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Two Very Basic Estate Planning Documents

Virtually everyone should consider signing two basic estate planning documents for a variety of reasons. One of the most important reasons is that in one of the documents, you can nominate an individual for appointment as your guardian if you should become disabled or incapacitated. Wouldn't you want to nominate your guardian, to make decisions with regard to your assets and your health, rather than leave the appointment to a judge? And there are a host of other compelling reasons to sign these two documents:

1. Durable Power of Attorney

   When you sign a Durable Power of Attorney ("DPOA"), you designate an individual to act on your behalf with regard to a range of financial and legal issues. If you become injured, disabled, incapacitated for any reason, or are simply unavailable to sign any sort of financial or legal document, the individual whom you designate as your "attorney-in-fact" has the authority to act on your behalf, to sign documents and transfer assets pursuant to your estate plan, or to obtain records you could normally obtain only yourself.

   If you become injured, disabled, hospitalized, or are simply away on travel, you may need to transfer or sell real estate or any other asset, sign a tax return, sign a legal document, or obtain medical records from your health care provider.

The "durable" aspect of such a document means that the attorney-in-fact's authority survives even if you are deemed to be disabled or incapacitated.

A "general" DPOA covers the broadest range of transactions and generally empowers your attorney-in-fact to act on your behalf with regards to virtually everything you could do yourself.

A "limited" DPOA may restrict your attorney's authority to a smaller range of matters, or to one or a few financial institutions or accounts.

And a "springing" DPOA takes effect only when your doctor certifies that you have become incompetent to handle your own affairs and that it is appropriate for the durable power to "spring" into effect. While this last option is often attractive if you have any qualms about appointing someone to legally act on your behalf (since a non-springing durable power of attorney becomes effective immediately when it is signed), it can be a problem if the attorney-in-fact has to contact your physician and have him or her certify that you are not competent to handle your own affairs before having the authority to act on your behalf. Besides, if you have no qualms about having your attorney-in-fact serve if your doctor certifies your inability to act on your own behalf, and you trust them with the authority in that circumstance, why not abandon the medical certification issue and appoint that person in the first place?

A Durable Power of Attorney becomes effective the moment you sign it (or upon certification of your disability or incapacity if it is a "springing" power, as discussed), and it ceases to be effective upon your death. At that point, your attorney-in-fact's authority expires and an Executor (or "Personal Representative") or Administrator must be appointed by a court to serve as fiduciary for your estate.

Additionally, the individual signing the Durable Power of Attorney (the "principal") can nominate a guardian or conservator in the event it becomes necessary for a guardian or conservator to be appointed. Under a 1997 Massachusetts case, the nomination of a guardian or conservator in a Durable Power of Attorney is binding on the attorney, and on the Court, unless the nominee is proven to be unfit to serve.

2. Health Care Proxy

In December, 1990, Massachusetts enacted legislation (MGLA c.201D) establishing an individual's right to sign a "Health Care Proxy." The statute enables any Massachusetts resident (as "principal") to sign a document appointing a "health care agent" to represent him or her with regard to health care decisions when the principal is determined to be unable to make or to communicate health care decisions himself or herself. That "determination" that the principal lacks such capacity normally has to be made by a physician (and the document can state so). A successor health care agent can also be named in the document, but the document has to be clear that the successor agent only serves if the first named agent is not available, willing, or competent to act as agent – the legislature determined that two agents should not serve at the same time, for the obvious reason that if they disagreed on how to handle a critical medical issue, the public policy purpose behind the Health Care Proxy would be thwarted.

Massachusetts used to recognize Living Wills (or "Advance Directives") as legally non-binding guidance for a health care agent acting on behalf of a principal. Such documents generally expressed, in a legally non-binding manner, the principal's wishes with regard to their health care. For example, they included language such as "I do not want to be kept alive in a state of diminished capacity…" or "I do not want to be kept alive by artificial life-

support systems such as a respirator, artificial nutrition or artificial hydration, if I am terminally ill…" or the like.

With the passage of Chapter 201D, Living Wills and Advance Directives became superfluous, since they are not technically legally binding, resulting in some estate planners and family law practitioners doing away with them altogether. However, other practitioners, recognizing the utility of language expressing a principal's basic attitudes toward such issues, have incorporated some of the typical language of a living will or advance directive in the body of the Health Care Proxy as guidance. There is no prohibition on such inclusion, and it often provides a means for the principal to ensure that his or her wishes with regards to such matters are clearly expressed. It is what is called "precatory" language, but it is useful.

Once signed, copies of your Health Care Proxy should be given to your named agent(s) and your primary care physician - when a medical crisis arises and the need for the Proxy is immediate, no one wants to have to locate a legal document, typically signed years earlier, in such circumstances.

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