



Why Do I Need a Power of Attorney and Healthcare Proxy?

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Most of us have heard about wills and have an idea of what a will is all about. You may have a will already. However, if all you have is a will, your financial desires and goals, as well as your physical and mental well-being, are not being adequately protected. Here's why.

A will is a document that becomes operative when the creator of the will (a testator) dies. The will directs how the decedent's property is to be distributed and to whom (and perhaps also who is excluded from getting anything). A will is also a vehicle in which a testator can nominate a guardian for minor children in the event the testator's death leave the children without parents. In other words, the will is a document for the deceased.

In contrast, a power of attorney is designed for the living. Specifically, it is a document you use to appoint an agent (known as an "attorney in fact") to make decisions on your behalf if you become incapacitated and unable to act. These appointments can be limited (such as giving another person the power to sign documents at a real estate closing) or broad (e.g., to pay debts, access bank accounts, make estate planning decisions, etc.). A power of attorney can be designed to be immediately effective upon its proper execution (a durable power of attorney) or contingent upon certain conditions, such as mental incapacity (a "springing" power of attorney).

With a springing power of attorney, the issue of mental capacity can still be contested, which can lead to litigation as time-consuming and expensive as a guardianship proceeding.

Our firm generally recommends clients create a durable power of attorney, rather than a springing power of attorney. The reason for a power of attorney is to short-circuit the need for expensive guardianship proceedings if a client becomes mentally incapacitated. Since the durable power is an unconditional power, this generally better meets the needs of a client if the client becomes incapacitated. However, because this is an unconditional power, creating an

attorney-in-fact relationship upon its execution, the client should be satisfied that the selected agent will reflect the client's interests.

As with death, the loss of sanity or mental capacity is not a pleasant subject for many people. We can help you design an appropriate document that fits in with your overall financial strategy.

A will and a power of attorney are not enough, however. The will addresses what happens after a client dies, while the power of attorney addresses many areas of life in which you can designate someone to take charge if you become incapacitated. But a power of attorney cannot and does not have any ability to control the healthcare decisions and choices of a client; that's where a healthcare proxy and living will come into play.

The healthcare proxy is a document that appoints someone (a healthcare proxy) to make healthcare decisions on your behalf if you are unable to do so. It also authorizes your proxy to access your medical records.

The living will operates in tandem with a healthcare proxy (and is often incorporated into the healthcare proxy) to reflect your medical care wishes. The healthcare proxy gives your proxy the right to make healthcare decision when you are unable to do so; the living will is documentation of the guidelines you want the healthcare proxy to use when making those choices. The living will is an explicit expression of your wishes about extraordinary medical care, intubation (feeding tube), and organ donation. If you choose, it allows you to reject things such as respirators or life support when there is no reasonable expectation you will regain intelligent consciousness.

Our firm has extensive experience drafting powers of attorney, healthcare proxies, and living wills that will express your wishes and meet your needs. Along with a will, these will round out the documents you need for your financial, mental, and physical well-being.

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