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POWER OF ATTORNEY, HEALTH CARE DIRECTIVES AND HIPAA AUTHORIZATIONS AS A PLANNING TOOL FOR INCAPACITY

This Advisory discusses the importance of power of attorney forms, health care directives and HIPAA authorizations as an estate planning tool for possible incapacity. This Advisory is neither exhaustive nor tailored to your specific situation. You should discuss your personal situation with me or with your own attorney. Representation is only undertaken through a written engagement letter and not by the mere distribution of this Advisory.

Imagine how you would handle this scenario: You receive a phone call from a doctor or hospital official saying that your mother has been hospitalized after a fall and the initial evaluation is that she needs hip replacement surgery. You are the nearest child who has been helping with care for your mother as her mental abilities have deteriorated recently due to dementia, and your brother and sister both live outside California. You need to take action to grant permission for the surgery and take over your mother's financial affairs while she recuperates. What are your options to solve these dilemmas? Do you step in alone to take legal action, or do you act jointly with your brother and sister? Without proper planning for incapacity, you will need to find an attorney to quickly file a temporary conservatorship to give you the authority to act on your mother's behalf. The cost will be \$4,000-\$5,000 and a permanent conservatorship will also be necessary to last beyond this first crisis. If your mother had a power of attorney and health care directive, the conservatorship and court action would not be necessary.

Introduction. Planning for incapacity is an integral part of estate planning. Although a conservatorship, revocable living trust, or joint tenancy bank account are all devices for handling incapacity, anyone who may at some future time need another person to manage his or her financial affairs needs a financial power of attorney and a health care directive either as the primary tool for handling incapacity, or as a backup device for other methods. Because an accident, stroke, heart attack or other event can happen at any moment in our lives, it essentially means that everyone should have a power of attorney form in place to designate someone to manage your finances while incapacitated and a health care directive to designate someone to make medical decisions for you at a time when you cannot do so for yourself. Having an attorney prepare these documents for a possible future need eliminates the need for your family to go through a court proceeding to have an agent appointed to act on your behalf. This is particularly beneficial

at a time when a couple is in an automobile accident resulting in both parties being hospitalized for months giving a designated agent authority to take over financial matters to pay for medical bills, a mortgage and other routine expenses while recovery occurs.

Powers of Attorney. The main purpose of a power of attorney is to make sure that a trusted nominee is ready act on your behalf if needed and to avoid the expenses of a conservatorship proceeding if no other means are available. Many people, especially single individuals of advanced years, add a child to their bank account so that someone can get easy access to funds if they are ill or injured. This is effective, but may create an unintentional gift to a joint account holder, since funds held jointly will pass to the survivor when one party dies and a joint account is not part of a person's estate or trust for distribution purposes. Other beneficiaries may be resentful if one child is favored by receiving bank account proceeds when others are not. A simple way to avoid this is to sign a power of attorney form and nominate someone to step in when an event occurs that renders you unable to manage you own finances.

Types of Power of Attorneys. Power of attorney nominations can be general or specific, and durable or nondurable. The forms have their own words of art. The "principal" is the person who gives power to another person to act on their behalf. The person acting on behalf of another person is the "agent" or the "attorney-in-fact," though a person using the attorney-in-fact title does not have the authority to represent the principal in a court proceeding in place of a licensed attorney. A power of attorney is deemed to be general unless it specifically limits the authority the agent is given to transact business on behalf of the principal. A durable power of attorney is one that comes into effect only when the principal becomes incapacitated.

The most common use for a nondurable special power of attorney is when the principal anticipates being absent when an important document requires his or her signature. For instance, a person may give a spouse, domestic partner, child, or a trusted friend a nondurable power of attorney to execute the documents to sell a house when he must be out of town and is not available to sign documents at the close of escrow. These types of power of attorneys usually have a stated expiration date and generally do not contemplate the possibility of being incapacitated, only that he or she will be unavailable. It is merely a delegation of authority for convenience purposes.

Immediate vs. Springing Power. A power of attorney can be drafted to be effective immediately upon signature or to be effective only if the principal becomes incapacitated. The latter is termed a "springing" power under California Probate Code section 4030. The determination of incapacity is easy if a client currently has a terminal illness, is in a coma, or has another condition that makes it clear that the person is too weak or incapable of managing day-to-day financial affairs. If this situation exists, an immediate power of attorney is the best choice, because incapacity need not be documented, provided that the person still has mental capacity to sign a power of attorney. If the person has mental impairments, then the hope is that a power of attorney form is already in place.

In many circumstances, the decision of whether to use a springing power is not an easy one, since dementia usually develops slowly over time. Determining when incapacity occurs may require one or two physicians to examine and certify that the person does not have the ability to understand and manage his own financial affairs. A power of attorney form will detail the circumstances and the persons who will determine when incapacity exists. This is important because it is common that a person may deny being incapable of managing their own finances, and when dementia is setting in

there may be times when a person is very lucid and then later the same day they slip into a state of temporary dementia. In this instance, it is important to have the person sign a power of attorney at a time when they can understand and communicate the nature and consequences of their decision in designating an agent.

Powers Granted. A power of attorney can be used to grant the power to deal with real property, obtain loans, pay debts, collect from creditors, handle public benefits, close charge accounts, gain access to safe deposit boxes and to deal with insurance, securities and retirement accounts and benefits. These powers are all covered by a general power of attorney, but some powers must be specifically granted pursuant to California Probate Code section 4264, including the power to create, modify or revoke an existing trust, fund a trust, make gifts of the principal's property, exercise a disclaimer on behalf of the principal, change survivorship beneficiaries in an insurance policy, or make a loan to the agent. These additional powers can have advantageous tax benefits, but unless specifically stated in the power of attorney, will not be one of the agent's options.

