

David M. Frees: dfrees@utbf.com
Douglas L. Kaune: dkaune@utbf.com

Phone 610-933-8069
Fax: 610-933-3603

UNRUH TURNER BURKE & FREES

120 Gay St.
Phoenixville, PA 19460

17 West Gay Street
West Chester, PA 19380

346 East King Street
Malvern, PA 19355

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ELDER CARE PLANNING DRAFTING AN EFFECTIVE POWER OF ATTORNEY

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ESTATE RECOVERY
PROGRAM

In earlier articles we have discussed the rising costs for long term nursing care and various planning techniques used to protect an individual's assets should this type of care be necessary. It is always preferable to have an individual enact and complete this planning on his or her own behalf. However, it is possible someone may become incapacitated and may need someone else to execute the appropriate planning if they had not been able to do so for themselves. Only through a properly drafted General Durable Power of Attorney would anyone else have the flexibility to make use of all planning techniques at their disposal. There are many reasons to have a Durable Power of Attorney signed. This article will discuss how the Power of Attorney plays a key role in the planning and protection process while considering the possibility of long term nursing care.

WHAT IS A POWER OF ATTORNEY?

As most people are aware, a Power of Attorney is a document that an individual will prepare while he or she is mentally capable and which will serve to appoint an individual or individuals, called an Agent, to act on his or her behalf should they want or

need them to do so. It will be necessary for the appointed Agent to physically have a signed original Power of Attorney document in order for them to act in that capacity. It is very important not to distribute the Power of Attorney document to individuals until such time as they are expected to act as the Agent. Potential substitute Agents should be notified that the document exists and where it can be located, if necessary. The Power of Attorney will frequently include many economic, financial, real estate and medical powers that allow the Agent to step into the shoes of the individual for whom they are acting.

WHAT HAPPENS IF NO POWER OF ATTORNEY HAS BEEN SIGNED?

If a properly drafted Power of Attorney is not prepared prior to an individual becoming incapacitated, his or her family will be greatly restricted. They will have a diminished ability to take care of the individual or carry out any of the planning goals associated with the protection of assets either from creditors, nursing care spend down or taxes.

Many clients wish to protect

their assets to the greatest extent possible so that they may be enjoyed by their spouse, children or other beneficiaries. Absent an appointed Agent, it would be necessary for someone to petition the court to become the guardian over an incapacitated person.

As the guardian of an individual's person and estate, they will be limited by the parameters set out by the guardianship laws of Pennsylvania or any other state in which the individual lived. Guardianship laws will not be flexible and will be structured in a way to protect the person over which the guardian has been appointed. Guardianship laws will not permit many of the planning techniques necessary for the protection of assets for the benefit of individuals other than the incapacitated person. Therefore, it will be very difficult for a guardian to execute a plan that would require the gifting of assets from an incapacitated person to a trust for the benefit of others or directly to other individuals.

It will be far more likely that the guardian would be forced to retain all of the assets in the name of the incapacitated individual and simply pay for all of the long term care costs. These long term care payments could continue until all of the assets of the incapacitated person were expended. Only after all assets were depleted would the person be able to qualify for Medicaid.

SPECIFIC CLAUSES TO INCLUDE IN THE POWER OF ATTORNEY:

To insure proper planning, it is not sufficient to have a Power of Attorney document prepared for an individual. There are very particular powers that must be made a part of the document in order to take advantage of all available elder care planning. Some particular planning powers that must be incorporated and that are often missed are the following:

1. The Agent should be specifically authorized to enter into asset protection planning. Specific reference should be made to a client's in

tent to allow an Agent to seek whatever means necessary to qualify them for public assistance or benefits. It is appropriate to specifically name various public assistance benefits, such as Medicaid or Social Security Disability. This power should also reference an understanding and an expectation that the planning may include impoverishment of the individual.

2. Unlimited gifting powers should be included in the document. Power of Attorney documents are often drafted without proper attention paid to the gifting power. You will frequently see documents drafted with a reference to limited gifting or a document may not have a gifting power at all. Even if a limited gifting power is used, this will only allow an Agent to make gifts on behalf of the incapacitated person in an amount equal to the annual exclusion permitted by federal law. That annual exclusion is presently \$11,000 per person, per year. This type of restriction may make it very difficult to properly reduce an individual's assets for Medicaid qualification. Therefore, an unlimited gifting power should be incorporated which states that the Agent is not limited in any way or by any law when considering gifting of assets. It is appropriate to state once again, that unlimited gifts may be made even if that results in that incapacitated person's impoverishment.

