

Documents facilitate lifetime planning

By Ryan W. Collier

Although clients rightly associate estate planning attorneys with the topics of death and dying, the value of planning is for the living. Estate planning practitioners discuss the difficult issues of aging, disability, incapacity, mental health treatment, and disposition of human remains. Fortunately, here in Oregon we have tools that assist clients during the planning process. This article discusses some of those tools.

Durable Power of Attorney

A durable power of attorney (DPA) is a valuable tool for assisting a person during disability, but can be a dangerous weapon in the wrong hands. On one hand, a DPA allows a person to delegate to another the power to manage his or her affairs regardless of the principal's disability or incapacity. This power is very personal and individual. Knowing that daily operations can be handled if disability occurs can be a great source of comfort and relief for a client. On the other hand, giving someone complete control over your daily life creates a significant risk of abuse. Thus, a client should use care when granting a power of attorney to an agent.

When preparing a DPA, a client should take into account the abilities of the proposed agent, the level of trust between the principal and agent, and the circumstances that trigger the use of the DPA. The client must make decisions on whether the DPA takes effect immediately or upon disability, whether to grant authority to make gifts, and whether the DPA limits the agent's authority by time or scope. Answers to these questions will depend on the circumstances of each client.

In addition to considering the effective date, gift powers, and scope of the DPA, the client should consider two statutes that affect its use. First, a power of attorney is not revoked at the instant of death but at the time when the principal's death becomes known to the agent or third party. Agents acting in good faith under a power of attorney without knowledge of the death of the principal bind the principal and heirs, and personal representatives. Any third party who has not received actual notice of revocation of a power of attorney or death of the principal is not liable for actions taken in reliance on the power of attorney. Second, a person may not refuse to honor a power of attorney based on the passage of time since the power of attorney was executed. In my practice, I occasionally deal with financial institutions that refuse to honor an otherwise valid DPA that is more than two years old. A reference to the statute generally resolves the matter.

Advance Directive for Health Care

Oregon is a pioneer in its progressive approach to health care issues. Not the least of these is the statute adopting an advance directive for health care (ADHC). The statute provides a form that allows a client to make decisions regarding end-of-life care and life support issues and to create a basic power of attorney for health care issues. Under the ADHC, an appointed health care representative holds authority over all the principal's health care that the principal would have if not incapacitated.

The ADHC requires two witnesses. The health care representative and alternate, and the attending physician cannot serve as witnesses. The health care representative and alternate have to agree to accept the appointment. The principal can revoke either the ADHC or a specific health care decision, in writing or otherwise.

The ADHC does have several limitations. The health care representative has authority to make health care decisions when the principal's attending physician (or a court) determines that the principal lacks the ability to make and communicate health care decisions. The ADHC provides no authority relating to mental health treatment, convulsive treatment, psychosurgery, sterilization, and abortion. The health care representative also does not have authority over life-sustaining procedures unless specifically granted authority in Part B, Section 2 and 3 of the form. The authority also likely excludes issues related to organ donation, autopsy, and experimental treatments. Additional documents may be required for these situations. The ADHC provides a useful tool to discuss end-of-life care with clients. It encourages the client to discuss issues that are often difficult, such as death and dying.

Declaration for Mental Health Treatment

One document that receives less attention than it deserves is the declaration of mental health treatment (DMHT). Many elderly clients may eventually suffer from dementia, Alzheimer's disease or various other mental illness conditions as they continue to age. In acknowledgment of these issues, the Oregon Legislature adopted the Declaration for Mental Health Treatment Act in 1993, which it revised substantially in 1997. The statute requires all health care and mental health care organizations to adopt policies to provide patients with information regarding their mental health rights and the ability to make mental health decisions, including executing the statutory declaration. The statutory form is similar to the ADHC, and also requires witnesses. It provides for the appointment of a decision maker and for directions relating to mental health treatment. However, the DMHT is only effective for three years unless the principal becomes incapacitated during that period, in which case the DMHT is effective during the principal's incapacity.

HIPAA Release

In conjunction with the ADHC and DMHT, a client must execute a release of confidential medical information. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and 45 CFR Parts 160 and 164 make a client's medical information confidential. Health care representatives and mental health decision makers need a release from the restrictions of this act in order to work with medical professionals for the principal's best interests. Clients should execute a HIPAA release to accomplish this goal.

Anatomical Gifts

A client should consider authorizing anatomical gifts. The typical response from clients is, "Who would want my old body?" In reality that "old body" can be valuable to sustaining life through scientific research or organ transplant. A client may make an anatomical gift either by a document of anatomical

gift signed by the donor, through designation on a driver's license or identification card from the Department of Transportation, or by will.

Disposition of Human Remains

Clients should consider the disposition of their remains after death. These decisions made during one's life often will save loved ones the trouble of making difficult decisions during a period of grieving after death. A person may make decisions regarding the disposition of their human remains either through written, signed instructions or through pre-arrangement with a licensed funeral service. A person may also appoint someone to make decisions concerning the disposition of human remains by using a statutory form. This declaration requires witnesses.

Process itself is important

While these documents are important, their value often lies in the process more than the finished product. The documents become a catalyst for the client to make important decisions and speak with loved ones about difficult topics of death and disability. Many clients and families of clients would not otherwise discuss these issues before a crisis in care occurs. These issues should be resolved with a client while the client is capable of doing so. Once a client becomes incapacitated, it is too late.

For more information relating to these documents or other questions, please feel free to contact Ryan Collier at 503.485.7224 or ryan@collier-law.com. This article is an updated version of one by the author appearing in the Spring 2003 issue of Oregon State Bar Elder Law Newsletter.