

ELDERLAW

NEWS

New Jersey

Legal News for the Aging and Disabled

January 2001

QUESTIONS? CALL CERTIFIED ELDER LAW ATTORNEYS FOR ANSWERS.

Questions about protecting your assets against catastrophic illness and nursing home costs, Estate Planning and Administration, Social Security, Medicare, Medicaid, Retirement or Disability Planning?

Call or write: Donald D. Vanarelli, Esq., Certified Elder Law Attorney and former Social Security Claims Representative.

Mr. Vanarelli is available to speak with your social, religious or educational group, or with your employees.

A PUBLICATION OF

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NEW LAW IN NEW JERSEY SUBSTANTIALLY CHANGES RULES GOVERNING FINANCIAL POWERS OF ATTORNEY

INTRODUCTION.

One of the most important areas of personal and estate planning is protecting oneself legally and financially in the event of disability or incapacity. Many older persons and their families fear the possible onset of physical or mental disability in older age. A properly drafted durable power of attorney is a critical tool through which an older person may make and implement decisions concerning the management of his or her property in advance of incapacity. A new law in New Jersey, the *Revised Durable Power of Attorney Act, N.J.S.A. 46:2B-8.1, et seq.*, has substantially changed the rules governing these important and powerful estate planning tools.

WHAT IS A POWER OF ATTORNEY?

Powers of attorney have long existed under New Jersey law. A power of attorney is used to designate an agent to act on behalf of an individual during incapacity. A power of attorney is a written document by which one person, as principal, appoints another person as his or her agent, or attorney-in-fact, and confers upon that agent the authority to act in place of the principal for the purposes stated in the instrument. The agent is empowered to "stand in the shoes" of the principal or to act in the place and stead of the principal with respect to financial matters. A power of attorney therefore authorizes the agent to act as if the agent *were* the principal. A power of attorney may be limited to one specific action, a "special" power of attorney, or it may authorize the agent to perform virtually any kind of financial transaction, a "general" power of attorney. In addition, a power of attorney may be classified as "springing" or "durable". A "springing" power of attorney empowers the agent to act only upon the disability of the principal, while a "durable" power of attorney becomes effective immediately upon executing the instrument and remains in force despite the principal's incapacity. The person executing a power of attorney must have the requisite capacity to understand the nature and significance of his act at the time he or she signs the document. Creating a power of attorney is relatively simple. There are only two requirements: (1) The power of attorney must be in writing, and (2) the power of attorney must state that the powers conveyed are not affected by (or will become effective upon) the subsequent disability, incapacity or incompetence of the principal.

NEW LAW IN NEW JERSEY RE-WRITES THE RULES GOVERNING POWERS OF ATTORNEY.

On December 8, 2000, the Revised Durable Power of Attorney Act became effective. Except with regard to banking transactions, this new law completely revises the law in New Jersey governing powers of attorney. For example, for the first time, the law defines when the principal and agent are legally considered to be under a disability ("if the principal is unable to manage his property and affairs effectively", and

when “the [agent] is unable to exercise the authority conferred by the power of attorney effectively”). *N.J.S.A. 46:2B-8.2(c)*. The new law, also for the first time, specifically states that a power of attorney remains effective until it is revoked by the principal or terminates under its own terms. *N.J.S.A. 46:2B-8.3*. Further, the law states that third parties may properly presume that a power of attorney is effective unless they have received actual notice of revocation or death of the principal. *N.J.S.A. 46:2B-8.5* and *8.6*. Surprisingly, under the new law, the execution of a subsequent power of attorney does not automatically revoke a prior power of attorney. Rather, revocation occurs only when the principal signs a written revocation or physically destroys all originals of the power of attorney. *N.J.S.A. 46:2B-8.10*.

The new law defines the relationship between a principal and an agent, and imposes new obligations on the agent. Under the new law, an agent under a power of attorney owes a fiduciary duty to the principal, or to his guardian if the principal has been found to be incompetent, and must act for the sole benefit of the principal at all times. *N.J.S.A. 46:2B-8.13(a)*. Further, the agent has a duty to maintain accurate books and records of all financial transactions, and must render an accounting if required by the principal, the principal’s guardian, conservator or executor, or the Superior Court. *N.J.S.A. 46:2B-8.13(b)*. The new law also empowers a principal to provide for compensating an agent in a power of attorney, and to provide a method by which compensation will be calculated and a timetable by which the compensation will be paid. *N.J.S.A. 46:2B-8.12*. The Superior Court may also award reasonable compensation to the agent when the power of attorney does not provide for the agent to be compensated. *N.J.S.A. 46:2B-8.12*.

CONCLUSION.

New Jersey’s new law substantially revises existing law governing powers of attorney. Among other things, the new law provides new rights for principals and imposes new obligations on agents. The new law will make powers of attorney more useful to State residents.

NEW MEDICARE LAW EXTENDS COVERAGE RULES

At the end of December, President Clinton signed a bill into law which makes some significant additions to Medicare coverage rules. The bill phases in new coverage for glaucoma screening and medical nutrition therapy, and will enhance access to pap smears, pelvic exams, screening mammographies and colonoscopies. Unfortunately, the bill does not include any new prescription drug or long term care benefits.

The new law also includes an enhancement to the Medicare home health benefit that is effective immediately. The law enlarges the “homebound” definition so that individuals who attend adult day care for medical, therapeutic, or psycho-social reasons will not be considered to have violated the homebound definition and, therefore, may also qualify for Medicare. The law also eliminates religious services from consideration of a person’s homebound status so that individuals who regularly attend religious services will still be eligible for Medicare home health coverage.



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