Lifetime Estate Planning Documents: Often Overlooked, But Always Important (Including the New Medical Directive Statutes)

Gregory S. Williams, Esq.
Carruthers & Roth, P.A.
235 N. Edgeworth Street
P.O. Box 540
Greensboro, NC 27402
Telephone: 336-379-8651
Facsimile: 336-273-7885
E-mail: gsw@crlaw.com

1. Overview.

When most people hear the phrase "estate planning document," they typically think of a will and sometimes some form of a trust. This is likely so because "estate planning" is usually equated with planning for circumstances arising after death, particularly the management, administration, and disposition of one's assets.

However, there are several estate planning documents that govern the financial and medical well-being of a person during lifetime. These documents are especially important for older individuals, but should be implemented by everyone since no one is guaranteed an average life span. In fact, given the circumstances, these documents can be just as or even more important than "death-time" documents. In fact, their absence can result in expensive legal proceedings, such as guardianships. Moreover, family heartache and struggle can result from the fact that an individual did not spell out in advance who they wanted to handle their financial and medical affairs, nor how they wanted their health care managed or their remains disposed.

Thus, everyone should consider executing, at a minimum, a financial power of attorney, health care power of attorney, and living will. In certain circumstances, individuals should arrange for a MOST form or cremation directive. In any event, everyone should think seriously about how their financial and medical affairs should be handled in the event that one were no longer able to understand or communicate their wishes regarding these issues.

2. Financial Powers of Attorney (also known as General or Durable Powers of Attorney). A financial power of attorney is a legal document by which someone (the principal) names one or more others as their agent (sometimes known as an "attorney-in-fact") to handle the financial affairs of the principal. Attached as Exhibit A is a sample Carruthers & Roth power of attorney.

a. General v. Limited. Most powers of attorney are considered "general" since they grant the agent very broad powers to handle the principal's financial affairs. In most cases, it would not make sense to create a power of attorney that omitted certain powers, because their absence might require a guardianship proceeding. On the other hand, a limited power of attorney is one that is intentionally limited in scope and/or duration, typically created to handle a particular transaction, such as a real estate closing.

b. Attorney-in-Fact. The attorney-in-fact is the agent who is granted the powers under a power of attorney. Planners typically recommend that a primary and at least one backup agent be named in the document. It is permissible to name multiple agents, and it is quite common to name more than one child, for example, as co-agents. However, naming multiple agents should be weighed against the inefficiency and inconvenience of requiring multiple signatures on every check, tax return, and transaction. In the right situation, this concern can be ameliorated by permitting the agents to act either jointly or individually.

c. **Incapacity.** The primary reason that powers of attorney are so critical is that many people do in fact lose their mental capacity due to disease or accident. Without a power of attorney, the only way that an incapacitated person's financial and business affairs could be managed would be through a guardianship proceeding.

i. **Durability.** Powers of attorney only function during the principal's capacity (which is, ironically, not the time when a power of attorney is most needed), unless the power specifically states that it is to continue even in the event of incapacity. A power of attorney that remains effective during someone's incapacity is known as a "durable" power of attorney. N.C.G.S. §32A-8.

ii. **"Springing" Powers.** In order to avoid potential misuse of powers of attorney during the principal's capacity, some planners use "springing" powers that only come into existence upon the principal's incapacity. The author rarely uses "springing" powers because of the sometimes burdensome requirement of proving to the "rest of the world" that the principal has lost his or her capacity. In the alternative, we prefer that the client simply maintain control of the document during his or her capacity.

d. **Use of Statutory Short Form Power of Attorney.** N.C.G.S. §32A-1 provides a statutory short form power of attorney. While the short form power of attorney is certainly valid and effective, most estate planners prefer the use of a more expansive power of attorney document. The broader document typically includes additional powers, as well as clarifying language not included in the cursory phrases of the short form power of attorney. N.C.G.S. §32A-2 does elaborate on the cursory phrases of the short form power of attorney, but the experience of most estate planners is that the back offices of most financial institutions do not like to look past the "four corners" of a document in determining whether they will honor a particular power of attorney.

e. **Selected Powers.** Although many basic powers are essential to an effective power of attorney, there are other powers, some not included in the statutory short form, that should be considered for a power of attorney, including:

i. **Gifting.** Under North Carolina law, the power to make gifts must be specifically stated in a power of attorney in order for gifts made thereunder to be effective. If someone has started or should start a gifting program, and has become incapacitated, the only way to start or continue such a plan is if specific gifting language is in the power of attorney. Different language should be used depending on the particular situation (such as the need for gifts to charity, gifts to spouse, annual exclusion giving, larger lifetime gifts, or, perhaps, Medicaid planning.

