

Beyond Birth Order – Selecting your attorney-in-fact

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by Leanna Hamill, Attorney at Law

An attorney-in-fact is the person you name to act on your behalf under your durable power of attorney in the event of your incapacity. Under the power of attorney, that person will be your legal agent, and able to manage your money, real property and other matters such as life insurance and retirement accounts. They will essentially be able to perform any act related to your property that you could have performed.

I have seen many clients who appoint their spouse as their primary attorney-in-fact, with their children, from oldest to youngest listed as the alternates. Your spouse is probably a good first choice, since they are most likely on many of your accounts and know how you would like things handled. But, when appointing your children, there are more important things to consider besides birth order:

1. Your first choice for an agent should be that the child is responsible and trustworthy. After all, this person will be managing your money, writing checks on your account, and may even have the power to sell your property. If your oldest child has a drug, alcohol or gambling problem, or is recently recovering from one, you should not select them as your attorney-in-fact simply because they were born first.

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2. Your agent should ideally live near you as well, since it will be easier to handle things on your behalf. However, if the most responsible child lives far away, and another child lives nearby, you could appoint them both to act either jointly or separately. That way the local one can run down to the bank for you, or write a check to the plumber, but the other one can manage your stock accounts and retirement plans. Make sure their relationship is such that it won't lead to conflicts or the inability to make decisions.
3. If one of your children is going through a divorce or other stressful event, you may not wish to select them as your attorney-in-fact at this time, in order to minimize the stress in their life.
4. Your agent should know where your important papers are kept, in case they should ever have to access them.
5. Your agent should be someone you think can handle the responsibility. In the event of your incapacity, which will no doubt be stressful enough on your family, you need to consider who the child is who could step up and handle those things that need to be dealt with – writing checks to pay the mortgage, signing contracts for medical facilities, arranging for home care and cashing out your retirement plan to pay for it, maybe even remortgaging or selling your house.

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If none of your children fit this description, or if you have no children, you should still select an attorney-in-fact, or the court will select a guardian for you in the event of your incapacity. I had one client select a friend from her widow support group, another one chose a trusted niece, still others have chosen a professional to take on this role for them. This is not a decision to be made lightly, but it is a decision that has to be made.