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TRUSTS & ESTATES

The Journal of Wealth Management
for Estate Planning Professionals

May, 2010 Issue

*Advance Health Care Directives
Standard forms don't do the trick*

By Michael Gilfix

Trusts & Estates

The Journal of Wealth Management for Estate-Planning Professionals—Since 1904



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Advance Health Care Directives

No two clients are alike. Real life stories show why standard forms don't do the trick

I've counseled thousands of clients about the need for advance directives as an integral, critical component of an estate plan. Advance directives can be the most important document a client signs. If difficult health care decisions are to be made, nothing can be more critical. In addition to addressing the most fundamental questions about life-sustaining treatment, advance directives are living, breathing documents that give our clients an opportunity to express themselves creatively.

I've represented individuals and families in a number of "right to die" court cases,¹ I've served on ethics committees and represented hospitals and nursing homes in health care decision-making matters. But every time I think I've seen it all, another unique circumstance comes along. That's why I don't believe in using simple, standard form advance directives.

I understand why most attorneys rely on standard forms. We're not physicians and few of us understand the difference between a coma and a persistent vegetative state, for example. Most believe that simple forms are necessary so clients can understand them and physicians can quickly determine a patient's wishes by looking at a form with which they are arguably familiar.

But my discussions with clients underscore the importance of tailoring the directives to the client's specific needs. I talk with clients about their wishes on many issues. For example, I ask whether they want to use life-sustaining treatment in challenging circumstances and where they would draw the line. I ask about pain control as a possible priority. I talk about

organ donations and the disposition of remains. I ask about family members who might object and attempt to insert themselves in the health care decision-making process against the client's wishes. These discussions can take up to an hour and yield many poignant and sometimes painful requests. I've been asked by cancer patients to draft language precluding the use of certain treatments, such as chemotherapy or radiation. I've been asked by victims of amyotrophic lateral sclerosis, also known as "Lou Gehrig's Disease," to help them define the point at which they would no longer want life-sustaining treatment to be maintained. I have had similar discussions with individuals afflicted with kidney failure and other diseases.

These discussions have also yielded a great deal of creativity—and humor—on the part of my clients. Here are some real life situations I've encountered. I offer them confident that they'll make each of us more successful and more complete in drafting comprehensive advance directives for our clients.

Psychic Phenomena

A retired engineer and his wife, a retired teacher, concluded a discussion about certain dynasty trust provisions with comments about the terms of their advance directives. They were very clear on one critical point: If they're completely unable to communicate and there's no hope for recovery, they each wanted all forms of life-sustaining treatment to be terminated. They understood that their attending physician or specialist would typically make this determination, but they wanted more.

With some hesitation, clearly wondering how I would react, they told me that they strongly believed in the power of psychics to see what traditional physicians can't see. After a lengthy discussion, I agreed I would draft a provision calling for a second—or third—opinion about



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“hopelessness” by psychics with whom they’ve had direct experience. Here’s the language I included in their executed advance directive:

“Consultation with Psychics or Psychic Healers:

“Before making decisions with regard to the non-use of life-sustaining treatment, my agent shall consult with at least two psychics to determine if there still exists energy (psychic or life force) suggesting that there is indeed hope of recovery. In such event, subject exclusively to the discretion of my agent, the termination of life-sustaining treatment may be delayed.

“My agent is to reimburse any involved psychics for their out-of-pocket costs and expenses. My agent is also to take all reasonable steps to insure that they are also provided with reasonable compensation by the trustee of my trust for services rendered.

“Below, I identify individuals who may be consulted in this capacity. It is my wish and direction that two psychics, at minimum, are to be consulted by my agent. If any named psychic is not available, my agent shall rely on references or additional names provided by the psychics to identify alternative individuals.

“In carrying out terms of this provision, my agent is to be flexible and creative so that my agent can be as certain as possible that my wishes are fulfilled. All reasonable fees and reimbursement for travel and other expenses will be paid by the trust, with our gratitude. Any of the psychics listed can recommend another if they are not available. If only one psychic is available, he will be empowered to suggest a second reader. If nobody listed is available for readings or recommendations, then [name of organization] can be used as a source of recommendations of people with psychic gifts. The trustee is empowered to modify this process as she sees fit, if our wishes can not be filled as a practical matter.

“The names and contact information for individuals I identify as appropriate psychics are as follows: [list of names and contact information].”

