

TRUST TOPICS

Power of Attorney

An Important Estate Planning Document

Most estate planning documents deal with the disposition of assets after death. However, one of the more important issues deals with the handling of an individual's affairs if the individual becomes incapacitated. A properly drafted power of attorney addresses this issue, providing a mechanism for resolving lifetime planning issues at a critical time. This Trust Topics outlines the advantages and disadvantages of signing a power of attorney, and includes suggested provisions to consider in the preparation of a well-drafted document.

A power of attorney is a document in which an individual (the principal) designates another individual as an agent (attorney-in-fact) to perform certain transactions on the principal's behalf. This is a very powerful document and in most instances becomes effective upon signing. Since the attorney-in-fact is able to perform the transactions enumerated in the document, including financial transactions, great care should be taken when choosing an agent. The most important traits are trustworthiness, integrity and availability. In many instances, a spouse, child or other close family member is designated as the attorney-in-fact.

DURABLE POWER OF ATTORNEY

Historically under common law, a power of attorney was terminated upon the principal's death or incapacity. In 1954, the Commonwealth of Virginia enacted legislation allowing the designation to continue in force if the document specifically states that it will survive the principal's incapacity. Thus, the term "durable power of attorney" came into use. All 50 states and the District of Columbia now recognize the validity of a durable power of attorney.

The following types of powers of attorney are typically durable:

General power of attorney. The principal authorizes the attorney-in-fact to handle all business, financial and personal transactions on the principal's behalf.

Special or limited power of attorney. The principal limits the attorney-in-fact's authority to perform a specific transaction, for example, to fund a revocable trust or to sell a parcel of real property.

Springing power of attorney. The attorney-in-fact's designation becomes effective upon the occurrence of a future event, such as the principal's becoming disabled or incapacitated. The standard for determining the principal's incapacity and the mechanism to carry out this determination should be clearly defined in the document.

Advantages of Having a Power of Attorney

- It is a valuable estate planning tool in situations where the extent, nature and value of an individual's assets do not merit the expense associated with the creation of a revocable trust.
- The document remains effective despite the principal's incapacity or disability, without the need for court intervention or court supervision.
- It is inexpensive and allows an individual to cope with the risks of future incapacity without potential delays expenses (including legal, filing and bond and accounting fees) of a court proceeding for the appointment of a guardian or conservator.
- A properly drafted power of attorney provides certainty about who will handle the principal's financial affairs if the principal becomes disabled. In addition, the principal is not required to transfer property to the attorney-in-fact.
- The principal may be able to designate a guardian or conservator through a power of attorney. However, this is a matter of local law, and counsel should be consulted in the appropriate jurisdiction.

Disadvantages of Having a Power of Attorney

- A power of attorney should not be used as a substitute for a revocable trust. Rather, a power of attorney should be used in conjunction with a properly drafted agreement creating a revocable trust.

- Generally speaking, no monitoring mechanism of the attorney-in-fact's actions, such as court supervision, exists with a power of attorney. Although it can be a very important estate planning tool, a power of attorney may also be a source of abuse. Some situations may warrant the use of a court-supervised guardianship or conservatorship instead.
- Some banks, brokers and other third parties may be reluctant to deal with an attorney-in-fact under a valid power of attorney. Many institutions require that their own forms be used and may refuse to honor any others.
- Unlike a trust, a durable power of attorney does not survive the principal's death.
- The validity of the document and the scope of an attorney-in-fact's authority may be subject to suspicion after the passage of time.
- Laws are still evolving in this area, and some uncertainty remains regarding the type of powers that can be granted to the attorney-in-fact.

In our opinion, however, the benefits of a well-drafted power of attorney far outweigh any drawbacks.

DELEGATING POWERS

A good starting point to determine what types of powers should be included in a durable general power of attorney is the statutory short form power of attorney,

which typically lists the following types of powers normally granted to the attorney-in-fact:

- Real property transactions
- Stock and bond transactions
- Business operating transactions
- Banking and other financial institution transactions
- Retirement plan transactions

(Note that the above-listed powers are defined and set forth in state statutes and not in the power of attorney form.)

