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Time to update your health care proxy?

A health care proxy states who you want to make medical decisions for you if you're not able to make them yourself. A living will provides a roadmap as to how you want those decisions to be made. It's a very good idea to create these documents, and to review them on a regular basis.

Here are some things to consider:

Has your state recently adopted a "standard" health care proxy form? Some states have adopted a particular form by law. It might not be necessary to use this form, but you might want to do so, because doctors and hospitals will be more familiar with it and using it might avoid delay and confusion about whether to accept a document.

If you spend a significant amount of time in another state, you might want to see if that state has adopted a standard form as well. There's no harm in having multiple forms – as long as you name the same person as your agent!

Does your document mention HIPAA? The Health Insurance Portability and Accountability Act, or HIPAA, protects your medical privacy. The law generally became effective in 2003. So if you have an older health care proxy or one that doesn't specifically mention HIPAA or waive your rights under the law, your agent could have a hard time accessing your medical records in a crisis.

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Be sure you've updated your proxy with reference to HIPAA so that your doctor can talk freely with your agent and tell him or her about your condition.

Has your medical condition changed? If you have recently developed a condition that could land you in the hospital – diabetes, MS, or any other long-term problem – you might want to talk with your doctor about the specific issues that could arise with that disease, and update your living will with your instructions.

Have you thought about nutrition and hydration? It's not easy

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Sometimes it can be smart to turn down a bequest

Disclaimers are sometimes used to "fix" a problem in a will caused by someone who didn't update his or her estate plan.

Here's something you probably never thought about: Just because someone leaves you money or other assets in a will, that doesn't mean you have to take it. You can also just say, "No, thanks."

(Actually, you have to do more than that. You have to sign an official document called a "disclaimer.")

Why on earth would someone turn down a bequest? Well, it turns out that in some cases, doing so can save a family money in the long run.

Disclaimers are sometimes used to "fix" a problem in a will caused by someone who didn't update his or her estate plan. For instance, suppose a very elderly person dies and leaves a substantial sum of money to a child. The child is at retirement age and has plenty of money to live on. If the child takes the inheritance, and then leaves that money to his children, a large estate tax may have to be paid twice – once when the parent dies, and once when the child dies. But if the child disclaims the money in favor of the grandchildren, the money could go to the grandchildren without a second tax.

It's also possible to disclaim only part of an inheritance. For example, suppose a husband dies and leaves everything to his wife. There's no estate tax on assets you leave to a spouse, but there is a tax on assets (above a certain amount) that you leave to children. By leaving everything to his wife, the husband may have missed an opportunity to give some assets to his children and not have them taxed as part of his wife's estate when she dies. In this situation, the wife could disclaim as much of the inheritance as can go tax-free to the couple's children (or to a trust for the children), and keep the rest.

You should be aware, however, that there are limits on the power to disclaim. For instance:

• You generally have to disclaim property within nine months after a person's death.

• You can't disclaim in favor of anyone you like. You can only disclaim in favor of someone who would be next in line to receive the assets according to the will if you were no longer alive (or if the will doesn't name anyone, the person who would be next in line according to state law).

• Not every asset can be disclaimed. For instance, often a 401(k) or other retirement plan can't be disclaimed unless the owner filed a document with the plan specifically allowing for a disclaimer. (And even then, there might be negative tax consequences to disclaiming this type of asset.)

• Innocent mistakes, such as depositing a dividend check, could establish your ownership of an asset and prevent you from making a disclaimer.

The moral of the story is that if someone in your family has recently passed away, it's a good idea to talk with an attorney as soon as possible to see if you can use disclaimers (or other techniques) in order to reduce taxes.

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If you're hiring home help, beware of the 'nanny tax'

If you or an elderly relative is hiring someone to provide care in their home, you should be aware that the "nanny tax" may apply.

Generally, the tax applies if you hire someone and pay them $1,700 or more a year. Here's what's involved:

• You must pay the employer's share of Social Security and Medicare taxes for the employee. That's 6.2% of wages for Social Security and 1.45% for Medicare.

• You must also withhold the employee's share of these taxes and pay that, too. The amounts are the same, except that for 2011 the employee's Social Security tax is reduced to 4.2%.

• In addition to these taxes, you may have to pay a 6.2% federal unemployment tax if you pay someone more than $1,000 in a calendar quarter. You might be able to take a credit against this of up to 5.4%, but on the other hand you might also have to pay state unemployment taxes.

• If asked, you might also have to withhold federal and state income taxes from the employee's pay.

