DURABLE POWERS OF ATTORNEY FOR FINANCIAL MATTERS

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I. WHAT IS A DURABLE POWER OF ATTORNEY AND WHY DO YOU NEED ONE

A. WHAT A DURABLE POWER OF ATTORNEY DOES

A durable power of attorney (DPOA) is an indispensible part of a complete estate plan. You should put one in place sooner rather than later.

A DPOA is a special type of power of attorney that is used to plan for your incapacity. With it you (the principal) give another person (your agent or attorney-in-fact) the authority to act for you in financial and legal transactions. An ordinary power of attorney ceases to be valid if the person giving the power becomes incapacitated. A DPOA, on the other hand, continues in effect and allows your attorney-in-fact to manage your affairs if you are no longer able to do so (hence the term “durable”).

The DPOA document includes language providing that it remains in effect if and when you become incapacitated or it becomes effective if and when you become incapacitated. See IV. When a Durable Power of Attorney Takes Effect below.

B. HOW IT WORKS

When you execute a DPOA, you delegate certain powers to a carefully selected person to be exercised during your incapacity. Once you become incapacitated, the granted powers last for the duration of your incapacitation, whether short-term or long-term. The person you select steps into your shoes and handles your financial affairs pursuant to your expressed wishes or best interests.

You can give your attorney-in-fact unfettered powers to handle all your affairs, or you can limit the powers. Some of the common powers given to an attorney-in-fact include:

- Writing checks to pay your bills and depositing funds into your accounts.
- Managing your real estate, including buying, selling, and renting it.
- Buying and selling your personal property.
- Managing your investments and insurance and retirement accounts.
- Managing your government benefits.
- Filing your tax returns and paying your taxes.
- Accessing your safety deposit box.
- Filing and defending lawsuits on your behalf.
- Operating your business.

See III. What Powers to Give your Attorney-in-Fact below.

Your attorney-in-fact presents your DPOA to the people or institutions with whom you deal as proof of the grant of authority and signs your name followed by his or her own, e.g., “Jane Jones by Sam Smith, Power of Attorney.”

C. WHO CAN MAKE A DPOA

To give someone a power of attorney, you must be of sound mind and have the mental capacity to understand the powers you are giving. What constitutes sound mind is somewhat subjective. Someone might be of sound mind at one given moment and not the next. In general, if you are giving someone the power to handle your affairs, you need to have a full understanding of the powers you are agreeing to give them in the event of your incapacity.

Sadly, the courts regularly see cases where someone, often a family member, contests the appointment of the attorney-in fact on the grounds that the principal was not of sound mind when the document was executed. The earlier (prior to any signs of incapacity) you can put your DPOA in place, the less likely an assertion that you were not of sound mind will prevail.

D. DEFINING INCAPACITY

The definition of incapacity may vary from state to state. However, in general, an individual is considered incapacitated when he or she lacks the understanding to make rational or responsible decisions.

Incapacitation can be temporary or long-term. Short-term incapacitation examples include a period of time after surgery or an accident from which you will recover. Long-term incapacitation could be caused by a stroke or dementia, Alzheimer's Disease, or other similar diagnosis. A DPOA remains in effect for the duration of your incapacitation, whether weeks, months, or years.

E. WHAT HAPPENS IF YOU BECOME INCAPACITATED WITHOUT A DPOA

If you become incapacitated without having executed a DPOA, someone close to you-- a family member, partner, or friend, will have to seek a guardianship and/or conservatorship over you. A guardian is appointed to look after your personal care and wellbeing. A conservator (in some places known as a guardian of your estate) is appointed to handle your financial affairs. Sometimes these are the same person. Unfortunately, once you lose capacity, it is too late to give someone a power of attorney.

The appointment of a guardian and/or conservator can be costly and time consuming. It can also be contentious with different people vying for the position or even contesting the need. A court must review the case and make the appointment. By executing a DPOA, you can avoid this hassle for your loved ones.

