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UPDATE YOUR POWER OF ATTORNEY AND LIVING WILL

By Robert A. Wade, JD, and Mark E. Kropiewnicki, JD, LLM

Most people think of estate planning as beginning and ending with the preparation and execution of wills. While well-drafted wills are the cornerstone of any properly prepared estate plan, they do not, in and of themselves, make for a complete plan. If the broadly stated goal of estate planning is to pass the maximum amount of wealth to one's chosen beneficiaries free of governmental interference, then every reasonable step that moves you closer to that goal must be considered and acted on.

Durable general powers of attorney, which can help preserve wealth during periods of incapacity and allow for tax minimization as well, must be considered one such important step. Therefore, if you haven't executed a durable general power of attorney, your estate plan is probably not complete.

Defining the role

What is a durable general power of attorney? Starting with the component parts, it is a document in which one person (the principal) appoints someone else as his or her agent (attorney-in-fact); granting this person the authority to conduct business on the principal's behalf.

A general power of attorney gives complete authority to the attorney-in-fact to transact any and all kinds of business in the principal's name. A durable power of attorney provides that the powers are not to be affected by the principal's subsequent disability or incapacity.

So how does the execution of a durable general power of attorney get you closer to the goal of maximizing the amount of wealth that will ultimately pass to your beneficiaries? Statistically, one out of every two Americans will suffer a period of prolonged disability during his or her lifetime. There is, therefore, a substantial likelihood that there will be some period of time during your life when you are disabled. Your inability to manage your affairs during such time could be quite costly.

Cumbersome alternatives

Without a durable power of attorney, if you become incapacitated, you will be saddled with one of the more cumbersome alternatives under our legal system for dealing with incapacity. For example, depending on the state where you reside, if you become incapacitated and have no power of attorney, a "conservator" or "guardian" must be appointed by the local court so that someone can manage your affairs.

Moreover, in almost every jurisdiction, to have a guardian or conservator appointed requires extensive (and expensive) court hearings to establish incompetency. This can be embarrassing, traumatic, and costly, In addi-

tion, guardians and conservators frequently do not have the in-*• vestment authority and powers that someone acting under a durable power of attorney can have.

Finally, in some jurisdictions, the conservator or guardian cannot be a family member, even though they often know best how to handle your affairs.

You might wonder why you need a durable power of attorney when you and your spouse own everything in joint names. After all, if you become incapacitated, couldn't your spouse simply deal with the jointly held assets?

For one thing, it is unusual to have everything in joint names. More than likely, there are going to be some assets in your sole name (retirement plan assets and stock in professional corporations are two examples). And, while joint tenancy is useful for handling things like bank accounts, it is not at all effective in dealing with real estate, stock or myriad of other kinds of properties.

Thus, on the financial front, a well-drafted power of attorney serves many purposes. It can give your attorney-in-fact the power to make deposits or withdrawals from bank accounts; open new accounts; buy or sell stocks; bonds or other securities; enter into real estate contracts; gain access to safe deposit boxes or open new ones; sign tax retains; create trusts; and engage in more traditional forms of estate planning, *eg*, gift giving.

The power to make healthcare decisions is also quite commonplace in a well-drafted power of attorney, and quite useful as well. Thus, for example, the durable general power of attorney can authorize the attorney-in-fact to make decisions regarding medical treatment, admission to hospitals or nursing homes; and allow him or her to make arrangements for, consent to, or waive any and all kinds of medical procedures.

A question of power

The importance of giving someone this kind of power is fairly self-evident. If there is no one vested with the authority to make decisions for you when you cannot, estate-preserving opportunities will be missed, filing deadlines will pass, and chaos will result

Nevertheless, some people are reluctant to grant any one individual as much power as is usually contained in a durable power of attorney. They do not feel comfortable granting that kind of authority even to someone very close to them.

