

Managing Prosperity: Estate and Retirement Planning for All Ages Powers of Attorney

Jesse J. Richardson, Jr., Attorney and Assistant Professor, Department of Urban Affairs and Planning, Virginia Tech and L. Leon Geyer, Attorney, Professor, and Extension Specialist, Department of Agricultural and Applied Economics, Virginia Tech

Powers of Attorney can be a powerful tool for handling financial and other affairs. The importance of a power of attorney increases if you become incapacitated in any way. The power of attorney is a legal document by which one person (called the creator, grantor, or principal) appoints another person (called the attorney-in-fact) to make personal and/or financial decisions and perform certain acts on behalf of the principal. The principal signs this document and the signature is notarized. Each power of attorney document pertains to one principal. The attorney-in-fact does not sign the power of attorney.

The attorney-in-fact acts as an agent of the principal and can make substitute decisions for the principal. However, the attorney-in-fact is bound by a set of legal rules called agency. The attorney-in-fact acts on behalf of the principal without owning the property or assets. Authority is granted by the principal to the attorney-in-fact to act as the principal would act. The powers may be adjusted to the principal's current, future or potential needs. The powers may range from complete control or specific control. Generally, when planning for incapacity, broad powers are given to a trusted agent to cope with unforeseen or unforeseeable circumstances as well as known issues and concerns. The power of attorney has many uses beyond situations of incapacity.

The power of attorney usually becomes effective immediately, granting the attorney-in-fact immediate authority to act. However, the principal does not lose the ability to act on his or her own behalf. Both the principal and attorney-in-fact simultaneously hold authority and both may act.

The attorney-in-fact need not be, and usually is not, an attorney-at-law. You should appoint as your attorney-in-fact someone in whom you can place total trust. A family member or trusted friend usually serves under a power of attorney. It is important to understand that the person holding your power of attorney is under a fiduciary duty (duty to act in good faith, use sound judgment and act with fidelity). Any violation of that duty will subject the attorney-in-fact to criminal and civil penalties. It is important that you select someone who has outstanding personal and business qualifications to act in your stead.



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Why have a Power of Attorney?

Many people question the need for a power of attorney. A common fallacy holds that if you become incapacitated, the executor of your will or administrator of your estate may act on your behalf. However, the executor or administrator possesses no power until your death and authorization by the court (see VCE publications 448-080, Wills, and 448-067 Probate and the Probate Process). Therefore, the power of attorney controls during your lifetime, while the executor or administrator possesses no power. At the moment you die, the power of the attorney-in-fact disappears.

The main purpose of a power of attorney is to appoint someone to make decisions, sign documents and carry out other important acts when you are unable. Disability can strike any of us at any time. If you are married, you may feel that joint bank accounts solve any problems that may arise due to disability. You may also believe that your spouse may automatically act for you if you become incapacitated. Similarly, unmarried persons often believe that their parents can act on their behalf. These beliefs are not reflected in the law.

A parent holds authority as guardian of any minor child. Once a child attains the age of eighteen years, the parent's authority ceases. A spouse never holds the authority to act for the other spouse without a power of attorney or court action. If a person becomes incapacitated and failed to appoint an attorney-in-fact, then no person may sign deeds, make gifts, or make other decisions without court intervention. A joint bank account fails to address many of these issues. In these cases, the spouse, parent or other interested party must petition the appropriate court to be appointed as guardian of the incapacitated person. This process usually costs between \$2,500.00 and \$5,000.00. When children become disabled, parents must initiate this process when the child turns eighteen.

The guardianship proceeding results in a person being appointed by the court to conduct the affairs of the incapacitated person under court supervision. The guardian makes financial and/or personal decisions for the incapacitated person, acting as an agent. The powers of the guardian derive from the order issued by the judge.

If the incapacitated person signed a durable power of attorney (see discussion below) prior to incapacity, a guardianship proceeding can usually be avoided and the attorney-in-fact can usually act on behalf of the incapacitated person in all regards. The fee for preparation of a power of attorney amounts to a fraction of the cost of a guardianship proceeding. Therefore, the

power of attorney serves as inexpensive insurance, perhaps its greatest function.

Types of Powers of Attorney

Various types of powers of attorney exist. The choices include general, special, durable, non-durable, and springing. The types of powers of attorney may be combined. For example, you may choose a durable general power of attorney. The following sections describe the various types of powers of attorney.

