

Giftng Provisions in a Financial Power of Attorney

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All Financial Power of Attorneys are not created equal. Most Financial Power of Attorney documents will allow the person selected to pay bills and change investments around. Thus, such a document may be helpful to keep a person away from probate court in the event that the person becomes incompetent.

The person who drafts a Power of Attorney is generally known as the Principal. The person selected by the Principal is generally known as the Agent or the Attorney in Fact. When drafting a Power of Attorney there may be different goals. Generally, the goal is very simple. It is designed solely to select someone to manage your financial affairs, especially when you are unable to do this for yourself. It usually is a General Durable Financial Power of Attorney. The term "General" means that it is designed to cover all of your financial affairs. The term "Durable" means that even if the Principal becomes incompetent, the Agent can still continue to conduct the Principal's financial affairs. The law of Principal and Agent has been around for hundreds of years. The concept of a "DURABLE" Power of Attorney is of recent creation. In Wisconsin, the law has allowed the creation of a "Durable" Power only since 1984. Now, almost every Power of Attorney drafted will contain the appropriate language as required by State Law to make it a "Durable" Power. This specific language is very important. With this language in there, even though the Principal becomes incompetent, the Agent can still take action. This is helpful because the Principal will have selected an Agent who can conduct financial affairs for the Principal, and thus, the Principal's family will not have to go to court to have the Principal declared incompetent by a judge in a costly proceeding called a Guardianship. There would be no need for a Guardianship to be created because the Principal has taken action in advance, as part of good planning, to select a person he loves and trusts to manage his affairs.

This is a very important planning tool and everyone over the age of 17 should have this kind of a document. This is true because everyone runs the risk of becoming incompetent. Seniors are concerned with it because of dementia and other physical problems. Younger people need to be concerned because of the risk of an automobile accident, making one either permanently or temporarily incompetent.

Not all Powers of Attorney are created equal. Many Powers of Attorney do not permit the Agent to do planning to protect a person's assets from being wasted paying for nursing home care cost. They do not contain the necessary language to permit the Agent to do gifting. The ability of an Agent to gift is barred by the law in many states. The document must specifically authorize gifting in order for an Agent to be able to gift. This law exists for the protection of the Principal. However, in a family setting, where a trusted loved one has been selected by the Principal, it generally is appropriate to include gifting language in the document. Language that says my Agent can do anything and everything is not sufficient under the law to allow the Agent to make gifts. In fact, if the Agent makes gift, the law would require the Agent to return the money to the Principal. The reason for this is the Agent exceeded his authority. An Agent who exceeds his authority can get into serious trouble with the law.

A better solution may be to authorize the Agent to make gifts. There may be a number of times in which gifting, by the Agent of an incompetent Principal, could be very important. One might be planning that happens after incompetency where planning is being done through gifting to reduce taxes. Another may be reducing the Principal's assets through gifting in order to get the Principal qualified to get Government benefits to pay for the Principal's nursing home care costs.

Thus, I would recommend that you review your existing Power of Attorney. See if it contains express language authorizing the Agent to make gifts. See if any restrictions have been placed on the Agent's ability to make gifts. Laws can be different from state to state. You need to know what your state law provides and what the requirements are to have a valid Power of Attorney in your state. Consult with Attorney Timothy P. Crawford and tell him that you want your Agent to be able to make gifts to protect your assets from being sold to pay for nursing home care costs.

**“Those Who Plan Ahead Win.
Those Who Don't Plan Ahead Lose.”**

This article is not intended as legal advice. It is basic information. I would recommend that you call Attorney Timothy P. Crawford for a free conference to discuss your

situation in more detail. Attorney Timothy P. Crawford can be reached toll-free at 1-888-634-6675. When you call in, please mention the fact that you have read this article.

*Attorney Timothy P. Crawford is a Board Certified Elder Law Attorney(CELA). He has been Board Certified by the National Elder Law Foundation which has been approved as the Sole Certifying Organization for Elder Law Attorneys by the American Bar Association.

**Timothy P. Crawford was invited to join the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys (NAELA) in August of 2005. The Council of Advanced Practitioners (CAP) is a small group of premier elder law attorneys, all of whom have been members of NAELA for at least 10 years, are certified as elder law attorneys by the National Elder Law Foundation, and are AV rated the top in the nation by Martindale Hubbell. A Service that provides an independent rating of the quality of attorneys.

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