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PLANNING for DISABILITY with the POWER OF ATTORNEY

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INTRODUCTION to the POWER OF ATTORNEY

Power of Attorney: A Powerful Tool

By signing a power of attorney, you can appoint an agent to take care of your personal business or to make health care decisions for you. An Illinois power of attorney is powerful. You can authorize the agent to take care of all your affairs without court supervision. You can empower your agent to sell your home. You can even give the agent power over your life and death.

Having somebody who can make decisions for you when you can't do it yourself is a wonderful thing. Nothing I have done as a lawyer has been more helpful to my clients and friends than helping them prepare power of attorney papers. The lives of dear friends have been enriched; needless suffering has been averted. But because the power of attorney is so powerful, it's also dangerous. By avoiding the inconvenience and expense of court supervision you also waive court protection. Broad powers let the agent take *care* of you... or take *advantage* of you.

The decisions you make in preparing a power of attorney are therefore as important as any decisions you will ever make.

Our power of attorney law lets you write your own rules. You can't name your doctor as your health care agent, but otherwise, you can delegate any power you want, to whomever you chose, under whatever terms you specify. If you don't specify terms, the law fills in rules for you, but you can over-ride them if you want. For example, if you don't say anything about whether your agent can be paid, a *property* agent is entitled to be paid but a *health care* agent isn't. If you want to forbid pay for your property agent or allow pay for your health care agent, you have to say so.

Why a Power of Attorney is Important

We believe that every Illinois resident should appoint a health care agent and a property agent. Here's why.

Health care

The Illinois Health Care Surrogate Law allows a family member to make some medical decisions for you in some circumstances. We do not recommend that you rely on that law. The family member might not be the person you would choose. The law does not protect you against differences of opinion in the family. Finally, it is the attending physician who decides when the law applies, so the doctor has effective veto power over any decision made in your behalf.

Property

The only people who can use your bank accounts to pay your bills are you, an agent you appoint, and a guardian of your estate. If you don't appoint a property agent and can't speak

for yourself, then your assets cannot be reached until a guardian is appointed by a judge. The guardian may not be the person you want and must get advance court approval of every decision.

You can try to protect yourself from a guardianship by putting your assets in a trust or joint tenancy, but joint tenancy and trusts have other results which may not be good for you. Besides, there are some things even a trustee can't do for you, like sign your tax returns and claim your refunds. A power of attorney can be useful even if you have all your property in a trust or in joint tenancy.

Powers of Attorney, Living Wills, Wills, Living Trusts: What's The Difference?

Health care

A living will does some of the work of a health care power of attorney, but they are not the same thing. The power of attorney is much better.

First, a living will is a single purpose document. It only applies in *certain circumstances*. Your death must be imminent; it can't protect you from a long period of excruciating pain or humiliating dependence. It only allows *specific actions*. It does not allow withdrawal or withholding of feeding tubes. Moreover, if the circumstances apply, the actions *must* be taken. There is no provision for discretion or for consideration of special circumstances. A living will is like a land mine. Until it's triggered, nothing happens at all. Once it's triggered, it explodes.

The health care power is much broader and more flexible. It can allow your agent to make *any* health care decision for you. Like the living will, it can authorize ending treatment. But, if you prefer, you can also require that treatment be *continued*. And the health care power can cover entirely different questions. It can allow the agent to authorize experimental treatments, admit you to a convalescent home, release your medical records, or fire your doctor. The health care power lets you delegate crucial decisions to a human being you trust, who can consider all the subtle complexities of life.

Property

A will tells what happens to your property after your death but it has no effect while you are living. The executor you nominate in a will does not have any power until after your death. A property power of attorney works the other way around. It lets your agent act while you are alive but has no effect after your death. Your agent's property powers end when you die, so the agent can't close your bank accounts or pay your bills.

A living trust can do most of the work of the property power of attorney and of the will. For some people a living trust is a smart way to provide disability planning and to avoid probate. For other people it is more trouble than its worth. We have a memo called "Living Trusts" which may help you decide whether to use a trust-based plan.

“Do It Yourself?”

You can prepare a statutory power of attorney without a lawyer. It's better to write one for yourself than to go without, but we think it's worth getting help. A lawyer can help you in four ways: explaining the law and the printed form, phrasing your instructions so they have the legal effect you intend, guiding you through signing technicalities, and, ideally, providing sensitive counsel to help you make wise choices.