General and Special Powers of Attorney

A general power of attorney allows the attorney-in-fact to act in a broad manner over an unspecified amount of time. The general power of attorney remains effective until revoked by the principal. The attorney-in-fact under a general power of attorney may usually do anything that the principal can do, such as buy/sell real and personal property. The following list outlines the typical types of powers and duties granted under a general power of attorney.

- To demand, sue for, receive, collect, and hold any and all monies, securities, and real and personal property that is owned now or in the future and to deal with the property as needed;
- To commence, prosecute, discontinue, or defend any and all legal and other actions involving your assets;
- To write, sign, endorse, deposit, discount, collect or assign any note, check, or other negotiable or non-negotiable instrument;
- To vote in person or by proxy, to sell or otherwise dispose of, and to transfer, redeem, convert, or exchange any security owned or purchased in the future;
- To buy, acquire, lease, or invest in property, real or personal, tangible or intangible;
- To record all deeds, sell, grant options upon, or lease any lands, buildings, or other improvements or appurtenances to lands owned now or in the future;
- To borrow or lend money or property;
- To pay and receive money that you now or in the future will owe or be owed;
- To have access to and remove or add contents to any safe deposit box;
- To convey present or future assets to the trustee or trustees of any inter vivos trust (trust formed during life) of which you are the grantor and have a beneficial interest;
- To make gifts on your behalf to any charitable organization and to any of your descendants and their

spouses with or without limitations of amount transferred to comply with the federal gift tax rules or, to make gifts to any of the beneficiaries named in your will as total or partial satisfaction of any bequest, devise, or legacy to such beneficiary as then written in your will;

- To borrow against or obtain cash surrender value of any of your life insurance policies, and to transfer the ownership of life insurance policies to the beneficiaries;
- To authorize any medical or surgical care and services, including, but not limited to, your admission or discharge from any hospital, nursing home, convalescent home, or adult home, and to authorize or direct the termination of medical treatment, including, but not limited to, hydration and nutrition pursuant to the appropriate law. (This is a health care power of attorney provision; see the publication 448-065, Advanced Medical Directives);
- To disclaim the possession of any property, real or personal, or any interest therein, to the extent allowed under the applicable state law. (This is a tool to prevent you from inheriting property that might have negative estate consequences);
- To appoint a substitute attorney;
- To handle all tax matters; to make elections and to sign, make, execute, and file, in your name and on your behalf with any tax authority, such tax returns, forms, and reports as required by law;
- To perform or to contract for the performance of any other acts as fully and effectively as you would do if you were acting personally.
- Provisions can be made tailored to the needs of your business or businesses.

A special power of attorney is limited in time and/or scope. For example, if you were to travel overseas and need someone to sign papers to sell your house while you are away, you could sign a special power of attorney appointing Sally as your attorney-in-fact to sign the documents to sell Ye Old House for the sum of \$150,000 to Bill Buyer. Sally could sign the documents to convey the house during your absence(s) as your agent. But Sally lacks the authority to sign a deed to convey your interest in the Family Farm to Bill Buyer (or anyone else). A special power of attorney is not a useful tool for creating a substitute decision-maker. It is a valuable tool to answer specific needs.

Durable and Non-durable Powers of Attorney

A durable power of attorney contains provisions that allow the power of attorney to survive the incapacity

(mental or physical) of the principal. Without this provision, a power of attorney terminates upon the physical or mental incapacity of the principal, and is non-durable. Since the principal often relies most on powers of attorney to create a substitute decision-maker during incapacity, it is important that the power of attorney contain the durable or enduring authority. An attorney-of-law must carefully draft the power of attorney to indicate that a durable power is given to the attorney-in-fact.

Escrow Agreements and Springing Powers of Attorney

Generally, the attorney-in-fact immediately possesses the authority contained in the document upon the signing of the power of attorney. Many individuals who appoint a substitute decision-maker want assurances that the attorney-in-fact does not act prematurely or while the individual is capable. One way is to select a trusted person (often the attorney-at-law who prepared the document) to hold the power of attorney until certain circumstances are met. The arrangement amounts to an escrow agreement.

