Powers of Attorney

by Attorney Michael Hooker

If you have read my prior columns you know that there are three essential documents a person for the bare minimum estate plan: a will, a power of attorney and a health care proxy. The will dictates who should manage your estate when you die (the executor) and who should inherit your estate (your beneficiaries). The will also covers less important issues such as waiving the requirement of bond, authorizing the executor to sell real estate, etc.

Wills are not generally useful when the elder is alive but incapable or handling his or her finances. This appears to be happening with greater frequency. It may be attributable to longer life spans and changing demographics. (Many children live out of the area, leaving the elder on his/her own.) If an elder becomes incapable of managing his/her financial affairs, a will is not going to do them any good.

If an elder becomes incapable of managing his or her finances and has not appointed a surrogate under power of attorney, or as trustee of a trust, and has not placed a trusted family member's name on his/her bank accounts, then the family members are not going to be granted access by the bank to the elder's funds. The family will be left with the option of filing for guardianship in probate court. This is a very expensive proposition, which involves an unbelievable amount of red tape.

In Hampshire County, for example, the probate court will appoint an independent person to see whether the elder needs a guardian. That person is paid by the elder's estate. The guardian has to file accounts with the court. There are filing fees and (usually) lawyer fees. On these accounts, the court will again appoint that independent person who will be paid by the elder's estate. If the guardian wants to sell real estate or engage in Medicaid planning (asset protection), the guardian has to petition the court and, again, that independent advocate (a lawyer) is appointed by the court and paid for by the elder's estate.

All of these burdensome delays and expenses can be avoided by appointing a trusted family member as your power of attorney. Some might argue that the court oversight is warranted. If you want court oversight, don't do a power of attorney and leave the issue to chance. If you want to avoid the court delays and fees, do a power of attorney.

Although power of attorney forms can be found on the Internet or at Staples, I still don't think you should sign a POA without consulting with an elder law attorney. There are several points, which you need to address in the POA: Should the POA have authority to make gifts of your funds? When does it take effect? What if the POA dies before the elder? Can the POA sell real estate? Can they get paid for their work? Can there be joint POAs?

In many instances, I think a power of attorney is equally, if not more, important than a will. You should have a POA. At the same time it would be a shame to have you create a POA and have it turn out to be defective. You wouldn't prepare your own will would you? It's too dangerous. The same holds true for a power of attorney and estate planning.

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