

SPECIAL REPORT

General Durable Powers of Attorney

INTRODUCTION

This brochure will introduce you to a relatively new legal document. The document is called a durable power of attorney. Durable powers of attorney are used in disability planning. They are substitutes for a court appointed guardian or conservator.

WHY SHOULD I PLAN FOR DISABILITY?

While estate planning is common, planning for disability is not. Death is a certainty. However, few people realize just how likely a period of prolonged disability is, or the magnitude of the problems that disability causes. Insurance statistics tell us that a 22 year old is 7.5 times more likely to suffer a disability of 90 days or more than to die within one year. At age 62, he or she is still 4.25 times more likely to suffer such a disability within one year. At age 20, 789 persons out of 1000 can expect to suffer such a disability during his or her lifetime. At age 62, 221 persons out of 1000 can expect to suffer such a disability during his or her lifetime.

Why hasn't there been more attention to planning for disability. Until recently, there hasn't been an adequate legal solution. In the past, the only

solutions were guardianship or conservatorship. The new solution is a durable power of attorney which was first introduced in Virginia in 1954. Today, all 50 states and the District of Columbia recognize general durable powers of attorney.

WHAT IS A DURABLE POWER OF ATTORNEY?

A general durable power of attorney is a legal document that appoints an agent (sometimes referred to as an "attorney-in-fact") to represent you in your personal, financial, and business dealings. A power of attorney is the grant of legal rights and powers by a person, the "principal," to another, the "agent." The agent, in effect, stands in the shoes of the principal and acts for him or her in financial and business matters. The agent, with a few exceptions, can do whatever the principal may do (withdraw funds from bank accounts, trade stock, pay bills, or cash checks) except as limited in the power of attorney. As a fiduciary, the agent must use your assets for your benefit unless your power of attorney authorizes the agent to make another use of your assets.

Your agent's authority under a power of attorney terminates upon your incapacity unless you specifically state that the authority remains effective after your incapacity. A power of attorney that

survives your incapacity is called a durable power of attorney. The authority of the agent under a durable power of attorney, however, ends at your death.

WHAT IS A GENERAL DURABLE POWER OF ATTORNEY?

A durable power of attorney can be special or general. Under a special durable power of attorney, you limit your agent's authority to specific acts. For example, you could limit your agent's authority to the sale of a parcel of real property, the funding of a trust or the execution of tax returns. Under a general durable power of attorney, you generally authorize your agent to transact any business, financial and personal affairs on your behalf.

You should consider executing a general durable power of attorney to provide for the management of your business, financial and personal affairs. As the principal under a general durable power of attorney you may pick the person who will manage your affairs and customize the agent's authority to meet your needs.

If you become incapacitated without a general durable power of attorney, it may be necessary for a court to appoint a guardian or conservator for you. In that case, the court will choose the guardian or conservator. The guardianship or conservatorship is a public court supervised proceeding. Therefore, they are normally relatively expensive and time consuming.

WHEN DOES A GENERAL DURABLE POWER OF ATTORNEY TAKE EFFECT?

Unless the general durable power of attorney is "springing," it takes effect as soon as you sign it. A "springing" power of attorney takes effect only when the event described in the instrument itself takes place. Typically, this is the incapacity of the principal as certified by one or more physicians.

DOES A GENERAL DURABLE POWER OF ATTORNEY TAKE AWAY MY RIGHTS?

No. Only a court can take away your rights in a conservatorship or guardianship proceeding. Your agent simply has the power to act for you.

WHOM SHOULD YOU SELECT AS YOUR AGENT?

The selection of your agent is the most important decision you must make in the preparation of a durable power of attorney. The person must be someone in whom you have complete confidence. Confidence, however, is not enough. Is the person available? Does he or she have the necessary experience? Some person that you may select may have conflicts of interest to your own interests. This will not be a problem if you trust this person and are willing to waive the conflict.

What happens if the person you select is unable or unwilling to serve when you need them? Clearly, it is important to provide in your power of attorney for a successor agent(s).

Once you have selected your agents, you should ask them if they are willing to serve if called upon to serve.

WHAT IF I APPOINTED MORE THAN ONE AGENT?

Just as you and your agent can act at the same time, you can give more than one person the power to act on your behalf. In most cases, these agents are given the right to act independently of one another. You can also require both of them to agree to any actions, but this can be cumbersome in practice. Finally, you can name one or more successors if your original agent can no longer act.