The advance directive specified the names of three psychics to contact if and when the need arises. It

included the name of the church they all attend in confidence that alternate psychics could be identified if those originally named are somehow unavailable. They assured me that their daughters, alternate agents named in their advance directive, understood and would honor those wishes.

Green Burials

Over the past year, over a dozen clients have chosen a “green burial” for their remains. A green burial is one that minimally impacts the environment. For example, no embalming fluids or metals are used, there’s no casket and the remains are often buried in land that’s to

Green burials aren’t currently available in most communities, but they reflect a growing phenomenon that’s increasingly acknowledged and popular.

be preserved as open space. Some clients opt for a green burial for ecological reasons; others are attracted to the economic benefit since it’s less expensive than either burial or cremation.

While green burial provisions incorporated in the advance directive vary with individual inclinations, the following provision is perhaps most typical: “It is my wish to have a ‘green burial,’ with no casket, and with no embalming or other preservation steps to be taken. It is my wish that my body be wrapped in simple cloth and placed in the earth.”

Green burials aren’t currently available in most communities. They reflect a growing phenomenon, one that’s increasingly acknowledged and popular. We’re well

advised to understand the approach and to perhaps offer it as an alternative to our clients.²

Ashes to Ashes

About a third of our clients opt for cremation. We always ask if a client wants to include information about the disposition of remains in the advance directive. While many choose not to include this information, the vast majority do and are pleased that we suggested it. Discussing the distribution of one's ashes is seldom dull. Some say, "I leave that to my kids" and nothing else. Many, however, have strong and typically creative thoughts about what to do. For example, our 66-year-old client was an aeronautical engineer at NASA. He became an engineer and joined NASA to fulfill his dream to travel into outer space. Unfortunately, NASA rejected his many applications to be a part of a space travel mission. He realized that he was too old, at age 66, to ever be chosen for the experience.

"I may not go into space, but my ashes will!"

His advance directive specifically calls upon his

and well, recently reaffirmed that his views haven't changed. In our discussion, he even said, "I'm looking forward to it."

Another client, a single man without children, was an avid duck hunter. He was part of a club that owned many acres of land that included a number of duck ponds. His greatest joy was joining his buddies, having a few drinks and setting out the decoys.

His advance directive calls upon the agent to have a portion of his ashes loaded in a number of shotgun shells and to distribute those shotgun shells to his buddies. They're to take one of the club's boats out into a duck pond and shoot them into the air so that his ashes settle with explosiveness on the pond that gave him so much pleasure during his lifetime. He assures us that his hunting buddies understand his wishes and are on board.

We all have our passions. We had one 80-year-old client who enjoyed shopping more than anything else in life. She would spend entire days at the Stanford, Calif. shopping center, located only a few miles from our office in Palo Alto. After she told me that she wanted her remains cremated, I asked if she had any particular wishes with regard to the distribution of her ashes. Her face lit up. "At the Stanford Shopping center!" She proceeded to identify her favorite stores. She directed that her named agents distribute a small portion of her ashes at exterior corners of each of these stores. We of course advised her about the legal issues that her children would confront. She was happy to leave those questions to her children.

One client wanted her advance directive to include a provision mandating that classical music be played in her room if she's ever unable to communicate.

The Sound of Music

In the late 1980s, I was speaking with one of my long-time friends and favorite client. She was then in her late 50s and enjoyed a substantial estate along with her husband. She had creative thoughts about virtually everything. In discussing the terms of her advance directive, I explained that it could deal with any health care issues that she was concerned about.

She said that she was disturbed by the sterility of hospitals and about the lack of stimulation. A singer herself and lover of the arts, she wanted music, in particular, to be a part of her health care treatment. After one of the most interesting discussions I've ever had about health care decisionmaking, she announced that her advance

named agent, his son, to send some of his ashes into space as part of a payload on a shuttle or other missile. If you have the money, there is space available on U.S. shuttles for any harmless material. While such payloads typically involve scientific or other experiments, there's no prohibition against the inclusion of ashes on a mission.

