When it comes to estate planning, three key documents are the last will and testament, the living will, and the health care proxy:

- A **last will and testament** (commonly called a “will”) contains instructions that take effect after an individual’s death – to distribute property, pay debts, and make arrangements for burial, as well as the payment of estate and inheritance taxes.

- A **living will** generally expresses the maker’s wishes for end-of-life medical treatment should the maker become incapacitated.

- A **health care proxy** is a legal document that designates a third party (agent) to make health care decisions on behalf of the document creator in the event of that individual’s inability to do so because of physical, mental or emotional disability or incapacity.

**Why write a will?**

A will is a legal document that is filed and becomes a matter of public record upon the death of its maker. It names the executor of the deceased person’s estate – the person or institution who will supervise the distribution of assets and the payment of the expenses and debts of the estate.

A person who dies without a written will is declared “intestate.” In these cases, the probate court names a personal representative for the estate, and state law will determine how this individual’s assets will be distributed. Individuals who do not wish to have the state mandate how their assets will be divided ordinarily create a will to help ensure that their final wishes will be carried out.

If a will is handwritten (often called a “holographic will”), many probate courts will allow it. It may not be a good idea, however, to rely on that kind of will. Another kind of will, a verbal will, has little standing in most courts, especially if the will is challenged. To avoid disputes that can be costly and divisive for families of the deceased, wills should be drafted by a competent attorney, witnessed and notarized.

In addition to naming the executor, a will can be used to:

- Provide instructions for the disposition of certain financial assets. (Keep in mind that not all assets pass through a will. For example, most insurance benefits and retirement plan assets pass directly to a named beneficiary. And any assets placed in a trust are distributed according to the terms of the trust – not the will.)

- Divide personal property among heirs – including homes, cars, furniture, heirlooms and tangibles, such as jewelry and coins.

- Name the children’s guardian(s) if an individual dies while responsible for minor children.

- Specify charitable gifts to be made after death.

- Create a trust that takes effect at death to hold specific assets or properties. (A trust created by will is called a “testamentary trust.”)
At least two copies of a will should be made and stored in safe places that are known and accessible to the maker’s attorney and the executor. (A safe deposit box may not be a good place to store a will, as its contents are often frozen upon the box owner’s death.)

**Living Wills**

A living will is a statement that indicates what its maker wishes in end-of-life situations. It often stipulates “informed consent” for medical professionals to withhold food, water, or medications if they are only intended to prolong the terminal illness of an incapacitated individual – or in those cases when a sudden illness or accident has occurred and death appears imminent.

**Health Care Proxies**

The health care proxy is used in conjunction with the living will. (In fact, in some states, these two documents are part of the same form.) Essentially, while the living will stipulates the individual’s wishes under certain health care-related circumstances, the health care proxy identifies the individual whom the creator of the health care proxy wishes to act in his or her place to carry out the terms of the living will.

**A Word of Caution**

While a number of states have adopted the Uniform Rights of the Terminally Ill Act, which recognizes the validity of declarations made through living wills, it’s important to understand the following limitations of these wills:

- Family members and medical personnel may challenge a living will because of unclear or legally invalid instructions, concern over possible legal consequences, or the emotional difficulty involved in withholding treatment.
- While each state has different laws regulating the application of living wills, some states consider the opinions of medical authorities to be on par with, or superior to, instructions in the living will.

Despite these constraints, a living will and health care proxy can help to ensure that an individual’s wishes are respected when end-of-life medical care is warranted.

The creation of a will, living will and health care proxy is the first – and perhaps most important – step in the estate planning process. These three documents can help health care professionals understand the wishes of the maker – and they can potentially save estates and heirs vast amounts of trouble and money. But remember: These three legal documents should be reviewed regularly and, if necessary, updated to reflect changes in circumstances or the wishes of their maker.

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