One of the benefits of a DPOA is it is a voluntary delegation of rights. You get to (a) state the actual powers that will be granted (and any limitations) and (b) choose the person or persons to whom those powers are granted. A conservatorship is an involuntary delegation of rights that comes with the guardianship process. In being proactive, you are not giving away control, but simply delegating your rights to a person you trust.

F. WHY YOU NEED A DPOA EVEN IF YOU ARE MARRIED

If you have a spouse, you may think you do not need a DPOA because most of your property and accounts are joint. It is true that your spouse can manage the joint accounts in the event of your incapacity. He or she can write checks, make deposits (even of checks that are in your name), and even trade stocks that are in a joint account. But, if you own (or expect to own) real estate together, usually you both have to authorize the sale. If you are incapacitated and your spouse (or someone else) does not have your DPOA authorizing real estate transactions, your spouse is stuck. Your spouse will need to pursue a guardianship/conservatorship to complete the sale. The same may be true of a vehicle depending on how it is titled. And, to the extent that you do have separately owned property, your spouse will not be able to manage or sell it once you are incapacitated without your DPOA.

G. WHY YOU NEED A DPOA EVEN IF YOU HAVE A REVOCABLE LIVING TRUST

If you have or plan to have a revocable living trust, you may be wondering if you also need a DPOA. The answer is yes.

One of the benefits of a living trust is that it provides for property management in the event of your incapacity. The trust document will provide that the person you name as your successor trustee takes over if you become incapacitated. Your successor trustee will then have the power to manage all the assets in the trust, but only those assets.

Doubtless you will have some income and assets that are outside the trust, such as personal bank accounts and retirement accounts. You probably also will receive income from various sources such as social security and pensions. A DPOA gives your attorney-in-fact the power to manage those assets and pay your bills.

II. CHOOSING AN ATTORNEY-IN-FACT

A. WHOM TO CHOOSE

Because an attorney-in-fact under a DPOA is usually granted broad powers, the person you choose should be someone you trust completely and know will act in your best interests. You should have absolute faith in the agent's loyalty, competence, and devotion. People often select a family member, close friend, or a professional with a reputation for honesty. The person you choose may, but need not be, the same person as the executor of your will, or the successor trustee of your revocable living trust.

You want to choose someone who is willing and able to serve. You can't force someone to accept the appointment.

You do not want to spring your decision on your attorney-in-fact after you have executed the document. Sit down and have a frank conversation with the candidate. Make sure he or she knows what duties the appointment will entail and that he or she feels capable of fulfilling them. Then secure the person's consent before naming him or her.

B. CHOOSING A SECOND OR ALTERNATE ATTORNEY-IN-FACT

You can select more than one person to act as your attorney-in-fact. If you choose more than one, you need to decide whether to grant them authority to act individually or only jointly. Pros and cons exist for each method.

Granting your attorneys-in-fact power to act individually allows one agent to act quickly on your behalf without needing to consult the other. On the other hand, requiring your attorneys-in-fact to act jointly provides a built-in safeguard to ensure your agents are acting in your best interests. Each operates as a check on the other. A downside of requiring the agents to act jointly is that they could disagree on how to handle the matter, or one may be unavailable, which could cause delays in completing the action.

It's a good idea to name an alternate attorney-in-fact to serve if the first person you name is unavailable or unable to serve when the time comes.

III. WHAT POWERS TO GIVE YOUR ATTORNEY-IN-FACT

A. CHOOSE WISELY AFTER CAREFUL CONSIDERATION

When you execute a DPOA you give your attorney-in-fact the power to act on your behalf regarding various financial obligations and transactions. Choosing the powers you want to give your attorney-in-fact requires careful consideration. The powers you grant your attorney-in-fact will be for the duration of your incapacitation. In the event you become incapacitated, you will no longer have a right to revoke or amend the DPOA.

1. POWERS YOU MAY WANT TO CONSIDER:

a. Personal Finance

When you become incapacitated someone needs to be able to handle your day-to-day affairs. This might include paying bills (e.g. utilities, health care costs, housing, etc.), paying caregivers, filing taxes, and other routine matters.

b. Banking and Investments

Banking transactions might be part of personal finance or can be more specifically spelled out. These permissions might include the ability to transfer funds between accounts, cash checks, and even make and sell investments such as stocks, bonds, and mutual funds.

