

# SPECIAL REPORT

## Durable Powers of Attorney – They Are Not Forms

Yesterday I saw one of my clients at the supermarket. I told him that I was working on an article on Durable Powers of Attorney (“DPA”). His response was “I didn’t think there was enough material to write an entire article about DPAs.” Initially, his response surprised me. I had just spent the last year researching and preparing a 118-page outline on DPAs for a continuing legal education seminar. Upon reflection, however, I realized that most attorneys treat DPAs as forms. They have one form that they use for all of their clients. Most attorneys give very little thought to customizing DPAs for their clients and charge nominal fees for DPA preparation. If we attorneys treat DPAs as forms, it is no surprise that our clients, like the one I saw at the supermarket, also consider them simple forms. From my experience and research, nothing could be further from the truth.

DPAs are a relatively recent legal development. Virginia adopted the first DPA statute in 1954. All forty-nine other states and the District of Columbia adopted DPA statutes between 1954 and 1987. Most DPA statutes are relatively short and provide few default rules. Every DPA statute differs from the others in many material respects. There is little case law to provide guidance. The law for some aspects of DPAs is not settled and is still evolving.

For example, does a DPA with unlimited authority to make gifts create a general power of appointment for gift and estate tax purposes? Because of the evolving nature of this area of law, careful drafting by an experienced estate planning or elder law attorney is very important.

Many families are dysfunctional. I am frequently retained to represent an agent who is attempting to utilize a DPA or a family member who is concerned about the agent’s actions under a DPA. Many form DPAs do not anticipate and deal with potential problems and questions. For example, how do you resolve disagreements between multiple agents? Does a subsequent general DPA revoke a prior general DPA? Is the agent entitled to compensation? May the agent act for the principal when the agent is personally interested in the transaction? When must information concerning the agent’s actions be shared with the principal’s family members? Is the agent liable for errors? Is the agent obligated to act? Is it a conflict of interest for the agent to retain the principal’s attorney who drafted the DPA?

As estate planning and elder law attorneys, we should be prepared to draft DPAs that answer these questions and that are customized to meet each client’s needs as well as applicable local law. In addition, we must also be prepared to counsel agents

and interested family members concerning the use of DPAs. Because so many DPAs are poorly drafted and because even well drafted DPAs are difficult for a layperson to understand, counseling agents and interested family members concerning DPAs will be a growth area in our practices.

### WHAT IS A DPA?

DPAs are an alternative to conservatorship for the management of the affairs of an incapacitated person. Since DPAs are less expensive and time consuming than a conservatorship, they are very commonly used. Practically every estate plan that I prepare includes a DPA.

A DPA is a written instrument by which one person, a principal, appoints another person or persons as his agent (sometimes referred as an "attorney in fact"). The instrument confers authority upon the agent to perform certain acts on behalf of the principal. The power of attorney creates an agency relationship. Under the common law, an agency relationship terminates on the principal's death or incapacity. By statute, all fifty states and the District of Columbia permit a principal to create a power of attorney that survives the principal's incapacity. A power of attorney that survives the principal's incapacity is a DPA. To create a DPA in Virginia, the power of attorney must be in writing and contain words that show the principal's intent that it survive his incapacity.

A DPA is either a general DPA or a special DPA. A special DPA limits the authority to one or more specific transactions. It is frequently called a limited DPA. A general DPA grants the agent authority to perform any act that the principal may delegate to an agent. General DPAs are frequently used in estate planning and elder law. However, special DPAs should be considered and discussed with the client as an alternative. For example, I have drafted special DPAs to authorize an agent to make gifts, to care

for the principal's minor children, to care for the principal's pets, to sell or buy real property, to sign tax returns or represent the principal before the IRS, and to fund a revocable living trust. After consultation in each of these cases, the client felt that the grant of limited authority was appropriate.

