



# **KNOCK, KNOCK, KNOCKING ON HEAVEN'S DOOR: DISCUSSING END OF LIFE DECISIONS WITH YOUR CLIENTS**

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# DURABLE POWER OF ATTORNEY

Durable powers of attorney are also referred to as “procurations” and give someone the right to act legally and financially on behalf of someone else. The person authorized to act for someone is called the “agent”. The person on whose behalf they act is called the “principal”.

Having a POA in place is critical for everyone, because unexpected incapacitation can happen, but especially critical for older individuals or people who are sick or have Alzheimer’s or dementia.

A POA may prevent the need to have someone interdicted.

# EXPRESS AUTHORITY REQUIRED

Express authority in the POA must be given for certain acts:

- Alienate, acquire, encumber, or lease real estate
- Make a lifetime gift either outright or in trust
- Contact a loan, acknowledge or make remission of a debt, or become a surety;
- Draw or endorse promissory notes;
- Enter into a compromise or refer a matter for arbitration
- Make health care decisions
- Prevent or limit reasonable communication, visitation, or interaction between the principal and a relative or another person

# FORM OF DURABLE POWER OF ATTORNEY

Durable POAs don't have to be in any specific form unless it's required for certain act, such as anything involving real estate. Then it must be an authentic act (signed before 2 witnesses and a notary).

Because durable POAs are usually intended to give broad authority to the agent, they should all be executed in authentic form.



Agent must act with prudence and diligence on behalf of the principal



Agent is responsible for any losses to principal if agent failed to act prudently or diligently



Principal can demand on accounting



Agent must inform principal when procurement is fulfilled if it's for a specific action



If agent enters into a K on behalf of principal but doesn't disclose the procurement, the agent is personally obligated for performance of the contract, but won't be personally liable if disclosed procurement



Agent will also be personally liable if contract exceeds their authority

# DUTIES OF AGENT

# TERMINATION OF DURABLE POWER OF ATTORNEY

The durable power of attorney terminates automatically on the death or interdiction of the principal

Principal can terminate the durable power of attorney at any time and for any reason

Agent can terminate the durable power of attorney by notifying the principal, if the principal lacks capacity then can inform the successor agent, or if no successor agent then a person who has an interest in the welfare of the principal

At termination the agent has a duty to account to the principal unless that duty has been expressly waived

# POWER TO MAKE GIFTS

Many durable powers of attorney will give the agent the power of make gifts, but should be careful about making that power too broad.

If the agent can make gifts to himself/herself without any limitations and if the agent dies before the principal it could be considered a general power of appointment (a concept Louisiana doesn't have) and the IRS could include all of the principal's assets in the agent's estate.

Can draft around this by making any gifts the agent makes to him or herself subject to limitations like consent of another person, or the annual gift tax exclusion

# SPRINGING DURABLE POWERS OF ATTORNEY

Many durable powers of attorney will be effective from the moment they are signed. Some clients are uncomfortable with that idea and want the durable power of attorney to only be effective upon the occurrence of an event, like their incapacity. These are called “springing powers of attorney”.

These can cause a lot of problems for the agent, if the durable power of attorney states it can only be used in the event of incapacity, the agent will have to prove the principal’s incapacity every time the durable power of attorney is used. Will also have to define “incapacity” which can be tricky.



# MULTIPLE AGENTS

It is usually a good idea to have more than one person as an agent. If someone is unavailable, predeceases the principal or becomes incapacitated him or herself, then there is another person who can act.

Should the multiple agents be independent of each other? Have to act jointly?

Joint action makes using the durable power of attorney more difficult, but can reduce family tension because all the agents will have access to financial information. Can also make it harder to abuse the durable power of attorney.

Problem with agents acting independently is if they act in a conflicting manner.

# MISCELLANEOUS BUT IMPORTANT

The principal can name his or her curator in the durable power of attorney. A court will give first consideration to person designated in a writing by the proposed interdict.

Financial institutions: some may reject perfectly legal durable powers of attorney because they require their own forms to be used. Clients should be advised to discuss this with their financial institutions

Tell clients to put their copy of the durable power of attorney in a secure location, but not in a safety deposit box.

