



The Ageless Millionaire

The E-Zine of the Longevity Club

Longevity Document Dangers And How to Fix Them

By Adriane Berg

The fastest growing demography in America are those over the age of eighty-five. While most of us age well, we all need specialized legal documents that assure us life long control over our money and our healthcare during mental or physical incapacity.

These documents are: Powers of Attorney that appoint surrogates to carry out your financial wishes, and Health Care Powers of Attorney or Health Care Proxies that appoint a surrogate to carry out your health care wishes. Living Wills and Do Not Resuscitate Orders are also used in many states to express your wishes directly.

Without these documents, there is danger that the court will appoint a conservator or guardian to take over your money and health care decisions, at considerable cost and often heart break for you and your family. Or that doctors, institutions or the legislature will impose their decisions at critical times.

But, these crucial documents can also be a danger to our health or wealth, if they do not adequately and clearly express your desires.

Here are the pitfalls and how to avoid them.

#1. Danger-The document is ineffective just when

you need it.

A Power of Attorney is a document that appoints an agent to act as your substitute. It authorizes your agent to access and spend your money, to buy, sell or gift your investments, your personal and real property, to sign your name to other documents, cash checks, file your taxes, and do a host of other financially related activities. Most people sign these powers of attorney for use if they become incapacitated and cannot act for themselves. But a traditional Power of Attorney is extinguished if you become incapacitated. It strips your surrogate of the power to act, just when you need a substitute to act for you.

The Fix:

Create a "Durable" Power of Attorney, which is effective (unless specifically revoked by you) no matter what your mental or physical condition. Durable powers take effect immediately upon signing, and continue in force whether or not you have capacity. The document must specifically state that it is durable and remains in effect upon your incapacity.

#2. Danger-The Document Gives Control To Others Too Soon

Since a Power of Attorney (durable or standard) takes effect immediately upon signing, you are giving over power while you are still able to handle your own affairs, and make your own decisions.

The Fix:

The “Springing” Power of Attorney “springs” to life when two physicians certify that you have incapacity, whether temporary or permanent, that prevents you from handling your affairs. Your surrogate can act for you only if and when you are incapacitated, and, you take back the helm on regaining capacity.

Idea for Entrepreneurs: Create a separate “Springing” Business Power of Attorney. While most powers of attorney carefully spell out when they take effect, rarely do they spell out how to regain control. A well thought-out Business Power of Attorney can be flexible enough to allow you to keep control over your business for as long as possible even as competency waxes and wanes.

#3. Danger-The Directions are Incomplete or Just Plain Wrong

Many Powers are “one size fits” all computer generated forms that don’t take account of your needs or wishes.

The Fix:

The Power should make sure your medical bills are paid, your insurance premiums are met, your mortgage is satisfied, your taxes are paid and your affairs are managed.

Powers can be “general,” affording the power to the surrogate to do anything you can legally do, or “limited,” specifying one or several distinct activities. Significant to our longevity, both the Durable and Springing Power can establish your wishes regarding spending money for home health care. For example:

It is understood that it is my overriding wish to stay in my home in the event of an incapacity; therefore I

authorize my agent to make expenditures for home renovations, at home medical equipment, medication management, mobility devices, motion sensors and the services of a geriatric care manager and any other expenditures to create a state of the art environment.

Idea for Long Term Care: Give your agent sufficient power to plan for government benefits that cover long-term health care costs. Strategies include gifting assets or placing them in trust. Since most people name their closest heirs as their surrogate, there may be a conflict of interest, so consider a separate Gifting Power of Attorney, naming as surrogate, a person who will not also be the recipient of the gift.

#5. Danger-The Health Care Directive is Too Vague

Without clear health care directives, decisions regarding your medical care, custodial care and even your end of life planning will be out of your hands. The quality of your final years, days and moments may have very little resemblance to what you would have wanted.

The Fix:

Say it like you want it:

Long Term Care: Set out your preferences regarding your care during a long term or chronic illness. Coordinate your directives with your Durable or Springing Power of Attorney. Make sure that the agent handling your money, and arranging for the payment of your desired care is not in conflict with your health care agent. One easy fix is to make them the same person. If you have the clause in your Power of Attorney for “aging in place” in your home, make sure that a similar clause exists in your health care power.

Pain Treatment: A typical clause gives your surrogate the power:

To consent to and arrange for the administration of pain-relieving drugs of any kind or other surgical or medical procedures calculated to relieve my pain, including unconventional pain-relief therapies that my Agent believes may be helpful to me, even though such drugs or procedures may lead to permanent physical damage, addiction, or even hasten the moment of (but not intentionally cause) my death.

Idea for Family Surrogates: Whether you opt for discontinuing life support in the event that physicians feel there is no hope, or for aggressive treatment, such as continued “machine assistance”, “heroic surgeries” or repeated defibrillations, make sure that your agent, (usually a child or your spouse) understands your desires, and is on your wavelength. The American Bar Association, www.aba.net, and the National Academy of Elder Law Attorneys, www.naela.com, have helpful material on holding a conversation with the family on End of Life Preferences.

#6-Danger-Your Surrogate Will Re-Interpret or Ignore Your Wishes

There are legal and criminal sanctions for surrogates who ignore your wishes deliberately, or self deal with your money. But the more frequent problem is the honest fiduciary, including a professional trustee, concerned with liability to your heirs if they spend large sums on your health care.

The Fix:

One way to handle this is to specifically relieve your trustee or other surrogate, of liability to your heirs if they spend too freely on your health care, so long as the decisions are in accordance with your expressed wishes. Such a clause may look like this:

My Trustee and my Trustee’s estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, and assigns from all liability and from all claims or demands of all kinds arising out of the acts, except for willful misconduct or gross negligence, needed to carry out my wishes as expressed in clause (specify the relevant clause in your trust) of this Trust.