His revocable trust specifically provided funds to pay for this space shot. It mandates that the trustee make available up to \$50,000. Our client, still alive

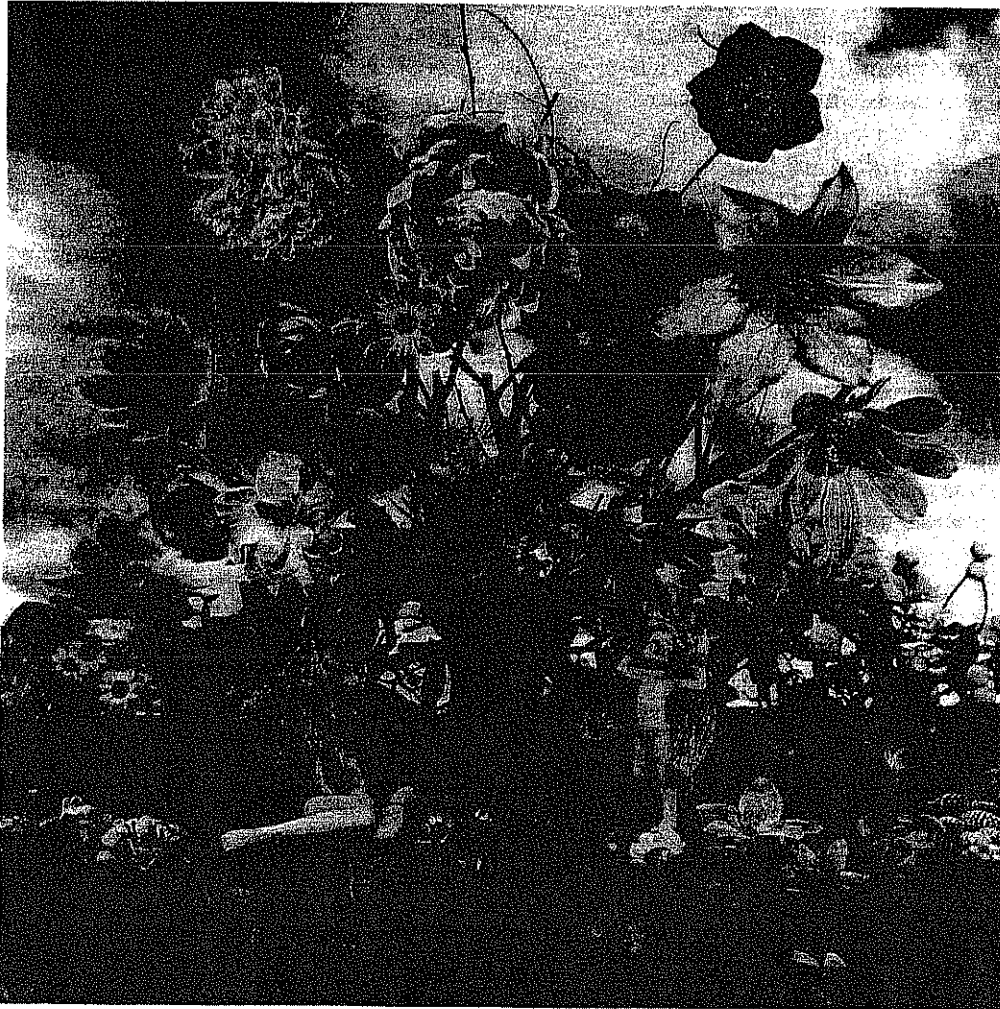
directive must include a provision mandating that classical music be played in her room if she's ever unable to communicate. She may be convalescing, in a coma, or someday suffering from dementia. She went on to specify the music of four composers to receive predominate attention: Beethoven, Brahms, Bach, and Vivaldi. She signed her advance directive, which included a detailed provision reflecting these wishes, a week later.

A month later my client called me in a state of virtual panic. "Mike" she said, "we have to amend the terms of my advance directive." I asked what she wanted to do, worrying that she was diagnosed with a life threatening illness. "We have to add the music of Marlene Dietrich."

We added that provision and she signed her new advance directive. Many years later, as she was dying, all visitors noticed that there was never silence in her room. They particularly enjoyed the dulcet tones of Marlene Dietrich. Her recordings also graced our client's memorial service. **TE**

Endnotes

1. See, e.g. *Estate of Drabick*, 200 Cal. App.3d 185 (1988).
2. For more detailed information about green burials, see Michael Gilfix and Carolyn A. Chandler, "Burials—Going Green, Greener and Greenest," *Trusts & Estates*, February 2009 at p. 58.



SPOT LIGHT

Spring Into Action! Tetsutaro Kamatani's oil and mixed media on canvas "Happy Paradise II-#32," about 57 inches by 145 inches, sold for U.S. \$7,725 at Sotheby's "Contemporary Asian Art" auction in Hong Kong on April 5, 2010.