

## Durable Powers of Attorney and Health Care Proxies

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The use of a power of attorney has been recognized at common law for years. It is a form of written instrument in which you, as “principal”, authorize an agent, your “attorney-in-fact”, to act on your behalf. Generally the power of attorney becomes effective and can be used as soon as it is signed. The powers granted can be very broad or limited. Today, most power of attorney forms contain broad powers and authorize the attorney-in-fact to perform a wide variety of acts on behalf of the principal.

You can, if you wish, name more than one attorney-in-fact. The nominees may serve concurrently (with power to act singly or jointly) or successively. It is obviously important that you have complete trust and confidence in the person or persons you name.

The major failing of a power of attorney at common law was that it became ineffective when the principal became disabled or incapacitated and legally incompetent to act on his or her own behalf. This failing has been cured in Massachusetts by legislation which permits you to create a “durable” power of attorney — one which will continue to be valid even if you become disabled or incapacitated. This form of power of attorney continues in effect until you revoke it or until your death. In order to be “durable”, the power must be in writing and must contain certain words indicating that it will not be affected by the subsequent disability or incapacity of the principal.

Durable powers of attorney have now become valuable financial and estate planning tools. Since the powers can continue to be exercised if you become disabled or incapacitated, the durable power of attorney is often viewed as an informal and inexpensive alternative to guardianship or conservatorship. On the other hand, circumstances sometime require the appointment of a guardian or conservator and in your power of attorney you may nominate the person to be appointed. The person nominated need not be the person named as your attorney-in-fact.

In addition to the customary provisions, there are a number of other powers which you may wish to include, some of which may be particularly important in your estate planning if you become disabled or incapacitated, such as the power:

- § to fund your revocable trust during lifetime in order to minimize or avoid probate; to make gifts on your behalf, either in unlimited amounts or limited to gifts qualifying for the \$11,000 annual gift tax exclusion (to be adjusted for inflation annually) to members of your family or charity;
- § to elect or release homestead rights;
- § to maintain and contribute to your retirement plans;
- § to disclaim property interests in order to save gift or estate taxes.

The power of attorney does have limitations. For example, certain acts are non-delegable, such as executing or amending a will. In addition, a power of attorney recognized in Massachusetts may have limited utility in another state. Nevertheless, the modern version of the durable power of attorney can serve an important role in your financial and estate planning.

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In the summer of 1990, the United States Supreme Court decided the Cruzan case. This decision acknowledged that every individual has a constitutional right to determine the course of his or her medical treatment. This right includes the power to reject any medical treatment, even if that treatment is necessary to keep the patient alive.

Patients competent to communicate their health care preferences may direct the course of their treatment, while patients incapable of communicating their own treatment preferences may find themselves the subject of a court proceeding, initiated by family or doctors, to determine what their preferences would be under the particular circumstances and to authorize treatment in accordance with this determination. If the patient has not left written instructions or appointed a person to speak for him on such matters, the court proceeding may result in a judgment inconsistent with the patient's preferences and principles.

To avoid court intervention, or to ensure that the patient's wishes are given due consideration in a court proceeding, we recommend executing a health care proxy.

The health care proxy allows you to appoint an agent to make health care decisions for you if and when you are incapable of making or communicating these decisions yourself. Decisions made by the agent must be consistent with your expressed intentions, including instructions in a declaration. A declaration may express philosophical or general principles and provide that you only wish to reject "heroic measures" or treatments which artificially prolong life. Others may include specific guidelines for accepting or rejecting particular types of treatment. Reference to some treatments which are commonly at issue in critical care situations, such as renal dialysis, chemotherapy, do not resuscitate (or DNR) orders, and artificial nutrition and hydration may be specifically mentioned. If you are unsure which treatments you want to reject and which you want to accept, options should be discussed with your personal physician. Which form of declaration you select is a matter of personal preference; however, you should review your health care proxy annually to ensure that it reflects your current preferences regarding your health care. Also, if you spend a substantial portion of the year in another state, you should make sure your existing health care documents comply with the law of the other state.

Due to recently-issued privacy Regulations under The Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), a provision citing HIPAA should be included in the health care proxy, emphasizing your wish that your health care providers disclose health-related information to your health care agent, if your health care agent requests such information. Such a provision may also state that health-related information should be disclosed to your named health care agent, even before any determination is made by your attending physician that you are not competent. Among other things, this would help your health care agent determine if his or her power under the health care proxy to make health-related decisions for you has been triggered.

When selecting your health care agent, be aware that no employee of a health care facility in which you are a patient or resident or to which you have applied for admission can serve as your health care agent, unless he or she is related to you by blood, marriage or adoption. Thus, choosing a physician to serve as your health care agent may not be appropriate.

Upon execution of a health care proxy, the original of the health care proxy should be given to your health care agent; copies should be given to your alternate health care agent and to your physician. These copies should be stamped as such and should state where the original proxy is kept. You should keep a list of the names, addresses and telephone numbers of all persons with copies of your health care proxy so that all copies may be easily recalled if you later amend or revoke your proxy. You should also provide your physician with the names and addresses of your health care agent and alternate so that they may be contacted quickly in the case of an emergency.

Questions concerning durable powers of attorney and health care proxies may be answered by members of our Trusts and Estates Department.