Powers of Attorney

by John S. Kitchen, JD, LLM
johnkitchenlawoffices.com

A. General Powers of Attorney

A durable general power of attorney is most often chosen to provide for financial decisionmaking in the event of the client's future disability. The financial decisions are then made by a person who has been selected by the client when the client was able to sign legal papers before the client became disabled. No Court hearings are then required for financial decisions to be made. Other people are not involved in choosing the decision maker, although the Court can be asked to review the actions of the fiduciary under RSA 506:7.

Financial powers of attorney are governed by RSA 506:5,6,7, as well as RSA 384:39, RSA 385:7 and RSA 477:9. RSA 506:6 I provides:

> "The subsequent disability or incompetence of a principal shall not revoke or terminate the authority of an agent who acts under a power of attorney in a writing executed by such principal which contains the words 'This power of attorney shall not be affected by the subsequent disability or incompetence of the Principal' [emphasis supplied] or words of similar import showing the intent of such principal that the authority conferred shall be exercisable notwithstanding his subsequent disability or incompetence."

Unless other arrangements are made, a financial power of attorney goes into effect as soon as it is signed. Often it is not intended to be used until disability of the principal. If a power of attorney is desired that does not go into effect until disability (a so-called springing powers of attorney), the question arises as to how to determine whether the principal is in fact disabled. A person dealing with the agent of a springing power of attorney might require guardianship or updated medical reports on a periodic basis in order to honor the power of attorney. That is why most general financial powers of attorney are written to go into effect immediately even though they may not be used until much later. As an alternative for the client who is concerned about the power of attorney going into effect immediately, it may be advisable to have the financial power of attorney held by a third party for release upon disability under specified circumstances such as the opinion of the client's physician or a chosen family member or friend.

General financial powers of attorney are an important part of estate planning for disability, but it is important to remember that abuses can occur. The client should select the agent with great care and inform the agent of his or her fiduciary duties. It may be appropriate to appoint co-agents, and/or give an outside party power to approve disbursements in advance and/or power to revoke

the power of attorney. The Court in the case of In re Estate of Ward, 129 N.H. 4 (1986), held that the agent is a fiduciary, and that the agent may be held liable on any misappropriated funds. Under RSA 506:7 the person who is signing their own power of attorney (called the "principal") and the spouse, child or parent of the principal, an heir or devisee of the principal, a treating health care provider and the office of the ombudsman under RSA 161-F:10, may, without a Court proceeding, require the agent to submit an accounting. RSA 506:6 II provides that if a guardian or conservator has been appointed by the Court, then the guardian or conservator has the same power that the principal would have had to revoke, suspend or terminate any part of the power of attorney. To protect the principal's interests, RSA 506:7 contains significant limitations on the powers of the agent and provides that a petition may be filed in the Superior or Probate Court to determine whether the power of attorney is in effect, to determine the legality of acts of the agent, to require the agent to file an accounting or to terminate the power of attorney. RSA 506:7 provides that the Court may order the agent to pay reasonable attorney fees to the petitioner if the Court determines that the agent has violated his fiduciary duties under the power of attorney or has failed without a reasonable cause or justification to submit accounts after written request.

RSA 477:9 requires that powers of attorney concerning real estate must be signed and acknowledged and may be recorded as required for a deed, and RSA 506:6, IV requires that every durable power of attorney be executed in accordance with RSA 477:9. The legislative has also enacted into law specific disclosure forms which must be attached to financial powers of attorney. These disclosure forms are designed to make the principal aware that he or she is giving someone else significant authority to act, and to make the agent aware that the agent must act properly.

A power of attorney for financial matters may be written to be specific to one matter. Typically, however, financial powers of attorney are written to cover a broad range of issues which might arise in the event of disability of the principal. These issues include depositing funds in a bank and withdrawing funds to pay for the principal's needs, making investment decisions, having access to safe deposit boxes, arranging for social security and other public benefits and private retirement benefits for the principal, filing tax returns and handling tax audits and representing the principal's interests in litigation.

Financial powers of attorney may also allow the agent to disclaim any interest in property which the principal may be entitled to. Such a disclaimer would allow property to be disclaimed which would have gone to the principal while disabled prior to death. Disclaimer powers and gifting powers can be very helpful, for example in tax matters, but do place considerable power in the agent. Disclaimers are regulated by RSA 563-B. Gifts to the power of attorney agent must be specifically permitted in the document. It is also a good idea to consult the principal's will when using gifting powers in a financial power of attorney.

When estate planning in the principal's best interests needs to go beyond carrying out a plan already established prior to the disability, there is the option of requesting or petitioning the Probate Court to make an estate plan.

A power of attorney may also contain a provision stating that the agent may "take such other actions on my behalf as a guardian has the authority to do under RSA 464-A."