You can put limits or restrictions on your attorney-in-fact's access to your accounts. For example, you can allow the attorney-in-fact access to certain accounts only or limit spending no more than a certain amount each month. The purpose of such restrictions is to make sure your needs are met, while discouraging mismanagement and self-enrichment.

c. Business Operations

If you own and operate a business, you may consider allowing your attorney-in-fact to run the business and, if necessary, step into your shoes as a shareholder. These powers can be broad in scope, or specific to certain aspects of the

business. They may include the ability to make investment, budget, employment, and management decisions. These powers might also include representing you during meetings or in litigation. Some safeguards might include having separate DPOAs for your business and personal matters that name different attorneys-in-fact. You can also place restrictions the powers such as precluding the attorney-in-fact from personally investing in the business, or limiting what types of new employees the attorney-in-fact can hire (e.g. no personal friends).

d. Real Estate Transactions

Many states have specific requirements for allowing an attorney-in-fact to handle real estate transactions. Often the full legal description of each property must be specified in the DPOA. Real estate powers might allow your attorney-in-fact to sell, buy, rent, mortgage, or trade property in your name. Granting these powers to an attorney-in-fact might make sense if the equity in your property could be needed to pay for your care. You can also restrict this type of power. For example, you could prohibit your attorney-in-fact from selling your home. You could restrict him or her from buying additional properties or renting out a particular one.

e. Legal Affairs

You could be sued or have the right to sue someone else. Giving your attorney-in-fact the power to act in legal matters means he or she can prosecute and defend legal claims on your behalf. He or she can start a lawsuit or step into your shoes in an existing suit. Your attorney-in-fact can file a claim with a government agency or participate in a mediation or arbitration on your behalf. Like any powers, you can restrict your attorney-in-fact's legal powers. For example one restriction may be to represent you only in ongoing cases, but not future cases. Another restriction may be to bring only a certain type of case or to defend you if you are sued, but not to sue on your behalf.

f. Insurance

You may allow your representative to change, renew, and otherwise alter your insurance policies and coverages. These can include home, business, annuities, and even life insurance. Some individuals may want to allow their attorney-in-fact to manage home and business insurance, but restrict the ability of an attorney-in-fact to change insurance policies, and, in particular, beneficiary designations. The powers granted here should be considered carefully.

g. Family Care and Maintenance

Incapacitation usually is not a foreseeable event and can happen suddenly. Therefore, you must consider your obligations to care for others, including spouses, children, and aging parents. You can give your attorney-in-fact the power to use your resources to meet the financial needs of family members.

h. Your Care and Maintenance

If you become incapacitated you may require special care or have special needs. You can grant your attorney-in-fact the power to hire professionals to meet your care needs. These might include an accountant, lawyer, financial advisor, caregiver, or health care professional. You can restrict the type of professional or category of professionals.

i. Tangible Personal Property Management

You probably own personal property such as cars, jewelry, furniture, and other personal effects. You can allow your attorney-in-fact the power to manage, control, and even sell these tangible personal property items. You can also place limits on these powers. For example, you can allow your attorney-in-fact to sell your automobile if it is no longer needed.

j. Gifts and Charitable Contributions

You can give your attorney-in-fact the power to make gifts and charitable contributions in your name from your income and assets. You may not want to give your attorney-in-fact unfettered power to give away your property. It is common to limit the power to make gifts to specified persons or charities, or to regular contributions you were presently making, or to limit the total dollar amount.

2. POWERS YOU CANNOT GIVE TO YOUR ATTORNEY-IN-FACT

Some powers cannot be given to an attorney-in-fact, including:

- Power to vote on your behalf in any public election.
- Power to alter or execute estate planning documents, including wills and trusts.

