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LEGAL BRIEFS

General Powers of Attorney – Choice of a Fiduciary

“I want Mom’s power of attorney” I often hear this request from a child of a client when that client is showing signs of diminished capacity or the inability to take care of himself. When it comes to managing a loved assets during any period of disability, most people think in terms of a general power of attorney.

Just what is a general power of attorney? In legal terms, it is a document that allows a principal (such as a parent) to have an agent (perhaps, a child) manage the parent’s assets for the benefit of that parent. The parent remains the owner of the property, but the child has the authority to deal with the parent’s property for the benefit of that parent.

What often happens is that a child is appointed as agent, and that child then seems to take over ownership of the property. The agent/child acts as if the appointment as agent is a position of honor and provides the child authority to do anything the child wishes with the property no matter what the parent may want. Neither assumption is correct.

An agent under a general power of attorney acts in the capacity of a *fiduciary* with respect to the property interests of the disabled person.

Merriam-Webster’s Dictionary of the Law defines a fiduciary as “one often in a position of authority who obligates himself or herself to act on behalf of another (as in managing money or property) and assumes a duty to act in good faith and with care, candor, and loyalty in fulfilling the obligation.”

The duty to act in good faith means that agent must act with honesty, fairness, and lawfulness of purpose. The agent must also act without any intent to defraud,

act maliciously, or take unfair advantage. In other words, the agent must always “do the right thing.”

The duty to exercise care is important since it means the agent must do what needs to be done to protect the assets of the principal. This means paying legitimate bills on a timely basis and otherwise managing the assets in a prudent manner.

Candor means that the agent must be frank, open and sincere in his actions. And, very importantly, the agent must act in a manner that is free from bias and partiality.

Finally, the duty of loyalty means that there can be no self-dealing. The agent cannot profit or benefit in any way as the agent, unless the general power of attorney specifically authorizes such a benefit. For example, the agent may not make gifts of the principal’s money to himself, even if the principal made gifts to the child/agent prior to the disability.

When a client is considering who to appoint as an agent under a general power of attorney, considerations of birth order, geographic proximity, and the relative egos of the children are discussed. However, these are secondary considerations. The real question is who will best be able to fulfill the fiduciary duties of the agent. This will take careful thought and, perhaps, conversations with all of the children to determine who is best suited for this very important role.