Basic Information About Durable General Powers of Attorney

Durable General Power of Attorney – What Is It?

The Durable General Power of Attorney is a document executed by an individual with mental capacity (the "principal") in which he or she nominates an agent (formerly known as an "attorney-in-fact") who can to take certain actions on behalf of the individual. Serving as an agent is no laughing matter. The agent must act in the best interests of the principal, in good faith, and only attend to matters expressly granted in the document. When an agent is serving on behalf of the principal, the agent is in a fiduciary role and owes a duty of care and loyalty to the principal.

State laws govern the form and meaning of powers of attorney and those laws have evolved. In 2010, Virginia adopted stricter statutes to address the drafting, use and enforcement of powers of attorney in statutes called the "Uniform Power of Attorney Act" in Title 64.2, Chapter 16 of the Code of Virginia (hereinafter referred to as the "Act").

What Does the Act Do?

The new act applies to all powers of attorney with a few exceptions (e.g., it does not apply to health care decisions or the power to make arrangements for burial or cremation). It thankfully makes all powers of attorney durable unless the document itself provides otherwise. This means the power of attorney is effective even after the principal loses capacity. Copies of the power of attorney are now effective - no longer is there a need to bring the original document with you. Further, it strictly identifies certain actions an agent cannot take unless expressly stated in the document.

Scope of Power of Attorney

Virginia is strict about certain grants of authority to an agent. Unless expressly addressed in the power of attorney, the agent will have no authority to do any of the following important actions:

1. Deal with the principal's revocable trust;
2. Make gifts (to spouses, the agent, family members, etc.);
3. Create or change rights of survivorship;
4. Create or change beneficiary designations (on insurance policies for example);
5. Delegate authority granted in the power of attorney;
6. Address the principals' rights to joint or survivor annuities; or
7. Exercise any fiduciary powers that the principal has the authority to delegate.

These specific grants of power need to be provided in the document. If not, it is a good reason to update the power of attorney.

**Financial Institution and Banks**

When an agent named in the power of attorney presents a properly executed Durable General Power of Attorney to a financial institution or bank ("institution"), we have seen a desire of that institution to request the agent to prove agency on a power of attorney form prepared by the institution. This is troublesome for many reasons, including the fact that if the agent is using the power of attorney, it is often due to the principal's lost mental capacity. This means there is no opportunity for the agent to obtain the individual's signature on the institution's own form.

However, the new act helps in this regard. It requires the institution to accept the properly executed power of attorney (with some exceptions) within seven days after it is presented for acceptance. There are valid exceptions that would cause an institution to fail to accept a properly executed power of attorney (e.g., the institution has received notice of termination of the power of attorney), but the institution can no longer require the power of attorney to be on its own form. In fact, a person who refuses to accept a properly executed power of attorney (absent exceptions) is liable for reasonable attorney fees and costs incurred in requiring the institution to accept the power of attorney.

**Updating Powers of Attorney**

Typically, powers of attorney do not need to be updated frequently. However in light of the adoption of the act, it is a good idea for a person with capacity to execute new powers of attorney if the existing ones were executed prior to July 1, 2010. Other key points to consider include proper execution (notary and witnesses per each state's statutes) and the scope of the power of attorney (to ensure specific actions are expressly listed in the document).

We also like to ensure the related but separate Advance Directive/Health Care Power of Attorney is up to date (to grant, at a minimum, the agent the necessary authority under the Health Insurance Portability and Accountability Act of 1996), and we often also address health care privacy rights in the Durable General Power of Attorney.