

Durable Power of Attorney: A Crucial Part of the Estate Plan by Atty. Joseph H. Helm, Jr.

When least expected, an accident, serious illness, or simply the natural consequences of the aging process can render a person incapacitated. Such a person is no longer able to manage their financial, legal and medical affairs.

They can no longer make investment decisions, pay bills, or sign the necessary documents for the purchase and sale of assets. Neither are they able to make decisions regarding their own living arrangements and medical care. Unless the incapacitated person has prepared for this condition as part of their estate plan, the local probate court must step in and appoint a guardian or conservator to act on their behalf.

If an adult person becomes incompetent and does not have the necessary private estate plan documents referred to as powers of attorney, someone close to them, either a spouse or adult child for example, would be required by law to petition the local probate court to be appointed the incompetent person's guardian. This typically takes sixty to ninety days and can easily cost \$2,000 to \$4,000 in attorney fees and court costs. And, even after the guardianship is obtained, the guardian must return to the court at least once each year to give a detailed accounting of the incompetent person's affairs and assets. In addition, if issues arise regarding the management, purchase, or sale of real estate or business interests, the guardian is required to follow additional court procedures often incurring significantly more attorney fees. Most people would want to avoid these complicated and expensive procedures and, instead, to plan for the private management of their affairs.

The Power of Attorney is a simple and inexpensive alternative to the court supervised guardianship system. The power of attorney is written document, much like a will, that allows one person (the principal) to give another person (the agent) authority to act on the principal's behalf. The authority given to the agent may be very specific, limiting the agent to one or more specific duties. Or the authority given to the agent may be very general and comprehensive, granting the agent broad power to make financial and legal

decisions and transact business for the principal. Typical authority granted under a general power of attorney would include paying bills, collecting income for deposit and investment, selling and reinvesting assets, handling tax matters such as the annual tax return, signing contracts, and defending claims and lawsuits. Power of attorney documents can come in a number of different varieties.

A standard power of attorney document would become void upon the principal becoming incapacitated. As a result of this restriction, these types of documents have very limited use. A typical example would be a power of attorney granted to your investment advisor or broker allowing him/her to make financial or investment decisions on a day to day basis. This type of power of attorney would become void if you died, became incompetent or revoked the document. In order to address the need for a simpler, private method of managing the affairs of an incompetent person, legislatures across the country authorized the use of “durable” powers of attorney.

The word “durable” simply means that the agent’s authority continues even if the principal becomes incapacitated. As a result the durable power of attorney is the most common form of power of attorney for estate planning purposes. With this kind of power of attorney, a spouse or adult child for example, could privately handle the financial, medical and legal affairs of an incapacitated spouse or parent. This would in the vast majority of cases avoid the necessity of petitioning the court for guardianship. It would be important to note, however, that if the incompetent person became combative requiring physical restraint, or required confinement as a result of a propensity to wander off and get lost, constitutional liberty interests would usually necessitate a court order authorizing bodily restraint. These cases are very rare and should not be a concern to the average family.

Most states encourage, if not require, that the medical power of attorney be an entirely separate document from the financial/legal power of attorney.

To facilitate consumers getting appropriate documents, most states have enacted legislation authorizing statutory forms that can be used with some degree of confidence.

However, great care should be exercised in the filling out of the forms and the execution of the forms. A mistake in the numerous formalities required in the signing of the document alone could render the document void. It is strongly recommended that expert help be sought out in the preparation and signing of any legal document. This is one area where an ounce of prevention is certainly worth a pound of cure.

One final word of caution. In this writer's opinion, thoroughly drafted durable powers of attorney, both medical and financial, are a crucial part of any good estate plan. But, these documents typically grant an enormous amount of authority to the appointed agent. Accordingly the agent you choose should be above reproach ethically and morally. You should trust their integrity without reservation. It may be wise on the financial power of attorney to name two agents to act together as "co-powers of attorney." In all cases it is wise to consult with an attorney who is a specialist in estate planning. The time, effort and cost of such a consultation will be more than worth it in the long run.