I frequently use a combination of general and special DPAs. For example, I often advise a client to execute a general DPA and a brokerage firm special DPA or a special DPA for the management of out-of-state assets or assets situated in a foreign country. The use of the brokerage firm special DPA helps insure acceptance of the agent's instructions concerning the investments in the brokerage account. The special DPA for out-of-state assets or assets in a foreign country is drafted to comply with the laws of the foreign state or country. Where the same agent is used for both the special and general DPAs, usually no coordination problems exist. On other occasions, I use a special DPA to appoint an agent for the management of a particular asset or business and a general DPA to appoint another person as agent to generally manage the principal's other affairs. In this case, it is important to limit the authority of the agent under the general DPA over the assets managed by the special DPA.

DPAs are powerful legal instrument. We should not treat them as aspirin.

### WHY ARE DPAS IMPORTANT?

While there is no certainty that a client will suffer a disability, there is a significant statistical likelihood that all of our clients will require assistance with the management of their affairs due to incapacity. Approximately fifty-four million Americans, or twenty-one percent of the total population, have a disability. Twenty-six million Americans have a severe disability. In addition, there is a fifty-eight percent probability that a twenty-five-year-old will become disabled for three months or longer at some time during his or

her life. Forty-year-olds have a forty-five percent probability, and fifty-five-year-olds have a twenty-three percent probability of becoming disabled for three months or longer. Therefore, it is prudent to plan for the possibility that a client will suffer a period of extended disability.

Other clients will require assistance with the management of their affairs because they will be unavailable for a period of time. For example, military personnel may be overseas for an extended period of time. Other clients, although legally competent and available, will wish to delegate authority to an agent to manage their affairs. The DPA provides an effective and economical means to assist all of these clients.

An agent is a fiduciary with respect to the authority granted by the DPA. The duties the agent owes the principal include the following<sup>8</sup>: i) duties based on contract or promissory estoppel, ii) the duty of care and skill, iii) the duty of good conduct, iv) the duty to give information, v) the duty to keep records, vi) the duty to act only as authorized, vii) the duty not to attempt the impractical, viii) the duty to obey instructions, ix) the duty to avoid conflicts of interest, and x) the duty to account for profits arising out of the agency. The principal owes the following duties to the agent: i) the duty to compensate the agent and ii) the duty to reimburse the agent for expenses incurred during the course of the agency.

The drafting attorney should explain these duties to the principal and agent. I provide the principal with a sample letter to the agent explaining the agent's duties. Most agents are not familiar with their duties as an agent. It is very important that they understand these rules to avoid personal liability and litigation. Our firm has seen a significant growth in litigation concerning actions taken by agents under DPAs.

#### **WHAT AUTHORITY MAY BE GRANTED TO AN AGENT?**

A principal may authorize an agent to perform any act "unless public policy or an agreement with

another requires personal performance." The Circuit Court of the City of Winchester, Virginia has stated that "in the few reported cases dealing specifically with durable Powers of Attorney, the Courts have defined nondelegability rather narrowly."

While the scope of what may be delegated to an agent may be broad, there are exceptions. The following acts are or may be nondelegable:

- Marriage or divorce. The general proposition is that matters relating to marriage or divorce are nondelegable due to their inherently personal nature. However, a South Carolina court has allowed an agent to proceed with an action for legal separation and related equitable relief.
- Voting. An agent cannot vote on behalf of the principal in a public election.
- Executing, amending or revoking a will. Generally, it is believed that the authority to execute, amend, or revoke the principal's will is nondelegable. However, Washington's DPA statute provides that an agent under a general durable power of attorney "shall not have the power, unless specifically provided otherwise in the document: To make, amend, alter, or revoke any of the principal's wills." By implication, in Washington a principal may specifically authorize an agent to make, alter, or revoke a will.
- Amending or revoking Revocable Living Trusts. Revocable living trusts are commonly used in some jurisdictions as an alternative or substitute for wills to avoid probate. At the grantor's death, the trust normally provides for a disposition of the trust assets. Under the common law, a principal cannot authorize an agent to make a will for the principal. Can the principal authorize the agent to execute, amend, or fund a revocable living trust that disposes of the principal's assets? The answer is not clear in many states since there is no clear statutory or case law authority. In some states there is statutory authority for the principal to expressly authorize an agent to

execute, amend, or revoke a trust agreement. In other states there is case law authority approving the amendment or revocation of a revocable living trust by an agent under a DPA. In any event, prudence dictates caution in recommending and drafting a DPA that authorizes an agent to execute or amend trusts that dispose of the principal's assets at his death. There are many dysfunctional families; authorizing an agent to draft, amend or revoke the principal's estate plan may be pouring gasoline on a fire. Where this authority is granted, I recommend that the DPA direct who will be the ultimate beneficiaries of the principal's estate.

