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"WHAT'S IN THE NEW "POWER OF ATTORNEY" LAW FOR ME?"

Effective January 1, 2017, Washington has a completely new law on Powers of Attorney. This article highlights the most important features and benefits of the new law.

What is a "Power of Attorney"?

It is ***"a writing that uses the term 'power of attorney' and grants authority to an agent to act in the place of the principal."***

Normally, a grant of an Agent's authority automatically ends in the event of the Principal's disability, but not if the writing provides otherwise, in words that show *"the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's incapacity."*

Such language makes it what is known as a ***Durable Power of Attorney*** ("DPOA").

What Good is a Durable Power of Attorney?

A DPOA is a powerful tool. It allows the Principal to state a choice of who is or will be the authorized Agent, empowered to make decisions for the Principal. It can be put into effect immediately upon signing, or it may state conditions under which the Agent's authority will become effective.

If the triggering event of the authority is the disability or incapacity of the Principal, then the DPOA's powers are known as "springing" powers, *i.e.*, they "spring" into being upon the occurrence of the disability. A DPOA thus can avoid court proceedings to institute a guardianship. Why is that desirable? Guardianship is a lengthy and expensive process, requiring multiple court filings, reports by court-appointed physician and attorneys, and in-person court hearings. Moreover, once a guardian is appointed, the incapacitated person loses all legal autonomy, including the right to vote, to make a contract, to marry or divorce, to own or sell property, etc.

By contrast, the Agent under a DPOA can exercise the powers granted without the long delays and substantial expense to establish the guardianship.

Why is that useful in estate planning? Because the provisions of a Last Will do not have any meaning or effect so long as the maker is living. But unfortunate things befall people all the time, and either a temporary or a terminal condition of disability can throw one's affairs into serious disarray.

A DPOA that will "spring" into effect, or if already in effect, continue to remain in effect throughout the incapacity of the Principal is an enormously helpful tool for those caring for the Principal. The Agent can make decisions to deal with and address issues of a financial and property nature in the event of the Principal's incapacity. If so stated, an Agent may also be authorized in the same writing or a separate "health care power of attorney" to make medical decisions for the Principal.

What is "Incapacity"?

Incapacity means one's ***inability "to manage property, business, personal, or health care affairs."*** This may be due to either an impaired ability to understand information or communicate decisions. Or it may be due to a person's absence for some reason, and such person cannot be found or is unable to return to the country.

What Effect Does the Lapse of Time Have?

We have long used durable powers of attorney. But even with the right words establishing durability, there have been many times when a DPOA was refused because the provider or institution to which it was offered felt it was "too old" to be relied upon. How old as to old? No one knew. Sometimes it was a matter of months, sometimes years. What recourse was there? Guardianship.

The new law provides significant relief from this problem. It simply provides that lapse of time since the document was signed is no excuse to decline to honor the document.

Must I Sign Before a Notary Public?

Before this new legislation, our law was silent on what signature was valid and sufficient to make an effective power of attorney. This was an anomaly compared to the requirements to make a valid recordable deed that conveys an interest in real property, or to execute a valid Last Will by signing in front of disinterested witnesses who attest in writing to the maker's intent and competence. So it was that a power of attorney could be simply signed "under penalty of perjury" and it was the equivalent of notarized.
No longer. This new law has corrected that omission. Now, to be valid, a power of attorney executed after January 1, 2017, must be signed, dated, and acknowledged by the

Principal either in the presence of a Notary Public or, if no notary is available, in the presence of two witnesses who are not related to the principal, nor employed in a variety of home care or health care settings such as an assisted living facility where the Principal resides.

Now, if your current power of attorney does not meet these requirements, do not worry, as the law expressly provides that a power of attorney validly created under the pre-January 1, 2017, rules remains valid. But to eliminate potential uncertainty, all powers of attorney signed from this point forward must adhere to the new requirements.

Can My Agent's Powers Be Customized?

Back in the day, people could go to a stationery store and buy a legal form called Power of Attorney. Today, forms are readily available from a forms bank on the internet, and otherwise. These standard forms use a broad grant of powers from the principal to the agent. Language such as ***"My Agent shall have all the powers of an owner over property of the Principal"*** is common. In addition, these form documents typically recite some specific additional or illustrative powers intended to be included. But exceptions existed, and frequently caused problems. These fall into three types:

First is the case where the document failed to list the particular matter at hand, and so a recipient could decline that Agent's request. For example, a bank's refusal to admit the Agent to the Principal's safe deposit box because "safe deposit box" was not listed anywhere, or a custodian of the Principal's IRA refuses the Agent's request to withdraw funds in the absence of the custodian's preferred language or even their own form.

