



PLANNING FOR THE FUTURE

AGING WITH DIGNITY

CONTINUING POWER OF ATTORNEY

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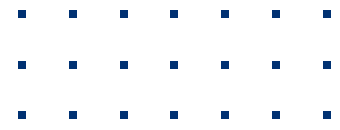
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Introduction

According to a survey of adults aged 60 and over by the United States National Council on Aging, two of the items that aging adults are most concerned about are financial security and the maintenance of their physical and mental health. Reality in Israel has meant these items and decision making facilities for people who no longer possess legal mental capacity have now become concerns of Israelis of all ages.

People of all ages who contact us are concerned with planning for the future: Prenuptial agreements, Postnuptial Agreements, Wills, which is why in this short booklet I will take an initial look at the Continuing Power of Attorney – its purpose, the players involved, and the process for drafting and implementing one.

Many people in Israel have heard about the Continuing Power of Attorney and mistakenly believe that it is the equivalent of what is commonly known in Western countries as a "living will" or an "advance health care directive", but this is a misnomer. The Continuing Power of Attorney addresses many facets of these types of documents, but when done correctly it can address much more.

My goal is to give people the information they need to make an informed decision at any age on whether or not the Continuing Power of Attorney is the right tool for them to utilize in the event that they are unable to manage their own affairs in the future.

Regarding Mental Health

Here in Israel, up until recently, when a person's mental health started to fail them (i.e. they were unable to manage their own affairs), the standard procedure was to have a court appointed guardian (apotropos) put in charge of their affairs. This guardian makes both financial and other decisions for that person. Some of these decisions require further court approval, and some do not. All of this is done in accordance with the Israeli Law of Legal Capacity and Guardianship of 1962.

(חוק הכשרות המשפטית והאפוטרופסות, תשכ"ב - 1962)

The current process is problematic in two key ways:

1. It lacks dignity: Many individuals find the experience humiliating and report feeling diminished by the procedure.
2. It overlooks personal autonomy: The system often fails to consider or implement what the person would have chosen for themselves if they still had legal decision-making capacity.

From 2016 to 2018 amendments were made to the Israeli Law of Legal Capacity and Guardianship of 1962, which have gone into effect, and which bring Israel into line with many Western countries regarding decision making facilities for people who no longer possess legal mental capacity to make decisions for themselves. These amendments allow for the creation of three new legal tools that people can avail themselves of:

- the "Continuing Power of Attorney" יפוי כוח מתמשך
- the "Decision Making Supporter" תומך בקבלת החלטות
- the "Expressed Decisions Document" מסמך הבעת רצון

The Purpose of the Continuing Power of Attorney

Many people are under the impression that the Continuing Power of Attorney (CPA / CPOA) is a tool for the elderly for the making of health care decisions when they are no longer able to make such decisions by themselves. It is that, but it is also much more.

Firstly, it does not just have to be for the elderly.

Secondly, it can also enable decision-making over three main areas health, financial, and personal issues and more if necessary.

The two main underlying assumptions behind the Continuing Power of Attorney (CPA) are:

A. People would rather have people that are close to them, and who they trust, making decisions for them when they are no longer able to manage their affairs (i.e. instead of a court appointed guardian).

B. It is preferable to have a system in place for most decisions that have to be made when a person is no longer able to manage his or her own affairs, does not require the whole legal procedure involved in having a Guardian appointed by the court and the regular court involvement thereafter.

When a person has made a valid CPA, once that person has been medically determined to be unable to make decisions for his or herself, the CPA becomes effective.

To Clarify

The person who decides they want a Continuing Power Of Attorney is the Maker – the Appointer - in Hebrew הממנה (hamemaneh). The Maker appoints legal representatives - POA הכוח מיופה (haco'ach meyupeh).

The CPA enables the person appointed (POA) to make the decisions (but only in accordance with the instructions listed in the CPA.

A competent Attorney will make sure there are instructions that address each person's individual situation when they make the CPA.

For example, some people may not want their POA to make financial decisions, or some people may want two different POAs who will make decisions on different things – perhaps one for health-related issues and one for monetary related issues, etc.

Also, even though the idea of the CPA is to enable decision making over three main areas (health, financial, and personal issues – like having haircuts, purchasing clothing, etc.) and gives the POA general power to make such decisions, there are certain things that can only be done by the POA (or POAs if multiple people are appointed) if they are expressly listed – e.g. giving gifts, or making a specific loan to somebody, etc.

Even then there are things that cannot be done at all without court approval – e.g.

- If the total of all the transactions allowed is over 100,000 NIS
- Real estate transactions
- Estate related transaction, etc.

Finally, there are some things that just can't be done by the POA no matter what – like making a Will in the Maker's name or changing the Maker's religion or adopting a child, etc.



How decisions are made

The POA is supposed to make decisions for the Maker of the CPA in the following order:

- If the Maker's desires are known, then in accordance with those desires.
- If they are unknown then in accordance with any directions in an advance directive statement.
- If there is no advance directive statement, then if the Maker has a current opinion (remember – he or she is now unable to manage their own affairs) then in accordance with what the Maker wants once it has been ascertained that he or she understands this particular point.
- If the Maker cannot understand, then in accordance with what the POA knows and believes would have been the Maker's desires.
- Finally if the POA does not know what the Maker would want, then in accordance with the best interests of the Maker (i.e. taking into account his or her religious, cultural, social, familial, etc. beliefs and if need be, talking to friends and family members to ascertain what he or she would have wanted).



