By Lee R. Phillips, JD

The durable power of attorney is becoming more and more important in today's society. I have always considered it the "lesser" of the estate planning documents, but I am becoming convinced otherwise.

You have heard me say that everyone should have a durable power of attorney. You need one, your parents, your kids, everyone. I’ve updated my durable power of attorney in the last year, so if you need a new durable power of attorney, just email or call for one. There’s no charge to you, as a newsletter subscriber.

Don’t Wait!

Don’t wait to do your “estate planning.” Just get a durable power of attorney in place for everyone. It’s just a big boilerplate form. There’s only one decision you have to make. Just put the names in and sign it. Note that you sign in three places in the new forms.

Once in the middle of the document and twice near the end.

A durable power of attorney is now often one of the first things a hospital asks for, and it is absolutely the first document that any type of rest home or long term care facility asks for. You basically can’t admit someone to a long term care facility unless they have a durable power of attorney in place.

This really is something everyone in the family over 18 needs to do. Walk through the rest homes. The patients aren’t just old people. The accident or illness can come at any time. So the durable power of attorney isn’t just for grandma and grandpa.

The durable power of attorney appoints someone to handle everything for you during a period where you are incompetent. I tried to get away without a durable power of attorney

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By Kristy S. Phillips, JD

My daughter-in-law called me last night to see if I would talk my son into refinancing their home. She was so excited that they could qualify for a 2.35% interest rate on a new fifteen year loan. She told me they would only save $1000 each year off their payments, but over the long haul the lower interest rate would save them over $35,000. My son is a very good businessman, so I did some checking before I talked to him. What I found out may be important for you if you are wondering whether to refinance. My message is that now is the time to refinance. Yes, the interest rates are low, but there’s another reason.

Though low rates may seem like the reason to refinance now, the big issue is the so-called “credit risk retention rule.” This rule was supposed to take effect last March under the federal Dodd-Frank Act. It “requires lenders to retain 5% of the credit risk on any new mortgages, unless the mortgage is a qualified residential mortgage or QRM.”

The reality is, no lender can afford to tie up 5% of their

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when I was hospitalized with my cancer. It was a long hospital stay. I went in on January 21 and came out for the first time on July 4. Most of that time I was in isolation and basically intensive care.

I Should Have Had One
I tried to transact business when I was in the hospital. The social worker had me apply for disability. I signed the papers—I signed the wrong papers. The government came after me a year later, because I made a mistake with the paperwork. When the case went to court, I proved that I had had 23 drugs that day including 120 mg of morphine. I had no clue what the papers were. The social worker had just said, “sign here.” I should have had a durable power of attorney. It would have allowed someone else to sign all the papers for me, and it would have prevented a lot of trouble and worry.

The Agent and The Principal
The person appointed in a durable power of attorney is called the “agent.” They’re the person who will make the decisions for the “principal.” The principal is the person who signs the durable power of attorney and appoints the agent to make their decisions for them.

In the past couple of years, I have had a number of students call in a panic because their parent was going into the rest home or hospital, and the facility said the parent had to have a durable power of attorney that appointed an agent. In fact, this month I have been helping a student fight the hospital that had admitted her mother. Not only did the hospital insist on a durable power of attorney for mom, but they required it to be activated because mom was a little senile.

To make matters worse, they kept pointing to the language in Article 8 of the durable power of attorney included in your LegaLees Accumulation and Preservation of Wealth kit, and they said that the only way to “activate” the durable power of attorney was to have two doctors declare mom incompetent.

Some people can’t read. Article 8, which is the “durability provision,” reads as follows:

“My Agent shall take no action under this instrument unless (1) I am deemed to be incapacitated as defined herein, or (2) I have executed a certificate that from and after the date of execution thereof my Agent is fully authorized to act under this instrument.”

Incapacitation is determined by a court or by two doctors. The head dudette at the hospital just kept saying that the only way to activate the durable power of attorney was to have the doctors declare her incompetent. Mom wasn’t totally incompetent. Yes, the hospital was needlessly chasing its tail in a circle. For several days, the head nurse insisted that the only way to activate the durable power of attorney was to have the doctors declare mom incompetent. She wouldn’t recognize that mom could sign a “certificate” authorizing the agent to act.

Finally, I asked the student to demand the name of the attorney that represented the hospital. I assume at that point somebody came to their senses, because I stopped getting calls from the student. The medical and long term care systems are becoming increasingly harder to work with.

Be Prepared, Life Is Going to Get Harder
If you like our medical system now, wait until ObamaCare kicks in in a couple of years and the government is handling everything. The medical aspect of it is just one of the pieces. It is the largest tax hike in history. No you haven’t seen it yet. Everything starts to take effect after the next election in 2013.

The politicians had to start the mess after the next election or everyone of them would be voted out. If they are elected for one more term, before the public figures out what happened, by the time the next election in 2016 comes, the public will have forgotten who created the mess, so the politicians will probably keep their jobs. However, I think the public will be really upset when they learn what really happened.

