Save Your Settlement

Injury Settlement Planning Attorneys

Will Your Power of Attorney Help or Hurt The Client Post-Settlement?

By Julian E. Gray, CELA*

April 18, 2021

A little over 20 years ago, Pennsylvania drastically changed its laws about durable powers of attorney. You might not remember it, or even care, unless your client has a long-term disability. That's because**,** in Pennsylvania**,** if you fail to have the "magic language" in your power of attorney that was created by statute in 1999, your client could lose his or her life savings, including any awards or settlements gained through your efforts in a liability case.

First, let's revisit the power of attorney so we understand what it is - and what it isn't. A Durable Power of Attorney is a document you sign today and it is good for tomorrow; or the rest of your life. When you sign a Power of Attorney, you give another person(s) the right to make decisions for you if you ever become incapacitated. This document can be held in safekeeping for years after it is signed and it will still be effective. On the other hand, a Power of Attorney does not dispose of your assets at death (that's what a Will or Trust does) and it actually is no longer valid upon your death since it is an agency agreement to act as a surrogate for a living person who is incapacitated or unavailable. While there are a wide variety of powers that a person can delegate through a Power of Attorney, let's discuss one that resonates with everyone - handling your client's money, home and other assets.

Unfortunately, many people think all Powers of Attorney are created equal. Yes, there are forms out there you can get that might help you to do routine activities like pay bills, file tax returns or make medical decisions, but when the situation involves a long-term disability, some extra precautions are necessary. What's even worse is that many lawyers who do not specialize in planning for disabled clients are unaware of a law change from two decades ago and continue to write Power of Attorney documents that fail to address this critical issue.

Let's look at what changed in the law in 1999 and some scenarios where this change has a major impact.

The Law: It's all about the ability for the Agent under the Power of Attorney document to make gifts of property on behalf of the Principal (the one who creates the document). An Agent appointed under this document has many powers by statute to act on behalf of his Principal.

However, for Powers of Attorney signed after 1999, the document must contain specific language about the nature and amounts of gifts that can be made to third parties of the Principal's assets.

Prior to 1999, many Powers of Attorney were silent on the issue of making gifts; or the document said "to make gifts" or "to make limited gifts". Well, after 1999, if the Power of Attorney does not specifically mention making gifts, then gifts are not allowed for any reason. Worse yet, if the document states the simple "to make gifts", then the interpretation is that this gift is limited to the IRS annual exclusion of $15,000/year (note that the current lifetime federal gift tax exemption is $11.7 million**,** so if your gift is more than $15,000 you still don't pay any gift taxes - until you gift an aggregate of $11.7 million - we should all be so fortunate!).

Why is this so important? Let's examine a very common scenario that is affected by this situation.

Power of Attorney needs for a person with a catastrophic injury or long-term disability that will require expensive care not covered by traditional health insurance: While there are numerous disability planning scenarios, we'll examine one that is very common and could hinge on the right gifting language in your client's Power of Attorney: Personal injury plaintiffs who need to plan on obtaining government benefits to subsidize their long-term care costs at home or in a facility to avoid squandering their settlement on these costs.

An injured client awaiting a cash settlement from an accident or medical malpractice injury should beware. That client typically waits two years or more to settle the case so the client has got time on his or her hands. This is when we look at your client's Power of Attorney to see if it will be helpful when the money arrives, and your client wants to protect it. Sadly, the typical scenario involves the plaintiff attorney (no offense, you do a great job getting money for your client's injuries but you don't specialize in disability estate planning) who hands the plaintiff a boiler plate Power of Attorney to sign when the case begins shortly after the injury.

However, this Power of Attorney is really not meant to cover the issues that will arise after your client receives a settlement - and a lot can happen over those years awaiting payment. Frequently, a person who has a catastrophic injury may suffer additional medical trauma before they settle their liability case; so much so that they lose the ability to make decisions for themselves due to a stroke, traumatic brain injury, etc. Then, a family member typically steps in to act on behalf of the injured plaintiff. Sounds a lot like the family member is going to be the "agent" of the injured person under that Power of Attorney hurriedly assembled a couple years ago to get the case started. Now it becomes clear that the injured person is going to require expensive long-term care for the rest of his**/**her life costing hundreds of thousands or millions of dollars. Uh oh, if only the settlement funds could be gifted to a protective trust or some other planning scenario to not waste away as the injured person's costs increase. All of this could be avoided if the plaintiff would have signed an appropriate Power of Attorney while he still had

capacity - one that specifically states the agent can make broad gifts of assets, especially in light of expected long term care costs.

Now, you might say: can't a disabled person who is receiving a settlement arrange for a Special Needs Trust so that he/she doesn't have to spend down all of the settlement funds to pay for care that will be covered by Medicaid? The answer is technically "yes", but that only delays the forfeiture of the money to the government if it is not spent down during the disabled person's lifetime. There are better options in many situations.

In summary, having the most appropriate and detailed Power of Attorney that contains specific gifting provisions can literally mean the difference between saving a person's assets or watching them waste away without the ability to stop the loss. Considering that preparing an appropriate Power of Attorney document is a fairly insignificant cost compared to the potential massive financial exposure, everyone with a disability should investigate this option before it's too late.