B. DRAFTING YOUR DPOA

Although you can prepare your own DPOA or use a form you find online, the best way to ensure your document is properly drafted is to consult an estate planning or elder law attorney. The forms you find online may not be valid in your jurisdiction or may not be sufficiently tailored to your situation.

Your DPOA might include broad language giving the attorney-in-fact “all powers” to manage your financial affairs if that is your desire. But, for your protection, your jurisdiction likely requires that some powers be spelled out with specific language in the DPOA. Some examples of these powers might include:

- The power to change the beneficiaries of your life insurance.
- The power to gift your property or money to others.
- The power to change real estate agreements.

Having your DPOA prepared by a professional as part of a comprehensive estate plan will ensure that your wishes are met, and that the attorney-in-fact is not hampered by a document that is meant to empower him or her.

C. HEALTH CARE DECISIONS REQUIRE A DIFFERENT DOCUMENT

A DPOA cannot grant your attorney-in-fact the power to make health care decisions during your incapacitation or after your death (e.g. cremation or burial decisions). Health care power of attorney documents must be prepared and executed separately to appoint an agent to make health care decisions for you, if you are unable to do so yourself. Your estate planning attorney can prepare these and supervise their execution along with your DPOA. The person you choose as your health care agent may, be need not be, your DPOA attorney-in-fact.

IV. WHEN A DURABLE POWER OF ATTORNEY TAKES EFFECT

A. YOUR OPTIONS

Depending on where you live, you may have two choices: 1. Have your DPOA take effect immediately on execution; or 2. Have your DPOA take effect when you become incapacitated (known as a "springing power of attorney"). Most states allow both options, but some do not allow a springing durable power of attorney.

B. MAKING YOUR DPOA EFFECTIVE ON EXECUTION

In some ways this is the simplest solution. Making your DPOA effective on execution will allow your attorney-in-fact to begin managing some or all of your affairs immediately, if that is what you want. Then he or she can continue seamlessly if and when you become incapacitated.

If you don't want your attorney-in-fact to exercise any authority granted by your DPOA unless you are incapacitated, you can simply explain your wishes to him or her. If you trust the person you named as your attorney-in-fact to respect your wishes (and you should, or you should choose someone else), you shouldn't have a problem.

Making your DPOA effective on execution does not deprive you of any of the powers you delegate to your attorney-in-fact. You both have them, but your attorney-in-fact can decline to exercise them in accordance with your wishes. You can continue to manage your affairs unless and until you become incapacitated when your attorney-in-fact will take over.

C. MAKING YOUR DPOA EFFECTIVE ON YOUR INCAPACITY

If you really are not comfortable with making your DPOA effective immediately, you may be able to make it effective only when you become incapacitated. This type of DPOA is called a "springing" power of attorney because it springs into effect on a future event. A springing DPOA does pose some difficulties for your attorney-in-fact.

Typically the springing power of attorney document will provide that you are incapacitated when a physician (or two physicians) certifies that you are. So, before your attorney-in-fact can begin to manage your affairs, he or she must get the certification from the physician(s). At the minimum, this will cause delay. Without a valid HIPPA release from you, a physician may not be willing to provide the certification.

Even with the certification(s), some individuals and institutions may be hesitant to accept the DPOA and question its validity.

If you decide you want a springing durable power of attorney, your best course of action is to consult an estate planning attorney to make sure the document is legal in your state and that it is properly drafted with all required legal language and a valid HIPPA release.

D. COMPARISON WITH NON-DURABLE POWERS OF ATTORNEY

A durable power of attorney should not be confused with a “regular” power of attorney. You can give another person your power of attorney to accomplish a single legal or financial transaction. For example, you need to sell some property but cannot be present for the closing. Or you can give another person your power of attorney to handle a broad range of legal and financial matters over a longer period of time. For example, you are traveling outside the country for an extended period. These “regular” powers of attorney will expire on a date or occurrence of an event specified in the document. And they will cease to be valid as soon as you are incapacitated. Both regular and durable powers of attorney expire on the death of the principal.