- Representing the principal in court. Unless the agent is an attorney, the agent may not represent the principal in court.
- Augmented estate elections. In Virginia it is doubtful that an agent may make an augmented estate election against the will of the principal's deceased spouse without prior court approval. There is no statutory authority and the Virginia conservatorship statute requires a conservator to obtain court approval for the election.
- However, other states do permit an agent to make an augmented estate or spousal elective share election.
- Bankruptcy. The United States Bankruptcy Court for the Eastern District of Virginia has held that the "filing of bankruptcy is a personal action which the individual should make." However, two other Federal Bankruptcy Courts have permitted an agent to file for bankruptcy on behalf of a principal.
- Federal Retirement Benefits. The United States Office of Personnel Management, the Social Security Administration, and the Department of Veterans Affairs, do not recognize agents under DPA's. Instead, these agencies appoint a representative payee to receive the beneficiary's funds.

The rules dealing with what acts may be delegated to an agent are still evolving. Therefore careful drafting is very important.

## **DOES THE PRINCIPAL HAVE THE LEGAL CAPACITY TO EXECUTE A DPA?**

The first practical problem that frequently confronts elder law attorneys is whether the principal has the capacity to execute a DPA. In many cases, the principal will have some degree of cognitive impairment. In order to execute a valid DPA, the principal must have the capacity to consent to authorizing an agent to act on behalf of the principal. The principal should understand the nature of the act that he is undertaking and its consequences. In other words, the principal should understand that he is authorizing the agent to act for the principal and that the principal will be legally bound by the agent's acts.

Where a question concerning the principal's capacity exists, you should start with the legal presumption that all adults are presumed to have legal capacity. The attorney should interview the principal during the preparation and execution of the DPA and maintain contemporaneous notes concerning the principal's responses, personal observations, and the persons present. At least a portion of the client meeting should be in private with the client. Disinterested witnesses should be present for the execution and the witness should prepare contemporaneous memos to confirm their observations as to the principal's capacity. Where there is genuine concern about the principal's legal capacity, the attorney should seek the opinion of the principal's treating physician. The opinion of the principal's treating physician is generally accorded great weight.

I have a sliding scale for clients suffering some cognitive impairments. When the entire family is in agreement with the DPA and the DPA is customary without authority to change the principal's estate plan, I require a fairly low level of capacity. However, when there is disagreement among the family or the agent is granted the authority to make gifts, pay himself compensation, or to change designations of beneficiary, I require the principal have a higher level of capacity to

insure he can consent to the delegation of this authority.

A DPA that is unconditional is effective immediately on execution. Many DPA statutes also authorize the creation of DPAs that become effective at i) a specified time, ii) the occurrence of a specified event, or iii) the existence of a specified condition which may occur in the future (a “springing DPA”). Some states do not permit springing DPAs.

The most common triggering event for a springing DPA is the principal’s incapacity. The springing DPA should specify who determines and how the determination is made that the triggering event has occurred. I frequently draft DPAs that are hybrids. The DPA is immediately effective for the primary agent who is the principal’s spouse. However, the authority of the successor agents, typically the children, is conditioned on the spouse being unable or unwilling to serve and the principal being incapacitated.

Springing DPAs have some practical problems. First, many principals suffer a gradual decline in capacity which makes it difficult to determine when the triggering event has occurred. Second, some third parties, such as title companies, are reluctant to accept springing DPAs. To increase the likelihood that third parties will accept a springing DPA, it is important to include in the DPA a provision protecting third parties who act in good faith in the belief that the agent’s powers are in effect. Third, many clients are mobile. They may move to a state that does not recognize springing DPAs. An alternative to a springing DPA is for the principal to lodge an immediately effective DPA with an escrow agent. The escrow agreement provides that the escrow agent may deliver the DPA to the named agent if the triggering event occurs.

