**POWER OF ATTORNEY**

**BY: WILLIAM G. MORRIS, ESQ.**

Florida Statutes define power of attorney as a writing that gives an agent authority to act as the principal. That means the agent authorized to act with a power of attorney is treated like a duplicate of the principal with full authority to act as if he or she was the principal. The agent’s acts have the same effect as those of the principal and bind the principal.

A power of attorney can be as narrow or as broad as the principal desires. Sometimes a power of attorney is used for a very limited purpose. One example of a limited power of attorney is that used by car dealers. The dealer gets a purchaser to sign a power of attorney granting the dealer authority to process all documents to acquire title through the Department of Motor Vehicles. At other times, a limited power of attorney can be used to authorize an agent to sign contracts or other documents. A power of attorney may be used to authorize an agent to sign closing documents in connection with a real estate transaction.

A power of attorney takes effect at the time set forth in the power. If no time is referenced, the power starts immediately and ends when specified in the power or if it is revoked by the principal. Although a power of attorney can be revoked at virtually any time, getting notice of revocation to everyone who might rely on the power of attorney can prove difficult. Accordingly, anyone signing a power of attorney should do so with caution.

Florida’s Power of Attorney Act governs powers of attorney in Florida. The Act appears at Sections 709.2102 through 709.2402 Florida Statutes and applies primarily to powers created on and after October 1, 2011. It governs manner of signing, witnesses and notarization for powers created on or after its effective date. Powers created prior to the effective date remain valid, even if they did not comply with the Act.

A power of attorney authorizes an agent to act only as long as the principal could act unless it is made durable by its terms. If the principal is incapacitated or dead the agent has no authority. Since incapacity of the principal is precisely the reason many want to authorize someone else to act through a power of attorney, modern statutes overcome this aspect of authority by providing for creation of a durable power of attorney. Florida Statutes provide that if the power contains the words “this durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in Chapter 709 Florida statutes” or similar language expressing the principal’s intent, the authority can be exercised even if the principal is incapacitated.

When the principal dies, authority to act under a power of attorney ends. This applies even to a durable power and is often a surprise to family members continuing to act on behalf of mom and dad after their death. It can also be a surprise to real estate agents assisting in the sale of property when dealing with someone having a power of attorney.

Powers of Attorney are often used as part of estate planning. They allow someone to select a trusted person for authority to act if they are incapacitated. Florida used to allow creation of a power of attorney that would only become operative when the principal was incapacitated. That is known as a springing power. For those powers to become operative, the principal’s primary physician was required to sign an affidavit confirming the principal’s incapacity. Few physicians were willing to sign the affidavit and that rendered those powers of attorney useless. The legislature abolished the statute. Springing powers created before the statute was abolished are still valid, but likely ineffective because doctors will not sign the affidavit. Anyone that has a springing power should consider replacing it with a new power of attorney.

Florida Statutes generally require a power of attorney be signed by the principal, two witnesses and be acknowledged by the principal before a notary public if created after October 1, 2011. If created prior to that date, the power is valid if it meets statutory requirements at the time it was created. A power of attorney executed in another state is valid in Florida as long as it meets requirements of that other state at the time it was executed, with one big exception. That exception is a power of attorney to convey Florida real estate must include the signature of 2 witnesses and a notary acknowledgment.

A copy of a power of attorney is sufficient for most purposes. Most powers include language that confirm a copy is effective as original. For real estate transactions, the original power is usually required to be recorded along with the deed. And, in a real estate transaction, the agent acting under the power must confirm that the principal is still alive and that the power has not been revoked. If the power is not made durable by its terms, the agent must also confirm that the principal has capacity and would have the ability to act if the principal was present.

A power of attorney can be a very important but often overlooked estate planning document that is especially true for married couples, who own everything jointly and assume that if one of them is incapacitated the other can take care of everything. That is not usually a good assumption. Medical insurance companies may not discuss payment of medical bills of an incapacitated spouse unless the other spouse is agent under a power of attorney. Medical bills are financials and do not fall within authority of health care directives, so the Florida statute which grants a spouse priority in making medical decisions for an incapacitated spouse does not give authority to deal with an insurance company. Similarly, a spouse cannot access retirement funds, talk to a credit card company for a spouses account or even deal with utility company if the account is in the other spouse’s name unless authority has been arranged or spouse has a power of attorney.

A power of attorney is an effective tool when used properly. Powers can be limited in scope and time and as broad as the principal might like. A power of attorney can be used for protection during incapacity, to affect business transactions and for almost any other purpose when the principal will not be acting personally. But, a power of attorney should not be created without proper attention to purpose and scope.

***William G. Morris is the principal of William G. Morris, P.A. William G. Morris and his firm have represented clients in Collier County for over 30 years. His practice includes litigation and divorce, business law, estate planning, associations and real estate. The information in this column is general in nature and not intended as legal advice.***