Naturally, we can explain the law and the forms, helping you understand the choices you can make and the effect of the papers you sign. You probably won't read the statute. Even if you do, you may miss something which is important to you. Your lawyer may miss it too, or may not recognize that it's important to you, but you improve your odds.

Drafting is another typical part of the lawyer's work. Lawyers are trained to use language to achieve specific goals. When a doctor, bank officer, or court reads your form, you want them to understand your intentions correctly. So a lawyer is important if you want to make any changes from the standard form.

We can also try to make sure that the forms are properly signed. The people who designed the form tried to make it fool-proof but they failed. You don't want to have trouble with your form because you signed in the wrong blank or didn't get the right number of witnesses.

A good lawyer can often do more. We try to be “Lawyers *and Counselors*,” we hope to help you make better choices. Some decisions look good at first but may not work out in practice. Section III of this memo warns about some pitfalls and temptations we've run across. Even if we had no special expertise or experience, we may still be helpful: it's always good to get an outside perspective or a second opinion about important decisions.

The time it takes to prepare powers of attorney can vary. If you need a lot of personal explanation, if we give you a lot of help making decisions, or if you need complicated special provisions, then even preparation of the statutory form can take many hours. That is very unusual. If this memo provides most of the explanation you need and the statutory forms fit your circumstances, you won't need much help. We can usually prepare both health care and property forms for two people for less than \$100.00.

These are important documents. If you need more time, it is worth taking. If our regular fee would work a hardship, ask us to make a special accommodation.

A Look Ahead

A power of attorney is flexible. You can do almost anything you want. Your choices are literally limitless. Virtually every word of the printed form represents a decision. We can't discuss every possibility, either in person or in this memo. You want to make considered choices, but you can't give full consideration to every word.

Here's how we balance these conflicting priorities. If we think the printed form does what most people want, we won't call your attention to it unless we get a clue that your needs are different. For instance, we think the answer which the printed form health care power provides

for disposition of your remains—leaving the decision to your agent—is usually right, and we don't think it's worth raising the issue for every client.

In this memo, I only discuss three kinds of choices:

- Choices which we think everybody should think about carefully, because they're so important (like who is to be the agent and instructions about termination of life-sustaining treatment) or because the answer is particularly dependent on individual circumstances (like the agent's authority to make gifts). (Section II.)
- Temptations: choices that often look better at first glance than they do upon reflection. (Section III.)
- Modifications to the statutory provisions. On a few questions, we think that the choices which the forms provide for you if you don't change them are wrong for most people. We don't think these changes deserve as much reflection as the choice of agent or directions about life-sustaining treatment. But when our guess about what you'd choose is different from the guess the legislature made, we want to tell you. (Section IV.)

Of course, having a power of attorney form won't do you any good if nobody knows it exists or if nobody can find it when it's needed. So I'll close the memo with some suggestions about handling the forms once they're signed. (Section V.)

CRITICAL CHOICES

Who's The Agent?

Choosing the agent is the most important choice you'll make. Yet it's often the easiest. Many people have an obvious first choice.

Successors are sometimes harder. It's a blessing to have one person whom you can comfortably entrust with the powers of the agent; it's still more precious to have three or four. Even so, it's always a good idea to have backups in case your agent is unavailable. After all, your choice is between nominating the best agent you can think of, or taking pot luck with a court proceeding before a judge. Most people can come up with two or three people they'd prefer to *that*.

The agent under the health care power of attorney makes medical decisions for you. The agent under the property power handles business. For both, you need people in whose honesty and diligence you trust. They must be people who respect your wishes and values, even if they disagree with them. But they need not be the same person. Somebody who couldn't balance a checkbook probably would be a bad choice as a property agent but might be a great health care agent. A financial wizard may make lousy medical decisions.

What about Uncle John in New York City? Where the agent lives makes a difference, but it's easy to over-emphasize it. Much of what the agent will need to do can be handled on the phone or even by mail. If there's an emergency or a decision that requires eyeball judgment, the agent may be flying to the scene anyhow. It's better to have an agent who's nearby than one who's out of town, but it's better to have the right agent on the phone than the wrong one at the bedside.

Life-Sustaining Treatment

The health care agent can decide whether to begin and whether to terminate lifesustaining treatment. Your agent can decide to “pull the plug.”

