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Crafting a Better Power of Attorney

Creating effective powers of attorney that carry out an elder's wishes while simultaneously protecting the elder from potential abuse requires care and diligence. This review of some of the more critical issues, along with examples of how to address them, can help elder law attorneys to better serve their clients.

By Penny L. Davis

Powers of attorney are widely used by older clients who want to arrange for a family member or friend to take over if they become unable to manage their own finances. Clients understand the advantages of naming a substitute decision-maker. Attorneys know from experience that a power of attorney may make a guardianship or conservatorship proceeding, with its attendant cost, delay, and stress, unnecessary. A power of attorney is simple

to execute and relatively inexpensive. Preprinted forms are readily available from office supply stores and as part of legal self-help books and software. But the very features that make powers of attorney attractive can lead to serious problems. Elder law practitioners can draft custom documents that help to preserve their clients' quality of life while offering protections against financial abuse.¹

Understanding the Concept

At the most basic level, a power of attorney is an agreement between the principal and the agent, authorizing the agent to do certain acts. It creates a fiduciary relationship and requires the consent of both parties. The agreement and consent may be established by custom or an exchange of letters in a business setting. In an elder law practice, a power of attorney is a document signed by the principal that provides evidence of the agent's authority. The agreement can include consideration to be paid to the agent, but consideration is not a necessary element.

The principal can delegate almost any act that he or she could perform personally. Public policy does prohibit an agent from doing certain acts on behalf of another, including making a will or casting a ballot.² The scope of the delegation may also be limited by another agreement to which the principal is a party. It is common for a revocable living trust to state that the power to amend the trust is personal and may not be exercised by a guardian, conservator, or agent acting under a power of attorney.

The extent of the agent's authority is determined by the terms of the agreement between the principal and the agent. The agent has the powers listed in the instrument, plus those necessarily

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inferred. For example, the authority to execute the relevant contracts and sale documents is inferred from the power to sell assets. The provisions are interpreted to carry out the principal's intent, as expressed in the document.³ According to the law of agency, the agent must have the principal's specific consent in order to take particular actions, including those that would otherwise be a breach of the agent's fiduciary duty. The broad language found in many powers of attorney, granting the agent the authority to do everything that the principal could do himself or herself, is somewhat misleading.

Capacity and Durability

Every elder law attorney confronts issues about capacity. It is not unusual for a relative of an ill older person to ask a lawyer to prepare a power of attorney for the elder to sign, naming the relative as the agent. The situation raises several questions, including whether the elder is able to understand the document. Since a power of attorney requires agreement, the principal must have the capacity to consent to the relationship. The legal standards for capacity vary according to the complexity and impact of the action being contemplated.

Capacity to contract appears to be a more appropriate standard to apply to a power of attorney than the lower standard of capacity acceptable for making a will. A person who does not have the legal capacity to contract because the court has appointed a conservator or a guardian may still be able to make a will.⁴ A principal who has the capacity to take action in person can delegate that authority to an agent. Although a power of attorney is not necessarily a contract (because consideration may not be present), many of the acts an agent is typically called upon to do are contractual in nature.

Under the common law of agency, the agent's authority ends when the principal no longer has the ability to perform the act. A durable power of attorney preserves the agent's authority to act if the principal loses capacity after the document is signed. Since the primary reason most clients sign powers of attorney is to provide for financial management if they become ill or incapacitated, it is important for the practitioner to address the issue of durability. Many states, including Oregon, have enacted laws to change the common-law result, enabling an agent under a written power of attor-

ney to act notwithstanding the later legal disability of the principal.⁵ In other jurisdictions, it may be necessary to state that the power of attorney is durable and that the principal intends for the agent's authority to continue should the principal become incapacitated.

