

COMMONWEALTH of VIRGINIA

DEPARTMENT FOR THE AGING



POWER OF ATTORNEY

Power of Attorney and Durable Power of Attorney

A Power of Attorney is a written document that allows you (the “principal”) to appoint another person that you trust (the “agent”) to act on your behalf. The “power” that you choose to give can be very narrow (for example, to sell a car) or it can be very broad to include buying and selling your property, making contracts on your behalf, making gifts, etc. A regular power of attorney is good only as long as you are capable of handling your affairs. However, a durable power of attorney document will remain effective even if you become incapacitated. Both the power of attorney and the durable power of attorney are created using specific language according to State law and are permitted in Virginia.



A WORD OF CAUTION:

Even though your agent must follow certain legal rules in Virginia as a “fiduciary,” there is no formal oversight of the agent. If there is no one you fully trust to act as your agent, this tool is not recommended. Please see the material that follows for more specific information on different types of Power of Attorney documents.

The Virginia Department for the Aging gratefully acknowledges the assistance of the Virginia Poverty Law Center (Richmond, Virginia), for written material and Jackie Bedard, (T.C. Williams School of Law at the University of Richmond) who designed the original format while serving at VDA as an intern in 2005/2006.

SPECIFIC LEGAL INFORMATION

By: Virginia Poverty Law Center
(April 2008)

What is a power of attorney?

A power of attorney is a written document that authorizes one person to act on behalf of another. The person giving the power of attorney is the 'principal' and the person who is authorized to act on behalf of the principal is the 'attorney-in-fact' or 'agent'.

The principal must be able to understand the nature and consequences of the power of attorney at the time he or she signs it in order for the power of attorney to be legally valid. This decision is made at the time you sign it, so it is still valid even if you later become incapacitated (if the power of attorney is "durable").

What is a durable power of attorney?

A durable power of attorney will remain in effect if you later become mentally incapacitated.

Virginia law requires language indicating that you intend for the power of attorney to remain in effect upon your disability; otherwise, the power of attorney would automatically terminate.

What is a springing power of attorney?

A power of attorney is normally effective as soon as you sign it unless it contains language stating that it will not go into effect until a specified time in the future (for example, if you later become unable to handle your own affairs). A power of attorney with this language is called a springing power of attorney.

What is a general power of attorney?

The general power of attorney gives the agent broad power to do almost anything for you, the principal.

While the power of attorney may give the agent authority to make medical decisions, this authority is generally granted separately in an advanced medical directive or health care power of attorney.

An agent cannot make a Will for you.

What is a limited power of attorney?

A limited power of attorney gives the agent authority to do only certain specific things spelled out in the document.

OTHER FREQUENTLY ASKED QUESTIONS

1. Why should I sign a power of attorney?

A durable general power of attorney could be very useful to you if you ever become temporarily or permanently incapacitated and unable to handle some or all of your business and personal affairs. Your agent could step in and take care of your affairs for you without delay.

Having a power of attorney may avoid the need for a guardianship. If you become incapacitated and have not signed a power of attorney, someone may be forced to petition the Circuit Court to have a guardian and/or conservator appointed for you. A guardianship and/or conservatorship proceeding can be an expensive, unpleasant and slow process for you, your family, and your friends. It is expensive because you will have to pay lawyers, court fees, and other fees. It can be unpleasant because a hearing must be held in open court, and it can be slow because it takes time to get a court date for the hearing. After the hearing, the Court will decide who should be your guardian or conservator and it may not be someone you would want handling your affairs. In addition, your conservator may be required to file certain documents with the court on an ongoing basis, which can be both time-consuming and expensive.

2. When does the power of attorney take effect?

Your General Power of Attorney will take effect on the date you sign it unless it is a springing power of attorney. Your power of attorney remains in effect during your lifetime unless you revoke it.

A springing power of attorney may seem like a good way to prevent the agent from using the power of attorney before it is necessary, but it may lead to problems. The agent may have a hard time using the power of attorney because it may not be accepted unless the agent can prove that you are disabled every time he tries to use it. If you do not trust your agent to use the power of attorney only when it is necessary, you probably should name another person as your agent. If you want to use a springing power, you should consider including language about how your incapacity is to be determined, such as a letter from your physician that is to be attached to the power of attorney. Some attorneys will hold the power of attorney for you until a physician informs the attorney that you are no longer able to handle your own affairs.

The time to sign a general power of attorney is as soon as you decide that it's a good planning tool. You never know when something might happen to you that would cause you to be unable to handle your affairs. This is true regardless of your age.

It is often too late to sign a power of attorney once you need it because you may no longer have the mental ability to sign a valid power of attorney.