Document Formalities. In California, to be an effective power of attorney, the document must be notarized or signed by at least two witnesses. A valid power of attorney executed in California is generally accepted in other states, but in some instances, a form will not be found valid because it may not meet the standards for that other jurisdiction. If a person regularly deals with property or finances in two or more states, it may be advisable to have two separate power of attorney forms drawn that meet the specific requirements for each state. Otherwise, a delay may occur when a bank or other entity must send a California form to their general counsel to confirm that it meets that state's legal requirements to be deemed valid.

Termination of a Power of Attorney. A power of attorney can be revoked only in writing and if a bank or other entity has knowledge of or experience with a delegated agent, it is best to have a copy of a revocation delivered to that entity to make sure they stop allowing acts from the agent to occur. The authority of an agent to act under a power of attorney terminates automatically when the principal dies, but as with many legal issues, there are some exceptions that can apply.

How an Agent Signs Documents on Behalf of the Principal. When transacting business under a power of attorney, the agent should first sign the name of the principal and then his or her own name, followed by the words "attorney-in-fact", or "under power of attorney dated 1/1/07." The agent should never use his or her name alone, or sign the principal's name alone when doing business on the principal's behalf in order to avoid any possible charge of fraud or the inadvertent acceptance of personal responsibility for the transaction.

Duties and Legal Responsibilities of an Agent. Duties of an agent may include banking transactions, writing checks, paying bills, depositing checks, claiming Social Security and other benefits, managing investments and real estate, paying expenses, preparing and filing tax returns, and running the principal's business. Keep in mind that you can hire experts to help you with any of these tasks and the fees for these experts are paid out of the principal's assets. An agent holds a position of great trust and the law requires that they be scrupulously honest and act only in the best interests of the principal. In particular, an agent must manage the principal's assets prudently, steering well clear of risky investments, and avoid conflicts of interest and make sure that they do not benefit personally from an action taken on the principal's behalf unless the power of attorney document specifically allows them to do so. The agent should keep their property and the principal's property separate, keep good accounting records, maintain receipts, and should keep in contact with the principal to the extent possible. If a principal gives an agent instructions that they believe is not in his or her best interest, the agent should seek court approval before

disobeying those instructions. An agent is entitled to be paid a reasonable fee for their time in handling the principal's affairs and they can resign at any time and allow the alternate person named in the power of attorney document to take over.

Health Care Decisions. A "health care decision" is any decision made by a patient or their agent or conservator regarding the patient's health care. The legal authority for advance health care decisions is set forth in the California Probate Code section 4600-4805 and includes the right to select or discharge a health care provider or institution, approve or disapprove diagnostic tests, surgical procedures, medication and directions to provide, withhold or withdraw life support, artificial nutrition and cardiopulmonary resuscitation.

Advance Health Care Directive. An Advance Health Care Directive is a written document designating an agent for health care decision-making and contains certain instructions regarding choices the principal may like adhered to at a time when they are not able to make their own medical decisions, including continuing or terminating life support, burial instructions, or organ donations. Because decisions may need to be made quickly, it is generally advisable to name an agent who lives near the principal or is able to travel on quick notice to be at the hospital to make these decisions. Most individuals name their spouse or partner as the primary agent, with children or friends as alternates.

HIPAA Release. Because of the privacy rules of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) it may be difficult or impossible for an agent to communicate with a health care provider on behalf of a person without a HIPAA release, since the release of private medical information may subject a doctor or hospital to liability if they disclose personal information without a patient's consent. Because of this Act, it is wise to have a signed HIPAA release allowing the same agent designated for health care decisions to be able to receive copies of medical records and communicate with medical providers.

For a planned surgery or hospital stay, a patient should bring a copy of their Health Care Directive and HIPAA release with them at the time of admission so that the hospital has records of the contact persons for decisions should that need arise.

Living Will Forms. An attorney can draft a customized document setting forth detailed wishes of what medical decisions should be made by the agent in certain given instances. This document is commonly referred to as a "living will" and can be reassuring to a patient who has strong opinions about choices in receiving medical procedures, but there are advantages to using the pre-printed form available from the California Medical Association (CMA) rather than a custom drafted form. Doctor, hospitals, and nursing homes in California are familiar with the CMA form and will act on it quickly without hesitation since they are familiar with the most commonly used form in California. A custom drafted form may provide greater detailed instructions from the principal, but it may result in delays because a medical provider may need to send a copy of the document to their legal counsel before they will accept and recognize the terms of the document as being legally valid and releasing them from any liability. Another commonly used form is called a "Five Wishes" form from a company called Aging with Dignity and is available for a cost of \$5 at <https://agingwithdignity.org/shop/product-details/five-wishes>

Conclusion. If you have already signed a power of attorney and health care directive form, pull it out and review it occasionally to make sure that it still reflects your desires and names the person you want to act in your behalf. Check to see if it is valid for your agent to act now, or if it is a "springing" power of attorney that will apply only when you are incapacitated and if the document adequately states how the determination is made when you will be deemed to lack capacity to manage your own financial affairs and medical decision. If the forms need to be changed, don't delay having it revised to meet our

needs. These are extremely important documents to record your decisions and the persons you wish to carry them out in your behalf.

As always, you should be sure that additional legislation has not been enacted or that court decisions have been rendered that would change the above advisements. This advisory is neither exhaustive nor is it tailored to your specific situation. If you have questions or concerns, you should discuss your individual situation with us or your own attorney.

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