Summary – Incapacity Planning & Guardianship

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Why Incapacity Documents?
In most cases (other than objections by incompetent persons in need of help, or persons unable to execute incapacity documents such as incapacitated minors), incapacity documents help to avoid guardianships and conservatorships, which are court-appointed positions. A guardian is a court-appointed person who will take control of certain aspects or all aspects of personal care decisions. Conservators are court-appointed people who take control of finances, removing personal autonomy or decision-making.

- Nominate those wanted to be your guardians and conservators if court appoints them.
- Appoint/nominate guardians/conservators for minor/incapacitated children, or even adult children.
- Be wary about filling out forms obtained from the Internet without seeking some legal advice. Use lawyers qualified in the specific area needed (elder law, incapacity, guardianship, etc.). Feel free to interview lawyers and consider communication styles and ability to build a good rapport.

Incapacity Documents -- Consider legal capacity to execute these documents. The person in question may be competent to make certain types of decisions, yet not competent to make all decisions (carry out will vs. health care vs. financial decisions, for example). When revoking these documents, provide written evidence to all institutions that house the original document.

- **Funded Revocable Living Trust** (discussed in previous podcast: http://www.mitoaction.org/blog/estate-planning-law)
- **Durable Power of Attorney (DPoA)** -- powerful, but with issues.
- **Health Care Proxy (HCP)** -- becomes effective when person lacks capacity to make health care decision. It can vary by state.
- **HIPAA Authorization**
- **Advanced Directives** (Living Will, MOLST, DNR, 5 Wishes, Harvard Grid, etc.)
- **Appointment/Nomination** of Guardians/Conservators of Minor/Incapacitated Children

Capacity (execution)
"Legal capacity" varies with the type of transaction or engagement, is not well defined, and is not the same as various types of mental capacity that medical professionals employ. Capacity to execute is capacity to understand. Execution requires capacity to execute, and volition (willingness to execute). Capacity to physically sign is not required!

Gifting: The highest standard for legal capacity seems to be the capacity to engage in gifting assets, although even in that case "Massachusetts courts have a well-founded

aversion to interfering with property transfers unless actual fraud or undue influence can be shown."

DPoA: The next highest standard for legal capacity is general contractual matters, such as a sale of a home, or the execution of a Durable Power of Attorney. PoA is not supposed to be used against the wishes of the person it protects, but concerns arise over agents abusing their given power. Financial institutions (i.e. banks, brokerage houses, etc.) frequently resist PoAs.

- Some states: Capacity for executing DPoA seems to be the capacity for personally dealing with each and every subject there is a power over in the DPoA.
- Most states: Capacity for executing DPoA seems to be more or less understanding that the Principal is giving concurrent authority to another to handle non-medical affairs, and if there is a gifting power that the AIF can give away the Principal's assets.

HCP: Next lowest seems to be capacity for executing a Health Care Proxy. Needs merely to be the ability to understand that the Principal is turning over non-concurrent power to make medical decisions if Principal does not have ability to do so.

HIPAA Authorization: Merely authorizes access to medical records and communications with medical professionals.

Wills: The lowest standard for legal capacity, even less than to execute a Health Care Proxy, seems to be for making out a Last Will and Testament. To execute a will, one only has to have a general idea of what it means to sign a will, a general idea of their assets, and know the people who would most naturally leave assets, such as a spouse and/or child. A will requires an "ability to understand and carry in mind, in a general way, the nature of the situation of his property and his relations to those persons who would naturally have some claim to his remembrance. It requires freedom from delusion, which is the effect of disease or weakness and which might influence the disposition of his property. And it requires ability at the time of execution of the alleged will to comprehend the nature of the act of making a will."

- Issue: Prospective client has capacity to execute a will, but not the capacity to enter into contracts. If there is no existing DPoA, how can the client hire the lawyer to prepare the will?

Invocation of Authority of Agent

DPoA – immediately by execution

HIPAA – immediately by execution

HCP – Springing, which means that authority invoked upon determination by attending physician, noted in writing in the medical records, that Principal lacks capacity to make or communicate health care decisions, and must include opinion regarding cause and nature of incapacity, extent, and probable duration. If cause is "mental illness" or

"developmental disability," attending physician must have, or consult with health care professional who has specialized training or experience in diagnosing or treating same or similar condition.

- The medical standard for capacity to make/communicate informed medical decisions is higher than the capacity to execute a HCP. Thus, it is not uncommon for a psychiatrist in a hospital to have an elderly person execute HCP, then psychiatrist immediately invokes HCA's authority.

Revocation (reversal)

Oral is technically sufficient for all, however:

DPoA: Revocation in writing delivered to AIF and to each person/institution Principal believes may have DPoA on file.

HIPAA: Revocation in writing delivered to each Authorized Recipient plus the Privacy Officer of each person/institution Principal believes may have HIPAA Authorization on file.