3. An estate planning power should be incorporated in the document. Always consider allowing the Agent to enter into estate planning. The elder care planning will often make use of irrevocable trusts so that the assets are protected during the incapacitated individual's lifetime and so that the assets will ultimately pass to that person's intended beneficiaries. This power will allow for the Agent to draft a proper Medicaid Asset Protection Planning Trust so that both the incapacitated person's and future beneficiaries' interests will be protected.

4. There should be a specific reference in the Power of Attorney to the Agent's acknowledgment page. Each Agent is now required to

sign an acknowledgment that they will accept the position and will (a) exercise the powers for the benefit of the principal (b) keep separate the assets of the principal from those of an Agent; (c) exercise reasonable caution and prudence; (d) keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

These references in the acknowledgment may come into conflict with some of the powers granted to the Agent including gifting, creditor protection and potential impoverishment of the incapacitated person. The person creating the Power of Attorney document should acknowledge that the authorities granted to the Agent, may conflict with his fiduciary duties as set forth on the acknowledgment page. The Power of Attorney should further state that it is the creator's specific intention that even if a conflict exists, that the powers granted within the Power of Attorney document should take precedence. This will help eliminate any financial institution or state agency's ability to claim that the power cannot be exercised because of the breach of fiduciary duty.

CONCLUSION:

Long term nursing care costs continue to rise and asset protection planning has become of greater importance in the elder care arena. Individuals have become more and more aware of the planning opportunities for protection of assets for themselves and their beneficiaries. However, there are often occasions where an individual is incapacitated prior to setting a plan into motion. The only way for this plan to be carried out is through the use of a properly drafted General Durable Power of Attorney. As discussed in this article, it is not enough to just have a Power of Attorney document drafted. The Power of Attorney must be drafted with an eye toward elder care and estate planning and all of the authorities that Agent must have in order to properly protect an individual's assets.

Hopefully this article has served to alert you to some of the issues relating to the General Durable Power of Attorney as it relates to elder care

planning. If you have any particular questions regarding this topic, you may contact us at (610) 933-8069 or at dkaune@utbf.com. You may also call or e-mail us with any other questions or topics for future articles.



AVAILABLE ON CD MEDICAID PLANNING INFORMATION YOU CAN USE NOW

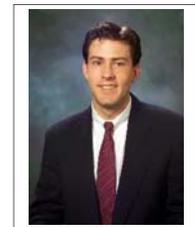
"Medicaid Planning—Protecting your assets from Nursing Care Spend-down"

This narrative CD, presented by Douglas L. Kaune and David M. Frees, provides a great overview of many of the Medicaid and nursing care asset protection issues confronting you, your friends, family and clients.

Order your copy of the CD by calling 610-933-8069.



David M. Frees, III



Douglas L. Kaune

Douglas L. Kaune and David M. Frees, III are local Elder Law Attorneys practicing in the areas of Estate Planning, Estate Administration, Asset Protection and Nursing Home Care Planning and can be reached at 610-933-8069 or dkaune@utbf.com for questions or suggestions.

The information provided in this article relates only to Federal and Pennsylvania laws presently in effect as of the writing of the materials. The article is only intended to be informational and each case should be reviewed

NEED A SPEAKER?

David M. Frees, III and Douglas L. Kaune are experienced presenters on many estate planning and estate administration topics, including:

- Basic Estate Planning: What is it? Who Needs It? Why Do It?
- Planning To Prevent Your Heirs From Paying Federal Estate Taxes
- Protecting Your Assets from Nursing Care Spending
- The Executor and Trustee Workshop: Learning Your Responsibilities and Avoiding Personal Risk
- Keeping Your Children's Inheritance Safe From Their Creditors

To have David and Doug present a program for a group of your employees or clients on these or any related practice topics, call 610-933-8069 or contact them by e-mail at dfrees@utbf.com or dkaune@utbf.com

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P.O. Box 289
Phoenixville, PA 19460