ii. **Handling Retirement Accounts and Life Insurance Policies.** It is critical that an attorney-in-fact have the authority to manage a principal's retirement accounts and life insurance policies in the event of incapacity.

iii. **Changing Beneficiaries.** Although it is important for an attorney-in-fact to be able to manage retirement accounts and life insurance policies for an incapacitated principal, granting the right to change beneficiaries should be done advisedly, since this would give the right to change one's dispositive scheme and may cause unintended transfer tax consequences.

iv. **Funding Revocable Trusts.** If a principal has executed a probate avoidance revocable trust, it will be important for the attorney-in-fact to be able to fund that revocable trust to obtain the full benefit of the trust.

v. **Renunciation or Disclaimer.** Although planners rarely build an estate plan around a disclaimer, we believe that it is an important power to include in a power of attorney to retain flexibility, including addressing changes in the tax law or an unexpected order of deaths.

f. **Recording.** General powers of attorney do not need to be recorded unless the principal loses capacity. In the event that the principal does lose capacity, then the power of attorney must be recorded with the Register of Deeds in the county where the principal is a resident before the agent can continue acting under the power of attorney. Effective July 1, 2002, our state instituted additional fees for "nonstandard" documents. The current recording fees for a power of attorney are $12 for the first page, plus $3 for each additional page for a "standard" power of attorney. The recording fee for a nonstandard power of attorney is the same as the standard document, plus an additional $25 fee.

g. **Revocation.** All powers of attorney are revoked in the event of the death of the principal. However, the method for revoking a power of attorney by the principal depends on whether the power of attorney has been registered:

i. If the power of attorney has been recorded, then the principal must file a revocation document with the Register of Deeds with proof of service on the attorney-in-fact.

ii. With respect to a power of attorney that has not been recorded, the power of attorney may generally be revoked by any method provided in the power of attorney, by destroying the power of attorney or by a revocation document delivered to the attorney-in-fact.

h. **Enforcement of Power of Attorney.** Until 2005, the honoring of North Carolina powers of attorney was essentially voluntary. Thus, a financial institution or other third party could, in its own discretion, decide whether or not to act in accordance with the direction of an attorney-in-fact. In most cases, this was not a problem,

however, there were occasions where a financial institution indicated that the power of attorney was too old or not in the format that they would like. Effective October 1, 2005, N.C.G.S. §32A-40 et seq. were added to enable third parties to rely on validly executed powers of attorney, and to create a penalty for the unreasonable refusal to recognize a valid power.

3. Health Care Powers of Attorney. Article 3 of Chapter 32A of the North Carolina General Statutes, which was enacted in 1991, authorizes the designation of a "health care agent" in a "health care power of attorney." This statute was part of a second wave of end-of-life legislation (after the living will statute) enacted in response to the Nancy Cruzan case in Missouri. The statute indicates that it is the public policy of North Carolina that an individual has a fundamental right to control the decisions relating to his or her medical care, and that this right may be exercised on behalf of the individual by an agent chosen by an individual.

a. Definitions. A "health care agent" is a person appointed as a health care attorney-in-fact. A "health care power of attorney" is a written instrument signed in the presence of two qualified witnesses, and acknowledged before a notary public, pursuant to which an attorney-in-fact or agent is appointed to act for the principal in matters related to the health care of the principal. "Health care" is defined broadly to include <u>any</u> care, treatment, service, or procedure to maintain, diagnose, treat, or provide for the principal's physical or mental health or personal care and comfort including life-prolonging measures.

b. House Bill 634. Several North Carolina legislators expressed concerns in 2005, in light of constituent questions prompted by the Terri Schiavo case in Florida, about the clarity of North Carolina law on "living wills" and "health care powers of attorney." The North Carolina Bar Association, the North Carolina Medical Society, and other legal and medical groups worked together to prepare a proposal that became House Bill 634: "An Act to Clarify the Rights to Make Advance Directives and to Designate Health Care Agents and to Improve and Simplify the Means of Making These Directives and Designations." The primary intent of the law was to eliminate ambiguity and create clarity when dealing with medical directives. Specifically, House Bill 634 was intended to make these changes:

i. To specifically allow residents to choose whether the authority of a health care agent or the wishes stated in a living will "trumps" in the event of a conflict.

ii. To allow residents to <u>require</u> that their living will be honored.