Effective Date

Unless state law or the terms of the instrument provide otherwise, the power of attorney will be effective when it is signed. An elder law client may not want the agent to act under the power of attorney unless and until the client becomes unable to manage his or her finances. That goal suggests using language that would allow the powers to "spring" into existence upon the principal's incapacitation. Some jurisdictions endorse the use of springing powers of attorney and may provide sample language; others do not address the concept. Elder law practitioners often utilize a standard for determining incapacity in revocable living trusts in which the grantor serves as the initial trustee. That language could be adapted for powers of attorney. But financial institutions, title companies, and other third parties may be slow to accept the authority of an agent acting under a power of attorney. Drafting a springing power of attorney complete with a process for determining the principal's incapacity could render the document unusable.

The difficulties with making a power of attorney effective immediately go beyond the client's reluctance to give authority before it is needed. Revoking or changing the power of attorney becomes more problematic. The principal and the agent may both attempt to deal with the same assets or undertake the same tasks. The risk of confusion by banks and other entities increases.

One approach for resolving this dilemma is to make the power of attorney effective upon signing, but for the lawyer to hold onto the document pursuant to a letter of instruction signed by the client. The letter can direct the practitioner to hold the document for safekeeping and to release it only upon the written request of the client or upon the lawyer's determination that the client is incapable of handling his or her finances. A practitioner who accepts the responsibility for holding the power of attorney should consider what protections he or she wants, such as an agreement in the letter of instruction that the lawyer, the law firm, and its employees will not be liable for good faith acts or

omission in determining capacity and deciding whether to release the power of attorney.

There are a number of methods for determining financial incapacity that could be specified in the letter of instruction. They include consulting with the client's attending physician; consulting with a member of the client's family or with the agent; and having a formal evaluation done. If the method chosen may require the lawyer to obtain information from the client's physician, other health care provider, or medical records, the letter of instruction signed by the client should include a release for that purpose, together with the client's date of birth and Social Security number. The following is one example of language for a release.⁶

I authorize my physicians and other health care providers to release information concerning my physical and mental condition and capacity to ATTORNEY NAME or LAW FIRM upon presentation of a copy of this letter. This release includes, but is not limited to, medical records, diagnostic tests, letters, notes, and opinions.

Alternatively, the lawyer can suggest that the client place the original power of attorney in the client's safe deposit box and add the agent as an authorized signer on the box. The client should make sure that the agent knows how to get the power of attorney if the client becomes ill. The client could put a copy of the key with a letter instructing the agent about the location of the safe deposit box (or the name of the attorney to contact) in a prearranged location. The transition from principal to agent will go more smoothly if the client also keeps a current list of assets with the instructions or original power of attorney.

Encouraging Acceptance

Third parties may be unwilling to recognize the authority of the agent. They may have had bad experiences with forgeries, documents signed as a result of undue influence, or powers of attorney that have been revoked. If the power of attorney is not accepted, setting up a conservatorship or guardianship of the estate is likely to be faster and less expensive than suing the third party in an effort to establish the agent's legal authority. However, the practitioner can include features in the instrument to increase the reliability of the power of attorney.

Formalities, including acknowledgment before a notary public, are basic methods for encouraging acceptance. Practitioners are familiar with the concept that a power of attorney authorizing an agent to sell or transfer real property must be executed with the same degree of formality required for a recordable deed. Notarization provides any third party with confirmation that the principal signed (or acknowledged) the document before a notary public and provided the notary with acceptable proof of the principal's identity. If the document is notarized, the agent can record the power of attorney before it is used. The principal or the agent can then obtain certified copies of the document from the recording office, if necessary. And third parties can reasonably expect that a recorded power of attorney remains in effect unless a subsequent revision or revocation has been recorded in the same location.

The principal should expect the bank or other entity to verify the agent's identity and signature. This process will be simpler and the result more dependable if the practitioner includes a sample signature of the agent and any alternate agent as part of the document. Obtaining sample signatures has the added benefit of assuring that the agent or agents chosen by the principal are aware of the power of attorney and have consented to act.

Third parties may be less inclined to accept an older power of attorney, claiming that it is "stale." The lawyer can suggest that the principal sign a new copy of the document every year or two, to keep it fresh. If the principal has a personal relationship with bankers, brokers, and others to whom the power of attorney would be presented, the attorney can also advise the principal to tell them about the document in advance, before it is used.

