

The Importance of the Power of Attorney in Your Estate Plan

Webster's dictionary defines "attorney" as: "one who is legally appointed to transact business on another's behalf," (as distinguished from an "attorney at law" or a "lawyer" who is qualified to represent clients in a court of law, and to advise them on legal matters). Webster defines "power of attorney" as "a legal instrument authorizing one to act as the attorney or agent of the grantor". Today, the grantor of the power of attorney is often called the "principal", and the "attorney" is commonly referred to as the "agent" because the word "attorney" is now more commonly associated with a person who is an "attorney at law".

There are two general types of Powers of Attorney used in most estate plans. The first is a Durable Health Care Power of Attorney. The second is a Durable General Power of Attorney. A Durable Health Care POA, just as its name implies, is a document through which a principal names an agent to make health-care decisions on his or her behalf. Without a Durable Health Care POA, the State will decide which individual or group of your family members will make health care decisions for you if you are incapable of making such health care decisions for yourself. The state's decision will not necessarily be the person or group of persons who you think would be best suited for the position. If a group of individuals (such as all of your children) are named as your co-health care agents, and they are unable to agree on the appropriate course of action for you, your disposition may remain stagnant until your co-health care agents are able to agree. As you can imagine, in some families, this can cause considerable delay in action, and emotional turmoil for your loved ones.

Perhaps you have a child who you would rather not have involved in your health care decision-making. Without a Health Care POA, you are unable to exclude a child or family member from making health care decisions on your behalf, if he or she is, according to the schedule set forth by the state, the person or one of the group of persons who is to act as your health care agent.

A Durable General POA is a document through which a principal names an agent to make financial and other non-health care decisions on his or her behalf. A Durable General POA should be drafted to accommodate your particular circumstances. You can provide your agent with the authority to take care of all sorts of issues for you, including such issues as your banking, insurance, retirement, real estate, estate planning and other matters, depending upon the amount of authority you want to give your agent.

Both Durable General POAs and Durable Health Care POAs can be either effective immediately upon signing, or they can be "springing" POAs which become effective at some triggering event in the future. Generally, the triggering event is that the treating physician has declared the principal to be incompetent. Whether your documents should be "effective immediately" or "springing" is a topic you should discuss with your estate planning attorney (at law) who can help you decide what is right for you.

It is common for spouses to name each other as their primary agent on both the Durable Health Care POA and Durable General POA. Additionally, principals usually name at least one contingent agent in case something would happen to their primary agent. Often spouses do not

believe that they need a Durable General POA to be able to act on the other's behalf. Although that is often true with regard to joint accounts which both parties have access to in their own right, it is not true when it comes to individually owned assets (such as retirement plans and life insurance policies), or with regard to individually and jointly owned real estate.

If you do not have a Durable General Power of Attorney, and your spouse needs to sell your real estate (even if your spouse is the joint owner of same), or dip into your retirement account for your benefit, and you are unable to sign the deed or the authorization form due to your incapacity, the only option your spouse will have is to obtain a Guardianship. A guardianship requires the Court to appoint someone or some entity to handle your affairs for you. Guardianships are expensive and time-consuming. And, in the end, the Court may appoint someone or some entity other than the person you would have wanted as your Guardian. When you have just suffered from some great trauma which has left you incapacitated, time and money are two things that you and your family members will not want to waste. With a little planning, a guardianship can be avoided entirely by having well-drafted Powers of Attorney prepared on your behalf.

For more information regarding Powers of Attorney and other estate planning documents, please contact me at 1-877-LAW-2555 to schedule an initial consultation.

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