The Uniform Statutory Form Power of Attorney Act provides guidelines for creating a short form power of attorney. In 1988, The National Conference of Commissioners on Uniform State Laws approved the Uniform Act, and this Act has been adopted in the following jurisdictions: Arkansas, California, Colorado, District of Columbia, Montana, New Mexico, Oklahoma, Rhode Island, Texas and Wisconsin. Other states that have enacted their own statutory short form durable powers of attorney include Alaska, Connecticut, Georgia, Illinois, Minnesota, New Mexico, New York, and North Carolina.

Generally speaking, the following powers are non-delegable:

- Matters relating to marriage and divorce
- Executing, amending or revoking a will
- Voting in public elections
- Performing services under a personal services contract

Suggested Additional Powers and Provisions

Laws regarding powers of attorney vary from state to state and continue to evolve. Check with local counsel to make certain that the following suggested powers and provisions are allowed in a particular jurisdiction:

Gift giving. Power to make annual exclusion gifts, up to \$12,000 per year per donee, to identified donees, including the attorney-in-fact, and the power to make gifts to custodians, trustees and guardians on behalf of the intended donee.

Advancements. Power to make gifts in an amount up to the \$12,000 annual gift tax exclusion when such gifts are made to beneficiaries of general bequests under the principal's will or trust agreement, and to treat those gifts as advancements in partial or full satisfaction of the disposition due the beneficiary under the will or trust agreement.

Medical expenses and tuition expenses. Authority to pay medical expenses and tuition expenses for family members and other specific donees (without any gift tax consequences). Depending on the principal's financial circumstances, the principal may wish to limit these payments to \$20,000 or \$25,000 per year per donee.

Safe deposit box. Authority to gain access to safe deposit boxes in the principal's name, with authority to add or remove contents and to renew a lease or surrender the box.

Agents. Authority to employ brokers, realtors, accountants, attorneys, custodians, investment advisors and other agents to render services to the principal and to pay such agents for those services.

Create, modify or revoke a trust. Authority to create a revocable trust for the principal's benefit if none exists, and the power to modify or revoke an existing trust created by the principal, including adding all or any part of the property owned by the principal to any trust created by the principal for the principal's benefit.

Qualified disclaimers. Power to make qualified disclaimers of all or any part of a property interest, without court approval.

Nomination of conservator or guardian. Power to nominate a guardian or conservator of the principal's person, estate or both, including the attorney-in-fact.

Business interests. Power to continue the operation of any business in which the principal had an interest when the power of attorney was signed or a business in which the principal later acquired an interest.

All other matters. Power to act on behalf of the principal regarding all other matters not specifically enumerated in the power of attorney form and which the principal can execute through an attorney-in-fact.

Successor attorney-in-fact. The principal should consider including a provision in the power of attorney form designating a successor attorney-in-fact to act if the nominated attorney-in-fact dies, resigns, becomes incapacitated or declines to accept the appointment.

Compensation. If the attorney-in-fact is to be compensated, the document should indicate how the compensation will be determined; if the attorney-in-fact is not to be compensated, the document should indicate that as well. In all cases, reimbursement would be expected for reasonable expenses incurred in connection with the services rendered as attorney-in-fact.

Revocation upon divorce. In some jurisdictions, unless the power of attorney or a court decree provides otherwise, the appointment of a principal's spouse as attorney-in-fact is revoked upon the entry of a decree of dissolution or legal separation or declaration of invalidity of the marriage.

Failure to act. Determines whether or not the attorney-in-fact will be liable for failure to act under a power of attorney, including obligations to be imposed on the attorney-in-fact to act under the power of attorney.

Accountability. If the principal dies, the attorney-in-fact would logically be accountable to the personal representative of the principal's estate. Accountability issues come up not only if the principal dies but also if the principal becomes incapacitated. In North Carolina, for example, in order for the power of attorney to remain valid if the principal becomes incapacitated, the attorney-in-fact is required to register the power of attorney in the office of the register of deeds of the appropriate county.

Portability. Acceptance of a power of attorney outside the state in which the document was executed may be difficult to attain. Third parties, including banks, brokerage firms and title companies of outside states, may or may not accept the document. It is generally recommended that if a principal owns real property in a state other than his or her domicile, the principal should execute a new power of attorney governed by the laws of the situs of the real property.

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