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Estate Planning: Everything You Need to Know But Didn't Think to Ask!

The 2022 Lavender Law Conference & Career Fair

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Trust, Estates, and Guardianship Litigation and Why You Avoid It

An Aging Population

- The number of people 65 and older in the US is expected to double from 46 million in 2015 to 98 million in 2060.
- That number is expected to increase by almost 18 million between 2020 and 2030, as the baby boomers reach age 65.
- Resource (source): Mark Mather, Linda A. Jacobsen and Kelvin M. Pollard, *Aging in the United States*, POPULATION REFERENCE BUREAU– POPULATION BULLETIN, Vol. 70, No. 2 (December 2015), available at https://assets.prb.org/pdf16/aging-us-population-bulletin.pdf
- With an aging population, we will see an increase in people suffering from dementia.
    - The "prevalence of dementia is estimated to double every five years in the elderly, growing from a disorder that affects 1 percent of persons 60 years old to a condition afflicting approximately 30 percent to 45 percent of persons 85 years old."
- Resource (source): ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), available at https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf.
- According to the CDC, 1 out of 10 persons, age 60 or over and who live at home, experience elder abuse.
    - The CDC considers this number as underestimated because of fear or inability of the victim to report the crime.
- Resource (source): *Elder Abuse Prevention*, Centers for Disease Control and Prevention, at https://www.cdc.gov/features/elderabuse/index.html

Benefits of Planning

- Provides opportunity to exercise the right to self-determination.
- Protects clients and prevents indignities of court proceedings
- Avoid questions of the validity of documents prepared at the onset of dementia or reduced capacity by preparing and executing while capacity is clear
- Give clarity and peace of mind to loved ones
- Avoid family conflict
- Family will not have to make emergency decisions – only honor your decisions
- Critical when family members may not respect a person's relationship, particularly for LGBT clients

Types of Litigation to Expect with Trust, Estates, and Guardianships

- Will and Trust Disputes:
  - Capacity
  - Undue Influence
  - Second Marriages and Dissolution of Marriages
    - Prenuptial Agreements
    - Elective Shares
    - Failure to Update Estate Plan
- Incapacity, Guardianship, and Conservatorship
  - Advance Directives
    - Disputes Over Validity vs. Use as Alternatives to Guardianship
  - Living Wills and End of Life Decisions
  - Use of Power of Attorney Designations
  - Disputes Over Appointment of a Guardian or Conservator
  - Protection of Vulnerable Adult vs. Paternalistic Approach and Due Process Violations
- Financial Exploitation of the Elderly or Vulnerable Persons
  - "Convenience" Bank Accounts
  - Power of Attorney Designations
  - "Gifts"
- Fiduciary Litigation
  - Breach by Trustee, Guardian, or Attorney In Fact

Forms of Planning (to avoid… or at least minimize, litigation)

The following items are various devices that allow a person to exercise their right to self-determination. They permit your clients to express their wishes and assure that their needs are met and to avoid the indignity, intrusion, and cost of a proceeding to determine whether they are no longer able to care for themselves. In the event of incapacity, the devices may serve as an alternative to guardianship or conservatorship and to assist clients as they age.

Advance Medical Directives

Declaration of Heath Care Surrogate

A Declaration of Heath Care Surrogate informs the principal's physician, hospital or other health care providers that in the event the principal is unable to make medical decisions, the person named can make those decisions instead. Generally, this document contains a HIPAA release or waiver indicating that the principal allows the surrogate to have access to the principal's health records so they can make informed decisions. The attorney-in-fact may also make these decisions for the principal if granted that right, however, many physicians and hospitals prefer a form specifically designating a heath care surrogate. This document only becomes effective if the principal cannot make his or her own decisions and terminates when the principal's capacity to make decisions returns. Capacity in this document has a slightly different meaning than legal capacity. No Court designation or physician's affidavit is required as the incapacity can be temporary such as being under anesthesia, under the effects of strong pain medication, in an induced coma, or other medically defined incapacities. In most cases, it is recommended that a principal name one or two surrogates who are to be contacted sequentially. It is also recommended that the principal provide copies of this document to family members or counsel and physicians and that they have a list of who has a copy in the document. This document terminates upon revocation, during capacity, or upon death.

Omnibus Advance Directive

This document incorporates the Health Care Surrogate and Living Will (discussed below). The individual provisions of each of these documents are incorporated into each section of the Omnibus document and can be as specific or broad as desired, even giving direction that if the principal is placed in a nursing home and unable to make their wishes known, such as a desire to have classical music played in their memory. While this document is convenient, it is also recommended that a principal has the individual documents as well. It might not be desirable for a physician or the hospital to have any more information in any one document than is necessary. Of course, the proxy designee may find it more convenient to have the two documents combined.

