Add power to the estate plan

It's important to nominate a trusted person to make decisions on your behalf should you become incapacitated

STORY MELISA SLOAN

Many people think it's relevant to put a will in place and then tick off their estate plan. However, what would happen if you were in a serious car accident and ended up in the intensive care unit of your local hospital? You sustain brain injuries, your body is wrecked, you spend a month in intensive care and then go to a rehabilitation facility for an extended period.

Or perhaps you are out for dinner with friends having a joyous time and in the next instant you have a stroke, with the devastating effect that you are now totally incapacitated and can no longer make decisions for yourself.

Who will run your business? Who will look after your investments and other financial interests, including paying your household bills? Who will care for you and decide where you will live?

Most people do not like to think of these incidents happening as they are way too daunting and far removed from our daily lives – unless, of course, you know someone who has suffered a sudden debilitating change. We think we are all immune to this, that it happens to others, but the reality is it can happen to anyone.

So, it's crucial that you consider this eventuality as part of your estate plan and put the relevant documents in place so the people who make decisions on your behalf regarding financial, legal, guardianship and medical issues if you can no longer do it yourself will be the people you want making such decisions for you.

If you don't put these arrangements in place, you are leaving everything to chance, and it may mean someone you would not want making decisions for you will be granted authority to make them on your behalf.

How does it work?

Many people think that you need to make provisions for these documents only when you get old. When you are older, you most certainly should put these documents in place, particularly as dementia and Alzheimer's are becoming more prevalent in our society as people live longer.

However, it is important to remember dementia and Alzheimer's are not just "old people" diseases.

Some years ago, I acted for a client – let us call her Monique. She had extensive business and investment interests: an appointor of several discretionary trusts, a director and secretary of various entities, the unit holder of a number of unit trusts. She was also a dedicated and loving mother to seven children; the youngest attended primary school with the rest were in secondary school.

Two years after putting her extensive estate plan in place, we were contacted by Monique's husband and advised that she had dementia at just 46. Sadly, Monique's health deteriorated rapidly, and it was not long before she could no longer remember her young children's names and could not operate properly as a member of her family.

A full-time carer was hired to look after her, and the family also acquired a nanny to care for the younger children as well as assist with transportation to school, sport and other after-school and weekend activities - activities that Monique had attentively attended to before dementia diminished her health. Monique's family were fortunate that they had the funds to afford such assistance, particularly since her husband now had the sole responsibility of looking after the various business interests.

Crucially, as Monique had taken the time to put in place a well-considered estate plan, her power of attorney could be used extensively for both her business and personal interests, so they were not impacted significantly.

If Monique had not put a power of attorney in place, it would have been a totally different story – her condition would have had the capacity to impact her business interests in the short term and potentially lead to family conflict and no doubt enormous stress. This was a small positive out of a shocking diagnosis. Monique's young family and her husband suffered as her health continued to deteriorate; she was no longer the person they knew and, devastatingly, at 52 she passed away. Monique's story shows dementia can happen at any age.

It pays to be prepared

Around the same time that Monique was diagnosed, a friend contacted me about one of her colleagues. She and her husband, Tom, had separated just over 18 months before. They shared custody of their two young children and were in the process of finalising their divorce and property settlement with the court. Then disaster struck: at 42, Tom had a massive stroke, which rendered him permanently incapacitated. He could not communicate, he could not walk and he had limited movement. He needed full-time care for the rest of his life.

Tom had no estate plan in place, so he had not made provisions for a power of attorney. He was recently separated with two young children and a relatively fractured maternal family. Given the unexpected deterioration of Tom's health and the emotions involved, cracks started to show among his siblings and parents. They were in conflict over who would be the best person to care for Tom and his financial and legal interests.

In Victoria, where Tom resides, if someone can no longer make decisions for themselves and do not have a power of attorney in place, application needs to be made to the Victorian Civil and Administrative Tribunal (VCAT) for a guardian and administrator to be appointed to make decisions on their behalf. In Tom's case, three interested parties made an application to VCAT to be appointed both guardian and appointor.

Based on the applications, Tom's medical records and other relevant information submitted, a determination was made. The VCAT representative making this decision did not know Tom nor did they have any idea of who he would want to care for his needs. If you were in Tom's situation, would you wish for such a decision to be made by a person you have never even met? The VCAT application made on Tom's behalf – which created conflict and stress and took considerable time – could have been avoided if he had put in place the relevant power of attorney documents while he had the capacity to do so.

WHAT CAN HAPPEN WHEN YOU DON'T HAVE A POWER OF ATTORNEY

This is an important question and one that I wish people knew the answer to so that they clearly understood the importance of putting these documents in place. Put simply, if you don't have them in place and you can no longer make your own decisions, you – or, more to the point, your family or loved ones - are in a pickle.

Each state has its own body or tribunal where someone, normally a family member or close friend, would have to apply to be appointed to make decisions on your behalf with respect to your financial, legal, medical and guardianship needs.