HCP: Revocation in writing delivered to HCA and to each person/institution Principal believes may have HIPAA Authorization on file.

Incompetent Person attempting to revoke document signed when previously competent:

- Court declaration of incompetence to revoke, OR
- Guardianship (use this if concerns about future ongoing attempts to revoke or concurrent authority under DPoA)
- Distinguished from Court affirmation of DPoA or HCP (in cases where institution fails to honor DPoA etc).

DPoA – Features & Bugs and Key Provisions

Statutory document.

Concurrent Authority.

- Springing DPoA allowed under most state's law but pretty useless and is now prohibited in Florida.

Can **have multiple current AIFs**, with either mutual or joint and several authorities to act.

A **document of enumerated powers** (not by statute, but by historical development). See Gagnon v. Coombs, 39 Mass. App. Ct. 144 (1995).

Great difficulty in getting financial institutions to honor. By statute, Principal/AIF can seek damages for unreasonable failure to honor. Often attorney saber-rattling fixes the problem. Pre-emptive actions:

- "Register" DPoA with each institution.
- Phone/web access: give password to trusted AIF (if not trusted, why did you name as AIF or successor AIF?).
- Institution's own form (often inadequate – e.g., power over IRA that only allowed change of investments, not withdrawals).

Abuse

- There is a tension between the need for broad powers to get things done for the Principal, but may open doors for abuse.
- Some attorneys deal with this by various means, such as Attorney Escrow of the DPoA.
- Abuse by AIF makes the casebooks and headlines; in reality the dominant problem is the opposite: getting financial institutions and others to honor the DPoA when needed. The real problem is elder abuse, not DPoA, which means you must pick trustworthy AIFs, Trustees, etc. Studies show abuse under guardianships/conservatorships is just as high as under DPoA. Other means of financial abuse exist as well, such as taking elder to bank for frequent withdrawals of cash.

Real Estate Powers

- Partial interests, including life estates.
- Necessary to list specific parcels? (Florida; some Mass)

Authority to Deal with Public Agencies (SPED, Medicaid, SS, DDS, etc.) and Advocate

Gifting Powers

- Often missing
- Often restricted
- Gift tax annual exclusion, which can often inadvertently exclude spouse
- HEMS
- Limit self-gifting to "5 & 5" – IRC §§2041(b)(2) & 2514(e)
- No gifts to AIF
- Sometimes purpose is stated, such as "to qualify me for Medicaid" (A) Required in 3 states (including NH) (B) PA court held provision void as against public policy (C) Best if silent in most states.

Self-Dealing. This provision is necessary even if, for example, AIF wants to buy a house from Principal at MORE than FMV (Fair Market Value). Gagnon v. Coombs, 39 Mass. App. Ct. 144 (1995).

Power to create and fund trusts and other entities. Enumerate as many as possible (revocable, irrevocable, whether or not I am a beneficiary.

Power to change form of ownership (tenancy in common, joint with right of survivorship, etc.).

Power to change death beneficiary designations by whatever term known (POD, TOD, ITF, death beneficiary).

IRA & Qualified Retirement Plan powers (e.g., choosing payout).

Execution formalities (1) Massachusetts: Just a notary 5; (2) Florida: 2 witnesses and notary. Even though full faith and credit, we always do two witnesses and notary unless circumstances make it problematic.

State that DPoA revokes all prior DPoAs except powers granted on forms provided by financial institutions respecting accounts and financial contracts with said financial institution.

Statute authorizing nominating Guardians/Conservators should either ever be needed. Court MUST appoint in accordance with these wishes unless compelling reason not to (e.g., nominee is in jail for embezzlement).

HCP

- **Statutory**.
- **HIPAA Language** (not required, as HIPAA regs imbue HCA with HIPAA authority, but in practice good to have)
- **Formalities of Execution** (2 witnesses, no notary required)
- **Springing Power** only permitted.
- **Everyone but AHW & MWW:** HCA & successors must be linear. AHW & MWW: can have multiple concurrent HCAs. In practice, go with the majority opinion and have a linear list of successors. (Significant minority view: only allowed to name one successor after the primary HCA.)
- **Living Will** language can be included. Best if precatory.
- **Specific Powers and Authority** should be enumerated.
    1. E.g., Power to authorize or deny anti-psychotic meds. (What would be "Rogers authority" were a guardianship in question.)
    2. Not necessary (see Mass Attorney General letter to Attorney Moschella dated July 24, 1997) but practical.

HIPAA Authorization -- communication of medical information..

- Health Insurance Portability & Accountability Act of 1996.
- Federal Regulations April 15, 2003.
- HIPAA Consent: Form given out by hospitals & other health professionals, giving that professional the permission to share your medical information.
- HIPAA Authorization: Created by the patient with attorney -- allows your medical information to be shared with designated person (husband, parent etc.). This authorization does not require incompetence nor requires that medical staff notify designated person.

