The Importance of Powers of Attorney in Estate Planning

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When contemplating estate planning, it is important to think of managing one's estate not only after death, but during life. A power of attorney is the lifetime counterpart of a will. It is a grant of legal rights and powers by one person to another to handle specific affairs. The person granting the powers is known as the "principal," and the person receiving the power is known as the "agent" or "attorney-in-fact."

The agent, in effect, stands in the shoes of the principal and acts for him or her on financial and business matters. The agent can do most anything the principal may do in financial matters - withdraw funds from bank accounts, trade stock, pay bills, cash checks - except as limited in the power of attorney.

A power of attorney can be very handy in the event that one is unable to take care of her own affairs, for reasons such as extended travel or illness. It becomes even more important, however, in the event of incapacity. When there is no power of attorney, family members of a person stricken with an incapacitating illness very often must resort to probate court proceedings to obtain the authority to handle their loved one's affairs. This can be a time-consuming and expensive process which could usually be completely avoided if there was a valid power of attorney in place. Thus, the proverbial ounce of prevention can be easily and economically obtained with a valid power of attorney.

Although, the typical power of attorney grants the agent very broad powers, it does not give the agent carte blanche to take the money and run. The agent must use the finances for the benefit of the principal. In other words, it is a management tool. Nor does a power of attorney take away the rights of the principal. It is similar to handing the keys to one's car to someone else. Just as the keys can be taken back, so can a power of attorney be revoked.

A couple of common terms used in conjunction with power of attorney merit explanation. Many people wonder what is meant by "durable power of attorney." Prior to 1975, a power of attorney was intended to give an agent powers to act only while the principal was still competent.

This may seem counterintuitive - after all, one would think that the main point of a power of attorney would be to give an agent control in the event of incapacity. In 1975, a law was enacted to do just that - to allow a power of attorney to stay in effect in the event the principal became incapacitated; hence the term "durable power of attorney." Now, virtually every power of attorney is a durable power of attorney.

Another frequently used term is springing power of attorney. This refers to the time when the document takes effect. Most often, a power of attorney takes effect as soon as it is signed by the principal. A "springing" power of attorney takes effect only when an event described in the instrument (typically, incapacity of the principal) takes place, as certified by one or more physicians.

Powers of attorney are typically drafted by attorneys. There are forms available on the Internet and do-it-yourself legal document kits. When using such forms, consumers should beware. Each state has different laws laying out the requirements for powers of attorney, and in most cases the generic forms do not address state-by-state requirements.

In Maine, a special notice provision is required, without which, a power of attorney executed in Maine after 1997 is not valid. Moreover, many individuals have specific needs which should be specially addressed in their powers of attorney. For example, if one wants to give his agent authority to make gifts of his assets, this must be spelled out in the power of attorney.

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