3. Will I still be able to handle my own business after signing a power of attorney?

Yes. Signing a power of attorney does not mean you will lose the right to take care of your own affairs and make your own decisions.

As long as you are competent, the agent should act only when asked by you. However, the agent may act legally at any time unless the general power of attorney is a springing power of attorney. You should tell the agent to use the power of attorney only if you become incapacitated or if you instruct him to act.

4. What are my agent's obligations to me when using a power of attorney to handle my business?

Under Virginia law, the agent you name must act only in your best interests.

Your agent should keep records and papers showing what she has done for you. You have the right to ask the agent for these records.

5. Where do I get a power of attorney?

A lawyer should write a general power of attorney for you because you want to be sure that the agent will be able to use it if it becomes necessary.

Banks and other institutions may not accept a power of attorney that has not been prepared by a lawyer because it may not have the exact wording that is necessary. A lawyer should know what language should be in the power of attorney to make it "durable" and to give the agent the authority he or she may need to handle your affairs.

If you had a power of attorney prepared while you were living in another state or country and you have now moved to Virginia, that document may or may not be legal under Virginia law. To be sure the document will be valid in Virginia, you should have an attorney review it for you or have a new one written.

Your local legal aid office may prepare a power of attorney for you if you are eligible for legal aid. Most private lawyers charge only a small fee for preparing a power of attorney, particularly if you also have a Will prepared.

6. Who should I appoint as my agent under the power of attorney?

You may appoint any competent adult as your agent. It is most important that you appoint someone you completely trust.

It is a good idea to name more than one agent in case your agent is unable to assist you when the time comes. You can name co-agents or a successor agent.

You can appoint an agent who lives outside Virginia; however, it may be more convenient if your agent lives near you.

Be sure you completely trust your agent, because you are giving that person powers that could be abused.

7. Can I later change or revoke the power of attorney?

You can revoke or change the power of attorney at any time as long as you are still mentally able to understand what you are doing.

If you are no longer able to understand what you are doing, a court could appoint a guardian or conservator and revoke the power of attorney if it is necessary.

8. Should I discuss the power of attorney with the person I name as the agent?

Yes. Be sure your agent is willing to use the power of attorney to take care of your business if it becomes necessary.

Instruct your agent(s) not to use the power of attorney unless you ask him to use it or if you become unable to handle your own affairs.

You need to make sure your agent knows where your power of attorney is kept, so he or she will have access to it if you become incapacitated.

If you keep the power of attorney in your safety deposit box, make sure that your agent will be able to get into the box if necessary. You may want to let your agent keep the power of attorney for you.

9. If my agent needs to sign something when handling my business using a power of attorney, how should he sign?

Tell your agent that if he uses your power of attorney and must sign a document on your behalf, he should sign as follows:

_____ (Your name) by _____ (Agent's name), agent for _____ (your name).

It will then be clear that he or she is signing on your behalf only and is not making himself or herself liable for your debts.

10. What can be done if an agent misuses the power of attorney or does not properly handle my business?

If you are still mentally able to understand what you are doing and you believe your agent is not acting in your best interests, you can revoke the power of attorney. You should notify the agent that he or she is no longer authorized to act on your behalf. You should also notify any bank or other institution with which your agent may have done business for you so that they know the agent is no longer authorized to handle your business.

Under Virginia law, a person interested in your welfare (for example, a family member or a co-agent), can make a written request to your agent asking him or her to disclose any actions taken on your behalf within the past five years and to allow reasonable inspection of records about these actions. If the agent refuses to comply with this request within 60 days, the person interested in your welfare can bring a case in circuit court to get a court order requiring the agent to provide the requested records.

You could also file a case in circuit court seeking an accounting from your agent.

IF YOU NEED ADDITIONAL ASSISTANCE . . .

Finding a Lawyer

For assistance in finding a lawyer, contact the Virginia Lawyer Referral Service:

1 (800) 552-7977 (Statewide)

(804) 775-0808 (Richmond, VA)

(804) 775-0502 (Voice/TDD)

<http://www.vsb.org/site/public/lawyer-referral-service/>

Locating a Legal Aid Office Near You

For assistance in finding a local legal aid program that may be able to assist you, contact the Virginia Poverty Law Center:

1 (866) 534-5243 (Toll Free Statewide legal aid locator)

(804) 782-9430 (Richmond, VA)

www.VaLegalAid.org

Locating an Area Agency on Aging (AAA) Near You

For assistance in finding a local AAA program that may be able to assist or refer you, contact the Virginia Department for the Aging:

1 (800) 552-3402 (Statewide)

(804) 662-9333 (Richmond, VA)

1 (800) 552-3402 (Voice/TDD)

<http://www.vda.virginia.gov/findservicesintro.asp>

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