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## **LIVING WILL, HEALTH CARE PROXY, ORGAN DONATION, DO NOT RESUSCITATE ORDER AND POWER OF ATTORNEY**

Due to the growing marvels of medical science, people are living longer than ever before. As we grow older, sicker, or become suddenly incapacitated, however, we may be thrust into a position that requires us to make decisions regarding how we want to be treated medically at the end of our lives. In fact, we may not be able to express ourselves physically, mentally, or both. Such a situation also will impact our ability to manage our financial affairs. Advance care directives and Powers of Attorney may provide a means for us to handle these situations. Without them, your family may have to obtain court orders to deal effectively with your medical and financial matters.

### **LIVING WILL**

A Living Will is a document which provides written directives as to how you want to be treated by your attending physician, hospital, nursing home, or other healthcare facility in the event that you are incapable of making the decisions for yourself. Although a Living Will may be used to explain your desired treatment for certain medical conditions, typically, the Living Will is used to express your wishes regarding life sustaining treatment (i.e., life support). Life sustaining treatment may include the use of medical machinery and procedures that may not, by themselves, cure your condition, but may extend and sustain your life.

Unlike the majority of states in America, New York does not have legislation that recognizes the use of a Living Will; however, in *In re Westchester County Medical Center (O'Connor)*, 72 N.Y.2d 517, 530, 534 N.Y.S.2d 886, 892 (1988), the New York State Court of Appeals (our State's highest Court) expressly accepted the use of a Living Will as a means to express your intentions regarding life sustaining treatment.

For those individuals who wish to refuse life sustaining treatment, their Living Will should specify the types of treatment to be withheld. In particular, while the boilerplate Living Will may state that you desire that no "extraordinary means" be used to sustain your life, that description may not be adequate in this age of medical science. What may have been an "extraordinary means" yesterday may be standard medical procedure today. Without specificity your wishes may not be expressed clearly.

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A Living Will is not a topic that most individuals like to address. Yet, an identification of your instructions today may provide a layer of comfort and support for your family in the future, by easing their burden if confronted with these life sustaining issues in the event that you lack the capacity to make such decisions.

### **Health Care Proxy**

A Health Care Proxy is a document that appoints an agent to make health care decisions for you in the event that you cannot do so. Generally, this may happen if you are unconscious or you do not have the legal capacity to make your own decisions. In the typical situation, you would appoint an individual as your health care agent to make decisions for you and appoint an alternate to serve if your agent can no longer act; however, there may be occasion to appoint co-agents to make decisions for you.

In addition, the Health Care Proxy is a vehicle by which you can authorize your agent to remove you from a hospital, nursing home or other health care facility (and bring you home). Also, it is a document in which you may give your agent the authority to preclude certain individuals from visiting you in the health care facility.

For those individuals who have a Living Will, or are interested in one, it is important to consult your attorney to coordinate the terms of your Health Care Proxy and Living Will. For instance, one may wish to consider limiting the agent's discretion regarding the life sustaining treatment to comply with the express declarations contained your Living Will.

### **Do Not Resuscitate Order**

A Do Not Resuscitate Order ("DNR") is a document placed in your medical file while you are in a health care facility that, after your consent, orders your doctors (and nurses) not to utilize cardiopulmonary resuscitation ("CPR") in your care. This can be important because in New York, there is a statutory presumption that every individual consents to cardiopulmonary resuscitation (CPR). The DNR, however, should not be confused with the Living Will described above. While the Living Will may relate to your refusal of life sustaining treatment (including CPR), the DNR *only* relates to CPR (measures to restore cardiac function or to support ventilation in the event of a cardiac or respiratory arrest).

While there is also a statutory presumption that an adult patient has the capacity to consent to a DNR, the attending physician may defeat that presumption if he/she opines with the concurrence of another physician selected by a person authorized by the health care facility to make such decision, that you lack capacity to consent to a reasonable degree of medical certainty. In this instance, your Health Care Proxy may consent to the issuance of a DNR.

However, if you do not have a Health Care Proxy, the following persons in order of priority may consent on your behalf: your (1) legal guardian appointed pursuant to Article 17-A of the Surrogate's Court Procedure Act; (2) spouse; (3) son *or* daughter who is over 18 years of age; (4) parent; (5) brother or sister over 18 years of age; (6) close friend. It is important to note that your surrogate may be able to consent to a DNR only if you have a terminal condition, are

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permanently unconscious, resuscitation would be medically futile, or if resuscitation would impose an extraordinary burden on you. Given this, the potential for conflict between the persons in this prioritized list is apparent (i.e., disagreement regarding whether to grant consent for a DNR). Thus, it is important to consult your attorney for advance planning that may avoid (or lessen) the potential for conflict.

It is important to note that a DNR is only effective in a hospital or skilled nursing facility. In the event that you want a DNR to be in effect while you are *not* in such a facility (i.e., your home), your doctor must sign a Non-Hospital Order Not to Resuscitate (“NHDNR”). Without a NHDNR, the emergency paramedics are required under New York law to perform cardiopulmonary resuscitation. This form can be downloaded from the NYS Department of Health’s website.

### **Power of Attorney**

A critical component of lifetime planning is the Power of Attorney (“POA”). The POA is a document in which you appoint an agent (a/k/a “attorney-in-fact”) to make a wide range of financial and other decisions and to enter into appropriate transactions for you. The power given to the agent in a POA can be limited to certain powers or unlimited (i.e., the agent basically stands in your shoes for property, financial or other matters). Further, the authority given to an agent can take effect immediately upon signing or may not take effect until you are certified to lack capacity to act on your own behalf. Whichever is the triggering event, typically, the agent is authorized to act on your behalf until your death or until you terminate the POA.

This is important for a number of reasons. For example, in the event of your absence or incapacity, you may need your agent to handle tax, real property, investment, gifting, asset protection, banking, and other matters. The absence of a properly executed Power of Attorney may require the court appointment of a guardian for your person and property under New York State Mental Hygiene Law to handle routine or more complex matters for you.

### **Organ Donation a/k/a Anatomical Bequest**

Often, clients ask that we insert a provision in their Last Will and Testament that provides for their organs to be donated for research or implant. Although we admire our clients’ intent, the Last Will and Testament (“Last Will”) may not be the most appropriate vehicle for such a provision. Remember, your Last Will may not be admitted to probate for months (if not years, when contested) at which point your organs may no longer be available (due to burial, cremation, etc.). Thus, for those of you who wish to donate organs, it is important that you register with the NYS Department of Health as an organ donor. You can register with the NYS Department of Health on their website or by choosing to be an organ donor when you renew your NYS driver’s license. In addition, it is important to communicate this desire to your family, Health Care Proxy and/or primary care physician. An open line of communication regarding your wishes is critical.

**Where Can You Obtain These Documents and What Do You Do With Them?**

Your personal attorney can provide you with these documents, if necessary, after a consultation. Generally, the execution of these documents require two witnesses unrelated to you and a notary public. Once you have obtained these documents, you should keep them with your important papers and give a photocopy of the Living Will and Health Care Proxy to your primary care physician and the agent whom you appoint. In addition, if you go into the hospital for a procedure, be sure to give a copy of those documents to the appropriate individual. As to the Power of Attorney, consult your attorney regarding the necessary recipients of that document.

If you do not have an attorney, please feel free to contact our office for a consultation.

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