Some clients are wary of giving agents the actual document - advise them to put it in safe location, tell the agent about the durable power of attorney and where to find it, or instruct the agent to call the attorney who prepared it (and usually keeps a copy) in the event it's needed

# MEDICAL POWER OF ATTORNEY

- A medical power of attorney is also a procuration and states who will make medical decisions for an individual if he or she can't make them for himself
- The medical power of attorney is different from the durable power of attorney because it is only used if the individual can't make their own medical decisions
- Can be in the same document as the durable power of attorney but is often a separate document
- The medical power of attorney can just be a broad authorization to the agent to make medical decisions or can give specific instructions for certain medical situations. The most important being a DNR.



It is usually preferable to name more than one individual as an agent in the medical power of attorney, so that if one agent is also incapacitated, or predeceases the principal, there is someone who can make medical decisions



When naming more than one agent it is important to address whose decision will be final if the agents disagree

# Multiple Agents

# LaPOST

- In Louisiana, patients can complete a form with their physician called LaPOST. This form states the patient's desires regarding end of life care and is designed to travel with the patient across various health care settings, as it's part of their medical record. The form addresses issues such as intubation, CPR, and intensive care
- Studies have found that when these types of forms are completed, the patient's desires are followed 98% of the time.
- LaPOST is not designed to replace a medical power of attorney but to supplement it

# Living Wills

- A living will is a document where the client states that he or she does not want to be kept alive artificially if they are in a permanent and irreversible coma.
- The living will should also include whether the client also wants IV food and water to be discontinued along with the ventilator.
- The living will can be oral or written and must be signed or declared in front of 2 witnesses (a notary is not required).
- The living can be filed with the secretary of state

# Long Term Care Insurance



It's expensive and gets more expensive the longer someone waits to purchase a policy



Some policies will cover at-home care or care in an assisted living facility, adult day care, care coordination, and modification of the client's home so the client can age in place.



Policies can be individual or joint, however caution is advised with joint policies because there are often limits on the total amount of benefits and one spouse could deplete the policy.

# EXECUTION OF WILLS IN A PANDEMIC

A will must be executed in one of two ways:

- For a notarial will – one prepared by an attorney, it must be signed by the testator before a notary and two witnesses. The notary and witnesses have to be present during the entire signing. The testator also must declare to the notary and witnesses that he or she has just signed their will
- For an olographic will – one which is generally not prepared by an attorney, it must be entirely in the testator's handwriting, dated, and signed. No notary or witnesses are required.



# REMOTE NOTARIZATION

Governor John Bell Edwards issued a proclamation on March 26, 2020 allowing for remote notarization except for:

- Wills
- Trusts
- Donations Inter Vivos
- Matrimonial Agreements
- Authentic Acts
- Acts modifying, waiving or extinguishing final spousal support

# Long-term Care Insurance

- If the client has a pre-existing condition the insurer may turn them down or exclude coverage for that condition.
- Most policies will have a limit on the total amount of benefits or duration of time benefits will be paid.
- In order to use the policy will have to meet certain conditions: when the client can no longer perform 2 or more activities of daily living such as bathing, eating, dressing, using the bathroom or walking. Care should be taken to make sure that dementia and Alzheimer's will trigger the policy
- Most policies have an elimination period of 0-100 days from the time the client qualifies to start using the policy until it kicks in.

# Long Term Care Insurance

- Premiums generally increase over time.
- While statistics vary, it's clear that a majority of people will need long term care after age 65, and women are more likely to need such care.
- Some part of the premiums may be deductible as they will be considered "medical expenses" if the plan meets certain criteria
- Insurance companies have started offering hybrid insurance policies with long term care riders
- The insured will have to use up the cash value first and then the company will start paying long term care benefits.

