



DURABLE POWER OF ATTORNEY

THE RISK OF LIVING

You are injured in an automobile accident and are unable to make decisions regarding your property or your person. Due to medical complications arising during your recovery, you suffer a stroke affecting your speech and causing some paralysis. Tax returns need to be signed, bank deposits made, checks written, surgical consents signed, property leased or sold, lawsuits initiated or defended, assets managed, Who will make these and other decisions for you? Your spouse? What if he or she is also injured or even killed, or simply "stressed out"?

Under current law, if you are injured, or suffer from a disease, stroke, or some debilitating condition it may be necessary to arrange for the appointment of a **guardian** or **conservator** via court proceedings in order for someone to have the authority to make the necessary decisions for you. A court appointed conservator takes charge of your assets while you are physically incapacitated. A conservator can only be appointed if you consent to the appointment and the conservator has no power to make decisions regarding the care and treatment of your person. If you are mentally incapacitated it may be necessary to have a guardian appointed who will then make decisions regarding your care and treatment (i.e. a guardian of your person). Both a guardian of property, as well as a conservator, are normally required by law to file a bond with the court which insures that the guardian or conservator will faithfully handle your money or property (or, if he/she doesn't, there will be a fund available to recover loss due to an embezzlement).

Guardianship or conservatorship proceedings require annual accountings and filing of "plans" setting forth the management goals of the guardian or conservator regarding the property of the "ward" (that is you), as well as plans for your physical care and treatment.

Needless to say, the appointment of a guardian or conservator is expensive (lawyer's fees, court costs, bond premiums), time consuming, sometimes humiliating, and not very private. The annual fees and court costs (and other court procedures such as those required to sell real estate) continue to make such a procedure somewhat complex, and burdensome to all concerned.

OPEN THE WINDOW FOR SOME FRESH AIR

The durable power of attorney has been authorized by various states, including Oklahoma, as a way of dealing with the problems and expenses of guardianship/conservatorship. A durable power of attorney is simply a document signed by the person establishing the power (the "**principal**") who appoints another person (the "**attorney in fact**," i.e. the person acting as your agent) who is empowered to carry out certain acts or functions that are authorized in the document on behalf of the principal. The document is called a "durable" power of attorney because the power continues (i.e., "endures") even if the principal becomes mentally incapacitated. Thus if you had been injured in an accident, suffered a stroke, or developed a mentally disabling condition, then instead of a family member having to employ a lawyer, going to court and having a guardian or conservator appointed, your attorney in fact simply takes over duties, both as to your health care and the management of your property and assets, without court involvement, delays, expense, etc.

BEWARE OF THE RISK

The durable power of attorney has one very significant risk. The person appointed by you is not normally supervised by the court (although there are court supervised powers of attorney authorized by law). Therefore, unless you require court supervision to some degree in the power of attorney document, then the attorney in fact is fairly free to handle your affairs and make decisions for you as he or she thinks is in your best interest. Obviously, such power should be placed in the hands of someone who is very trustworthy and possesses solid integrity. In addition, unless you require a bond, the attorney in fact does not normally work under the expense of a bond. Again, if he or she were dishonest and "went to Mexico" with your money, you could suffer a significant loss. A "durable" power must contain special language which makes it "durable." Lacking such language, the power of attorney becomes void if the principal becomes mentally incapacitated. The powers granted in the document can be limited or general (i.e. "full powers"—meaning the attorney-in-fact can perform any act that the principal could have performed were he/she competent).

CONCLUSION

Durable powers of attorney are very useful documents to help deal with management of assets and the physical care of a person who is incapacitated, either temporarily or permanently. If you establish a Revocable Living Trust, then the power of attorney is used mainly to make decisions regarding health care matters and other decisions unrelated to asset management, since the trustee normally handles the assets in the living trust. The durable power of attorney can be amended or revoked at any time before death. It has no power after death, thus a living trust or last Will is normally used to transfer property after death.

If you do not have a close family member or someone with whom you could "trust your life," then the power of attorney arrangement may create more risk than you would like. In such a case, a guardianship or conservatorship may be more appropriate. On the other hand, if your personal and family situation warrants a durable power of attorney, then you will find it to be extremely useful, time saving, cost effective, and far less demeaning than would be a guardianship or conservatorship.

Occasionally, clients have informed us that a financial institution has declined to honor a power of

attorney that is more than five years old. Although there is no automatic “expiration date” on a durable power of attorney and there is no statutory authority supporting such decision by a financial institution, we recommend clients update their powers of attorney documents at least every five years.

If you have additional questions or concerns regarding the durable power of attorney, feel free to discuss this with our office.

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