V. EXECUTING YOUR DURABLE POWER OF ATTORNEY AND STORING AND DISTRIBUTING THE DOCUMENT

A. EXECUTION REQUIREMENTS

Your DPOA must be executed in order for it to be considered a legal document. Each jurisdiction has its own execution requirements for a DPOA. You will want to make sure that you understand your jurisdiction’s execution requirements before signing the document.

Most states require that you sign the document in front of a notary. And most people and institutions your attorney-in-fact will need to work with will expect it to be notarized. You may also need witnesses and your attorney-in-fact may also need to sign. You must be of sound mind, i.e. competent to understand the document and the powers it grants.

The best way to ensure that your document is properly executed is to execute it under the supervision of your estate planning attorney.

B. FILING/RECORDING THE DOCUMENT

In most jurisdictions, a DPOA does not need to be filed or recorded anywhere. One exception to this is if the DPOA allows the attorney-in-fact to engage in real estate transactions. Then the form usually has to be recorded with county clerk or recorder’s office in the county where the property is located. A couple of states require a DPOA to be recorded when the principal becomes incapacitated.

C. WHAT TO DO WITH THE DOCUMENT

If your DPOA is to become effective immediately, you will need to give the original or a photocopy to your attorney-in-fact, who will need it to prove you have authorized him or her to act for you. Institutions will usually accept a photocopy as evidence of the attorney-in-fact’s authority. You can include language in your document to the effect that a photocopy

of the executed original should be treated as an original. Then you can keep the original in a secure location just in case the photocopy is lost or destroyed. Your estate planning attorney may advise you to execute several duplicate originals just in case your attorney-in-fact encounters an institution that will not accept the copy.

If your DPOA will not become effective until you are incapacitated, you should keep the original. Keep in mind that the DPOA may be required on short notice. This is especially true if your incapacitation is unexpected and sudden. To plan for emergencies, you want to keep the original in secure place where your attorney-in-fact can access it quickly and easily, if needed. A fireproof safe in your home to which your attorney-in-fact has the key or combination is a good choice.

Safe deposit boxes present a problem for estate planning documents. You will need to make advance arrangements with the bank for your attorney-in-fact to have access to the box. Otherwise, the bank may be unwilling to open the box for him or her without the original durable power of attorney, which, or course, can't be produced because it is inside the box. The other problem is that banks are only open during business hours, which means the power of attorney could be unavailable if needed in an emergency.

It is not a good idea to keep the location of your DPOA a secret because, without the document, your attorney-in-fact will be unable to act on your behalf.

D. OTHER DOCUMENTS YOUR ATTORNEY IN FACT WILL NEED

Your attorney-in-fact will need access to the same documents and information that you need to conduct your own affairs. At a minimum, he or she will probably need:

- A list of all financial institutions at which you maintain accounts, the types of accounts, and the account number of each. These might include checking, savings, CDs, credit cards, retirement, and brokerage accounts.
- A list of all your bills/debts, payment amounts for those with a set payment, and their due dates.
- A list of the sources of income you receive and how and when your receive them (e.g., pensions, social security, etc.)
- If you do your banking and bill paying online, your attorney-in-fact will need your user id and passwords.

Depending on the complexity of your finances and the powers you have given to your attorney-in-fact, he or she may also need these and other documents:

- A list of your real estate holdings and copies of the deeds and leases currently in effect.
- Your insurance policies.
- The title to your vehicles.
- Tax returns.

Copies of documents pertinent to your business holdings such as partnership or LLC agreements, shareholder agreements, buy-sell agreements, and bylaws.

A good way to store this information is to scan the documents and save everything on a flash drive which you put in a secure location to which your attorney-in-fact has access.

VI. CHANGING OR REVOKING YOUR DURABLE POWER OF ATTORNEY

A. YOU CAN MAKE CHANGES IN YOUR DPOA SO LONG AS YOUR ARE COMPETENT

When you execute a DPOA, as long as you remain mentally competent, you do not give up the right to handle your own legal affairs. You have the right and the power to change or revoke your DPOA.