As patients lose their rights, the durable power of attorney will become even more important for families. It will be a tool that may help the families interface with the system.
Two Powers of Attorney

There are two types of powers of attorney. There is the durable power of attorney you have in the LegaLees set, and there is a “general power of attorney.” You can create either power of attorney at any time and have your agent act on your behalf.

I remember when I was about four years old my uncle bought a new pink Thunderbird convertible. He was then drafted in the Korean War. His going to war made a big impression on me, but I also remember that he gave Grandpa a power of attorney to sell the car. Maybe that was a fore-shadowing of my future legal career, otherwise that is an odd thing for a four year old to pay attention to.

Once the car was sold the power of attorney “disappeared.”

Powers of attorneys have been around forever, but the durable power of attorney is only about 30 years old. The powers of attorney like Grandpa had authorizing him to sell the car was a general power of attorney. If my uncle had become incompetent for any reason before the car was sold, the power of attorney would have instantly become invalid.

In the 1980’s, the states finally started to recognize that the critical time for a power of attorney to be effective was when the principal was in fact incompetent and couldn’t act for themselves. Each state has now passed laws which allow durable powers of attorney to “survive” or “endure” the incompetency of the principal. In fact, in Canada they call them “enduring powers of attorney.”

Who’s the Agent?

Who do you name as your agent? That’s the only decision you have to make when you put a durable power of attorney in place. The agent is often the same person you use as your successor trustee, but it doesn’t have to be.

I did a trust recently for a client where the successor trustee was chosen because he had a great business mind. When I asked the client if he wanted the same person to be his agent in the durable power of attorney, the client answered, “Hell no. That guy would pull the plug on me in a heart beat.”

You want someone to act as your agent who will “treat you well” when you can’t act for yourself. They don’t necessarily have to be the best business mind. They should be compassionate toward you. They will see to your physical needs, not just your fiscal needs. The agent will have power to do everything for you, so choose wisely.

Name a list of possible agents. If your first choice can’t act for some reason, then the next choice will step in.

More Than One Document

The updated durable power of attorney has the power of attorney with the durability provision, plus it also includes a directive to the medical profession. This is basically a living will. It is quite extensive. The hospital will give you a living will. In fact, they will force you to sign one before they admit you. Go ahead and sign theirs. If there is an issue, then your family can whip out the extensive one you signed and argue with the hospital.

There is also a Health Insurance Portability and Accountability Act of 1996 (HIPAA) statement in the documents you have. This allows someone to interface with the doctors when the doctors are required to respect your privacy and “not talk to anyone.” The laws don’t let the hospitals or doctors give out any information unless the person receiving the information is “authorized” by the patient to get the information.

All of these documents need to be in place now, because the accident or illness may strike suddenly, and you and your family can be caught without any legal protection. Use the forms I have for you. When you have to rely on them, you’ll find out they are very good documents. ■
capital. So as a result, NAR Research estimates the pricing difference for a non-QRM could be as high as 225 basis points. Should interest rates rise later this year, think of how hard home sales could be hit if on top of these higher rates borrowers have to pay 225 basis points more. And the fact is, with a minimum 20% down required for loans to qualify for the 5% exemption, the vast majority of borrowers will have to go for the more expensive financing — assuming they can even afford that financing.

The good news is that Congress has heard the concerns of NAR and others and asked banking regulators, who proposed the rule, to push back its deadline for accepting public comments on its rule. Dozens of members of the Senate and almost 150 members of the House wrote to the banking regulators asking them to delay the comment deadline, and this resulted in a year’s extension. The delay makes it clear that regulators heard Congress’ concerns about moving too quickly on such a potentially destabilizing rule.

Originally six federal agencies proposed a joint definition of the qualified residential mortgages or "QRMs." Under this new definition the new loans were expected to be less costly for borrowers because the loans won't be subject to the risk retention requirement. However, as proposed, the QRM definition would require homeowners to have at least 25% equity for a rate-and-term refinance or at least 30% equity for a cash-out refinance, and it would require them to meet other credit-related guidelines as well. While it would be great to have less costly loans, the sad truth is that fewer than half of the homeowners in the country have that much equity. What this will probably mean is that fewer people will be able to buy or refinance homes.

“The result,” says Kathleen Day, a spokeswoman for the Center for Responsible Lending, an advocacy organization in Washington, D.C., “would be less opportunity for homeowners to refinance. They may be stuck in a high-cost mortgage, even though they're not,” she says.

Of course I understand that with market conditions as they currently are, the government can’t afford to stifle home buyers, so the law will probably be delayed again. This is the hope, however, we don’t know what will happen. After reading the research, the message I am giving to you and my son is that if you need to refinance, you should act now before the credit risk retention rule becomes effective. ■