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Wills, Trusts, Estates, Probate,
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PLANNING FOR INCAPACITY

Basic Estate Planning should include helping clients plan for incapacity. An experienced attorney will educate a client of the benefits and limitations of four basic documents no estate plan should be without: Durable Power of Attorney, Designation of Conservator, Health Care Instructions (“Living Wills”), and Appointment of Health Care Representative. These four documents comprise the basic foundation of incapacity planning. When the need arises, Revocable Trusts can be used to augment these four basic documents.

Incapacity can be defined as the inability to understand and appreciate the nature and consequences of one’s decisions. By definition, when one becomes incapacitated, one can no longer legally make decisions on behalf of one’s self. If an individual has each of the four documents listed above, one’s affairs can be seamlessly managed after incapacity.

Durable Power of Attorney

A Durable Power of Attorney is arguably the most important component of an incapacity plan. A Durable Power of Attorney establishes a fiduciary relationship between the agent – the person appointed attorney-in-fact and the principal – the person signing the document. If a Power of Attorney contains a statement similar to the following: “This power of attorney shall not be affected by the subsequent disability or incompetence of the principal”, then the subsequent disability or incompetence of a principal will not revoke or terminate the authority of the attorney-in-fact. A typical statutory form power of attorney is an extremely powerful document. It allows the attorney-in-fact to engage in a broad range of transactions and activities on behalf of the

principal. For this reason, one should exercise care and diligence when appointing an attorney-in-fact.

Notwithstanding the broad nature of a Durable Power of Attorney, many skilled estate planning attorneys suggest that the Connecticut Statutory Short Form Power of Attorney be revised to add certain language missing from the standard form. These additions include: (i) the power to make gifts to spouse, descendants, and charities, (ii) the power to transfer property specifically to a Revocable Trust established by the principal, and (iii) the power to serve as a Personal Representative for the Health Insurance Portability and Accountability Act of 1996 (“HIPPA”).

Designation of Conservator

Because the Probate Court has the authority to appoint a Conservator of the Estate to represent the interests of an incapacitated person, and because that appointment will terminate the relationship created by a Durable Power of Attorney, many clients sign a Designation of Conservator simultaneously with their Durable Power of Attorney. This document simply expresses one’s desire to appoint a particular individual as conservator should that need arise. A Designation of Conservator could prevent a disgruntled family member from being named conservator. It could also save significant fiduciary fees if the Probate Court were otherwise inclined to appoint a professional as conservator.

Health Care Instructions/Living Will

Health Care Instructions (commonly known as a “Living Will”) is a written document which contains one’s wishes concerning any aspect of one’s health care, including the withholding or withdrawal of life support systems. A Living Will becomes operative when the document is furnished to the attending physician and the patient is determined to be incapacitated. A physician or medical facility will not withhold or remove life support systems unless or until (i) the decision to remove or withhold care is based on the best medical judgment of the attending physician in accordance with the usual and customary standards of medical practice, (ii) the attending physician deems the patient to be in a terminal condition or permanently unconscious, and (iii) the attending physician has considered the patient’s wishes concerning the withholding or withdrawal of life support systems. If the attending physician does not deem the patient to be in a terminal condition or permanently unconscious, then beneficial medical treatment including nutrition and

hydration must be provided. A Living Will can be used to help the attending physician determine a patient's wishes.

Appointment of Health Care Representative

An Appointment of Health Care Representative is a document that appoints a fiduciary to make health care decisions for the declarant in the event the declarant becomes incapacitated. A Health Care Representative can help insure that one's wishes are followed.

From a legal standpoint, one should keep the following rules in mind: (i) the person appointed as representative cannot act as a witness to the document appointing him/her, (ii) a nurse or employee of a health care facility or nursing home may not act as a representative to a patient unless they are related, and (iii) the appointment of the principal's spouse as health care representative is revoked upon divorce or legal separation from the principal.

In conclusion, an individual with a Durable Power of Attorney, Designation of Conservator, Living Will, and Appointment of Health Care Representative in place is very well prepared for the management of their assets and health care in the event of short term incapacity. Any Estate Plan prepared by Holland Law Offices includes these four documents as part of the plan.

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