MILLER CANFIELD

Building a Safety Net for Fledging Adults

May 20, 2018

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Originally published in Res Ipsa Loquitur, May/June 2018

It's that time of year again: young women and men across the country are graduating from high school and leaving the nest to embark on the first phase of their (hopefully) independent adult lives. For most, this is the first time they will live away from home and be responsible for their own care and feeding. But rarely do these graduates or their parents consider what sort of legal safeguards are appropriate in case something should happen while they are busy stretching their wings. Consider the following story:

A colleague contacted me recently about preparing durable powers of attorney for a potential client whose son – let's call him Sam – had just been discharged from an in-patient mental health facility in Indiana. Sam had been admitted directly from Indiana University where he was a student. And because he was over eighteen, neither the facility nor the university would share any information with his parents about why he had been admitted, his condition, his diagnosis, or his future care needs. It was a scary time for his family. Now discharged from the hospital with a diagnosis and some stabilizing medication, Sam had re-enrolled and his parents wanted a way to be legally involved in his care in the future. And naturally, they asked the first lawyer they encountered for help.

This story (and many like it) is probably not unfamiliar to you. But it is not the sort of thing most parents consider when they deliver their daughter or son to their first dorm room or apartment. This is why I almost always recommend to estate planning clients whose children are Young Adults ("YAs") that they consider having Durable Powers of Attorney ("DPOAs") for financial and healthcare decisions prepared for these YAs at the same time they are preparing them for themselves. At first blush, this is a relatively simple proposition. But there are a few complexities to bear in mind that make the process slightly different than preparing DPOAs for other single adults.

First, there is a potential choice-of-law issue to consider. The governing law in Michigan is no different than that for any adult: the Estates and Protected Individuals Code ("EPIC"). Article V, Part 5, MCL 700.5501-5520 covers DPOAs and sets forth the general rules and procedures that must be followed. But YAs who are leaving home may be travelling to colleges or jobs outside the state - will a Michigan DPOA be honored where they end up? State law differs with respect to whether foreign DPOAs are valid, so be sure to determine whether a Michigan DPOA will be honored wherever your YA is headed.[1]

Second, there are professional responsibility considerations that often crop up when working with YAs. Not least among these considerations: who is the client? Is the client the parent, the YA, or both? As in our example, the parents are often the ones asking to be made their YA's agent, even though the YA is the one appointing a fiduciary. In that case, you might prefer to keep only the parent(s) as your client and advise the YA that they should consider obtaining their own counsel. Or you may prefer that the YA is a client separate from, or jointly with, his or her parent(s). While this does not present an inherent conflict of interest under MRPC 1.7, the potential conflict should be considered and addressed, if necessary. It seems obvious, but if the YA is your client, be sure to meet separately with them to ensure you fully understand their interests. It would be easy to prepare DPOAs based solely on what a parent wants, but the YA client may want something else, and you may be in the middle of a conflict as a result.

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Another consideration: who is paying the bill? Rule 1.8(f) prohibits a third-party from paying a client's legal bills unless (1) the client consents; (2) it does not interfere with the lawyer's independence, judgment, or the client-lawyer relationship; and (3) information is protected in accordance with MRPC 1.6. If the YA is your client and his or her parent is paying the bill, then MRPC 1.8(f) applies to you. Consider maintaining a separate file for the YA to keep each party's information segregated and to prevent spillage. It is easy to forget that while the parent brought the work to you and is paying the bill, it is not their interests that the lawyer is representing in this matter, but the interests of the YA. Those interests must therefore come first.

Third, be aware of other laws or policies that may affect the YA and bear on the scope of any DPOA you prepare. This is especially important if the YA is entering a program or institution which subjects the YA to additional laws, policies, or regulations, like universities, military service, foreign service, or other governmental programs. For example, you might advise your client to include a specific waiver under the Family Education Rights and Privacy Act ("FERPA") 20 U.S.C. § 1232g; 34 CFR Part 99. Like HIPAA, FERPA creates privacy rights in certain information and its rules must be closely followed by any school that receives federal funding; each school has some flexibility to adopt their policies and procedures to achieve FERPA's mandates. Absent a specific release by the student, these schools can deny disclosure of protected information (e.g. grades) to the student's parents - even if the parents are paying tuition and the student is a dependent for tax purposes. If your client wants the YA's parents to have access to their protected information, then a specific FERPA waiver may be necessary. Check with the school to see if it requires a form separate from your DPOA.

Finally, be sure to consider some of the customer-service aspects of your representation. Who should get original copies of the signed documents – the parent, the YA client, or both? Do they want a scanned PDF copy? Should a copy be sent to the academic institution for their records? Should the YA provide login credentials for digital assets and social media to the parent in case of emergency? As with most things, the YA client will provide answers to these questions, with their parents' advice and counsel, of course.

[1] Illinois, Ohio, Wisconsin, and Indiana all have statutes explicitly recognizing a DPOA if it was valid in the state in which it was executed. 755 ILCS 45/2-10.6; 8 Ohio Rev. Code § 1337.26; Wis. Stat. § 244.06(3); Ind. Code § 30-5-3-2. EPIC is silent with respect to whether a DPOA is valid if executed in another state.