

Trusts & Estates

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The Durable General Power of Attorney – The Most Important Part of the Estate Plan?

An Overview

A Durable General Power of Attorney is an essential component of any estate plan. This is equally true for a multi-million dollar estate as well as for the humblest of estates.

The Durable General Power of Attorney (or “DGPOA”) is a document by which a client authorizes another person or a bank (the “Attorney-in-Fact”) to act in the client’s behalf. The DGPOA is “durable” in that it lasts for the client’s lifetime, unless revoked, and it is “general” because it applies to all of the client’s financial affairs and property.

The DGPOA typically is used by the Attorney-in-Fact to handle a client’s ongoing personal affairs and needs – such as bill payment, preparation of tax returns and asset management – if the client is unable to or becomes incapacitated by reason of age or illness. Commonly the DGPOA is used for the client confined to a nursing facility – and thus unable to attend to financial affairs.

Perhaps surprisingly, the law does not automatically grant the spouse or a child of an incapacitated client the legal authority to handle the client’s finances and property. Rather, if the client has no DGPOA the spouse or child must institute a court guardianship proceeding to have the client deemed incompetent and then be appointed as the client’s legal guardian – to be able to legally act on the client’s behalf.

Thus, implementing a DGPOA is highly advisable to help avoid a court guardianship and to posture one’s life to continue as smoothly as possible in the senior years – and free of the judicial guardianship system.

The Attorney-in-Fact

One critical issue with the DGPOA is the selection of the party that will serve as the Attorney-in-Fact.

Florida law permits any person 18 or older, or a Florida bank or trust company, to serve as the Attorney-in-Fact. Often the ideal Attorney-in-Fact is a close relative who is both trustworthy and available to attend to the client’s affairs, for a multi-year

period, in the event of incapacity. Also, the DGPOA may designate a successor Attorney-in-Fact to the primary Attorney-in-Fact.

If a client does not have a trusted and available relative, an alternative choice for Attorney-in-Fact may be the client’s bank.

Importantly, although an Attorney-in-Fact has broad authority over a client’s property the Attorney-in-Fact is held to the same standard of conduct as a trustee. Therefore, if an Attorney-in-Fact mishandles funds or engages in impropriety he or she is subject to both civil liability and criminal penalties.

Does Every DGPOA “Work”?

It is not uncommon that a person executes a DGPOA and, years later – when the DGPOA is needed – it is found to be defective.

For example, many states only require that a DGPOA be executed in the presence of a Notary. However, Florida law is more restrictive and provides that any DGPOA must have been executed by 2 witnesses. Thus, many persons who move to Florida – but fail to update the estate plan for Florida law – unknowingly hold invalid DGPOAs.

Also, a DGPOA must contain a statement compliant with Florida statute 709.08 to specifically clarify that the DGPOA is to remain valid after the client’s incapacity. If this statement is omitted from the DGPOA – such as if the DGPOA was prepared in another state without a similar requirement – the DGPOA is not a valid Florida DGPOA.

Further, it is critical that the DGPOA document be tailored to address the client’s particular situation. Often mass-marketed DGPOAs – such as those available on-line or from office supply shops – come in either the “kitchen sink” variety that grant too many powers to the Attorney-in-Fact (such as the power to give money away to any descendant) or are streamlined to the point that important options are omitted – such as the authority to communicate with the client’s physician.



Finally, if the DGPOA is more than several years old it is possible that the “receiving” party – such as a bank – will not follow the Attorney-in-Fact’s directions until the Attorney-in-Fact demonstrates the DGPOA’s validity. In particular, the receiving party is concerned that the client may have revoked the “old” DGPOA and appointed a different Attorney-in-Fact under a newer DGPOA. Therefore, caution dictates that a new DGPOA be executed every 5 years to preclude this issue.

Summary

The DGPOA is an important component of the estate plan which can make the difference between continuing one’s life smoothly in the senior years versus being subject to ongoing judicial supervision under the court guardianship system. However, it is essential that the DGPOA be prepared by a skilled Florida attorney and tailored for consistency with one’s personalized estate plan and goals.



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