
Attorney at Law

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Estate Planning | Wills & Trusts

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Powers of Attorney: Underrated Estate Planning Documents

POWER POINTS:

- *Powers of attorney are an integral part of any proper estate plan.*
 - *The costs and consequences of not having powers of attorney in place far exceed the cost of having the documents prepared.*
 - *Every adult who is responsible for his or her own health and estate should understand the benefits of powers of attorney and have a proper estate plan in place.*
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Powers of attorney are very flexible documents used to reflect your wishes for decisions regarding your health care and control of your assets if you are ever unable to make those decisions yourself. If you (the principal) are ever incapacitated, your powers of attorney dictate the individuals you have appointed to serve as your agent and successor agents to act on your behalf.

Recently, there have been several high-profile cases in which families have gone to court to fight for the authority to make the difficult decision of whether to continue life-sustaining treatment for a family member or to withdraw treatment. Whether the intentions of the family members are dictated by love or greed, the fact is that most of these conflicts could have been avoided if the proper estate planning steps had been taken during the individual's capacity.

Health Care Power of Attorney

A health care power of attorney allows you to reflect your wishes for organ donation and to authorize either your agent or your physician to determine when to discontinue life-sustaining treatment. Alternatively, you may choose to continue treatment under all circumstances for as long as possible. The document also allows you to name the agent and successor agents to make such decisions on your behalf if and when you are unable to do so.

There are several factors to consider when selecting your health care agent and successor agents, including geographic location, experience making such difficult

decisions and the emotional capability to do so. Though it is a common instinct to name co-agents, especially when children are named, in most cases it is better to name a single agent with one or more successors rather than co-agents.

Once the document is executed, you may want to provide a copy of your health care power of attorney to your physician. It is also recommended that you inform your agent and successors that you have had the document prepared along with the contact information of your estate planning attorney and any specific wishes you have regarding your health care beyond what is reflected in the document. In addition to reflecting your wishes for health care and choice of agents, the health care power of attorney also includes a Health Insurance Portability and Accountability Act (HIPAA) authorization which is necessary in order for your agent and successors to access your medical records and history.

Property Power of Attorney

A property power of attorney grants your agent significant authority to access your assets for your benefit in the event of your incapacity. The greatest flaw in many property powers of attorney is that they are drafted to be effective immediately upon execution rather than during incapacity only. There are only a few, limited circumstances when an immediately effective power is appropriate. It is crucial that the drafting attorney and the principal understand the consequences of this decision.

In addition to the standard powers granted by a property power of attorney, a properly drafted document must work with your estate plan, particularly any trusts that you may have, to provide flexibility. In many cases, this may be the final opportunity to qualify for government benefits in case of disability, avoid probate and minimize estate taxes at the principal's death. Due to the significant powers granted to your agent, in addition to being trustworthy, your property agent should be someone who will be able to work with your attorney and your accountant to make the decisions that are in the best interest of you and your family.

Consequences of Not Having Powers of Attorney

If you are incapacitated and do not have properly drafted and executed powers of attorney, your family may have to go to court in order to seek guardianship over your person and your estate. This is an expensive, time-consuming process that can be easily avoided. Additionally, if trust issues exist or arise, conflicts and costs may increase significantly. Cases of second marriages, estranged spouses or cases in which a relative has a frayed relationship with the principal are especially vulnerable to such disputes. Due to the complexities that exist in all families, it is important to work with an experienced estate planning attorney who can identify and address the issues that may arise. The costs and burdens of failing to do so can be significant for your loved ones.

Who Needs Powers of Attorney?

Powers of attorney are instruments used to appoint an agent to act on your behalf if you are unable to do so. Everyone who is a legal, competent adult is responsible for his or her own person and estate; any individual, regardless of age, can be incapacitated unexpectedly and should have a backup plan. For this reason, it is recommended that all legal adults have up-to-date powers of attorney in place.

While the elderly are more likely to succumb to physical and mental health issues, young adults can also fall victim to unexpected physical and mental ailments. In such cases, parents and other relatives of young adults have been denied access to the individual, their medical records and their assets due to the absence of powers of attorney. Young or old, once the individual is incapacitated, it is too late to have the document prepared and executed. The cost of having proper powers of attorney is minimal in comparison to the risks and burdens of not having them when they are needed.



Manish C. Bhatia is an Illinois attorney focusing his practice in the area of Estate Planning. Manish has focused his education and practice on Tax Planning, Estate Planning and Business Succession Planning since the first year of law school. He has also added Asset Protection, Trust and Estate Administration and Nonprofit Organizations/Charitable Giving to his fields of practice. Manish has served as Vice President of Professional Development for the Indian American Bar Association and board member of the Young Professionals of Evanston.

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