THINGS CHANGE WHEN PEOPLE DIE

A Practical Guide to Wills, Trusts, Powers of Attorney, and the Decisions That Matter Most

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Second Edition

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For Tiffany, Maddy, Betty Lou, and Avery—
because in the end, it has always been about family.

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Introduction

"I feel like such a grown-up!"

That is the kind of comment I sometimes hear when someone finishes the estate planning process. It makes sense. Estate planning is one of those things most adults know they should address but can easily put off. Thinking about incapacity and death is not particularly enjoyable, and there is almost always something more pressing to do. Yet people often feel a genuine sense of relief once they have made the decisions and put a plan in place.

Estate planning can seem like a tangled web because so many of the subjects are interconnected. Wills, trusts, powers of attorney, beneficiary designations, taxes, long-term care, probate, guardianship, and estate administration are often discussed as separate topics, but in practice they are pieces of the same plan. A decision made in one area can have consequences somewhere else. Since a book has to proceed from one subject to the next, I will occasionally refer backward or forward to related subjects as we work through them.

The central theme of this book is risk management. Managing the risks of life can be as complicated as you want to make it or as simple as doing nothing. But doing nothing does not mean that nothing happens. If you fail to make certain decisions for yourself, the law provides default rules that may make those decisions for you. Those rules may produce a perfectly acceptable result, or they may produce a result very different from what you would have chosen.

Even the most sophisticated estate plan cannot eliminate every risk. The goal is to manage risk, not eliminate it. A good

plan begins by identifying the risks that matter and understanding the available choices. From there, you can decide which risks are worth reducing, which ones you are willing to accept, and what cost or complexity you are willing to incur in the process.

This is important because estate planning solutions almost always involve tradeoffs. A trust may solve a particular problem but add cost and administrative responsibility. Joint ownership may simplify the transfer of an asset at death but create other consequences during life. Giving someone broad authority under a financial power of attorney may make it easier for that person to help you if you become incapacitated, but broad authority can also create an opportunity for abuse. Restricting that authority may reduce one risk while making the document less useful when it is needed.

The same analysis applies to probate. Probate involves expense, procedure, and court supervision, so there are circumstances in which avoiding it makes sense. But court supervision can also provide accountability and protection. Avoiding probate should therefore not be an objective simply because someone has told you that probate is bad. The better question is whether avoiding probate solves a meaningful problem in your particular circumstances and whether the solution creates other risks or expenses.

Long-term care presents another example. The possibility of needing years of assistance later in life can create a substantial financial risk. Some people may decide to retain that risk and pay for care themselves. Others may use long-term care insurance, hybrid insurance products, Medicaid planning where appropriate, or some combination of strategies. There is no single solution that is right for everyone. The planning process requires understanding both the risk and the consequences of the available responses.

Throughout this book, I will occasionally refer to what I call the Holy Trinity of estate-planning advice: your estate-planning attorney, accountant, and financial advisor. Each approaches your circumstances from a different perspective—legal, tax,

and financial—and important decisions often involve more than one of those perspectives. They do not need to consult one another about every decision you make, but when the consequences cross professional boundaries, good planning often requires coordination among them.

Another theme will appear repeatedly throughout this book: ***things change when people die***. That does not mean you should assume the worst about the people you love. It means that a plan should recognize that relationships and circumstances can change.

A surviving spouse may remarry. A child may experience financial trouble or divorce. Someone you expected to serve as executor may die before you or become unable to serve. A beneficiary may die in an order you never anticipated. Family members who have always gotten along may sincerely disagree about what you intended. A person who was responsible with money when you created your plan may be in a very different position years later. If something is important enough to be part of your estate plan, it generally makes more sense to address it in the plan than to depend upon someone voluntarily carrying out your wishes later.

The first edition of this book was written specifically for Ohio residents. This edition is intended for a nationwide audience, which requires an important distinction. The problems addressed by estate planning exist throughout the country, but the laws governing them are not always the same. Wills, trusts, probate, powers of attorney, advance directives, guardianship, spousal rights, property ownership, Medicaid planning, and other areas can vary significantly from state to state.

