

**SENT FROM:**  
**2100 Genesee Street, Utica, NY 13502**  
**Ph: 315.624.9600 Fax: 315.624.9604**

119 Schuyler St. P.O. Box 26  
Boonville, NY 13309  
Ph: 315.942.4444 Fax: 315.942.4445

## **The Dangers of Not Having a Power of Attorney**

By James S. Rizzo, Esq.\*

*“A man who procrastinates in his choosing will inevitably have his choice made for him by circumstance.” - Hunter S. Thompson*

Clients are often surprised when I tell them the Power of Attorney is arguably the “most urgent” document to have completed, with a Will and Health Care proxy as close runners up. Ideally, all three documents should be in place for anyone over 18. However, if you have a short or long term health setback where you cannot manage your own assets and have not properly authorized someone to handle them, your return to health may be met with overwhelming financial strain. With a Power of Attorney, you designate which individuals are in control of your assets and can take care of your affairs if you are unable to do so or are incapacitated.

The following are just a few of the common and very avoidable problems that can arise without an up to date Power of Attorney in place:

1. **Your family may need to undertake a Guardianship Proceeding.** If you become incapacitated, your loved ones may be forced to file for guardianship in order to have court appointed authority to act on your behalf. This is true even if you are married, in order to allow your spouse to act on your behalf. The legal cost of a guardianship proceeding can be in the thousands of dollars and take several months to complete. It may also increase the potential for animosity and expensive litigation if other family members disagree and challenge the request for guardianship.
2. **Serious Financial Problems.** This is a broad and potentially devastating category. If bills, accounts, mortgages, etc., are only in your name, someone will need the authority to pay such debts on your behalf. Bad credit, house foreclosure, loss or lapses of insurance coverage, having judgments and liens filed against you and being forced into bankruptcy are just some of the avoidable financial black holes one may fall into without a responsible adult having the authority to manage your debts.
3. **Overwhelming Nursing Home bills and denial of Medicaid Eligibility.** With the average cost of nursing homes in Upstate New York ranging between \$10,000 - \$11,000 per month, even one month of Medicaid ineligibility can result in great financial distress. The Medicaid application process, even with qualified attorneys involved, requires a diligent and responsible person to gather a multitude of records, sign numerous documents and follow through with the myriad requirements to

achieve Medicaid coverage. If a Medicaid application is denied, generally you will need a personal representative to proceed with an appeal or fair hearing to get coverage in place.

4. **Inability to obtain Medical Records.** An up to date Power of Attorney should include an authorization for your appointed agent to take care of health care billing and payment matters and access medical records in compliance with the strict privacy requirements of the Health Insurance Portability and Accountability Act (“HIPAA”). Without such authority, even as a spouse or other close family member, you may be denied access to review records and ensure your loved one is receiving proper treatment and care. This becomes even more urgent if you suspect medical malpractice or mistreatment by providers.
5. **Inability to transfer assets if necessary.** There can be a host of unfortunate circumstances where an estate attorney may recommend transferring an asset such as a home or other large assets out of an incapacitated person’s name. The most common circumstance, and one usually fraught with peril without a qualified estate attorney involved, is during the Medicaid application process when a person requires nursing home care. There may be other tragic circumstances, such as a person in the final stages of life, where transferring an asset (while the person is still alive of course) can avoid a long and protracted probate proceeding after they die. Such a transfer of assets can only take place if the Power of Attorney form is up to date and has a fully executed “statutory gift rider” section in place.

While there are many more unexpected and stressful circumstances that can ensue without a Power of Attorney in place, the good news is these situations can be easily avoided by meeting with an estate attorney for usually less than an hour. The Power of Attorney should also be an inexpensive component of any estate plan. It provides peace of mind and substantially eases the emotional and financial burden on your family members by clearly stating who is in charge and allowing those persons to resolve matters efficiently on your behalf should these situations arise.

In short, do not let procrastination and chance determine what happens to your hard earned assets!

*James S. Rizzo is an attorney with the law firm of Hilton Estate & Elder Law, LLC, with offices in Rome, Utica, Boonville and Lowville, NY. He has over twenty-two years of legal experience and concentrates in Estate Planning matters, including Wills, Revocable and Irrevocable Trusts, Powers of Attorney, Health Care Proxies, Asset Protection, Nursing Home/Medicaid planning and related Litigation issues. He can be reached at (315) 624-9600 or [jsr@hiltonlawny.com](mailto:jsr@hiltonlawny.com) for a free, confidential initial consultation.*

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