

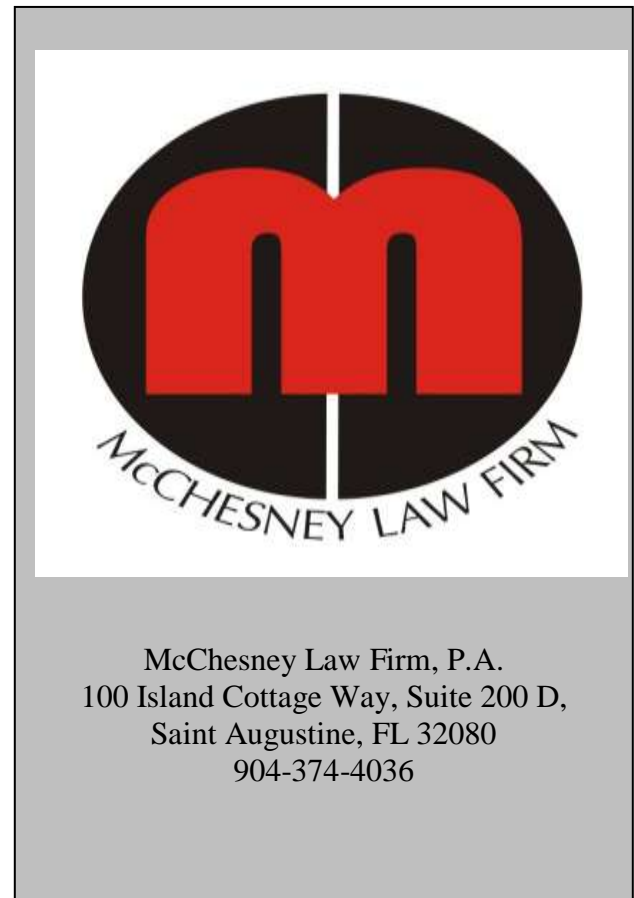


December, 2017

## Top Reasons Everyone Needs a Comprehensive Power of Attorney

The benefits of a highly detailed, comprehensive power of attorney are numerous. Unfortunately, many powers of attorney are more general in nature and can actually cause more problems than they solve, especially for our senior population. This issue of the *ElderCounselor* highlights the benefits of a comprehensive, detailed power of attorney, including some of the provisions that should be included. A proper starting point is to emphasize that the proper use of a power of attorney as an estate planning and elder law document depends on the reliability and honesty of the appointed agent.

The agent under a power of attorney has traditionally been called an "attorney-in-fact" or sometimes just "attorney." However, confusion over these terms has encouraged the terminology to change so more recent state statutes tend to use the label "agent" for the person receiving power by the document.



The "law of agency" governs the agent under a power of attorney. The law of agency is the body of statutes and common law court decisions built up over centuries that dictate how and to what degree an agent is authorized to act on behalf of the "principal"—in other words, the individual who has appointed the agent to represent him or her. Powers of attorney are a species of agency-creating document. In most states, powers of attorney can be and most often are unilateral contracts – that is, signed only by the principal, but accepted by the agent by the act of performance.

Much has been written about financial exploitation of individuals, particularly seniors and other vulnerable people, by people who take advantage of them through undue influence, hidden transactions, identity theft and the like. Prior issues of the *ElderCounselor* have addressed guardianships and conservatorships and discussed the benefits of court supervision of care of vulnerable people in such contexts. Even though exploitation risks exist, there are great benefits to one individual (the principal) privately empowering another person (the agent) to act on the principal's behalf to perform certain financial functions.

A comprehensive power of attorney may include a grant of power for the agent to represent and advocate for the principal in regard to health care decisions. Such health care powers are more commonly addressed in a separate "health care power of attorney," which may be a distinct document or combined with other health topics in an "advance health care directive."

Another important preliminary consideration about powers of attorney is "durability." Powers of attorney are voluntary delegations of authority by the principal to the agent. The principal has not given up his or her own power to do these same functions but has granted legal authority to the agent to perform various tasks on the principal's behalf. All states have adopted a "durability" statute that allows principals to include in their powers of attorney a simple declaration

that no power granted by the principal in this document will become invalid upon the subsequent mental incapacity of the principal. The result is a "durable power of attorney" – a document that continues to be valid until a stated termination date or event occurs, or the principal dies. Absent durability provisions, the power of attorney terminates upon the principal's death or incapacity.

Having covered the explanation of what a durable power of attorney is, let us look at the top benefits of having a comprehensive durable power of attorney.

