Five documents that you should have in place

Estate planning is all about five essential documents:

The Power of Attorney

The most important estate planning instrument for taking care of you and your family during life, as opposed to after death, is the power of attorney. This appoints one or more people you trust to step in and handle your finances and legal matters in the event of your incapacity, whether through illness, dementia, or an accident.

You have to make decisions about how many agents to appoint, whether to have alternates, whether to allow gifting, when the power of attorney should take effect, and whether to grant trust powers.

Health Care Proxy

Like the power of attorney, a health care agent steps in for you to make health care decisions when and if you become incapacitated. Unlike a power of attorney, it only takes effect when a doctor determines that you are unable to make decisions yourself. You can only appoint one individual to serve at a time. You can, and should, name one or more alternates to the principal agent.

However, health care proxies often have no idea or only a vague idea of what decision the patient would make in a particular circumstance. This can be addressed in one or more of these ways: a medical directive, a conversation between the patient and the agent, or a letter of instruction by the patient.

A general medical directive can be included with the health care proxy that says either (1) pull the plug if I am in a vegetative state or irreversible coma, (2) balance the potential benefit and discomfort of any proposed treatment, or (3) do whatever you can to keep me alive, depending on your preferences.

HIPAA Release

In addition to a health care proxy, everyone needs a HIPAA release. The HIPAA law bars medical practitioners from releasing medical information to anyone, even to the spouse of a patient, without a release. Have a HIPAA release signed and available in case it is ever needed.

Your will

Your will says who will get your assets when you die and who will be in charge of paying your bills, filing your tax returns, gathering your assets, and distributing your estate according to your instructions.

Although the will gets all the recognition and there are substantial laws governing the "probate" process, these days most assets pass outside of probate. What the will says does not apply in many situations, including: joint accounts that pass to the other joint owners, retirement plans and life insurance policies that go to designated beneficiaries and property in trust that passes to the beneficiaries named in the trust document. Only the assets you own in your own name passes under the will. In addition, while the will requires a lot of formality — two witnesses and a notary all signing at the same time — these other forms of passing on property usually require only the signature of the owner, or, sometimes, simply filling out a form online.

Your will appoints your executor or personal representative who is in charge of carrying out your wishes. This can be very important in avoiding squabbling.

Your will can be used to appoint guardians for minor children. A will permits you to make charitable or other specific bequests. Finally your will can serve as a failsafe in case other means of passing on property fail.

Revocable trust

The documents listed above may be enough, but you may also want a revocable trust, sometimes called a "living" trust. A trust is a construct under which one or more people, the trustees, manage property or investments for the benefit of one or more people, the beneficiaries. In a revocable trust, typically at the start, the same person acts as the creator of the trust, the grantor or donor, as trustee and as beneficiary. Not much changes in their lives after they set up the trust. But it avoids probate by naming successor beneficiaries for after the initial beneficiary passes away.

More importantly, a trust is a tool for intervening in the event of incapacity. Financial institutions appear to be more comfortable with trusts when a successor trustee is named. It works even better when a parent names one or more adult children as co-trustees. The parent then does not give up any rights or autonomy, but permits the child to begin participating in financial management. Even if the child does nothing, he or she can view accounts and step in immediately if a problem arises. This can be especially important in the event of dementia or scams that target the elderly.

This information was submitted by Renata Mizak, attorney and chair of trustees and estates with Laddey, Clark and Ryan.