Clients sometimes wonder why they need a financial power of attorney if they are establishing a trust. Financial powers of attorney typically include certain powers which a trustee does not have. Financial decisionmaking by a trustee only extends to the assets which have actually been retitled into the trust. The agent under the financial power of attorney can be authorized to make decisions concerning assets which are not in the trust. Arranging for public benefits and handling various tax matters are two examples of areas of decisionmaking outside the trust. Also the agent under the financial power of attorney can be authorized to transfer assets into trust.

B. Health Care Powers of Attorney

A power of attorney for health care matters should be considered so as to allow all health care decisions to be made, in the event of the client's disability, by a person who has been selected by the client before the client becomes disabled. RSA 137-J provides specific legislative authorization for this type of document and also a specific form, created by the legislature, to use. No Court petition for guardianship is then required before health care decisions can be made for a disabled person who made a health care power of attorney prior to disability.
A living will, in addition to the health care power of attorney, is appropriate if the client wishes to declare that he or she does not want artificial means used to prolong his or her life in the event a person is near death or permanently unconscious. RSA 137-J provides specific legislative authorization for this type of document and also a specific form, created by the legislature, to use.

If the client wishes a living will, it is usually best to have both documents (a living will and a health care power of attorney) because the living will more clearly determines what will happen concerning near death situations and permanent unconsciousness, and the health care power of attorney allows decisions to be made flexibly not only concerning near death situations and permanent unconsciousness, but also for all other health decisions by a person named in the document. If there is a conflict between the instructions of a living will and a health care power of attorney, the health care power of attorney controls under RSA 137-J:21 II.

Both the health care power of attorney and living will declaration are legislative forms, but they are in many ways the most important planning documents. The language can be altered to some degree, but it is not advisable to create a document which would risk not being honored when needed.

Clients may ask what happens if they are out-of-state at the time a decision needs to be made if the client could not return to New Hampshire. No guarantee can be made that the documents will be honored in another state or country, but New Hampshire's advance directive reciprocity law (RSA 137-J:17) states: "Nothing in this chapter limits the enforceability of an advance directive or similar instrument executed in another state or jurisdiction in compliance with the law of that state of jurisdiction. However, any exercise of power under such a foreign advance directive or similar instrument shall be restricted by and in compliance with the requirements of this chapter and the laws of that the State of New Hampshire." If a client maintains a vacation home in

another state or country or travels regularly to another jurisdiction, the client should inquire about the matter there. Having both a living will and a health care power of attorney provides some additional security that one or the other at least would be honored on the issue of near death situations or permanent unconsciousness. Near death situations and permanent unconsciousness are very personal matters, but should be discussed with the client in connection with an estate plan.

A health care power of attorney covers all health care matters, not just near death situations and permanent unconsciousness. It is possible to add to the statutory health care power of attorney additional specific provisions similar to what are often found in guardianships orders. Although it should not be necessary to do so, it may be advisable to add additional powers to the statutory health care power of attorney to help ensure that the mental, emotional and physical health concerns of the disabled person are properly addressed and treated.

It may also be advisable to add a specific reference to the health care records federal law such as the following: In accordance with the Health Care Insurance Portability and Accountability Act of 1996 (Pub. L 104-191), 45 CFR Sections 160 and 164 ("HIPAA"), my Agent may act as my Personal Representative for the purpose of obtaining and receiving any and all protected health information related to my health care and related to payments in regard to such health care.
On the specific question of disclosure to family members, friends and services providers of confidential records, it is also useful to know that RSA 135-C:19-a provides:

I. Notwithstanding RSA 329:26 and RSA 330-A:19, a community mental health center or state facility providing services to seriously or chronically mentally ill clients may disclose information regarding diagnosis, admission to or discharge from a treatment facility, functional assessment, the name of the medicine prescribed, the side effects of any medication prescribed, behavioral or physical manifestations which would result from failure of the client to take such prescribed medication, treatment plans and goals and behavioral management strategies to a family member or other person, if such family member or person lives with the client or provides direct care to the client. The mental health center or facility shall provide a written notice to the client which shall include the name of the person requesting the information, the specific information requested and the reason for the request. Prior to the disclosure, the mental health center or facility shall request in writing the consent of the client. If consent cannot be obtained, the client shall be informed of the reason for the intended disclosure, the specific information to be released and the person or persons to whom the disclosure is to be made.

II. Notwithstanding RSA 329:26 and RSA 330-A:19, when the medical director of designee determines that obtaining information is essential to the care or treatment of a person admitted pursuant to RSA 135-C:27-54, a designated receiving facility may request, and any health care provider which previously provided services to any person involuntarily admitted to the facility may provide, information about such person limited to medications prescribed, known medication allergies or other information

> essential to the medical or psychiatric care of the person admitted. Prior to requesting such information the facility shall in writing request the person's consent for such request for information. If the consent cannot be obtained, the facility shall inform the person in writing of the care providers how have been requested to provide information to the facility pursuant to this section. The facility may disclose such information as is necessary to identify the person and the facility which is requesting the information. No care provider who discloses otherwise confidential information to a designated receiving facility following a request made pursuant to this section shall be held civilly or criminally liable for disclosing such information.