An immediately effective DPA is easier for the agent to use since the agent will not have to prove that the triggering event has occurred. However, when asked, many of my clients want springing

DPAs conditioned on their incapacity. In Virginia, most DPAs are drafted as immediately effective. Some attorneys prepare immediately effective DPAs without discussing the options with the client since they are concerned about whether springing DPAs will be readily accepted. However, I have corresponded with several attorneys who advise me that their clients have not had difficulty using springing powers of attorney.

The client should choose whether to use an immediately effective DPA, a springing DPA, a hybrid DPA, or an escrowed DPA. We should educate the client concerning the options and the relative benefits and drawbacks of each option.

#### **WHO SHOULD THE PRINCIPAL DESIGNATE AS THE AGENT(S)?**

The most important decision that the principal will make is the choice of the agent(s). It is imperative that the attorney spend sufficient time assisting the client in the selection of an appropriate person or persons to serve as the agent(s).

Many factors should be considered, including: i) is the person trustworthy, ii) is the person willing to serve, iii) where does the person live, iv) does the person have financial and investment expertise, v) does the person have conflicts of interest with the principal, vi) does the person have time to serve, vii) if the person is the principal’s spouse, is there a risk of divorce, and viii) if one of the principal’s children is chosen, is there a risk of family friction?

In my experience most DPAs are drafted with a single agent and a single alternative agent. In situations where only one of the principal’s children is appointed, I have seen a variety of problems arise, including litigation, jealousy, suspiciousness, self-serving decisions, formal demands for information, exclusion of family members, and family discord. To avoid these problems, I frequently recommend that the client appoint multiple agents. The participation of more than one child in the decision making seems to reduce the number of disputes. It also provides a safeguard against abuse of the DPA

by having multiple parties involved in reviewing records and transactions. When multiple agents are appointed, the DPA should address whether each may act independently or all must act jointly and address how disputes among the agents will be resolved. I frequently draft DPAs that appoint an arbiter to resolve disputes among the agents.

Frequently, the agent will be a family member or close friend of the principal. Unfortunately, many families are dysfunctional and do not work well together. To avoid family disputes, the DPA should address the following issues concerning the agent: i) is the agent entitled to compensation and if so how will it be calculated, ii) does the agent have an obligation to act or does the DPA only create authority to act, iii) is the agent prohibited from participating in acts in which the agent is interested, iv) is the agent obligated to provide interested family members with information concerning the agent's actions under the DPA, v) is the agent obligated to comply with the Prudent Investor Rule, and vi) is the agent responsible for errors in judgment? Most DPAs fail to answer these questions. There are no set answers to these questions that would be appropriate in all cases. The drafting attorney should discuss these questions with the principal and the DPA should expressly address these questions. The failure of many DPAs to address these issues may result in disagreements and litigation.

#### **SHOULD THE AGENT BE AUTHORIZED TO MAKE GIFTS?**

Many DPA statutes provide that an agent under a DPA may not make a gift of the principal's property unless the DPA expressly authorizes gifts. Virginia permits an agent to make gifts i) in accordance with the principal's history of making gifts, ii) as expressly authorized by the DPA, or iii) with the express authorization of the circuit court.

The granting of authority to make gifts to an agent in a DPA can result in unanticipated transfer tax consequences to the principal and/or the agent. The granting of an unlimited power to make gifts in a DPA is not a taxable gift as long as the DPA is

revocable. When the agent exercises the gifting authority, the principal makes a taxable gift. There is considerable uncertainty concerning whether the agent under a DPA with the unlimited authority to make gifts holds a general power of appointment. IRS regulations state that the term power of appointment "includes all powers which are in substance and effect powers of appointment" without regard to what they are called. A power of appointment that is exercisable in favor of the power holder, his estate, his creditors, or the creditors of his estate is a general power of appointment. Property subject to a general power of appointment is included in the estate of a deceased power holder or, if the power is exercised, as a gift by the power holder.