# Nursing Home Care

- Costs vary between private pay nursing homes and ones that accept Medicare and Medicaid, a 2017 study found that the higher the percentage of Medicaid patients the lower the quality of care
- Most nursing homes offer different levels of care: independent living, assisted living, and nursing care.
- Private pay nursing homes can cost anywhere from \$3k-\$5k per month for independent living, \$4.5k-\$7k per month for assisted living, and up to \$9k per month for nursing care
- Life care plan: a national trend is for these facilities to offer residents the option of a large buy-in (\$275k-\$690k at Lambeth House) and the cost of assisted living and nursing care will be cut almost in half, but first have to enter at the independent living level. Placement is guaranteed when need to move to a higher level of care and 90% of the buy-in is returned upon the death of the resident (or if they leave).

# Medicare

- Medicare does not pay for long term care, but will cover short-term care at skilled nursing facilities if the patient was admitted to the hospital for at least 3 days and then admitted to the facility. Medicare pays 100% of the costs for the 1st 20 days, for days 21-100 the patient pays the costs up to \$164.50 per day and Medicare will pick up any excess costs.
- Medicare will also pay for part-time skilled nursing care, physical therapy, and other medical services to cope with an illness if the services are medically necessary and Medicare will pay for these services indefinitely if a doctor reorders them every 60 days

# Medicaid

- The majority of nursing home residents pay for their care through Medicaid.
- To qualify for Medicaid have to meet 5 requirements:
  - 1. Reside in Louisiana;
  - 2. Have or apply for a social security number;
  - 3. Have monthly income below \$2,313
  - 4. Have countable resources of \$2k or less for individual and \$3k for a couple
  - 5. US citizen or alien with permanent residency

# Medicaid

- Some clients may come in wanting to divest themselves of assets in order to qualify for Medicaid. This is fairly tricky as any transfers made within 60 months of applying for Medicaid for less than fair market value will disqualify someone from Medicaid for a period of time.
- The disqualification period is determined by dividing the amount given away by the average cost of private pay nursing home care in that state. Give away \$100k and average cost is \$5k/month, then will be disqualified for 20 months and the penalty period starts when would otherwise qualify for Medicaid (i.e. \$2K in assets)



A client can transfer assets to an irrevocable trust and then wait 60 months before applying for Medicaid, the client can be an income B of the trust. The assets in trust will not be considered countable resources.



If the client wants to be the income B, the terms of trust must be carefully drafted so that the trustee has a great deal of discretion in making distributions, otherwise the client could be disqualified from Medicaid



Once the person dies, the state has a right of recovery against the estate for reimbursement in an amount equal to the benefits the decedent received.

# Trusts and Medicaid



# Hospice

- Hospice care is covered by most private insurance plans, Medicare and Medicaid.
- A client will qualify for hospice if they have been diagnosed with a terminal illness and are not expected to live longer than 6 months
- The focus of hospice care is to manage pain and treat the symptoms of the terminal illness.
- Hospice can occur at the client's home, hospital, or a stand alone hospice care facility.
- Hospice will create a team consisting of a nurse, hospice volunteer, social worker, home health aide, and chaplain

# Hospice

- Hospice workers are not at the home 24/7 so a lot of the care for the terminally ill person can fall on family members. Families who can afford to will often hire private sitters
- Private sitters qualify as household employees and if they are paid in excess of \$2k the family must give the sitter a W-2 and will be responsible for payroll taxes - Social Security (6.2%), Medicare (1.45%), state unemployment and possibly Federal Unemployment Tax, the family does not have to withhold federal income taxes
- If a sitter is hired through a home health care company the company should take care of those details.

# Burial and Cremation

- It's often advisable to have clients state in a will or notarized document their desires around cremation or burial, including naming someone who is in charge of the services to prevent conflicts among family members

# Issues with Cremation

- In speaking with multiple funeral homes they all agreed that the biggest problem they face is with cremation. In Louisiana if there isn't a directive in a notarized document by the deceased authorizing cremation then there is a list of individuals who can make that decision
  - 1. Surviving spouse
  - 2. Majority of adult children of decedent
  - 3. Majority of adult grandchildren
  - 4. Parents of decedent
  - 5. Majority of siblings
  - 6. Majority of adult person in next degree of kinship
- If can't get a majority to agree then have to get a court order

# Cost of Funerals and Prepayment

- Burials are significantly more expensive than cremation. Burial packages can begin at \$10,455 with the most expensive being \$14,525. In contrast, cremation starts at \$3,615 and goes up to \$5,095
- Clients may wish to prepay for their funeral services, a prepayment plan can be either revocable or irrevocable and funeral homes are required to invest the funds prudently.