It is possible to limit the authority granted under a power of attorney, but that would be self-defeating from an estate planning point of view. After all, the primary use for a durable general power of attorney comes when you are incapacitated If you were disabled, you would want someone; to act in your stead—as if he or she were you. That means, generally speaking, giving the broadest possible authority so that the attorney-in-fact has the ability to respond to changing circumstances, as you would. You need to provide that individual with as much flexibility as possible in dealing with what can be a very difficult situation.

The magnitude of financial and personal problems that arise if you are incapacitated cannot be overstated.

Still, many people fear that if they give a power of attorney to another individual (even a spouse), that person can use it improperly. These fears are compounded when they realize that most durable general powers of attorney are drafted to be currently effective. That is, they do not take effect simply upon incapacity.

It is possible to execute a "springing" durable general power of attorney, that is, one that only becomes effective upon the principal's incapacity.

However, springing powers have problems of their own. If one of the points of executing a power of attorney is to avoid lengthy court hearings to prove incompetency, it is arguable that executing a springing power

of attorney does little to resolve that problem. Someone has to make a decision about your competence before they can act.

Moreover, third parties might be reluctant to rely on the attorney-in-fact's word that the principal is incapacitated. They therefore might be reluctant to allow the attorney-in-fact to make use of the power.

If you are worried about misuse of the power of attorney, it is probably better to establish a currently effective power, and let your lawyer keep the document in a safe place so that it can be pulled out when needed.

Living wills

In setting up a complete estate plan, a "living will" can be an important extension of the durable general power of attorney. A living will is a legal document that allows an individual to decline medical treatment that would merely prolong his or her suffering from a terminal injury or hopelessly critical injury. Some form of living will legislation has been enacted by at least 39 states and the District of Columbia; several others have legislation pending.

Should you execute a living will? Many people strongly feel that they do not want heroic measures taken to extend their lives. If you feel that way, you would be well advised to explore signing such a document even if the state in which you reside does not explicitly recognize living wills. The problem is that, depending on the jurisdiction in which you reside, executing a living will may not do precisely what you would like it to do. As a recent article in the American Bar Association's *Real Property Probate and Trust Journal* stated, "Most living will statutes add little beyond clarification to the legal rights of patients.

"Despite their grand titles, living wills are very limited in scope. In most states they can only be used to refuse extraordinary life-prolonging care. Second, they are only effective to refuse care after a patient has become terminally 21."

Of the 40 jurisdictions that have adopted living will legislation, virtually everyone has a different definition, both as to what kind of care may be withheld pursuant to a living will and under what circumstances the document may be revoked. For example, most living will statutes (and sample living wills) would allow for the refusal of <*life-sustaining treatment," But the definition of life-sustaining treatment varies from state to state.

Would you want to be kept alive by the insertion of nasogastric feeding tubes? Many people feel that if that were all that stood between life and death, they would choose death. But the withdrawal of nutrition is not covered by most Irving will statutes.

At what point may treatment of any kind be refused under a Irving will? Different states specify different conditions permitting refusal of treatment Some states indicate that you must be “terminal” condition. Others specify that death must be “imminent”. In addition, there is a wide variation from state to state in what constitutes effective revocation of a living will.

Given the limitations and uncertainties that abound with living wills, why execute one? The fact is that even with its limits and uncertainties, the .living will can serve as an indicator of how you feel or what you would want to have happen if you were to suffer from an accident or illness and not be able to make decisions for yourself.

If you have the leisure to explore and think things through before signing, a living will is an expression made at a time when you were capable and under no duress. This latter point is important because a living will is only going to come into effect when you are not capable of communicating your desires. Its purpose is to speak for you when you cannot.

If you do execute a living will, you should be as specific as possible about your intentions and under what

circumstances you would not want extraordinary life-support system treatment. Since state laws vary, you should consult with an attorney who has some experience in preparing these documents. A living will can be one step toward establishing your desires and avoiding some of the pain others have experienced.

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