

Powers of Attorney

by Attorney Michael Hooker

There are three essential documents in an estate plan: a Will, a Power of Attorney (POA) and a Health Care Proxy. The Will dictates who should manage your estate at your death (the Personal Representative) and who should inherit your estate (your beneficiaries). Wills are not useful when the elder is alive but incapable or handling his or her finances. (Similarly, a POA is of no use post death of the elder).

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, nor has placed a trusted family member's name on his/her bank accounts, then no one will be granted access by the bank to the elder's funds. The family will be left with the option of filing for Conservatorship in probate court. This is an expensive proposition that involves an unbelievable amount of red tape.

In Hampshire County, for example, the probate court will appoint an independent advocate/attorney to see whether the elder needs a Conservator and whether the nominated Conservator is appropriate. The advocate is paid by the elder's estate. The Conservator must file annual accounts and the court will reappoint that independent attorney/auditor. If the Conservator wants to sell real estate or engage in asset protection Medicaid planning, the Conservator must petition the court for special authority and yet again, the advocate is appointed by the court.

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 go government bureaucracy. If you want to avoid the court delays, fees and intrusion into your personal financial affairs then sign a power of attorney.

Although power of attorney forms can be found on the Internet or at Staples, you should not sign one without consulting an elder law attorney. There are several points, which you need to address in the POA: Should the POA have authority to make gifts to achieve asset protection goals in case of nursing home placement? Including gifts of real estate? What if the POA dies before the elder? Can they get paid for their work? Can there be joint POAs? Should it take effect immediately or only when your doctor says you can't manage your finances? Can it establish a Trust for you? Can the agent change beneficiaries on annuities or life insurance? Are there particular financial institutions that require a certain type of POA?

In many instances, a power of attorney is more important than a Will. It would be a shame to have a POA and have it turn out to be defective. You wouldn't prepare your own Will would you? I don't try to fix my home heating system. What you pay now for estate planning save you money and headaches down the road for those who try to help you in your time of need.