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Durable General Power of Attorney
&
New Jersey Advance Directive for Health Care

I. History of the power of attorney.

Beginning the late 1960's there was a statutory revolution in the law of agency. Under traditional agency law, the agent's powers are limited to those possessed by the principal. With the principal's incapacity, the agent was also unable to act. The "durable" power of attorney statutes such as the law passed in New Jersey changed this. A durable power survives the incapacity of the principal.

To permit maximum flexibility, The Power of Attorney used by TCED permits the power giver to allow the exercise of the power only in the event of a disability. This is known as a "springing power." Alternately, the TCED Power of Attorney may be made effective upon its execution regardless of the capacity of the power giver. If the power is not executed to take immediate effect the issue of proving incapacity may become a roadblock to the use of the power by the attorney in fact. In our experience, banks and other third parties may be more reluctant to accept the authority of an agent under a springing power of attorney, and may require periodic demonstration of the principal's continued incapacity.

As a practical matter you should know that the person to whom you have given your power, known as an "attorney in fact" must have physical possession of the Power of Attorney in order to exercise its powers. Realizing this, many of our clients execute a power of attorney to take immediate effect, but keep the original in their possession. In the event of illness or absence, the attorney in fact is told where the Power of Attorney document is located so

they can take possession of the document if and when needed. Also, TCED always retains one original signed copy of our client's power of attorney in our files.

II. Definition of Power of Attorney

A power of attorney is a written instrument in which the principal authorizes another person, known as the attorney in fact, to act in the principal's place as the principal's agent. As a result the agent has the power to affect legal relationships between the principal and third parties. In other words, the attorney in fact has the power to obligate the principal and to act as the principal would act.

Since a general durable power of attorney instructs third parties to recognize the agent's authority to deal without restriction with the principal's affairs this is a very powerful document. Accordingly, the power must be executed before a Notary public with one witness present.

Only a "competent" individual can execute a power of attorney. A person is competent if he or she has the ability to understand the purpose and effect of the document being signed, and to understand the underlying powers being conveyed.

III. Benefits of Power of Attorney

If a person has executed a power of attorney, the attorney in fact can act as a conservator with respect to the person's financial assets. This precludes the necessity of appointing a guardian of the person and property by Court action. For example, where real property is held as tenants in common, if one of the owners develops a legal incapacity to act and has no power of attorney in place, the property cannot be sold until a Court appointed conservator or guardian of the person and property of the incapacitated person is named to act on behalf of that owner.

IV. Detriments of Power of Attorney

The primary detriment in executing a power of attorney is the possible misuse of the principal's assets. The risk that the agent

will misbehave must be weighed against the possible need for a cumbersome and expensive Court proceeding to appoint a private conservator or guardian, or even the appointment of a public guardian with its attendant percentage charges at the death of the ward of the state. But if the principal cannot identify a trustworthy individual to be his or her attorney in act under a power of attorney, he or she will have to let a Court take over in the event of incapacity.

To discourage misuse of a power, the New Jersey Power of Attorney statute permits the power giver, and his or her heirs after death, to obtain a court supervised accounting of all financial transactions of your attorney in fact. If it is shown that the transactions were not in the best interests of the power giver, the attorney in fact will be liable for damages.

As a further limitation on the misuse of a power of attorney you should know that the power giver may revoke the power at any time, and that the power terminates upon the power giver's death. A revocation of a power of attorney can be accomplished by simply destroying all originals of the power. If a new power holder is named under a replacement power of attorney all authority given to any previously named attorney in fact is eliminated.

V. Scope of Power of Attorney

A. One or several attorney's in fact

Generally, TCED encourages its clients to name more than one attorney in fact each of whom will serve in succession. Some clients, however, may wish to name joint power holders with both required to authorize transactions. Other clients will permit either of the power holders to act as attorney in fact. Unless the power of attorney expressly permits multiple agents to act independently of one another, most third parties will require the signature of every agent before permitting a given transaction.

B. Actions on principal's behalf

In acting on behalf of the power giver, the attorney in fact should disclose the fact that the signature is being affixed by: "Jane Doe, POA" or "Jane Doe, Attorney in Fact."

C. Powers granted to an attorney in fact

Principal among the powers granted to an attorney in fact are powers to allow the agent to handle all financial matters for the principal. A New Jersey power of attorney must make specific reference to state banking statutes so that New Jersey banks will accept the attorney in fact's authority.

No power can be granted to create or change the power giver's will. Authority can be given to the power holder to change retirement plan and life insurance beneficiaries.

Third parties will sometimes refuse to permit the attorney in fact to act without express language granting the specific authority in question. Therefore, the power of attorney document may appear to be verbose.

Thus, for example, the attorney in fact has no gift giving powers unless specifically granted. The TCED power of attorney document limits gifting powers to benefit family members, or in the case of a person without children, to heirs under his or her will provided that such gifts will save Federal or New Jersey estate or inheritance taxes. Charitable gifts may be authorized but TCED recommends qualifying language so that gifts are consistent with a client's charitable giving program.

A person who has a pet may want to require his or her agent to care for the pet and not simply have it put to sleep.

An attorney in fact may employ experts and agents but will remain liable for those he or she employs. In other words, your power of attorney holder may not delegate his or her authority to another person.

VI New Jersey Advance Directives for Health Care Act

A. Purpose

Sets forth the patient's treatment choices, including instructions regarding withholding or removal of life-sustaining treatment in the event the principal is in a terminal condition or vegetative state. This is the "Living Will" portion of the New Jersey Advance Directive.

Appoints a health care representative who is to make decisions consistent with the principal's wishes. This is the "Health Care Durable Power of Attorney" portion of the New Jersey Advance Directive.

The New Jersey Advance Directive is the product of the New Jersey Bio Ethics Commission. This body was appointed by the Governor in response to public outcry over the Karen Ann Quinlin case in which a comatose individual was kept alive for years because no law was available to set her free.

B. Effect of state law.

New Jersey expressly provides for the recognition of a Living Wills and durable health care powers of attorney prepared in accordance with the law of another state. Unlike the laws of 28 other states, however, New Jersey does not permit a surrogate decision maker to make health care decisions for you if you become incapacitated unless you have executed either a New Jersey Advance Directive or a similar document in another state.

C. Effect of Federal law

The Federal Patient Self-Determination Act passed in 1990 requires all hospitals, nursing homes, and HMO's to inform patients about their right to execute a New Jersey Advance Directive. These providers must also inquire upon a patient's admission for service about the existence of an Advance

Directive. The Act explicitly prohibits health providers from requiring patients to sign an Advance Directive.

D. Execution and Distribution

As with a power of attorney the principal executes the New Jersey Advance Directive for health care before a witness and notary public.

It is extremely important for the principal to discuss the Advance Directive with his or her Health Care Representative. During any period of incapacity or limited capacity of the principal the Health Care Representative should expect to be involved in decision-making regarding the principal's health care. TCED also recommends that you provide a copy of your New Jersey Advance Directive to health care providers, especially those where you live.