

A Pandemic Estate Plan

Individuals Need to Have These Four Documents in Place

By Gina M. Barry

COVID-19, also known as the novel coronavirus, has arrived in our communities. While statistics show that many people will survive being infected, they may experience incapacity due to significant symptoms, such as breathing difficulties and fever, and, for some, the infection will be fatal.

Most have diligently stocked up on food and household supplies, particularly disinfectants. Some have also prepared a kit of 'illness supplies,' containing items that would be needed in the event of illness, such as a thermometer, acetaminophen, and herbal teas. Surely, this preparedness helps to alleviate some of the anxiety that has become rampant as this virus takes its toll on our communities.

However, if you were to become so ill that you could not communicate, do you know who would handle your affairs? Have you given that person the legal authority that they would need to do so without added cost, time, and administrative difficulties? Additional peace of mind can be found in ensuring that you have a plan in place should you become ill or pass away.

Fortunately, legal services have been deemed to be 'essential' during this pandemic, and estate planners are using modern technology, such as videoconferencing, to help you plan with the least amount of risk to all involved.

Further, unless remote notarizations become legally acceptable, strict office protocols are in place to minimize the risk of illness transmission when documents are being signed.

A pandemic estate plan should, at minimum, contain the following documents:

Last Will and Testament

Your will directs how your probate assets will be distributed after you pass away. Your probate assets are those assets held in your name alone that do not have a designated beneficiary. A will is also necessary for you to name a personal representative (formerly known as executor), who will carry out your estate. Your personal representative will gather your probate assets, pay valid debts, and distribute the balance as set forth in your

will. Further, a guardian can be named in your will to take custody of minor or disabled children. Likewise, a trust may be established in your will to provide ongoing financial protection for these children and other beneficiaries who should not receive their inheritance outright, usually due to spendthrift or addiction concerns.

Healthcare Proxy — and Possibly a MOLST

A healthcare proxy is a document that designates a person to make healthcare decisions for you if you are unable to make them for yourself. Your healthcare



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agent should make your decisions as you would make them if you were able.

Should you lose capacity and not have a proxy in place, your loved ones will need to petition the Probate Court to become your guardian, which is a lengthy, expensive, and public process. Further, access to the courts is more restricted during the pandemic, with a number of courts being accessible only for emergencies due to court staff having received positive COVID-19 diagnoses.

'Living-will' language should be included within the proxy to address your end-of-life decisions. This language generally sets forth that you do not want extraordinary medical procedures used to keep you alive when there is no likelihood of recovery. Due to the need for ventilators for COVID-19 treatment, many have asked whether they would be placed on a ventilator if needed.

Fortunately, recovery is quite possible with ventilator support; therefore, the triggering event of 'no likelihood of recovery'

would not be present in most cases, and ventilator support for COVID-19 would be instituted. Here, it is especially important to review the language in an existing document and to discuss these concerns with your named proxy.

Those of advanced age, the terminally ill, and those with painful, chronic conditions may also consider establishing medical orders for life-sustaining treatment (MOLST) in addition to a healthcare proxy. A MOLST is a form, usually printed on bright pink paper, that contains actionable medical orders that are effective immediately based upon your current medical condition. A MOLST would eliminate the

need for living-will language, but the best practice would be to reference the MOLST in your proxy.

It is important to note that a living will

and a MOLST are very different. A MOLST form needs to be signed by both you and your physician and is used by physicians to understand your wishes at a glance.

A healthcare proxy, on the other hand, only takes effect if you are incapacitated. Also, a living will asks the health care agent to take into account all facts and circumstances to decide whether recovery is likely before carrying out instructions to withhold or terminate life support, whereas a MOLST sets forth decisions you have already made about what you do and do not want as far as medical care.

The MOLST takes the place of do-not-resuscitate (DNR) and do-not-intubate (DNI) forms, as the MOLST is more comprehensive, but existing DNR and DNI forms remain valid. The MOLST not only addresses these situations, but also sets forth wishes regarding hospitalization, dialysis, and artificial means of receiving nutrition and hydration.

Durable Power of Attorney

A durable power of attorney is a document that designates someone to make financial decisions for you. The durable power of attorney is a very powerful document with authority that is as broad as the powers granted within it.

It gives power to the person you name to handle all your financial decisions, not just pay your bills. Should you lose capacity and not have a durable power of attorney in place, your loved ones will have to petition the Probate Court to become your conservator, which involves the same obstacles described above as to the appointment of a guardian.

Homestead Declaration

If you own your primary residence in Massachusetts, you should also record a homestead declaration in order to protect the equity in your primary residence up to \$500,000 from attachment, seizure, execution on judgment, levy, or sale for the payment of

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debts. In some cases, such as advanced age or disability, the equity protection can be up to \$1 million.

If a homestead declaration is not recorded, there is an automatic \$125,000 of equity protection, which may be adequate for some. Homestead protection will likely be particularly important as the financial consequences of this pandemic take hold.

Conclusion

The COVID-19 pandemic has brought the possibility of disability or death to the fore, and prior dismissals of ‘it won’t happen to me’ ring hollow.

We are at a time when you should presume that it will, in fact, happen to you.

That being the case, would you prefer to have a plan in place to ensure your loved ones can manage your affairs with the least amount of delay, cost, and stress? If the answer is yes, please call an estate-planning attorney today, establish or update your plan, and give yourself and your family that much more peace of mind during this pandemic. ♦

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