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Powers Of Attorney: A Look At The Basics

There are many legal documents and techniques that can be used to assist in the management of assets and health care decisions in the event of incapacity. One of these techniques is the Revocable Living Trust. Much has been written about the Revocable Living Trust, and its many advantages have been discussed in previous articles. Other important techniques that most people overlook are the powers of attorney for property and the powers of attorney for health care. This article will discuss the basics of these essential planning tools.

A property power of attorney (PPOA) is a document that allows you, the "principal", to designate another person, your "agent", to make and sign legal documents for you, or make financial decisions on your behalf. A general PPOA allows your agent to do anything that you could do as if you were acting personally. A specific PPOA restricts your agent and allows him, or her, only to do those things that are set out in the written power of attorney document. A PPOA can be as broad or as limited as you wish, simply by designating which duties you want your agent to perform. It is generally a good idea to be as clear as possible when setting forth these duties, such as selling your real estate, or writing checks. If you wish your agent to have the authority to make gifts of your property to your family, to take advantage of the annual gift tax exclusion (\$12,000 per year per donee), it is essential that this authority be included in the PPOA. It should also be set out whether the agent may make gifts to himself, otherwise the law prohibits acts of self-dealing.

A power of attorney, whether general or specific, can also be "durable". This means that the power of attorney will be effective when you are disabled or incompetent, precisely when you will need someone to act on your behalf. A power of attorney is made durable by incorporating language, set out in the Code of Virginia, or the laws of the state of your residence, that evidences your intent that an agent act for you while you are incompetent. Without this special language, your PPOA will not be effective upon your incompetence.

Anyone over the age of 18 and mentally competent may execute a PPOA. If there is a question about a principal's possible incompetence, it is usually wise to obtain a letter or opinion from a medical doctor regarding the principal's competence at the date of signing the PPOA.

Any person over the age of 18 can serve as your agent. This can be any trusted person, including your spouse, a child, a friend, or relative. Despite its name, a licensed attorney does not have to be your agent for your power of attorney. It is always a good idea to name at least one alternate agent in the

event your first choice is unable to act on your behalf, such as when they too become disabled, or die. Since your agent will have broad authority to act for you, the selection of a trustworthy agent is critical.

The PPOA becomes effective on the day that you sign the power of attorney document in the presence of a notary public. Your agent is immediately vested with the authority to act for you from that date on. Many people have heard of a power of attorney called a "springing" power. This is not a new type of power of attorney, but merely one that becomes effective on a later date, such as the day that you might be declared incompetent. The danger with "springing" powers is that any person who may rely on the agent's authority to act (banks, stock brokers, and others) may require your agent to prove that you are incapacitated. This could delay your agent from acting, and gives an opportunity for your PPOA to be legally challenged.

There are many advantages to the PPOA. First, by designating an agent to act for you in the event of your incapacity, you can avoid the need for the court to appoint a conservator to manage your assets. Conservatorship can be an expensive and frustrating way to manage your finances and property.

Unlike joint accounts, a power of attorney does not give your agent the ability to use your money or property for his or her own use. Under the law of agency, these assets must be preserved and used for your benefit. A power of attorney also allows your agent to manage these funds during your life, but at your death those funds pass to the persons whom you have designated in your will. With joint accounts, the asset could pass to the survivor, with no obligation to share these amounts with your family.

The PPOA also has its disadvantages. Because a PPOA is not under court supervision, there is always the possibility of abuse by the agent. If the agent acts improperly, your assets could be diminished. Although state law allows a court to intervene and order your agent to replace the lost funds, in many cases this may be too late, or your agent does not have the ability to replace your lost savings. This is why the selection of a trustworthy agent is so important.

A PPOA can be revoked or changed at any time while you are competent. You maintain control over who can act for you by retaining the ability to remove your agent, or restrict his or her actions on your behalf.

A health care power of attorney (HCPOA) is another type of power of attorney. A HCPOA allows you, the principal, to select an agent to make health care decisions for you. As long as you are competent and can communicate your health care desires you have the right to make all decisions, even if you have executed a valid HCPOA. The HCPOA is effective only in the event you are incompetent or unable to communicate your wishes to your doctors.

A HCPOA has become increasingly important as our life expectancies increase through medical advances. Courts and the state legislatures have recognized the right of each of us to control our health care and quality of life. A HCPOA allows us to decide whether or not we will be forced to take

medicines, medical procedures, or other life sustaining measures. The HCPOA does not presume that you want someone to "pull the plug" or that you want to hang on to life as long as possible. The HCPOA is the way you tell the world what your wishes are regarding your care. The United States Supreme Court in 1990 ruled that if we make our health care wishes known, preferably in writing, the state could not intervene to protect life. This is why a written HCPOA is so important.

A HCPOA is a written document, like the PPOA, which designates an agent to make health care decisions for you. The agent can be given broad powers, including making funeral arrangements, or donating organs. The HCPOA can be restricted, allowing you to customize the document to fit your particular needs and desires. The HCPOA sets out what you want to do for your health care. The agent's job is to follow your expressed directions and communicate these instructions to your health care providers.

Your agent should be someone you can trust to communicate your wishes. A spouse, child, friend or relative can serve as your agent. As with the PPOA, it is always a good idea to name at least one alternate or successor agent who can act for you if the first agent is incompetent or dies. If you wish, you can even appoint two or more people to serve as co-agents who will each be entitled to serve. However, the potential for disagreements among your agents makes it important to choose your agents wisely.

A HCPOA, like a PPOA, can be revoked or changed at any time, as long as you are competent. You maintain complete control over this document.

A HCPOA differs from a living will in that a HCPOA allows an agent to speak for you when you cannot communicate your wishes. A living will speaks for you only if you are terminal, and directs the doctors not to do certain things, such as putting you on respirators. A terminal condition is one that will probably result in your death within one year, regardless of the type of treatment you receive. Because of this definition, a living will is of limited use in directing your care. A HCPOA is broader because it allows your agent to communicate for you when you are incompetent, such as when Alzheimer's disease or other conditions exist that are not necessarily terminal conditions.

A HCPOA will prevent the need for the courts to appoint a guardian for your health care needs if you ever become incompetent. A guardian would not have the benefit of your written directions for your care, and you could be faced with medical care that is unwanted and expensive, simply because there is no guidance available to the guardian.

In order for you to maintain control over your property and health care decisions, it is essential that powers of attorney for your property and health care be executed now, before it is too late.

This article was prepared by Midgett & Preti PC and is intended to provide general advice only. For answers relating to a specific situation, you should consult a competent estate-planning lawyer.