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Glencroft Center for Modern Aging | Leadership Team Presentation¹

UTILIZING ADVANCED DIRECTIVES

During one's lifetime, adults with proper understanding may wish to execute advanced directives. Advanced directives are the opportunity to designate one's agents to handle the principal's legal and financial matters in the case of temporary or long-term incapacity. The basic trifecta of such important documents are a General Durable Power of Attorney, as well as a Durable Health Care POA (sometimes with a "Living Will") and a Durable Mental Health Care POA. On the pages that follow, you will find your presenters' customized articles providing you a broad scope of considerations related to empowering another adult to handle one's own affairs and highlighting implementing such authorizations responsibly and with deliberate, appropriate thought and action.

Not only will today's presentation address how properly to act as an agent under such powers. We will also touch upon subtle and oft-overlooked distinctions and potential provisions among the many legislative authorizing provisions for these documents. Here are some up-front examples that we hope will assist in recognizing the importance of well-drafted, highly customized documentation. For instance, a mental health care power of attorney is may include wording such as: "*This mental health care power of attorney or any portion of it may not be revoked and any designated agent may not be disqualified by me during times that I am found to be unable to give informed consent.*"² Revocation and durability, or the continuation of a document during one's life time once the principal is incapacitated, are critical concepts. Practitioners often apply the language to the title and content of all three powers listed in the above paragraph, as we've done for you, our reader. Here you will note that the very title of the documents is not necessarily uniformly applied. For instance, the word "durable" in the context is within the legislation pertaining to Powers of Attorney ["POA"] but usually in sections associated with the General Durable POA. Yet, the health-related provisions provide for this, implementing the concept: "*Health care power of attorney' means a written designation of an agent to make health care decisions that meets the requirements of section 36-3221 and that comes into effect and is durable as provided in section 36-3223, subsection A.*"³ and then *that* section provides "*The individual designated in a health care power of attorney to make health care decisions is an agent entitled to make and communicate these decisions while the principal is unable to do so.*"⁴

Further example of the importance of highly customizing documentat is that one may utilize a Last Will & Testament to designate agents for the Testator's loved ones. However, a LW&T should not be entered into hastily without due consideration to the entire of one's estate planning, thus avoiding inadvertent contradictions that sometimes result, primarily related to potential effects of overlooked financial provisions among a LW&T and other documentation.

¹ The presenters thank John Thorhauer, President & CEO, for the kindness of his presentation invitation.

² Arizona Revised Statutes, title 36, section 3286 (Sample mental health care power of attorney) , [abbreviated [A.R.S. §#-#"]

³ A.R.S. §36- 36-3201.6. Definitions

⁴ A.R.S. §36-3223.A. Agents; powers and duties; removal; responsibility; fiduciaries

A Professional's
ADVANCED DIRECTIVES AND ESTATE PLANNING
MEETING GUIDE[©]

CREATED BY ATTORNEY DONALD T. SCHER, revision October 2022

- I. **Introduction. An attorney focused on his client's wishes will ask the same questions that your Leadership Team likely asks at any intake interview, and then throughout the successful stay of your resident. We should explore this line of inquiry:**
 - a. **HOW DOES THE CLIENT WANT TO LIVE?**
 - b. **WHERE DOES S/HE WANT TO LIVE?**
 - c. **WHAT ARE THE CLIENT'S DAILY ACTIVITIES?**
 - d. **WHAT CREATES AND MAINTAINS HIS/HER ENJOYMENT IN LIFE?**
 - e. **HOW CAN WE ENHANCE THEIR ENJOYMENT OF LIFE?**
 - f. **HOW CAN WE DEAL WITH LONELINESS, DEPRESSION?**
 - g. **HOW CAN WE IMPROVE HEALTH AND ASSURE GOOD MAINTENANCE?**

