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Legal Foundations for the Future

You've planned, budgeted, saved. You're insured, and you may be debt free. But what would become of all this diligence if you suddenly became unable to continue to manage your affairs personally due to physical and/or mental infirmity? In an abundance of caution, these three documents should be cornerstones in every prudent adult's legal and financial foundation:

1. **Last Will and Testament.** It is startling that as many as half of all adults do not have this *most* fundamental document in place when they die. Perhaps they don't realize that if they die without a Will (intestate), the laws of the state — *not* they or their heirs — will determine who gets their property and is named guardian of their minor children. For instance, many Georgians might be surprised to learn that under current Georgia law, the estate of an intestate person is divided between the spouse *and each child*, with the spouse potentially receiving *as little as one-third!*

In the alternative, by establishing a "Will," *you* retain control by conveying *your* will, attitude and beliefs toward your family and assets. In it you can:

- Designate the person whom you want to be the executor of your estate and give him the power to act without posting bond and filing reports with the probate court, if desired;
- Specify the persons or charities you want to receive your real and personal property;
- Name your children's guardian and provide financially for their future. For example, parents oftentimes establish a Trust in their Wills to provide for minor children, grandchildren or those with special medical needs; and

- Establish a Trust to provide for a spouse who is or may become incapacitated.

When drafting a Will it is typically prudent to consult an attorney to ensure that it addresses your specific personal circumstances and any necessary legal issues. For example, a properly drafted Will can minimize or possibly even eliminate estate taxes, or can maintain Medicaid qualification for a spouse who is in a health care facility. Also, an attorney can ensure that the resulting document fully complies with prevailing state laws and takes advantage of special considerations that may be contemplated by the law such as marriage or the birth of a child. Also, like a number of other states, Georgia law recognizes "self-proving" Wills. Making yours self-proving will save time and money when the Will is probated.

After it is drafted, your Will must be properly signed and witnessed or it won't be valid. The original signed Will should then be kept in a safe place where it will be found when it is needed. Finally, it should be reviewed periodically to ensure that it continues to represent your wishes.

2. **Durable Financial Power of Attorney (DFPOA).** While a Will determines what will happen to your estate *after your death*, this document controls how your business and finances are to be handled while you are *alive but incapacitated*. In it you name someone you trust to act as your "agent" in making financial and property decisions for you in the event that you become unable to do so. The term "Durable" pertains to specific essential language which enables your agent to act on your behalf if, and especially when, you become temporarily or permanently incompetent.

A new DFPOA statute went into effect in Georgia in July 2017; it was amended in 2018. This statute makes it easier for agents to enforce use of the Power of Attorney, provided the document meets the requirements in the statute. So does an attorney need to draft this document? Yes – if you have a bank account, own real property, own investment assets, own a business, or wish to make gifts to family or charities. Although forms and computer programs provide the basics, they *are* basic; generic one-size-fits-all approaches cannot be sufficiently refined to *thoroughly* address each individual's circumstances. Thus, it is beneficial to consult an attorney who is knowledgeable in this area to ensure that *your* circumstances are *thoroughly*

and specifically addressed.

For example, particular language is necessary for your agent to accept your income, continue your business, establish a trust, or make gifts of money or property to friends or charity. Also, many financial institutions *do not accept* the basic document. Instead, they require that specific language be included to empower your agent with respect to your accounts held at their institution. In addition, real estate and investment assets should always be specifically described in the document. And it is recommended that you name at least one back-up agent, in case the first-named agent becomes unable to serve for any reason.

Having a DFPOA crafted especially for *your* circumstances will make it easier and less costly for your agent to act on your behalf. It also provides two significant benefits:

- It enables decision making to be kept within the family unit – where you want it to be; and
- It can eliminate the need for *Conservatorship*.

Avoiding Conservatorship is recommended for several reasons. First, conservatorship proceedings can be emotionally difficult for the family and the prospective "ward" to endure. At the hearing, evidence is provided to the probate court judge to demonstrate that the ward is no longer competent to make his own decisions. If satisfied, the judge then removes the ward's legal rights to make his own financial or business decisions or engage in any financial transactions.

Second, the appointed conservator must be bonded and must file an inventory, a budget, and annual financial reports with the court. This can be expensive and very time consuming.

