

ESTATE PLANNING: GETTING BACK TO BASICS

Although there was a great deal of discussion at the end of 2012 surrounding the “fiscal cliff” and concerns about a radical change in the Federal estate tax laws, we now know that those were needless worries, and we will summarize some of the more important estate tax planning issues in a future issue.

However, as our practice includes more than tax planning, we have found that it is often a lack of having the basic estate planning documents in place that can cause the most problems, which problems usually do not arise until such a point when a person is no longer able to do anything about it. Thus, as we enter this New Year, it is a good time to review some of the most basic estate planning documents and the ways in which having these documents in place can assist you and your family during difficult times. In this issue we will focus on the importance of Powers of Attorney, for both financial and medical purposes.

Durable Power of Attorney

A financial Durable Power of Attorney (“POA”) is one of the most basic and potentially useful estate planning tools available. A POA is a document in which one person appoints another person to act on his or her behalf (usually called an “attorney-in-fact”). Although a POA can be limited to certain transactions, it typically is drafted as a general power, which would include handling all matters related to banking, real estate, payment of taxes, etc. It is important for the POA to state that it is durable, because it will then survive incapacity, which means the attorney-in-fact will be able to use it after the person granting the power is no longer able to handle his or her affairs. The importance of this fact cannot be overstated, as the alternative to a POA upon incapacity is to seek Guardianship over the incapacitated individual, which is a public process through the local probate court. A Guardianship proceeding can be costly and it also ties the Guardian to the Court, requiring annual accountings, additional time and expense, from the initial appointment until the “ward” passes away.

While the need for a Guardianship proceeding can potentially be avoided with a POA, it must not be taken lightly. You must only appoint someone who is going to handle your affairs in a trustworthy manner. We have all heard horror stories about powers of attorney being used for malfeasance and you should feel free to speak with an attorney about any concerns you have, as well as the benefits of a POA.

Through our work with the senior population, we have heard from several Assisted Living facilities that many of their residents have no POA’s, which can be a problem both for the resident and for any child who might be asked to personally sign documents for their parents. While the ultimate choice is with the client, it is important to have the conversation and understand the risks and benefits of signing or not signing a POA.

Durable Power of Attorney for Health Care

A Durable Power of Attorney for Health Care (“HCPOA”), might be the most important estate planning document that a person can execute. A HCPOA is a document in which one party designates someone to make health care decisions for him or her when he or she cannot do so. Notably, while a POA can be used whether the person granting the power is incapacitated or not, a HCPOA is only necessary when someone cannot speak for themselves. Unless that person is deemed incapacitated, an agent under a HCPOA would never be able to override someone making a medical decision for himself or herself.

It is important to note that, a HCPOA is not only for end of life decisions, but it is also useful where decisions must be made about the care they need and possible placement in a facility, where the person cannot advocate for himself or herself. It also allows the agent access to medical records and other pertinent information.

Having these conversations now and having these basic documents in place, if you choose to do so, can save a lot of time and expense later, especially in moments of crisis when a decision needs to be made or a document needs to be signed, in addition to the fact that through the process, you can make your wishes known to the people who will need to speak and act for you. Having a solid plan in place will give you and your loved ones peace of mind so that when the unexpected happens the proper tools are in place.

If you have any questions about either of these documents, or estate planning concerns in general, please do not hesitate to contact our office to set up a more detailed consultation. We look forward to serving you.