- II. **How to determine what clients wishes are:**
 - a. **SUGGEST TO THEM TO TALK WITH THE RESPONSIBLE PERSON OR PERSONS.;**
 - b. **TRAIN AND GROOM YOUR RESPONSIBLE PERSON.;**
 - c. **DISTINGUISH BETWEEN "DOING WHAT IS BEST FOR YOU AND WHAT IT IS THAT YOU WANT."; AND**
 - d. **GIVE THE RESPONSIBLE PERSON THE AUTHORITY TO CARRY OUT YOUR WISHES.**

- III. **Selecting one's responsible decision-maker(s):**
 - a. **RELATIVES, FRIENDS, OR FEE-BASED PRIVATE FIDUCIARIES;**
 - b. **HIRING AND TRAINING;**
 - c. **QUALIFICATION TO SERVE;**
 - d. **COMMITMENT TO SERVE; AND**
 - e. **SUBSTITUTE DECISION-MAKING.**

- IV. **PREVENTING FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE**
 - a. **POAs**
 - b. **TRUSTS AND TRUST PROTECTORS**
 - c. **GUARDIANS AND CONSERVATORS**



Handling Another Adult's Affairs -
de facto control, advanced directives, & some court actions

IDENTIFYING SIMILARITIES & DISTINGUISHING DIFFERENCES

Adults who have legal "capacity" may execute a number of documents to authorize a different person to handle his/her affairs, usually in case of incapacity. For example, Arizona recognizes the validity of a general, durable power of attorney AND of a limited (or "special") power of attorney, a durable health care power of attorney (often accompanied by a living will), and a mental health care power of attorney. (Only when appropriate some people might consider executing "trusts" of various sorts.) The person who signs a power of attorney is the PRINCIPAL and the person who acts for the Principal is the AGENT under the POA. A person acting without such authority and also without a court order will be recognized as a "de facto" guardian and/or conservator. When a de facto taking of control over a vulnerable adult or his estate occurs, that person is still required to implement proper actions as if designated as a fiduciary.

There are many other advantages to each of us executing customized "advanced directives." For instance, sometimes one might designate prospective guardians for one's self but also for dependents in accordance with statutory requirements, such as in one recent case of a mother who died leaving a disabled adult child. Another example is that often, someone might wish give agents instructions in advance as to medical care wishes in a living will. While sometimes loved ones may be recognized as surrogates in certain urgent health situations without documents, there is a designated order of priority and disharmony may result. Often, vulnerable adults without these valuable advanced directives are the subjects of guardianship and conservatorship court proceedings, instead. Our presentation accompanying this hand-out today will discuss these ideas, focusing on powers of attorney validly executed in conformity to the legal standards.

Food for Thought: The "Orange Card" is a Do Not Resuscitate instruction. The effect of a DNR is that the unconscious patient may not be saved, even if it turned out to be for non-life threatening injury. A principal may prefer to leave well-informed decision-making to his agents rather than to pre-determine his fate with an Orange Card posted to the door or refrigerator.

Prevent the Event – Detect and Protect. ⁵

KNOW THESE WARNING SIGNS OF FINANCIAL EXPLOITATION OF A VULNERABLE ADULT:

- **Isolation;**
- **Sudden change in life, health, or mentation (cognition);**
- **A new "BFF" (best forever friend);**
- **The new BFF handling the accounts;**
- ***An estranged person suddenly taking over.***

"SEE SOMETHING, SAY SOMETHING!"

⁵ Coined for a seminar by Dawn Savattono of The Area Agency on Aging and by Ms. Weeks.

SOME FACTORS IN APPLYING “CRITICAL THINKING” AT TODAY’S PRESENTATION AND IN THIS OUTLINE INCLUDE:

WHAT IS THE LEAST RESTRICTIVE ACTION TO ASSIST AN INCAPACITATED ADULT?

Is Court action necessary? Desirable?

Are some matters already being handled responsibly with proper authority?

HOW CAN THE PERSON ASSISTING MAINTAIN MAXIMUM INDEPENDENCE?

