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July 5, 2015

## Responsibilities of an agent under a power of attorney

Power of Attorney documents are an extremely important part of estate planning. The key word is “planning” since these documents, as well as Wills, must be completed while the person signing the documents has capacity. Once dementia or some other type of situation that affects one’s ability to comprehend is evident, these documents cannot be put in place. Power of Attorney documents (for finances and Healthcare) are planning for life when you might become physically or mentally incapacitated.

In a Will, the person who administers the Estate is an “executor” or personal representative. This person’s role is fairly well defined by law and custom. His or her “job” does not commence until death of the testator. On the other hand, the Agent under a financial Power of Attorney has a less clear role. Generally, their “job” does not start until the person signing the document, the “principal,” needs the Agent to act. In some documents the principal must be declared incapacitated by two physicians. In other documents the Agent can act if he or she is needed, but in all cases the Agent is to act in the principal’s best interests. The Agent Acknowledgment form for the new Power of Attorney document for finances (effective as of January 1, 2015) states the Agent agrees to “act in accordance with the principal’s reasonable expectation to the extent actually known to me and, otherwise, in the principal’s best interest, act in good faith and act only with the scope of authority granted to me by the principal in the power of attorney.”

The principal is warned on the notice page that a Power of Attorney is a very powerful document. The principal is giving a huge amount of control or potential control over his or her finances. The limits to this control are within the document and should be reviewed carefully with one’s attorney. Furthermore, the principal should be very cautious in whom he or she appoints as an Agent. However, as powerful as this document is, and no matter how necessary it might become, it does **not** give an Agent the power to write a new Will for the principal, despite a common misconception.

Many Agents are unsure as to how or when to act under a Power of Attorney document. Most Healthcare Powers of Attorney can only be used if the principal is unable to speak or make a rational decision for himself. Then the Agent will follow the wishes laid out in the document, acting on the best interests of the principal as known or expressed. On the other hand, a financial Power of Attorney Agent is a fiduciary who must act loyally on behalf of the principal and not on their own behalf. The Agent is to attempt to preserve the principal’s estate plan provided it is in the principal’s best interest. For instance, there may be times that the principal intended to give his or her money to children, but the need for long term care intervenes. Or the Agent may feel that mother really meant to change her estate plan eliminating a child who was perceived as depleting mother’s estate for his or her own best interests, but if mother did not make that change when she was able, it is not up to the Agent to do so now when mother is incapacitated.

The key to being an effective Agent and not risking liability is to act in good faith, with care, competence and diligence. Be sure that you read the document carefully and consult an attorney if you have any questions.