**1. Provides the ability to choose who will make decisions for you (rather than a court).**

If someone has signed a power of attorney and later becomes incapacitated and unable to make decisions, the agent named can step into the shoes of the incapacitated person and make important financial decisions. Without a power of attorney, a guardianship or conservatorship may need to be established, and can be very expensive.

**2. Avoids the necessity of a guardianship or conservatorship.**

Someone who does not have a comprehensive power of attorney at the time they become incapacitated would have no alternative than to have someone else petition the court to appoint a guardian or conservator. The court will choose who is appointed to manage the financial and/or health affairs of the incapacitated person, and the court will continue to monitor the situation as long as the incapacitated person is alive. While not only a costly process, another detriment is the fact that the incapacitated person has no input on who will be appointed to serve.

**3. Provides family members a good opportunity to discuss wishes and desires.**

There is much thought and consideration that goes into the creation of a comprehensive power of attorney. One of the most important decisions is who will serve as the agent. When a parent or loved one makes the decision to sign a power of attorney, it is a good opportunity for the parent to discuss wishes and expectations with the family and, in particular, the person named as agent in the power of attorney.

#### **4. The more comprehensive the power of attorney, the better.**

As people age, their needs change and their power of attorney should reflect that. Seniors have concerns about long-term care, applying for government benefits to pay for care, as well as choosing the proper care providers. Without allowing, the agent to perform these tasks and more, precious time and money may be wasted.

#### **5. Prevents questions about principal's intent.**

Many of us have read about court battles over a person's intent once that person has become incapacitated. A well-drafted power of attorney, along with other health care directives, can eliminate the need for family members to argue or disagree over a loved one's wishes. Once written down, this document is excellent evidence of their intent and is difficult to dispute.

#### **6. Prevents delays in asset protection planning.**

A comprehensive power of attorney should include all of the powers required to do effective asset protection planning. If the power of attorney does not include a specific power, it can greatly dampen the agent's ability to complete the planning and could result in thousands of dollars lost. While some powers of attorney seem long, it is necessary to include all of the powers necessary to carry out proper planning.

## **7. Protects the agent from claims of financial abuse.**

Comprehensive powers of attorney often allow the agent to make substantial gifts to self or others in order to carry out asset protection planning objectives. Without the power of attorney authorizing this, the agent (often a family member) could be at risk for financial abuse allegations.

## **8. Allows agents to talk to other agencies.**

An agent under a power of attorney is often in the position of trying to reconcile bank charges, make arrangements for health care, engage professionals for services to be provided to the principal, and much more. Without a comprehensive power of attorney giving authority to the agent, many companies will refuse to disclose any information or provide services to the incapacitated person. This can result in a great deal of frustration on the part of the family, as well as lost time and money.

## **9. Allows an agent to perform planning and transactions to make the principal eligible for public benefits.**

One could argue that transferring assets from the principal to others in order to make the principal eligible for public benefits--Medicaid and/or non-service-connected Veterans Administration benefits--is not in the best interests of the principal, but rather in the best interests of the transferees. In fact, one reason that a comprehensive durable power of attorney is essential in elder law is that a Judge may not be willing to authorize a conservator to protect assets for others while enhancing the ward/protected person's eligibility for public benefits. However, that may have been the wish of the incapacitated person and one that would remain unfulfilled if a power of attorney were not in place.

## **10. Provides immediate access to critical assets.**

A well-crafted power of attorney includes provisions that allow the agent to access critical assets, such as the principal's digital assets or safety deposit box, to continue to pay bills, access funds, etc. in a timely manner. Absent these provisions, court approval will be required before anyone can access these assets. Digital assets are also important because older powers of attorney did not address digital assets, yet more and more individuals have digital accounts.

## **11. Provides peace of mind for everyone involved.**

Taking the time to sign a power of attorney lessens the burden on family members who would otherwise have to go to court to get authority for performing basic tasks, like writing a check or arranging for home health services. Knowing this has been taken care of in advance is of great comfort to families and loved ones.

## **Conclusion**

This discussion of the Reasons Why Everyone Needs a Comprehensive Power of Attorney could be expanded by many more. Which benefits are most important depends on the situation of the principal and their loved ones. This is why a comprehensive power of attorney is so essential: Nobody can predict exactly which powers will be needed in the future. The planning goal is to have a power of attorney in place that empowers a succession of trustworthy agents to do whatever needs to be done in the future.

*To comply with the U.S. Treasury regulations, we must inform you that (i) any U.S. federal tax advice contained in this newsletter was not intended or written to be used, and cannot be used, by any person for the purpose of avoiding U.S. federal tax penalties that may be imposed on such person and (ii) each taxpayer should seek advice from their tax advisor based on the taxpayer's particular circumstances.*

