Estate Plan Misconceptions-Power of Attorney

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This article is the second in our series of articles that outlines the risks in preparing one's own estate plan documents. This article will focus on the Power of Attorney.

A Durable Power of Attorney gives another person or entity (typically referred to as the "Attorney-in-fact" or "Agent") the power to handle financial, health care, and other transactions on behalf of the maker of the Power of Attorney (usually referred to as the "Principal"). The most common need for a Power Attorney is when the Principal becomes incapacitated and needs assistance with his or her affairs. For this reason, the Power of Attorney can be one of the most important documents in the estate plan. Unfortunately, the Power of Attorney can also be one of the most abused, misunderstood, and misused documents.

A "**General**" Power of Attorney gives the agent broad authority to handle transactions on behalf of the maker of the Power of Attorney. A General Power of Attorney typically incorporates those powers found in the Indiana Power of Attorney Act. The General Power of Attorney can also add powers unique to the Principal and in addition to the statutory powers under the Indiana Power of Attorney Act. Such powers can include long-term care planning, management of electronic assets and accounts, authority to deal with pets, and more.

A "**Durable**" Power of Attorney is one that survives the incapacity of the Principal. Normally, a Power of Attorney terminates when the principal becomes incapacitated. However, a Durable Power of Attorney continues to remain in effective even when the Principal is incapacitated.

The most significant Power of Attorney issue our firm encounters is inadequate powers for the Agent, especially in regards to long-term care planning and public benefits planning. Power of Attorney stock forms found on the internet or office supply stores may contain sufficient authority for the Agent to handle "every day" financial affairs on behalf of the Principal. The Agent will typically have the authority to access bank accounts to pay bills, manage finances, and protect property, but these forms stop short of extraordinary authority needed to successfully plan for asset protection from long-term care costs. For example, the Power of Attorney Statute places the obligation on the Agent to be a prudent investor and limits gifts that the Agent can make to himself or herself. However, it is the need to invest in a single type of asset or make gifts in excess of statutory limits in order to have a successful plan to protect assets from long-term care. Without this authority, the ability to conduct Medicaid, VA benefits, or other public benefits planning will be limited or nonexistent.

Issues can also arise in "picking" powers in a stock form. Stock forms typically require "check the box" execution to add a particular power to the Agent's general authority. Often the wrong box is checked or a needed box is unchecked because a particular power did not apply to the principal during the moment of execution. So, for example, when the Agent needs to sell the Principal's home later because the Principal can no longer reside in the home, the Agent has no authority because the "real estate box" was not checked at the time of execution.

Another issue can arise when a Power of Attorney is not durable. That is, the stock form has no provision for the power of attorney to continue once the Principal is incapacitated. This can be particularly disconcerting as the event of incapacity is typically the event that the Principal anticipates the Agent's authority to begin.

Besides problems with the authority given to the Agent under the Power of Attorney, problems also arise with abuse of authority by the Agent. Most likely because Power of Attorney stock forms proliferate the internet and other resources, many individuals fail to grasp the magnitude of the authority given under the document since the form is so easy to obtain. Because the individual may not understand the significance of the document and the authority granted, he or she can appoint an Agent who is incompetent to handle his or her own affairs, let alone the Principal's. As a result, funds can be lost from malfeasance, neglect, or outright theft.

Other issues can arise in not understanding the capacity necessary for an individual to execute a Power of Attorney. Having the ability to sign one's name to the document is not the appropriate level of capacity to execute the document. Instead, the maker of the Power of Attorney generally must have the ability to understand and appreciate the nature and effect of what he or she is signing. Lack of appropriate formalities in the document execution are less common problems, but can also arise (e.g. lack of notary).

Finally, it is important to note that most authority under a Durable Power of Attorney ends at the death of the Principal. Many individuals improperly assume that the Agent under the Power of Attorney can handle his or her final affairs after the death of the individual. Instead, a Last Will and Testament is required for this function.

In most instances, a Power of Attorney is good substitute for guardianship- a court proceeding where the "Agent" is appointed by a court. However, if the Power of Attorney is inadequate to meet the needs of the Principal, a guardianship can none-the-less be required. Consequently, additional expenses arise from the court proceeding and the Principal's intent is potentially circumvented.

To avoid these unintentional consequences when creating a Power of Attorney, consumers should consider hiring legal counsel for such an important endeavor. To create your estate plan with us, please contact us to schedule an appointment at 317-622-8181.

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