You may also specify in the power of attorney the circumstances under which the attorney-in-fact may begin to act (usually when the principal becomes incapacitated). This type of power, which becomes valid only when certain events or specified conditions are satisfied, is called a springing power of attorney. The power springs to life when the specifications are met and not before. Events can be specified when the power is to be undertaken on your behalf, such as in the case of medical incapacity or absence due to travel.

The authors urge caution when using escrow agreements and springing powers of attorney. The conditions must be carefully drafted to avoid uncertainty. For example, if the springing power of attorney becomes effective “upon the principal’s incapacity,” what does “incapacity” mean? If your family members disagree, the discussions, or even litigation, could defeat the purpose of the power of attorney by delaying the effectiveness of the document. You may be better served by using good judgment to select an attorney-in-fact in which you may place total trust.

Powers of Attorney and Real Estate

Special issues arise when an attorney-in-fact signs a deed or other document pertaining to real estate matters which must be recorded in an appropriate Clerk’s

Office. In these situations, the power of attorney must be recorded prior to any other document signed by the attorney-in-fact. However, the power of attorney need not be recorded immediately after signing it to cover future contingencies. The power of attorney is normally recorded immediately prior to recordation of the document signed by the attorney-in-fact. If an attorney-in-fact will sign closing documents for real estate, the closing agent should be notified as soon as possible. In addition, a copy of the power of attorney should be provided to the closing agent well in advance of the closing date.

Practical Considerations

The following list attempts to outline a few of the relevant considerations associated with powers of attorney. The list is not exhaustive.

1. An attorney-at-law should always draft a power of attorney. The cost of professional advice in drafting the document constitutes a fraction of the cost of correcting mistakes in drafting later. Use of forms may initially save money. However, in the long run, forms provide plentiful sources of income for attorneys when the “mess must be cleaned up.” The legal advisor can craft special provisions or delete general provisions to fit your special needs.
2. You should ALWAYS appoint an alternate attorney-in-fact, or successive alternate attorneys-in-fact. If the original attorney-in-fact predeceases you or becomes disabled, your power of attorney becomes worthless without an alternate. The alternate attorney-in-fact holds no power to act until the original appointee becomes unable to act.
3. Both the principal and the attorney-in-fact must be over the age of eighteen years. The attorney-in-fact must be competent at the time of action and the principal must be competent when signing the power of attorney.
4. The attorney-in-fact may be required to sign an affidavit when performing acts on behalf of the principal. This affidavit basically states that the person performing the act is the attorney-in-fact named in the document and that the power of attorney has not been revoked.
5. You may appoint several persons as “joint” attorneys-in-fact. This appointment occurs in one document and all joint attorneys-in-fact must sign for the act to become effective. This option provides obvious protections against unscrupulous attorneys-in-fact.

However, the requirement that all attorneys-in-fact join in the act may prove to be cumbersome and slow.

6. You may appoint two or more attorneys-in-fact. Each may then act separately and independently of the other(s). Several documents must be signed to effectuate this option, at least one for each attorney-in-fact. Although this option provides convenience, more attorneys-in-fact provide more opportunity for fraud.
7. Each power of attorney should be signed in multiple originals. One original may be recorded at a Clerk’s Office, one held by the attorney-in-fact, and one held by the bank, for example. The authors recommend at least three originals for each power of attorney.
8. Not all acts can be delegated to an attorney-in-fact. For example, you may not appoint an attorney-in-fact to care for your children. Similarly, if you serve on the board of directors of a corporation, you may not delegate that responsibility to an attorney-in-fact. Your legal advisor can provide more guidance on this issue.
9. You should obtain permission from the person you wish to appoint as attorney-in-fact prior to the appointment. In addition, you should let this person know where the original powers of attorney documents are located, particularly if he or she will not hold an original. The alternate(s) need to be fully informed as well. You should also make these persons aware of your wishes so that they may better adhere to your plan.

Conclusion

Powers of attorney provide valuable benefits to an estate plan when properly considered and drafted. At a minimum, the power of attorney may avoid costly guardianship proceedings. However, many issues must be considered when tailoring a power of attorney. The authors believe that every individual should consult with a legal advisor to craft one or more powers of attorney.

Jesse J. Richardson, Jr. can be reached at (540) 231-7508 (phone); (540) 231-3367 (facsimile); and jessej@vt.edu (email).

L. Leon Geyer can be reached at (540) 231-4528 (phone); (540) 231-7417 (facsimile); and geyer@vt.edu (email).