THE COULSON LAW GROUP

# MEDICAID PLANNING TODAY

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## POWERS OF ATTORNEY AND MEDICAID ELIGIBILITY PLANNING

Most Medicaid eligibility planning is carried out by someone acting on behalf of the elder, rather than by the elder personally. The reason is fairly self-evident: by the time someone has reached the point of requiring a substantial level of care, that person is generally unable to personally carry out property and financial transactions or make health care decisions.

There are only two ways in which one person can acquire the legal authority to act on someone else's behalf. One is by having that other person give him or her the authority directly, by executing a power of attorney. The second is by having a court give him or that authority by naming him or her as guardian of the person and/or guardian (in Illinois) or conservator (in Missouri) of the estate of that other person.

For several important reasons, it is much wiser for authority to be conferred directly from one person to another than through a court proceeding.

First, a power of attorney is much quicker and way less expensive. Next, a person giving power of attorney gets to name exactly whom he or she wants to act, rather than that choice being made by the court, thus eliminating the risk of an expensive and time-consuming court battle or "the wrong person" being chosen. Finally, when one person gives another power of attorney, he or she has the opportunity to make clear what the agent is and isn't allowed to do (more on that below). A guardian or conservator is only given basic authority, set forth by statute, and has to go back to court to seek permission to do anything else.

Both Missouri and Illinois differentiate authority to make and carry out property and financial decisions from authority to make and carry out health and personal care decisions. Illinois has basic statutory forms for both types of power of attorney, named "Illinois Statutory Short Form Power of Attorney for Property" and "Illinois Statutory Short Form Power of Attorney for Health Care." Missouri's statutes govern and regulate the contents and use of powers of attorney for property, but do not prescribe a statutory form. For health care, Missouri has a "Durable Power of Attorney for Health Care and Health Care Directive."

Although the use of statutory forms is not required, it does offer the distinct advantage of guaranteed acceptance of the form, at least in that state. Incidentally, almost all St. Louis area medical providers accept both states' health care power of attorney forms automatically.

The most common misconception lay people share with regard to health care powers of attorney is that they only address life-sustaining measures in the event of a final illness. In fact, their application is much broader. For example, the agent may be called upon to make every health care decision, for several years, for someone with Alzheimer's disease.

### THE STANDARD OF COMPETENCY FOR EXECUTING A POWER OF ATTORNEY

The standard of competency required for execution of a power of attorney for property is lower than for a will or trust. The standard is generally met if, *at the time of signing* (even if it wouldn't be the case on a "bad day"), the person:

◇ realizes he or she has money and or/property
◇ is able to recognize the person(s) to be named
◇ understands that the agent will be handling his or her financial affairs
◇ and trusts that the agent will be guided by his or her best interests in acting.

To grant the "additional powers," the person should also approve the idea of the agent "giving away what I have to help protect it."

Having a health care power of attorney in place can actually save a lot of money. Without someone to discuss care options and reasonable limits with, doctors and other care providers often feel constrained to practice "defensive medicine" by ordering every possible test and undertaking heroic measures that offer only remote hope for success.

Especially with the advent of statutory forms, most lay people – and even many attorneys – share the unfortunate misconception that most powers of attorney for property are pretty much the same, and either you have one or you don't. That's not true. Moreover, the scope of the agent's powers is of critical importance in determining whether effective Medicaid eligibility planning can be accomplished.

The powers granted in a "basic" power of attorney for property cover actions that fall under the heading of "taking care of my business for me." The powers that are not included unless specifically mentioned fall under the heading of "giving away what I have or making changes in how I own things." (See the insert on that subject.)

**HAVING THE POWER YOU NEED**

The following powers, often critical in carrying out Medicaid planning, are not granted under a power of attorney for property unless they are specifically mentioned:

◇ Making gifts ◇
◇ Establishing trusts ◇
◇ Moving assets into or out of a trust ◇
◇ Naming, deleting or changing joint tenants ◇
◇ Naming, deleting or changing beneficiaries ◇

To avoid potential abuse, careful limitations must be set when these powers are granted. This subject requires close discussion with the attorney who prepares the document.

To be eligible for Medicaid, a person must have very limited "countable resources" – $999.99 in Missouri, $2,000.00 in Illinois. Unless assets can be given away, they have to be spent down. As explained in other issues of this newsletter, gifting remains an effective planning strategy, if done very carefully under the direction of an experienced elder law attorney. The designation of beneficiaries of assets that a Medicaid applicant is allowed to keep can be critical toward protecting them from being lost to Medicaid "estate recovery" when the person dies. Similarly, placing ownership of real estate into a living trust has been a historically effective means of protecting it from "estate recovery." Each of those actions involves the exercise of one of the "additional powers" not included in many power of attorney forms.

Likewise, in the case of a married couple, assets owned by the spouse in the nursing home can often legally be given to the other spouse to satisfy the "community spouse resource allowance" (assets the other spouse is permitted to keep), or converted into a stream of income the other spouse could keep, but that can only be done if someone has the authority to do it.

What happens when a power of attorney does not authorize everything necessary to carry out Medicaid planning? If the person who signed it remains competent (see the insert on that subject), a new one granting the additional powers can be signed. The only other choice is court proceedings, with no guarantee that the judge will authorize the proposed actions.

When is the right time to put powers of attorney in place? The answer is easy: Now! Everyone faces the possibility of becoming incapacitated at some point in life, and none of us knows when that might happen. If you wait "until the situation comes up," you run a huge risk of having waited until it's too late. As the boy scouts so aptly put it, "Be prepared."

***In Service Training Available:***

The Coulson Law Group offers in-service training on topics related to:

* Medicaid Eligibility and the Deficit Reduction Act of 2005
* An Introduction to Medicaid Planning and Division of Assets
* Guardianship/Conservatorship and Powers of Attorney
* Other Elder Law Issues

We can cater presentations to meet your time requirements. For more information contact our Director of Community Education and Outreach, Beth Frame, at (314) 567-9292 or (618) 659-9292.

Medicaid Planning Today is written by the attorneys of The Coulson Law Group, Wesley J. Coulson and Joseph Ilges, and is published as a service of The Coulson Law Group, 1001 Craig Road, Suite 224, St. Louis, Missouri 63146; 107 Southpointe Drive, Suite 2, Edwardsville, Illinois 62025. This is for general informational purposes only and does not constitute legal advice. For specific questions, you should consult a qualified attorney.

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