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ATTORNEYS

WILLS, TRUSTS AND ESTATES NEWSLETTER

Volume 4, Issue 2 May 2012

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TOP FIVE REASONS TO UPDATE YOUR POWER OF ATTORNEY

BY LORI K. MURPHY, ESQUIRE

Over the years, clients have presented to me medical and financial powers of attorney that were drafted 10 or even 20 years ago, while asking "Does this still work? Do I need to update it?" Sometimes, they still work but only in limited fashion, but most of the time, my answer is yes.

Typically, there are five instances in which you will need to update your power of attorney:

1. You executed a power of attorney before 1996;
2. You executed the medical power of attorney prior to 2009 and you like flexibility;
3. You executed a general power of attorney prior to 2010 and you want to be sure that your agent will have no problems using it;
4. Your agents have died, have dementia, moved too far away to be helpful or you want to name someone else; and
5. You are separated or divorced and your current power of attorney names your (ex-) spouse.

First, if you executed your power of attorney (medical or financial) prior to August 21, 1996, you need to be aware that the Health Insurance Portability and Accountability Act was enacted thereafter by Congress (the "HIPAA Privacy Act"). The HIPAA Privacy Act requires privacy rights and responsibilities to be addressed and a power of attorney needs to include references to the HIPAA Privacy Act. I have reviewed powers of attorney executed as late as the early 2000s that failed to contain the necessary references to this Act. If HIPAA is not addressed in your medical or financial power of attorney, you need a new power of attorney. The former document is often called some variation of Medical Power of Attorney, Advance Directive or Health Care Power of Attorney, and the latter is often called a Power of Attorney or a Durable General Power of Attorney, for example. All of these would require updates if signed prior to 1996.

Second, if you executed a health care power of attorney prior to 2009, an update would not be required, but you could avail yourself of new flexible provisions adopted in the Virginia Health Care Decisions Act. Key changes included authority of an agent to address mental illness by authorizing the admission of an individual to a health care facility for treatment. Another key change includes authority to include other flexible directions about life-prolonging procedures. Prior to 2009, it was common for many clients to state their wishes, in case of a terminal illness, to

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avoid the application of artificial life support if it would only serve to prolong the dying process. After 2009, many clients opt to include a proviso that allows the agent to request artificial life support for any purpose during a pre-specified time period, like three or seven days, for example. Common reasons clients like this are 1) to ensure that there is truly no hope of recovery; 2) to allow a grown child studying abroad time to return to the bedside; or 3) to allow family members time to grieve.

Third, the Virginia Uniform Power of Attorney Act was made effective on July 1, 2010. There were several changes to the law that apply to powers of attorney. A few key points include, in part, allowing a power of attorney to be effective even after the principal suffers incapacity, ensuring that third parties such as banks will accept the power of attorney as valid even if only a photocopy is produced, and the addition of specific requirements for so called "hot powers". These are certain powers you are allowed to delegate to your agent in a power of attorney, but only if you specifically state the powers. They include, in part, amending inter vivos trusts (which would be very useful given the current unified credit amount situation), making gifts (and this applies even as between spouses), and designating beneficiaries on various policies.

The fourth and fifth points are the reasons that most clients contact us: either an update of the agents are required for reasons including death, distance, incapacity or age of the individual or the client is separated or divorced from the spouse who is named as an agent in the document.

In summary, if you have powers of attorney of any kind that are signed prior to 1996, immediately request an update. If you have powers of attorney signed prior to 2010, you may wish to update your powers of attorney to remain current and to take advantage of the flexibility that Virginia has afforded its residents to date. Lastly, if your personal situation has changed or that of your agent, then please contact us.

The typical cost for a new "two-in-one" Advance Directive/Health Care Power of Attorney is $250/person or $300/couple. The typical cost for a new Durable General Power of Attorney is the same: $250/person or $300/couple.

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ESTATE PLANNING AND DIVORCE: WHAT TO CONSIDER WHEN YOU'RE SEPARATING OR DIVORCED

BY LAUREN K. KEENAN, ESQUIRE

If you're planning to separate from or divorce your spouse you probably already know that it's critical to begin working with a good family law attorney, but you may not realize that it's also a good time to consult with an estate planning attorney. Divorce can throw an otherwise well-thought-out estate plan into turmoil, and divorcing couples are wise to consider updating their estate plans.

Following a divorce, there are often titling issues that need to be addressed. Assets that were once jointly-owned by both spouses are now owned by one spouse, individually. Beneficiaries and agents (who were more than likely your soon-to-be ex-spouse) should be changed and updated. If you own property in more than one state or have minor children, now may also be a good time to consider a trust.

