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TRUSTS AND ESTATES

Life Planning With Powers of Attorney, Living Wills

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When people think about estate planning, "death" tends to come to mind, but what about "life?" While people generally understand the importance of having a will, knowing that a will sets forth how the estate will be managed after death, they also ought to recognize that they should plan for how their personal and financial affairs and medical decisions will be handled in the event that a lifetime disability leaves them unable to act for themselves. A durable power of attorney is essential to provide that function for personal and financial matters, as is a living will for medical matters, and each should be part of every comprehensive estate plan.

- **Powers of attorney.** A power of attorney is a written legal document in which you (the principal) appoint another person or institution to act as your agent or attorney-in-fact to handle your affairs. The agent is given authority to perform certain acts for the benefit of the principal, such as signing checks, paying bills, managing investments, signing contracts and handling bank accounts. The power of attorney can be drafted to be "general" (covering all activities) or to be "limited" or "special" (granting powers limited to specific matters, such as selling a piece of real estate).

- **Durable powers of attorney.** Powers of attorney can be granted for any length of time and may be revoked by the principal at any time. Although traditional powers of attorney terminate when the principal becomes incapacitated, the more frequently used "durable" power of attorney continues the agency relationship even if the principal becomes incapacitated and cannot act on his or her own behalf. It typically contains words like: "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or a lapse of time."

• **Durable versus springing powers of attorney.** While a durable power of attorney becomes effective at the moment it is signed, there is another type of power of attorney, known as a "springing" power of attorney, which does not become effective when it is signed, but only "springs" to life after the occurrence of a specific event named in the document, such as incapacity. While springing powers of attorney may seem appealing to many people who are worried about giving up too much power too soon, we generally recommend and prefer that clients execute durable powers of attorney for their ease of use and immediate effect. Unlike as may be the case with a springing power of attorney, with a durable power of attorney, there will never be an issue of having to obtain evidence that the principal is incapacitated, such as certifications by doctors, which might delay the process (particularly if the doctors are worried about divulging information under the Health Insurance Portability and Accountability Act without a court order). In the case of an emergency, any such delay could defeat the very purpose of having the power of attorney in the first place. For that reason and others, it generally makes sense for people to execute durable powers of attorney and only name individuals who they trust completely. Also, another form of protection is to ask your lawyer to hold onto the original durable power of attorney and not release it to the agent unless and until it is needed (whether for incapacity reasons or otherwise).

• **Powers of attorney versus guardianships.** Without a durable (or springing) power of attorney in place, in the event of incapacity, a guardianship or conservatorship proceeding would need to be initiated. These court proceedings can be expensive, time-consuming and embarrassing as the determination is made to declare the principal incapacitated and in need of a legal guardian. Moreover, the ultimate decision of who will handle your affairs would be made by a judge — not you. By comparison, a power of attorney is an efficient and inexpensive way to allow a principal to name the person who he or she trusts to handle his or her affairs, and avoids the humiliation of being declared legally incapacitated.

• **Living will declarations and designations of health care agent.** If you understand the importance of naming agents under a power of attorney to handle your financial affairs, would you not feel the same about your medical affairs in the event that you are unable to act? Having a living will declaration (also known as an advance directive) and designation of health care agent (also known as a health care proxy or health care power of attorney) enables you to appoint a health care agent to convey your wishes to medical providers in the event that you are unable to communicate. These documents can be separated into two parts — the living will and the designation of health care agent.

• **Living wills.** A living will (which should not be confused with a living trust — a will substitute often used to hold and dispose of an individual's assets to avoid probate) is the legal document under which you would state your wishes regarding life prolonging medical treatment. Typically, you would indicate which forms of treatments you do or do not want in the event that you either suffer from an end-stage medical condition (such as a terminal illness, which will result in death, regardless of medical treatment) or are in

a state of permanent unconsciousness (such as an irreversible coma or vegetative state). The forms of treatment that you may want withheld include cardiac resuscitation, mechanical respiration, tube feeding, surgery, dialysis and so on. Having this written record of your wishes will serve to guide your physicians and health care agents at a time when you are not able to communicate your own desires.

• **Designations of health care agent.** In addition to stating your medical wishes in a living will, it is important to designate a health care agent to carry out those wishes by completing a designation of health care agent or health care proxy, which are often incorporated within the living will document. The health care agent that you choose should understand and value your end-of-life decisions and, ideally, have the emotional ability to make the ultimate decision of life or death. By clearly stating your wishes and naming a trusted health care agent, you can help your loved ones avoid a tragic situation like the infamous Terri Schiavo case. The Schiavo case involved a protracted legal dispute between family members (spouse and parents) over who could make decisions (and what Schiavo would have wanted) with respect to the administration of life-sustaining medical treatment during a period of more than a decade where, according to her doctors, Schiavo persisted in a vegetative state.

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