The most important estate planning document for seniors

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PORT ST. LUCIE — In my estimation, the single most important estate planning document for a senior is a durable power of attorney.

The reason that I'm saying a power of attorney is most important is because the availability of one can be critical in being able to implement long-term care planning strategies in the event of the mental incapacity of the senior and the need for long-term care planning services and strategies.

A power of attorney is a writing whereby a principal designates an agent and gives that agent the power to accomplish certain tasks on behalf of the principal.

Under the common law, a power of attorney was automatically revoked by the death or mental incapacity of the principal.

If there is no power of attorney in place and the principal is incapacitated, then the loved ones were forced to go to the guardianship court to be empowered to deal with the incapacitated principal's assets and legal affairs.

This created substantial need for attorneys and associated expense to help the guardians, as well as a substantial workload on the probate court.

The word "durable" refers to the fact that, unlike in the pre-existing common law, the statutory power of attorney is "durable" through future mental incapacity.

And, therefore, to the extent that the document conveys the appropriate powers, the agent is able to act without dealing with the guardianship court.

The power of attorney, even under the statute, still terminates automatically at death, and it is therefore, in itself, not a probate avoidance vehicle.

One of the reasons that the power of attorney is becoming increasingly important is because of a new durable power of attorney statute enacted in Florida effective October 1, 2011.

This statute does not void a pre-existing power of attorney and it does not void an out-of-state power of attorney, but all powers of attorney used in Florida after 10/1/11 will be interpreted under the new statute.

The new statute makes some fairly sweeping changes in the law, and it is our advice to our clients that they are almost always better to get a post 2011 power of attorney that incorporates and takes advantage of the provisions of the new statute.

One of the most fundamental changes is a concept that I would refer to as "no blanket authorization". In other words, you might see an older power of attorney that says "I empower my agent to do anything that I could do personally."

Under the new statute, that statement is meaningless and no power is conveyed by the power of attorney unless such power is expressly set forth in the document.

In our practice of helping seniors and their families on a daily basis deal with the potentially devastating financial effects of long-term care in a skilled nursing facility or assisted living facility, if the senior is mentally incapacitated, we need to have an agent who is empowered to perform the functions that may be necessary to protect the senior and/or the senior's spouse.

Therefore, we want to see these specific authorizations in the power of attorney document.

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In addition to the requirement for specific authorization, with respect to "special powers" under the statute, no such powers are conveyed by the document unless they are in separately initialed paragraphs. Special powers are generally powers that convey with them the ability to modify the principal's estate plan. These powers are going to be essential for many of the necessary long-term care planning strategies.

All of the ramifications of a power of attorney are extremely complex and space limitations prevent their inclusion in this short article. However, in a very abbreviated way, some of the other changes in the 2011 statute include the following:

1. The statute specifically provides for the appointment of successor agents, which is something that the principal will certainly want to consider;

2. Unless drafted differently, the appointment of joint agents empowers either agent to act without the joinder of the other. This may or may not be advantageous depending upon the family situation;

3. Issues with respect to whether or not your agent has accepted the job are clarified under the statute as are the fiduciary duties owed by the agent to the principal;

4. Third parties (financial institutions generally) must accept or reject the power of attorney and give their reasons for rejection in writing within four business days. Such third parties cannot require you to use their form;

5. There are provisions whereby notice can be provided to third parties to give the principal some protection against an unscrupulous agent.The quality of your power of attorney is going to become increasingly important over time, especially as long-term care custodial expenses become a larger and larger part of state and federal budgets.

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