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Powers of Attorney: Critical Components of Your Estate Plan

*“For want of a nail the shoe was lost.
For want of a shoe the horse was lost.
For want of a horse the rider was lost.
For want of a rider the battle was lost.
For want of a battle the kingdom was lost.
And all for the want of a horseshoe nail.”*

- Ancient Proverb

Two of the more common myths about estate planning are that you must be either old or rich (or both) to engage in estate planning. Nothing could be further from the truth, particularly when it comes to Durable Powers of Attorney for Finance and Durable Powers of Attorney for Health Care. Regardless of your age or station in life, these seemingly minor documents can truly save the day for you and your family, and be the “nail” that could have saved the day in the ancient proverb above.

DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Let’s discuss the Durable Power of Attorney for Health Care (DPAHC) first. Perhaps you remember the case of Terri Schiavo, the young Florida woman whose case rose to national prominence in the early part of this decade. She was a 27 year-old married woman who suffered irreversible brain damage after a heart attack in 1990 that left her in a permanent vegetative state. After years, her husband argued that she should be allowed to die, but her parents argued for her to be kept alive, in the hope that she would one day recover. The argument reached the courts in 1998 and raged for 7 years until her ultimate death at the age of 41 after her court-ordered removal from life support in March of 2005. One could reasonably argue that there were no “winners” in this case. The sad part is, so much of this could have been avoided had Terri had the foresight to memorialize her wishes through completion of a DPAHC.

A DPAHC is a document by which you appoint a health care agent, often, but not necessarily a spouse, life partner, parent or adult child, to make health care decisions for you in the event that you can no longer speak for yourself. This would have applied in Terri Schiavo’s case or any other situation where there has been a loss of mental or physical capacity, such as Alzheimer’s disease, dementia or

stroke. It also applies during the time when there is a temporary loss of capacity, such as a loss of consciousness following an accident. Your agent must act on your behalf with your best interests in mind, and carry out your wishes as you have made them known to him or her. Your specific health care wishes can also be expressed through an Advance Health Care Directive or a Physician Orders for Life Sustaining Treatment (POLST) form. Advance Health Care Directives are accepted in most state, but be sure to use the form designed for use in your state of residence. If you spend a lot of time in another state, you may want to consult a doctor, attorney, or the medical society in that state to find out about requirements specific to that state. With regards to the POLST program, as of this writing, only California, Oregon, Washington, Hawaii, Tennessee, North Carolina, and New York have fully endorsed POLST programs. A number of other states are developing the program. More information about POLST nationally can be found at www.ohsu.edu/polst/. For California residents, you can find out more about the California POLST program at www.finalchoices.calhealth.org.

In the Terri Schiavo case, her husband Michael argued that she had verbally expressed to him that she be allowed to die if she were ever to be in the circumstances that occurred after her heart attack. Her parents argued exactly the opposite, which was that she would want to live no matter what. The point is, nothing was in writing, and no one had the ultimate authority to decide for her. A valid DPAHC would have ended the argument, and possibly avoided years of ugly public legal wrangling that virtually destroyed both families. *For want of a nail...*

DURABLE POWERS OF ATTORNEY

Now let's briefly discuss the Durable Power of Attorney for Finance (DPA). A DPA, as with the DPAHC, is a document by which you appoint an agent, your "Attorney-in-Fact", to make financial or legal decisions, and financial transactions on your behalf in the event that you no longer have the mental capacity to do so. The powers you grant to your agent can be limited or very broad, and they can be made effective immediately, or only upon your incapacity. The term "durable" refers to the fact that the power continues even if you have become mentally incompetent.

In the absence of a Durable Power of Attorney for Finance, your family will have to go to court to open a Conservatorship. A conservatorship is a court proceeding by which the court grants one (or more) person(s), called the Conservator, the authority to make financial and/or health care decisions for another person, called the Conservatee, because of a loss of mental or physical capacity which is preventing the Conservatee from making informed decisions on their own. There are legal and court fees involved, the proceedings are public, and the Conservator may have to be bonded. This can be avoided while still protecting the rights of the individual through the creation of a properly drafted DPA before there are any signs of mental incapacity. This is true even in marital situations. The marital bond does not confer authority for the healthy spouse to make financial decisions on behalf of the incapacitated spouse. This could create significant hardship if, for instance, the home needed to be sold or refinanced, or the investment or retirement accounts of the incapacitated spouse had to be accessed. Absent a DPA, a conservatorship would be required, even in a marital relationship.

The importance of the DPA is that it allows your agent to keep your financial affairs in order, and to communicate with the financial institutions with which you do business, without the need for a conservatorship. Imagine even a temporary incapacity, during which you miss a lone house payment, credit card or car payment. Damage is done to your credit rating through no fault of your own. With a DPA in place, your agent would have the authority to access your accounts, pay your bills, and receive and deposit paychecks and other sources of income. If your incapacity is long-term, your agent can file your income taxes, buy or sell property on your behalf, access your group medical and retirement benefits, and very importantly, plan for governmental benefits, such as Social Security, Supplemental Security Income (SSI), and Medi-Cal. Needless to say, your agent must be someone in whom you place a great deal of trust, and they must act with your best interests in mind at all times. It is also a good idea to have at least one alternate agent named, just in case your first choice is unable to act, or ceases to act as your agent.

Should you have an attorney draft your DPA and DPAHC? In our opinion, yes, and here's why: First, an attorney will be familiar with the specific requirements of your state. Second, an attorney can draft the DPA to meet your specific needs. There are pre-printed forms available, but these are often broadly worded and may not adequately reflect your specific wishes. Third, and quite importantly, since a DPA is subject to potential abuse, it is always a good idea to meet with an attorney to make sure both the principal and the attorney-in-fact understand the document and the attorney is assured of the principal's competency and capacity to execute the document.

Lastly, it is a good idea to periodically review your DPA and DPAHC documents. Are the agents you have chosen, or the order in which they are to serve, still your preferred first choice? Has there been a change in family situation, perhaps a family member who is now on the "outs" but is named in the document that was created a number of years ago? On occasion, we find that a former spouse is still named as the first choice as agent in the DPA years after the dissolution of the marriage.

These documents are analogous to having a fire extinguisher. You hope to never have the need to use them, but if you do, they had better work perfectly!

For more information about this and other estate planning matters, please call our offices and schedule a free consultation.