Planning Before the Crisis: Important Documents and Considerations

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What is Elder Law?

- Elder Law is a practice area that focuses on a specific group of clients: older adults, disabled individuals, families
- Most elder law attorneys practice in some or all of the following areas:
  - Estate Planning
  - Guardianship and Conservatorship
  - Long-term care Medicaid planning (including asset protection and eligibility)
  - Probate and Trust Administration
  - Special Needs Planning (Supplemental Needs Trusts)

Why Plan Ahead?

- Ensure sure your wishes are known.
- Ensure the right people are in place and have authority to carry out your wishes.
- Protect your loved ones from undue burden and financial stress.

Where to start?

- Meet with an elder law attorney to discuss options and develop a plan.
- Execute legal documents to formalize your plan.
- Have continued conversations with family and friends about your wishes and needs.

Capacity

- Capacity = an individual's ability to make decisions.
- Capacity is not clear cut. There is a spectrum of levels of capacity, and different types of capacity.
- A diagnosis of dementia does not automatically mean no capacity.
- To execute legal documents such as Powers of Attorney, an individual must have enough capacity to understand the document, its consequences, and retain the information.

What is a Power of Attorney?

- A Power of Attorney is a written, legal document that allows you, the principal, to appoint another person to act on your behalf.
- The person selected to act on your behalf is typically called an Agent.
- Appointing someone as your Agent does not limit your rights or authority in any way.

Types of Powers of Attorney

- Durable General/Financial Power of Attorney
  - Authorizes your Agent to make financial and legal decisions on your behalf.

- Healthcare Power of Attorney
  - Authorizes your Agent to make medical decisions on your behalf.

Why is a Durable General Power of Attorney Necessary?

- No one (not even a spouse) has automatic authority to make legal or financial decisions for an adult over the age of 18.
- Without one, a family member will likely need to file for Conservatorship.
- Conservatorship:
  - Court-based proceeding.
  - Court has discretion over who to appoint.
  - Removes rights of the incapacitated individual.
  - Conservator must provide ongoing reports to the court.

Durable General Power of Attorney (DPOA)

- A robust DPOA is a critical document.
- A thorough DPOA will ensure your Agent has the authority needed to carry out tasks and make decisions.
  - Examples: Paying bills, filing taxes, checking mail, signing release forms
- If there is a goal of protecting assets for a spouse or children, the Agent may be able to take the steps to do so.
  - Examples: Executing an asset protection plan, ensuring beneficiary designations are correct, creating a trust

Durable General Power of Attorney (DPOA)

- Think carefully about the selection of your Agent!
- Things to consider:
  - Is the person trustworthy?
  - Is the person responsible? Does he or she make good decisions?
  - Does the person understand your goals, and will he or she try to act in accordance with your wishes?
  - Does the person have the time to commit to this job? Yes, it is a job!
  - Your agent may need to serve for an extended period, depending on the cause and nature of your incapacity.

Durable General Power of Attorney (DPOA)

- Additional Considerations:
  - Do not name two Agents to serve together! Select one primary Agent, and at least one backup.
  - Check with your Agent before naming him or her in your document. Ensure the individual is willing to serve.
  - Make your DPOA effective immediately.
  - Think about whether you would like to compensate your Agent.
  - Leave information for your Agent to make sure your Agent can act easily and quickly, if needed.

Healthcare Power of Attorney

- Why is a Healthcare Power of Attorney (POA) necessary?
  - Allows the principal to choose a healthcare decision maker, rather than defaulting to closest family member.
  - Without a Healthcare POA, several family members may have equal standing to make decisions. If there is a lack of consensus, guardianship will likely be needed.
  - May authorize specific powers or directions, or place restrictions on certain treatments, depending on the principal's wishes.
  - Reduces the risk of family fighting over important healthcare decisions.

Healthcare Power of Attorney

- Things to consider when selecting an Agent:
  - Will the Agent carry out your wishes?
  - Does your Agent fundamentally oppose any of your beliefs about healthcare or end of life treatment?
  - Can your Agent handle the emotional strain of making life or death decisions?
  - Will your Agent be available and able to take on this role?
  - Your healthcare Agent may be needed briefly, such as to give consent to treat in an emergency. However, if you are incapacitated due to dementia or other cognitive impairments, your healthcare Agent may need to serve for years and manage your ongoing care.

Living Will

- A Living Will is a document that instructs your healthcare Agent about your wishes for end-of-life care.
- It should be executed with a Healthcare Power of Attorney.
- Typically, a Living Will discusses whether you wish to receive life sustaining treatment if you are diagnosed with a terminal illness, are in a permanent vegetative state, or have an end stage condition, such as Alzheimer's Disease.
- A Living Will is not a Do Not Resuscitate Order or MOST/MOLST.
- A Living Will is not a Last Will and Testament.

Long-term Care Planning

- Start thinking and discussing the future now!
- The earlier you plan, the more options you will have.
- Types of planning to consider:
  - Asset protection and long-term care Medicaid eligibility
  - Where you would like to age or be cared for
  - How your care will be paid for
  - Goals for yourself and your family
  - How information will be accessed and communicated if you become incapacitated

Questions?

Contact Information

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