If you sign the health care power, and neither give instructions nor specifically take away power over life-sustaining treatment, then your agent must make the decision with no guidance from you. The printed form offers you three pre-written instructions which you can choose by initialing them. If none of the choices works for you, you can also write your own. If you're not sure whether to use one of the pre-written choices or write your own, we suggest the pre-written one, because people are familiar with it and there's less chance of misunderstanding.

The three choices are alternatives. They contradict each other. Do not initial more than one. If two or all three of them appeal to you, study them more carefully. Perhaps you have misunderstood their effect or perhaps you have mixed feelings.

The three choices are supposed to offer a range, from broad authority to terminate treatment through a specific instruction to *continue* treatment as long as possible.

I call the first choice “broad discretion to agent.” It reads:

I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

In other words, the agent is supposed to consider all the circumstances and make a decision. This is the most common choice.

Here is the second choice:

I want my life to be prolonged and I want life-sustaining treatment to be provided or continued, unless I am, in the opinion of my attending physician, in accordance with reasonable medical standards at the time of reference, in a state of “permanent unconsciousness” or suffer from an “incurable or irreversible condition” or “terminal condition”, as those terms are defined in Section 4-4 of the Illinois Power of Attorney Act. If and when I am in any one of these states or conditions, I want life-sustaining treatment to be withheld or discontinued.

Because all the triggering conditions—“permanent unconsciousness,” “incurable or irreversible condition,” and “terminal condition”—are joined by the word “or,” any one of them alone triggers termination. The definitions of these conditions in the statute aren’t the same as the way people use those words in normal language. And, like the living will, termination of treatment follows automatically once any of these conditions is found, with no allowance for discretion or judgment. It’s easy to imagine a case where almost anyone would want to be given treatment, but where this instruction would result in withholding treatment.

Moderation is often wise, but in this case we believe the middle course has little to recommend it.

The third alternative is “keep me going no matter what:”

I want my life to be prolonged to the greatest extent possible in accordance with reasonable medical standards without regard to my condition, the chances I have for recovery or the cost of the procedures.

If none of these choices expresses your preferences, you can write your own instructions. That is, however, a risky path, and a lawyer’s guidance is a good idea.

Gifts

If you sign the property power form without making changes, your agent cannot make gifts. If your assets are large enough so that your estate may be subject to estate taxes, you may want your agent to be able to make annual gifts as a tax planning option. If, on the other hand, you may become eligible for Medicaid, you may want to authorize gifts to qualify. Or you may want to ensure that, if you’re incapacitated, your agent can continue your custom of gifts to loved ones or causes. The law about gifts has some pitfalls and hidden traps, so any provisions allowing the agent to make gifts need to be carefully analyzed for unintended consequences.

TEMPTATIONS

Property Transaction Limits

There are lots of horrible things which your agent can do to you if you don’t impose specific restrictions. At worst, he or she could sell your house and invest the proceeds in junk. It’s tempting to give the agent lots of limits.

Tempting—but usually not a good idea. Maybe it will really be necessary to sell the house. How can you write a rule to separate good investments from bad ones?

The best way to keep your property agent from doing things that aren't in your best interest isn't to tie his or her hands. The best response to this risk is the same as the best response to most other risks: choose the agent carefully, and then give him or her all the power you can. In other words:

Choose an agent you trust.
Trust the agent you choose.

Medical Instructions

The same temptation is even stronger, and, in my view, even more dangerous, in preparing the health care power.

The official Illinois printed form calls your attention to some things you may not want done: "blood transfusion, electro-convulsive therapy, amputation, psychosurgery, voluntary admission to a mental institution, etc." While blood transfusion is included for religious reasons, the rest of these procedures sound unattractive. Remember, however, that your agent is unlikely to authorize torture. When you think of amputation, you may picture your life with no arms and legs, but the word also applies to an inch of your little finger.

You may see forms which ask you to decide about specific medical procedures in specific circumstances. We do not recommend signing such forms. You are unlikely to study each circumstance as carefully when you are preparing the form as you would if you were really facing the issue. When you face a real decision, you'll have the choices explained by the doctor. Even if you study enough medicine so that your choices are well-informed when you complete the form, they may be wrong in light of new medical developments that occur before the issue comes up.

Other circumstances besides the medical technology are also hard to picture in advance. It's hard to reduce complicated questions that affect your whole life into a few pages of either-or, if-then questions you can decide in advance. Life is too complicated.

