

The Estate Planning Advisor

A Power of Attorney is Not Enough

By Richard J. Shapiro, J.D.

Most people know that a will is a legal document that becomes effective only upon the death of the creator of the will, who is referred to as the “Testator”. To address the Testator’s possible lifetime disability issues, the drafting attorney will have the Testator sign a statutory General Durable Power of Attorney. The power of attorney (“POA”) typically grants one or more designated “agents” the legal authority to handle personal and financial affairs of the “principal” who has signed the POA.

A POA can be drafted with “springing” powers that will be effective only upon the happening of a future event, typically certification by the principal’s physician that the principal has become incapacitated. However, in the vast majority of cases, clients choose to have the POA immediately effective upon signing. While the immediately-effective POA is easy to use by the agent, it can be subject to abuse if the agent is unscrupulous.

But even when a POA is not abused by the agent, there is another significant flaw in relying upon the POA as the sole source of disability planning. While a typical “immediately effective” POA authorizes a third-party agent to handle the principal’s financial affairs, there is no mechanism in the POA to “take away” the principal’s power to inflict financial harm on himself. For example, I recently received a call from “Donna” who described the following scenario: Donna’s father and mother are both in their early 80’s, and both are suffering from dementia; her mother’s condition is somewhat more advanced than her father’s. A new home healthcare aide has recently begun caring for her parents. Donna explained that her father has been going to his bank with the healthcare aide to make substantial cash withdrawals, and is giving significant amounts of cash to the aide.

Donna said that her father was a successful businessman and that, had he possessed all of his faculties, would never have made cash gifts to a virtual stranger. Donna’s father insists, however, that he’s perfectly fine and that the gifts to the aide are simply a thank you for her help. Unfortunately, Donna’s only recourse to protect her parents is a costly and likely contentious guardianship proceeding.

Donna’s situation would not be so dire if her parents’ estate plan included revocable living trusts with disability planning provisions. A revocable living trust can provide that the “Trustmaker” is deemed disabled upon a determination of the “disability panel”. Based on that determination, the Trustmaker will be replaced as Trustee for the administration of the trust and its assets. The disability panel is hand-picked by the Trustmaker upon the creation of the trust, and typically consists of the Trustmaker’s attending physician, the spouse (if any), and one or more children, other relatives, friends, clergy and anyone else the Trustmaker chooses. By naming these trusted people while the Trustmaker is of “sound mind,” the Trustmaker creates a protective mechanism to ensure that at some future time a successor trustee is available to take over control of the Trustmaker’s personal and financial affairs, even if the Trustmaker – as is apparently the

case with Donna's father – believes he is “fine.” A POA cannot authorize this same seamless transfer of authority and responsibility, necessitating a costly and unpredictable court guardianship proceeding.

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