

SEPTEMBER 2024

**WHY A DURABLE POWER OF ATTORNEY IS
ONE OF THE MOST IMPORTANT ESTATE
PLANNING TOOLS**

POZZUOLO RODDEN POZZUOLO, P.C.
COUNSELORS AT LAW
2033 WALNUT STREET, PHILADELPHIA, PA 19103
215-977-8200/FAX 215-977-9663
www.pozzuolo.com



**WHY A DURABLE POWER OF ATTORNEY IS ONE OF THE
MOST IMPORTANT ESTATE PLANNING TOOLS**

As part of your overall estate plan, you should have a durable power of attorney document. You will save yourself and your family substantial time, money and stress by executing a durable power of attorney. By executing a durable power of attorney, you choose who will control your financial affairs in the event your health fails or in case of emergency. A durable power of attorney is an easy-to-setup backup plan that will serve you in the event you suffer a

lifetime disability that leaves you unable to manage your affairs.

A durable power of attorney document is a legal document in which you authorize someone else to act on your behalf. You, as the person granting authority to act, are the principal. The person to whom you grant that authority is the agent. Your agent is a fiduciary³ and generally held to a fiduciary standard. A fiduciary standard imposes legal and ethical responsibilities on your agent and is a high standard. An agent cannot act in his own personal interests ahead of his duty as agent. When considering who will be your agent, be sure to appoint someone who is prudent, responsible, trustworthy and able make clear decisions. Your agent must be able to put your interests first.

You should also consider appointing a co-agent and backup agents. For example, you may appoint two agents and grant them authority to act on your behalf only if they reach an unanimous decision regarding certain specific actions or singularly concerning certain administrative duties. You may also appoint your spouse as your agent, and in case your spouse dies before you do, you may appoint your child or children as a backup agent.

The fact that a power of attorney is durable is significant. Generally, a power of attorney is effective only as long as the principal is able to act on his own behalf. This standard power of attorney loses effectiveness upon either the incapacitation or the death of the principal. That is, under a standard power of attorney, once you cannot act for yourself, your agent cannot act for you either. A durable power of attorney, however, remains effective despite the principal's incapacitation. It will continue to remain effective until death of the principal. Thus, if you were to suffer a major stroke and be mentally incapacitated, your durable power of attorney would remain effective and your agent would continue to be able to act on your behalf.

Furthermore, a durable power of attorney may be either a standing durable power of attorney or a springing durable power of attorney. A standing durable power of attorney takes effect immediately and remains effective until the principal dies. A springing power of attorney takes effect only upon the incapacitation of the principal and remains effective until his death. A springing power of attorney document should provide rules regarding how to determine if the principal is incapacitated. For example, you may state in your springing durable power of attorney document that two or more licensed doctors must declare you incapacitated before the document takes effect and your agent may act on your behalf.

In all cases, powers of attorney automatically lose their effectiveness upon the death of the principal. Thus, if you appoint your son as your agent under a power of attorney document, your son cannot use his appointment as your agent under that document to handle your estate or your affairs after you die.

Death of the principal is not the only way a durable power of attorney loses its effectiveness. The principal may amend or revoke the power of attorney. If you amend your power of attorney document, you may change your agent's authority to act or you may change your agent. If you revoke your power of attorney document, you take away all authority from any agent to act on your behalf.

You may grant your agent as many specific powers under a durable power of attorney as you wish. Some of the more common powers granted to an agent include:

- Conduct bank transactions
- Buy, sell or manage real property
- Buy, sell or manage investments
- Borrow money
- Enter into safety deposit boxes
- To apply for, purchase, change or amend, receive or exercise any rights under retirement plans
- Prepare and file tax returns
- Deal with insurance and retirement benefits
- Dispute or assert legal claims
- Exercise stockholder rights or options, or handle investments
- Contract for services, such as lawyers and accountants
- Collect Social Security
- Exercise rights of the grantor of a trust

While it is likely that your agent will ultimately only be responsible for depositing checks, paying bills and other “everyday” transactions, your agent may have to take on more sophisticated financial responsibilities. Certainly, if your financial estate is complicated and requires a significant amount of attention, then your agent’s responsibilities will be more complicated and more demanding. The bottom line is that you should be certain your agent is comfortable handling money and, ideally, as comfortable as you are.

A durable power of attorney is not the only available remedy by which your affairs will be handled in the event of your incapacitation. However, it is probably the cheapest and easiest to execute, and they may be the most encompassing as far as granting your agent power.

For example, property owned jointly or in joint names may be managed by the other joint owner. Thus, if you and your wife have a joint bank account, she will be able to manage banking transactions from that account, like paying bills. However, even if you own property jointly with your spouse, a single joint owner may not sell certain real or personal property without the consent of the other joint owner. If you and your wife jointly owned securities, and she wanted to sell the securities to raise funds in the event of your incapacitation to pay for your care, she may not be able to because you cannot give valid consent. In other words,

owning property jointly if you were to become incapacitated is not the total solution.

The only other total solution if you become incapacitated and do not have a durable power of attorney is to seek a guardianship or conservator. When you become incapacitated, in order to take over your affairs, your loved ones would have to petition a court to have you legally determined incapacitated and to have someone appointed as your guardian or conservator. Of course, going through this process is less than ideal. It is time consuming and expensive. Legal documents must be prepared, a hearing must be held, and witnesses must be called. Legal and filing fees will mount. On top of that, the proceedings may be open to the public. This makes a very private matter open for all to see. Furthermore, family members or interested parties may fight over who may be appointed guardian. In the end, the court may not even appoint a family member but, rather, a neutral third party. The court appointed guardian will receive payment for his services and no matter who is appointed guardian, all his actions will be under court supervision. It is not a convenient way to have your financial affairs managed in the event you become incapacitated.

A durable power of attorney is a sensible, cost effective and proactive solution to a problem that, usually, catches a person off guard. Aside from protecting yourself and your financial estate in the event of your incapacitation, you protect your loved ones who depend on you. Do not leave what could be a very emotional and difficult situation for your family to chance or even to court determination. Consult with your attorney and prepare a durable power of attorney to take control of your estate now.

Please visit our website: www.pozzuolo.com

To unsubscribe to this e-newsletter email: info@pozzuolo.com