

## Does Your Power of Attorney Do What You Need it to Do?

February 3, 2020 | Arthur P. Bergeron | Articles

Oftentimes at my elder law seminars I ask guests if they have a Durable Power of Attorney. Most people raise their hands. A Power of Attorney is needed to authorize someone to handle all your financial and legal affairs if you are not able to do so yourself.

If there's no Power of Attorney, only a Court-appointed conservator can do those things. Next, I ask how many people have recently read their Power of Attorney. Fewer hands go up. You should make a point of reading it, *and updating it every few years*, as situations may change over time.

Here are the factors you should check:

- **Be sure your Power of Attorney is “Durable.”** This means it will remain effective even if you become incompetent. A standard Power of Attorney is not “durable” and will no longer be valid if you become incompetent. The Power of Attorney must state that it remains valid even if you become incompetent.
- **Name an alternate.** Many seniors have a Power of Attorney that they signed when they were younger and that names their spouse only. As you get older, you want to make sure there is a successor named in case your spouse is also sick or has passed away. Instead of naming only one of your children, you may want to name two or three of them “jointly and severally.” That way, any one of them can handle things for you at any time. (But check with your financial institution as some of them refuse to honor this format even though it is allowed under the

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law.)

- **Include the power to make gifts.** Many of my clients initially come see me because their spouse needs nursing home care or otherwise needs to qualify for MassHealth, and they are concerned about protecting their assets or how they will afford the nursing home. Having a Power of Attorney that specifically authorizes gifts to the person named as the agent (the healthy spouse) will allow the healthy spouse the ability to transfer the assets from the “sick” spouse’s name into his/her own name. This issue also comes up if a dying person has told his/her Attorney to make gifts to people before he/she dies so that those people can avoid probate or reduce estate taxes.
- **Exclude a cap on gifts.** The federal gift tax exclusion amount is currently \$15,000 per person per year. I will often see Powers of Attorney that limit gifting to this exclusion amount. Typically, this exclusion amount is irrelevant to my clients, since people may give as much as they want to their children (or anyone) as long as lifetime gifting does not exceed a federally established amount of \$11.4M. Therefore, including a cap on gifts can make it impossible for someone who is trying to qualify for MassHealth or trying to distribute their assets before they die.

So, do yourself a favor and read your Durable Power of Attorney. If you’re not sure it’s correct, talk with your lawyer about it. If drafted correctly, this inexpensive legal document can save you and your family a lot of money, time, and aggravation. If you need more information on this, you may contact me at (508) 860-1470 or [abergeron@mirickoconnell.com](mailto:abergeron@mirickoconnell.com). You may also view my 10-minute Q&A Fireside Chats and Frank and Mary TV Shows on Frank and Mary’s YouTube Channel, [www.youtube.com/elderlawfrankandmary](http://www.youtube.com/elderlawfrankandmary).