These forms can be valuable checklists for discussing your feelings with your agent. But we believe that they are very harmful as legally-binding documents. Help the agent understand your feelings and values, and then let him or her make specific decisions based on what really happens. Look over the checklist if you like; talk it over... but don't sign it.

Delaying Effectiveness

The issue

Your power of attorney forms can come into effect immediately or, if you prefer, at some time in the future. If you don't say otherwise, the power is effective immediately and continues until your death.

You can set a later date if you want. For example, you could complete the sentence at paragraph 3 on the health care form to read, “This power of attorney shall become effective on *January 1, 2041.*”

Many people want to make their power of attorney become effective only when they can’t handle things for themselves. They might complete paragraph 3 of the health care form so it reads, “This power of attorney shall become effective on *the certification by my doctor that I am incapacitated.*”

This is a powerful temptation. After all, so long as you are able to speak for yourself, you want to make your own decisions. You’re appointing your agent to act for you when you can’t, not to take action behind your back. Even so, I believe that it’s usually better to *leave these paragraphs blank* so that the power is effective immediately.

What’s the risk if I let my agent act even while I can act for myself?

The danger in making the power take effect immediately is that your agent might do something behind your back. That would be terrible, but how likely is it? You have, after all, chosen an agent you trust. Again, your first and best line of defense is the character of your agent.

For the health care agent, you also have an automatic second line of defense. You retain a *practical* veto even if you make the power of the agent effective immediately. It’s hard to imagine much that your health care agent *could* do behind your back. If you are conscious and know what you are doing, you’ll know before you’re operated on --- and you can revoke the power or give an instruction which over-rides the agent’s. If you don’t know what’s happening to you, or if you can’t give instructions, then that’s exactly when you want the agent to be able to act. The only thing I can think of that a health care agent could do behind your back is to review your medical records.

Your property power is a little different. You can’t have a medical checkup without knowing about it, but your agent could close out your bank account and get to Argentina before you found out. The automatic second line of defense doesn’t work, so I believe it’s wise to provide a different one. However, there are ways to protect yourself that I think are better than requiring a doctor certification before your agent can act. Section IV.C at page 15 below discusses our suggestion.

What’s the problem if I don’t allow my agent to act until I can’t act for myself?

If you try to keep control until you actually need to give it up, I see other risks I think are worse.

One problem with keeping the power ineffective until you need it is that you have to provide some way of determining when that happens. If your agent can only act in certain circumstances, you have to say what the circumstances are and you have to say who decides when they’re present.

Let’s say your power isn’t effective until your doctor certifies that you are incapacitated. “Incapacitated” is not a technical medical diagnosis. The doctor can’t refer to a medical

reference, give you tests, and make entries in your file to uphold a determination of incapacity. A prudent doctor will consult a lawyer before saying that you meet some standard that isn't technically defined.

Once your doctor signs something, somebody needs to accept the doctor's signature. For the health care power, that means other health care providers, such as a hospital legal department. For the property power, it may be a bank. "How do I know that the person who signed this paper is really the principal's doctor?" I hear in my nightmare, "Besides, that paper isn't a certificate. It isn't even notarized."

While the bankers and lawyers quibble, you are *out of luck*.

Here's an illustration to show another problem. Say you're in the hospital, weak and confused. Sometimes you are making sense and sometimes you aren't. Most of the time it's hard to tell whether you could give informed consent or not. Your health care power doesn't allow your agent to act until a doctor certifies that you are incapacitated. And your agent and doctor both think you need an operation.

Since your agent can't act until you are incapacitated, there are only two alternatives. If you *are* incapacitated the agent can act and you can't. If you are *not* incapacitated *you* can act and the *agent* can't. The doctor must be careful to get consent from the right person but doesn't need to pay any attention to the other one. If you have capacity, the doctor must explain the risks and benefits of the procedure to you, be satisfied that you fully understand, and obtain your clear consent. If you don't have capacity, the doctor must certify as much. Then, once the certification is completed, the doctor must accept the agent's decision, but needn't consult you at all. Neither alternative makes sense.

By allowing your agent to act even while you're still competent, you avoid this harsh choice. The prudent doctor and the responsible agent will still explain everything to you as well as possible. If you seem to object, people won't proceed unless they're very certain of their ground. But if you seem to agree, nobody needs to decide whether your agreement is fully informed or not.