Some banks prefer to have their customers sign a limited power of attorney form provided by the bank in the presence of a bank officer. The client should check with his or her financial institution about its policies.⁷ The Internal Revenue Service (IRS) has its own limited power of attorney form as well (Form 2848, Power of Attorney and Declaration of Representative). Some title companies have refused to honor powers of attorney that do not contain the legal description of the real property being sold or transferred. If the principal wants the agent to have the authority to deal with real property, the elder law attorney should consid-

er including the property's legal description in the applicable provision or attaching a copy of a lengthy legal description as an exhibit and incorporating it by reference.

The fact that the power of attorney was prepared by a lawyer may make a third party more willing to accept it. The elder law attorney can add his or her name and the firm's name, address, and phone number to the beginning or end of the document or to the cover sheet. Including this identifying information also gives the client and the agent ready access to the practitioner's name and number if there are questions or future legal needs.

Going Beyond the General

The agent's authority to bind the principal and to make the principal personally liable for the agent's actions is central to the concept of a power of attorney. Because of the potential impact of that authority, an agent under a general power of attorney does not have certain "extraordinary" powers.⁸ If the principal intends the agent to have any of these powers, including the power to borrow money, to lend money, to make gifts, to lease property, to make or endorse checks (and other negotiable instruments), to appoint subagents, and to compensate the agent, they should be specified in the document. Phrases commonly found in a general power of attorney, such as the power "to execute and deliver any written instrument," "to perform any other act necessary or desirable," or "to take any action I might take if personally present," are not interpreted literally and are insufficient to confer extraordinary powers on an agent.

There are other excellent reasons for indicating which of these powers the agent will wield. Addressing a subject, such as gifts, and delineating the extent of the agent's authority in that area lessens the chance for future misunderstandings.⁹ For example, if the intent of the principal is for the agent to continue making gifts to family members and to minimize estate taxes, the gifting provision might read as follows:

GIFTS. Make gifts of not more than the amount of the federal estate tax annual gift exclusion (\$10,000 in 1998) per year to each of my children and grandchildren for birthdays, holidays, education, and extraordinary expenses or for estate tax planning or income tax planning purposes. However, within these limits, my agent has the sole and absolute discretion as to

whether to make any gifts, the amounts of any gifts and the recipients of any gifts.

However, if the principal has a more modest estate and may need Medicaid assistance in the future to pay for long-term care, the above provision would be inappropriate. Gifts made using a power of attorney within the three years preceding an application for Medicaid benefits have the potential to cause the principal (and the principal's spouse) to be ineligible for assistance.¹⁰ The period of ineligibility is based on the value of whatever was given away. The Medicaid statute and regulations do not penalize certain gifts and transfers, including transfers to the applicant's spouse. If the principal's goal is to protect his or her spouse from impoverishment, the following sample provision is one way to express the client's wishes.

TRANSFERS TO SPOUSE. Transfer my interests in individually and jointly held property to or for the sole benefit of my spouse, SPOUSE'S NAME. This power includes the authority to transfer my interest in our residence, located at ADDRESS, and more specifically described as LEGAL DESCRIPTION. I intend to protect my spouse from impoverishment if I need long-term care.

Elder law clients who are concerned about future long-term care needs may want to give authority and instructions concerning long-term care insurance, government benefits, and in-home services. The attorney can draft provisions to reflect the client's intent regarding these areas, such as the following examples:

INSURANCE AND ANNUITY CONTRACTS. Purchase, maintain, modify, renew, convert, exchange, borrow against, surrender, cancel, collect or select payment options, and give receipts or releases under any insurance or annuity contract. If I have long-term care insurance, I instruct my agent to keep my long-term care coverage in force as long as it is financially practical to do so.

GOVERNMENT BENEFITS. Perform any act necessary or desirable in order for me or my spouse to qualify for and receive all types of government benefits, including Medicare, Medicaid, Social Security, veterans', and workers' compensation benefits. I nominate my agent to serve as my representative payee for government benefits.

ASSISTANCE IN HOME. Pay for care and services (including adult day services) that I may need in order to remain in my own home in the event that I require long-term care. This power includes the authority to pay my agent, family members, and friends who provide or arrange for in-home care and services for me at the current fair market rates for the services or the care management they provide.

