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# Planning for Incapacity: Controlling Your Legal Affairs as You Age

Few of us are comfortable talking about illness, disability, or death. However, these issues won't go away just because we refuse to confront them. In many cases, the failure to plan for your own illness or disability will only compound the problem. In order to help you understand how addressing such issues head-on can help you legally, and maybe even emotionally, prepared, YourLaw is presenting the following primer on an important legal tool—the power of attorney.

## **Q. What can I do to make sure that people consider my wishes if I become incapacitated?**

A. Make Plans now, while you still have capacity. The first priority is to make sure that, in the event of incapacity, someone of your choice is authorized to act on your behalf, and/or to tell other people how to care for you and your property.

There are different types of planning tools that can help you accomplish this goal. Some tools, including the power of attorney, joint property arrangements, and living trusts, can help you manage your property and financial affairs. Others, including advance-directives for health care, can help you address your health-care concerns, including decisions to be made near the end of life. The details regarding these documents vary by state; however, some general principles apply. You should work with your attorney to create the right plan for your specific circumstances.

While in this issue we focus just on powers of attorney, future editions of YourLaw will look at advance-directives and living trusts.

## **Q. What is power of attorney?**

A. A power of attorney is a document in which you (the principal) grant certain authority to another person (the agent or attorney in fact) to act on your behalf. A power of attorney may be very specific—for example, authorizing a person to sell a car for you, and nothing more. Or it can be very

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broad, allowing the agent to do almost anything on your behalf. A general power of attorney grants a person broad authority to handle virtually all types of financial matters. Note that the Social Security Administration will not permit your agent, even through a general power of attorney, to cash or deposit your Social Security check.

## **Q. Will a power of attorney be valid if I become mentally incapacitated or incompetent? Will a power of attorney be valid if I become mentally incapacitated or incompetent?**

A. In most states, a power of attorney is not valid if you become incapacitated, unless it's a durable power of attorney. A durable power of attorney clearly states that you intend the power to continue if you become disabled or incapacitated. It generally remains in effect until you deliberately revoke it or you die. In some states, your durable power of attorney is terminated if a guardian is appointed for you (although appointment of a guardian is usually unnecessary, because the durable power of attorney takes care of the management of your affairs).

## **Q. Do I need a lawyer to write a durable power of attorney?**

A. While not required, it is advisable to ask a lawyer to draft your durable power of attorney. A lawyer can make sure that your document meets your state's requirements and that the powers you wish to give your agent are actually spelled out in language that will be legally effective to protect your interests.

Some powers need to be very clearly spelled out—for example, the power to make gifts or loans or file tax returns. Some states require a specific format or specific wording in the document. Certain states offer do-it-yourself, short-form durable powers of attorney. These documents allow you to simply mark off the powers to be granted to the agent, with state law providing an in-depth definition of what each power means. However, even if you're using these simplified forms, legal consultation is advisable.

## **Q. Whom should I name as my agent under a durable power of attorney? Does the person have to be a lawyer?**

A. Your agent does not have to be a lawyer. In most states, it can be any adult or an institution. However, it should be someone who knows you well and whom you trust completely to manage your affairs. After all, decisions made by your agent can have tremendous consequences. Your agent has to carry out your wishes and should always act as you would choose or with your best interests in mind. If there is no one whom you would trust with this power, other planning tools may suit you better.

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## Q. How may I ensure that my agent under my power of attorney will manage my affairs properly after I become incapacitated?

A. Your power of attorney should contain specific guidance for what is expected, including your agent's particular duties, responsibilities, and limitations. YOU can also build in some oversight by requiring annual accountings to other family members, or requiring co-signatures for large transactions.

## Q. Who decides whether I'm incapacitated?

A. You can specify how you wish to have your incapacity and mental status determined if the need should arise. For example, through your durable power of attorney, you can name a doctor or particular mental health professional who will be responsible for making this determination, or you could say that if two doctors certify in writing that you lack capacity, then your power of attorney becomes effective. Any doctor or clinical psychologist who makes evaluations of capacity should have experience in this area. If you provide no instructions, then a court may ultimately have to decide the issue, guided by generally accepted standards.

As these questions show, using a power of attorney to plan for your possible incapacity can be key to ensuring that you, your affairs, and your family are taken care of. Working with your attorney when drafting such documents will likely save you some time and headaches, particularly if you have any complex issues (such as owning a small business, having a number of assets and investments, or having children from a previous marriage). Powers of attorney work like many legal tools: an ounce of prevention is worth a pound of cure. Even through a power of attorney may seem straightforward and simple, these tools are important legal documents outlining rights and responsibilities for both sides. In the end, you can't be too careful when protecting your rights, especially when your finances may be on the line. A simple review of your planning needs by your attorney will certainly be worth your time if it ends up providing you and your loved ones with peace of mind.

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