Sound complicated? It is! But remember that these rules apply only if you hire someone directly. If you pay an agency and the agency pays the caregiver, then you're off the hook because the agency has to do the paperwork.

It might be time to update your health care proxy

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to think about these issues, but it's very important to do so, and it can save your agent from making difficult decisions without knowing your wishes and agonizing afterward as to whether he or she did the right thing.

Some people executed a living will long ago from a book or from the Internet. A lot of these "cheap" forms have very inadequate provisions for nutrition and hydration and can create serious problems in real-life situations.

Be careful with multiple agents. If you've named more than one person as your agent, consider whether they still get along and will be able to agree when making decisions.

Lately, it's happened that some doctors and hospitals have been confused about what to do if there are multiple agents. They might be unwilling to follow one agent's instructions without the other agent being present, even if the other agent would agree with the decision. It might be good to clarify that multiple agents can independently make decisions for you.

If you have children who live far apart, and you spend some time near each of them, you might provide that the first child will be your agent if you're in state A and the second child will be your agent if you're in state B.

Don't be too specific. Unless you have very strong wishes, it's usually not a good idea to be highly specific about medical treatments in a living will. It's better to state your general philosophy about later-life care, and allow your agent to make specific decisions based on the details of the actual situation that arises.

On the other hand, it's good to be very specific about certain non-medical things, such as organ donation, burial instructions, and religious preferences. These can be very helpful to an agent and to family members at a difficult and stressful time.

Is your health care agent also your power of attorney? Most people will name the same person in their health care proxy and in their power of attorney, but there might be reasons not to do so – for instance, the person you trust most to make medical decisions might not be good with money.

That's okay – but keep in mind that the two could come into conflict. For instance, your health care proxy might decide that you need round-the-clock care at home, but the person who has power of attorney might think a nursing home is better and refuse to pay for 24-hour care. If so, a court would have to decide between them.

If you name different people, it's a good idea to be more specific about your wishes in order to try to head off conflict.

If you've named different people in your health care proxy and your power of attorney documents, be aware that they could come into conflict.

Bank pays $64,000 for not honoring a power of attorney

Clarence Smith Sr., a Florida resident, decided he no longer wanted to have to manage his finances. He signed a power of attorney document authorizing his son to handle his affairs.

Clarence owned a bank account jointly with a female friend from his retirement community. His son became suspicious about some withdrawals from the account and contacted the bank. He asked the bank to transfer $64,000 from the joint account into an account owned solely by Clarence.

Before doing so, the bank contacted the joint owner. She objected to the transfer. She also told the bank that Clarence's son was trying to steal his money. The bank then refused to transfer the funds.

Shortly afterward, the "friend" withdrew all the money in the joint account, leaving Clarence with nothing. Clarence died a few weeks later.

His son sued the bank on behalf of Clarence's estate. A jury sided with the estate, finding that the bank acted wrongly in refusing to honor the son's power of attorney, and awarding the estate $64,000 in damages.

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

Trust protectors: A new idea for long-term trusts

The idea is to keep a long-term trust serving the purposes you intended, despite inevitable changes in family situations and tax laws.

A new idea for people who set up long-term trusts is that of the "trust protector."

A trust protector is different from a trustee. A trustee's job is to administer the trust on a day-to-day basis according to how it is written. A trust protector's job is to "protect" the trust by making very occasional changes to its rules as needed to further its goals.

The idea is to keep a long-term trust serving the purposes you intended, despite inevitable changes in family situations and tax laws.

Trust protectors create an added level of complexity, and they're not for everyone. But they might be worth considering if you have a revocable trust or are planning a new irrevocable trust.

A trust protector has whatever powers the person who sets up the trust grants to him or her. These could include:

- Removing or replacing trustees.
- Expanding or limiting trustees' powers.
- Amending the trust, terminating the trust, or changing where the trust is located due to changes in the law.
- Resolving disputes between trustees, or between trustees and beneficiaries.
- Changing the rules for distributions due to changes in the beneficiaries' circumstances.
- Adding new beneficiaries when additional children are born.
- Vetoing distributions or investment decisions.

A trust protector can be a good idea for long-term irrevocable trusts. For instance, many years from now it might be wise not to make a trust distribution to a child who is battling an addiction or facing an imminent divorce. It might also make financial sense to move the trust to another state with more favorable tax laws. A trust protector can make these decisions.

Of course, a trustee could be given the power to make certain discretionary decisions as well. But you might prefer to give the trustee job to a person or institution with a lot of investment savvy, and give the trust protector job to a family friend or advisor who is familiar with your wishes, goals and preferences and can represent those through the years.

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