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Is the Durable Power of Attorney the Most Important Document?

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Many people think of Wills and Trusts related to Estate Planning. For many people in difficult situations, the Durable Power of Attorney is the most important document.

The following suggestions in a presentation, "Medicaid in Mind" by April D. Hill, an attorney in St. Petersburg should be discussed with clients:

Update Durable Power of Attorney-Under Florida §CH. 709.08(7) certain authorizations must be specifically stated in writing in order for the attorney-in fact to have authority. The following is a short list of authorizations that affect Medicaid and other public benefits.

Create and Fund an Income Trust- Florida is an "Income Cap State" thus, any person whose income, regardless of assets, is over the cap (in 2008 it is \$1,911 per month), will be denied benefits unless they have a funded income trust.

Make sure your documents include the authority to create an income trust;
Authority to draft irrevocable income trust for purposes of Medicaid.
Authority to draft "Miller Trust"
Authority to draft an irrevocable Trust

Carry our Gifting- include authority to make gifts (of any amount). Many DPOA documents allow for making gifts but limit the attorney-in-fact (AIF) to the amount that falls under the federal requirement for filing a gift tax return, for Estate Planning purposes. With that, any gift made above that amount would be void and could be forced back into the estate. Some documents limit gifting to continue gifting that the principal carried out in the past. In addition, gifting may be limited so that the AIF cannot gift to self. In family situations, this can be limiting. Allowing gifting to any person, including the attorney-in-fact, for any purpose provides the AIF with ability to carry out a variety of plans later on. Even now, with the limitations imposed by the Debt Reduction Act (DRA), gifting may be a viable planning option.

Change Beneficiaries- the authority to change beneficiaries of retirement plans, IRAs, life insurance policies, etc., can be particularly beneficial when a named beneficiary is deceased and no others have been named. In Medicaid planning, we work to avoid probate because non-exempt assets that become a part of a probate estate would be subject to creditors, including Medicaid. In fact, Medicaid takes priority.

Power to convey homestead- while we rarely plan to convey a homestead, there may be a time when maintaining it is prohibitive for the family or transfer to a well spouse is part of a plan.

Participate in Medicaid Asset Protection Strategies- while this may be going overboard, there is no harm in having specific language for Medicaid planning. Just recently, in Palm Beach County, the Medicaid office began denying applications where a "personal service contract" was not specifically spelled out in the DPOA and because it was a contract between the principal and the AIF. The denial was reversed as it was a contractual activity. Language that includes self-dealing on the part of the AIF may have effectively avoided this denial.

Create, modify or amend other trusts- planning for benefits may be needed for another beneficiary. Should the client no longer have capacity, and it would benefit their beneficiary to receive assets via a trust, particularly a



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supplemental need trust below, the attorney –in-fact would have to express authority. Language should include the ability to create revocable and/or irrevocable trusts and enter into a pooled trust agreement.

If you are creating or amending a revocable living trust, check to see if the Trustee has authority to engage in Medicaid planning. Would Trustee violate his or her duties by engaging in such planning?

Clients should be made aware of long-term care insurance and the new Long-term Care Partnership in Florida. For a better understanding of long-term care, Florida Department of Financial Services produces an excellent guide: http://www.fldfs.com/Consumers/literature/Long_Term_Care_2006.pdf

If your client owns a mobile home, make them aware of the possibility that, even though it will count as homestead for Medicaid purposes, possibly it will not be considered homestead for the probate estate. They need to plan accordingly.