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DURABLE POWER OF ATTORNEY

1. WHAT IS A POWER OF ATTORNEY?

A power of attorney is a written authorization by which one person (called the "principal") appoints another as his/her agent (called the "attorney-in-fact") and confers upon him or her authority to do some act or acts in the principal's name. The attorney-in-fact is not to be confused with an attorney-at-law. The agent does not have to be and frequently is not a lawyer.

2. WHAT DOES "DURABLE" MEAN?

A power of attorney is durable only if it continues to operate even after the principal becomes mentally incapacitated. The regular power of attorney automatically ends upon the incompetence of the principal. This is precisely the opposite result most of us want. If we become incompetent, that is the time we most need a power of attorney. Consequently, every state, including Virginia, has passed legislation providing for powers of attorney that are DURABLE, that is, they continue to be valid, even if the principal becomes incompetent or incapacitated. However, the document must specifically state that the power of attorney continues to be valid even after the onset of incapacity or mental disability.

3. WHEN IS A DURABLE POWER OF ATTORNEY USED?

Many people think that if they make a power of attorney they give up all authority to act for themselves. This is false. A power of attorney grants concurrent authority since the principal retains the right to make his own decisions while at the same time authorizing the attorney-in-fact as an agent who must follow the commands of the principal. A DURABLE POWER OF ATTORNEY CAN BE USED IN ANY SITUATION WHERE YOU DESIRE OR NEED SOMEONE ELSE TO HANDLE SOME OR ALL OF YOUR PERSONAL AFFAIRS FOR YOU. For example, it may be inconvenient for you to handle some personal business matter in a distant place; a power of attorney may be used to allow someone also to take care of it for you. Similarly, you may need someone else to handle your affairs for you because of illness.

4. HOW AND WHEN CAN I MAKE A DURABLE POWER OF ATTORNEY?

To make a power of attorney you must be over 18 years of age and competent. If an individual is already mentally disabled or incompetent, he or she cannot make a power of attorney. In this case, a court appointed guardianship must be obtained in order to

authorize someone else to transact business for the disabled one. Likewise, the individual named as the attorney-in-fact must be over 18 years of age and be competent. Normally, the attorney-in-fact is a friend or relative. He or she should be someone you fully trust, because a power of attorney could be used to your disadvantage by someone less than honest.

It is advisable to have a lawyer draft the document for you to ensure that your intent is properly carried out. The document must be signed and should be notarized. Witnesses are not required.

5. WHAT IS A SPRINGING POWER OF ATTORNEY?

Normally, the Durable Power of Attorney is effective at the time of signing. A springing power of attorney is a Durable Power of Attorney in which the powers do not take effect until the principal becomes incompetent, or upon the occurrence of a specific event stated in the power, at which time the power of attorney "springs" into effect. A springing power has the advantage of preventing the possibility of unauthorized use of the Durable Power of Attorney by the agent, but it does have two problems. It requires careful drafting to specify who makes the decision that you are incapacitated and what criteria they shall use. The second problem is that not all states recognize the springing power of attorney, although Virginia does. Third parties may be less willing to accept the power because of this contingency.

6. WHAT AUTHORITY DOES THE ATTORNEY-IN-FACT HAVE UNDER A DURABLE POWER OF ATTORNEY?

The attorney-in-fact has only as much or as little power as is described in the document. You can give the attorney-in-fact the power to transact virtually all personal business that may require the principal's presence or signature, such as the power to sign checks, enter contracts, buy or sell property, and so on. This is called a "General Power of Attorney." Or, you can limit the authorization to one or a few very specific tasks, such as selling one particular piece of property for you. This is called a "Special Power of Attorney." It is generally a good idea to be as specific as possible in describing the power being given.

7. WHAT DUTIES DOES THE ATTORNEY-IN-FACT HAVE UNDER THE DURABLE POWER OF ATTORNEY?

Obviously, the attorney-in-fact is obligated to exercise only those powers described in the power of attorney. However, in a more general sense, the attorney-in-fact takes on the legal responsibility of a "fiduciary" that is, his/her position is one of trust or confidence which obligates him to act with care in the interests of the principal.

The principal can call upon the attorney-in-fact to give a full accounting of all property or interests entrusted to the attorney-in-fact. For this reason, it is advisable for the attorney-in-fact to keep an accurate inventory of all property entrusted to him or her and to keep a detailed record of all transactions.

Additionally, the attorney-in-fact can be required to disclose to a person interested in the welfare of the principal, the extent to which attorney-in-fact has acted, and has taken actions on behalf of the principal within the past two years.

As long as the attorney-in-fact acts properly within the scope of his power, he or she will not be personally liable for any obligations of the principal. The attorney-in-fact should always make his status as agent or attorney-in-fact clearly known to third parties.

Any documents signed by an attorney-in-fact should state after the signature "Signed: as attorney-in-fact for (name of the principal)."

8. WHAT DO I ACTUALLY DO WITH THE DURABLE POWER OF ATTORNEY AFTER I SIGN IT?

After you sign the power of attorney, your attorney-in-fact will need the original to show anyone with whom he or she transacts business. More than one original can be signed if it becomes necessary to actually give an original to another party. However, a copy is usually sufficient.

If the power of attorney has been made in order to buy or sell real estate in Virginia, then it must be recorded in the deed books of the county where the property is located. It can be recorded in the deed books in any other case as well, although it is not a requirement. It is important to know that the power of attorney does not have to be honored by others. For example, an agency or a bank or other business could require that you use their own authorization forms or follow their particular procedures.

9. WHEN DOES A DURABLE POWER OF ATTORNEY END?

A Durable Power of Attorney may end in any of four (4) ways.

A) The document itself can state a termination date or otherwise describe when the power ends.

B) The principal has the right to revoke or terminate the power at any time by informing the attorney-in-fact that the power of attorney is terminated. (A power of attorney can be made irrevocable if the attorney-in-fact has a legal interest in the property which he is managing under the Power; however, this is not the usual situation for the typical power of attorney.)

When revoking the power, the principal should send a written notice of the termination to anyone (such as his bank) with whom the attorney-in-fact has done business. Otherwise, these third-parties can continue to rely on the Power. Also, the original power of attorney document should be destroyed.

C) A non-durable power of attorney will end upon the incompetence of the principal.

D) The death of the principal always ends the power of attorney as soon as the attorney-in-fact receives notice of the death. At this time, an executor or administrator of the estate assumes responsibility for the affairs of the deceased.

IMPORTANT

Everyone's situation is different and most every rule has exceptions. The information above is intended only for general informational purposes in the State of Virginia. It may not apply to your individual situation. Therefore, it is advisable to discuss your particular situation with a lawyer.

If you need legal help, call the Legal Services Branch that serves the city or county in which you live to make an appointment. To be helped by Legal Services, you must meet financial eligibility requirements. These guidelines will be explained to you when you call.

MAIN OFFICE (FALLS CHURCH OFFICE)	703-778-6800
ALEXANDRIA OFFICE	703-684-5566
ARLINGTON OFFICE	703-532-3733
FAIRFAX OFFICE	703-246-4500
LOUDOUN OFFICE (IN LEESBURG)	703-777-7450
MANASSAS OFFICE	703-368-5711

LAWYER REFERRAL SERVICES

For a small fee you can have a half hour appointment with an attorney, call:

Alexandria	703-548-1105
Arlington	703-228-3390
Fairfax	703-246-3780
Statewide	800-552-7977
Services are available for the hearing impaired by calling:	800-828-1140

Phone numbers updated February 2005