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What is a Power of Attorney and Why You Need One!

By James S. Rizzo, Esq.*

A Power of Attorney is arguably one of the most critical and important estate documents you can complete during your lifetime and is equally the most underrated and misunderstood. In short, a Power of Attorney designates which individuals are in control of your assets and can take care of your affairs in the event you are unable to do so and/or are incapacitated.

If you completed a Power of Attorney prior to September 2009, you should be aware the State of New York substantially revised and expanded the required form, including a separate rider for gift giving and asset transfers, explained below. One of many important revisions was to authorize an 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). While the old forms will generally remain effective unless revoked, any form older than 2009 should be reviewed and updated with an attorney concentrating in estate planning to ensure you are getting the maximum benefits from your Power of Attorney.

If you become incapacitated without a Power of Attorney in place, you run the risk of bills not being paid, services discontinued, house foreclosure, benefits lost (including Medicare and Medicaid coverage) and a host of other easily avoidable financial pitfalls. These risks are exacerbated if you are single and/or have accounts, funds and real property solely in your name. While completing a Power of Attorney should take less than a half hour and be an inexpensive component of an estate plan, the cost of not having one can be great.

Without a Power of Attorney, and besides the potential financial losses listed above, your loved ones may be forced to undertake a guardianship proceeding in order to have court appointed authority to act on your behalf. The legal cost of a guardianship proceeding can be in the thousands and take several months to complete. It may also increase the potential for litigation if other family members challenge the request for guardianship. An up-to-date Power of Attorney avoids this unnecessary situation.

Your Power of Attorney should name at least one primary agent and one successor agent, although more than one person can be named for each. A common and understandable fear of granting another person Power of Attorney authority is that they will not carry out their duties and, instead, spend or waste your assets on themselves or in a way you never would have authorized. Therefore, care should be taken to only appoint your most trusted family members

and/or friends who have a clear understanding of what you would want done in a given situation. You should discuss the Power of Attorney with your agents to avoid any misunderstandings.

There are also several checks and balances you can impose on your agents if trust is a factor. A modern Power of Attorney has an option requiring agents to act together in any actions they take on your behalf (i.e., signing checks together, going to a bank together, etc.). You may also appoint monitors over your agents, requiring your agents to report to these monitors every transaction they undertake on your behalf. Your agents are also required to sign a notarized statement that they will act, among other things, in your best interest and keep records and receipts of all their actions.

Another common misconception of a Power of Attorney is that accounts can be accessed or documents signed on your behalf after you pass away. This is inaccurate as any authority granted under a Power of Attorney expires upon your death, which is when your Will and any other post-death estate documents take over.

The statutory gift rider section of the Power of Attorney is also an essential estate planning tool. The gift rider can authorize your agent to both gift and make asset transfers in conjunction with a nursing home application, long term hospital stay or to assist with any estate tax issues on your behalf. Since the gift rider can provide expansive asset transfer powers, it should be reviewed with an estate planning attorney to fully understand its benefits and provide additional safeguards if necessary.

The Power of Attorney is one of three core documents (the others being a Will and Health Care Proxy) all adults should have in place. Completing a Power of Attorney provides peace of mind that your personal and financial matters will be properly tended to if you become incapacitated. It also 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 that situation arise.

As a general rule, if you have not completed or updated your estate documents in over five years, you should consult with an estate planning attorney to review, update and/or complete them as soon as possible.

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-one 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 jsr@hiltonlawny.com or (315) 624-9600 for a free, confidential initial consultation.

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