
ESTATES AND ELDER LAW REPORTER

Powers of Attorney

Of all the issues that Elder Law attorneys face in their line of practice, Powers of Attorney are some of the most frequent and important. As we age, many of the members of the elderly community will lose the ability to make crucial decisions regarding their estate, health and many other matters. When this happens it is best to be prepared. By making your wishes known and choosing someone to carry out those wishes, you can eliminate a lot of confusion and chaos if you become incapacitated or lose your ability to make important decisions.

The easiest way to be prepared for these possibilities is with Powers of Attorney for Property and Health Care.

Power of Attorney for Property:

With a Power of Attorney for Property, you appoint someone to act on your behalf in whatever matters are delegated by the document. This person is referred to as your Agent. The authority granted by the document can be as broad or narrow in scope as you want them to be. It is important to make sure that your prospective agent is willing and able to handle the responsibilities that are being delegated to him/her. Chances are, if they don't handle their own affairs very well, they won't handle yours very well either. A power of attorney allows the agent to do anything that you, as principal, could do. You should not provide anyone with a power of attorney unless you place the utmost trust and confidence in that person.

Power of Attorney for Health Care

A Health Care Power of Attorney is a companion to the Property power but is a

separate document. With a Power of Attorney for Health Care, you name a person that you trust to make health care decisions for you. You are allowed to provide careful directions to your Agent regarding how to make health care decisions for you when you are unable to do so for yourself. The law does not automatically grant members of your family or your friends the right to make these decisions for you. You must name one of these individuals in writing as your Agent.

You decide how much power you want to grant your Agent. You spell out your wishes. You may give your Agent the power to make all health care decisions for you or you may set whatever limits you want. As examples, you may want to tell your Agent to do everything possible to keep you alive or take into consideration any treatment that would limit your pain and suffering. You can also provide for unique religious or cultural beliefs in your document.

As with the Property Power of Attorney, Agent choice is very important. Your Agent should be someone who will advocate for your health care preferences. It should also be someone who functions well in stressful situations and can stand up to health care providers and family members if necessary to make sure your wishes are respected.

In addition to naming an Agent under a Power of Attorney for Health Care, you may also want to sign a Living Will. A Living Will is a written statement that gives you the right to stop or not begin medical treatment that delays your death if you have a terminal condition. Your health care Agent supercedes a Living Will but it is important to have both in case you Agent is not immediately available when needed.

As you can see, it is extremely important to make these preparations while you are healthy and capable of executing legal documents.

Special Needs Trusts Provide for Loved Ones, Preserve Estates

If someone wishes to provide, after their death, for the needs of a spouse or a child who is under a disability, and also to protect assets from being depleted by nursing home or long-term care costs, a "Special Needs Trust" can be established to achieve both goals.

Under the Special Needs Trust, the trustee may be instructed to hold and administer the beneficiary's share of the trust estate for his or her benefit for so long as the disability continues, or until the beneficiary's death. This allows for the disabled beneficiary's needs to be provided for with trust assets for as long as such special needs are present.

If, however, the disability is so severe that the beneficiary is receiving, or may receive, governmental benefits to assist in payment of the expenses of his or her care, and the financial condition of the patient is a factor in determining eligibility, an outright inheritance will probably result in disqualification or ineligibility for the governmental benefits. Even a directive to hold the beneficiary's share in trust may result in disqualification or ineligibility for benefits unless the Trustee's discretion to make distributions to or for the beneficiary is carefully limited.

Careful draftsmanship should assure that the trust being established for the care of the beneficiary does not include any assets that legally belong to the beneficiary, so the trust will not be deemed to have been "established" by the beneficiary within the meaning of statutes such as the Medicaid statute. If the beneficiary is receiving Medicaid assistance and the beneficiary is deemed to have established the trust, the

existence of Trustee's discretion to make principal distributions may cause the entire trust estate to be considered an available asset of the beneficiary

The trust document must provide that distributions from the trust are intended to supplement, and not replace governmental assistance, and trust distributions are not intended as the primary source of funds for the beneficiary's care. Distributions from the trust must be wholly discretionary on the part of the trustee.

Therefore, the Trustee may be allowed to provide for care or needs not otherwise covered by governmental benefits and assets can be passed on to other beneficiaries upon the death of the disabled beneficiary.

Of course, the key to the success of the Trustee in meeting the goals of the trust are in the careful drafting and administration of the trust provisions.

There are many different types of trusts designed to meet the many varying estate planning needs. An experienced attorney can help determine if a trust can help you achieve your estate planning goals and, if so, what type of trust is necessary to accomplish those goals. Seek out an experienced estate planning or elder law attorney before you take any estate planning action.

This newsletter is designed to provide friends and clients with information regarding Elder Law and Estate Planning issues. It is not a substitute for legal advice. This newsletter may constitute advertising under the rules regulating Illinois attorneys.

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