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THE IMPORTANCE OF A PROPERLY DRAFTED

DURABLE POWER OF ATTORNEY

FOR FLORIDA MEDICAID PLANNING & VETERANS BENEFITS PLANNING

DRAFTING A DURABLE POWER OF ATTORNEY

DO-IT-YOURSELF OR ATTORNEY-DRAFTED?

Historically, up to 30% of the durable power of attorney documents that I see, which have been obtained from a non-attorney source, are deficient in some way.

At the beginning of a Medicaid planning or Veterans benefits planning case, one of the most important things to know is whether or not the client has a properly drafted durable power of attorney document. A large number of our prospective clients have obtained their durable power of attorney documents from a non-attorney, or obtained the document from the internet. Historically, up to 30% of the durable power of attorney documents that I see, which have been obtained from a non-attorney source, are deficient in some way. We cannot use a deficient durable power

of attorney to do Medicaid Planning. The first thing we have to obtain is a new durable power of attorney that has all of the elements that allow us to do the things that Medicaid Planning requires to get the needed coverage from Medicaid. I will go into what those things are now.

Navigating the Florida Income Cap With a Qualified Income Trust (QIT)

Florida has an income cap (or an income limit) for Medicaid qualification. If the Medicaid applicant's gross monthly income exceeds the income cap, a qualified income trust (QIT) is needed, in order for the person to obtain Medicaid benefits. In order to establish the qualified income trust, under Florida Department of Children and Family rules, a spouse can establish a qualified income trust, without a durable power of attorney. However, if a person is unmarried, only the Medicaid applicant, the agent under a properly drafted durable power of attorney, or a guardian is authorized to establish a qualified income trust.

A valid, properly drafted durable power of attorney is also needed to restructure the assets of a Medicaid applicant, or a Veterans benefits claimant. For a variety of reasons, the Medicaid applicant or VA claimant is often unable to participate in the asset restructuring process.

Legal Capacity to Restructure Assets

Many of our clients are residents of nursing facilities or assisted living facilities. Most of those clients have medical problems, which would interfere with their ability to participate in the asset restructuring process. A large percentage of our clients also have memory problems, such as dementia, and Alzheimer's disease, which prevents them from participating in the asset restructuring process. For example, financial companies, banks, insurance companies, annuity companies, and funeral service providers must all be contacted by telephone, fax and email to accomplish Medicaid

planning and Veterans benefits planning. A person confined to a nursing facility, or an assisted living facility, is typically not in a position to do those things.

Meeting Checklist Requirements to Apply for Government Benefits

Additionally, the Florida Department of Children and Families and the Department of Veterans Affairs both have checklist items that must be assembled and submitted, in order for government benefits to be granted. Those checklist items include, but are not limited to, copies of identification cards, durable power of attorney documents, trust documents, birth certificates, funeral and cremation contracts, Medicare cards, bank statements, life insurance policy value letters, annuity statements, deeds and property tax bills, vehicle titles and registrations, health insurance premium notices, long-term care insurance policies, Social Security verification letters, and pension verification letters. As a general rule, only the Medicaid applicant or the agent under a properly drafted durable power of attorney (or guardian) are legally authorized to obtain those documents.

I think now you are beginning to see why one of the biggest problems that our office sees, regarding a durable power of attorney document, is the lack of authority in the durable power of attorney to establish a trust. This problem has been exacerbated by a Florida durable power of attorney

statute that went into effect in Florida on October 1, 2011. We will delve deeper into how this change has affected Medicaid Planning in Florida now.

Powers of Attorney Executed Before October 1, 2011

As far as Medicaid qualifications are concerned, a properly executed durable power is one of the most important documents in a Medicaid case. A durable power of attorney is a critically important document, because the typical nursing home or assisted living resident is often too ill to act on his or her own behalf. A power of attorney gives another person the legal right to act on someone's behalf. The term "durable" means that the power of attorney document remains in effect even if the principal becomes incapacitated.

In Florida, the power of attorney document must be executed with the same formalities as a real estate deed, which requires the principal (the person who grants the power of attorney) to sign the power of attorney in the presence of a notary public and two impartial witnesses.