iii. To bring consistency to the terminology used in the living will and health care power of attorney statutes, and make that terminology clearer to doctors and to patients.

iv. To create more "user friendly" and understandable non-exclusive statutory forms, with more flexibility in exercising choices.

v. To clarify the procedures for withholding life-prolonging measures when no living will or health care power of attorney applies.

vi. To implement miscellaneous improvements and enhancements in the applicable forms.

c. Conflicts Between Living Wills and Health Care Powers of Attorney. Under the old law, the statutory forms were not clear which document trumped the other. In other words, if a living will indicated that a person did not want their life extended by extraordinary means of life support, but a health care agent determined that it was in the principal's best interest for life support to be implemented, then an ambiguity was created as to which instruction controls. This lack of clarity was a major concern of some legislators who approached the Bar Association in 2005. The new statutory living will form contains a section in which the declarant can make the specific choice as to which document was to be followed. The living will form also specifies that the living will prevails if neither choice is specified.

d. Effectiveness and Duration. A health care power of attorney becomes effective when and if the physician or physicians indicated in the health care power of attorney (often simply the "attending physician") determine in writing that the principal lacks sufficient understanding or capacity to make or communicate decisions relating to the health care of the principal, and this authority continues in effect during the incapacity of the principal.

e. North Carolina Advance Health Care Directive Registry. The North Carolina Secretary of State maintains an online database of medical directives at: http://www.secretary.state.nc.us/ahcdr/. Registration in the Advance Directive Registry is entirely voluntary, but may make one's directives more readily available in the event of an emergency.

f. Statutory Health Care Power of Attorney Form; Nonexclusive. §32A-25.1 of the North Carolina General Statutes provides for a new legal and valid health care power of attorney. Paragraph (b) of that section indicates that the use of the statutory form prescribed in this section is an optional and nonexclusive method for creating a health care power of attorney and does not affect the use of other forms of health care powers of attorney, including previous statutory forms. The new form currently used by Carruthers & Roth is attached as Exhibit B.

g. Consent to Health Care for Minor. Article 4 of N.C.G.S. §32A provides a nonexclusive method for a parent to authorize in the parents' absence consent to health care for the parents' minor child. A statutory form is provided for the delegation of authority to consent to health care for a minor in N.C.G.S. §32A-34.

4. Living Wills (Declarations of a Desire for a Natural Death/Advance Directive). Article 23 of Chapter 90, enacted in 1979, authorizes "declarations of a desire for a natural death," commonly known as "living wills," and specifies the procedures for withholding medical treatment in end-of-life situations when there is no advance directive. The living will statute is part of the first wave of end-of-life legislation enacted in response to the Karen Ann Quinlan case in New Jersey. As described above, House Bill 634 made substantial changes to the living will statute and the statutory form.

a. Definition. A "declaration of a desire for a natural death" is a signed, witnessed, dated, and proved document that expresses a desire of the declarant that life-prolonging measures not be used to prolong the declarant's life if, as specified in the declaration as to any or all of the following:

(1) The declarant has an incurable or irreversible condition that will result in the declarant's death within a relatively short period of time; or

(2) The declarant becomes unconscious and, to a high degree of medical certainty, will never regain consciousness; or

(3) The declarant suffers from advanced dementia or any other condition resulting in the substantial loss of cognitive ability and that loss, to a high degree of medical certainty, is not reversible.

b. Life-Prolonging Measures. Life-prolonging measures are medical procedures or interventions which, in the judgment of the attending physician, would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function, including mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and similar forms of treatment. Life-prolonging measures do not include care necessary to provide comfort or to alleviate pain.

c. Which Document Trumps? In the author's experience, most clients fall into one of two camps when it comes to addressing end-of-life situations in an advance directive:

i. Health Care Power of Attorney Trumps. In this camp, the principal wants the health care agent to have total and absolute authority over the administration or withholding of medical treatment, including life-prolonging measures. In this case, even if a principal generally does not want his or her life extended by extraordinary means of life support, the principal still wants the final say in the hands of the agent. Thus, even if a living will is executed, the health care agent can override it.

ii. Living Will Trumps. In this camp, the principal wants to create a valid and binding statement that the living will be carried out even over the objections of the health care agent. Principals in this camp would either feel so adamant that any doubt should be resolved in favor of withholding

life-prolonging measures, or out of a concern that the decision will put too much stress, strain, and guilt on the health care agent.

d. **Statutory Living Will Form; Nonexclusive.** Pursuant to N.C.G.S. §90-321(i), use of the statutory living will form is an optional and nonexclusive method for creating a declaration and does not affect the use of other forms of the declaration, including previous statutory forms. The new form currently used by Carruthers & Roth is attached as Exhibit C.

