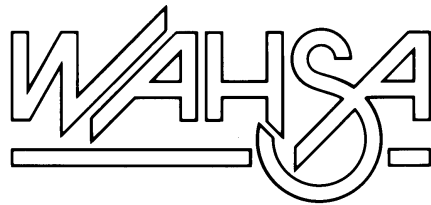


Legal Matters and Terminology for Seniors

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One of the most important things to set in motion is getting the legal paperwork taken care of! Power of Attorney for Health Care and Financial Power of Attorney are essential, along with an Advanced Directive or Living Will.

What is a “Power of Attorney”?

Power of Attorney (POA) is a document whereby one person (called the “principal”) authorizes another individual or entity (called an “agent” or “attorney-in-fact”) to act on behalf of the principal. The most common uses for a POA are financial transactions and health care decisions. Most states have one set of laws governing financial POAs and second set of laws governing POAs for health care decisions. The State of Wisconsin requires both a Power of Attorney and/or a POA for Health Care; they cannot be combined. Therefore, an individual in Wisconsin desiring to have a POA covering both financial and medical situations must prepare two separate POAs, one dealing with financial issues and the second dealing with medical issues.

When Should I Have a Financial Power of Attorney?

Persons with a physical disability or limitations often set up financial POAs, with a family member as the agent, to allow the family member to do such routine matters as making withdrawals from the principal’s bank account. Otherwise, it would be a burden for the principal to make the short trip personally to perform the banking transaction. The second reason for preparation of a financial POA is preventative in nature. If you lose the mental capacity to handle your own financial affairs, without a durable power of attorney (see below), your family members will need to go to court and have a guardian or conservator appointed over your assets. If you have previously set up a durable power of attorney and then lose mental capacity, the agent named in your POA will be able to handle your financial affairs without the time and attorney fees necessary to go to court to get a guardian and conservator appointed.

A “Durable” POA is one that remains in force even after the principal (i.e., the individual who executed the POA) loses mental capacity. Unless a POA is “durable,” it will become ineffective at the time the principal becomes incompetent. Thus, a POA, which is not “durable,” fails to protect you against the potential of your family having to go to court and get a guardian or conservator appointed over your assets.

What Makes a Power of Attorney “Durable”?

This is a matter of state law. The Uniform Durable Power of Attorney Act has been adopted by 48 states, including Wisconsin, and provides the following definition:

“A durable power of attorney is a power of attorney by which a principal, in writing, designates another as his/her agent and the writing contains the words, ‘This power of attorney shall not be affected by subsequent disability or incapacity of the principal,’ or ‘This power of attorney shall become effective upon the disability or incapacity of the principal,’ or similar words showing the intent of the principal that the authority conferred shall continue notwithstanding the subsequent disability or incapacity of the principal.”

Therefore, the first requirement is that there be a written and signed document and second, that the document contain words such as those above which clearly indicate that the principal intended the POA to be effective even after he or she became incapacitated.

Although the language of the Uniform Act does not specifically state whether the document must also be notarized in order to be effective, the form recommended by the uniform laws commission has a space for the signature of a notary. Wisconsin specially requires POAs to be notarized and witnessed by two non-related individuals to be effective for finances and property.

Advanced Directives (Living Wills)

The term “advanced directives” refers to legal means by which individuals can express and, within certain limits, enforce their wishes regarding health care in the event that they become unconscious or otherwise mentally incapacitated. Common examples include living wills (which may direct families and physicians to withhold or withdraw life support if the person is terminally ill and unable to give directions) and powers of attorney for health care (which appoint and invest third parties with full authority to make healthcare decisions for incapacitated patients). When properly set up, these documents provide those who, in good faith, follow their provisions with protection from prosecution and civil suit.

Will

A legal document created by an individual that names an executor (the person who will manage the estate) and beneficiaries (persons who will receive the estate at the time of death). A will is simply an instruction to the probate court telling that court how assets should be divided up. A will won't keep assets out of probate. A trust, however, will keep assets private and out of the probate courts.

Living Trust

This is a trust created by an individual (the grantor), and administered by another party (the trustee), while the grantor is still alive. The individual creating the living trust can be his or her own trustee while they are living and not incapacitated. Upon the individual's death, a successor trustee named in the trust will become the administrator. A living trust can be either revocable or irrevocable. At the time of death, a living trust avoids probate in court and, therefore, gets assets of the estate distributed much more quickly and with less cost than a will does. It also offers a higher level of confidentiality, as probate proceedings are a matter of public record. Additionally, trusts are usually harder to contest than wills. On the downside, a living trust takes longer to put together than a will, and requires more ongoing maintenance. Although both, a will and a living trust, can be modified or revoked at any time before death, such changes are slightly more time consuming for a living trust. Additionally, assets that a person

wants to move to a living trust, such as real estate and bank or brokerage accounts, have to be retitled in the name of the trust.

Charitable Giving

Charitable trusts, which involve making a gift to a charity and getting some payments back, can also save on both estate and income tax. There are many other complex trusts; learn about them on your own and then have an experienced estate planning lawyer draw up the documents you want.

Conclusion

Consult with your local retirement community for a referral to an elder law attorney who can educate you on all of the necessary estate planning documents.