# Digital Death

- Most people do the majority of their banking and bill paying online, which can create major problems when someone dies and the executor and/or succession attorney are trying to figure out what assets the person owned and what bills are due.
- My practice is to advise clients to create a spreadsheet, or notebook, or use a password vault to manage their online accounts. And not just the bank account, but also credit cards, mortgage, utility, Amazon, Netflix, etc. as it can be very difficult to access these accounts to close them or manage recurring charges.

# Louisiana Law and Digital Death

- Louisiana does have a statute that gives the executor the right to access online accounts and states that the operators of such accounts have to give access to the account within 30 days of receiving letters testamentary or letters of administration
- However, in real life these companies are located all over the world and often still require a court order before they will allow an account to be accessed.

# Pets

- Providing for pets in a will is an issue that is often overlooked but can be very important to many clients.
- One way to provide for pets is to set aside a specific amount of money for an individual with the condition that they have to accept the pet into their home and provide care for it for the rest of its life.



# Pet Trusts

- Louisiana finally enacted a law in 2015 allowing for the creation of pet trusts.
- An individual can create an inter vivos or testamentary trust to provide for the care of one or more pets who are in existence on the date the trust is created. The trust must appoint a caregiver for each animal beneficiary. The trust can appoint someone to enforce the provisions of the trust and if no one is appointed then the settlor, or the successors of the settlor, or the caregiver can enforce the trust provisions.

# Pet Trusts

- Trust assets can only be used for the care of the animal and reasonable compensation for the trustee and caregiver. If a court determines that the trust assets are in excess of what's necessary for the care of the animal and the trustee/caregiver expenses then the court can terminate part of the trust.
- Trust will terminate at the death of the last living pet and will be distributed to whatever individuals are designated. If no ultimate human beneficiary was designated, the trust assets will go back to the settlor or the settlor's successors.

# Capacity Issues

- It is the estate planning attorney's responsibility to make sure that our clients have the capacity to execute estate planning documents and to try to determine if a client is being subjected to undue influence by a relative or caretaker
- This can be a very hard call for the practitioner, especially if you haven't known the client for long

# Standard for Determining Capacity

- The standard for capacity is whether the person can comprehend generally the nature and consequences of the disposition. A person has to be able to understand, in a general way, the nature and extent of his or her property, the relationship to the people who are considered to be the natural objects of his bounty, and the consequences of the disposition
- The person doesn't have to understand all of the mechanics, but does have to be capable of understanding it. Many estate plans, especially for high net worth families, are very technical and the person doesn't have to understand all the legalese

# Capacity

- Capacity must exist at the time the will is signed by the testator and cases involving challenges to a will based on lack of capacity are fact intensive, will look at illness, age, presence of delusions, sedation, outrageous behavior (although the statute notes that outrageous behavior can just be a personality quirk).
- Individuals with Alzheimer's or dementia may still be able to execute documents if they have lucid moments.
- Medications come up in 2 scenarios: where the person has a mental condition the fact that they were on medication doesn't indicate lack of capacity and where the person was taking medication like painkillers which may affect the ability to understand the documents.

# Undue Influence

- Undue influence is defined as influence that so impairs the volition of the testator as to substitute the volition of the influencer for that of the testator. It has to be of such a nature that it destroys the free agency of the testator.
- Physical coercion and duress are clearly undue influence but also applies where someone creates resentment towards a natural object of the testator's bounty through false statements.

# Undue Influence, cont'd

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The undue influence must be active at the time the will is signed

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Advice, persuasion, kindness and assistance are not considered undue influence

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If find that a bequest was a product of undue influence then the bequest will be invalidated, not the entire will.

# General Advice

- When you are meeting with a client who has received a terminal diagnosis or has a life-threatening illness the first job is to review all documents which are currently in place and see if they still conform to the client's wishes.
- The client and the family should be advised to start gathering important documents and information regarding assets and debts.