Durable Powers of Attorney

The right and power to manage our own business and personal life is perhaps our most cherished gift. It is frightening to realize the likelihood that sometime during our lifetime we may lose the ability to make the decisions that affect our health and finances.

An individual who is "*unable to manage his own affairs*" is *incapacitated.* (The harsh word "incompetent" has lost favor). The onset of incapacity may be sudden (a stroke or accident) or gradual (dementia or Alzheimer's) and the duration may be short (an accident or surgery) or lifelong (dementia or Alzheimer's).

The procedure to determine if an individual is "*unable to manage his own affairs*" is determined by whether or not the individual has planned **in advance** for incapacity.

If the incapacitated person has no valid **Durable Financial Power Of Attorney**, no other person has the legal authority to act for him. In South Carolina, an incapacitated person is referred to as a "Protected Person." Guardianship and Conservatorship proceedings must be brought in the Probate Court of the county where the person resides to establish that the person is, in fact, "*unable to manage his affairs*." The Protected Person's spouse, an adult child, or other relative may petition the Court as an "Interested Person," alleging that the Person is incapacitated and asking the Court to appoint a Guardian and Conservator. A Guardian *Ad Litem* and a special "Visitor" will be appointed as independent representatives to protect the interests of the Protected Person. The Protected Person's physicians will testify concerning his mental capacity. If the Court finds that the Protected Person is *unable to manage his affairs* (incapacitated), the Court will appoint a Guardian and a Conservator, typically, the spouse or other family member named in the Petition.

The Conservator, in his capacity as Conservator, takes possession of the Protected Person's financial assets (cash, stocks, etc.). The Conservator must file an Initial Inventory and post a bond with the Court. Thereafter, an annual accounting must be filed. The Conservator must submit a budget to the Court, and any significant expenditures require prior Court approval. The Court may order the sale of stocks and securities, converting these assets to cash. The Protected Person's death terminates the Guardianship and Conservatorship, and a final accounting is submitted to the Probate Court.

With proper planning, the costs, publicity and potential disruption of a Guardianship and Conservatorship may be avoided. In South Carolina, the durable *Health Care Power of Attorney* (HCPOA) and *Durable Financial Power of Attorney* (DFPOA) provide a convenient alternative, and allow for the choice **in advance** of persons who will see to the personal medical needs and attend to the financial affairs if the Principal becomes incapacitated. A "Durable" Power of Attorney is a Power that survives the incapacity of the Principal. The DFPOA document must contain words to the effect that "this Power of Attorney shall not be affected by the incapacity of the Principal." The HCPOA appoints an Agent to make or carry out medical decisions on

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behalf of the Principal only in the event of the Principal's incapacity, thus eliminating the necessity for the appointment of a Guardian. The HCPOA contains a Living Will which makes it unnecessary to execute a separate Living Will document. Unlike the HCPOA, the Principal granting the Financial Durable Power of Attorney does not have to be incapacitated for the Power to be effective.

A well-drafted DFPOA will contain the provisions recently approved by the South Carolina Legislature that require third parties to recognize the Power and permit payment of compensation to the Agent.

The formal requirements for the execution of a DFPOA are the same as for the execution of a Will. Also, the executed DFPOA must be recorded in the County where the Principal resides before it is effective. A Power may be revoked. Most are not recorded until needed.

HIPAA is a federal law that imposes stringent new rules to protect the privacy of medical records. There is a concern that the Agent seeking to establish his Principal's incapacity might not be able to secure the necessary records. Further, physicians are reluctant to disclose information about the medical condition of a patient (the Principal) to unauthorized persons (the Agent, who can't be authorized without the information). Consequently, a well drafted HCPOA and DFPOA will contain language appointing the Agent as the Principal's Personal Representative for HIPAA purposes and authorizing and directing health care providers to release medical information to the Agent.

The most effective arrangement for the management of the assets upon disability is the funded revocable living trust. A trustee rather than an agent is appointed to act, and the trust generally provides for the care of family members while the trust owner (Settlor) is incapacitated. A DFPOA is still used for personal acts, but the trust "trumps" the power for assets in the trust.

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