

Handling Incapacity through a Power of Attorney

A core document of any good estate plan is a Power of Attorney. A Power of Attorney is a legal document which you can use to give someone (your agent) the ability to handle financial transactions on your behalf. You can give your agent limited power (only for a specific transaction) or you can grant him or her general power over your affairs. You can also give the agent immediate authority or you can allow his or her authority to act to become effective only after the determination of your incapacity by a doctor. A Power of Attorney can save a great deal of time and expense should it be necessary for someone to handle your financial affairs for you.

The first thing to understand about a Power of Attorney is that it has absolutely no effect once someone passes away. Thus, although you may be able to handle an incapacitated family member's finances while they are ill, should that person pass away you can no longer act on their behalf based on the Power of Attorney. In that situation, if the deceased person doesn't have a living trust which gives you power to act on their behalf as a successor trustee, in most circumstances you will have to get permission from the court through a probate proceeding to continue to handle their affairs.

If a person is unable to handle their financial affairs and has not authorized someone else to do so with a Power of Attorney or through a living trust, it may become necessary to file a court proceeding called a conservatorship. The purpose of a conservatorship is to get court permission to act on behalf of an incapacitated person.

Circumstances may require a conservatorship in a given case even if the incapacitated person is a parent, child or spouse. I once had a gentleman contact me concerning a conservatorship for his wife who was in a coma due to an on-the-job accident. The wife had an adult daughter from a previous marriage. The daughter had passed away and left no husband or children. She had named her mother as the beneficiary of her life insurance policy but the mother could not collect on the policy due to her incapacity. In that case, the husband was required to get court permission to act on behalf of his wife to collect the insurance. The proceeding cost him several thousand dollars and many months in court. If the wife had given him a Power of Attorney before her accident, he could have simply shown it to the insurance company to collect the money for her.

If you were in a bad accident or had a sudden stroke or heart attack, who could make financial decisions for you or write checks to pay your bills? If you have not assigned someone to make decisions for you and to take care of your business affairs, one of your relatives or close friends may have to petition the court to get a conservatorship to allow them to make decisions for you. You have no choice in the matter -- sometimes a relative that you would least want to be in charge of your money is the very person appointed as the conservator. The important benefit of the Power of Attorney is that you get to choose who will act on your behalf and save the time and expense of court involvement.