



Healthcare Durable Powers of Attorney and Durable General Powers of Attorney for Property Management

RICHARD PETERSON (Greenwood Village, Colorado)



Good estate planning not only addresses lifetime and after-death issues but gives you the opportunity to address issues that are raised if you become disabled. It is a fact of life that you will at some point in your life, become physically or mentally unable to give prompt and intelligent consideration to business matters. You simply do not know when that stroke, automobile accident, or other event may render you incapable of taking care of yourself and your affairs. Who is going to handle those matters on your behalf? The answer is: your “agent.” That agent is appointed by you in your Durable General Power of Attorney for Property Management and Durable Healthcare Power of Attorney.

WHAT IS AN AGENT?

In this context, an agent is a person authorized by another to act for him or her. Both the principal (person giving the power) and the agent must be adults who are both mentally competent when the power of attorney is signed.

WHAT DOES “DURABLE” MEAN?

Under the body of law we inherited from England, known as the common law, a power of attorney was only as good as the principal who created it. If the principal became disabled, so did his power of attorney.

Then along came a proposed uniform law, which most state legislatures have now adopted in one form or another. The Uniform Statutory Power of Attorney Act allowed a power of attorney to contain the words “this power of attorney shall not be affected by disability of the principal.” Such language allowed the power of attorney to endure even though the principal became disabled. The power endured and therefore became “durable.”

The beauty of the reverse in common law is its simplicity in contrast to the former need to have conservators appointed by a court to manage and account for financial

matters of the disabled person and the need to have guardians appointed by a court to make decisions regarding medical care of the disabled person. Often, the disabled person had little choice as to who was appointed. Under the “durable” provision, the principal has the opportunity to select in advance who serves as his or her agent after disability.

WHEN SHOULD YOUR AGENT’S POWER BECOME EFFECTIVE?

You can literally turn on or turn off the power under your Power of Attorney any time you wish. Also, the choice of when powers are to become effective may depend upon the type of power of attorney you want to use.

Healthcare Power of Attorney

Most people do not want to delegate decisions regarding their healthcare until such time as they are not mentally or physically competent to make medical decisions themselves. However, they also realize there can come a time when it is simply not in their own best interests to be making healthcare decisions.

The point at which a healthcare power of attorney becomes effective for the agent is in your hands as the principal. It could be as precise as setting a specific date or age. However, more often than not, the principal has the power “spring” into existence when disability occurs. A well-drafted power of attorney defines “disability” in terms with which you as the principal are most comfortable. For example, disability can be defined as a time when two licensed physicians concur you are no longer capable of responsibly conducting your own business affairs or making your own medical decisions. Keeping in mind that an agent must act in the best interests of the principal in all matters, this so-called “springing power” can contain very simple criteria to spring it into effect or more arduous criteria may be used, such as requiring spousal or family member to concur with the opinion of a physician or two physicians. For these reasons, it is best that you make these determinations now while you are not disabled.

The “springing” event need not be as broad as any and all disability. It can be limited to other criteria such as a confirmed diagnosis of a particular disease like Alzheimer’s disease, or factors such as marital status, your financial condition, or literally anything else that is important to you in deciding when to turn over your right of self-determination.

General Power of Attorney for Property Management

Just when a Durable General Power of Attorney for Property Management is to become effective merits separate evaluation from the effective date of the Healthcare Power of Attorney. For example, perhaps you have reached a stage in life when you would like to be relieved of the daily responsibility of managing your own financial affairs. Doing the banking, paying the bills, keeping track of certificate of deposit maturities, maintaining records for income tax returns, and so forth are simply burdens you simply no longer wish to bear. You can simply turn all of that over to a trusted child or friend immediately while still being able to monitor the checking

account, investment account statements, and all other records as you wish from time to time.

A “springing” effective date can also be selected for a general power of attorney for property management. The springing event could be disability (as you define it), the sale of your business, or any other milestone or trigger you select.