Third, conservatorships are cumbersome because court permission is required before the conservator can undertake action with regard to the ward's property. For example, the conservator must always seek permission from the court to spend any principal of the ward's estate, to sell stock, to make gifts, to enter into a contract on behalf of the ward, to continue the ward's business, or to sell or lease the ward's property. While this oversight may decrease the likelihood of

malfeasance, it also dramatically decreases familial control at considerable emotional and financial expense.

Whether common prudence, sound legal advice or specific issues such as Conservatorship influence the decision to pursue a DFPOA it would, of course, be wise to discuss your wishes and desires with your named agents. And as with your Will, once drafted it is critical that the document be properly signed and witnessed as required by state law. It should then be retained in a readily accessible location in the event that it is ever needed.

3. **Durable Advance Directive for Health Care (DADHC).** This document is conceptually similar to the DFPOA in purpose, but its focus is *health care* decision making. In fact, we used to call it a Durable Medical Power of Attorney. The Georgia statute was last amended in 2007.

In your DADHC you appoint and empower someone whom you trust to act as your agent in making your medical and health care decisions in the event that you become unable to do so. These include such decisions as the hiring and firing of physicians, admitting you to health care facilities, consenting to surgery, antibiotics, experimental treatment and making end-of-life decisions.

Since a statutory DADHC form is readily available in Georgia, an attorney is not necessarily required in order to draft this document. However, a number of hospital situations have occurred both within and outside of Georgia in which this form was not accepted. This was a result of the failure of the "short form" to specifically enumerate the powers and authorities given to the agent.

In April 2003 a new federal law known as the Health Insurance Portability and Accountability Act (HIPAA) went into effect. The implementation and interpretation of this law by doctors, hospitals, and other health care providers has made it more difficult for family members to obtain information or medical records unless the provider has in hand a signed consent from the patient.

As such, with affairs this critical — quite literally the possibility of life and death — you would be well advised to consider engaging an attorney who is knowledgeable in this area. Adequate legal counsel and proper drafting will ensure

that your document enables your stated wishes to be carried out without obstacle. Counsel is particularly recommended if you have a unique medical condition and wish to indicate specific types of treatment that you do or do not desire.

As with the DFPOA and Conservatorship, the DADHC also has probate court implications. With this document in place, *Guardianship* can be avoided — which is strongly recommended for many of the same reasons that Conservatorship is discouraged. As with Conservatorship, it may be necessary for the guardian to obtain Court approval for certain personal and medical decision to be made on behalf of the ward, and annual reports must be filed with the Court. In the alternative, a well drafted DADHC enables personal and medical decision-making to be kept within the family and can make the task of the agent much easier in ensuring that you receive the type of treatment you desire.

As with the DFPOA, it is wise to name at least one backup agent in case the first-named agent is or becomes unable to serve. And it is strongly recommended that you discuss your wishes and desires with your agents so that they will have a full understanding of the treatment that you would want in any given medical situation.

Finally, it is equally critical that the DADHC be properly signed and witnessed as required by state law. A copy should then be given to each of your physicians and each person named as an agent or back-up agent for use if and when required.

Rounding out your planning process with each of these three essential documents enables you to rest assured that your will *will* be carried out no matter what your future may hold.

A couple more important matters .....

Physician Orders for Life-Sustaining Treatment (POLST). The Georgia Department of Public Health developed this standard medical order for individuals who have an advanced illness to document their wishes as they approach the end of life. It specifically addresses the use (or not) of CPR, comfort care, antibiotics, and food and water. The patient should discuss his wishes with his health care provider and with his agents under his Durable Advance Directive for Healthcare. Those

preferences are documented in the POLST, which is then signed by the patient (or his agent under his DADHC if the patient is unable to do so), and by the physician.

Have that Conversation. It is important to make these important decisions and commit them to writing. However, just as important will be the conversation you should have with the agents you have named regarding your specific wishes for medical and personal decision making. I recommend talking with all of the potential decision makers at one time, describing your wishes, and drawing on situations you are personally familiar with or those you have heard about in the media. What would you want if your health situation were the same as that of Terri Schiavo? Or President Reagan? Or Barbara Bush? Or Jacqueline Kennedy Onassis? It is this conversation that will give the agents the knowledge, the strength, and ultimately the peace of mind to make decisions as you wish them to be made. The documentation and the conversation are your gift to your agents.

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