

DURABLE POWER OF ATTORNEY SURVIVES DISABILITY

Act No. 25 of January 18, 2012 established a new legal figure called "Durable Power." A Durable Power is an agreement executed pursuant to a public deed designating a trusted person to perform a series of acts with respect to the real and/or personal property of the grantor. This legal figure exists in the United States as "Durable Power of Attorney". The power is valid from the moment the person so designates, and is used, for example, in cases where a person has been diagnosed in an early stage of Alzheimer's or senile dementia or otherwise fears losing capacity in the future. The power seeks to protect the property of the person who may become disabled and prevent extensive and expensive procedures for declaration of legal incapacity and guardianship.

The adoption of this new figure is extremely useful when it becomes difficult to clearly determine when a person fears, or begins to lose, his or her mental capacity in the near future, or in situations where the person is not able to manage his or her assets.

In essence, a Durable Power under Puerto Rico law is an agency agreement granted through a public deed. An agency agreement is a document by which a person is obliged to render a service or do something, on behalf or on commission of another. A Durable Power is peculiar in context to other types of agency agreements in that that the Power conferred by a Durable Power does not end by the inability of the grantor to manage his or her property. In other words, with the new figure of Durable Power, the authorized acts stipulated in the mandate remains valid in the event that the person is *incapacitated* or is *declared legally incapacitated*.

The Durable Power is valid in Puerto Rico if executed by a *public deed* before a *notary* attorney in Puerto Rico. When granting a Durable Power, it must be *expressly* stated in the deed that the power is durable. In addition, it is necessary that the grantor be in a state of *lucidity* or *sound state of mind* at the time of execution.

It is required that the grantor unequivocally describe the real property owned and used as a residence in the deed. The grantor may provide for the inclusion of properties acquired after the granting of the Durable Power. Furthermore, the powers must also include any assets or acts that the grantor so decides may be excluded from the scope of the agent. The Durable Power can be revoked or amended by the grantor as often as he or she deems necessary. The termination of the Durable Power occurs only by: its revocation by the grantor, the resignation of the person to whom the power, death, or bankruptcy or insolvency of the grantor or agent is granted.

The recent case of ASR v. Ex Parte Procurator of Family Relations, 2016 TSPR 239 (2016), demonstrated the problem of having to act when a person becomes incapacitated without having a Durable Power of attorney, and a declaration of incapacity and appointment of guardianship is required. In this case, the mother filed an action for the declaration of incapacity and appointment of a guardian with respect to her daughter before the Court of First Instance on February 11, 2015. It was not until September 28, 2016, one year and seven months later, that the Court declared the daughter legally incapacitated and named her mother as her tutor. A Durable Power expedites and enables the agent to fulfill the wishes of the grantor in the administration of his or her assets. In this case, had there been a prior Durable Power, the mother, as agent, would have been able to administer or alienate the assets of the incapacitated person before her being declared legally incapable.

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