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Capitol Hill Village
Contemplation of Our End of Life, Part II - June 9, 2022
Financial Powers of Attorney and Health Care Powers of Attorney/Living Will

I. Financial Powers of Attorney

A. What is the default? Bad news. If you get incapacitated, lawyers will make a lot of money and your relatives will be greatly burdened by complex (and often permanent) court proceedings known as “guardianship and conservatorship”. Guardians are in charge of medical decisions, whereas conservators are in charge of the incapacitated person’s money. These proceedings usually last as long as the incapacity (which can be until death). A court appointed fiduciary serves for the incapacitated individual, bonds are required, and every cent spent or earned has to be accounted for to the court.

B. This applies even if you own assets jointly with your spouse. If one of you becomes incapacitated, the other can’t act for you in real estate transactions (even for jointly owned real estate transactions) or for solely titled assets (such as retirement assets and life insurance).

C. Suggestion: Make a Financial Power of Attorney.

1. Definitions for Powers of Attorney: The “principal” is the person making the Power of Attorney. The “attorney in fact” (sometimes called “agent”) is the person empowered to make financial transactions for you.

2. Can be limited, applying to only specific assets or transactions, or general – covering everything. If you want to include powers over real estate, you must make sure it includes special real estate language for D.C.

3. Be sure that it is “durable”: that is, that it survives your incapacity. Do NOT make it “springing”, which is only effective upon your incapacity. A springing Power of Attorney complicates matters, as it is often hard to get a certification of incapacity that will satisfy financial institutions who are fervently trying to protect against liability. If you don’t trust someone when you are capacitated, you certainly shouldn’t trust them when you are incapacitated.

4. Maintain control over access to the original and copies.

5. Have an alternate attorney in fact.

6. Can record at Recorder of Deeds. Must record if using for real estate transaction.

D. Who should you pick to serve as your agent?

1. You must really trust the agent – they are fiduciary. They have access to all of your assets.
2. Your agent should be organized and financially savvy.
- E. Execution requirements: A notary and one witness is required; it is better to have a notary and two witnesses.
- F. Nuanced issues:
 1. Compensation for agent.
 2. Gifts – often limited to “exempt” gifts, but larger gifts can really help with estate planning.
 3. Even if you have a lawyer do your Powers of Attorney, it is a good idea to register your agent at your largest financial institutions. They will have forms to fill out for this purpose.
 4. IRS – it is a good idea to fill out their form for Power of Attorney.
 5. Social Security does not recognize a Power of Attorney.
- G. Revocation – in order to revoke your Financial Power of Attorney, you must give written notice to the agent and to any entities which have the Power of Attorney on file.
- H. Authority – the authority given by the Power of Attorney ends at death.

II. Health Care Power of Attorney

- A. There is a default if you do not have this document.
 1. You can be declared incapacitated by two physicians.
 2. List of folks who can act through “substituted consent”:
 - a) Spouse
 - b) Adult Children
 - c) Parents, etc.
- B. It is good to have a Healthcare Power of Attorney so that you can name who you would like to act for you and in what order.
- C. It does not have to be notarized; just two witnesses are required. They should not be relatives or health care providers.
- D. Be sure to add contact information for the individuals you name to serve as your agent.
- E. Give a copy to your primary treating physician so it can be part of your medical record.
- F. Add a HIPPA (Health care privacy law) release. Make sure there is an expiration.
- G. Most importantly, talk to your “attorney in fact” – the person acting under your Healthcare Power of Attorney – so that they know what your wishes are.
- H. When the attorney in fact is acting under a Healthcare Power of Attorney, they must act as if they were the incapacitated individual. If they have different values or opinions, they still must act in accordance with the wishes of the incapacitated individual.

III. Living Will (or “Advance Directive”)

- A. Default is “Full Code” – idea is that at some stage you want to become “DNR”, or do not resuscitate. Sometimes this is expanded to “Do Not Intubate”, “Do Not Hospitalize”, and/or “No Dialysis”. This must be medically ordered in the patient’s chart by a physician.
- B. Statute says if you have an “incurable injury, disease, or illness certified to be a terminal condition by two physicians who have personally examined [you], one of whom [is your] attending physician” and that death would occur regardless, then life-sustaining procedures can be withheld pursuant to your Living Will.
- C. Persistent vegetative state – in essence, a coma with no reasonable likelihood of recovery – is not in the statute, but it is a good idea to have it included so that life-sustaining measures can be withdrawn.
- D. Separate Living Will for Dementia

IV. MOST and Five Wishes

- A. MOST is filled out by MD/DO or NP. This is an actual medical order and a living will/advance directive.
- B. Five Wishes is a user-friendly form that just requires two witnesses for most states. It is a great conversation starter between the person giving health care authority to another. It also contains personalized information, like funeral wishes. Five Wishes is legally accepted as Healthcare Power of Attorney and Living Will.