e. **Procedures for Natural Death in the Absence of a Declaration.** N.C.G.S. §90-322 provides for a procedure for the withholding of life-prolonging measures where there is no advance directive. In general, if an attending physician determines with a high degree of medical certainty that a person lacks capacity to make or communicate health care decisions and the person will never regain that capacity, and the person (1) has an incurable or irreversible condition that will result in the person's death within a relatively short period of time, or (2) is unconscious and to a high degree of medical certainty will never regain consciousness; and there is confirmation of the person's condition in writing by a physician other than the attending physician, then life-prolonging measures may be withheld or discontinued upon the direction and under the supervision of the attending physician with the concurrence of one or more persons indicated in the statute. In the statute, a "line of succession" is established to determine who would have primary authority to consent to the withholding of life-prolonging measures (including guardians, health care agents, attorneys-in-fact, or family members).

5. **Portable Do Not Resuscitate Order (DNR).** A DNR is another legal document dealing with end-of-life situations. Although available in North Carolina since the late 1980's and early 1990's, in 2001, N.C.G.S. §90-21.17 codified the concept of a DNR and provided immunity for health care providers acting on a DNR.

The statute recites that it is that section's intent to recognize a patient's desire and right to withhold cardiopulmonary resuscitation to avoid loss of dignity and unnecessary pain and suffering through the use of a portable do not resuscitate ("DNR") order. The statute also makes clear that it establishes an optional and nonexclusive procedure by which a patient or the patient's representative may exercise this right. A DNR is generated by a physician, not the patient or a lawyer. A sample of the official DNR adopted by the North Carolina Department of Health and Human Services is attached as Exhibit D. The official DNR form is yellow.

6. **Medical Orders for Scope of Treatment (MOST).**

a. **Background.** Advance directives have limitations on their use. For example, sometimes advance directives cannot be located when critical decisions need to be made. Even when the documents are available, whenever the patient is transferred from one care setting to another, they must be reviewed by a physician

in the new facility who then must issue new medical orders. In cases where a patient with no advance directive is transferred, the receiving facility has even less information to go on and will have more difficulty determining the patient's wishes or the person who can speak on behalf of the patient. If the patient is at home and emergency medical services is called, EMS may provide life saving intervention even though the patient has expressed contrary wishes through advance directives. While portable DNR orders were a significant step forward, their scope is limited to preventing the administration of CPR when a patient is experiencing cardiac arrest. Therefore, many patients who do not wish to have their life prolonged by artificial means continue to receive these interventions.

b. Three Concepts Necessary for Effective Treatment of Individuals nearing End of Life: Prognosis, Frailty, and Continuity. Doctors indicate that prognosis, frailty, and continuity are important concepts in determining the best treatment for someone nearing the end of life.

i. Prognosis. Prognosis has been described as where a patient is on their "life trajectory." Physical, cognitive, spiritual, and social aspects must be taken into account in determining the best treatment for such a patient.

ii. Frailty. Patients nearing the end of life do not tolerate stress well, and hospitalization adds stress. A physician's goal in this respect should be to treat in a manner and location that are least stressful on the patient.

iii. Continuity. Continuity of care is essential for the health and well being of such patients. Having the same physician involved in and prescribing the medical care for a patient obviously provides continuity.

c. Enter the MOST Form. A MOST form is a physician order that must be filled out by a health care professional in direct consultation with the patient's representative. Although generated by a health care professional, the form does require the signature of the patient or the appropriate patient representative. A sample MOST form is attached as Exhibit E.

d. Miscellaneous.

i. Color. The official MOST form is a bright pink paper ("pulsar" pink).

ii. Conflict With Advance Directives. The MOST form trumps conflicting provisions of a living will or health care power of attorney, although commentators believe that conflicts should be rare.

iii. Original. The statute indicates that a physician has to act on the <u>original</u> of the MOST form in order to avoid liability.

iv. **Duration.** The statute indicates that MOST forms are valid for one year, at which time the form must be reviewed and renewed or a new MOST form must be completed.

v. **Candidates for a MOST Form.** Appropriate candidates for MOST forms include:

(1) Someone with a chronic, progressive disease;

(2) Someone who might die within one year; and

(3) Someone who wants to define their care specifically in the event that they might not be able to adequately communicate their own decisions.

A MOST form is clearly not applicable in emergency situations.