To understand the types of changes that may be required during a divorce, first consider your will. Most married couples executed "I love you wills" during the course of their marriage, naming their spouse as the sole-beneficiary of their estate. It's highly unlikely that this matches your current intent now that you are separated or divorced. While it is true that the Commonwealth of Virginia (and several other states) has a law that voids most inheritances by an ex-spouse, this law only applies once your divorce is final. As long as you are still legally married to your spouse, even if you are in the process of divorcing or separated in advance of divorcing, your spouse may still make a legal claim for a portion of your estate.

If you don't have a will, now is a good time to consider drafting one. Dying without a will is called dying intestate. In Virginia, dying intestate means that some or all of your estate will go directly to your spouse. Again, until you are legally divorced, you are still married. Therefore, if you die without a will before your divorce is finalized, your spouse may inherit a large portion of your estate.

The good news is, most estate planning documents are fairly easy and relatively inexpensive to modify. The process of modifying your plan should begin as soon as separation or divorce is imminent. To update your will you may either request a codicil to your current will or a new will, destroying any past wills that you no longer wish to have legal force and effect.

In addition to updating your will, as soon as you decide to divorce you should also update any Advance Directive/ Health Care Power of Attorneys or Durable General Power of Attorneys that you may have naming your spouse as your agent. Powers of Attorneys are powerful legal documents that grant decision-making authority to a third-party (your "Agent" or "Attorney in Fact"). A Health Care Power of Attorney addresses health care related decisions while a General Durable Power of Attorney generally deals with finances and real property. A Power of Attorney provides that in the event that you are unable to make your own decisions due to illness or incapacity, your agent can act on your behalf. Most married couples name their spouse as their agent. Such documents should be updated immediately upon separation or divorce; consider in the alternative naming as your agent a close trusted friend, a sibling or even an adult child.

Finally, if you don't already have a trust, ask your attorney to talk to you about the benefits of establishing one. A trust is especially appealing for divorcees with minor children because it allows for in-depth planning for future distributions to minor children and it can be very useful to have in place if you ever decide to remarry. A trust may be created through a will or "testamentary trust," or it may be a stand-alone document - a "revocable living trust." There are pros and cons to both options, and it is best to discuss with your attorney which one is best for you.

If following your divorce you're a single parent with sole custody of your children, a trust can be an excellent tool for planning for your children's future care if you should die or become incapacitated. A trust allows you to appoint a third-party to serve as Trustee and to administer funds to your children (if they have reached the age of majority) or to their guardian (if they are minors) in accordance with your instructions. Through a trust you can direct that the children only receive a portion of their full inheritance at certain ages to avoid a windfall of cash when they may be too young to manage it maturely. Through a trust you can also encourage certain behaviors like graduating from college or trade school or obtaining a graduate degree. Through a trust you can also plan for big life events like your children's wedding or helping them with the purchase of their first home. There is a great deal of flexibility in drafting a trust and contrary to popular belief, trusts are not just for the wealthy. Trusts serve as excellent planning tools if you do decide to remarry and particularly where there are two families with children coming together.

While it may be hard to imagine dealing with estate planning at the same time you're going through the difficult emotional process of seeking a divorce, you may be surprised to find out how empowering it can feel. There can be a tendency to put off planning until you're "back on your feet" and your divorce is behind you, but doing so can have unintended negative consequences which may be easily avoided with appropriate planning.

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NATIONAL HEALTH CARE DECISION DAY: HAVE YOU MADE YOUR WISHES KNOWN?

BY LAUREN K. KEENAN, ESQUIRE

April 16, 2012 marked the 5th Annual National Health Care Decision Day. The day is intended to inspire, educate and empower the public and providers about the importance of advance care planning. The purpose of the day is to encourage people to start thinking about their health care decisions before they become ill or incapacitated and can no longer speak for themselves and to put those decisions in writing.

There are two important legal documents that address health care wishes: Advance Medical Directive (or Power of Attorney, as it is often referred) and a Living Will. These documents may be merged into one single document.

An Advance Medical Directive serves to appoint an

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agent to make decisions on your behalf if it is determined by a health care professional that you are no longer capable of making decisions for yourself. This document also includes guidance to your agent regarding the type of care you want to receive.

A Living Will addresses end of life decisions more specifically, including whether or not you want your life to be artificially extended if a physician has determined that death is imminent.

Both documents are relatively inexpensive to have prepared. Once drafted, you should give these documents to your primary care physician and tell relatives and friends that you want them to honor your wishes when the time comes that you cannot make your own health care decisions. Having your wishes in writing should offer peace of mind, knowing that your health care decisions will continue to be made in keeping with your own beliefs and preferences.

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