Training programs? Activities? Rehabilitation?

Safety is *always* a top priority.

WHAT ARE THE OPTIONS OF WHO SERVES? WHAT COSTS AND TASKS ARE INVOLVED?

PLEASE JOT DOWN IMPORTANT TAKE-AWAYS THOUGHTS AND QUESTIONS:

WHAT IDEAS CAN YOU CONTRIBUTE FOR GLENCROFT TO IMPLEMENT? Jot those here and share them among the Leadership Team!

PLEASE LET US KNOW IF YOU HAVE FUTURE PRESENTATION TOPIC IDEAS! Today’s presentation to the Glencroft Leadership Team provides a general discussion, not legal advice. Every case is unique, both as to facts and application of law. It is our goal to contribute to the education of fellow professionals, and we thank you for today’s opportunity to inform and hopefully, to stimulate conversation among the Leadership.

CONSIDERATIONS IN DESIGNATING ANOTHER ADULT TO HANDLE ONE'S AFFAIRS

Whether implementing a plan or struck with an emergency, anyone can need legal assistance handling his/her affairs. Depending upon the circumstance, events can develop in a controlled ripple or a consuming wave. There are three basic practicalities of how one adult comes to handle another adult's affairs, all of which include undertakings of countless duties and tasks that hopefully establish and maintain a high quality of life for the person needing assistance. Those three basic descriptions of how one "takes over" do not signal a right or wrong or unlawful activity – however, each puts someone in a position of undertaking fiduciary duties. At today's event, we will review some types of documents that may authorizing a third party to assist the principal (versus assuming duties), and we will touch upon some court actions and attorneys' ethical considerations.

The term "estate planner" is broadly used. By pre-deciding whom to authorize and directing that those chosen actors be provided lawful authority in proper well-drafted documentation, many families will be spared the often costly and difficult alternatives assisting their loved ones in times of incapacity. Your presenters suggest that adults with mental capacity meet one-on-one with an attorney about preparing for possible later vulnerability or incapacity. Documents when custom-drafted with an attorney often take advantage of other lawfully permitted tools. For instance, providing for funeral or disposition arrangements; and delegation of guardianship upon the first spouse's passing or for a dependent child.

ASSUMING DUTIES TO HANDLE ANOTHER ADULT'S AFFAIRS IS A FIDUCIARY UNDERTAKING.

In fact, it is a class 5 felony for a de facto guardian or conservator to permit the life of a vulnerable adult to be endangered or his "health to be injured or endangered." (A.R.S. §46-455); *De Facto Guardians or Conservators are "in a position of confidence" with respect to "us[ing] the vulnerable adult's assets solely for the benefit of the vulnerable adult and not for the benefit of the person who is in the position of trust and confidence to the vulnerable adult or the person's relatives" except pursuant to the exceptions listed in A.R.S. §46-456.*

As the Glencroft team, each of you is in the unique position to be sure that everyone is alert and proactive within your caregiving continuum, from custodial staff and chefs and caregivers to those in positions of top leadership.

In Arizona, vulnerable adult exploitation, neglect, and abuse have long been actionable unlawful acts, including as "abuse" the categories of intentional infliction of physical harm, injury caused by negligent acts or omissions, unreasonable confinement, and sexual abuse or sexual assault. Emotional abuse now joins the list, effective this past month and defined as "a pattern of ridiculing or demeaning a vulnerable adult, making derogatory remarks to a vulnerable adult, verbally harassing a vulnerable adult or threatening to inflict physical or emotional harm to a vulnerable adult." (A.R.S. §46-451. Definitions; program goals)

SAFETY FIRST - ALWAYS REMEMBER TO PHONE 9-1-1 FOR SAFETY EMERGENCIES.
AREA AGENCY ON AGING AND THE OMBUDSMAN: 602-264-2255

STATE-WIDE IN ARIZONA IN ENGLISH & SPANISH:
2-1-1 Arizona, the Statewide Resource Line for Health and Human Services
9-8-8, Suicide and Crisis Lifeline

THINKING OF COURT ACTION?