- HIPAA Consent/Authorization does not require doctor, etc., to talk to the Authorized Recipient or hospital to release records, but in practice doctors/hospitals act like it does.
- Multiple concurrent HIPAA Recipients OK.
- Requirements for valid HIPAA Consent/Authorization include statement that info disclosed may be redisclosed. Many "HIPAA Releases" do not say so.
- Formalities of Execution (no witnesses, no notary required)

Advanced Directives: Living Wills, DNRs, MOLST, 5 Wishes, Harvard Grid, etc.

- Living Wills not recognized by statute in Masschusetts. (Three states have no living will statute: MA, NY, MI). Living wills cover very narrow set of circumstances and HCPs are more effective. Living wills are not self-executing.
- Many attorneys say Living Will is not valid in Massachusetts, which is not true as the LW is just not self-executing.
- Living Will and other expressions of advanced medical directives are valid in all states under Cruzan v Director, Missouri Department of Health, 497 U.S. 261 (1990).
- MOLST: Massachusetts Medical Orders for Life Sustaining Treatment -- From molst-ma-org: The Massachusetts CC/DNR form ("Comfort Care" form) remains valid. MOLST is a medical expression of wishes. The CC/DNR form can still be used to document that a valid DNR order exists for a patient, and it will be honored by EMTs in outpatient settings. Because the MOLST (an actual medical order form) can be filled out to indicate "DNR" if that is the patient's decision, the MOLST form can be used instead of the CC/DNR form. In some situations, patients may have both the MOLST and the CC/DNR forms. If both forms are present, in the event of cardiac or respiratory arrest, the most recent orders should be followed. In events other than cardiac or respiratory arrest, the MOLST orders should be followed.
- Other than doctor-executed DNR, SNLG not fans of Advanced Directives except as guidance for and discussion tools with loved ones.

Appointment/Nomination of Guardians/Conservators of Minor/Incapacitated Children

- Newly possible since July 1, 2009.
- Can appoint (not merely nominate) guardians for minor children to take effect on your incapacity or death (subject to subsequent ratification by probate court).
- Can appoint guardians for minor children, nominate guardians for incapacitated adult children, and nominate conservators for minor and incapacitated children, to be effective not only at death, but also in the event you become incapacitated.
- Previously, nominations were only effective at death (nomination was by will).
- Can appoint guardian for incompetent adult child.

Choosing a health care agent who will work and communicate with the person over time to make sure that wishes are upheld throughout a lifetime and with declining and/or improving health. Ongoing communication is key. The agent becomes an advocate.

Transition Planning

When advanced planning is not possible, how else can legal authority be obtained? Specifically, parents seeking to obtain legal authority to continue to make decision for disabled children who become adults at 18, yet are not competent to make decisions independently. The plan should be flexible and evolve over time (slide 1). The three pillars in a transition plan include:

- Public Benefits
- Special Needs Planning to protect those public benefits
- Legal Authority

Why consider Guardianship? (slide 2)

- At age 18, an individual is considered to be a legal adult.
- At age 18, all financial and health care decisions can only be carried out by the individual.
- No presumption of incapacity exists.
- Even if the adult Mito patient is able to make some decisions for him/herself, guardianship offers the benefit of much needed advocacy so that the individual is able to live as full a life as possible. Obtaining services for a Mito patient is very complex, including: financial issues, hiring caregivers, managing medications, dealing with school systems or educational transition programs, advocating for medical care, and more.
- Guardianship can be limited to allow some decisions to be left to the individual, honoring independence and self-determination.

What is Guardianship? (slide 3)

- Legal authority to make certain and specific decisions for an incapacitated adult.
- Only a court of law/judge can determine:
    - Whether a person is incapacitated and to what extent
    - Whether a guardian should be named
    - Who should be named as the guardian (nomination forms are vital)

Is Guardianship Right for our Family? (slide 4)

- Review the individual's needs, strengths, weaknesses, and risks
- Evaluate Pros and Cons:
    - Can be expensive and complex and child may not be ready at 18 years of age to take on these challenges.
    - Public process (excluding medical information).
    - Protect individual from possible neglect and abuse.
    - Allows parents to continue to advocate for child with schools and other public benefit agencies. Some schools push for graduation (to save money) when individual could benefit from more education and life experiences.
    - Court is involved in the family's life, requiring reporting to the courts
    - Guardian is required to take under consideration what the individual would want under that circumstance.
    - Must wait until 18th birthday - Plan ahead to avoid large gaps.

- If no family member is available, seek nonprofit organization to provide guardianship. (National Guardianship Association or local state chapter of Guardianship Association.)

Alternative to Guardianship (slide 5)

- Health Care Proxy (HCP) -- Governs healthcare, giving agent authority to act on the part of the individual only in response to physician request
- Power of Attorney (POA) -- Governs financial authority and gives agent authority to act on the part of the individual.
- Shared or supportive decision-making with agencies is on the horizon, which would greatly benefit those without family support.