Second, there was ambiguity of whether an Agent could make gifts of the Principal's property. Before 1984, the broad grant of authority ("all the powers of an owner") was read as impliedly allowing gifts by the Agent of the Principal's property. Then, amendments to the law meant that after 1984, an agent under a POA had no power to make gifts at all unless that power was specifically granted. "All the powers of an owner" no longer were enough.

Third, having all that authority still could not avoid conflict with others, often other family members who objected to the Agent's exercise of the powers under the POA; oftentimes, when a third party (such as a financial institution or a health care facility) learned of these conflicts, the third party stopped acceding to the Agent's directions until a court sorted it all out, and an order through a guardianship could be obtained.

The new law addresses these kinds of problems by a two-pronged treatment of the grant of general authority to an Agent. On the one hand, such a grant of general authority carries with it extensive powers in some twelve areas of concern, from handling real estate and personal property, to financial, investment, retirement and other monetary matters, to operation of the principal's business, dealing with their veteran's or other benefits and health care programs, personal and family maintenance, and too many more

to list in this brief article. These we might think of as the powers ***implied*** in a grant to an agent of general authority.

On the other hand, the law states certain other powers that are ***not granted unless*** specifically set forth in the language of the POA. That is, these will not be implied by the grant of general authority, but rather these powers must be spelled out. Examples include the power of the Agent to delegate some of the Agent's powers to someone else, and the Agent's ability to keep confidential the accounts kept for the Principal.

What Types of Powers and Authority are Addressed?

The law has specific provisions to spell out what a grant of general authority means in several areas:

- Real and personal property.
- Stocks, bonds, and financial instruments.
- Banks and financial institutions.
- Insurance and annuities.
- Estates, trusts, and other beneficial interests.
- Claims and litigation.
- Personal and family maintenance.
- Government program and civil and military service benefits.
- Retirement benefits and deferred compensation.
- Taxes.
- Operation of a business.

While there are notable features in each of these, the present focus is on the last one.

What Does the Flexibility in the New Law Offer Business Owners?

In the past, a common practice in estate planning has been to make a Will or a Trust, which provide for disposition of assets following the Principal's death, and have a standby plan using one or more Powers of Attorney, to authorize an agent to act on behalf of the Principal if incapacitated. But problems arise when the Principal was also the owner of a small business, one in which the owner was an indispensable part of the management and daily operations of the company. Now, with the new law, new flexibility is available for drafting more precise Powers of Attorney, to guide the Agent in operating the Principal's business.

How? Under the new law, a POA that grants the Agent general authority in regard to operation of the Principal's business, without more, gives the Agent the following implied powers (paraphrased to save space):

●Obtain, operate, or terminate ownership;
● Perform a duty or discharge a liability and exercise a right the principal has;
● Enforce an ownership agreement;
● Handle a dispute or litigation to which the principal is a party;
●Exercise a right or option the principal has regarding stocks, bonds, and financial instruments, including dealing with a dispute or litigation concerning such instruments.

Where the Principal is the sole owner of the business, even greater powers are provided.
● The Agent can deal with contracts, and perform all aspects of operating the business, including its location.
● The Agent can determine or change what its business is, and how it does it.
● The Agent can change the business's name or form of organization.
●The Agent can even sell the business or merge it with another company.

"Whoa! My Agent can change my business? Sell or merge it?"

Relax, these are powers that come with a general grant of authority. But you can choose to have the Power of Attorney provide differently. Therein lies the flexibility available.

We can modify, enlarge, or eliminate any one or more of these powers. This lets us tailor the powers granted in your Power of Attorney to fit your specific situation.

This is true, not just with respect to business, but also all the other subjects and their implied powers. The Power of Attorney can state otherwise.

What is the Call to Action?

There is so much new in this law. For that reason, it seems wise for everyone to have their existing powers of attorney reviewed.

More than ever before, the new law makes more reliable including language that specifically fits your personal preferences, protections, and objectives.

For many, new updated powers of attorney may be the right move. Conforming the document to the new law should eliminate any uncertainty inherent in old documents, such as validity of execution, general or specific grants of authority, or risk of impairment due to lapse of time.

This is an opportunity to engage a flexible planning tool that promises to bring with it greater peace of mind.

If you would like a no-cost review of your existing documents, or to discuss preparation of new ones, please let me hear from you by phone or email.

And thank you for reading.

Very truly yours,

Larry R. Schreiter