

**GIVING SUBSTANCE TO THE FORMS:
ADDRESSING THE POTENTIAL FOR CONFLICT THAT LIES
BENEATH THE SURFACE OF YOUR LEGAL DOCUMENTS**

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I. WHY DO I NEED LEGAL DOCUMENTS?

Before we, or our loved ones, get to the point when we are no longer able to manage our own affairs due to a mental or physical incapacity, it is of critical importance that we prepare a Power of Attorney for medical, legal, financial and personal decisions. Once we have lost our capacity to execute legal documents, it is too late for us to appoint a trusted friend or family member to act on our behalf. We are then at the mercy of a court to appoint a person, institution or agency to serve as the guardian of our person or property. If a family member or friend is appointed on our behalf, he or she may become overwhelmed by the time, expense and formality associated with a rigid court process.

We recommend to all of our clients that they execute a General Power of Attorney, a Health Care Power of Attorney and a Living Will.

A) General Power of Attorney: A General Power of Attorney executed by you grants to one or more individuals broad authority to make financial, legal and personal decisions on your behalf if you are no longer able to make these decisions on your own. The person named is referred to as an “Attorney in Fact”.

i) A General Power of Attorney can be “Durable”, which means that it becomes effective upon signing and will remain effective from the date you execute it until the date you revoke the document or the date of your death. A Durable General Power of Attorney remains effective should you subsequently become incapacitated.

ii) A General Power of Attorney can be “Springing”, which means that it cannot be used unless you become incapacitated. The document should provide how incapacity is established and usually requires the opinion of one or two physicians.

B. Health Care Power of Attorney: This document authorizes a friend or family member to make any and all medical decisions on your behalf

once one or more qualified physicians determines that you are unable to make those decisions on your own. The person named is referred to as a “Health Care Agent”.

C. Living Will: This document allows you to express your wishes with regard to life support. This document should be shared with your Health Care Agent as well as your primary care physician.

Note: The basic North Carolina statutory versions of the General Power of Attorney, Health Care Power of Attorney and Living Will can be found on our website at www.bradynordgren.com.

II. WHO SHOULD I APPOINT AND SHOULD MY DECISION BE DISCUSSED WITH MY FAMILY?

While it is a good idea to execute the legal documents discussed above, it is extremely important that you give careful consideration to each of the following points before you sign these documents:

A. These documents should be executed now while you are in good health and not under pressure to make quick decisions. As with many things in life, we often wait until there is a sense of urgency before we take action. If you wait until a crisis occurs, you may no longer be in a position to make clear, uninfluenced decisions regarding who should manage your affairs. It is not uncommon for people to sign powers of attorney while they are being wheeled into surgery, often times too medicated or distracted to understand what they are signing.

Further, attorneys should not prepare powers of attorney, or other estate planning documents, for people who do not understand the meaning of the documents they are signing. Documents that are executed in this manner can be overturned if another person can prove you were incompetent at the time the documents were signed. A successful challenge to the integrity of the legal documents will likely result a declaration of your incompetence by a court and the appointment of a guardian to act on your behalf.

B. Make sure you are completely comfortable with the individuals you have named. Consult with a qualified estate planning attorney to make sure you fully understand the meaning of the documents you are signing. Give consideration of the existing responsibilities of the people you are considering naming and whether they will be available to handle the additional responsibilities that you have placed upon them. Talk to them in advance of signing your documents to make sure they are comfortable taking on this responsibility. Do

you feel certain that the individuals you have named can be trusted? Do they have the time, skills and resources necessary to handle these responsibilities in an effective manner?

When making this decision, keep in mind that it is your care that is at stake so try hard to avoid naming people who are not qualified to act on your behalf or who do not have your best interests in mind. Further, try not to name someone out of a sense of obligation or fear that not naming them will upset them. Even if it means hurting a family member's feelings, we strongly encourage you to name only trustworthy people who have the time, skills and resources to make the best possible decisions for you.

C. Reduce the potential for conflict through communication. This involves discussing your decision not only with the person or persons you have decided to name but also with other individuals who may have an interest in your affairs. For example, if you name one child to make financial, legal or medical decisions for you, make sure that your other children are aware of your decision and understand the reasoning behind your decision. While they may not be happy with your decision, your openness will prevent surprises down the road thereby reducing the likelihood of future conflict. If a child is surprised by your choice of another child and you are no longer capable of explaining your decision, the child who is not named may suspect improper influence, abuse of authority or other inappropriate conduct by the named child.

Further complicating the situation is the fact that uninformed family members often learn that a power of attorney has been granted to someone else only after a crisis has occurred. The timing of the surprise may compound suspicions and ignite the conflict. The result is often a pattern of accusations, defensive responses and ultimately the break down of family relationships.

III. CONCLUSION:

The execution of legal documents granting broad authority and responsibility to a trusted friend or loved one is more than just a process of signing forms. We recommend that you fully engage yourself in this process so that you can make well thought out decisions with your own best interests in mind. Consult with a qualified estate planning attorney to make sure you fully understand the meaning of the documents you are signing. This will enable you to name the people who are best qualified to handle the responsibilities that you have given to them. If you have reservations about talking to your family about the decisions you have made and the reasoning behind your decisions, recognize that an uncomfortable conversation could save your family from unnecessary conflict at some point down the road.