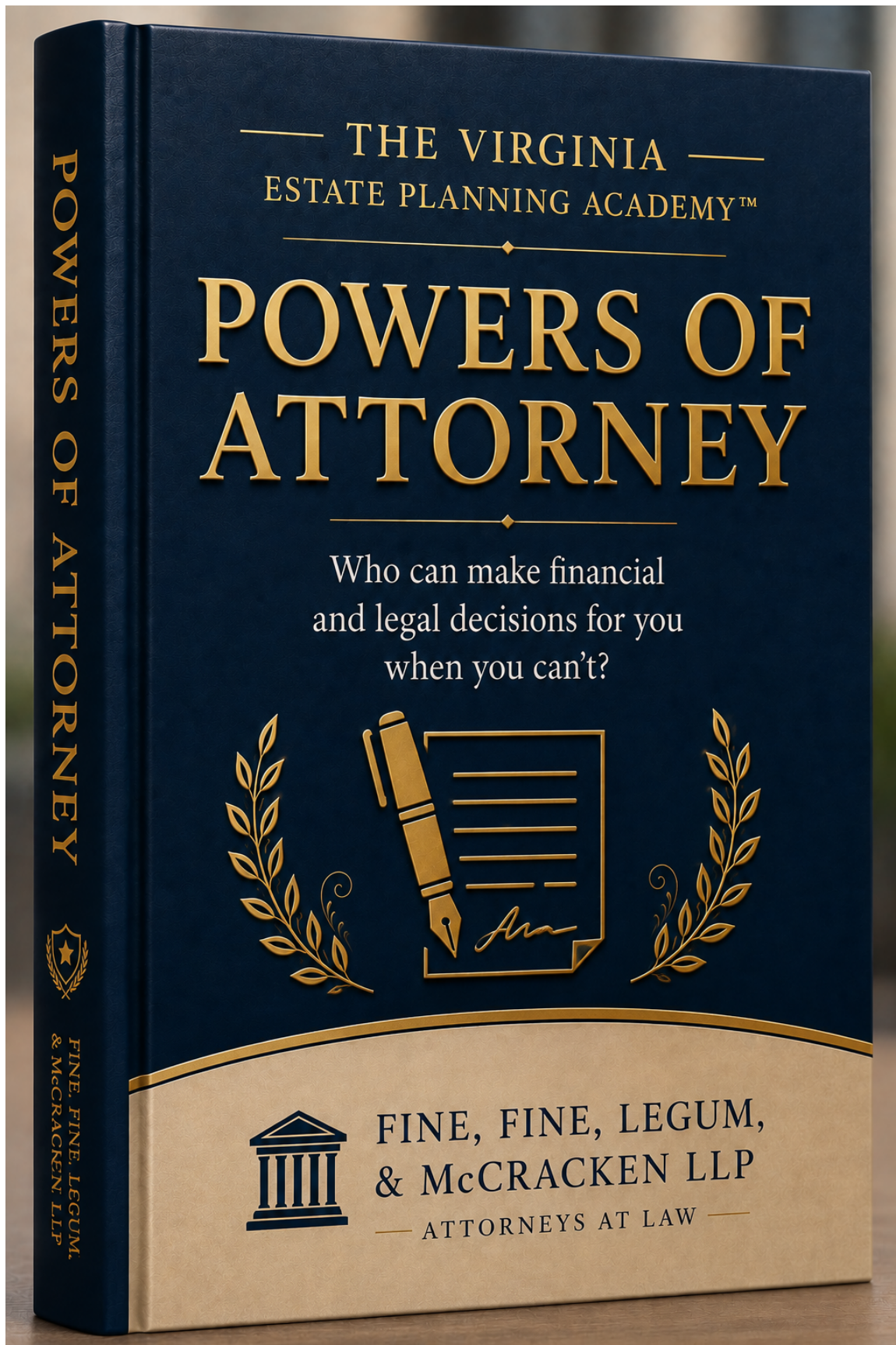




Virginia Estate Planning Academy™

Understanding Powers of Attorney in Virginia

Preparing for the Unexpected and Protecting Your Financial Affairs

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Serving Individuals and Families Throughout Virginia

Welcome

Estate planning is not only about what happens to your property after your lifetime. An equally important question is what happens **during your lifetime if you become unable to manage your own affairs.**

Who could access your accounts to pay your bills?

Who could handle financial matters on your behalf?

Who could communicate with financial institutions, manage property, or complete important transactions when you cannot?

A **power of attorney** is an important estate-planning document designed to address these questions.

Through a power of attorney, you can authorize someone you trust to act on your behalf in specified financial and legal matters. Thoughtful planning allows you to make that decision for yourself rather than leaving your family to confront an unexpected situation without clear authority.

