

Powers of Attorney Podcast

Hi, this is Craig Hersch and welcome to the family estate and legacy program podcast. This podcast episode will center on Powers of Attorney, on the Durable Power of Attorney document that may have been sent to you as part of your package, or you may have been updating your Power of Attorney.

There's a lot of common questions about this document that I'm going to answer here. If you have a specific question to your Power of Attorney, or if this podcast episode does not answer your question, we're always here for you please call your attorney or email us. We're happy to help.

Now, let's first look at the Power of Attorney document itself that's in your packet. It looks like a form document but it's not. The Power of Attorney is a document that we fashioned over the years. When I first started practicing back in 1989, it was only about three or four pages and now it's much more substantial than that. There's a variety of reasons, the first and foremost being that the law has become much more complex, but then you have to look at it from the point of somebody who's accepting the Power of Attorney.

So if I, let's say, sign a Durable Power of Attorney to my daughter and she goes to my stockbroker and says, 'well, I'm going to withdraw some money, using this Power of Attorney,' the stockbroker is afraid of his or her liability. So, there's been a lot of safeguards built into the law, and that's why the Power of Attorney has become as substantial as it is.

Now let's talk about the document itself. What is a Durable Power of Attorney? A Durable Power of Attorney allows you to name somebody as your Attorney-in-Fact. No, that's not us at the law firm, the Attorney-in-Fact is the agent that you're naming under the Power of Attorney document. Now, the fact that it's Durable means that it survives your incapacity. In other words, the Durable Power of Attorney is valid, and can be used by your agent immediately upon signing.

Normally our clients say, "well, I only want this document to be used, if I should become incapacitated." The Florida statute talks about that, so there is a way to do that. The problem is in order for a document that says it's contingent upon your incapacity; is it's not exercisable until a physician's affidavit, (and that physician should have the primary responsibility for your treatment and care and is licensed to practice medicine pursuant to the Florida Statutes.) In other words, they must be a Florida physician.

So if you happen to be incapacitated, up north, typically a Durable Power of Attorney document would be good, in that state of Florida Durable Power of Attorney document; unless you have put this contingency in your Power of Attorney document, in which case it may not be.

So, for that reason, the Power of Attorney document, the Durable Power of Attorney document that we have prepared for you is not contingent upon any circumstance. Now, under the Florida Statutes, again, we can't make it contingent upon something else. For example, let's say I gave a Power of Attorney to my wife and then I also gave a Power of Attorney to my daughter. I can't say in the document that my daughter's Power of Attorney is only good if my wife can't serve. The Florida Statutes don't allow that, and that's called a Springing Power of Attorney.

For practical reasons, you can imagine why they won't work as well. So let's go back to the scenario where my daughter goes to the financial institution and says I'm going to withdraw money from dad's account using this Power of Attorney:

If it said something like, "it's only good upon dad's wife, (daughter's) mom, not being able to act," then the bank is going to say, "we're gonna have to send this up to legal apartment, because how do we know that your mother, your father's wife, your mother can't act under the Durable Power of Attorney?" and there it will get stuck and you'll never be able to use it.

So, for practical reasons, because banks and financial institutions are concerned about their liability, a Springing Power of Attorney, one that's contingent upon some event, just won't work. Under the Florida Statutes, we can't make a Power of Attorney contingent upon an event such as that. So again, the Power of Attorney documents that you have, are good, as soon as you put pen to paper.

Now typically, your agent, whether it's your spouse, whether it's your son or daughter or some other loved one; typically, they won't act unless you're incapacitated. If you have any suspicion, that the person that you're naming, will try to act, even when they're not supposed to, or won't act in your best interests, then you have no business naming that person as a Power of Attorney.

Now, sometimes my clients will say this, "okay, I want to give a power tree tourney to my spouse, I'm not going to give a Power of Attorney to my daughter or my son, until my spouse can't act, then I'll give a Power of Attorney to my son or my daughter. What's the problem with that?" The problem with that is, what happens if you're out on a Saturday night, and both you and your spouse get incapacitated at the same time? Now you don't have somebody to act for you, since there is no Power of Attorney named because he or she didn't sign that other document, and you're unable now to sign a new document.

That could cause a pretty big problem. So typically, our clients will name one or two, or sometimes more people to serve as a Power of Attorney. The way we do this, of course, is we give them separate instruments, so that there's no confusion over any contingency or anything like that. We don't want to have a joint Power of Attorney. What if one of them can act and the whole thing is bad? You can't, have just this singular person act in a dual role. So, we're going to name a Power of Attorney, let's say the spouse; and then we have another Power of Attorney, from you to your daughter, let's say as my example.

