PREPARE ADVANCE DIRECTIVES IN PREPARATION FOR LONG-TERM CARE

Most adults will need long-term care. According to *Forbes* (https://www.forbes.com/sites/wadepfau/2016/01/05/costs-and-incidence-of-long-term-care/#15d87bd34ceb, citing a 2005 study by Peter Kemper, Harriett L. Komisar, and Lisa Alecxih, calling it the "most rigorous research [the author] found,") after age 64, 58% of men and 79% of women will need long-term care. (Both the study and the article might be dated, but the projected usage of long-term care has increased.) As an attorney who focuses on long-term care, I urge you who practice estate planning to help your clients prepare advance directives with the assumption that they will need long-term care. I, and my fellow elder law attorneys, can help the client much more if the client has good advance directives.

I. Who should be Agent?

The client (presumably the Principal on the advance directives) should name as Agent in the Health Care Power of Attorney ("POA") and the General POA (often considered the financial POA) whomever they most trust AND who agrees to act as Agent. (No one should be surprised at being named Agent.)

BUT, I strongly suggest that you urge the Principal to name as Agent on both Health Care and General POAs:

- First: Spouse (if married, and if spouse can handle it);
- Second: Child most likely to take in parent when parent needs care;
- Third: Child second-most-likely to take in parent when parent needs care,
- etc.

I strongly recommend that the Principal empower the most likely caregiver to make decisions about care and give that caregiver the ability to spend money necessary to carry out those decisions. (I will admit that some elder law attorneys disagree with me on this suggestion.)

Elder law attorneys often encounter clients who have named a one child as the Health Care Agent and another child as the General (i.e., financial) agent. Rarely does the non-caregiver child realize how difficult it is to be caregiver. So, the child in control of money often

doesn't cooperate in hiring help or moving a parent to a nursing home or assisted living community. Unless the caregiver has the ability both to hire help AND to pay for help, the caregiver will suffer under the burden of caregiving, and the parent will suffer from (unintentionally) inadequate care.

II. Arbitration Opt-Out

Nursing homes and assisted living communities often have provisions in their standard contracts mandating arbitration of disputes. On July 18, 2019, the federal government promulgated a rule (Federal Register document 2019-14945, codified at 42 C.F.R. § 483.70) allowing long-term care facilities to include mandatory arbitration provisions in their standard contracts if:

- The arbitration clause is not a "condition" of admittance to the facility;
- The agreement is explained to the resident (or resident's representative) in a way that they understand;
- The resident (or representative) acknowledges their understanding of the arbitration clause; and
- The resident (or representative) may rescind within 30 days.

In addition, the facility must keep records of its arbitrations for five years so that the federal government may inspect the records. (The rule does not mention the availability of such arbitration records to residents or representatives.)

Arbitration agreements, and the secrecy that goes with them, reduce a facility's incentive to avoid problems. Of course, one may respond that a facility would not want to have any injuries to its residents, so courtroom litigation is no better at incentivizing good behavior than is arbitration. Perhaps that is true, but I have my doubts. The Catholic church used confidential mediation to keep clergy sexual abuse secret for decades. Like the Catholic church, a facility could believe that it would be less expensive to keep disputes confidential than to maintain vigilance over its business practices.

I suggest that you offer your clients a prospective chance to opt out of such arbitration clauses. A form of opt-out document is available at http://www.protectingseniors.com/wp-content/uploads/2019/09/Arbitration-Opt-Out-Advance-Directive-2019-08-24A-JLK.pdf.

III. General Powers of Attorney

A. Durable v. Non-durable

A General POA is preparation for the possibility that the Principal may, at some future time, need help making decisions. So, the General POA should be durable (the Agent keeps authority even if the Principal loses decision-making capacity.) A non-durable POA often is useless when the Principal needs long-term care. In Ohio, a POA is durable unless it states otherwise. (R.C. § 1337.24)

B. Immediate v. Springing

An "immediate" power of attorney takes effect upon signature. A "springing" power of attorney takes effect at some future date, usually when the Principal has been determined to lack decision-making capacity. Your clients should use "immediate" POAs.

A family fight can erupt when one family member "takes control" over a parent. The test used to trigger a "springing" POA often requires a physician's opinion. An unhappy family member can find an expert witness to testify that the "springing mechanism" has not been triggered. As a result, at a time when parents probably need help managing their affairs, such help is delayed because of a fight among the children and their expert witnesses.

