Power of Attorney Myths – and the Truth Behind Them

By Brian V. McAvoy and Geena G. Kandel

A Florida Durable Power of Attorney ("DPOA") is a critical part of any estate plan. A DPOA is a written document in which you (the "principal") grant legal authority to a third party (your "agent") to handle financial and legal matters on your behalf. A DPOA typically gives the agent broad powers to handle matters such as banking, bill paying, signing contracts, filing tax returns, etc. The agent named in your DPOA is serving in a fiduciary role, meaning the agent must act in good faith and for your sole benefit.

There are three common misconceptions about the DPOA. The first misconception is that clients often believe a DPOA can only be used in the event the client becomes incapacitated. That is false. In Florida, a DPOA becomes effective the moment you sign it. Florida no longer permits a "springing" DPOA; which is a DPOA that only becomes effective when the principal becomes disabled.

The second misconception is that a DPOA can still be used after the principal has died. That is false. A DPOA becomes null and void upon the principal's death.

The third misconception is that the person designated as the agent in a DPOA can manage assets titled in a revocable trust. That is false. Only a trustee can manage a trust. If a client wants to give someone the ability to manage his/her trust, the client must name a co-trustee.

Just about any type of power you can think of can be included in a DPOA. There are, however, a few prohibited powers. For example, a DPOA may not give the agent the authority to vote, sign an affidavit, revoke a Will, or exercise power granted to the principal as a trustee of a trust.

Why do you need a DPOA? If you do not have a DPOA and you become incapacitated, the only recourse is for a family member or friend to hire a lawyer to petition the court to become your legal guardian. By having a DPOA you can avoid a court-supervised guardianship. Guardianships are expensive, cumbersome and intrusive.

A Florida DPOA must be in writing. It must be signed by you, as the principal, and by two witnesses. The principal's signature must also be notarized. A DPOA executed in another state may be valid in Florida if it is valid where it was executed. If you are a Florida resident, you should have a Florida DPOA.

The reason the power of attorney is "durable" is because it remains effective even if you become disabled. Specific language must be included in the document to make it durable.

Who can serve as your agent? Anyone who is 18 years or older can serve as your agent. Alternatively, a financial institution with trust powers that has a place of business in Florida can serve as your agent. You can (and should) name successor agents. For example: "I designate Mary as my agent but if she is not able to serve then John will serve as my agent." You can also name multiple agents. Example: "I designate Mary and John as my agents to serve together." If you choose to name multiple agents you need to decide if they can act independently or if they must act jointly.

Financial institutions are often wary of honoring a DPOA, especially if it is old. For this reason, we recommend a DPOA be updated approximately every five years. The newer the DPOA, the less pushback the principal will receive from the financial institution.

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