The agent is entitled to reimbursement for out-of-pocket expenses, such as postage and long-distance phone charges, incurred while acting under the power of attorney. Of course, the agent should have documentation for those expenses. The issue of whether the agent will be compensated for his or her work can be complex. An agent who initially refuses payment may change his or her mind if the responsibilities become time-consuming. Including a payment standard protects the principal from exorbitant hourly charges and the agent from challenges to the rate of compensation.

PAYMENT TO AGENT. Pay my agent for the reasonable value of financial services provided by my agent while acting under this power of attorney. The reasonable value is the current fair market rate for book-keeping services.

Addressing Personal Issues

A power of attorney does not have to be limited to financial matters. The authority to make a variety of personal decisions may be delegated to an agent. Depending on state law, the lawyer can adapt the document to give the agent access to medical information, the power to make living and care arrangements in accordance with the client's wishes, or even nominate the agent to serve as guardian or conservator for the client.

NOMINATION OF GUARDIAN AND CONSERVATOR. To the extent permitted by state law, I nominate my agent to act as my guardian and conservator if I become incapacitated. If my agent is unable or unwilling to act as my guardian and conservator, I nominate **SECOND CHOICE** to act as my guardian and conservator.

Most jurisdictions have enacted statutes concerning health care decisions and surrogate decision-makers. These range from recognizing "living

will" forms to conferring decision-making authority on a prioritized list of family members to adopting a particular format for naming a health care agent. As part of the planning process, the practitioner should review any documents previously signed by the client to determine whether they have been executed correctly and whether they reflect the client's current wishes. The client may want to sign a separate health care document or, if permitted by state law, incorporate health care decision-making authority in the power of attorney.

Protections from Financial Abuse

Since powers of attorney are private agreements, there is no routine oversight by a court, government agency, or financial institution. Every elder law attorney knows of situations in which an agent under a power of attorney has misused his or her authority over the principal's assets. The best protection is to counsel the client to choose an agent who is trustworthy, who has experience managing the types of assets owned by the client, and who is not likely to be under family or financial pressures. The practitioner can also add some protections to the document.

If the principal does not want the agent to have certain types of authority, the power of attorney can reflect that decision. For example, the agent might be given the power to sell or transfer real property, with the exception of the principal's residence.¹¹ Or the document might state that the agent does not have the authority to make gifts. Listing every act for which the agent does not have authority would be cumbersome. However, principals, agents, and third parties may not know that a general power of attorney does not include gifting, borrowing, and the other types of extraordinary authority discussed above. They may misinterpret the broad language found in the instrument.

A power of attorney can be revoked by the principal at any time, for any reason, provided that the principal has the capacity to understand what he or she is doing. The practitioner who is drafting a power of attorney should ask the client about prior powers of attorney and review any available copies. Unless the client wants an earlier document to remain in effect for a particular reason, all prior powers of attorney should be revoked. A revocation can be a separate document or a provision within the power of attorney. If the earlier power of

attorney was recorded, the revocation should be recorded in the same manner. The principal should inform any third parties who are aware of the prior power of attorney that he or she has revoked the earlier document and executed a new power of attorney.

REVOCATION OF PRIOR POWERS OF ATTORNEY. By signing this document, I revoke all prior financial powers of attorney. I specifically revoke the power of attorney dated DATE, naming PRIOR AGENT as my agent.

In many jurisdictions, a fiduciary appointed by the court, such as a conservator or a guardian of the estate, must post a surety bond and file an annual accounting. The accounting allows the court staff and those entitled to notice to review the decisions and expenditures made by the fiduciary. Attorneys often add notice and accounting responsibilities to a trust, requiring the trustee to furnish an informal accounting to the beneficiaries every year. The practitioner can develop a similar provision for use in powers of attorney.

