Protecting your future

THE POWER OF ‘POWER OF ATTORNEY’

PRESENTED BY

THE GRAHAM NUCKOLLS CONNER LAW FIRM

gnclawfirm.com

The Power of 'Power of Attorney'

by David Silver

As of January 1, 2018, the new North Carolina Uniform Power of Attorney Act came into effect that significantly changes the authority, use, and treatment of Power of Attorneys in North Carolina. A Power of Attorney ("POA") that was signed before 2018 is still valid and will be interpreted under the prior law, so if you already have an adequate POA you will probably not need to have that document re-drafted. However, if you sign a POA after 2017, it will be interpreted under the new law. Please don't be the person who forces a judge to figure out how to interpret a POA designed for the old law but signed during the time period of the new law.

A POA is one of the most important tools to have in your estate plan. If you don't have a Will, your wealth will still be distributed to your family (just maybe not in a way that you would prefer). However, if you don't have a POA, you might not have much of an estate left at your death. A POA can allow your loved ones to take care of you during a time of diminished capacity without having to go through the formalized court process. It can also allow for some planning and asset preservation even after you become incapacitated.

A POA is a document wherein a person ("the Grantor") gives authority to make financial-type decisions to another person or other people ("the Agent"). This authority can be very limited, like the authority given to a car dealer to re-title your trade-in, or very broad, which in North Carolina could allow the Agent to do just about anything the Grantor could do except marry, divorce, vote or create a Will. In estate planning, we usually don't know if or when a POA will be needed and for what it will be needed (if you can tell me the date you will have a stroke or get hit by a bus, I could probably give you a perfect estate plan). Therefore, for purposes of estate planning, as long as the Grantor trusts the Agent to act in the Grantor's best interests, then broader is better.

By creating a POA, you are giving someone else power to act on your behalf but you are not giving up anything. You are still the boss. You can still act on your own behalf and you can fire the Agent whenever you want for any reason. Additionally, the Agent has a fiduciary duty to you, meaning that they can only exercise the powers granted in the POA if it is in your best interest.

The Agent can be one person or multiple people. Multiple Agents can be given the power to act jointly (i.e. all the kids have to agree to everything) or independently (i.e. any one of the kids can sign the check or call the bank on your behalf). It is a good idea to name contingent Agents just in case your Agent is deceased or becomes incapacitated. If you are all frequently

in the same car, then you probably need another back-up.

Most POAs are effective on the day that they are signed, even though they are often put in a drawer/safe/etc. and not used until needed. However, a "Springing" POA is one that only becomes effective if/when the Grantor becomes incapacitated. This appears to be very reasonable, but utilizing these types of POAs can become cumbersome for the Agent. You can envision a banker asking for proof that the Grantor is incapacitated, and if the notarized letter from the doctor is too old, then the Banker could require a new one. Therefore, as long as you trust your Agent(s), it is usually easier on them to avoid Springing POAs.

A "Durable" POA means that the POA is still valid even after the Grantor becomes incapacitated. While a non-durable POA might have been very useful to landowners in 15th Century England (a lowly tax collector could become the most powerful man in the earldom with the POA of an incapacitated earl), it doesn't make much sense to have anything but a Durable POA in modern society.

There is a plain-vanilla POA within the North Carolina General Statutes (Section 32C-3) that anybody could simply cut-and-paste to create a workable POA, and a separate statutory POA limited to performing real estate transactions. This "Short Form POA" might be sufficient for some purposes, but it lacks some powers and provisions that are very important in estate planning. Whatever you do, do not sign the Short Form POA that existed under the old law since it is unknown how the courts will interpret these documents under the new law.

While it is not required for the Grantor to pass some IQ or memory test to effectively execute a POA, you must have the mental capacity sufficient to understand the nature of the document, its consequences, and its effect upon your rights and interests. If you don't have a POA in place prior to that stroke, bus accident, loss of capacity as a result of Alzheimer's, then your family members will have to file a petition with the Court to have you declared incompetent and have the Court create a guardianship for your estate. Compared to a POA, incompetency hearings and guardianships are expensive, unpleasant, cumbersome and inflexible.

A POA might be the last chance for you, through your AIF, to preserve some of your hard-earned assets for the benefit of your loved ones. The problem with a POA is that, when you really need one, it is too late to sign one. While a full description of all POA requirements and options are beyond the scope of this article, I hope you now understand that you should have a POA as part of your estate plan and appreciate that not all POAs are the same.

David Silver teaches The Legal Environment of Business in ECU's Department of Finance. Dave is also a Partner with The Graham.Nuckolls.Conner Law Firm in Greenville, specializing in Elder Law.