

Using a Power of Attorney

A power of attorney (POA) is a written document that authorizes an agent (called an “attorney-in-fact,” even though *any* competent adult can be named, and it need not be an attorney) to perform certain acts on behalf of another person. The POA is especially valuable when the nature and extent of an individual’s assets do not warrant the expense of such devices as a revocable trust.

The POA is an inexpensive, practical, uncomplicated procedure to plan for and protect persons who are or become unable to make personal decisions for themselves or to manage their own assets. Almost any adult can be named to serve on behalf of an individual during his or her disability or in his or her absence.

A POA is usually considered when either the physical or mental health of a person is deteriorating and someone else will be needed to take care of that person and that person’s financial affairs. A heart attack, stroke or accident can leave any of us in need of a legal agent regardless of age or health. As such, virtually everyone should consider a POA.

There are many advantages to a flexible and carefully drawn power of attorney. And although it appears to be a simple document, a POA should rarely be attempted by a lay person since state law requirements and the needs and desires of the client must be interrelated. Some of the advantages of a POA include the following:

- The scope can be as broad or as narrow as circumstances require or as the client chooses.
- The power can be revoked at any time.
- It does not result in a judicial declaration of incompetency (unlike a guardianship) and therefore certain rights (such as the right to contract or the right to vote) are not lost by the disabled person.
- Implementation is quick and inexpensive.
- The transfer or retitling of property to the agent is not required.
- The client’s agent can nominate a guardian of the disabled person’s property through this power, should a formal guardianship later be required.

THE DURABLE POWER OF ATTORNEY

The POA should be “durable,” that is, lasting even if the individual becomes legally or otherwise incompetent.

A durable power of attorney may avoid the necessity of a hearing to adjudicate incompetency and appoint a guardian. The power can be immediate (but kept “in waiting” by asking the attorney who draws the POA to hold it until the appropriate time) or “springing,”

that is, it will spring to life only if and when the client becomes disabled (the problem here though becomes definitional: by what mechanism is it decided that the client is disabled?).

WHO SHOULD BE SELECTED AS ATTORNEY-IN-FACT

State law requirements must be the first consideration when selecting an attorney-in-fact. In addition, the attorney-in-fact should be someone in whom the client has the utmost trust and confidence that he or she has the honesty and capacity to faithfully carry out whatever tasks are necessary and allowable under the power -- and always in the best interests of the person who has named the attorney-in-fact. It must be cautioned that the attorney-in-fact has the power to act in the place of the person who has given the power of attorney. As such, if the attorney-in-fact proves to be dishonest and misappropriates funds or such, the damage may already be done before the person who has granted the power (or someone else) can discover it.

POWERS TO SPECIFY

Powers can be as broad or as narrow as the client desires. The client’s agent (attorney-in-fact) can be given broad authorization to do whatever is necessary or desirable in handling real estate, financial and investment interests, and business and personal needs.

The person who drafts a power for someone who is or may become disabled or for someone who supports a disabled person should consider including the following powers to:

- Authorize admission to a medical, nursing, or residential facility; hospice; halfway house; group residence; or similar facility and authorize medical and surgical procedures.
- Fund a revocable trust, which may eliminate the need to have a guardian appointed and may also eliminate ancillary administration (administration of the disabled’s estate in more than one state).
- Provide care, custody, and control of the physical well-being of any member of the family.
- Establish residency in a nursing home or other facility.
- Make funeral and burial arrangements.
- Make decisions and obtain information affecting health care such as the right to have access to and disclose medical records, employ and/or discharge health care professionals, and give or refuse consent to medical treatment.
- Provide that third parties can rely conclusively on the power.
- Authorize the attorney-in-fact to sue any party who does not honor the power if that refusal results in injury or lost opportunity.

- Deal with the IRS and state authorities in all tax return preparation and litigation matters (the attorney-in-fact must obtain IRS Power of Attorney Form 2848).
- Access safe-deposit boxes.
- Deal with life insurance and retirement plans.

HOW LONG DOES A DURABLE POWER LAST?

A durable power of attorney is presumed to continue until shown to have been terminated, until the maker's death, or until revoked.

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If you would like to learn more about Fletcher Tilton's Elder Law & Special Needs Practice Group, contact Frederick Misilo, Jr., *Practice Group Leader*, at 508.459.8059 or fmisilo@fletchertilton.com

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