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THE BENEFITS OF A DURABLE POWER OF ATTORNEY APPOINTING SOMEONE TO SPEAK ON YOUR BEHALF

By Neil A. Derman, Esquire

John Doe is on his deathbed. It's a week before the end of the year and John decides to make annual exclusion gifts for this year to reduce his federal estate. He then wishes to make more gifts at the beginning of next year as well. The problem is what if he becomes physically or mentally unable to perform the second set of gifts. The estate tax savings he is legally entitled to will be lost unless someone can make the gifts on his behalf.

The simplest device to help John would be a Durable Power of Attorney. A Power of Attorney is a written document that enables an individual, the principal, to designate another person or persons as his "attorney in fact", that is to act on the principal's behalf. The power can be severely limited or quite broad. A Durable Power of Attorney is a power of attorney that is not terminated by subsequent disability or incapacity of the principal. A Power of attorney is an enabling document. It is limited only to the powers it grants. It must specify the powers that the attorney in fact (agent) is entitled to perform.

A Durable power of attorney is useful in numerous situations. When the principal is elderly and there is significant chance that he will become senile, a durable power of attorney negates the necessity of petitioning the local court for appointment of a guardian or conservator to handle the principal's assets. Furthermore, when an individual is suffering from a physical disability or illness, the effect of which can lead to permanent or long term incapacity, a durable power of attorney enables someone to assist the principal in handling his/her financial affairs as well as maintaining their general standard of living.

A Power of attorney can allow an individual to appoint someone to manage ones assets in the event he or she is unable to manage such assets for either a short or long duration of time because of physical or mental incapacity

It is also a useful substitute or supplement to other legal documents. It acts as a temporary and expedient substitute for a living revocable trust and is less burdensome and less costly. It can also provide flexibility as an addition to a revocable living trust.

But, most importantly, it can prevent legal proceedings to establish legal guardianship or conservatorship for an individual who may face short or long term incapacity.

The durable power of attorney continues in operation after the appointment of a guardian for the incompetent. However the guardian of the incompetent appointed by the court has the same rights as the principal and can terminate the durable power of attorney on behalf of his ward, the incompetent.

A typical Power of Attorney takes effect upon execution. Clients who are reluctant to grant another person wide powers to act at a time when the principal is capable of acting may prefer to use a springing power. A Springing power does not become effective until the occurrence of a specified event such as a physical or mental incapacity. The instrument must name the person or persons who are to determine whether the contingency has occurred (the attorney in fact may be the person).

Returning to our example, we see that a durable power of attorney would greatly assist John. If John names his son David as his power of attorney and gives him the power to make annual exclusion gifts on his behalf, David could draw checks on John's account to each of the donee's. If John becomes incapacitated before the end of the year his son David could assume his responsibilities and honor his fathers wishes by making the annual exclusion gifts at the beginning of the next year. The durable power of attorney would provide John with the ability to make sure his wishes as well as standard of living are maintained even when he becomes incapacitated.



Begley & Bookbinder, P.C. is a law firm that specializes in Elder & Disabilities Law. We are based in Moorestown, NJ, with offices in Stone Harbor & Lawrenceville.

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