Decision-Making Authority

The Maker can specify in their CPA that their POA should make decisions based on the Maker's wishes before they became mentally incapacitated. However, there's an important limitation: the POA cannot make major personal or medical decisions that go against the current wishes of the Maker, even if the Maker is now mentally incapacitated.

Information Sharing Rights

The CPA includes a valuable feature: it allows the Maker to designate specific individuals who should receive updates about their situation. This gives the Maker control over:

- Who receives information about their condition
- What specific information these people can access
- How updates about their personal situation and assets will be shared

This system ensures transparency with chosen individuals while maintaining the Maker's privacy preferences, even after mental incapacity occurs.



Who Is involved?

There are six categories of people involved in the making and implementation of a CPA . Each of them has a different role, and if you are considering making a CPA it is important that you know who each of these categories of people are, and what their role is.

1. The Maker / the Appointer in Hebrew הממנה (hamemaneh)

This is the person who makes the CPA. It is important to understand that the Maker must be of sound mind at the time that the CPA is drawn up and executed. This is typically done by having the appropriate medical professional fill out a form on the day you execute the CPA.

2. The Maker appoints legal representatives - POA הכוח מיופה (haco'ach meyupeh)

Generally, when you make a CPA , the POA should be somebody you trust and who is close to you, and who has been kept abreast of how you manage your affairs and how you want them to be managed in the future. Please note that not every person will be able to be appointed as a POA – for example a minor, or somebody who is bankrupt, are excluded from the pool of potential POAs.

3. Informed Persons (in Hebrew מידע אדם (adam meyudah).

This is a person (or people) that you want to be given information about what the POA is doing in your name.

You can specify in your CPA which information will be given to which people.

This is a very good tool to use in situations such as when the POA does not have a good relationship with the Informed Persons, or when the Maker has children who live in other countries and for that reason are not listed as one of the POAs.

4. The Attorney (in Hebrew עורך הדין (orech hadin).

In the Continuing Power of Attorney regime in Israel, the Attorney is really the gate keeper. Remember, the point here is to avoid having the court appoint guardians, and the POA is really acting like a guardian in a situation which would otherwise have had to have been court appointed.

It is the Attorney's job to ensure that all of the rules have been complied with – including verifying the Maker's mental capacity when the CPA is executed.

Only Attorneys who have undergone special training and are approved by the General Guardian's Office are qualified to draft and submit the CPA.

A good Attorney will work with you to make sure that your CPA is as specific as possible and is tailored to your particular needs and situation.



5. The General Guardian's Office (in Hebrew האפוטרופוס הכללי) (hapotropos haclali)

When a CPA has been properly prepared and executed, it is submitted to the office of the General Guardian's office and put into a special database that they keep which is supposed to be accessible by medical professionals.

The Attorney submits both soft copy and executed hard copy of the CPA and the idea is that once approved and put into the database by the General Guardian's Office, medical caregivers will be able to see that there is a CPA for a person when he or she becomes mentally incapacitated, and the CPA will then become legally effective and the POA will be able to take actions on the Maker's behalf from there on.

6. The Court (in Hebrew בית המשפט) (beit hamishpat)

With any new legal regime or tool, there has to be an address to go to when issues that haven't been addressed arise, and when people have disagreements with regards to the implementation and interpretation of both the law and the legal regime or tool itself.

If issues arise (say for example that one of the Informed Person's thinks that the POA is doing things that the Maker didn't want to have done), then the sides (and potentially the General Guardian's Office as well) will have to go to the court which, via the law, is enabled to make decisions regarding and in certain situations to change or limit the CPA .

The Procedure

Implementing a Continuing Power of Attorney is a relatively straightforward procedure with different stages.

The first stage is having an approved Attorney draft the CPA for you. A good Attorney will generally want to meet with both the Maker and the POA(s) in order to do this, and will have to meet with them at the time of execution. The CPA will have to be executed by the Attorney, the Maker, and any POA.

Once the CPA has been executed it is submitted by the Attorney to the General Guardian's Office, both in soft copy and in original executed hard copy within fourteen days of execution.

After the CPA has been reviewed, the General Guardian's Office will then send the Attorney a notification that the CPA has been received and is in effect (in my experience, in the Tel Aviv area this can take up to three months).

In the future, generally when a medical care provider realizes that the Maker is unable to make decisions, the POA is to be notified.

The POA gives notice connected to an affidavit containing a medical opinion to the General Guardian's Office that the CPA should be going into effect, and the General Guardian's office reviews the notice.

When the General Guardian's Office approve the notice, they issue an affirmation that the CPA has become effective (and update the database so that persons with access can see it as well) and, paperwork in hand, the POA is thereafter able to make the relevant decisions for the Maker.



Thank you for downloading my guide. I hope it provided useful advice and helpful insights to support you preparing for the future with tools like the Continuing Power of Attorney (CPA).

There are many more facts and rules about the Continuing Power of Attorney that can be addressed. However, my goal in writing this booklet was not to give an exhaustive tractate on everything to do with the CPA– but rather to introduce the CPA regime to the layperson, and to help him or her to get a general understanding of how the system works.

The Continuing Power of Attorney can be an important future planning tool to both ensure that your desires are executed after you are no longer legally competent to make decisions for yourself and at the same time, if used wisely, it can be an excellent accompaniment to your other estate planning tools (like Wills and Estates).

If you have questions about the Continuing Power of Attorney please feel free to email me or to call my office.

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