"A power is not considered a general power of appointment if it is not exercisable by the decedent except with the consent or joinder of the creator of the power." Since the principal may generally revoke the DPA, it may be argued that the agent may only make gifts with the principal's consent and therefore fit within the exception. I am personally troubled by the argument that the power to consent is the equivalent of consent or joinder.

Where estate and gift taxation is a concern, prudence dictates limiting the power to make gifts to the agent by an ascertainable standard or prohibiting the agent from making gifts to himself. However, in many elder law cases, gift and estate taxation will not be relevant since the assets of both the principal and the agent are less than the exemption equivalent of the unified credit. For those clients, I have found limitations on the authority to make gifts to be troublesome. For example, these limitations may prevent the funding of the Community Spouse Resource Allowance<sup>39</sup> or a gift of a home to a caretaker child.

The power to make gifts may cause other problems. For example, the agent may exercise the power to distort the principal's estate plan. If the agent is the principal's spouse, how serious is the risk of divorce? If the agent has the unlimited power to make gifts to himself, does the authority

make the agent's assets subject to the claims of the agent's creditors?

The authority to make gifts of the principal's property should only be included in a DPA after consultation with the principal and careful customization of the gifting authority. There are many reasons that make an appropriately customized gifting authority advisable.

First, with the tremendous increase in the stock market, many clients have increased estate tax concerns. These clients frequently use annual exclusion gifts and tuition gifts to reduce their taxable estates. Additionally, it may be necessary to transfer assets between husband and wife to insure that each spouse has sufficient assets to use his or her unified credit. Frequently, it will be necessary for married couples to file gift tax returns to consent to split gifts in order to maximize their use of the annual exclusions.

Second, some clients have long-term care planning concerns. It may be necessary for the principal or the principal's spouse to apply for Medicaid assistance for long-term care. In order to fund the Community Spouse Resource Allowance, assets may have to be gifted from the institutionalized spouse to the community spouse. Other clients may wish to make transfers of their interests in their home to a caretaker child, a disabled child, or a sibling with an equity interest in the home. These transfers are exempt from the Medicaid asset transfer penalties. Other clients may wish to implement a half a loaf gifting strategy or, if there is a round down rule, make monthly gifts in amounts less than the average monthly nursing home cost in the state.

Third, other clients have children or family members whom they assist with gifts or loans. I have a client who provides monthly support to an adult child with a physical disability. Other clients help support their parents. These clients will frequently not want this assistance to end if they become incapacitated.

Well drafted authority to make gifts in a DPA can permit the agent to continue the principal's current

gifting practice or implement gift planning for the principal. Clearly, the gifting authority required for each client varies. The gifting authority should be customized to meet the client's individual needs. If the agent will be a potential recipient of gifts or loans of the principal's assets, the DPA should expressly authorize this action and waive the fiduciary self dealing prohibition rules. The drafting attorney should consider means to limit the agent's potential estate tax exposure as discussed above.

#### **HOW DO YOU DRAFT A DPA TO MINIMIZE THE POTENTIAL OF ITS ABUSE OR MISUSE?**

As an estate planning and elder law attorney I have observed numerous occasions where the DPA has been abused or misused by the agent. There is no one solution. However, in my experience, many of the problems fall into the following situations:

- **Inadequate education of the principal.** Frequently, principals will be advised by attorneys to execute DPAs with little education, discussion, or advice. Some attorneys draft DPAs and provide them to a child to have the parent sign. I believe that the potential for abuse or misuse of the DPA can be reduced if the attorney educates the principal about DPAs and the drafting options available. With this information, the client can make informed and hopefully better decisions concerning who is designated as the agent(s) and the terms of the DPA. I provide my clients with a brochure concerning DPAs and commit a significant amount of time to discussing the DPA with the client.
- **The empowered child.** Unfortunately all siblings do not love or respect each other. Frequently, when one child is named as the agent, he will exclude the others from information or participation in decision making concerning the parent. This frequently leads to litigation or family arguments. Some states authorize interested family members to require that the agent provide information concerning acts taken by the agent if the principal is incapacitated. However, I recommend

advising the principal to consider including a provision in the DPA requiring the agent to keep his siblings informed and to consult with them on a regular basis. This provision could also authorize the children who are not serving as agent to obtain information concerning the actions taken by the agent from third parties (i.e. banks, brokerage firms, insurance companies, etc.). The principal should also consider naming co-agents because the use of co-agents requires cooperation and consultation.

