The Five Essential Documents

If the five essential documents that everyone needs to have are in place, it makes everything so much easier for the senior, the family and any caregivers to deal with life’s unexpected issues. These five documents are:

A Last Will and Testament

A Durable Financial Power of Attorney

A Durable Medical Power of Attorney which also names a Fiduciary – that is a Conservator and Guardian - if the need should ever arise

A Living Will which specifies end of life preferences (this can also be incorporated into the Durable Medical Power of Attorney, if desired), and

A Trust, if desired and appropriate

Do NOT store these documents in a safe deposit box unless a third party is also a signatory on the box. The bank will freeze access to the box upon the death of a sole owner, in which case access cannot be obtained without a court order. In the event an emergency arises, those who would need to use these documents may not even know the senior has a safe deposit box, or its location, the location of the key, or even be able to access it if they are not listed as signatories on the box as well. An alternative would be for the senior’s attorney and the executor of the will to each keep an original copy and any POA’s named in other documents to also keep original copies for use whenever they may be needed. Trustees could keep originals of any Trust documents for the same purpose. The senior naturally should have duplicate copies of everything in order to be able to update these documents as necessary. Another alternative might be to store all of these documents in a specified secure location, such as a safe or fire file, that everyone would be aware of and able to access.

Here is a short explanation of some legal terms for those of you who may not be familiar with them:
“Durable” is a term used to indicate that the document to which it refers will remain in force even if the individual who creates it becomes incapacitated for any reason, either physically or mentally. A “Power of Attorney” means giving another person the authority to act on the individual’s behalf. POA’s can be changed at any time during the individual’s lifetime as long as that individual has not been adjudicated mentally incompetent. Therefore, if a senior sets up such a document and later finds that circumstances have changed, thereby requiring the POA to be altered, this can be easily accomplished.

There are several different kinds of POA’s as well:

A General Power of Attorney, which allows the designated POA to act in an unlimited capacity for the individual

A Limited Power of Attorney, which allows the POA to act only in a specified capacity for the individual, and

A Medical Power of Attorney, which allows the POA to make healthcare decisions for the individual in the event of incapacity. End of life decisions typically found in a Living Will may also be incorporated into a Durable Medical Power of Attorney, effectively combining these two documents.

What is a fiduciary? The word “fiduciary” comes from the Latin term meaning “trust”. It refers to a person to whom property or power is entrusted for the benefit of another. When necessary and appropriate, another individual can be appointed as General or Financial Power of Attorney, Trustee, Conservator or Guardian.

A “Trust” is a legal entity created to hold assets in a name other than that of the individual owner. Some reasons to create a trust would be to protect those assets from being attached or seized to satisfy debts and claims, to prevent loss of benefits because of an overabundance of assets in the individual’s personal name, to make certain that those assets go to whom the owner wishes and not as state inheritance law would dictate when legal documentation is not in place to make this determination, and to lessen the tax burden as much as possible for both the estate and the heirs.
There are different kinds of trusts for different situations. For example, a "Revocable Trust" is one the maker of the Trust may dissolve or change at any time. Conversely, an "Irrevocable Trust" is one that cannot be dissolved or changed - once it is set up, that’s it. This is usually done in a case where circumstances may be anticipated where future changes would cause problems for all concerned. A good example of this type of situation is where a diagnosis has been made of a disorder that would render the maker incapable of making coherent future decisions. Trusts may be set up to be dissolved at the death of the maker, at a set future date or occurrence, or they may even be perpetual, as in the case of an endowment.

A recent innovation is the "QTIP" Trust, which is very often used for those who have remarried and have children from a previous relationship. This is a "Qualified Terminable Interest Property" Trust. A QTIP Trust takes advantage of the marital tax exemption by putting the assets into a trust and having the income from that trust designated for the benefit of the surviving spouse. However, once that spouse passes away, the assets within the trust then become the property of the children. When all is said and done, the decedent has been able to care for both the spouse and the children, all the while limiting the tax burden for both. This type of trust can also be beneficial for "intact" families or those where the parents are still married to one another and have no children from other relationships. The QTIP is a way to defer tax costs when they might create an undue burden for the surviving spouse. This type of set up can also help to protect surviving spouses from those who would prey on them. Unscrupulous individuals who would seek to marry someone for money would be deterred by the knowledge that they would never be able to inherit the assets that were a part of the trust.

This list is by no means exhaustive, and new types of trusts are constantly being crafted as life situations change and evolve. The most appropriate type of trust is dictated solely by the senior’s individual circumstances. A competent Trust and Estate Planning Attorney is essential in making this determination and in properly setting up the Trust according to prevailing state law.

The person who oversees and administers a Trust is known as a "Trustee", and the Trustee may be an individual, a professional – such as an accountant or an attorney - or a financial institution, or any combination of these. In days gone
by banks were commonly appointed as Trustees or Co-Trustees along with an individual. However, today banks change names and corporate identities all the time, and while legally the successor financial institution will remain as Trustee for as long as it wishes, the terms of the Trust agreement may change, such as the amount of fees charged and the time schedule according to which the fees are paid. This may end up being to the detriment of the Trust beneficiary, and the process of removing or replacing a Trustee can be very difficult, time consuming and expensive, and usually may only be done for cause, in other words only if the Trustee has actually done something illegal or improper. If there is anyone else available to fill this position, then it may very well prove more advisable than using a financial institution.

If an individual is adjudicated by the court as either mentally or physically incompetent, the court may appoint a “Conservator” and a “Guardian”. Years ago the terms “Guardian of the Property” and “Guardian of the Person” were used, but today the “Conservator” is the guardian of the property, and the “Guardian” is the guardian of the person. A Conservator handles all of the financial assets and liabilities of the individual, known as the “Ward”. The “Guardian” is the one responsible for the physical maintenance of the “Ward”. The Conservator and the Guardian may be the same person, if appropriate. But, if circumstances dictate otherwise, they may be two separate individuals, in which case they obviously must be able to work together. The Guardian makes all the decisions for the care of the Ward but cannot incur financial obligations without the prior knowledge and approval of the Conservator.

Fiduciaries of any type may be bonded and insured for the peace of mind of all concerned, but this is not mandatory. This decision is usually determined by the maker of the fiduciary agreement except in the case of Conservatorship, when it is determined by the court. It goes without saying that it is far better to have someone in a fiduciary position who is filling the role voluntarily and who knows the senior’s wishes and frame of mind, rather than someone whom the court appoints because no one else is available or able to do the job.

When more than one individual is involved in caregiving responsibilities for a senior, it can be very helpful to have a written agreement between children or others to specify the responsibilities of each to prevent misunderstandings or the overburdening of any one person. Such agreements can divvy up tasks by ability,
experience, geographical location, and appropriateness, as well as providing respite and down time for caregivers. One of my clients calls this “Caregiving by Committee”.

Disagreements among family members can be extremely detrimental to all concerned and can easily reach the point where they take legal action against each other. Families rarely recover after litigation, and if there are disputes, professional mediation can help defuse the situation before it escalates to this point. The Mediation Center is located here in Savannah and only charges only a nominal fee.

If neither the senior nor family members can afford the services of an attorney, even using basic documents downloaded from the internet and a notary public are better than nothing at all. Legal Aid offices are also available to help the indigent, and military veterans are allowed to use Judge Advocate General or military legal facilities. However it is done, it is always better to plan ahead than have loved ones face the alternative. Prior planning is key.