Our recommendation

Letting your agent act immediately is scary, and having two people who are both authorized to make decisions can be messy. When a power of attorney is needed, "scary" and "messy" are par for the course. We believe that, for most people, it's best to take the risk and accept the confusion. Return again to the general rule: Choose an agent you trust; trust the agent you choose.

GOOD IDEAS: CHANGES IN BASIC DOCUMENTS

Release of Personal Property

The first modification is for the health care form. We suggest the following language at paragraph 2 of the statutory form.

I grant my agent the right to receive any personal property found on my person.

A hospital is not a good place to keep your purse, wallet, or glasses. This provision allows the hospital to give such things to your health care agent.

Revocation of Health Care Power

Here's a nightmare: you've decided you don't trust the person you named any more, but he claims you're not competent to fire him.

The people who wrote our power of attorney law gave you the strongest possible protection from this nightmare. They provided that you could fire your agent even if you *are* incompetent. In the words of the statute, you can revoke or amend your power "without regard to... mental or physical condition."

But I have another nightmare. The patient says, "The moon is made of green cheese! I am Napoleon Bonaparte! There's a radio transmitter in my gold filling! You're fired!" With the legislature's language, that agent has been effectively fired.

We suggest adding the words, "*I cannot revoke or amend this agency while I am incapacitated.*" According to the statute, you can only be considered "incapacitated" if a doctor examines you and certifies that you "lack[] decision making capacity." So we think that our proposal reaches a good balance.

Property Power Copies

A property agent, unlike a health care agent, could do something behind your back. Your agent could empty your bank account and be in Argentina before you found out. Your first defense is to choose an agent worthy of trust. Here's a backup.

First, add a sentence to the property form, saying that a copy of the form is invalid unless you have initialed the copy. (If you don't include such a sentence, copies are valid. Even if you tear up the form, you can't be sure the agent hasn't made copies you don't know about.) Then make a few copies, initial them... and leave them someplace safe. If you want to fire the agent, you know exactly how many copies you need to recover and destroy, and exactly where they are.

Here's the language we suggest:

A copy of this power is not effective and can not be relied upon unless I have initialed the copy here:_____.

Of course, you should initial the *copy*, not the original. A Xerox copy of your initials isn't supposed to work: that's the whole point.

Additional Successor Agents

The new law lets you authorize somebody to name additional successor agents in case none of the agents you name is willing and able to act, but the statutory form does not use this new power.

I grant my agent the right to designate one or more successor agents to serve after those successors I have named in section 8 below.

FOLLOW-UP: MAKING IT WORK

A perfect power of attorney won't do any good if nobody knows about it or if nobody can find it when it's needed. We don't know any way to guarantee that your agent will have the practical opportunity to use the powers you've given, but there are ways to better your odds.

These problems are practical and personal, not legal. The legal part is simple: you are allowed to show or give copies of your forms to whomever you choose, and you are not required to show or give them to anybody.

The agent you name should usually have a copy of the form. So should the successor agents. Perhaps you might want to discuss your feelings and intentions with the agents and successors when you give them their copies. In particular, your health care agent should know your beliefs about termination of treatment.

If there are family members or other people who would be surprised or displeased at your choices, consider sharing the form with them. The discussion might be unpleasant. On the other hand, people who might be skeptical about a form they didn't know about may be more understanding if they hear your choices face to face. It might be better to have a conflict now than to risk a fight at the bedside or bank. Again, the questions are practical and personal.

There are few practical reasons to be stingy with copies of the health care power. It's usually a good idea to give a copy to your primary care physician and any other doctors you see regularly.

When you check in to a hospital, ask to have a copy of your health care power placed in your file. The hospital may invite you to prepare a new form. Unless you've changed your mind since you prepared the prior form, you are probably better off declining. After all, the prior form was prepared carefully; you may even have paid for assistance.

Hospitals generate more paperwork than they can keep track of. Even if they file a copy of your health care form when you check in, it may be hard to find it when it's needed. So keep another copy with your personal things at bedside. Every time your agent comes to visit, he or she should bring along still another copy, just in case.

To improve your odds that your wishes will be followed in an emergency, make it easy for police, paramedics, or emergency room personnel to find your agent. List the agent in your wallet or ID as someone to contact in case of emergency. I can give you a wallet card explaining that you have signed a health care power. The card includes our phone, and our file should include information to help find the agent.

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