

## Powers of Attorney

Powers of Attorney range from the simple to the sophisticated, and the experience of agents attempting to exercise those powers is anything but common. A well-prepared power of attorney instrument, however, can be used by the appointed agent to provide effective assistance in the management of assets and income in the event of incapacity.

The durable power of attorney (POA) allows the “principal” to designate another person, the “agent,” to make and implement financial decisions on behalf of the principal. A POA can be as broad or as limited in its delegation of powers as is appropriate for the task.

A general POA allows the agent to perform any legal act which could be performed if the principal were acting personally. A specific POA directs the agent to perform only those acts set forth in the document, such as selling real estate, handling a specific investment account or writing checks to pay bills. If the agent should have the authority to make gifts to family members, taking advantage of the annual gift tax exclusion (\$13,000 per recipient in 2011), or to sign income tax returns and deal with the IRS, it is critical that this authority be set out in detail in the POA.

At least one alternate agent should be named in the event the primary agent is unable to act on behalf of the principal due to the former’s incapacity or death.

A power of attorney should also be “durable,” which simply means that the power of attorney will be effective when the principal is disabled or incompetent (precisely when the agent is needed to act on ones’ behalf). A power of attorney is made durable by incorporating certain language, set out in the Code of Virginia, evidencing intent that the power is still effective even when one is incapacitated. Without this special language, the POA would be ineffective just when it is needed for the agent to act under it.

Any mentally competent person over the age of eighteen may execute a POA. If there is a question about the legal capacity of the principal, it is prudent to obtain an opinion letter from a medical doctor or clinical psychologist regarding the principal’s ability to understand this legal appointment of an agent as of the date of signing the POA.

Powers of attorney become effective upon signing the document in the presence of a notary public. Another type of power of attorney, known as a “springing power,” is one that becomes effective on a later date, such as the day that a doctor puts in writing that the principal can

## Powers of Attorney (cont.)

no longer manage your financial and legal affairs. The danger with “springing” powers is that any person who may be asked to rely on the agent’s authority to act (banks, stock brokers, and others) may require the agent to prove that the principal is incapacitated. This could delay one’s agent from acting, and gives an opportunity for the POA to be challenged in a court of law.

One of the many benefits of designating an agent to act under a power of attorney is the ability to avoid the need for a court to appoint a conservator to manage your assets. Conservatorship can be an expensive and laborious series of legal procedures, from the petition to the court to the accountings required of the conservator, but it is required if no one is appointed to manage ones’ finances and property.

Of course, a power of attorney does not give the agent the ability to use the principal’s money or property for his or her own use. Under the law of agency, these assets must be preserved and used for the benefit of the person granting the power of attorney. While the power of attorney enables the agent to manage and protect resources during life, the assets will still pass to the persons designated in the account documentation or in the Last Will and Testament.

Since the agent under the POA is not under court supervision, there is always the possibility of abuse. In addition, state law allows a court to intervene and order the agent to replace the lost funds, assuming that it is not too late and that the agent has the ability to do so. This illustrates the need to be circumspect in the selection of a trustworthy agent (and alternate agent).

A POA can be amended or revoked at any time, so long as the principal is still competent). Of course, the principal maintains control over the agent by reserving the right to remove or restrict the agent.

Finally, one should specify whether or not the agent is to be compensated for his or her efforts and, if so, how much they should receive. This simple fee clause will provide the agent and family with excellent options for Medicaid and estate planning on behalf of the principal.

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