Durable Power of Attorney & Living Will/Healthcare Directive

It's not something anyone likes to think about. But if you became incapacitated, who would have the legal power to act on your behalf?

In addition to your Will and any trust planning that may be appropriate, a thorough estate plan should consider the advisability of implementing a Durable Power of Attorney for general or business purposes, along with a Medical Power of Attorney and Healthcare Directive. Unlike your Will (which directs the distribution of assets following your death), these documents are applicable only during your lifetime. Powers of Attorney (financial or medical) and a Healthcare Directive express your wishes for on-going financial management or healthcare decisions in the event you become incapacitated and can not make these decisions on your own, and these documents appoint those you direct to act for you in making such decisions.

What is a Power of Attorney?

In general, a Power of Attorney is a document that allows you to designate someone to act on your behalf (e.g., an attorney-in-fact or an agent) to manage your day-to-day financial and/or personal affairs. If the Power of Attorney contains language describing it as "durable," making it a Durable Power of Attorney, the document will remain in effect despite your subsequent incapacity or disability. Typically, it is advisable to execute a Durable Power of Attorney to ensure your attorney-in-fact is authorized to act in the event you become incapacitated and are unable to continue to manage your own affairs. Like with any other estate planning document, you should consult your professional estate planning advisors for advice on specific issues relative to a Durable Power of Attorney. If your attorney-in-fact acts within the authority given to him or her in the Power of Attorney, then the acts of the attorney-in-fact are binding upon you.

Who may be appointed as your attorney-in-fact?

In appointing an attorney-in-fact, you should remember that the individual named will generally be involved with financial and personal matters. State law varies as to whom you may appoint. Some states forbid minors to act as attorneys-in-fact, as well as certain other individuals such as healthcare providers, unless such individuals are related to you. As you consider who should be designated as your attorney-in-fact, it is common that a spouse or trusted family member will be selected. You should feel comfortable that those you select have the financial acumen to act for you in making your financial decisions. Remember, too, that you may designate an initial attorney-in-fact, followed by successor attorneys-in-fact who will serve in the event your original designee is unable or unwilling to do so.

Powers granted to an attorney-in-fact

State law allows an attorney-in-fact to perform a number of acts, which typically include the ability to sign tax returns, access safe deposit boxes, receive income on your behalf, write checks, pay your expenses, access your retirement accounts and Social Security information and handle other day-to-day financial matters. You may give your attorney additional powers, but typically these powers must be specifically authorized

in the Durable Power of Attorney document. Where state law does not already provide, additional powers frequently granted may include the ability to make gifts of your property, to disclaim any gift or devise made to or for your benefit, to change the beneficiary designation on an asset, and to designate additional or substitute attorney(s)-in-fact.

Effective date of a Durable Power of Attorney

You may grant a Durable Power of Attorney that is effective immediately or becomes effective at some time in the future (e.g., a specific date or event, such as your incapacity). A Power of Attorney that becomes effective only upon your incapacity is often referred to as a "springing" Power of Attorney – in that it springs into use when you become disabled and unable to act for yourself. When using this form of a Power of Attorney, you retain complete and sole control to make your own decisions while you are able to do so, however you have put in place the authority for your designated attorney-in-fact to act for you when or if you become unable to do so.

Revocation of a Durable Power of Attorney

Generally, your Durable Power of Attorney becomes void at your death and the authority given to your attorney-in-fact ends. In addition, you generally have the power, either under state law or as provided in the document, to revoke your Durable Power of Attorney at any time.

What is a Living Will/Healthcare Directive?

A Healthcare Directive provides your general healthcare instructions to your doctor or treating physician if you become incapacitated and are unable to make healthcare decisions for yourself. If you have specific wishes with respect to certain medical procedures (e.g., your desire concerning the administration of certain life-sustaining procedures or life support systems if you are terminally ill), consider executing a Living Will. In some states, it's common that a Healthcare Directive and Living Will are combined into the same document. The Medical Power of Attorney names an attorney-in-fact, sometimes called an agent or a healthcare proxy, who is authorized to discuss your treatment with medical care providers and to make healthcare decisions for you that are consistent with your wishes. Again, in some states it is common for this document to be combined with the Healthcare Directive or Living Will; in other states it may be more common to have separate documents for each. Regardless, keep in mind that those you designate to act for you in making medical decisions do not have to necessarily be the same as those you designate in a Durable Power of Attorney (for financial or business purposes) to act for you in making financial decisions.

Who may be appointed as a healthcare proxy?

In appointing a healthcare proxy, consider that the individual named will be instrumental in making healthcare decisions for you. Generally, the person selected to act for you should either be a family member or close friend who is familiar with and will respect your wishes.

Revocation of a Living Will/Healthcare Directive

Generally, a Living Will or Healthcare Directive may be revoked, as either provided under state law or under the provisions of the document. To avoid any confusion as to whether the document remains in effect, you may wish to execute a written revocation, and have the copies of the revoked Living Will/Healthcare Directive collected and destroyed.

HIPAA

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 is a privacy law, which generally states that medical and care providers may talk to you and no one else about your diagnosis and care unless you tell them otherwise. This law is intended to protect your medical records and other health information, and allows you to obtain and control access to this information. Unfortunately, the HIPAA rules are complex, and many providers are unsure how to comply with them, which may cause them to err on the side of caution and refuse to release even basic medical information to your loved ones, attorney-in-fact, healthcare proxy, or caregiver.

As a result, unless you state otherwise, the HIPAA may prevent your healthcare providers from sharing sufficient information with your healthcare proxy under your Living Will or Healthcare Directive to make medical and caregiving decisions on your behalf. You can, however, insert language into your Living Will or Healthcare Directive to help shield your healthcare proxy from all or most of the privacy provisions of HIPAA. This language will generally express your intent that your healthcare proxy be treated as you would with respect to your rights regarding the use and disclosure of your individually identifiable health information or other medical records.

TIAA CREF

Financial Services