



Elder Law and Disability Planning & Strategies



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Durable Powers of Attorney

What is a durable general power of attorney? A durable general power of attorney is a legal document where one person (the principal) authorizes another (the agent) to act on the principal's behalf regarding financial decisions. It allows a person to plan for care and control of property in the event he or she becomes incapacitated.

Powers of attorney are the single most important documents to put in place so that a family member or trusted friend will have the legal authority to carry out your wishes if you can no longer speak or act for yourself. Without a power of attorney, if something happens to you that results in your ability to make decisions, your family may later face court proceeding and court supervised guardianship and/or conservatorship.

Do I need a lawyer to draft my power of attorney? No, But without proper, specific wording, your agent may not be able to deal with some of the issues that are important to you.

Clients have come to our office with "form document" powers of attorney they purchase at an office supply store or downloaded off the Internet. While these documents legally authorize persons to act on another's behalf, there are certain things a traditional or standard power of attorney may not address. In fact, the law provides there are certain matters your agent cannot handle unless there is specific wording in the document which empowers them to do so. Such matters include the power to make gifts on your behalf and the power to remove and/or add assets to a trust.

An example of this may go as follow: Janet came into our office to discuss Medicaid planning for her mother, Mildred. Mildred was in a nursing home costing over \$3,000.00 per month. Her income was only \$800.00 per month. With assets totaling \$80,000.00, Janet knew her mother would run out of money quickly. Janet was interested in establishing a gifting program, where Mildred would be able to gift money so that once her mother met the spend down and qualified for Medicaid benefits, Janet could afford to help keep mom in a private room.

Mildred was incapacitated, but Janet had a power of attorney that allowed her to hire an attorney on Mildred's behalf. I told Janet that as long as her power of attorney had the proper language, Mildred could save a large portion of her assets by gifting money to Janet and still qualify for Medicaid (as long as the gifting was done properly, taking into account the appropriate penalty periods.)

Unfortunately, upon review of Mildred's power of attorney, I had to explain to Janet that she did not have the authority to make gifts of her mother's money. I further explained that if Janet did begin gifting under the current power of attorney, it may be considered elder abuse. Janet was devastated. "But, I am her only child....she left everything to me." I had to tell Janet it did not matter. "I am on all of her bank accounts," she said. I told her that unless she contributed money to those accounts, it did not matter. Janet then pointed out the standard language in her mother's power of attorney which states, "I authorize my attorney-in-fact to engage in, transact and perform any and all actions as my attorney-in-fact may think proper; as fully to all intents and purposes as I might or could do if personally present at the time thereof." again, I had to tell Janet it did not matter. Unless the power of attorney specifically authorizes the agent to make gifts to him or herself, an agent is unable to establish a Medicaid gifting program.

Unfortunately, this situation is not unique. Many people feel their power of attorney allows their agent to do anything and everything. Had Mildred come into our office (or that of another elder law attorney familiar with Medicaid and estate planning) while she was still competent to sign a power of attorney that would allow for gifting and she could have set aside thousands of dollars by gifting money to her daughter, Janet, and would still qualify for Medicaid.

Bottom line: if you want to include language which empower your agent to deal with matters affecting older clients today, you should consult with an experienced elder law attorney for assistance in drafting your durable general power of attorney.

Free In-Service Training Available:

The Law Firm offers free in-service training on topics related to:

Division of Assets
Guardianship
Other Elder Law Issues

Medicaid Planning
Powers of Attorney

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