Nomination of Preneed Guardian or Conservator

The Nomination of Preneed Guardian or Conservator is a legal document that is filed with the court or kept with other important legal documents. It is a document signed during capacity indicating who the signer wishes to serve as their Guardian (or conservator) of the person, property or both in the event that there are not separate documents in place or the documents cannot be located or in the case of a question or challenge to the nomination of a person named in the other documents. This document does not become effective until the person signing the document is adjudicated incapacitated through a court proceeding, at which time the Judge will consider the signer's wishes. The judge is not obligated to follow this nomination, but must look to the nominated individual as a first choice. This document can be revoked by the signer at any time during capacity. This can be a critical document because there is a higher burden of proof for a court to disregard this designation.

Authorization for Release of HIPAA Information

There may be times when someone may wish to authorize others to obtain their protected medical information. This can be important in the case of a trustee, personal representative, prior medical provider, domestic partner, spouse or even a Health Care Surrogate or Living Will nominee if they are not granted this right in the document, or if the provider does not accept the authorization when it is incorporated into another document.

As children turn 18, it is important to obtain authorization for the parent to receive their child's HIPAA information. A parent's right to secure medical information without their child's permission terminates at the child's attainment of age 18 in many states. An age when many teens are leaving home for college.

Authorization for Medical Treatment

For those who have younger children, an Authorization for Medical Treatment will allow an outside party, such as a non-custodial parent, grandparent, day care center worker, principal, etc. to have the child treated in an emergency rather than forcing the hospital or medical provider to locate and speak with a parent. This document contains a limited release of HIPAA information that is restricted to information necessary for treatment decisions. It also gives on its face information regarding allergies, special medical conditions the child may have and a listing of any medications the child is taking.

Delegation of Financial and Contractual Rights

Durable Power of Attorney

A Durable Power of Attorney allows the party designated to act as the principal's attorney-in-fact during the principal's lifetime. This ability becomes effective on the date it is granted and terminates only by revocation or death. The person or institution who receives instruction from the designee is not required to look any further than the document for their authority to act. As such, a Durable Power of Attorney is a powerful document that allows a designee to 'stand in the shoes' of the principal and perform any actions the principal could perform with full authority of law. Many powers of attorney are generally not exercised by a designee except in certain circumstances such as by the principal's permission or in the event of incapacity. Additionally, a well-drafted power of attorney will enumerate those actions that a designee is permitted to exercise and those which the designee may not exercise and may limit the manner that a designee can exercise other actions. The benefit of durable power of attorney is that it is not affected by incapacity and will allow the designee to continue to act for the principal if the principal is found to be incapacitated. While it might be advisable to name a successor to the designee in the document, it is generally not recommended to name multiple attorneys-in-fact.

Springing Power of Attorney

Some states allow a springing Power of Attorney, which only becomes effective upon the incapacity of the principal.

Other Power of Attorney Designations

The principal can execute a Power of Attorney designation that becomes ineffective upon determination of incapacity. In addition, a principal can sign a power of attorney that gives limited authority. These are often executed to authorize certain sales of real property. The form can restrict the authority given to the agent.

Trusts

Trust declarations are a written recognition of a legal relationship in which a grantor gives to a Trustee the right to control and manage property for the benefit of the trust's beneficiaries. Trusts are created during a person's life to hold assets for themselves or others. They can help avoid the probate process and can assist a person if that person is no longer able to manage his or her financial affairs.

If a person who has created and funded a trust is found to be incapacitated, any funds held in trust are managed by the successor Trustee. The individual creating the Trust,

the grantor, has the ability to name in the document who becomes the trustee if that person is deemed incapacitated. Many Trusts include language to permit a successor Trustee to step in as Trustee if doctors write letters indicating that the grantor is no longer able to manage their own finances or make financial decisions. This eliminates the need for a successor Trustee to initiate Court proceedings to step in and manage the Trust assets. The Court in a guardianship/conservatorship has no authority over the Trust assets, so it maintains privacy and control over those finances. The Court recognizes the express wishes of the alleged incapacitated person from prior to their incapacity.

Authorization for Final Rites

Many people express their burial wishes in their Wills. While this can be effective, a Will may not be located or opened until well after death and burial or final rites have taken place. An Authorization for Final Rites designates who may give direction for the disposal of the signer's remains, what ceremonies or services they desire and whether or not they wish cremation. This document can be given to a spouse, partner, loved one or friend and serves as a stand-alone document expressing the signer's wishes.

