreversible condition is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition and hydration will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding or withdrawal of artificially administered nutrition (food) and hydration (water).

______________________________ **JOE C. CLIENT**

(3) I direct that (add other medical directives, if any)

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JOE C. CLIENT

c. **If I am persistently unconscious:**

(1) I direct that life-sustaining treatment be withheld or withdrawn if such treatment will only serve to maintain me in an irreversible condition, as determined by my attending physician and another physician, in which thought and awareness of self and environment are absent.

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JOE C. CLIENT

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) for individuals who have become persistently unconscious is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition and hydration will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding or withdrawal of artificially administered nutrition (food) and hydration (water).

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JOE C. CLIENT

(3) I direct that (add other medical directives, if any)

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JOE C. CLIENT

II. My Appointment of My Health Care Proxy

a. If my attending physician, another physician, both determine that I am no longer able to make decisions regarding my medical treatment, I direct my attending physician and other health care providers pursuant to the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act to follow the instructions of JANE J. CLIENT, whom I appoint as my health care proxy. If my health care proxy is unable or unwilling to serve, I appoint RONALD R. CLIENT as my alternate health care proxy with the same authority. My health care proxy is authorized to make whatever medical treatment decisions I could make if I were able, except that decisions regarding life-sustaining treatment can be made by my health care proxy only as I indicate in the following sections.

b. **If I have a terminal condition:**

(1) I authorize my health care proxy to direct that life-sustaining treatment be withheld or withdrawn if such treatment would only prolong my process of dying and if my attending physician, another physician, both determine that I have an incurable and irreversible condition that even with the administration of life-sustaining treatment will cause my death within six (6) months.

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JOE C. CLIENT

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition (food) or hydration (water) will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding or withdrawal of artificially administered nutrition and hydration.

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JOE C. CLIENT

(3) I authorize my health care proxy to (add other medical directives, if any)

____________________________________ JOE C. CLIENT

c. **If I am persistently unconscious:**

(1) I authorize my health care proxy to direct that life-sustaining treatment be withheld or withdrawn if such treatment will only serve to maintain me in an irreversible condition, as unanimously determined by my attending physician and another physician, in which thought and awareness of self and environment are absent.

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JOE C. CLIENT

(2) I understand that the subject of the artificial administration of nutrition and hydration (food and water) is of particular importance. I understand that if I do not sign this paragraph, artificially administered nutrition (food) and hydration (water) will be administered to me. I further understand that if I sign this paragraph, I am authorizing the withholding and withdrawal of artificially administered nutrition and hydration.

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JOE C. CLIENT

(3) I authorize my health care proxy to (add other medical directives, if any)

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JOE C. CLIENT

III. Anatomical Gifts

I direct that at the time of my death my entire body or designated body organs or body parts be donated for purposes of transplantation, therapy, advancement of medical or dental science or research or education pursuant to provisions of the Uniform Anatomical Gift Act (63 Okla. Stats. § 2201 et seq.). Death means either irreversible cessation of all functions of the entire brain, including brain stem. I specifically donate:

( ) My entire body; or

( ) The following body organs or parts:

( ) lungs, ( ) liver, ( ) pancreas,

( ) heart, ( ) kidneys, ( ) brain,

( ) skin, ( ) bones/marrow,

( ) bloods/fluids, ( ) tissue,

( ) arteries, ( ) eyes/cornea/lens

( ) glands, ( ) other __________________________

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JOE C. CLIENT

IV. Conflicting Provision

I understand that if I have completed both a living will and have appointed a health care proxy, and if there is a conflict between my health care proxy's decision and my living will, my living will shall take precedence unless I indicate otherwise.

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JOE C. CLIENT

V. General Provisions

a. I understand that if I have been diagnosed as pregnant and that diagnosis is known to my attending physician, this advance directive shall have no force or effect during the course of my pregnancy.

b. In the absence of my ability to give directions regarding the use of life-sustaining procedures, it is my intention that this advance directive shall be honored by my family and physicians as the final expression of my legal right to refuse medical or surgical treatment including, but not limited to, the administration of any life-sustaining procedures, and I accept the consequences of such refusal.

c. This advance directive shall be in effect until it is revoked by me.

d. I understand that I may revoke this advance directive at any time.

e. I understand and agree that if I have any prior directives, and if I sign this advance directive, my prior directives are revoked.

f. I understand the full importance of this advance directive and I am emotionally and mentally competent to make this advance directive.

Signed this 12th day of December, 2001.

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JOE C. CLIENT
Oklahoma City, Oklahoma County, Oklahoma

This advance directive was signed in my presence.

_________________________ Residing at ____________________________
Witness

_________________________ Residing at ____________________________

Witness