Some years ago, I acted for two adult sons. Their father, who we shall call Bill, had suffered several falls at home. His much younger second wife determined she no longer wished to care for Bill and returned overseas to her home country to reside. Bill was taken to hospital because of his injuries and tests were conducted to ascertain the cause of these frequent falls, together with other cognitive issues that were of concern.

On receiving the results of the tests, the medical specialists determined that Bill no longer had the capacity to care for himself and make his own decisions. Given that Bill no longer had the capacity to put in place a power of attorney and he was a Victorian resident, his sons had to make an application to VCAT to have them appointed administrator and guardian.

The medical advice stipulated that Bill could no longer care for himself in his own home, and with no family member being in a position to have Bill reside with them due to extensive work commitments, the sons searched for a suitable nursing home. A home, with a rare available opening for a new resident, was located, much to the family's relief. However, as with most nursing homes these days, one of the entry requirements was that a valid enduring power of attorney was required on acceptance to the nursing home. Bill did not have the converted document, so was refused admission until an administrator and guardian were appointed by VCAT.

Given the time it took to prepare the appropriate document and obtain the reports from medical staff and social workers that VCAT required to be submitted with the sons' application, together with a backlog in the tribunal's hearings, it was a number of weeks before the sons obtained an order appointing them as their father's administrator and guardian. Bill remained in his local hospital during this time; after the VCAT order he was finally able to be moved to his nursing home.

As you can see, this is a complicated process and can cause undue stress on family members and loved ones. Fortunately, in Bill's case he had family members who were looking after his best interests and were able to make solid decisions about his care, finances and legal matters. Not all people have that luxury, especially when it is ultimately in the hands of the tribunal in determining who is the best person to look after your interests.

I often compare power of attorney documents with insurance. You put them in place and hope that you never need to use them – they are there just in case. The reality for most of us is that there are certain people we would like to care for us if we were no longer able to care for ourselves and make our own decisions. Power of attorney goes a long way in providing peace of mind that we are covered. *M*

Tom's story is devastating. His wife and children were also severely impacted as court proceedings had not been finalised and she was consequently left financially disadvantaged to bring up their two young children alone.

Which one do you need?

There are different types of power of attorney documents, depending on which state or territory you reside in and where your assets are held. The most common are:

- A specific power of attorney is usually put in place for a specific purpose – for instance, you intend to sell a property and wish someone to act on your behalf in the sale process. Once that purpose has been satisfied, the power of attorney is redundant.
- An enduring power of attorney is the most common document. In some states and territories, it relates solely to appointing someone to make financial and legal decisions on your behalf, while in other states it allows your attorney to make financial, legal, medical and personal decisions on your behalf.
- Enduring guardianship is a document that allows you to appoint someone to make medical and personal decisions on your behalf.
- An appointment of medical treatment decision maker allows you to appoint someone to make medical and lifestyle decisions on your behalf.

Who should you appoint?

Choosing who to appoint as your attorney is a very personal matter. It really comes down to who you trust to make the best decisions for you in accordance with your wishes.

In most cases, a married couple will have each other as their attorney in the first instance. If their spouse is unable to undertake the role of attorney for whatever reason, then they may appoint one of their adult children, a sibling, a parent or a close friend.

It is common for people to appoint different people for each document. For example, you may have a child who is financially savvy and understands investments and legalities surrounding finances and property; you may wish to appoint them to exercise your enduring power of attorney. But this child may be emotionally disconnected from medical matters and so you may be inclined to appoint someone else to be your medical treatment decision maker.

In a number of the power of attorney documents, you may also appoint more than one attorney, should you wish. They may act jointly or jointly and severally, and it is important that you stipulate the manner in which you would like them to act on your power of attorney documents.

When does it take effect?

The date that a power of attorney commences can vary between states and the information contained in some of the prescribed forms. Generally, a power of attorney can come into effect immediately upon signing your document or it can come into effect when you are deemed to no longer have the capacity to make your own decisions. In most cases, the power of attorney forms allow you to stipulate when you would like these powers to commence.

There are arguments for and against your power of attorney commencing immediately. If you are someone who travels extensively and operates your own business, you may wish for your spouse to have the authority to sign important documents while you are away.

We have several elderly clients who have limited mobility and do not have internet banking or are not comfortable using technology. They often rely on their children or another trusted person to pay household bills or do their banking, so having a power of attorney in place assists their attorney in attending to these tasks. This also allows their attorney to communicate with government agencies such as Centrelink or utility and service companies on their behalf should the person wish them to do so.

Alternatively, you may deem that it is not necessary for your power of attorney to come into effect immediately and you may wish for it to commence only if you become incapacitated and can no longer make your own decisions.

In addition, some states require you to register power of attorney documents, particularly for land and property transactions.

Melisa Sloan has more than a decade of extensive experience in legal practice. Before establishing Madison Sloan Lawyers, she was a senior associate at a boutique law firm with a strong wills and estates practice and managed the firm's probate practice.

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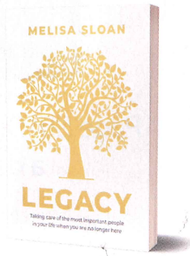

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