WHO SHOULD SERVE AS MY AGENT?

Once again, there is often a distinction between those you choose to make your healthcare decisions and those you choose to make your financial decisions in the event of your disability.

Parents with adult children sometimes approach the selection process based on what can be called the “committee approach.” Not wanting to hurt anyone’s feelings, the parents have all the children jointly serve as the healthcare agents and the property management agents. What is overlooked is the administrative difficulty of having, in some cases, three signing off on an informed consent form for surgery or to make other medical decisions on the spot. Imagine the frustration when all three of them need to sign all the papers at a real estate closing when the title insurance company typically prepares the documents the day before closing. Picture the frustration when the physician-assistant daughter must leave the bedside of her mother to attend a board of director meeting for the family business, which her brother with the MBA says is crucial for the survival of the family business.

All these scenarios are avoided by a more considered approach, the selection of single agents in succession. That is, naming one adult child at a time to serve as agent with an accompanying explanation. The oldest adult child will understand that selecting the youngest child, who lives in closest proximity to his or her parents, will make practical sense. That perception is particularly true when direction is given to the first agent to consult with the other adult children in making decisions.

Sometimes it is best to look outside the family to persons with particular skills in managing financial affairs or medical care. Once again, a simple explanation regarding such appointment will salve most wounded feelings.

Of course, it is a good idea to have successors in place should a designated agent cease or fail to act. The “cease or fail” language in a document covers all circumstances such as the agent’s refusal to serve, his resignation, death, or disability.

HOW DO YOUR POWERS OF ATTORNEY AFFECT YOUR LIVING WILL?

Over the last several decades, many people have heard about the so-called “Living Will.” Most states have adopted statutes which limit the use of life-sustaining procedures. Usually this limitation applies only in very dire medical circumstances, such as being in a terminal condition, in a coma, and being kept alive on a respirator and feeding tube. If you have signed a Living Will, you should reference it in your

Powers of Attorney. Then you can state that in the event your Living Will applies to the particular circumstances confronting your agent, the terms of the Living Will govern if it is in conflict with your Power of Attorney.

DO I ALSO WANT AN AFFIDAVIT OF POWER OF ATTORNEY?

A well-drafted Power of Attorney may contain up to 25 pages because it must contain authority to handle all the things you routinely do for yourself. You give little thought to the number of times you are asked to give authorizations to third persons in order to conduct your affairs. The simple act of signing on your behalf involves banks, insurance companies, car dealers, repair estimates, credit companies, taxing authorities, and so on. Because your disability does not allow your Agent to add things to your Power of Attorney after the fact, your “suitcase” of powers must be packed in advance.

The question then becomes whether your Agent needs to provide the entire document every time a transaction is needed. The answer for most transactions is “No,” if an Affidavit of Power of Attorney is available to your Agent. The Affidavit contains language which includes the following points:

- Any person may rely upon the Affidavit of Power of Attorney as evidence that the Power of Attorney is currently in full force and effect and that such third person is relieved of any obligation to verify that any transaction entered into by the Agent is consistent with the terms and conditions of the Power of Attorney.
- If the third person deems it absolutely necessary, copies of the signature page and specific power allowing the transaction will be provided.
- The signers of the Affidavit are currently the acting Agent of the Power of Attorney and that the foregoing statements and any attached portions of the Power of Attorney are true and correct under penalty of perjury.

Such an Affidavit including a notary verification should take only one page. It will save trees, data storage, and the size of a transaction file.

CONCLUSION

Durable Healthcare Powers of Attorney and Durable General Powers of Attorney for Property Management are powerful tools for dealing with your own disability. Your thoughtful approach to each of their components will serve you well in the event of your disability.

Richard G. Peterson has provided estate planning services for 40 years, during which time his abilities were rated by judges and his peers as “A” (very high to pre-eminent) and “V” (very high ethical standards).