Do Not Resuscitate Orders and Organ Donation Considerations

Living Will

A Living Will informs physicians, hospitals, and family, of the signer's wishes in the event of a terminal illness. It is a document that signed during the principal's capacity, of their free will, and pertains to their wishes regarding life-prolonging procedures, medication, food, and/or hydration in the event of a terminal condition. Additionally, the signer selects at which time they want the document to become effective based on the degree of quality of life available to them. This document also names a surrogate to carry out the signer's wishes if the signer is unable to, and contains a HIPAA release; however, it allows the surrogate to act only within the confines of the stated wishes. A Living Will can be as broad or restrictive as desired. It can also contain provisions for anatomical gifts. In most cases, it is recommended that the Living Will name one or more surrogates who are to be contacted sequentially. It is also recommended that the signer provide copies of this document to family members or their attorney or physician and that they list who has a copy in the document. This document terminates with revocation during capacity or death.

Organ Donation

Depending on state law, a person can designate their desire to make anatomical gifts in a Declaration of Health Care Surrogate and to designate themselves as an organ/tissue donor by joining registries, such as Florida's Joshua Abbott Organ & Tissue Donor Registry at www.donatelifeflorida.org. Neither action is intended to take the place of the designation on a driver's license, but these additional notifications of the donor's desires will allow medical providers to make timely arrangements to insure a successful harvest. These expressions of donation do not require any consent from the Health Care Surrogate and will be effective under any circumstances providing the medical providers check the Registry and/or have the document.

Testamentary Documents

Will or Trust

A Will is a testamentary expression of a person's desires regarding disposition of the person's property after death. The Will typically also nominates a personal representative, or multiple personal representative, although more than two is not advisable. A Will may refer to a separate writing that permits a person to prepare a list of tangible personal property and who the items should go to. Each State will have a law regarding the formalities required of a document to determine if it is a valid Will.

Property held in a Trust is not subject to the terms of a Will, although a Will may "pour over" property into a Trust or establish a Trust. In addition, beneficiary designations, such as those associated with bank accounts, life insurance policies, retirement accounts, and pensions, are likely not subject to the terms of a Will. Those designations relate to contracts between a person and an institution.

Prenuptial Agreement

Sometimes referred to an antenuptial agreement, a prenuptial agreement is an agreement between spouses regarding what happens with each person's property, or joint property, in the event of dissolution of marriage or the death of one of the spouses. These agreements can be entered into before or after marriage (postnuptial agreements) and determine how property that the spouses bring into the marriage, or acquire during the marriage, will be held or separated. Prenuptial agreements can be used to alter, define, or avoid benefits that a spouse may be entitled to upon the death of the other.

Resources

- *Elder Abuse Prevention*, Centers for Disease Control and Prevention, at https://www.cdc.gov/violenceprevention/elderabuse/index.html
- Barry A. Nelson, ESTATE PLANNING AND ASSET PROTECTION IN FLORIDA, (Juris Publishing 2019) (Chapter 15: *Financial Elder Exploitation*)
- *Education*, National Center on Elder Abuse, at https://ncea.acl.gov/What-We-Do/Education.aspx
- *Diminished Capacity: What Every Financial Services Professional Should Know*, National Adult Protective Services Association, *available at* https://www.sec.gov/investor/seniors/diminishedcapacity.pdf
- *Defining Undue Influence*, ABA Comm'n on Law and Aging (Feb. 1, 2014), at https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_35/issue_3_feb2014/defining_undue_influence/
- *Capacity, Assessment*, ABA Comm'n on Law and Aging (Apr. 21, 2021), at https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/
- Danielle and Andy Mayoras, *Are Aretha Franklin's Homemade Wills Valid, and What Happens Next*, FORBES (May 23, 2019), *available at* https://www.forbes.com/sites/trialandheirs/2019/05/23/are-aretha-franklins-homemade-wills-valid-and-what-happens-next/#2742bfa658e1
- Adam Walser, *Judge removes professional guardian from nearly 100 cases for alleged violations*, ABC Action News Tampa (Jul. 12, 2019), at https://www.abcactionnews.com/news/local-news/i-team-investigates/the-price-of-protection/judge-removes-professional-guardian-from-nearly-100-cases-for-alleged-violations
- ABA Model Rule 1.14: Client with Diminished Capacity, *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/
- *In re Guardianship of Atkins*, 868 N.E.2d 878, 880 (Ind. App. 2007) (upholding lower court's appointment of a man's parents as his guardians, despite evidence of "the Atkinses' lack of support of their son's personal life through the years and given his mother's astonishing statement that she would rather that he never recover than see him return to his relationship with Brett" because the son never gave his partner a power of attorney).
- *Covey v. Shaffer*, No. 2D18-3084, 2019 WL 2844163 (Fla. Dist. Ct. App. July 3, 2019) ("Trial court abused its discretion by granting life partner's petition for emergency temporary guardianship of ward ex parte; court was required to hold hearing prior to ruling on appointment of emergency temporary guardian.").
- *Raimi v. Furlong*, 702 So. 2d 1273 (Fla. 3d DCA 1997) (thoroughly defines testamentary capacity and undue influence)