- **Misuse of the DPA by the agent.** I have seen cases where an agent has made gifts of the principal's assets without express authority. I have also seen agents who fail to maintain records. These errors are frequently caused by the agent's ignorance of his duties and responsibilities. The drafting attorney can assist in avoiding this problem by providing the principal with written instructions and advice for the agent. The principal should consider authorizing and recommending that the agent retain the principal's attorney to assist the agent in the use of the DPA. If this authority is granted, the principal's attorney-client privilege should be waived in the DPA to authorize the attorney to provide the agent with confidential information.

#### **HOW DO YOU INCREASE THIRD PARTY ACCEPTANCE OF THE AGENT'S AUTHORITY?**

DPAs have been available in all fifty states for only twelve years. As third parties have become more familiar with DPAs, they have become more willing to accept them.

Drafting techniques exist that will increase the likelihood that third parties will accept the authority of an agent under a DPA. I recommend drafting the DPA in a clear, readable, and organized form. Consider having a separate captioned paragraph for each power granted to the agent. The DPA should expressly authorize those actions that the agent is likely to undertake. Clear language in an organized form will increase the likelihood that third parties will rely on the DPA. If the agent is a close family

member, the principal should consider granting permission for self dealing. For example, I represented an only son who was his mother's agent under a DPA. His mother was a widow and suffering from a mental incapacity. She needed to sell the family farm in order to qualify for Medicaid. The son wished to buy the farm. However, he could not sell it to himself due to the self dealing prohibition for fiduciaries. We had to have a conservator appointed to sell him the farm.

In addition, the DPA should also expressly indemnify and protect third parties who rely on the DPA and authorize the agent to seek damages for unreasonable refusal by third parties to accept the DPA.

Some states have statutory penalties for third parties who unreasonably refuse to accept a DPA. Frankly, to facilitate the use of DPAs, I believe all states should adopt a statutory penalty.

#### **WHAT LAWS APPLY TO THE DPA?**

DPAs are governed by i) state statutes and ii) the common law. All fifty states and the District of Columbia have DPA statutes and there are significant differences between and among those statutes. Where the applicable DPA statute is silent, common law agency rules govern DPAs.

Our clients are mobile. They will frequently own real or personal property in more than one state or move from one state to another. Therefore, we will frequently be confronted with i) using a DPA drafted in one state in another state or ii) drafting a power of attorney for a client with assets situated in another state.

Generally, the validity of the DPA will be determined by reference to the laws of the state in which it is executed. The validity of the agent's acts is determined by the law of the state where the agent is acting. These conflicts of laws rules can cause problems where the DPA is drafted in one state but must be recorded in another state which has different execution requirements. For

example, some states require that a DPA be witnessed while others do not. To alleviate this problem some states, by statute, permit a DPA validly executed in another state to be recorded although it does not comply with local rules. In addition, federal law provides that DPAs for military personnel are exempt from state form, substance, formality, or recording rules and must be given the same effect as if they had been prepared and executed in accordance with applicable state law. The military DPA is required to contain a statement that sets forth the provisions of this law.

When a client owns significant assets located in another state or country, I recommend retaining counsel in that state or country to draft a special DPA for the management of those assets. When the client moves to another state, I recommend having new general DPAs prepared under the laws of the client's new domicile.

