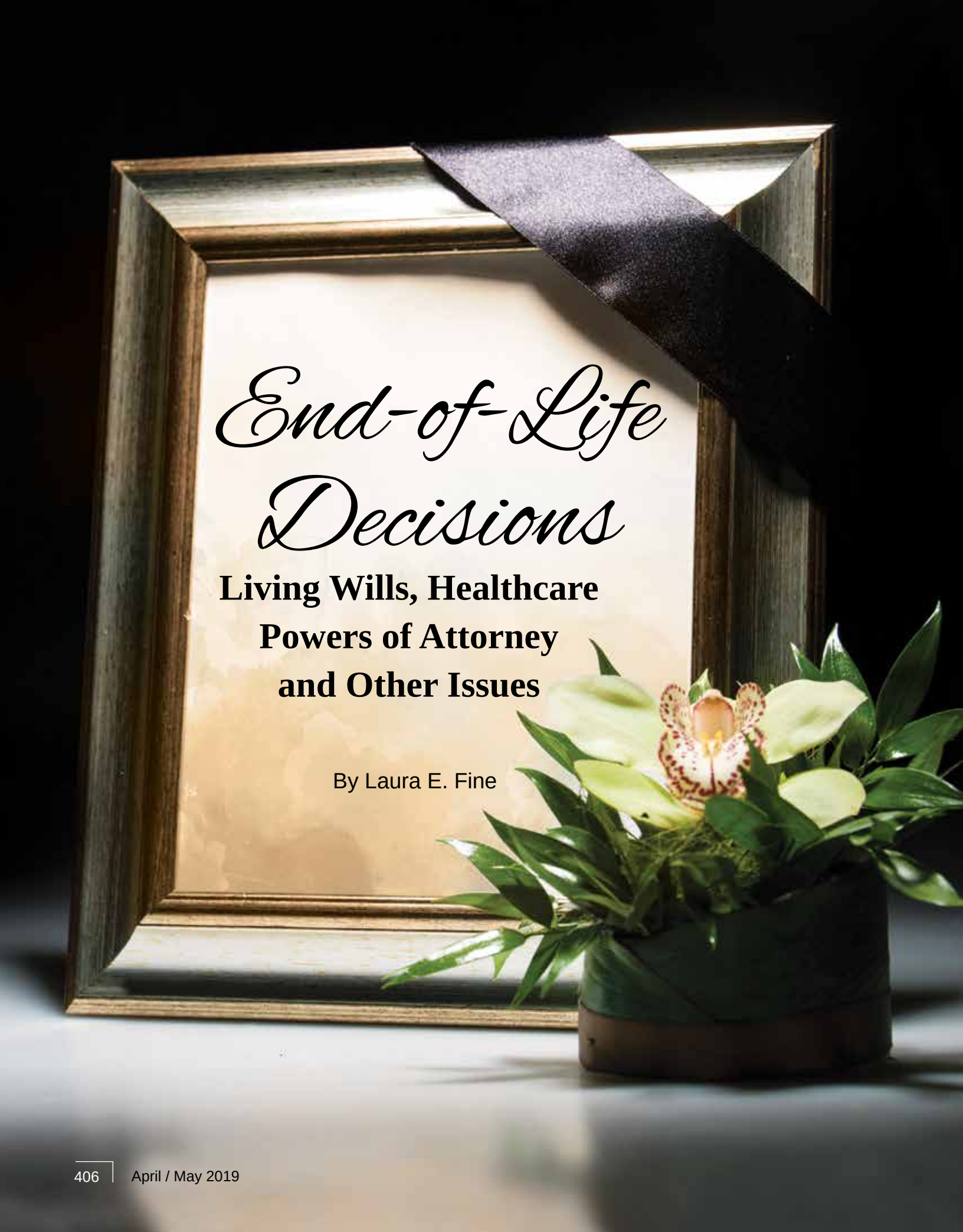

End-of-Life Decisions

Living Wills, Healthcare Powers of Attorney and Other Issues

By Laura E. Fine

Discussing end-of-life planning with clients is a very difficult, but necessary, topic for any practitioners involved in estate planning. This is particularly true if a client is facing a life-threatening illness. Decisions regarding end-of-life care are deeply personal and clients should talk to loved ones, healthcare providers and advisors regarding their wishes as this is crucial to ensuring those desires are carried out. If a client does the appropriate planning, he or she will be able to focus on spending time with loved ones rather than dealing with unexpected issues.

Powers of Attorney and Living Wills

The existence of a durable power of attorney can often mean that relatives will not have to institute interdiction proceedings if the individual becomes incapacitated, as durable powers of attorney will continue even if the individual is incapacitated. La. Civ.C. art. 3026. A person with a durable power of attorney (hereinafter the "agent") can act on the behalf of the individual (hereinafter the "principal") in legal and financial matters and can perform all acts incidental to or necessary for the performance of the power of attorney. La. Civ.C. art. 2995.