B. REVIEW YOUR DPOA PERIODICALLY

After you execute a DPOA you want to revisit your choices, including your attorney-in-fact selection every so often. Life circumstances can change including your needs and the attorney-in-fact's ability or willingness to fill the role.

C. AMENDING YOUR DPOA

It is possible to amend the document, but in most cases the better approach is to revoke your DPOA (see comments below) and execute an entirely new document. Amendments may create confusion and questions. With the execution of a new document, there will be no question about the validity of your intentions.

D. REVOKING YOUR DPOA

A DPOA can be revoked as long as you are mentally competent and follow your state's formalities. Once you are incapacitated, you lose the ability to revoke your DPOA.

Most states require a document revoking your DPOA. You typically have to sign the document before a notary. Then you need to send a notice of the revocation along with a copy of the document to your attorney-in-fact. You also should send a copy of the revocation to any persons or institutions that have copies of your revoked DPOA or that may have relied on it and to any government offices where your revoked DPOA was filed.

When you execute a new DPOA, it can include a statement that you have revoked the previous one.

VII. WHAT HAPPENS IF THE ATTORNEY IN FACT ABUSES POWER?

A. ABUSE IS ALWAYS POSSIBLE

No doubt, a DPOA can provide a lot of power to an attorney-in-fact. An attorney-in-fact can make bad decisions that are contrary to your intent and for the attorney-in-fact's own benefit. Sadly, this happens. Ideally, your attorney-in-fact is a trusted family member or personal confidante. But, sometimes the temptation is too great. There is always the risk that the person you choose will take advantage of the situation.

B. ATTORNEY-IN-FACT'S FIDUCIARY DUTY

An attorney-in-fact is held to a fiduciary standard. This means that he or she must act in the principal's best interests as outlined under the power of attorney and required by law. Failure to do so can have civil and criminal consequences. In general, an attorney-in-fact must:

- Act only in accordance with the scope of authority granted in the DPOA and your reasonable expectations.
- Act in good faith and not create conflicts of interests.
- Use diligence, competence, and care.
- Keep accurate records of all transactions.
- Comply with all disclosure requests.
- Attempt to preserve your estate plan.

C. EXAMPLES OF A BREACH OF FIDUCIARY DUTY

Example #1: John has his mother's DPOA granting him the power to conduct all of his mother's financial affairs, but not create conflicts of interest or transfer real estate into his name. John sells his mother's home for fair market value to his wife knowing that the market is likely to go up quickly. Although John did not sell the home to himself and he received fair market value, these actions may be considered a breach of fiduciary duty. The transaction is "too close" to be an arm's length, and knowing the market is likely to increase quickly, John is likely to gain from the transaction through his wife.

Example #2: Jane has her incapacitated brother's DPOA which grants her the power to handle financial and bank transactions. Jane pays her brother's bills each month, but also uses his checking account to pay her personal electric and cell phone bill. This amounts to stealing from the incapacitated principal.

D. SAFEGUARDS

In the unfortunate event an attorney-in-fact abuses his or her power there are some safeguards to invoke. You can revoke your DPOA at any time so long as you are mentally competent. You or someone on your behalf if you are

incapacitated can sue your attorney-in-fact for breach of fiduciary duty. Possible remedies include an injunction to immediately stop the bad behavior, restitution that must be repaid for the abuse, and even punitive damages. Finally, misuse of a power of attorney may constitute a crime such as theft or embezzlement, which can be reported to the police and punished with fines and jail.

VIII. 7 COMMON MISCONCEPTIONS ABOUT DURABLE POWERS OF ATTORNEY

Below some common misconceptions about DPOAs are clarified.

MISCONCEPTION #1. YOU CAN USE A POWER OF ATTORNEY FORM YOU FIND ONLINE

An online search for a DPOA will return multiple forms that look like they might work for your situation. Use of these power of attorney forms is not advised because the forms:

- May not contain the legal provisions needed for your jurisdiction.
- May fail to have adequate detail to convey your wishes or limitations of power you wish to impose.
- Are not the most current version.
- Do not explain the necessary execution formalities.
- Have conflicting or ambiguous language.
- Are not "durable." See #2 below.
- For these reasons, although you may find a power of attorney form online, it is best to consult an estate planning attorney to make sure your document is legal and meets your needs.