A power of attorney is typically most often needed when the principal is incapacitated (either physically or mentally). For this reason, it is critical to establish a valid durable power of attorney before a person becomes incapacitated. If a person loses capacity and cannot execute a new durable power of attorney, the only other option is guardianship.

Guardianship is an expensive, time-consuming, court-ordered process. A guardian is appointed by a court to handle the affairs of an incapacitated individual. If there is no durable power of attorney in place, and a guardianship must be established, there can be significant costs and time delays involved in establishing the guardianship.

A delay to complete Medicaid planning happens when a guardianship first has to be established through the court. Additional delays happen when the court has to be petitioned by the guardianship attorney to authorize Medicaid planning. If the Medicaid applicant is already in a nursing facility, the cost will generally be $8,000–$15,000 per month in private pay expenses while the court filings for the guardianship and Medicaid planning authorization are completed. The process can take 3–4 months, depending on the court.

A TALE OF

TWO SCENARIOS

SCENARIO #1

Frederik is 85 years old, he has severe dementia and he needs long-term care in a nursing facility.

ASSET MANAGEMENT

Frederik has $30,000 in his checking account.

VALID DURABLE POWER OF ATTORNEY

Frederik's son Ralph has a valid durable power of attorney, which was executed when Frederik had capacity to execute the durable power of attorney.

KNOWLEDGEABLE LEGAL CONSULTATION

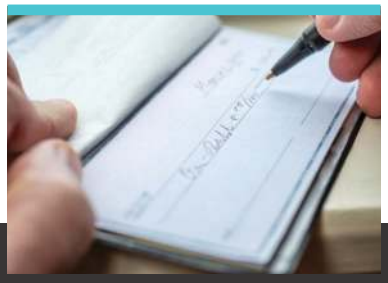
Ralph contacted an attorney knowledgeable in Medicaid planning, and the attorney was able to obtain Medicaid benefits in the same month the attorney was hired.

POSITIVE OUTCOME: Frederik's entire estate was preserved.

SCENARIO #2

Frederik is 85 years old, he has severe dementia and he needs long-term care in a nursing facility.

ASSET MANAGEMENT



Frederik has $30,000 in his checking account.

NO DURABLE POWER OF ATTORNEY

Frederik never executed a durable power of attorney when he had capacity.

UNABLE TO MAKE DECISIONS

Frederik can no longer execute a new durable power of attorney, because he is now incapacitated.

UNFORTUNATE OUTCOME: Frederik's son Ralph contacts the same attorney as in Example 1, but now the attorney must establish a guardianship and petition the court to authorize Medicaid planning. Unfortunately, it took three months between the time Ralph originally contacted the attorney until Frederik's Medicaid was authorized.

Because Frederik's facility costs $9,000/month, there is now a $27,000 outstanding bill at the facility, which must be paid from Frederik's $30,000 remaining assets. Because of the length of time it took to establish a guardianship and then obtain court authorization to proceed with Medicaid planning, thousands of dollars were needlessly spent on the nursing home.

Powers of Attorney Executed On or After October 1, 2011

On October 1, 2011, a new power of attorney statute went in to effect in Florida. (Florida Statutes Chapter 709.2101–709.2402). If a Florida power of attorney document was prepared and executed in accordance with Florida law prior to October 1, 2011, then the new statute generally would not affect the previously executed power of attorney. However, for powers of Attorney executed on or after October 1, 2011, the new power of attorney statute would apply. The new power of attorney is a significant change in Florida law. The following are some of the major features of the new power of attorney statute.

1. A power of attorney executed after September 30, 2011 goes into effect immediately upon signing. Accordingly, the new power of attorney statute eliminates "Springing Powers of Attorney". A Springing Power of Attorney is a power of attorney, which would go into effect at a later date, after the power of attorney was signed.
2. A "general grant of authority" can no longer be effectively used under the new law. Additionally, certain authorities granted in the power of attorney document must be specifically delineated, and separately signed or initialed by the principal.

