Health Care Proxies and Living Wills
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We tend to think of health care proxies and living wills as an older person’s issue, but most of the highly charged cases involving end-of-life issues have centered around young people, Karen Ann Quinlan, Nancy Cruzan, Terri Schiavo. All 3 of these young women were left disabled without any instructions about their care, beyond hazily recalled details of statements they made in their teens or in their twenties.

Older people may be less in the news when it comes to health care issues because older individuals tend to have established plans for dealing with end-of-life issues. Often these plans are developed as part of an estate plan, where individuals arrange health care directions, trusts and durable powers of attorney, in addition to the preparation of a will. Let’s examine each of these choices which supplement your will, to see which might be right for you.

Health care directions are generally spelled out in either a living will, or in states where a living will is not recognized, by a health care proxy. In some states these arrangements are designated as a Power of Attorney for Health Care.

A living will goes into great detail about how you want to be treated by your physician and your hospital if you are totally disabled with no hope of recovery. If you are mentally able but you move your residence to an assisted living facility, or if you move to a nursing home, or if your life is in danger in a hospital, the facility or the nursing home or the hospital will likely not admit you without a living will, or a similar document. Well-aired cases have made individuals more aware of what they might want to have in a living will, particularly terms dealing with resuscitation on the failure of our heart or lungs; and tubes and machines providing food, water and a steady but externally assisted heartbeat.

A health care proxy is closely akin to a living will, but with a health care proxy you name an individual to make health care decisions for you. Your health care proxy may address your preferences for end-of-life care, but the person you name as your “proxy” is the person who will step into your shoes to make the decisions you would have made if you remained able. Often this decision is couched more in terms of who you do not want to make these decisions for you, often we hear “…no way would my mom appoint me as her health care proxy, she’s afraid I’ll pull the plug….” Often we hear the same sentiment from mom, too.

So a living will, or a health care proxy, or a durable power for health care, are all directives aimed at caring for your body in the event of a life-threatening illness. Less publicized but sometimes equally important are arrangements like trusts and durable powers of attorney, arranged to take care of your finances in the event you can’t keep your financial books yourself.

A trust allows you to specify how your assets will be handled during your lifetime, including during any period of disability. In a trust you name a trustee, and you can even be your own trustee. In the trust you also name a trustee, an individual, or a bank or other trust institution, to take care of your financial affairs on your disability or death.

Arranging a trust does not do much to protect your assets during your lifetime, though, if you do not take one further step and “fund” your trust. Funding your trust involves placing assets right into your
trust, changing the name of bank accounts, securities and real estate from your name to the name of your trust. So to fund my trust my accounts would no longer list Kevin M. Flatley as owner, but rather The Kevin M. Flatley Trust will be owner. If I have a trust but if I do not take this added step of funding my trust, my trust offers me no protection upon disability. Generally this trust will be revocable, so nothing is lost placing assets right into my trust.

I still may be protected, though, if I do not have a trust, or if my trust is not funded, if I have a durable power of attorney. Powers of attorney generally protect our finances, much like a trust. You can have a power of attorney in which you name someone to take care of your finances right now, or your power of attorney can delay this responsibility until a disability. Until the concept of a “durable” power of attorney came about, powers of attorney became invalid on disability, but with fairly recent durable power of attorney statutes, you can now prescribe that a power of attorney will survive your disability.

Durable powers of attorney have one shortcoming when compared with the protection of a trust: when you have a durable power of attorney your accounts remain in your name, and they pass through your will at death. When assets pass through your will they pass through probate. Assets placed right into your trust during your lifetime avoid probate.

Do not confuse avoiding probate with avoiding taxes. When you avoid probate, you avoid the need to have your executor run back and forth to the local probate court settling your estate. Each of these trips costs money, and it can take months for the probate court to approve your estate’s filings; you avoid this expense and these months of delay by placing assets right into your trust. Placing assets right into your trust avoids the probate court: you are avoiding the cost and delay of “probate” by funding your trust.

Finally, living wills, health care proxies, and durable powers of attorney should remain accessible to your family. Copies and even duplicate originals are often left with the person named to care for you or your finances, but you might also send copies to your physician, a priest, rabbi or minister, and one or more of your children. A safe deposit box is probably the hardest place to reach on your disability, so this may be the worst place to keep these documents. Generally a will should not be executed in duplicate, but an original will is probably best kept out of a safe deposit box too, since a will should be read within hours of a death.

So when you arrange a will, explore the prospect of arranging a living will or a health care proxy to care for your body, and a durable power of attorney and a trust to protect your finances. Then go about your daily chores, and with good fortune these documents will gather dust in a closet and they will remain there forever, no more than just another insurance policy, useful only should the need arise.