MISCONCEPTION #2. ALL POWER OF ATTORNEY FORMS ARE THE SAME

There are several types of powers of attorney. These documents have different purposes.

Special or limited power of attorney: This power of attorney is limited to a specified purpose, or short duration. For example, if you cannot be present for a real estate closing, you can grant your real estate agent a power of attorney to handle the transaction on your behalf. In this case, the power of attorney is limited to the real estate transaction only.

General power of attorney: This power of attorney usually grants an attorney-in-fact broad powers to manage the principal's affairs for a longer duration, for example while the principal is out of the country on a sabbatical or extended trip. In this case, the power of attorney terminates when the principal returns, becomes incapacitated, or dies.

Durable power of attorney: This power of attorney is similar to a general power of attorney, but does not expire on the principal's incapacity. A DPOA contains language that it continues in effect if the principal becomes incapacitated or goes into effect when the principal becomes incapacitated (a springing power). Like all powers of attorney, it expires on the principal's death.

Health care power of attorney: Different states have different names for this document like a health care directive, health care proxy, or health care durable power of attorney. This document allows you to choose an agent to make medical decisions for you when you cannot make them for yourself. The document provides guidance based on your wishes—e.g., your desire to remain on or be taken off life support.

MISCONCEPTION #3. LEGALLY INCOMPETENT OR INCAPACITATED INDIVIDUALS CAN EXECUTE A POWER OF ATTORNEY

Attorneys often get phone calls from a panicked spouse or adult child who wants a DPOA for a loved one who has just had a stroke or other unexpected incapacitating event. Sadly, nothing can be done to execute a power of attorney for a person who is incompetent or incapacitated. To execute a DPOA, the principal must be of sound mind. This means the principal has to be aware that he or she is giving someone else the authority to handle his or her affairs. The only option is to seek a guardianship and/or conservatorship through the courts.

MISCONCEPTION #4. A DURABLE POWER OF ATTORNEY IS VALID AFTER THE PRINCIPAL'S DEATH

All powers of attorney, including durable powers of attorney, end when the principal dies. Administration of your estate will be handled by the person named as executor in your will and successor trustee in your living trust. If you do not have a will or trust, the court will appoint a personal representative to administer your affairs after your death.

MISCONCEPTION #5. YOUR ATTORNEY-IN-FACT CAN MAKE WHATEVER DECISIONS HE OR SHE CHOOSES REGARDING YOUR AFFAIRS

A DPOA can give an attorney-in-fact sweeping powers to handle all of your affairs. However, safeguards protect you from decisions by your attorney-in-fact that are contrary to your wishes.

First, the power of attorney document outlines what powers are granted to the attorney-in-fact. If he or she acts contrary to these powers, your attorney-in-fact can face serious consequences and be removed as your agent.

Second, an attorney-in-fact has clear fiduciary obligations and is required to make decisions in your best interest.

Third, you can limit the powers that you can give your attorney-in-fact. For example, you might give him or her power to pay your mortgage, but not to sell your home.

MISCONCEPTION #6. POWERS OF ATTORNEY ARE ONLY FOR THE ELDERLY

Regardless of your age, accidents and unexpected illnesses can happen at any time. Therefore, all adults should have both a health care power of attorney and a durable power of attorney for financial affairs. If you do not have these documents and an unexpected event renders you incapacitated, your family will have to apply for a guardianship to manage your affairs and make decisions for you. This can be a long and expensive process.

MISCONCEPTION #7. A POWER OF ATTORNEY IS VALID ONLY IN THE STATE WHERE IT WAS WRITTEN.

The laws about whether a power of attorney executed in one state is valid in another vary from state to state. Some states will recognize a power of attorney drafted in a different state. You will need to check your state requirements if you relocate to a new state and want to rely on a power of attorney executed where you formerly resided.