

COVID-19: A Reminder of the Importance of Advance Planning for Illness and Incapacity

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Planning for illness, infirmity and incapacity is always an important part of providing for your financial and personal security. In light of the COVID-19 pandemic, though, we are all potentially facing an increased risk of serious illness and the possible need to make difficult decisions regarding medical care.

When an individual becomes incapacitated by illness, they may no longer be able to manage their financial assets or make their own medical decisions. These difficult issues can and should be addressed in advance, when they can be considered fully and reasonably, and not under the weight of distress. Designating an agent (or agents) beforehand to make medical and financial decisions on your behalf in the event you should become incapacitated can prevent undue and costly delays in the management of your health and assets.

There are two separate documents that designate one or more individuals to make decisions for someone else in the event of incapacitation – a General Durable Power of Attorney and a Health Care Directive. These documents are an integral part of a comprehensive estate plan and should be reviewed regularly to ensure that the decision-makers named are still those best suited to the tasks at hand. If these documents have not yet been created, it is important to reach out to legal counsel to have such documents put in place.

Health Care Directives

Health Care Directives go by many names, including advance directive, living will, medical directive and health care power of attorney. In New Jersey, an individual has the option to prepare either a medical decision power of attorney, naming an agent generally to make health care decisions, a living will, providing specific instructions for health care

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measures during times of incapacity, or a combination directive, where a health care agent is appointed to act if the principal is unable to, and which also provides instructions regarding the principal's health care wishes.

Health Care Directives serve a critical function in that they allow one to prepare in advance for incapacity and to choose a trusted friend or family member to act on one's behalf. Health Care Directives also permit an individual to make their wishes regarding end of life care known in advance. In the absence of a properly prepared Health Care Directive, medical professionals are typically left seeking the advice of a "close family member" when tough decisions regarding medical care need to be made. Practically speaking, this leaves both the patient's family and the medical team without guidance as to the patient's wishes regarding their care and can lead to deadlock among family members as to the correct course of action. In extreme cases, the courts may be required to intervene if consensus cannot be achieved. Most importantly, a document setting forth an individual's wishes can assist their designated agent with making the most difficult decision a person can make for a loved one.

Powers of Attorney

Similarly, financial Powers of Attorney are a necessary component of any basic estate plan to assist with matters of incapacity during life. Powers of Attorney are documents in which the principal appoints an agent to handle transactions for them of a financial nature. Powers of Attorney are critically important as they allow an individual's financial concerns to proceed uninterrupted if they become ill or are otherwise unable to handle such matters.

The authority granted by Powers of Attorney can range from very limited to quite broad, depending upon the wishes of the principal. An agent can be empowered to pay monthly bills, sign checks, access safe deposit boxes, buy and sell assets, file tax returns, apply on behalf of an incompetent principal for governmental benefits to which they are entitled, and more.

It is important to understand that an agent acting under a Power of Attorney is not authorized to make decisions regarding the principal's personal life, such as where they live, or to make decisions regarding the principal's medical care. For this reason, a Health Care Directive and Power of Attorney are not interchangeable, but instead act as compliments to one another as part of an overall estate plan.

In summary, a Health Care Directive and Power of Attorney are important documents to have consistently reviewed and updated as part of an individual's overall estate plan. Proper preparation and execution of these documents in accordance with state law is paramount, and it is advisable to consult an experienced estate planning attorney to assist in such matters.

Please contact the authors of this Alert with questions or to discuss your personal state planning needs.

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