C. Contents of General POA

1. Grants of General Authority

Among the grants of general authority in the statutory POA form, the following are important if the Principal needs long-term care:

- Real Property (R.C. § 1337.45)
- Stocks and Bonds (R.C. § 1337.47)
- Commodities and Options (R.C. § 1337.48)
- Banks and Other Financial Institutions (R.C. § 1337.49)
- Operation of Entity or Business (R.C. § 1337.50)
- Insurance and Annuities (R.C. § 1337.51)
- Estates, Trusts, and Other Beneficial Interests (R.C. § 1337.52)
- Retirement Plans (R.C. § 1337.56)

The Agent's ability to manage these issues would give the Agent the ability to control "resources" as counted by the Medicaid program or "assets" as counted by the Department of Veterans Affairs ("VA") Pension (more commonly, but incorrectly, known as "Aid & Attendance") program.

In addition, authority over "Benefits from Governmental Programs or Civil or Military Service" allow the Agent to seek Medicaid and/or VA benefits for the Principal.

2. <u>Authorities that Require Specific Grants ("Hot Powers")</u> (R.C. § 1337.42)

The following specific grants of authority are important if the Principal needs long-term care:

- Create, amend, revoke, or terminate a trust
  - In addition, list Qualified Income Trusts, Special Needs Trusts, and Pooled Trusts by name.

A Qualified Income Trust is an income pass-through trust that allows a long-term care Medicaid applicant to meet the "low income" requirements even if they have "high" income.

Special Needs Trusts and Pooled Trusts allow an applicant for Supplemental Security Income and/or Long-term Care Medicaid or Aged Blind Disabled Medicaid to shelter resources that would otherwise cause ineligibility.

- Make a gift
    - Make gifts in any amount
    - Make gifts to likely heirs unequally
    - Make gifts to the Agent

Making gifts is an important strategy to shelter resources of the Principal from long-term care costs.

- Create or change rights of survivorship
- Create or change a beneficiary designation
- Waive the principal's right to be a beneficiary of a joint and survivor annuity or a survivor benefit under a retirement plan

3. <u>Additional Grants of Authority Not in the POA Statute</u>

- Power to create LLCs

and

- Power to create 401k accounts (including solo 401k accounts)

If the Principal has or might have an IRA at retirement, the general POA should include a clause specifically allowing the Agent to create a Limited Liability Company and another clause specifically allowing the Agent to create 401k accounts (and more specifically including a solo 401k account) for the Principal. If the Principal needs long-term care and gets Medicaid coverage to pay for that long-term care, the ability to set up a solo 401k inside an LLC can help facilitate a change in ownership of an IRA to the Principal's spouse without having to cash it out (and pay taxes on the distribution in one tax year) and without losing Medicaid coverage at the time of an annual redetermination.

(Surprisingly, the general grant of authority over operation of an entity or business (R.C. § 1337.50) does not appear to include the authority to CREATE an LLC. This Revised Code section appears to assume that the Agent, if given such authority, will be able to make decisions about an entity or business that was already in existence before the Agent started exercising authority via the POA.)

- <u>No</u> authority to sign pre-dispute arbitration for long-term care

As discussed elsewhere in this article, nursing homes and assisted living communities tend to put acceptance of confidential arbitration (including a waiver of class action rights) in their standard admission agreements. To help prevent the Principal becoming bound to an arbitration/confidentiality/no-class-action clause in the admission agreement, I suggest including a provision in a general POA that specifically withholds the Agent from having authority to bind the Principal to such a clause.

- Authority to designate an Authorized Representative

When helping a client apply for Medicaid, most elder law attorneys want to be the Authorized Representative. The Authorized Representative must receive all notices from the Medicaid agency. If the Authorized Rep doesn't receive a notice, any time deadline normally attached to that notice is tolled. Recently, the Medicaid agency has taken the position that an Agent does not have authority to designate an Authorized Representative unless the POA document specifically provides. (The Delegation authority among the "hot powers" would suffice, but a non-specific delegation authority may give the Agent more power than the Principal wishes.)

- Authority over public pensions

(If your POA form uses more description than the simple checklist for the General Powers, then perhaps mention public pensions in the Retirement Plans language.)

- Authority over U.S. Treasury certificates and Treasury Direct

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