

Who Will Manage My Affairs When I Become Incapacitated?

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Note that I wrote a few different titles for this article. The other titles suggested that someday you might become incapacitated between now and your death. In the end I decided to go with the more blunt approach as it promotes better planning and is a reality most everyone must plan for. Now unto the 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 you name to stand in your shoes to make all the same types of decisions that you normally would make on your own behalf (*except medical decisions*: you can nominate an agent to make health care decisions under your Durable Power of Attorney for Health Care, which is a separate document).

Generally this means your agent can withdraw funds from bank accounts, trade stock, pay bills, cash checks, file a tax return with the Internal Revenue Service, file for your Social Security Retirement benefit or even Medicare, along with many other authorities. This can of course be limited by you, for example, you may choose not to give your Agent authority to modify beneficiaries on your retirement accounts. Naming an agent with such broad authority certainly involves some trust, but then again, you should not name someone you don’t trust in this fiduciary position.

A “durable” power of attorney, takes effect when signed and continues through incapacity and up to the time of death (note that when you die, the power dies with you, so nothing done by your agent after your death is valid). A “springing” power of attorney, springs into action upon a particular event decided by you. Generally, the event is incapacity.

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 commitment proceeding. An



agent simply has the power to act along with you, or on their own and on your behalf if you should become incapacitated.

You will also take comfort in the fact that you may revoke a power of attorney at any time (think about Donald Trump saying “you’re fired!”). 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 the letter (called “notice”), he or she can no longer act under the power of attorney. If you are concerned about the agent’s willingness to follow the revocation, then it is wise to send a copy of the letter to key institutions, the bank being the best example. If you have created a new power of attorney, then send it 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, for your own benefit. Although a trip to the Bahamas might be more fun taking care of your affairs for the agent, the agent would eventually end up in hot water or worse. So a rogue agent can be held liable, but only if he or she acts with what is referenced as “willful misconduct” (Bahamas) or gross negligence (something the average person would not even consider doing).

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?

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, registering an automobile or as complicated as filing for the Medicaid long-term-care benefit (I assure you this is no easy task).

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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 the powers to: trade stock and bonds, work with financial institutions generally to include insurance and annuities, deal with real estate and business matters, deal with all types of government entities and programs (such as filing tax returns or applying for Social Security Retirement benefit, Medicaid or Medicare), retirement plans, pensions and family maintenance matter to name a handful.

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, but 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. This was terrible news, Bill was a really good guy and always had a smile on his face.

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.

What if you don’t create a

power of attorney? Well, there is the lesson we learned from Bill and elder law attorneys can give many more practical concerns, but generally speaking, if you don’t take the time and the small amount of effort to have a power of attorney created, and you become incapacitated, many 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 (another good topic for a future article).

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

PUBLIC WORKS DEPARTMENT

Highway Division: The highway crew plowed and treated roads and parking areas for 10 ice and snow events. The crew assisted with the reorganization of the shop area. The crew, between storms, were busy rebuilding and painting plows and wings on the trucks. Christmas trees were dropped off and chipped into mulch. The brush from storm road hazards were chipped into mulch as well. The Highway Division is working on filling potholes and started posting frost heave signs.

Recreation Division: During the winter season the groundskeeper helps with plowing, and finishing the winterizing of tractors etc. The Recreation Division also keeps the pond plowed and ready for skating after each storm.

Fleet Division: The new Kenworth 10 wheel truck was a huge fixture in maintaining the winter roads. This new truck eliminates a return trip to the garage for second load of road treatment material on longer plow routes, thus saving time, money and stress on the equipment. Fleet Maintenance Manser, Scott Beaulac continues to organize the shop area.

Buildings Division: If you have been to the Municipal Building lately, you may have noticed some of the meeting rooms have been painted. The Building Department installed a new door leading from the mezzanine to the old police station.