

Women and the Law

Incapacity planning – what you should know

By Mary Lynn Kirby

Enough about death...let's talk about the living...well, actually we're still on death, it's just living death. Confused? The question of the month: What about incapacity planning? You are alive, but just not functioning. What documents should you have in place? I'm so glad you asked. There are two very critical documents that are a must.

One document is a financial power of attorney. This document allows the person you appoint (legally called the "attorney-in-fact" or "agent") to have the authority to act for you in any type of financial transactions. This document specifically sets out all kinds of "powers" that you give to your agent. Some of the powers: sell real estate, get money out of banks, make and receive payments, settle lawsuits, conduct a business, hire representatives, access retirement accounts, make gifts, access your safe deposit box.

You may be thinking that is a lot

of power. You are right! You would not want to appoint someone as your agent unless you have absolute confidence in them. You are giving to this person the ability to be you for legal purposes.

One safeguard you may want to consider in this document would be making it effective only upon your incapacity. For the document to be effective would require a doctor to certify that you are incapacitated. This can be good or bad. If you make the document effective only upon incapacity, you would have to have that certification. Between spouses that have been married a long time, I typically just make it effective immediately and no one has to jump through the hoop of a medical certification. I have seen abuse of this document when given to a child (certainly this is not typical). You may want to make it effective only upon incapacity, especially when giving this power to a child or a friend.

Having this document in place usually avoids a very cumbersome

procedure in which the court appoints a guardian to act on your behalf. Your guardian must comply with cumbersome court requirements that the power of attorney does not.

Another question that often comes up is the meaning of a "durable" power of attorney. That word simply means that the power of attorney will continue to be effective even if you should become incapacitated. Actually, in Georgia, all powers of attorney are durable unless there is language that specifically states they are not to be durable (which I have never seen.)

The other power of attorney which I think is absolutely necessary is the Power of Attorney for Health Care. This document allows the person of your choosing to make any type of health care decision for you when you are not able to make the decision for yourself. This document includes termination of life support and much more (unlike a living will.) One of the most serious issues covered by this document is the right to get medical records.

Just because you are married to a wonderful man does not mean that he can walk up to the counter and find out what is in your medical records. If I thought someone had given my husband the wrong treatment or a wrong medication and I was not allowed to see his medical records, I would be in a tailspin, rest assured. Legally, however, a medical facility can not let me see his medical records just because I am his wife.

Armed with the medical durable



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power of attorney for health care, however, the hospital is allowed to give me my husband's medical records because he has named me as his power of attorney for health care. I can even give my successor agents the ability to have access to these records. This comes in handy when one child (a named successor) is out of town. That child, if named as the successor agent, can call in to the hospital and get medical information.

A copy of this document should be taken with you when you go to the hospital, even for outpatient treatment. Your doctor should also have a copy of this power of attorney. I think it's a good idea to discuss this with your doctor as well. You should also have a discussion with the person you name and the successor agents regarding your thoughts on termination of life support. The power of attorney gives the legal authority; your conversations give the emotional authority.

Let me hear from you on your thoughts and questions for next month.

— *fw*



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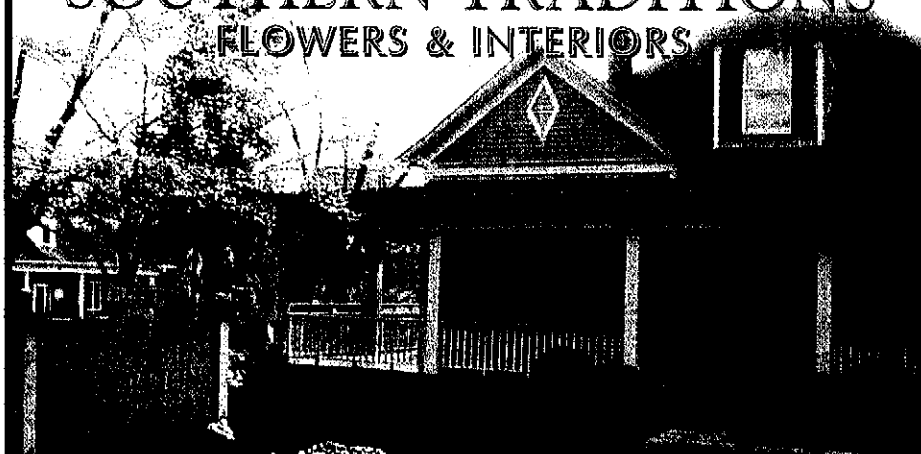


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