

BE PICKY TO MAKE SURE POWER OF ATTORNEY IS HONORED

A May 12, 2008 article in the Dallas Morning News pointed out that the durable power of attorney is a critical component of estate planning. However, your agent attempting to act on your behalf under such a power of attorney could run into roadblocks if you don't take steps to craft it correctly. Many financial services companies and other businesses are skittish about complying with a power of attorney unless they're certain the document is genuine and the person claiming to have that authority isn't acting fraudulently.

The power of attorney isn't to be conferred lightly because it gives a person the authority to handle your financial affairs if you become incapacitated. "It should be someone you trust with every penny you have in the world, because that's what they have access to," said B. Scott Daugherty, assistant general counsel at the Texas Bankers Association.

Contrary to what many may believe, being married doesn't automatically give your spouse authority over your financial affairs.

Someone holding a power of attorney is supposed to be able to take it to the various financial institutions – banks, brokerage houses, mortgage and title companies and the like – to execute transactions for the person they represent. But some are surprised to find that not all financial institutions will honor the document. And that can catch families off guard. The named agent may not know it's a problem until it's too late to fix it because the agent may not try to act using a power of attorney until after the principal has become incapacitated.

Experts say there are several reasons why banks and other businesses may be reluctant to honor a power of attorney:

- The financial institution may not be familiar with the person given power of attorney and may be worried about fraud.
- The institution may be concerned that the power of attorney has been revoked. "If you change it or revoke it, you need to tell us, otherwise we will assume this is good until you tell us," Mr. Daugherty said.
- There's a risk that the person given power of attorney may exceed his or her authority. "If you don't know that customer very well or at all, and you certainly don't know that agent [the person holding power of attorney] very well, what kind of issues are going to pop up in your mind?" said Debbie Cox, a wealth adviser at J.P. Morgan Private Bank in Dallas.

Steps to Take

There are a number of steps you can take to ensure that your durable power of attorney is honored to the greatest extent in the event your agent needs to use it for your care later.

- If you're considering a power of attorney, get to know the people at the companies you do business with and introduce them to your named representative. Give them original copies of the power of attorney for their files.
- Some banks and financial institutions may require you to fill out their own power of attorney form to authorize someone else to transact business on your accounts. Such institutions may establish policies that restrict the effectiveness of private powers of attorney, and current law in Mississippi protects them from liability for not complying with such documents if they have such policies. Therefore, you should ask any financial institutions holding your accounts if they require their own form of power of attorney and sign them at the time you sign your private durable power of attorney.
- To ensure that you get it right, consult a lawyer experienced in drafting such documents to craft your power of attorney. A power of attorney is not a "one size fits all" cookie-cutter document, and it should be customized to fit your personal circumstances.
- Don't let it get stale. You should consider updating your power of attorney every few years to ensure that it still reflects your wishes. "You don't want someone to go into a bank with a power of attorney that's 15 years old," said John Ventura, a lawyer and director of the Texas Consumer Complaint Center at the University of Houston. "That's going to cause all kinds of problems."
- Be very specific as to when you want the power of attorney to take effect and the powers you wish to give the agent. Use precise and comprehensive language to give your representative all the authority he or she needs to act on your behalf, but back that up with broad general authority. If the power of attorney is limited in its description of the power to deal with financial affairs, that makes banks nervous because they're afraid of going beyond the limitations of the power of attorney.
- Do all this while you're still healthy and of sound mind. Anytime there's an incapacity involved, it's very difficult for everybody. It's not the time for the power of attorney to be tested. If there is any question about incapacity at the time you are signing a power of attorney, consider getting your doctor's statement establishing your sound mental faculties at that time.

For help in creating a customized personal power of attorney as part of your estate plan, contact us at 866-ELDERLAW or on the web at www.elderlawms.com.