(Oft-Overlooked Practice Tip: The Court Can Order Single Transaction Authority.)

GUARDIANS and CONSERVATORS MAY BE NOMINATED IN ADVANCED DIRECTIVES
AND ARE APPOINTED BY A JUDICIAL OFFICER AT THE SUPERIOR COURT.

Conservators may be appointed when the protected person is unable to manage his/her estate and affairs, if there is property that will be wasted or dissipated, or to obtain funds for the support, care, and welfare of the person or those entitled to be supported by him/her. A guardian over an incapacitated person is someone who is appointed by the court or someone who files an acceptance of appointment made in an appropriate document by a parent or spouse and follows statutory requirements. (Guardianships over minors is not within today's topic.)

A guardianship can be limited in scope or general. Effective December 31st, 2016, there is legislative authorization for family or friends to file requests with the Court for visitation if a guardian will not permit seeing a loved one. Petitions may be brought prior to age 18 to seek Court orders effective upon an incapacitated minor's date of emancipation (18th birthday). There is also new legislation about whom the Court will appoint when an incapacitated adult is within two years of turning age 18 if there was a priority child "custodial" order.

- ❖ Limited Guardianship - Voting Privileges -- The Arizona Supreme Court has made available standardized forms for protected adults in *limited* guardianships to seek the right to retain voting privileges, implementing the statute already in effect. The forms (petition and form of order, with instructions) are at <https://www.azcourts.gov/probate/Probate-Forms/Petition-to-Restore-Wards-Right-to-Vote> See generally A.R.S. §14-5304.02 (Limited guardianship; voting) which reads "A person for whom a limited guardian is appointed shall retain the right to vote if the person files a petition, has a hearing and the judge determines by clear and convincing evidence that the person retains sufficient understanding to exercise the right to vote."
- ❖ Driving Privileges -- See A.R.S. §14-5304.01. (Effect of appointment of guardian on privilege to operate a motor vehicle) wherein the Court may suspend or decline to suspend driving privileges of a protected person upon finding of interim or permanent incapacity. Read in greater detail at <https://www.azleg.gov/viewDocument/?docName=http://www.azleg.gov/ars/14/05304-01.htm>

Avoiding Confusion - Contacting An Attorney - Understanding the Precautions Or,... Important Representation-Related Ethics' Assessments

Someone unfamiliar with the concepts we've been discussing may not have considered why often an attorney is cautious about who is present during client or witness interviews, why an attorney may not permit recording without permission, and whether and when to share information with a family member or friend of a client. The client may be a vulnerable adult in trouble, an adult with diminished capacity who does not know s/he has a lawful representative already, or a fully functioning client planning for future possibilities.

If you set up an appointment with an attorney, the attorney may need to discuss up-front whether the inquiring party will be a client personally, as a representative for someone s/he wishes to help, or otherwise. That is to say, we must identify the client before proceeding with substantive discussions. These preliminary probing questions are sometimes necessary but not always appreciated by third parties. As we strive to protect confidences and to be of the best service, a potential or new client should not mind these steps of inquiry.

Further considerations when undertaking even a limited scope of representation with a family member or friend could include that we may have a legal duty to report to a peace officer, the Court, or Adult Protective Services in cases of vulnerable adult exploitation, neglect, or abuse, even if the client prefers that we keep that confidence and not report. The State Bar published an ethics' opinion which Ms. Weeks had requested about this duty in such a circumstance, now known as 01-02 "Confidentiality; Disabled Clients; Communication with Clients; Disclosure2/2001" available to you at <https://azbar.org/for-lawyers/ethics/ethics-opinions/>

Where to Re-Visit These Topics?