The power of attorney will terminate upon the death or interdiction of the principal. La. Civ.C. art. 3024. The principal may terminate the power of attorney at any time unless the parties agreed to its irrevocability. La. Civ.C. art. 3025. The agent may terminate the power of attorney by notifying the principal of the agent's resignation. At the termination of the power of attorney, the agent has an obligation to account for his or her performance to the principal unless the duty to account has been expressly dispensed with by the principal. La. Civ.C. art. 3032.

Some clients may be uncomfortable giving such broad authority to one or more individuals if it is immediately effective upon execution. It is not uncommon to have clients ask to have the power of attorney be a "springing" power. A springing power of attorney is one that becomes effective upon the occurrence of a condition, such as the principal's incapacity. There are many difficulties that can arise when using springing powers of attorney, with the most obvious being how to define and confirm incapacity. One common method of proving the principal is incapacitated is to require that such incapacity be certified by two physicians. A springing power of attorney also presents difficulties when the agent attempts to use the power of attorney, since the agent will have to prove to third parties that the principal is incapacitated.

It is often advisable to have more than one agent acting as power of attorney for the principal. The reasoning is that if one agent is unavailable, incapacitated or predeceases the principal, another individual can act as agent. Clients may have concerns regarding naming someone other than their spouse as agent, as the possibility of conflict increases when more than one person is authorized to act on behalf of the principal. The question is also whether the multiple agents should be required to act jointly, or whether they should be allowed to act independently. Requiring joint action complicates the actual use of the power of attorney since two signatures will be required. However, naming more than one agent, especially if those agents are children of the principal, may reduce family conflict since both agents will have access to financial information. The agents are also less likely to abuse the power of attorney if another agent is looking over their shoulder.

In the event that the principal is interdicted, the principal can designate his or her preference for a curator in the power of attorney. La. C.C.P. art. 4561(C)(1)(a) states that the court will first consider as curator a person designated in a writing by the proposed interdict when he or she still had sufficient ability to communicate a preference.

Some financial institutions, particularly large financial institutions, can be reluctant to accept powers of attorney prepared by someone other than their own legal department. The practitioner should advise his or her client to contact the financial institution and confirm that the power of attorney prepared by the practitioner will be accepted by the financial institution.

As a final note, clients should be advised to place the power of attorney with other important legal documents (or give them to the agent), but should not place the power of attorney in a safety deposit box as the agent will need the power of attorney to enter the safety deposit box.

Medical Power of Attorney

While the power of attorney discussed above can include the power to make medical decisions on behalf of the principal, it is common for the medical power of attorney to be a separate document.

The medical power of attorney specifies the person or people the principal wishes to make his or her healthcare decisions in the event the principal is unable to make those decisions. If the principal wants to name more than one person as the agent, the drafter should consider how conflicts between the two (or more) agents will be resolved. It is advisable to name one person whose decisions will be binding on the healthcare professionals in the event of conflict among the agents. Unlike the durable power of attorney, the medical power of attorney will only be able to be used by the agent when the principal is incapacitated. The issues around "springing" powers of attorney do not apply with medical powers of attorney since the incapacity of the principal is easily ascertained by medical staff.

The medical power of attorney can be a blanket statement giving the agent the ability to act on the behalf of the principal for all medical decisions, but the medical power of attorney also can address the principal's desires in specific medical situations. For example, one of the most difficult decisions for an agent to make is whether to consent to a "Do Not Resuscitate" order. It is preferable for the principal to have considered this question prior to incapacity and to have stated his or her decision so that the children or a spouse cannot contradict the principal's desires.

In the absence of a medical power of attorney, La. R.S. 40:1159.4 states that

the people who can consent to medical treatment are (in this order): spouse (not judicially separated), adult child of patient, parent, patient's sibling, the patient's other ascendants or descendants, adult friend, person standing *in loco parentis* for a minor, person chosen by an interdisciplinary team, or person chosen by an ad hoc team assembled by an interested person.

Living Will

A living will is a document wherein the client expresses his or her desires regarding continuing medical care in the event the client is in a permanent and irreversible coma. For loved ones, the decision to terminate life support is particularly difficult. The decision to terminate life support also must encompass the decision to terminate hydration and nutrition through the removal of a feeding tube. As wrenching as these decisions are, if the client has expressed his or her wishes in a living will, the family will be able to effect the decision knowing that they are acting in accordance with their loved one's wishes.