This guide explains the fundamentals of powers of attorney in Virginia, the authority these documents can provide, and some of the important decisions to consider when incorporating a power of attorney into your estate plan.

1. What Is a Power of Attorney?

A power of attorney is a legal document through which one person authorizes another person to act on his or her behalf.

The individual granting the authority is known as the **principal**.

The individual authorized to act is generally known as the **agent** or **attorney-in-fact**.

Despite the term “attorney-in-fact,” the person you appoint does not necessarily have to be an attorney.

The authority granted to an agent depends upon the language of the power of attorney. A properly prepared document can establish what the agent is permitted to do, when the authority becomes effective, and other conditions governing the agent's actions.

Because an agent may be entrusted with significant authority over your financial affairs, choosing the right person and defining that person's authority carefully is extremely important.

2. What Does “Durable” Power of Attorney Mean?

One of the most important concepts in incapacity planning is **durability**.

A durable power of attorney is designed so that the agent's authority can continue even if the principal later becomes incapacitated.

That distinction matters.

One of the primary reasons people create powers of attorney is to ensure that someone has legal authority to manage important matters if illness, injury, cognitive decline, or another circumstance prevents them from acting independently.

Without appropriate advance planning, incapacity can leave family members trying to determine who has authority to act and potentially requiring additional legal proceedings before someone can manage the incapacitated person's affairs.

A durable power of attorney helps establish that authority **before a crisis occurs**.

3. When Does a Power of Attorney Become Effective?

The timing of an agent's authority is an important planning decision.

Depending upon how the document is structured, a power of attorney may become effective **immediately upon execution** or may contain provisions affecting when particular authority can be exercised.

This is something to discuss carefully with your attorney.

An immediately effective power of attorney does not necessarily mean that the agent must begin managing your affairs immediately. It means that the legal authority exists when it is needed, subject to the document's terms and applicable law.

The appropriate structure depends upon your circumstances, the person you are appointing, and how you want the authority to operate.

4. What Can an Agent Be Authorized to Do?

A power of attorney can address a broad range of financial and legal matters.

Depending upon the document, an agent may be authorized to handle matters involving:

- Bank and financial accounts.
- Bills and household expenses.
- Real estate.
- Personal property.
- Investments and securities.
- Business interests.
- Insurance matters.
- Retirement accounts.
- Government benefits.
- Tax matters.
- Claims and litigation.
- Contracts and other financial transactions.

The authority should be tailored to the principal's circumstances and planning objectives.

Not every person needs precisely the same powers, which is one reason a carefully drafted power of attorney can be significantly different from a generic form.

5. Some Powers Require Special Consideration

A power of attorney can potentially place substantial authority in another person's hands.

Certain powers deserve particularly careful consideration because they may significantly affect the principal's property or estate plan.

Depending upon the circumstances, these may involve authority concerning matters such as:

- Making gifts.
- Changing certain beneficiary arrangements.
- Creating or modifying certain trust interests.
- Handling business ownership interests.
- Exercising rights associated with retirement plans.
- Managing jointly owned property.
- Engaging in transactions that may affect long-term estate-planning objectives.

The important principle is simple:

The authority granted should reflect what you want your agent to be able to do.

A power of attorney should not be treated as a document in which “more authority” is automatically better.

6. Choosing Your Agent

The person you select as your agent may eventually have access to sensitive financial information and significant authority over your property.

Trustworthiness should therefore be the starting point.

When choosing an agent, consider whether the person is:

Trustworthy

Will this person respect your wishes and act in your interests?

Responsible

Can the person manage financial responsibilities, paperwork, deadlines, and records?

Available

Will the person realistically be able to act when needed?

Capable of Making Decisions

Can the person remain organized and make thoughtful decisions during difficult circumstances?

Willing to Serve

Has the person been told about the appointment, and are they comfortable accepting the responsibility?

The person who is closest to you emotionally is not necessarily the person best suited to manage complex financial matters.

7. Should You Name a Successor Agent?

It is often wise to consider what happens if your first-choice agent cannot serve.

Your chosen agent might:

- Become ill.
- Die before you.
- Move away.
- Become unavailable.
- Decline to serve.
- Develop circumstances that make serving impractical.

Naming an appropriate **successor agent** can provide another layer of continuity.

Rather than leaving your estate plan dependent upon one person's continued availability, you can establish who should act if your first choice cannot.

8. What Responsibilities Does an Agent Have?

Being named as an agent is not simply permission to use another person's property however the agent chooses.

An agent occupies a position of significant responsibility.

The agent generally must act within the authority granted by the document and in accordance with applicable legal duties.

Good financial management may also require careful recordkeeping.

An agent should be prepared to maintain appropriate documentation concerning transactions undertaken on behalf of the principal, particularly when managing substantial assets or acting over an extended period.