I am licensed to practice law in Ohio, not throughout the United States. Accordingly, this book generally discusses estate-planning concepts that are useful regardless of where you live while identifying state-law differences when they matter. Where Ohio law provides a useful example or Ohio readers need more specific information, I will identify the discussion as an Ohio Planning Note. Those notes are not only for Ohio readers. They can also be useful to readers in other states because they

identify issues that may be governed differently from one state to another and therefore deserve local attention. Readers outside Ohio should not assume that an Ohio rule applies in their state, but an Ohio example can alert them to a question they may not otherwise have known to ask. Many states have adopted or adapted uniform laws, including versions of the Uniform Probate Code and other uniform acts, so seeing how Ohio addresses a particular issue may also help a reader recognize that a similar statute or rule exists in another state.

This distinction is particularly important because estate planning is about more than documents. A will, trust, power of attorney, or beneficiary designation may be perfectly valid and still fail to accomplish what someone intended if it is not coordinated with the rest of the plan. A will generally does not control an account that passes by beneficiary designation. A trust designed to manage an inheritance for a child accomplishes little if the asset instead passes directly to the child. A carefully considered estate plan can be undermined by an old beneficiary designation that nobody remembered to change.

Forms can be useful, but having the right form is not the same thing as understanding the decisions that need to be made. The more important questions are often who should serve, who should receive property, when a beneficiary should control an inheritance, what happens if a beneficiary dies first, who serves if the first choice cannot, and whether the various pieces of the plan actually work together.

That does not mean everyone must hire an attorney to answer every estate planning question. Later in this book, we will discuss circumstances in which people may decide to handle some planning themselves and how to find reliable resources. State and local courts, probate courts, law libraries, state and local bar associations, and official government sources often provide valuable information and, in some states, useful powers of attorney, advance directives, and other forms. Commercial document services and artificial intelligence have also changed the resources available to consumers. The

important distinction is between obtaining a document and understanding whether that document accomplishes what you actually need.

Estate planning is also not reserved for wealthy people. Tax planning becomes important for some estates, and we will address both basic estate and gift taxation and more advanced strategies for those who actually need them. But many of the most important estate planning decisions have little to do with the size of an estate. Who will make medical decisions if you cannot? Who will handle your finances? Who should care for minor children? Should a young beneficiary receive an inheritance outright? How should a second spouse and children from a prior relationship both be protected? How will long-term care be paid for? These questions can be important whether someone has hundreds of thousands or tens of millions of dollars.

Finally, an estate plan does not need to anticipate every possibility to be worthwhile. People sometimes delay planning because they cannot make a particular decision with complete confidence. There may be no perfect guardian, trustee, executor, or age for a child to receive an inheritance. Circumstances will change, and a plan that makes sense today may need to be changed later. That is why reviewing and maintaining a plan is part of estate planning itself.

My goal in writing this book is not to turn you into an estate planning attorney. It is to help you identify the risks that deserve consideration and give you enough information to make informed decisions about them. If you understand what can happen, what choices are available, and the advantages and disadvantages of those choices, you will be in a much better position to create a plan that fits your circumstances.

Estate planning does not give us control over everything that will happen. It gives us an opportunity to prepare for what might happen. That is the essence of risk management, and it is where we will begin.

Part I: Planning for Incapacity

CHAPTER 1

Health Care Powers of Attorney

A health care power of attorney is one of the simpler documents in an estate plan, but it addresses one of the most important questions: Who will make medical decisions for you if you cannot make them yourself? Different states use different terminology. Depending on where you live, the document may be called a health care power of attorney, medical power of attorney, durable power of attorney for health care, health care proxy, or something similar. The person appointed may be called an agent, attorney-in-fact, proxy, representative, or surrogate. The terminology is less important for our purposes than the concept. You are choosing someone to make health care decisions for you when the law and the document authorize that person to act.