La. R.S. 40:1151.2 states that any adult person can make a written statement directing that life-sustaining procedures be withheld if that person is in a terminal and irreversible condition. The declaration must be signed in the presence of two witnesses. The declaration can be made orally or nonverbally after the diagnosis of the terminal and irreversible condition so long as the declaration is made in the presence of two witnesses. The statute also provides a sample form for the declaration. The declaration can be registered with the Secretary of State for a small fee.

Directives Regarding Burial and Cremation

Many clients have specific desires for the disposition of their remains and those desires can be outlined in either the will or a notarized declaration. In the will, or notarized document, the client can specify desires regarding the type of service, music, etc. and also name the person they would like to be in charge of the funeral services. Having such a will or notarized document can prevent conflict among family members and give clear direction for the funeral home.

In speaking with multiple funeral homes in the New Orleans area, it became clear that the area of most conflict was the decision to cremate. La. R.S. 37:876 provides a long list of individuals authorized to serve as the agent for the deceased with regards to the decision to cremate and requires majority consent in the event that the deceased's surviving children or grandchildren are the individuals whose consent is required. If the required authorization cannot be obtained, *i.e.* if a majority of the surviving children or grandchildren won't consent to cremation, a final judgment from a court will have to be obtained.

Long-Term Care Insurance, Medicare/Medicaid and Hospice Care

Planning for long-term care in the event a client becomes incapacitated or disabled is a vital part of end-of-life planning. The cost of long-term care can be astronomical and many clients are interested in purchasing insurance to cover those costs, as health insurance doesn't cover this type of care and Medicare only covers this type of care for a short period of time. Long-term care can meet a variety of patient needs, from help with everyday activities to skilled nursing care.

This type of insurance is generally not inexpensive, and the cost will climb the longer a client waits to buy a policy. The policies will offer different coverage options. Depending on the coverage options chosen by the client, the policy will pay for at-home care or care in an assisted living facility. Some policies also will pay for adult day care, care coordination, and modifying the client's home so the client can continue living there.

In order to start receiving benefits from the long-term care policy, the client will have to meet certain standards set out by the insurance company. Generally, the policy will be triggered when the client can no longer perform two or more activities of daily living, such as bathing, eating, dressing, using the bathroom and walking. Clients should make sure that the policy will be triggered by the onset of mental impairment, such as Alzheimer's or dementia.

While the statistics vary depending on the source, it is clear that the majority of people will need some form of long-term care after age 65. Women are more likely to need long-term care than men and to need it for longer.

Medicare does not pay for long-term care. It is intended to only pay for medically necessary care and acute care such as doctor visits, drugs and hospital stays. Medicare will cover short-term care in a skilled nursing facility for conditions which are likely to improve, such as physical therapy after a fall or a stroke.

Medicare will pay 100 percent of the costs for a 20-day stay at a skilled nursing facility, hospice or home health care if the patient had a recent hospital stay of at least three days, the patient was then admitted to a Medicare-certified nursing facility, and the patient requires skilled nursing or therapy. For days 21 through 100, the patient pays for the costs of the facility up to $164.50 per day, with Medicare paying for any costs that exceed $164.50 per day.

Medicare also will pay for part-time or intermittent skilled nursing care, physical therapy, speech therapy, occupational therapy, medical social services to help cope with an illness, medical supplies and durable medical equipment if such services are medically necessary. Medicare will continue to pay for these services indefinitely as long as the treating physician reorders the services every 60 days.

The vast majority of nursing home residents pay for their care through Medicaid. Qualifying for Medicaid can be a tricky business for clients who have assets or income in excess of the federal/state set limitations. While qualifying for Medicaid is often an important part of finding a nursing home, the topic is complex and beyond the scope of this article.

Hospice

Hospice care is covered by most private insurance plans, Medicare and Medicaid. The focus of hospice care is to manage the pain of the patient and treat the symptoms of the terminal illness, rather than attempting to cure the illness. The patient can receive hospice care at home, a nursing home, a hospital or a stand-alone, Medicare-approved hospice care facility. Hospice will create an interdisciplinary team that consists of a nurse, hospice volunteer, social worker, home health aide and chaplain. The team will work with the family to create a plan of care for the patient.

General Advice

Each end-of-life planning discussion is different. The conversation with a young, healthy client is very different from a conversation with a client who has received a terminal diagnosis.

When a client has received a terminal diagnosis or has a life-threatening illness, the practitioner's first job is to review all documents currently in place to see if they still conform to the client's wishes. If the client is either new or new documents must be drafted, care must be taken to execute them while the client still retains capacity and is not adversely impacted by medications.

The client or the client's family also should start to gather important documents and information regarding the client's assets and debts. These documents will be invaluable when the succession is opened. The client or family should get information regarding all financial assets, including bank accounts, life insurance, retirement accounts, annuities, pensions (especially if the pension has survivorship benefits), real estate descriptions and all debts.

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