PLEASE FEEL FREE TO VIEW THE THREE INTERVIEWS ON "HEALTH FUTURES" WITH BOB ROTH WHERE WE WERE HONORED TO BE GUEST PRESENTERS ON THESE TOPICS:

PREPARING FOR YOUR AND YOUR LOVED ONES' FUTURES (2017)

FUTURE PLANNING (2019)

ADVANCED DIRECTIVES, INCLUDING DURING THE PANDEMIC (2020)

AVAILABLE FOR YOUR LEISURELY VIEWING AT [HTTPS://WEECKSLAW.COM/IN-THE-NEWS/](https://weeckslaw.com/in-the-news/)

GLENCROFT LEADERSHIP TEAM TEST: WHAT DO THESE PEOPLE HAVE IN COMMON?

- An agent acting under powers of attorney, a trustee under a trust document, or anyone otherwise acting by way of a document empowering the agent on behalf of the principal
- Anyone who assumes management of another's affairs
- A guardian *ad litem*
- A court-appointed such as guardian, conservator, or otherwise handling another's personal, legal, and financial affairs, whether family, friend, VA, neighbor, or someone charging a fee?

➤ Answer : Fiduciary Duties

STUDYING SAMPLE BASIC FORMS, WITHOUT CUSTOMIZATION

Although seeing an attorney is beneficial to avoid error and minimize legal challenges later, for those who will not see an attorney, you may download and customize forms for free from these governmental websites if you have capacity, if you understand the documents, and if they reflect your informed decisions. One should never designate anyone whom s/he does not fully trust to be honest and capable. Several resources are available to the with simple samples in English and Spanish are downloadable at no charge at:

<https://www.azag.gov/sites/default/files/sites/all/docs/lifecare/Life-Care-Planning-Packet-Complete.pdf> including a Durable Health Care Power of Attorney, Durable Mental Health Care Power of Attorney, Living Will (End of Life Care), Letter to My Agent (Representative), and Pre-Hospital Medical Directive (Do Not Resuscitate) (must be printed on orange paper) Further, each of a General, Durable Power of Attorney, a Special Power of Attorney, and a Parental Power of Attorney are available at no charge in basic formats (together with a Revocation) at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/LawLibraryResourceCenter/Forms/PowerOfAttorney/index.asp>

HOW DO WE CARRY OUT THE VULNERABLE ADULT'S WISHES AND PREVENTING EXPLOITATION? A PRESENTATION WRAP-UP OUTLINE FOR YOUR LEADERSHIP TEAM'S FURTHER DISCUSSION

© BY ATTORNEY DONALD T. SCHER. (APRIL 2021; ABBREVIATED UPDATE VERSION OCTOBER 2022)

First Look at the MINDSET OF THE SENIOR ADULT who wishes to maintain integrity but may be shy to request or accept assistance. For instance, do you as the professional advisor notice these traits?

- Covering up deficits
- Avoiding assistance
- Not wanting to pay for help/services/assistance/therapy
- Not wanting to leave home / fearing being "Put in Nursing Home"
- Being unable to make a decision; afraid of being wrong/making a mistake
- Not facing consequences of incapacity/accidents/illness/death
- Failing to analyze one's financial condition, or to recognize assets needing management

The adage is that a failure to plan is a plan to fail. All of the above traits could result in a detrimental failure to plan. Seniors should take action to assure that their affairs are handled as they would want and also to protect themselves from exploitation by others.

Second The mortality table is wrong, you are going to live to be 90 or 100 ! Without regard to age, everyone is subject to accident and illness which may be incapacitating. Seniors need more medical care and are less likely to have an advocate to assist them once injured or in the event of their diminished capacity. This situation increases the risk of exploitation and averting the risk presents a compelling need to have your wishes honored by your agents and others.

OUR THANKS AGAIN TO THE GLENCROFT CENTER FOR MODERN AGING LEADERSHIP TEAM!
ATTORNEYS DONALD T. SCHER AND DEBBIE WEECKS.