

Who Will Transact Your Business When You No Longer Can?

By Wesley E. Wright and Molly Dear Abshire, as published in the Houston Chronicle Senior Living Section on June 1, 2002.

For those who failed to plan for the event of future incapacity, they may now or will be the subject of a guardian proceeding in a Probate Court. Why? One reason revolves around property management. If you have a bank or brokerage account, real property such as a homestead or rental houses, or other forms of property, how will they be managed when you fall subject to a disability in the future? Although no one plans to have an accident, or a debilitating disease or other illness that causes serious loss of bodily functions, it happens every day. Who will pay the bills when your cash or securities can not be accessed? Who will sell property that needs to be sold when title is held in your name?

In some cases, people turn to management trusts which are commonly referred to as living trusts. For the majority of planners, however, the problem will be solved by using a less burdensome vehicle known as a durable power of attorney for property.

A power of attorney is a transfer of authority by principal to a person whom the principal appoints as his attorney-in-fact. With the power of attorney, the principal confers upon the attorney-in-fact the authority to perform certain specified acts, or a broad range of acts, on behalf of the principal.

A durable power of attorney is a written power of attorney which contains words expressing the principal's intent that the authority conferred on the attorney-in-fact will continue despite, and not be affected by, the principal's subsequent incapacity.

Typically, durable powers of attorney are effective immediately upon execution. Sometimes, however, a principal is reluctant to delegate broad powers to anyone while he or she is still competent. Such a principal may want to execute a springing power of attorney, which becomes effective upon the disability of the principal and not before.

It is well to point out, however, that reluctance is sometimes an indication of a lack of trust in the agent named. If so, then it is doubtful that the trust will be there later for the springing power. Most people elect to have the power of attorney effective immediately.

Although Texas utilizes a statutory power of attorney, it is wise to consult an attorney regarding modification considerations. Gifting powers are frequently overlooked and without the power, subsequent gifts made are invalid and open the agent up for allegations of fraud and exploitation. Also, the IRS can disregard the gifts if no power was given causing the gifted amount to be brought back into the gross estate of the grantor for federal estate tax purposes. A valid gifting clause is frequently useful in gift tax and Medicaid planning scenarios.

If you already have a power of attorney, here are a few items to check:

- Make sure the document identifies you as the grantor of the power and that it names an agent and at least one or two alternates in the event an agent is unable or refuses to serve, or

predeceases you.

- Look to see if the power of attorney is durable, i.e., the power will endure your disability and will not expire just because you become disabled.
- Check to see if a gifting power is granted. If so, is the power adequate? Make sure it is signed by you and notarized. Have you told your agent about it? Does he or she know where it is? Have you provided the agent with the power of attorney?

This document is part of any intelligent estate plan and you do not want to become disabled without it. Therefore, either find a way to guarantee that you will never become disabled, or better look into obtaining a durable power of attorney for property.