Now this means that they can act independently, and again, you are trusting that the person that you've named in the Power of Attorney will only act in your best interest not in theirs, and that they will coordinate their actions with anyone else who has fiduciary responsibility to you. In other words, they have a responsibility to act in your best interest.

Another feature of this Power of Attorney, you'll see under Article five (5), you'll see Special Powers. So now what are these? Under the Florida Statutes, certain powers cannot be effective, unless you've initialed them. This is a relatively new change the law. If your current document doesn't have the Special Powers provisions, that's a good reason to update your power. Under Article 5, the Special Powers, we will walk you through these when you come in.

I'm going to briefly walk you through some of them right now. Section 501 is a power to make a statutory election. That's not in a general election that that involves Democrats and Republicans. That's in a statute election, such as what's called a spouse or elective share, or there might be a tax election to make. The person you named, if you initial this can make those elections for you.

The next one is to exercise a power of appointment. What's that? Well, in your, let's say, in your father's trust, he gave you a power to appoint where his where your share goes at your death. That would be a power appointment. If you want to give your Attorney-in-Fact, the person/agent that you're naming, to have that power for you, then you would initial this. Power over Trusts, to create and funded an intervivos (living) trust, that's a revocable living trust, the Power-to-Amend trusts. We typically don't use this one too much, because the power of mantras even if it's initialed here, the trust itself must provide that an Attorney-in-Fact holding a valid Durable Power of Attorney can amend for you, and that can get pretty dangerous.

Typically, we won't do that. If that's something that you want in your estate plan, do talk to us about that. Now specific types of trusts here, for example, let's say you become incapacitated and you need memory care, and you have Alzheimer's disease, God forbid, you might want to create a special type of trust that will qualify you for Medicaid that's listed here:

Section 504: Power-to-Fund. What's this mean? Well, typically, if you have a revocable trust, you want to put all of your assets into the trust. Those assets that aren't in the trust at the time of your death may go through probate. This Power-to-Fund allows your agent to transfer the asset to the trust so it won't go through probate, power to withdraw funds from trust, you know, perhaps to pay bills, powers over annuities if you have an annuity contract, your Attorney-in-Fact can exercise certain powers over those.

Power to make gifts - now what's this? Typically, when we become incapacitated, the IRS rules that gift made by somebody else your behalf really doesn't count as a valid completed gift, unless that person has the power to make that gift on your behalf. There are different types of gift powers here under Section 507. These are the ones that might be abused if you have somebody that's looking out for their own interests and not for yours, but you have a continuation of gifting.

Let's say I'm giving to my church or synagogue every year, the gifts to the Attorney-in-Fact themselves. So, let's say you're making gifts to all your children, you've named one of them as your agent, as your Attorney-in-Fact, would it be self-dealing for them to make a gift to themselves? Well here you're saying no, because, if you're giving it to all (of them) you wouldn't want them to be excluded gifts in excess of the annual federal gift tax exclusion, that used to be \$10,000 a year. Now, at the time that I'm recording this, it's \$15,000 a year.

Sometimes we actually want to make larger gifts to reduce our estate, for estate tax purposes, and that's counted there. Gifts for tuition, gifts for medical expenses, those are pretty self-explanatory. We have power over your retirement plans, such as IRAs, pensions, 401, K's, including the ability to make primary and contingent beneficiary designations. Again, this is a dangerous power, but whoever you're naming, you're hoping and you're trusting that they'll act in your best interests are what you would hope they do, not necessarily what they want. The power to engage in long term care planning, including applying for benefits that you may be entitled to either under insurance contracts, or under law.

Now what about power to select forms of ownership of real estate? That's section 5.10. And then power to make beneficiary designations is typically for those types of assets, like a life insurance policy that aren't already taken care of here. So that's a brief review. I would encourage you to read these in detail and if you have any questions about those, bring those up with us prior to signing them.

Now you may have only received one of the Powers of Attorney when you in fact are naming several different people. When we send out drafts, we typically only send out one for you to review it so you can get familiar with the actual document. Then you'll sign all the various documents when you come in, to sign.

One last thing about a Durable Power of Attorney even though it is Durable, it does not survive your incapacity, it ceases at your death. That's when your will and the testamentary provisions of your trust take over. Your Power of Attorney is only good during your lifetime.

So, I hope that this podcast answers various questions that you may have about the Durable Power of Attorney. Again, we're here for you, we're going to have other podcast episodes on healthcare surrogates, living wills, and pre-need guardians. Thanks for listening. If you'd like some more information, I've written a book entitled *The Florida Residency and Estate Planning Guide*, and you can pick up that book for free by clicking on the link below and we'll be happy to send you one. If you'd like more information about your particular estate plan and would like a complimentary appointment. Please click the link or call us and we'd be happy to establish that appointment for you. And if you'd like to listen to more podcasts like this one, we also have a link below for that.