

WHO WILL MANAGE MY AFFAIRS WHEN I BECOME INCAPACITATED?

BY BEN KINIRY, ESQ.

I want you to know I came up with a few different titles for this article. The other titles were less aggressive and suggested that someday you may become incapacitated between now and your death. In the end I decided to go with the more blunt approach as I believe it is a better call to action. The point is that you need to be realistic regarding your own potential incapacity. Now on to the body of this article



I hear it all the time “I don’t need a power of attorney, my son is on my bank account.” What is my response to this? First things first, what is a power of attorney?

A power of attorney is the grant of legal rights and powers by a person, the “principal” (this means you) to another, the “agent” or “attorney-in-fact” (this means someone you trust). Or in more simplistic terms, it is someone who will stand in your shoes for the purpose of managing your affairs (except medical decisions: you can nominate an agent to make health care decisions under a Durable Power of Attorney for Health Care (see July 2018 article for more on this topic).

An agent is generally provided with rather broad authority. If you can do it, the agent can do it. The authority provided can of course be limited by you. For example, you may choose not to give your Agent authority to modify the beneficiaries named on your retirement accounts or to make gifts to your loved ones.

A “durable” power of attorney, takes effect when signed by the Principal and the agent acknowledgement is properly executed (which is something that should not be done in advance). The authority provided to the agent continues until the Principal’s death (the power dies with you, so generally nothing done by your agent after your death is valid).

Many people assume that they are giving up their rights when they



execute a power of attorney but they are incorrect in this assumption. Only a court can take away a person’s rights through a conservatorship, guardianship or a commitment proceeding. An agent has the power to act along with you, or on their own if you should become incapacitated.

You should also take comfort in the fact that you may revoke a power of attorney at any time. All you need to do is send a letter to your agent informing them that their appointment has been revoked. From the moment the agent receives this notice, he or she can no longer act under the power of attorney. At the time of the revocation it is wise to send a copy of the letter to key institutions who may be holding a copy of the Power of Attorney document, a bank being the best example. If you have created a new power of attorney, then send a copy along with the revocation.

Another common misconception is that the agent can just take your money and run to the Bahamas, “thanks for the great trip mom.” The reality is that the agent is obligated to make decisions in your best interest. Although a trip to the Bahamas might be more fun than taking care of your affairs, the agent would eventually end up in hot water. So a rogue agent can be held liable, but only if he or she acts with what is

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JANIS KUCH HONORED WITH NORRIS COTTON AWARD

Janis Kuch of Page Road in Bow was chosen to receive the coveted Norris Cotton Award at the State Republican Annual Meeting on January 25, 2020. She is the Chairman of the Bow-Dunbarton Republican Committee and the wife of former State Representative Bill Kuch.

Scott Maltzie, on behalf of the Merrimack County Republican Committee, had nominated Janis for her decades of service. Said Mr. Maltzie: “The board and I were pleased to recognize Janis for her many years of service to the GOP, town of Bow and Merrimack County. Her dedication to Republican causes and the party has been extraordinary. She and husband Bill can be succeeded, but never replaced.”

Janis continues her community service as an active member of the Bow Garden Club.

The award annually honors someone who puts in hours of unpaid work on behalf of the Republican Party and its candidates.

Norris Cotton was a towering figure in New Hampshire public life as Speaker of the N.H. House. He served for years in the U.S. Senate representing the Granite State.

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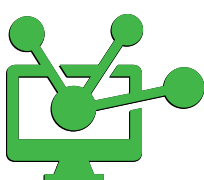
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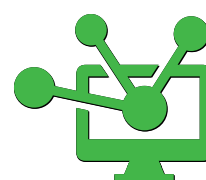
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BOW POLICE LOG

by Chief Margaret Lougee

JANUARY 2020 ARREST LOG

1/1 - Reynaldo Ramirez Martinez, 36, Candia, received a summons for operating without a valid license

1/2 - Nicholas Johnpier, 37, Hillsborough, was arrested on a warrant for domestic violence; simple assault

1/3 - Jerome Fuller, 38, Concord, received a summons for driving after revocation/suspension

1/4 - Michael Nadeau, 49, Hudson, was arrested for possession of a controlled drug; Kevin DeJesus, 20, Lawrence, MA received a summons for operating without a valid license

1/6 - Adam Morrissette, 35, Manchester, was arrested on a warrant for failure to appear

1/7 - Kishan Rajak, 28, Manchester, was arrested on a warrant for failure to appear; An adult received a summons for possession of marijuana

