



A DURABLE POWER OF ATTORNEY:

A Vital Part of Your Estate Plan

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The importance of a will, that is, ensuring your assets are distributed as you desire, is somewhat obvious. The same can be said, especially after the Terri Schiavo matter, of a Living Will to make certain that your medical wishes are carried out. However, often overlooked in dealings of this nature is the importance of a Durable Power of Attorney (“DPOA”).

To fully realize the importance of a DPOA one must first understand just what it is and what it means. Much like a Power of Attorney, in a DPOA an individual grants another person the power to act on his or her behalf in matters ranging from legal to financial in nature; essentially giving this person the power to step into your shoes as the grantor. These powers can be far reaching or very limited depending upon the language of the document.

A “general” power of attorney grants the most extensive powers; however, it terminates by law when the person granting those powers either dies or becomes mentally incapacitated (or the grantor

has the power to terminate the POA at anytime he or she sees fit).

The important feature of a DPOA is that it remains in effect even when the grantor becomes mentally incapacitated. On the surface this may seem to be just a slight difference; however, it is a distinction that if not made, could cost you not only a great deal of time and aggravation, but thousands of dollars in expenses.

Here’s how: since a general Power of Attorney terminates by law when the granting individual becomes mentally incapacitated, if this occurs, there needs to be someone in place with the legal right to make decisions and conduct affairs on behalf of that person. Therefore, an action will then need to be brought before the Superior Court for the appointment of a legal guardian. This process alone is complicated in and of itself.

In addition to (and before) the filing of a complaint in a guardianship action it is necessary to obtain two doctors certifications as to the mental capacity of the

individual. Additionally, the court will appoint an attorney for the alleged incapacitated person who will then compile information relating to the individual and prepare a report to the court. The court will then take into consideration the doctors’ reports, the appointed attorney’s report and any other relevant information before making its decision as to the capacity of the person. If the court agrees that the individual is indeed mentally incapacitated, a guardian will then be appointed.

This process has the potential to cost several thousands of dollars. Not only is the attorney filing the initial complaint entitled to legal fees, but so is the court appointed counsel. All of these costs are in addition to the fees of the doctors for their reports, as well as the filing fees of the court itself. What’s more, the court may require the appointed guardian to post a bond which would require payments of premiums (the bond acting as an insurance policy of sorts, covering the incapacitated person’s estate should the guardian fail to

properly perform his or her duties).

This is a far cry from the modest amount of time and investment involved in the preparation and execution of a DPOA...a “win-win” situation, as it were: it stays in effect even if the grantor becomes mentally incapacitated, it would eliminate the necessity of filing a guardianship action, and it allows the grantor to designate the individual or individuals who can make decisions on their behalf.

While not as prominent as wills and living wills, the importance of having a DPOA in place should not be ignored. Not only can it save thousands of dollars in expenses and ensure that your affairs will be handled by someone you personally choose to do so, it eliminates the stress that a guardianship action can place upon a family.

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