

What Jane Knows About Powers of Attorney

By Frank Dana



To her credit, Jane knew she and Tom had wills, and she had brought me a fairly complete list of what she and Tom owned. It was mostly the normal things: a house they bought when the kids were small, two cars, some money in the bank, and a couple of life insurance policies. The biggest piece of the puzzle that was missing was the power of attorney. "What's that?" was Jane's question, and I explained that a power of attorney is a document in which she and Tom would appoint an agent, naming each other to manage their business if either of them wasn't able to do that.

"Well, I thought that was what my will is for," was Jane's response, and again, I explained that a will only says what happens when you die, and doesn't say anything about what happens while you are still alive.

A person's will, in a nutshell, is the quintessential document used for planning for what will happen if you die. It is, by definition, "estate planning" only.

A power of attorney is the typical document used for planning for now until you die – an idea expressed in my firm's tag line, "Planning for Life." Jane's attorney had done a good job of drafting her will, but it was the "Planning for Life" that was the present cause of her problems.

I explained to Jane that if Tom had to go to assisted living or a nursing home, she would probably want to transfer the home to her so that she could refinance it or sell it, if she decided to move to a smaller place. I asked her whether Tom could sign a deed. "He would have always done whatever our advisors recommended, but now, I'm not sure," Jane quickly said. "He's so suspicious of everybody," she went on. "In fact, I tried to pay our bills the other day and he got so angry with me because it was something he had always done. But now, he doesn't do it, and I was afraid they wouldn't get paid."

That brought up another problem: what to do about all of those bank accounts – some in his name, some in her name, and some in both names.

"Can I just write a check?" Jane asked. "After all, I'm his wife," she added. I explained that while she could take care of many things for Tom, she couldn't automatically handle his business just because they were married. Unfortunately, there was a lot of money in Tom's accounts that she needed in order to keep their household going.

Obviously, the easy answer was just to find their power of attorney (presuming they had prepared one), and Jane and I talked about how she might look for it, including inquiring with the attorney who had done their wills, looking in the safety deposit box, and searching the desk at home where some of their papers were kept, among other things.

I wasn't too hopeful about this and neither was she, and finally she said, "Why don't we just do a new one?" This was actually an excellent idea, but there was at least one major obstacle – Tom's power of attorney would not be valid unless he understood what he was doing, and his recent behavior made us both wonder how well he understood business matters. Legally, we would say that a person must be "competent" to sign a power of attorney.

Fortunately, Tom was at the doctor, and I suggested to Jane that she call and ask the doctor to evaluate how well he was able to understand business matters and let us know whether he was able to understand a power of attorney.

Within a few minutes, the doctor's office called back and said that Tom had been evaluated. While the doctor was concerned about his behavior and the difficulties he was having, he felt that Tom was still able to understand a power of attorney.

This left Jane the not insignificant task of persuading Tom that it was a good idea to sign a power of attorney, but at least, we now knew that it was possible for him to sign one. Before she left, we made an appointment to meet with both of them to discuss powers of attorney.

I also told Jane before she left that if Tom refused to sign a power of attorney, there was a lot we could do through the Probate Court and that financial planning by guardians was a new legal technique that had a lot of promise. On the other hand, using the court is not only far more expensive, but is slow and often emotionally difficult for families.

Jane's story is not at all unusual, and in fact I often meet with clients with many of the same questions that Jane had.

A power of attorney is often practically ignored during the estate planning process, but is probably the single most important document for a client to have during his or her lifetime. For a client facing problems such as those that Tom is facing, a will is utterly ineffective in enabling anyone to do anything until Tom dies. If you are trying to survive financially during illnesses and perhaps dementia (as Tom may have had), the power of attorney is essential.

In my office, a power of attorney is not an optional document, and I prepare one for every client who wants to sign a will or do any other kind of estate planning. The only question is whom they should appoint, not whether they should have one.

I could say a lot more about powers of attorney, including what kinds there are, whether or not they are "durable", who to appoint, whether they need to be recorded, and what the agent can be authorized to do. But more important than all of this, the message I'd like to leave with you is this: you should have one. If you don't have a power of attorney, go directly to your attorney's office, get one drafted, and sign it immediately – it's that important.

do it now!

Let me say once more – **do it now!** Don't wait until you need it, like Tom, because you might not be able to sign it then. As in all effective planning, a power of attorney should be prepared long before it is needed.

We all hope Tom and Jane will be able to complete their planning, and at least financially put themselves back on an even keel.

If you have anything in common with Tom and Jane, I hope you will, too.

The Dana Law Firm focuses its practice on elder law, concentrating on the legal needs of senior and disabled Americans, including Medicaid planning and applications, special needs trusts, guardianships and conservatorships, long-term care planning, planning for disability and incapacity, including powers of attorney and health care advance directives, estate administration, probate proceedings of all types, and wills and estate planning.

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