Finally, it is possible to add to a health care power of attorney a provision saying that if a person is incapacitated but objects to medical treatment such as medications, the power of attorney Agent may still authorize the treatment under RSA 137-J:5, IV.

C. Mental Capacity to Sign Powers of Attorney

Sometimes guardianship is the only alternative available when there has been no chance during a period of capacity to grant powers of attorney. The Probate Court does provide supervision of guardians which can be very helpful, and the New Hampshire Probate Courts are efficient and understanding. But guardianship court proceedings can, by their very nature, be time consuming, expensive, adversarial and emotionally stressful for family members, although they may be much less stressful than Involuntary Emergency Admission (IEA) proceedings if done in advance of a mental illness crisis. It is always difficult, however, for family members to testify in Court about a disabled loved one's specific functional limitations, and then to be cross-examined about such sensitive family matters. It is more expensive and emotionally trying to the family to petition for guardianship, than it is to utilize powers of attorney given, without the necessity of Court proceedings, prior to the disability arising, if that is possible. Financial and Health Care Powers of Attorney are less restrictive alternatives to guardianship and IEA proceedings.

Even if the disability arose before powers of attorney could be granted, there are situations where a disabled person has periods of capacity during which documents can be understood and signed. Many disabilities have up and down periods.

If there is a question whether an already disabled person has the capacity to make a power of attorney, an evaluation may be done by a psychiatrist, psychologist, or other professional depending upon the nature of the disability. This evaluation can be done at or near the time of signing. Many people who are disabled still have the ability to make a power of attorney. A person is presumed to be competent unless a guardian has been appointed under RSA 464-A. RSA 464-A:2 XI requires a functional assessment of the client's ability to provide for his personal needs or to manage his finances or property. Before a guardianship can be granted the Probate Court must find that the proposed ward is incapacitated under RSA 464-A:2 XI, which provides in part: “Isolated instances of simple negligence or improvidence, lack of resources or any act, occurrence or statement if that act, occurrence or statement is the product of an informed judgment shall not constitute evidence of inability to provide for personal needs or to manage

property." RSA 464-A:2 XII then defines informed judgment as follows: "Informed judgment' means a choice made by a person who has the ability to make such a choice, and who makes it voluntarily after all relevant information necessary to making the decision has been provided, and who understands that he is free to choose or refuse any alternative available and who clearly indicates or expresses the outcome of his choice."

The testamentary capacity necessary to make a will requires under RSA 551:1 a "sane mind", but this statutory phrase is not defined in the statute. The leading New Hampshire case of Boardman v. Woodman 47 N.H. 120 (1866), held that "in order to have sufficient mental capacity to make the will [the decedent], at the time of making it, must have been able to understand its general nature, to bear in mind those who were then her nearest relatives as such, and to make an election upon whom and how she should bestow the property by her will; that she must have had the ability, the mental power or capacity to do this...." This standard is generally understood to mean that a person making a will must be able to (1) understand the nature of the act of execution, (2) recollect what property he wishes to dispose of and understand its general nature, (3) bear in mind his relatives, and (4) elect and choose the disposition to be made of his property. N.H. Practice Wills, Trusts and Gifts, Vol. 7, sec. 6.03.

Although the contractual capacity required under agency principles to make a power of attorney or can technically differ somewhat from the capacity to make a will (see Restatement Contracts 2nd, sec. 12 and Restatement Agency 2nd, sec. 20), the above Boardman standard is a New Hampshire Supreme Court defined standard to look to when determining capacity to make decisions about one's finances. See also, by way of analogy, the statutory standard for capacity to name another to make financial decisions set forth in RSA 464-A relative to conservatorship. The standard there is basically that the Court must find that the disabled person is capable of making the decision to have another person make financial decisions, even though the disabled person is not able to make the actual financial decisions themselves.

The Uniform Trust Code provides at RSA 564-B:6-601: "Capacity of Settlor Of Revocable Trust. The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."

RSA 137-J:14, concerning health care powers of attorney, requires that the witnesses to the durable power of attorney for health care affirm that the principal "appeared to be of sound mind and free from duress at the time....and that the principal affirmed that he was aware of the nature of the document and signed it freely and voluntarily." This is not as high a mental capacity as that required to make the health care decision itself under RSA 137-J:2 V, which generally states: "Capacity to make health care decisions" means the ability to understand and appreciate generally the nature and consequences of a health care decision, including the significant benefits and harms of and reasonable alternatives to any proposed health care."

In a close question, consider providing legal standards to a psychiatrist, psychologist, or other professional depending on the nature of the disability and requesting an evaluation and opinion letter. If the opinion favors capacity, then retain it with the powers of attorney. If the opinion favors incapacity, consider guardianship. If the court then overturns the evaluation and denies the guardianship because the client's functioning level is too high for a guardianship, then revert to

powers of attorney. Take these steps, if possible, before a crisis situation. If there is a crisis and no powers of attorney have been signed in advance, then consider guardianship as a less restrictive alternative to an emergency involuntary admission (IEA) procedure, unless an IEA is the only alternative.

December 2016