LEGAL EASE

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Is it worth completing power of attorney documents?

Power of Attorney documents, both for finances and healthcare, are very important "life planning" documents. These documents provide for you to choose who will make financial decisions and healthcare decisions for you if you are unable to do so during your lifetime, either ongoing (with loss of cognitive function) or temporarily (such as during an illness or after an accident). If and when the time comes that your named agent needs to use the documents, it is often impossible to execute them at that time. Likely, the principal (the person who needs to confer the power) is incapacitated and unable to sign a document, a process that must be done when the principal is able to understand the Power of Attorney and choose his or her Agent. Oftentimes the only option then is to petition for a guardianship which is expensive, time consuming, and strips the individual of all rights to make decisions, including who will serve as guardian. The court then oversees all financial transactions.

An argument that is often advanced is that many financial institutions refuse to accept Power of Attorney documents. There was an article in the "New Old Age" section of *The New York Times* recently entitled "Finding out Your Power of Attorney Is Powerless." The article highlights the not uncommon practice of financial institutions requiring their own paperwork to be signed instead of accepting a valid Power of Attorney document. Banks will say that they are avoiding elder financial abuse but it appears that the driving force is actually avoidance of liability. Pennsylvania has passed laws that a Power of Attorney that meets the statutory guidelines must be accepted. Requiring customers to sign the bank forms can result in unintended problems, such as the inadvertent creation of a joint account with its accompanying issues, or provisions in the bank's forms that do not comport with the principal's intentions.

At the root of the issue is that there is a lack of understanding about Powers of Attorney both by the consumer and the financial institutions. The Pennsylvania legislature passed a new Power of Attorney statute in 2014 (taking effect as of January 1, 2015) to address the concern of financial institutions regarding liability. However, many bank employees still do not understand what constitutes a valid Power of Attorney, and some consumers still do not understand the importance of having a well written Power of Attorney done earlier rather than later. A Power of Attorney covers more situations than having a form signed a Wells Fargo that only applies to accounts at Wells Fargo.

Some of the examples in the article refer to issues that elder law attorneys often encounter. A Power of Attorney to sell real estate is usually a "limited" Power of Attorney and only applies to that one transaction. Powers of Attorney do not become "stale" although bank employees may believe that. Powers of Attorney are active until the principal dies or revokes the document. It is not necessary that two physicians state that the principal is incapable of making financial decisions unless the document itself states that is needed.

Some people balk at spending the money to have any attorney draft the documents. However, the alternative if the principal becomes incapacitated if the document is inadequate is to file for a guardianship, rarely the preferred method. It is a good investment to be sure that your documents are not powerless when the time comes to be used.