

RECENT COURT CASE EMPHASIZES THE IMPORTANCE OF A POWER OF ATTORNEY

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In a recent New Jersey case, a mother became incapacitated without having a durable power of attorney. Her son petitioned the Court to be appointed as her legal guardian and requested permission to gift away assets so that she could qualify for Medicaid. The court appointed the son as guardian but denied the request to make gifts because the mother had not indicated a preference to gift away her assets while competent. This decision prevented the mother from making gifts to qualify for Medicaid and forced the family to use the mother's assets to pay for long term care.

This case illustrates the importance of estate planning for all individuals. An important part of an estate plan is a General Durable Power of Attorney (hereinafter referred to as "POA"). This legal document is important in the event that you become incapacitated because it allows a designated individual to assume control over your personal and financial decisions and take action on your behalf. If you become incapacitated without a POA, then a court must appoint a legal guardian to act on your behalf which may result in actions being taken that are not consistent with your wishes. Furthermore, as demonstrated in the recent New Jersey case, the Court may not allow the guardian to undertake Medicaid planning.

Even if an individual has an existing POA, it may have to be revised. Traditionally, a POA was merely a one or two page document which states that the Agent (designated individual) could do the same things as the incapacitated person. As an individual ages, he or she may require long term care. Families often seek the advice of an elder law attorney to protect the elderly person's assets. In some cases, the attorney will recommend that assets be gifted to family members. Elder law attorneys can protect a person's assets through different gifting strategies even after he or she enters a nursing home. However, this protection can only occur using a POA specifically authorizing gifts, which may require updating the content of a traditional POA to ensure that the designated agent is legally able to protect the elderly person's assets.

In summary, if you want your family to be able to protect your assets, you need a POA with adequate gifting powers.