NOTICE AND ACCOUNTING. My agent shall notify me and my alternate agent in writing within 30 days after my agent begins to act under this power of attorney. My agent shall prepare an accounting at least once a year. The first accounting shall include an inventory of my assets, together with a statement of all receipts, disbursements, investment transactions, and changes to assets since my agent began to act. After the first accounting, each accounting shall include the same information for the period since the prior accounting. Copies of documents showing the ownership of assets and a copy of my most recent personal tax return shall be attached to the accounting. My agent shall mail a copy of the accounting to me and to my alternate agent. If my alternate agent acts under this power of attorney, my alternate agent shall mail the notice and accounting to me and to ANOTHER PERSON CHOSEN BY THE PRINCIPAL.

The attorney may become aware of problems after an agent begins to act under a power of attorney. The lawyer may get a telephone call from another family member who questions the agent's use of funds or from a care provider who has not been paid. The agent may reveal that he or she plans to do some act that would constitute a breach

of fiduciary duty. If the attorney has advised the agent, or if the agent has a reasonable expectation that the attorney represents the agent, the attorney is ethically barred from revealing the agent's confidences or secrets. While the practitioner can and should advise the agent not to breach a fiduciary duty, and to remedy any breach that has already occurred, the lawyer may not be able to take any other action to protect an incapacitated principal who has been the attorney's client. The following sample paragraph allowing limited disclosure is an attempt to resolve this dilemma.

PROFESSIONAL ADVISORS; WAIVER OF CONFIDENTIALITY. Employ, pay, and discharge attorneys, accountants, and other professional advisors to render services to me or for my benefit. This power shall include the authority to waive confidentiality or privilege for the purpose of facilitating communication among my agent, my attorney, and other advisors. By agreeing to act as my agent, my agent consents to having any attorney or other professional advisor employed to advise my agent on a matter related to this power of attorney disclose any act or omission that may be a breach of fiduciary duty to me, to SPECIFIED PERSONS, and to the court. This waiver of confidentiality includes information my agent may have given to the attorney or advisor.

Conclusion

Powers of attorney will become increasingly important as more clients turn to elder law practitioners for lifetime planning assistance. Planning that includes the possibility of future disabilities must address the potential need for a surrogate decision-maker. The lawyer who can craft a power of attorney that encompasses the principal's individual needs and preferences, offers protections against misuse, and is accepted by third parties will be providing elder law clients with a valuable service.

Endnotes

1. This article is based on general legal principles and the author's experience practicing in Oregon. The author is indebted to the friends and colleagues who have generously shared their experiences and ideas. Powers of attorney are subject to laws that vary by jurisdiction. Attorneys should consult

- applicable state law when implementing any of the drafting suggestions.
2. Public policy does not prevent an agent from signing a will or marking a ballot *at the direction* of a mentally capable principal who is physically unable to complete the task.
 3. The parol evidence rule would prohibit the introduction of extrinsic evidence of the principal's intent in a court proceeding unless the document is ambiguous. *See* Or. Rev. Stat. § 41.740.
 4. The differing standards are recognized in some probate codes. *See* Or. Rev. Stat. § 125.455.
 5. Or. Rev. Stat. § 127.005.
 6. State law may prescribe a particular format for a medical release. In addition, the principal may have to specifically consent to the release of information involving drug or alcohol abuse, mental illness, sexually transmitted diseases, HIV status, or other highly sensitive issues. *See* 42 C.F.R. § 2.31.
 7. It is important for the client to understand the difference between adding an authorized signer to an account and creating a joint account or a beneficiary designation as some bank employees do not appreciate the distinction. The practitioner may want to contact the bank in advance or give the client a letter of instruction to present to the bank to prevent an inadvertent change in the client's estate plan.
 8. The Restatement, Second, Agency § 34 calls these the "dangerous powers."
 9. The IRS appears to be more likely to accept the agent's authority to make gifts on behalf of the principal if that power is specified in the document.
 10. *See* 42 U.S.C. § 1396p(c). A discussion of the Medicaid financial eligibility requirements and asset transfers are beyond the scope of this article.
 11. The obvious disadvantage to this type of limit is that the agent (or someone else) will have to initiate a court proceeding if the residence has to be sold and the principal is not capable of handling the transaction.