The document does not ordinarily mean that you surrender control of your medical care merely because you signed it. Advance directives are designed to address circumstances in which you cannot make or communicate your own health care decisions. The precise point at which an agent may act depends on the document and applicable state law. While you retain the legal capacity to make your own health care decisions, you generally remain the person making those decisions.

That distinction is important. Estate planning is about preparing for a problem before the problem occurs. You execute the document while you are capable of choosing the person you trust so that the authority is available if you later need it.

Your Spouse Is Not Automatically Your Health Care Power of Attorney

A common misconception among married people is that if they end up in the hospital, their spouse can simply make health care decisions for them. Sometimes that will be true, but it should not be assumed. When a patient cannot make decisions and has not appointed an agent, authority may depend on the surrogate-decision laws of the state, the identity and availability of the patient's next of kin, and the policies and procedures of the hospital, nursing facility, or other health care provider. Those rules and procedures can affect who the provider will recognize, what documentation may be required, and how disagreements are handled.

A spouse or other family member may therefore have authority in some circumstances even without a health care power of attorney, but that is not the same thing as personally selecting an agent in advance. Questions can arise about who has priority, whether several relatives must be consulted, what decisions a surrogate can make, or what happens when family members disagree. By executing a health care power of attorney, you substantially reduce the uncertainty because you have identified the person you want speaking for you.

Choose the Person, Not the Relationship

People have a tendency to fill estate planning jobs according to the family tree. Spouse first. Oldest child second. Next-oldest child third. That may produce the right result, but birth order and family relationship are not job qualifications.

A health care agent may have to speak with physicians, understand treatment alternatives, obtain medical information, consent to or refuse treatment when legally authorized, choose facilities or providers, and make decisions while other family members are frightened or emotional. The person you choose should therefore be trustworthy, but trust is only the beginning. The person should also be willing to serve, capable of understanding information, able to communicate with medical

professionals, and strong enough to carry out your wishes even when other people disagree.

That last characteristic can be especially important. Suppose you have made it very clear that under certain circumstances you would not want treatment continued. Your agent agrees with you when everyone is healthy. Years later, however, the decision is real rather than theoretical, and your siblings or children are begging the agent to "do everything." Will the person you selected be capable of carrying out your wishes? There is no universally correct answer about who to appoint, but choosing someone solely because you think that person is next in line is not enough.

Give Your Agent Enough Authority to Do the Job

A health care power of attorney can grant substantial authority. Depending upon applicable law and the terms of the document, an agent may be able to consent to treatment, refuse treatment, obtain medical information, deal with health care providers, and make decisions concerning admission to or discharge from health care facilities.

This creates another risk-management decision. You can place restrictions on an agent's authority, but every restriction should have a reason. If you do not trust your agent to make an important category of medical decisions, the first question should be whether you have selected the right agent. Excessive restrictions can create the same problem we will encounter later with financial powers of attorney: in trying to prevent someone from making a bad decision, you can make it impossible for that person to make a necessary decision.

That does not mean everyone should sign the broadest document available. Some people have strong religious, ethical, or personal convictions about particular treatments and appropriately want those convictions reflected in their documents. Others may have specific concerns arising from a medical condition. The point is to make restrictions deliberately rather than automatically.

Your Agent Is Not King

Within the boundaries imposed by law, you have substantial control over who to appoint and what authority to grant in a health care power of attorney. But your agent is not king. The agent's authority is limited by the document and by applicable law. Those legal limitations vary by state, which is one reason a nationally distributed form should not automatically be assumed to work everywhere.

States may restrict an agent's authority over particular end-of-life decisions or establish rules governing how a health care power of attorney interacts with a living will or other advance directive. Those subjects become particularly important at the end of life, so we will discuss the living will separately in the next chapter. For now, the important principle is simple: appointing an agent gives that person authority, but it does not give unlimited authority.

