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Planning for Eldercare

by

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Many people understand the importance of having a will; without a will, state law will dictate the distribution of assets on death. By writing a will, one can control both who will manage the assets (the executor) and how they will be distributed (the dispositive plan). But a will is effective only after death. Just as with the absence of a will, in the absence of planning for eldercare, state law will dictate certain decisions about an individual's assets and care should the individual become unable to manage his or her own affairs. To avoid this, there are other planning opportunities for later life that should be considered.

The simplest, least expensive, and most versatile tool for eldercare planning is the durable power of attorney. A power of attorney is a legal document that delegates decision making power to someone else. In legal terms, the person nominated by the principal (the signer of the document) is an attorney-in-fact (where attorney simply means agent). A power of attorney is durable if the document states that the person nominated continues to have the authority to act in the principal's behalf even if he or she is no longer able to act because of illness or incompetence. A spouse, child, friend or any other person can be named as an attorney-in-fact. A durable power of attorney can be revoked at any time by the principal, even after the principal has become unable to manage his or her own affairs.

A general, durable power of attorney will contain an exhaustive list of the powers that the attorney-in-fact will have. These powers can include the power to convey real estate, to handle any banking or investment matter, to act as representative before government agencies, such as the IRS, and even to make gifts for tax planning purposes.

However, the durable power of attorney is limited to financial matters only; planning for health care decisions must be done with an advance directive, also known as a health care power of attorney. With a healthcare power of attorney, a person is nominated to make healthcare decisions for the principal in the event of the principal's incapacity as certified by the individual's doctor.

Together, a durable power of attorney, a healthcare power of attorney and a will make an inexpensive and effective plan for eldercare. In fact, we believe that

these three documents should be part of every person's personal documents, no matter their age or circumstance.

Another financial planning tool for eldercare is the living trust. To establish a trust, the grantor names a trustee over certain assets for the benefit of the beneficiary. With most living trusts, the grantor, trustee and beneficiary are all the same person during the grantor's lifetime. The grantor also names a successor trustee or trustees to manage and distribute the assets of the trust on the grantor's death or in the event the grantor is unable (as certified by the grantor's doctor) or unwilling to act as trustee. In the event the grantor reaches a point where he or she is unable or unwilling to be in charge, the named successor trustee will have powers like those of an attorney-in-fact over the assets in the trust.

Because a trustee's powers are limited to those assets that are in the trust, for a living trust to be an effective tool for eldercare, most assets should be transferred to the trust (this also helps to minimize or eliminate the need for probate upon death). Certain assets should or cannot be transferred to the trust, but should be reviewed and their beneficiary designations included as an integral part of the eldercare plan. Assets that are not transferred to trust include those assets that are chosen to remain jointly held; those assets that are legally ineligible to be owned by a trust (such as a qualified retirement plan such as an IRA or 401k) or certain contractual assets (such as life insurance policies and some annuities).

An alternative to a durable power of attorney or a living trust is a conservatorship. This is a voluntary probate court proceeding initiated by the person who has become unable to handle his or her financial matters because of physical or mental disability (the proposed ward). The ward asks the court to name someone as conservator. The ward can suggest who should be conservator, but the decision rests with the court. The conservator's powers are similar to those of an attorney-in-fact, but because the probate court has supervision, the conservator must post a bond, file an annual account with the court, and may have to ask the court's permission to take extraordinary actions such as selling the ward's real estate or making gifts for tax reasons.

In the absence of a plan for eldercare, another probate court proceeding called a guardianship may be necessary. A guardianship is an involuntary proceeding wherein the court is asked to name a guardian for a person who is unable to make decisions for him or herself because of legal incapacity. Legal

incapacity is the measure of a person's functional inability to manage basic needs. Any family member, public official or other interested person may petition the court for the appointment of a guardian. A hearing is required at which the proposed ward (the person for whom the guardianship is sought) is entitled to legal representation. If a guardianship is granted, the guardian will have the powers ordered by the probate court; the guardianship can be over the person, over the assets of the person or both. It is easy to see how having a durable power of attorney and healthcare power of attorney can avoid the need for a guardianship in most cases.

A spouse, child or other suitable person can be named as guardian. While the court decides who will be guardian at the time a petition is brought, an individual can nominate some person or persons to act as guardian in the event a guardianship is ever necessary and the court must consider the individual's wishes. An individual can also state who should not be named as guardian and the court is bound by such a statement. The statement must be in writing and be signed in accordance with state law. As with a conservatorship, the guardian must post a bond and file detailed accounts with the probate court. Because a guardianship proceeding is a contested matter, it is usually a costly and difficult process.

By establishing an eldercare plan long before it is needed, an individual can ensure that his or her financial and healthcare affairs are managed by the person he or she chooses and in the way he or she designates. If you would like to discuss establishing an eldercare plan or evaluate your present plan, an attorney at Martin, Lord & Osman, P.A. would happy to meet with you. Please call any of our Estate Planning Attorneys (800) 439-5999 to make an appointment to discuss your estate planning needs and how we may assist you in achieving your planning goals.