

POWERS OF ATTORNEY, PART 2: ISSUES AND PROBLEMS

As I mentioned in my last newsletter, powers of attorney for health care and property can be very valuable. However, these documents can also create certain problems.

One of my biggest concerns is that an agent named under a power of attorney will somehow abuse the trust placed in him or her by the person who signed the power of attorney (who is sometimes called the “principal”). Because powers of attorney allow the agent such sweeping powers, an unscrupulous agent could cause a lot of financial damage to the principal. For instance, a property power of attorney could allow an agent to liquidate all of the principal’s bank or investment accounts.

The key here is the power of attorney’s “effective date” provision (that is, the date on which the person named as agent may begin acting in that role). In situations involving married couples, where one spouse names the other as agent, I feel very comfortable in allowing the power of attorney to become effective immediately. However, in other cases, I feel more conflicted – what about when a parent names a child, or an elderly single person names a more extended family member or even a caregiver? Those situations make me a bit more nervous. One remedy would be to make the power of attorney effective at a later date, but we then run the risk of eliminating one of the power of attorney’s main benefits: avoiding the need to go to court. For instance, I have seen powers of attorney that become effective upon a court finding the principal to be disabled, but that defeats the purpose. Another option would be for disability to be determined by a physician, although the patient privacy protections created by HIPAA (the Health Insurance Portability and Accountability Act of 1996) may make a physician reluctant to assist in such a determination.

For more information regarding powers of attorney, please consult a qualified estate planning attorney.

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