1/8 - An adult was taken into protective custody for intoxication; Michael Quinn, 29, Bow, was arrested for driving under the influence; subsequent offense; Jessica Lizotte, 22, Concord, was arrested on a bench warrant for driving after revocation/suspension; subsequent offense

1/9 - Christopher Couch, 23, Epsom, was arrested on a bench warrant for driving without giving proof; Ryan Brown, 28, Manchester, received a summons for driving after suspension/revocation

1/10 - Andrew Leduc, 40, Dunbarton, was arrested for driving after revocation/suspension; subsequent offense, and suspended registrations

1/11 - Bitu Tambwe, 24, Manchester, received a summons for operating without a valid license; Maenda Mlongecha, 27, Manchester, received a summons for allowing an improper person to operate

1/15 - Daniel Zabay, 33, Manchester, received summonses for driving after revocation/suspension, and suspended registrations; George Smith, 73, Bow, was arrested for driving under the influence

1/17 - Shawn Murphy, 18, Dunbarton, received summonses for suspended registrations, and unregistered vehicle

1/19 - Todd Duval, 32, Gilmanton, was arrested on a warrant for theft by unauthorized taking; Bryan Chouinard, 33, Concord, received a summons for driving after revocation/suspension

1/20 - Tyler Franks-Chubbuck, 21, Sunapee, was arrested on a bench warrant for deal/possess prescription drugs

1/24 - Stephen Bradford-Clifton, 36, Concord, was arrested for felon in possession of a dangerous weapon; Annmarie Damato, 41, Contoocook, was arrested for endangering the welfare of a child

1/29 - An adult was taken into protective custody for an involuntary emergency admission

01/31 - Lawrence Trant Jr, 72, Concord, received a summons for driving after-revocation/suspension and operating without a valid license

(Ben Kiniry article continued from page 12)



referenced as a “breach of fiduciary duty.” More to the point, an agent operating under a Power of Attorney document is held to a high level of accountability. This accountability is essential to your protection.

So back to the opening statement “I don’t need a power of attorney, my son is on my bank account.” What is my response to this? In short, the arrangement is insufficient and extremely ill-advised. Were your son to file for bankruptcy, that bank account could be drawn into his bankruptcy as an asset available to his creditors. Same problem if your son were to get divorced.

Let’s turn to functional limitations and practical needs. There are numerous tasks that must be accomplished in our lives that go beyond the paying of bills. These tasks can be as simple as cancelling the cable service or as complicated as filing for the Medicaid long-term-care benefit (see January 2019 article). The point is that we have to think beyond paying the bills to many other aspects of our lives and what powers our agent may need in order to manage our affairs. Some of the powers that can be provided for in a power of attorney are powers to deal with: real estate transactions and business interests, retirement accounts, stock, bonds, life insurance and annuities, pensions, family maintenance and with all types of government entities and programs (Medicaid and Medicare).

Myth: A very common myth is in regards to married couples. You should be aware that married couples do not have the power to freely manage each other’s affairs simply because they are married and hold property jointly. If a husband and wife fail to create powers of attorney (or some other legal arrangement), they will be forced to file a petition in the probate court and to take out guardianship over the spouse that has become incapacitated.

A Real Life Example:

One such authority that can be implemented into a power of attorney that families have found useful is gifting, which is often used as an estate planning tool when someone falls ill. Example: Bill came by the office one Monday to discuss his affairs. He did not look well at all to say the least. When I asked him how he felt, his only complaint was that his back hurt. I twisted Bill’s arm until he promised me that he would seek medical treatment upon departing the office. A promise he reluctantly made and kept. Margery, Bill’s wife, called me on Wednesday and informed me that Bill was diagnosed with an aggressive type of cancer and had less than a week to live.

The family home and one bank account were in Bill’s name only. By Friday Margery and I had utilized the Power of Attorney that Bill had given to Margery to transfer all of Bill’s assets to Margery. It was fortunate that we acted as fast as we did, because Bill died the following Tuesday. The end result in this case was the avoidance of the time and expense of probate, which was a great benefit to Margery, who of course was grieving the sudden and unexpected loss of Bill.

Here’s the lesson: If you don’t take the time and effort to create your power of attorney, when you become incapacitated, important opportunities may be lost. Beyond that, your loved ones will have to make an application to the appropriate probate court to acquire a very similar authority to handle your affairs called a Guardianship (see July 2019 article).

The information provided in this article does not constitute legal advice.

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