7. **Funeral, Burial, and Cremation Arrangements.** Many individuals are under the impression that they should provide in their wills what their wishes are with respect to funeral and burial arrangements. We do not recommend this practice since the will may not be read until several days or weeks after the funeral service (i.e., when it might be awkward or impossible to carry out the wishes described in the will). Instead, we recommend that clients put in writing and/or discuss with their families what their particular wishes are with respect to funeral and burial arrangements. (We do typically provide in wills that the executor is required to pay for funeral expenses, and may pay more than the statutory allowance for a gravestone. However, these provisions are for the proper administration of the estate, and do not generally impact funeral arrangements.)

a. **Relation to Health Care Power of Attorney.** Note that absent a contrary indication in another document, the health care power of attorney typically authorizes the health care agent to dispose of the principal's remains, including making burial arrangements, authorizing organ donation, or autopsy.

b. **Cremation Directive.** Pursuant to N.C.G.S. §90-210, North Carolina has adopted a cremation form to create a legally enforceable right to cremation. This form was adopted at least in part in response to the Georgia crematorium scandal from a couple of years ago. The form is lengthy and is designed to enable someone to make an informed decision about whether to have themselves or a deceased relative cremated rather than buried. When a client is adamant about cremation, we will provide a copy of the form (a copy of the form is attached as Exhibit F), but recommend that they contact a funeral home to discuss and assist in executing the form (particularly because the form will, at some point, need to be signed by a funeral director and a crematory representative).

8. Organ Donation.

a. The Heart Prevails. People who apply for driver's licenses are asked if they would like to be an organ donor and are furnished with organ, eye, and tissue donor cards and information. Those choosing to do so may request that the organ donor symbol be placed on the license or identification card. Also, the choice to place the symbol on one's license or identification card is shown on the Internet Organ Donor Registry maintained by the Division of Motor Vehicles.

Prior to October 1, 2007, the organ donation symbol on one's driver's license or identification card indicated only an intent to be an organ donor. Any actual donation had to be effected by a separate will or by a donor card or other document attested by two witnesses.

House Bill 1372, originally known as "The Heart Prevails" makes the authorization of the organ donation symbol an actual anatomical gift. An anatomical gift based only on the heart symbol will only be a gift of an organ or an eye; it will not include a gift of "tissue" (defined as any portion of the human body other than an organ, an eye, or blood donated for non-research purposes), or of the donor's entire body. The gift is not affected by the revocation, suspension, expiration, or cancellation of a driver's license. The entry on the donor registry is itself a gift, and will be effective even if the license or identification card is not available.

The bottom line is that people with the heart symbol on their license have now, by virtue of a retroactive provision, made an unspecific and limited anatomical gift. This gift generally may not be revoked or amended by their relatives or agents after their death.

b. Health Care Power of Attorney. As under prior law, the health care power of attorney must affirmatively provide authority for anatomical gifts. House Bill 1372 provides that a health care agent may make an anatomical gift before or after the principal's death to the extent provided in the health care power of attorney. Note that the new statutory health care power of attorney requires a principal to "opt in" to organ donation, and leaves blanks for special limitations or instructions. Thus, a health care agent under the new form has no authority to make anatomical gifts unless the principal affirmatively makes an election on the form.

c. What If Someone Does Not Want to be a Donor? First, the person should revoke any previous intentional or inadvertent donations. Second, to try to insure that someone does not make a donation after death, the person may wish to consider executing a refusal to make an anatomical gift. (See N.C.G.S. §130A-412.9). In addition, note that a driver's license heart symbol needs special attention in order for it to be treated as revoked. In essence, a person who really

does not want to make an anatomical gift must get the heart off their license or identification card, because that may be the only document that shows up in the emergency room, and the person should also see that the DMV Registry is corrected.

9. Conclusion. Certain estate planning documents are only applicable to certain people in certain circumstances such as high net worth families, family business owners, individuals in second marriages, or parents of special needs children. However, lifetime estate planning documents such as powers of attorney, health cares powers of attorney, and living wills should be implemented by everyone. These documents are relatively simple to prepare and execute, and can save families a great deal of hassle and expense in the long run.

Doc. 469407

EXHIBIT A

General Power of Attorney

EXHIBIT B

Health Care Power of Attorney

EXHIBIT C

My Desire for a Natural Death
(Also Known as a Living Will or Advance Directive)

EXHIBIT D

Do Not Resuscitate Form

EXHIBIT E

Medical Orders for Scope of Treatment (MOST)

EXHIBIT F

Application for the Authorization of the Cremation Process
and Instructions for the Disposition Form