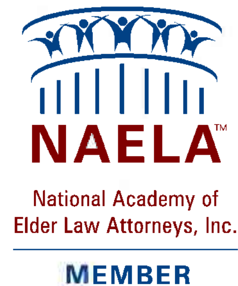
Richard A. Courtney, CELA
Certified Elder Law Attorney
4400 Old Canton Road, Suite 220
Jackson, Mississippi 39211
601-987-3000 or 1-866-ELDERLAW
For more Articles, go to: www.elderlawms.com



Power in a Power of Attorney

We are continually asked by clients whether they need a Power of Attorney. While the general answer is Yes, there is no universal answer to this question, as everyone's financial situation and relationship with others is different. A meaningful response requires that the client understand what a Power of Attorney (commonly referred to as a "POA") is and what it can and cannot do.

In general, we recommend that our clients execute Powers of Attorney, but only after discussion of several considerations, outlined below. The utility of a POA can be best described by the old saying, "Never has so little done so much for so many." We will explore the benefits of a POA later in this article, but we will begin with a basic understanding of what a POA is.

A POA creates an agency relationship between the person who signs the POA, known as the **principal**, and the person who is appointed as POA, known as the **agent**. Only the principal is required to sign the POA. The agent has authority under the POA only for so long as the principal is alive or at any time before the principal revokes the POA.

A POA can allow the agent to perform an unlimited number and range of functions on behalf of the principal. A POA can also limit the functions an agent can perform.

A POA should be **durable** – meaning that the principal intends to allow his agent to (continue to) act on his behalf in the event of the principal's incapacity. A POA is durable if it contains language that expressly states that the POA will remain in effect regardless of the principal's subsequent incapacity. Without such a statement, the POA lapses if the principal later becomes incapacitated – something almost always *not* intended when drafting POA's for estate planning purposes.

Springing Power of Attorney

Once a durable POA is signed by the principal, the agent is allowed to act on the principal's behalf – the agent can perform any of the functions allowed under the POA immediately. However, some people want to execute a POA so that in the event of their incapacity at some point in the future, someone will be able to pay bills, write checks, etc. on their behalf. A Springing Power of Attorney can grant the same authority that an Immediate Power of attorney allows, but does not go into effect until some later triggering event.

For instance, Mrs. Smith may be perfectly capable of managing her own affairs now, but may be concerned that as she ages her abilities may decline. She may want to ensure that someone she trusts will be able to help her out in the future should she need it. With a Springing POA, Mrs.

Smith can name someone as her agent, but her agent will not have authority to act on her behalf (access bank accounts, etc.) until some point in the future when Mrs. Smith is no longer capable of managing her affairs on her own (as determined by a statement from a doctor or her children).

Choosing an Agent

This scenario leads to a discussion on choosing an appropriate agent. Whether a person should grant a POA to another depends entirely on whether the person has **full, total, and complete trust** in another person. If there is no one in whom a person has such trust, then she should not execute a POA – Springing or otherwise.

Using our example above, if Mrs. Smith required her agent to sign an affidavit and attach a certification by a licensed physician attesting to her incapacity, she clearly does not have full, total, and complete trust in her agent. We have found in our practice that roughly 60% of our clients use the Springing POA and the rest opt for a non-Springing POA.

Limitations and Other Express Powers

In financial planning and Medicaid planning contexts, it is best to give a POA that conveys the broadest possible authority, limited only by the principal's concerns. Statutory POA and Springing POA forms convey thirteen separate powers, including "all other matters." Although this sounds fairly inclusive, it is not.

The most harmful limitation may be that a POA form may not expressly give an agent the ability to make gifts of the principal's assets. One's incapacity does not lessen the need to reduce the gross taxable estate for estate tax reduction purposes or to possibly remove assets out of one's name for Medicaid eligibility purposes. Without an express gift-making provision, it will be very difficult to transfer the principal's assets to her beneficiaries even though this is what the principal would have wanted. Even so, gift-making provisions should not be automatically included in all POA's without first considering the need and ramifications of such a power. If gift-making is to be included, then the principal should also address to whom and to what extent gifts may be made. To her spouse only? Unlimited gifts? To children? Must gifts to children be of equal value?

Other powers that we expressly add to our POA forms after discussion with our clients include dealing with the state of residence, the I.R.S. and state tax commission on all tax matters (income and gift, including gift splitting, sales and use tax), accessing safe deposit boxes, changing domicile, creating/funding/requesting distributions from trusts, and changing beneficiary designations on life insurance, annuities and retirement plans. Although some of these powers may arguably be included in a general form, it is wise to explicitly express them in the POA for enforceability purpose.

Acceptability of a Power of Attorney by Third Parties

You may take all the appropriate steps to execute your POA, but your agent may encounter difficulty trying to use the POA at some point in the future. Although the POA you sign is

effective until you revoke it and so long as you are alive, some financial institutions and banks have internal policies whereby employees are instructed to only honor POA's that are dated recently (in some cases, within six months). Some companies may request that the principal sign a statement that the POA has not been revoked – but what if the principal is now incapable of signing such a statement? These internal policies will frustrate your agent's ability to act on your behalf.

We customarily add language to the POA stating that unless the third party (bank, life insurance company, etc.) has actual notice of revocation, they may rely on the agent's authority. We also include hold harmless or indemnification language to assuage the third party's concerns. Whatever the method, your attorney should add whatever language possible to make the POA acceptable to the outside world.

An alternative or additional protection to a POA is creating a living or revocable trust. A living trust typically names the principal (client) as trustee and also names at least one successor trustee. The successor trustee will step in to manage the trust if the original trustee becomes incapable or passes away. If the principal transfers or re-titles his assets into the trust, then if he should become incapable, his successor trustee would be able to manage the assets – including paying bills, writing checks, etc. Financial institutions seem to be more accepting of a successor trustee's authority than the authority of what they deem to be an out-dated POA.

In summary, a POA is a powerful and useful tool for a variety of estate planning needs, both foreseen and unforeseen. Once you sufficiently identify your estate planning or Medicaid planning needs, you should execute a POA as soon as possible to ensure a seamless transition in the management of your finances from you to your agent if you should become incapable of managing your own affairs.

For expert help in crafting your financial and health-care powers of attorney, call us today at 866-ELDERLAW (353-3752).