

“Ancillary” Estate Planning Documents

In last month's issue, I addressed why many people have a will for the appointment of Guardians of their minor child(ren) and their Executors and trusts for the more flexible disposition of their property. However, estate planning is not just death planning. Estate planning is planning for the remainder of one's life, at one's death and after one's death. A will and trust can address the latter two time periods, but not the first. During life, unexpected events can be costly and embarrassing if the appropriate “ancillary” estate planning documents are not in place.

Durable Power of Attorney

The first such document that I recommend is a Durable Power of Attorney. A power of attorney is a document in which one (a principal) authorizes another (an agent) to perform certain acts. The authority granted terminates upon the death or incapacity of the principal unless the power of attorney is a “durable” power of attorney. The durability aspect means that the authority granted does not terminate upon the incapacity of the principal. Though even a Durable Power of Attorney terminates at death.

Most Durable Powers of Attorney grant the authority to bank, enter transactions and perform a number of other financial related acts. Some powers of attorney grant the authority to gift property of the principal and others permit the agent to transfer the principal's property to a trust. If the principal has complete confidence in the agent, which is usually the case between married individuals, I recommend that the agent execute a Durable Power of Attorney authorizing all of the aforementioned acts.

Having a valid Durable Power of Attorney can save money, time and embarrassment if the principal becomes incapacitated. In such a situation, the agent can transfer the principal's property to a trust to be managed for the benefit of the principal. Without a valid Durable Power of Attorney, someone would have to be appointed as Guardian for the incapacitated individual. The appointment of a Guardian requires a full probate court hearing which is costly and conducted in an open courtroom.

Health Care Proxy

Another similar document that I consider to be part of a complete estate plan is a Health Care Proxy which is actually a Durable Power of Attorney for health care purposes, which is exactly what it is called in some jurisdictions. In a Health Care Proxy, one (again called the principal) authorizes another as Health Care Proxy Agent, to make health care related decisions for the principal if the principal is unable to make them for any reason. The document has very broad application as it grants the authority to decide in all cases when the principal is unable to do so for any reason even if the principal is merely unconscious.

Living Will

In contrast to the broad application of a Health Care Proxy is the narrow application of a Living Will. A Living Will sets a person's desire to not have artificial

means keep him/her alive if two physicians, including the person's primary care physician, attest that the person has an incurable disease or injury and death is imminent.

A careful review of the prior sentence reveals three hurdles. There must be two physicians, the disease or injury must be incurable and death must be imminent. This last hurdle causes Living Wills to have very limited application. I always recommend that a client consider executing a Living Will. I do not recommend whether one should or should not execute one as that is a very personal decision, but you should be aware that you have the opportunity to execute a legally enforceable document to effectuate your desires on these issues.

These "ancillary" documents, along with a valid will and often a trust, complete an estate plan and achieve your objectives during your life, at your death and after your death. I recommend that you consult with an attorney to assist you with the documents that are appropriate for you.

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