

## **THE DURABLE POWER OF ATTORNEY**

Powers of attorney have been used for many years to authorize the handling of property affairs for a person when that person cannot be present at the time a document must be signed or when property must be managed or cared for. The person making a power of attorney is referred to as the principal or the donor of the power of attorney and the person authorized to act on the principal's behalf is referred to the agent or donee of the power of attorney. The power of attorney can be limited in duration and in the scope of the powers granted. A power of attorney ceases to be effective upon death and ceases to be effective on the disability of the principal. In other words, the agent or donee named in the power of attorney can act on behalf of the principal only when the principal is capable of performing the act himself or herself but is unable to do so because they cannot be present to perform the act.

The 1985 the Wyoming Legislature enacted a statute which allows the creation of a durable Care of Attorney. A durable power of attorney is different from a common power of attorney in that the agent may act on behalf of the principal even if the principal becomes disabled or incompetent for physical or mental reasons. A durable power of attorney has therefore become an important estate planning advice to provide for the unintended consequence of a person's disability, illness or disease.

A durable power of attorney can be made effective immediately upon its execution or may be worded so that it does not become effective until the person signing the power of attorney becomes disabled.

A durable power of attorney can avoid the necessity of a conservatorship for a person who is unable to care for his own property due to disability. The simple document can therefore avoid a great deal of unneeded cost and delay that is caused by conservatorship proceedings. A conservator is a person who takes care of a person's estate when they are unable to do so for themselves. The procedure for appointing a conservator is to file a petition for conservatorship with the probate court in the county of residence of the incompetent. Wyoming law requires that the conservator, after his appointment, make an accounting of the property to the court and an appraisal of the property will have to be obtained. The conservator must make annual accountings to the court, must obtain and file a bond for his faithful performance and will require prior court approval for any major dispositions of the incompetent's estate. Although each conservatorship may vary greatly in cost, it is not unusual to see fees ranging from \$500 to \$1,000 for the establishment of a conservatorship and annual fees paid to a conservator and for preparation of the annual accounting each year in the range of \$300-\$600 per year. This can all be avoided with a durable power of attorney.

The powers granted in a durable power of attorney can be as broad or as limited as the principal desires. It is generally preferable to be somewhat specific about various powers that are included. Other than general powers to deal with bank accounts and general management powers, one should consider including powers to file income tax returns, negotiate and enter into leases including mineral leases, powers to transfer and register motor vehicles and powers to make gifts on a regular basis consistent with the principal's custom prior to his incapacity.

A durable power of attorney, for the minimal cost of preparation and execution is perhaps one of the most cost effective estate planning tools available when comparing its cost to that of a conservatorship. The durable power of attorney may be revoked at any time. It may also name successor agents who can act on the principal's behalf if the original agent is unwilling or unable to act for the principal.

As with any other estate planning document, you should carefully choose the person or persons who you name as your agent. That person should be well-qualified to handle financial affairs on your behalf if the need arose. Because of the broad powers that are generally granted to an agent under a durable power of attorney, you must feel securely confident in their loyalty and faithfulness in carrying out the powers you enumerate without taking advantage of your incapacity. This is especially true since there is no accounting made by the agent and there is no court or other responsible entity which will monitor the agent's use of power.

Because of the inherent risk in granting an agent broad authority in a power of attorney, some people are reluctant to use them as an estate planning device. Whether or not a durable power of attorney is appropriate for you should be considered in your overall estate plan.

## **HEALTH CARE DIRECTIVES**

Health care directives are used to designate the person or persons to make health care decisions on your behalf when you are incapable of making those decision for yourself. A directive typically empowers the agent to examine and review your medical records, authorize admission and treatments, and make decisions about the administration of treatment or withholding treatment in situations of terminal illness or coma.

The selection of agents and successor agents may, oftentimes, be different from those selected for a durable power of attorney. The person or persons named in a durable power of attorney may be right for managing your property interests but not appropriate for making healthcare decision, particularly when life and death of the patient is at stake. Health care directives are effective only when the patient lacks the capacity to make decisions for himself or herself. The designated agent and successor agents have no authority until the patient is incapacitated.

Health care directives are an important estate planning tool in that they not only let you designate who will make health care decisions for you, but also the extent or limitation of their authority. As with durable powers of attorney, the proper designation of a health care agent will avoid the necessity of seeking appointment of a court approved guardian, thereby avoiding significant costs. As with conservators, guardians remain under the supervision of the probate court and are required to make semi-annual reports to the court as long as the ward remains incapacitated.

Wyoming law also permits designation in a health care directive designation of the person

or persons to make decisions regarding autopsy and disposition of last remains. The health care directive may also incorporate your desires regarding cremation and authorization of anatomical gifts.