CAN I CHANGE MY MIND?

You may revoke your general durable power of attorney at any time. If you have possession of the

originals of the DPA, you should destroy all of them. If your agent has possession of the DPA, you should notify the agent of the revocation by certified mail and request that he or she return all originals of the DPA to you. From the moment the agent receives the notice, he or she can no longer legally act under the power of attorney. If the general durable power of attorney has been recorded in the clerk's office, you should also record a notice of revocation. You should also notify any third parties with whom your agent has acted on your behalf. I recommend that you consult with an attorney if you wish to revoke a DPA.

AM I RESPONSIBLE TO THIRD PARTIES FOR MY AGENT'S ACTIONS

Yes, if your agent was acting within the scope of his or her authority under the power of attorney.

IS THE POWER OF ATTORNEY A FORM?

Absolutely not. You should customize your general durable power of attorney in light of your family, finances, and personal wishes. For example, the following matters, among other things, should be considered in the preparation of your general durable power of attorney:

- Who do you want to manage your affairs if you are unable to do so? If your primary agent is unable to act, do you want to name a successor agent?
- Do you want to compensate your agent?
- Do you want your agent to keep your family informed about the actions that your agent takes on your behalf?
- Do you want to authorize your agent to make gifts of your property?
- Do you want to authorize your agent to create trusts on your behalf or to make designations

of beneficiaries of your life insurance or retirement plans?

- Do you want your power of attorney to become effective on execution or upon your incapacity?
- Do you want to authorize self-dealing (ie. authorize the agent to transact business on your behalf with himself or herself)?
- Do you have a professional practice, business or real property that must be managed?
- Do you have dependents whom you are supporting? Do any of your dependents have any special needs?
- Do you own any out of state assets? If so, the power of attorney should comply with the laws of each state in which you own assets.
- If you become incapacitated, do you want to remain home as long as it is practical?
- Do you own any pets that must be cared for if you become incapacitated?
- Do you want to limit the liability of your agent for honest mistakes?

WHAT HAPPENS IF A GUARDIAN IS APPOINTMENT?

One of the purposes of a power of attorney is to avoid the need for the appointment of a guardian or conservator; however, depending on the circumstances, one may still be appointed. In most cases, the power of attorney includes the nomination of the agent or someone else you designate to be your conservator or guardian if such appointment ever does become necessary. This nomination is not absolutely binding, but it will be followed by the court unless convincing evidence is presented that it would not be in your

best interest. Even after the appointment of a guardian or conservator, your power of attorney will continue in effect unless the court takes the affirmative step of revoking the power of attorney.

Oast & Hook, P.C.
Tel: 757-399-7506
Fax: 757-397-1267
E-mail: mail@oasthook.com

SHOULD YOU CONSULT WITH AN ATTORNEY BEFORE SIGNING A DURABLE POWER OF ATTORNEY?

Yes. A general durable power of attorney is a powerful legal instrument which creates legal duties and responsibilities. It is not a simple form. A general durable power of attorney should be customized to meet your particular circumstances. You should seek competent legal counsel.

CONCLUSION

The likelihood of a disability in your lifetime is real. The general durable power of attorney provides a flexible means of managing your affairs if you become disabled. It is much less costly and time consuming than a court appointed and supervised guardianship or conservatorship.

ABOUT THIS DOCUMENT

This document is not intended as a substitute for legal advice. It is distributed with the understanding that if you need legal advice, you will seek the services of a competent Elder Law attorney. While every precaution has been taken to make this document accurate, we assume no responsibility for errors or omissions, or for damages resulting from the use of the information in this Explanation.

Reprint permission is granted only for educational purposes with appropriate citation to Oast & Hook, P.C.

Oast & Hook also publishes the *Oast & Hook News*, which is archived in searchable format on our web site. If you would like to be added to the distribution list for this newsletter, or if you need additional information concerning this Explanation, you may contact us by calling or emailing:

Oast & Hook, P.C.
www.oasthook.com

521 Middle Street Mall
Portsmouth, Virginia 23704
Tel: 757-399-7506
Fax: 757-397-1267

295 Bendix Road, Suite 170
Virginia Beach, Virginia 23452
Tel: 757-399-7506
Fax: 757-397-1267