

Paying for a Nursing Home: Medicaid (Part 8 of 12) Financial Power of Attorney – A Key to Asset Protection

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What is a Financial Power of Attorney? A financial power of Attorney is a legal document by which you (the principal) authorize another (your agent) to act on your behalf regarding your financial and legal matters. It is a document that allows you to plan for the care and control of your property in the event you become, because of advancing age or any other reason, unable to handle your own affairs. A “durable” power of attorney is one that continues to be effective if you later become disabled or mentally incapacitated.¹

A durable financial and healthcare power of attorney may be the single most important estate -planning documents you can have, more important even than a Will. After all, these concern what personal and financial decisions (that is, concerning you and your property) will be made during your lifetime, while a Will only concerns what happens after your death. Without such powers of attorney, if something happens to you that results in your inability to make decisions, your family may have to go to court and face the expense and restrictions of a court-supervised guardianship.

Do I need a lawyer to draft my power of attorney? No. However, please see the case below as an example of what can happen when you do not have the proper wording in your document. Without proper, specific wording, your agent may not be able to deal with some of the issues that are important to you.

We have had clients come to our office with “form document” powers of attorney they purchased at an office supply store or downloaded from the Internet. While these documents legally authorize persons to act on another’s behalf, there are certain things a traditional or standard power of attorney may not address. In fact, the law provides certain matters your agent cannot handle unless there is a specific wording in the document which empowers them to do so. Such matters include the power to apply for public entitlements (such as Medicaid), the power to make gifts on your behalf, and the power to add to or remove assets from a trust.

The case that prompted me to write this article: About 12 years ago Janet and Diane came into our office to discuss their mother, Mildred, who had just entered a nursing home.² They told me she had assets totaling about \$160,000, plus her house (that they thought was worth about \$120,000), but with the nursing home costing over \$8,000 a month, and with her only income being her Social Security of \$950 per month, Mildred would go through her \$160,000 in less than

¹ In Pennsylvania all powers of attorney are durable unless the document specially provides otherwise. 20 Pa.C.S. § 5601.1

² The names used here are fictional, but the story – unfortunately – is not.

two years. Janet and Diane told me they knew it was probably too late to protect anything, but a friend had suggested they call my office.

I asked them about their mother's health, and they told me that while she was in good physical condition ("as strong as a horse"), she had been diagnosed with Alzheimer's several years ago and her dementia had advanced to the point that she no longer recognized them. But two years earlier she had named Janet and Diane (her only children) as her agents under a financial power of attorney, and this allowed them to hire an attorney on her behalf.

I explained that just because their mother was now in a nursing home did not mean it was too late to protect any part of her life savings. However, because she was no longer mentally competent, I said what could be done would depend upon her power of attorney; it is had the proper language, Mildred could in fact protect at least half of her assets and still qualify for Medicaid.

I then asked to see a copy of Mildred's power of attorney. Upon review, I had to explain to them that it did not include an unlimited gifting authority – that is, it did not give them the power to take money or property out of their mother's named. I further explained that if Janet and Diane did begin gifting under the current power of attorney, it might be treated as a crime ("financial abuse of an elder").

Janet and Diane were devastated: "But we are her only children. She left everything to us in her Will." I had to tell them it did not matter. "We are on all of her bank accounts," they said. I told her that unless she contributed money to those accounts, it did not matter. They then pointed out the standard language in Mildred's power of attorney which stated, "I authorize my attorney-in-fact (old-fashioned term for "agent") to engage in, transact and perform any and all actions as my attorney-in-fact may think proper, as fully to all intents and purposes as I might or could do if personally present at the time thereof." Again, I had to tell them it did not matter. Because her mother's power of attorney had been prepared after December, 1999, and because it did not specifically authorize her agents to make gifts without limitation to amount (to themselves or anyone else), under Pennsylvania law they would be unable to establish a Medicaid gifting program.

Unfortunately, this situation is not unique. Many people believe their power of attorney allows their agent to do anything and everything. Had Mildred come into our office (or that of another elder law attorney familiar with Medicaid and estate planning) while she was still competent to sign a power of attorney, Mildred would have had a power of attorney in place that would allow for "unlimited" gifting. We could then have helped them protect her house as well as part of her money with a gifting plan and still have her qualify for Medicaid (taking into account the appropriate penalty periods).

Bottom line: if you want your agent to have the power to deal with matters affecting older clients today, particularly with nursing home issues, you should consult with an experienced elder law attorney (that is, one *who understands the Medicaid rules*) for assistance in drafting your general durable power of attorney.

The content herein is for general informational purposes only and does not constitute legal advice. For specific questions you should consult a qualified elder law attorney.

Note: *After the changes in the Medicaid law in 2006, it is more true than ever that “time works against you” when planning for long-term care. It is important that families who have a spouse, parent or other loved one needing long-term nursing care contact a knowledgeable and experienced elder law attorney for advice as soon as possible. While ideally this should be done prior to admission to a nursing home, families need to realize that even after the 2006 changes to the Medicaid law, there remain opportunities for seniors to protect a significant portion of their life savings, even when facing an immediate crisis, with no advance planning. But since every day of delay in a crisis can result in \$250 or more of irretrievable loss, don’t delay in seeking advice.*

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** Certified as an Elder Law Attorney by the National Elder Law Foundation as authorized by the Pennsylvania Supreme Court.*