Selecting an agent should therefore involve consideration not only of whom you trust, but also of who can handle the responsibility appropriately.

9. Power of Attorney vs. Advance Medical Directive

These documents are related to incapacity planning, but they serve different purposes.

A **financial power of attorney** generally addresses financial, property, business, and other authorized legal matters.

An **advance medical directive** addresses healthcare decisions and can identify the person authorized to make medical decisions when appropriate.

For example, the person authorized to manage your bank account and pay household expenses is not automatically the same person who should make healthcare decisions for you.

Some individuals choose the same trusted person for both roles. Others intentionally choose different people based upon their abilities and relationships.

A comprehensive incapacity plan should consider **both financial authority and healthcare decision-making**.

10. Power of Attorney and Living Trusts

A living trust and a power of attorney can also work together.

If assets are held in a living trust, the **trustee** manages those trust assets according to the trust agreement.

An agent acting under a power of attorney may be responsible for financial and legal matters involving property or responsibilities **outside the trust**, depending upon the authority granted.

This is why one document does not necessarily replace the other.

A coordinated estate plan identifies the appropriate decision-maker for different categories of property and responsibility.

11. What Happens Without a Power of Attorney?

Many people assume that a spouse, adult child, or other close family member will automatically be able to handle their financial affairs if they become incapacitated.

That assumption can create serious difficulties.

Financial institutions and other organizations generally require appropriate legal authority before allowing another person to act on someone's behalf.

If incapacity occurs without adequate planning, family members may have to explore court proceedings or other legal remedies to obtain authority to manage the incapacitated person's affairs.

Those proceedings can involve additional time, expense, oversight, and stress at a point when the family may already be dealing with a difficult situation.

A properly prepared power of attorney can help reduce that uncertainty by establishing your chosen decision-maker in advance.

12. When Should a Power of Attorney Be Reviewed?

A power of attorney should not necessarily be signed once and forgotten forever.

Consider reviewing your document after significant changes involving:

- Marriage or divorce.
- Death or incapacity of your agent.

- Changes in family relationships.
- Relocation to another state.
- Major changes in property or finances.
- Acquisition or sale of a business.
- Significant changes in your estate plan.
- Changes in the law.
- Concerns about whether your current agent remains appropriate.

Even without a major life event, periodic review can help ensure that the document continues to reflect your wishes and circumstances.

13. Common Power of Attorney Mistakes

Waiting Until Incapacity Has Already Occurred

A valid power of attorney generally requires the principal to possess the necessary legal capacity when executing the document. Waiting until a crisis can eliminate planning options.

Choosing an Agent Solely Because of Family Position

Being the oldest child, closest relative, or spouse does not automatically make someone the best financial decision-maker.

Using a Generic Document Without Understanding It

A form may contain authority that is broader or narrower than expected.

Failing to Name a Backup

If the only named agent cannot serve, the plan may not operate as intended.

Forgetting to Review an Older Document

Relationships and financial circumstances change. Your decision-maker should still be someone you know and trust.

Assuming a Power of Attorney Covers Healthcare

Financial authority and healthcare decision-making are separate planning considerations.

14. Your Power of Attorney Planning Checklist

Ask yourself:

- ☐ Who would I trust to manage my financial affairs?
- ☐ Is that person financially responsible and organized?
- ☐ Have I discussed the responsibility with that person?
- ☐ Who should serve if my first-choice agent cannot?
- ☐ What authority should my agent have?
- ☐ Are there powers I specifically do not want my agent to exercise?
- ☐ Does my plan address real estate and significant financial accounts?
- ☐ Do I own a business or other assets requiring specialized authority?
- ☐ Do I have an advance medical directive addressing healthcare decisions?
- ☐ If I have a living trust, are the responsibilities of my trustee and agent properly coordinated?
- ☐ Has my family, financial situation, or relationship with my agent changed since my document was signed?
- ☐ Would the people closest to me know where to locate my estate-planning documents in an emergency?

If these questions expose uncertainty, it may be time to create or review your incapacity plan.

Taking the Next Step

A power of attorney is easy to overlook because, ideally, you may never need someone else to use it.

But if an unexpected illness, injury, or incapacity occurs, the question of **who has authority to act** can suddenly become extremely important.

Thoughtful planning allows you to make that choice while you can do so.

A properly designed power of attorney can identify the person you trust, establish the authority that person may exercise, and coordinate financial decision-making with the other components of your estate plan.

Fine, Fine, Legum & McCracken, LLP can help you evaluate your power of attorney and develop an estate plan designed around your family, your assets, and your wishes.

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Educational Disclaimer

This guide is provided for general educational and informational purposes only. It is not legal advice and does not create an attorney-client relationship. Powers of attorney and incapacity-planning decisions depend upon individual circumstances and applicable law. You should consult a qualified Virginia attorney regarding your specific situation.