Legal Tools for the Family Caregiver

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Estate Planning, Elder Law, Special Needs Planning
Tools for the Family Caregiver

- Healthcare Power of Attorney
- Advance Directive for a Natural Death (Living Will)
- Durable General Power of Attorney
- Special Needs Trust
- Caregiver Agreement
Advance Directive – any statement by a competent individual of the individual’s preferences for treatment and/or appointment of a decision maker, in the event the person loses the ability to make decisions.

Formal Advance Directives:
- Advance Directive for a Natural Death (Living Will)
- Health Care Power of Attorney

Medical Orders:
- DNR (Do Not Resuscitate)
- MOST (Medical Order for Scope of Treatment)
DNR

STOP
DO NOT
Resuscitate

Effective Date:
Expiration Date, if any

☐ Check box if no expiration

DO NOT RESUSCITATE ORDER

Patient's full name:

In the event of cardiac arrest, the patient, efforts at cardiopulmonary resuscitation, or the patient should NOT be resuscitated. This order does not affect other medically indicated procedures.

I have documented this order and the consent required by the NC General Statute 90-31.77(b) in the patient's records.

Signature of the attending physician, physician assistant, or nurse practitioner:

Printed Name of Attending Physician:

Address:

City, State, Zip:

Telephone Number(s):

Do Not Copy, Do Not Alter

MOST

Medical Orders for Life-Sustaining Treatment (MOLST)

The Patient Keeps the Original MOLST Form During Travel to Different Care Settings. The Physician Completes & Date:

SECTION A: Resuscitation Instructions: When the Patient Has No Capacity to be Not Breathing

Check one:
- CPR Order: Attempt Full Pulmonary Resuscitation
- CPR Order: Attempt Cardiopulmonary Resuscitation
- CPR Order: Do Not Attempt Cardiopulmonary Resuscitation
- CPR Order: No Orders

If the patient has a developmental disability and does not have the ability to decide, the family must follow accepted medical standards and follow the written instructions in this document.

SECTION B: General for Prescribed Instructions: Check the box that best describes the patient's condition:

- Health care: Patient has been hospitalized
- Health care: Patient has a chronic illness
- Health care: Patient has a terminal disease
- Health care: Patient is not under health care system

SECTION C: Physiologic Information: Include the following information:

- Heart Rate:
- Blood Pressure:
- Respiratory Rate:
- Temperature:

SECTION D: Advance Directives:

- Patient has participated in the advance directive discussion
- Patient has not participated in the advance directive discussion

Please review and sign the MOLST form before leaving the facility.
Healthcare Powers of Attorney

- Naming someone to make health care decisions when you lack capacity to communicate your own decisions
Living Will
Advance Directive for A Natural Death

A document where you state your wishes for life sustaining treatment.
What Treatment Can Be Withheld?

“Life sustaining procedures”
- Defined as care or treatment that only serves to prolong dying process.
- Can include mechanical ventilation, antibiotics, dialysis, artificial nutrition and hydration, etc.
Who decides if there is no directive?

- Spouse
- Majority of Available Parents and Children
- Majority of Available Siblings
- Individual with “Established Relationship”
- Attending physician
Planning for Incapacity
Money Management

Durable Power of Attorney
vs.
Joint Ownership
Titling Assets Jointly With Children

- Parents’ assets now subject to creditors and liabilities of child

- Tax Issues
  - Gift Tax
  - Capital Gains Tax

- Disrupts estate plan
Power of Attorney

A written instrument where one person (the Principal) gives another person (the Agent) the authority to manage the Principal’s property.
Jack and Jill

- Married 40 years
- Jack has advanced dementia
- Nursing home costs $10,000 per month.
- Jack has a power of attorney, appointing Jill as his agent.
Power of Attorney

Gifting Powers
- Power to sign deeds, sell or purchase property is not the same as the power to gift the property
- Gifting is not presumed
- Problems with limitations on gifting
  - Community Spouse
  - Disabled Child
Jack and Jill
Medicaid Eligibility

- Nursing Home Spouse - $2,000

- Community Spouse – Half of “countable resource” up to a max of $137,400

- House is non-countable, but if home is in Jack’s name at his death, it will be subject to estate recovery.
Jack and Jill

- Jill would like to transfer the house into her sole name.

- Jack’s power of attorney states that Jill can make gifts of Jack’s property “in amounts not to exceed the annual exclusion amount for federal gift tax purposes.”
Jack and Jill

- Due to the limitation on gifting in the POA, Jill cannot re-title the house in her name.

- She finds out that she can apply for Medicaid, but if the property is in Jack’s name at his death, it will have to be sold to payback the state.

- Jill will have to petition the Court if she wants to transfer the house into her name.
Jim has a power of attorney that allows gifts to Susan as his spouse without a limitation on the amount.

Susan applies for Medicaid for Jim and uses the POA to transfer the house in only her name.
To further protect the property upon Susan’s death, Susan updates her Will to leave everything to Jim in a special needs trust.

This means Jim won’t lose his Medicaid if he inherits property from Susan and the property can pass to the couple’s children at both of their deaths.
Special Needs Trust

- A trust set up in your will for a disabled spouse

- The Trustee uses the funds in the trust to pay for things the disabled spouse needs

- If the disabled spouse is on Medicaid, the trust will not cause him or her to lose Medicaid

- At the disabled spouse’s death, the funds pass to the children (or whomever you choose)
Bob and Ruth

- Ruth has advanced dementia and is no longer able to manage her bank accounts.
- Ruth does not have a power of attorney.
Guardianship

- Incompetency Hearing
  - Service by Sheriff

- Appointment of a Guardian ad Litem (G.A.L.)

  - G.A.L. makes a recommendation to the court

- If declared incompetent, Guardian appointed
Bob and Ruth

- Ruth has $300,000 in an account titled in her name only
- Ruth and Bob own their house jointly
- Bob is appointed General Guardian for Ruth
Bob and Ruth

- Guardianship Fees = $1,200
- Bond Premium = $3,000
- Bob can’t sell the couple’s house w/o court approval
- Bob must petition the court whenever he needs to use money in the guardianship estate for Ruth’s care.
- Bob must file annual accountings with the Clerk of Court
Judy’s Story

- Judy hired a caregiver to help with bathing, dressing and meal preparation. She did not use a contract.

- A few years later, Judy needed nursing home care.

- When Judy applied for Medicaid she was told that the money she paid her caregiver was considered a “transfer of assets” and she would not get any assistance from Medicaid for 3 years!
Caregiver Agreements

- Must be in writing, signed by the caregiver and the recipient (or his or her agent) and must be dated
- Must be signed before services are performed
- Either party must be able to terminate at any time
- Person receiving care can not be in a nursing home at the time
- Services must be recommended in writing and signed by doctor as necessary to prevent entry into a nursing home
- Must specify the type, frequency, and duration of services
- Must specify amount to be paid
- Amount paid can’t be greater than fair market value
Planning Tips

- Meet with a qualified elder law attorney
- **Health Care Power of Attorney** – name someone to make health care decisions for you
- **Living Will** – have a talk with family members about your wishes for end of life treatment
- **Durable Power of Attorney** – consider whether the agent should be able to make gifts to the spouse or others
- **Caregiver Agreements** – must have written agreement if payments are made to caregivers
- **Update Last Will & Testament** – consider special needs trust.
THANK YOU!

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