Name a Backup

Naming the right person is only half of the decision. You also need to consider what happens if that person cannot serve. If you name your spouse at age fifty-five and need the document at age eighty-five, your spouse may have died, become incapacitated, or developed health problems of his or her own. An adult child may move across the country. Relationships change. The person who enthusiastically agrees to serve today may be unwilling or unable to do so twenty years from now.

Naming one or more successor agents provides another layer of protection. This does not require predicting exactly what everyone's circumstances will be decades from now. It simply recognizes a recurring theme of this book: a good estate plan should ask not only what happens first, but what happens next if the first plan fails.

There can also be situations in which someone wants multiple people involved. That decision requires care. Requiring several people to agree may provide checks and balances, but it can also make decisions slower and create a mechanism for deadlock. Medical decisions sometimes need to

be made quickly. As with most estate planning choices, additional protection can come at the cost of additional complexity.

Talk to the Person You Appoint

Signing the document without talking to your agent misses part of the point. Your agent should know that the document exists, know that you selected them, and preferably know where a copy can be found. More importantly, your agent should have some idea what you actually want.

No document can anticipate every medical circumstance. A health care agent may someday be asked to make a decision that neither you nor the lawyer who prepared the document specifically contemplated. In that situation, knowledge of your values can be more useful than another page of legal language.

Do you value extending life as long as medically possible? Is maintaining cognitive function particularly important to you? How do you feel about aggressive treatment when the likelihood of meaningful recovery is extremely small? Are there religious beliefs that should guide the decision? What does an acceptable quality of life mean to you? Those conversations can be uncomfortable, but they can also be an enormous gift to the person who may eventually have to make the decision. The goal is not to make your agent memorize a list of instructions. It is to give the agent enough understanding of you to make the decision you would probably make if you were able to make it yourself.

A Health Care Power of Attorney Can Help Avoid Guardianship

A health care power of attorney also illustrates an important theme that will recur throughout this book: private planning can sometimes reduce the need for court involvement. If an incapacitated person has already appointed someone with sufficient legal authority to make necessary health care decisions, there may be less reason to ask a court to appoint a guardian for that purpose.

That does not mean a health care power of attorney guarantees that guardianship will never be necessary. The facts, the scope of the document, and state law matter. But providing decision-making authority in advance can remove one of the reasons a guardianship might otherwise be needed.

This is a good example of risk management. Some people are uncomfortable giving another person substantial authority over their medical care. That is a legitimate concern. The alternative risk, however, is becoming unable to make decisions without having selected anyone to act. In that situation, family members may have to rely on state surrogate-decision rules or, depending upon the circumstances, seek court involvement. Neither alternative is completely risk-free; the question is which risk you prefer.

Ohio Planning Note

Ohio permits an adult of sound mind to create a durable power of attorney for health care. The document must satisfy Ohio's statutory execution requirements, which generally involve either qualifying witnesses or acknowledgment before a notary. Ohio law also prescribes important language and limitations concerning the agent's authority.

Ohio's statutory form makes another point particularly clear: while you retain capacity to make informed health care decisions, you retain the right to make those decisions yourself. The agent's general decision-making authority is triggered when the attending physician determines that you have lost that capacity. Ohio law also contains detailed rules concerning life-sustaining treatment and artificially or technologically supplied nutrition and hydration, and it addresses how a health care power of attorney interacts with a valid living will. Those rules should not be reduced to a generic statement that an agent can simply “pull the plug.” The authority depends on the circumstances, the document, medical determinations, and applicable law.

The Goal

The goal of a health care power of attorney is not to surrender control of your medical care. It is almost the opposite. You are exercising control while you are capable of doing so by deciding who should speak for you if there comes a time when you cannot speak for yourself.

Choose that person because of judgment and character rather than title or family rank. Give the person enough authority to do the job you are asking them to do. Name a successor in case the first choice cannot serve, and talk to the person about what matters to you. The document provides the legal authority, while the conversation provides the guidance. Both matter.