



THE IMPORTANCE OF PLANNING FOR INCAPACITY

We all want to think that we will live forever, and that we will be healthy and capable of managing our affairs right up to the end of our lives. But the truth of the matter is that this will likely not be the case. Therefore, it is vitally important to prepare for our incapacity.

By far the best way to plan for incapacity is to designate in writing who it is that will be responsible for your personal affairs if a time comes that you are not able to manage those affairs for yourself. Such a designation should be made with regard to health care decision making through an Advance Directive for Health Care and under a Durable Financial Power of Attorney with regard to financial decision making.

The failure to plan in advance for incapacity can result in the need for a court-supervised Guardianship and/or Conservatorship. Proceedings for the appointment of a Guardian or Conservator are costly and time-consuming and can put great strain on families during a time of crisis. Additionally, the individual a court appoints to oversee your affairs might not be the person that you would have chosen. Planning for incapacity through the use of an Advance Directive for Health Care and Durable Financial Power of Attorney allows you to maintain control by dictating who is responsible for handling your care and finances at a time when you are not able to do so.

Advance Directive for Health Care

An advance directive is a written document whereby a patient expresses to health care providers his or her desires regarding medical treatment. These directives take different forms and may be referred to as Living Wills, Health Care Powers of Attorney or Health Care Proxies. In Georgia, there have traditionally been two documents which were used as advance directives – the Living Will and the Durable Power of Attorney for Healthcare.

As of July 2007, however, Georgia has now sanctioned the use of the Advance Directive for Health Care (ADHC). The ADHC combines the Living Will and the Durable Power of Attorney for Health Care into a single document and serves not only to designate an agent to make health care decisions on your behalf, but also to express your wishes with regard to those health care decisions.

In signing an ADHC, you are designating an agent to make medical decisions for you in the event you are unable to make such decisions yourself. Therefore your agent should be a family member or friend that you trust implicitly and who you are confident will follow your wishes. Before executing an ADHC, you should talk to the person whom you want to name as your agent about your wishes concerning medical decisions, especially life-sustaining treatment.

Durable Financial Power of Attorney

By signing a Durable Financial Power of Attorney (DFPOA), you (the “principal”) are granting another person (your “agent” or “attorney-in-fact”) the legal right and power to manage your financial affairs. The attorney-in-fact, in effect, stands in your shoes with regard to financial and business matters. The attorney-in-fact can do whatever you could do—withdraw funds from bank accounts, trade stock, pay bills, cash checks—except as limited in the DFPOA. This does not mean that the attorney-in-fact can just take your money and run. The attorney-in-fact must use your finances as you would for your own benefit.

Unless the power of attorney is “springing,” it takes effect as soon as it is signed. A “springing” power of attorney takes effect only when the event described in the instrument itself takes place. Typically, this is the incapacity of the principal as certified by one or more physicians.

It is important for both the principal and the agent to understand that signing a DFPOA does not take away the rights of the principal to act on his own behalf. Only a court can take away a principal's rights in a conservatorship or guardianship proceeding. An agent under a DFPOA simply has the power to act along with the principal and in the best interest of the principal. An agent can be held liable to the principal for acts of willful misconduct or gross negligence.

A principal may revoke a DFPOA at any time. To revoke the DFPOA, a principal would need to destroy the original document and all known copies and send a letter to his or her attorney-in-fact telling the agent that his appointment has been revoked. From the moment the attorney-in-fact receives the letter, he or she can no longer act under the DFPOA. If the DFPOA has been recorded in the county deed records, then a revocation of the DFPOA should also be recorded in that county.

An attorney-in-fact can be compensated for his or her work if the principal has agreed to pay the attorney-in-fact. In general, the attorney-in-fact is entitled to “reasonable” compensation for his or her services. However, in most cases, the attorney-in-fact is a family member and does not expect to be paid. If an attorney-in-fact would like to be paid, it is best that he or she discuss this with the principal, agree on a reasonable rate of payment, and put that agreement in writing. That is the only way to avoid misunderstandings in the future.

It is very important that the attorney-in-fact keep good records of his or her actions under the power of attorney. That is the best way to be able to answer any questions anyone may raise. The most important rule to keep in mind is not to commingle the funds the attorney-in-fact is managing with his or her own money. Keep the accounts separate. The easiest way to keep records is to run all funds through a checking account. The checks will act as receipts and the checkbook register as a running account.