Examples of the types of powers that must be initiated or signed by the principal are as follows:

- The creation of a trust.
- Amendment, modification, revocation or termination of a trust created by or on behalf of the principal.
- Make a gift.
- Create or change a right of survivorship.
- The creation or changing of a beneficiary designation.
- The waiver of the principal's right to be beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.
- Disclaiming property or a power of appointment.

Under the new power of attorney statute, the agent must meet certain criteria.

The agent must be a natural person who is at least 18 years of age, or is a financial institution that has trust powers, has a place of business in Florida, and is authorized to conduct trust business in Florida.

Under the new statute, certain types of powers are prohibited by the agent. The following powers are prohibited:

- The Agent cannot perform duties under a contract that requires personal services of the principal.
- The Agent cannot make an affidavit as to the personal knowledge of the Principal.
- The Agent cannot vote in a public election on behalf of the principal.
- The Agent cannot execute or revoke any Will or codicil for the principal.
- The Agent cannot exercise any powers or authority granted to the principal as trustee or as court-appointed fiduciary.

0ther details regarding the Agent under the new power of attorney statute are as follows:

- Co-Agents may be appointed, and either agent can act independently, unless stated otherwise in the power of attorney document.
- Successor Agents can be appointed in the power of attorney document.
- Any Agent is entitled to be reimbursed for expenses.
- 0nly a "Qualified Agent" can be paid compensation. Qualified Agents are the following individuals: a spouse or heir of the principal, a financial institution with trust powers and a place of business in Florida, an attorney or a certified public accountant licensed in Florida, or a natural person who is a Florida resident and who had never been an agent for more than three principals at the same time.

There are also significant new rules regarding the acceptance or rejection of the power of attorney document by third parties:

- The third party must accept or reject the power of attorney within a reasonable period of time. For financial institutions, there is a presumption that four days is a reasonable period of time.
- For other third parties, the reasonableness of the acceptance or rejection of the power of attorney will depend on the facts and circumstances, and the terms stated in the power of attorney document.
- If the power of attorney is rejected, the reasons for the rejection must be stated in writing.
- A third party is not required to accept the power of attorney under the following circumstances:

1. The third party is not obligated to engage in the transaction with the principal.
2. The third party is aware that the Agent's authority has been suspended or terminated.
3. If the third party has made a timely request for an affidavit or English translation, or an opinion of counsel.
4. The third party has good faith belief that the power of attorney is not valid, or the Agent does not have authority.
5. The third party has knowledge of a report to Adult Protective Services supporting a good faith belief that the principal may be subject to financial or physical abuse by the Agent or someone acting with the Agent.

0ther important features of the new power of attorney statute are as follows:

- If the third party improperly rejects the power of attorney, the third party is liable for damages, including attorneys fees and costs; and the third party is also subject to a court order which would impose acceptance of the power of attorney or the third party.
- If the third party accepts the power of attorney in good faith, the third party will be held harmless for loss suffered by the principal.
- The filing of a petition for divorce or annulment terminates the spouse's authority to act as the agent under the power of attorney.
- A military power of attorney will continue to be recognized as valid under Florida law, if

the military power of attorney is executed in accordance 10 U.S.C. § 1044b.

With respect to Medicaid planning, two of the most significant issues to be addressed under the new power of attorney statute are the following: the use of a power of attorney to execute a Qualified Income Trusts, and the use of a power of attorney to execute personal service contracts. Since a general grant of authority is no longer authorized under the new power of attorney statute, the Florida Department of Children and Families will require the separate initialing or signature of specified provisions in the power of attorney document to establish a qualified income trust if the power of attorney document was executed on or after 0ctober 1, 2011.

CONCLUSION

In summary, a properly drafted durable power of attorney document is the most important, critical first step in a Medicaid benefits planning, or VA benefits planning case. Once you have a properly drafted durable power of attorney in place, you will be on the road to the successful completion of your case. I offer a free telephone consultation, and free review of any existing durable power of attorney documents. If you wish to discuss your existing durable power of attorney document, or your family member needs a new durable power of attorney, call me at (727) 586-3306 Ext. 104 or on my cell phone at (727) 748-5374.

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