#### **HOW DO YOU CHARGE FOR A CUSTOMIZED DPA?**

I have been informed by many attorneys that they charge only a nominal fee for a DPA. This nominal fee represents about thirty minutes at the attorney's hourly billing rate. An attorney drafting a DPA within this time frame can do so only if he uses a "standard" form without discussion of its terms with the client and without customization to meet the client's needs. However, a client can obtain a standard form at a lower cost from computer software, a form book, or an office supply store. I recently purchased a short form DPA at for less than \$10. You can purchase commercial software for less than \$20. If the DPA is merely a "form," the client does not need an attorney to draft it.

In my opinion, the DPA is a powerful, highly flexible legal instrument, not a mere "form." An experienced attorney should draft the DPA and customize it to meet the client's needs. I will not prepare a DPA unless I meet with the principal to determine the principal's needs and to insure that the principal understands and consents to the DPA.

The preparation of a DPA requires at least two meetings with the client. At the first meeting, the attorney will review the client's assets and discuss the client's affairs, needs, and the options available. At the second meeting, the attorney will explain the DPA and supervise its execution. Frequently it will be necessary to perform and document a capacity assessment. This capacity assessment may require communication with the principal's physician and with disinterested persons who are familiar with the principal. Elder law attorneys will frequently meet the client in the client's home, a hospital, assisted living facility, or nursing home. This effort requires more than a nominal fee.

To maximize the time I have to consult with and educate the client about DPAs, I use a drafting system. My drafting system includes: i) a client brochure, ii) a checklist for preparation of the DPA, iii) a letter to the principal's physician requesting a opinion about the principal's capacity, iv) a general DPA with drafting options, v) a special DPA with drafting options, vi) a certificate for successor agent succession, vii) an instrument of revocation of a DPA, viii) an affidavit by the agent that the DPA has not been revoked and the agent's powers are in effect, and ix) a letter of guidance to the agent. Most elder law or estate planning attorneys will draft at least two DPAs per week or 100 DPAs a year; therefore, a drafting system is a wise investment.

I charge a fixed fee for DPAs. This fee is frequently based on two to three hours of my hourly billing rate. If I meet the client out of my office, I will charge a flat fee (about one hour of my time) per visit. If a capacity assessment is necessary, I will charge an additional fixed fee. I draft at least 100 DPAs per year and have not experienced any difficulty with this fee arrangement.

#### **WHAT ARE STATUTORY SHORT FORM DPAS?**

Some states have enacted statutory short form DPAs. These statutory short form DPAs include a

## CONCLUSION

long list of powers. The principal indicates his decision to grant a power by placing his initials beside each power to be granted to the agent or, in some states, by crossing out or otherwise deleting those powers that will not be granted.

These statutory short form DPAs are frequently available for sale to the general public. The clear advantage of the statutory short form DPA is that they are short. They are also easy to prepare since the principal merely signs as provided by the state statute and indicates the powers that the principal wishes to grant the agent. Many attorneys believe that they are more readily accepted by third parties. However, I have had little difficulty with third parties refusing to accept the DPAs that I draft.

There are also disadvantages. For example, statutory short form DPAs do not include many advanced provisions such as requiring the agent to keep interested family members informed or exonerating the agent from liability for good faith errors in judgment. The incorporated powers are detailed in the state code and it is unlikely the principal will ever read them. Therefore, the principal will not necessarily understand the authority he is granting. The statutory DPA will be more difficult to use out of state since third parties will not be familiar with the state statute. Additionally, there is no one set of powers that is appropriate for all principals. For example, the authority to make gifts that is appropriate for estate planning is frequently inadequate for long-term care planning. No will, trust agreement, or DPA is appropriate for all clients.

If permitted by statute, I recommend attaching or inserting special instructions to the statutory short form DPA in order to customize the DPA to meet the client's needs. I understand that this is commonly done in New York where attorneys frequently use their word processors to duplicate the statutory short form power of attorney and then add their own instructions. In this manner the attorney can draft a short form power of attorney that is readily accepted by third parties and insert additional provisions. However, at least one state does not permit any modifications to its statutory short form power of attorney.

DPAs are a relatively recent legal development. The rules and laws concerning DPAs are developing and evolving. DPAs are powerful legal instruments, not simple forms. DPAs should be prepared by an experienced attorney to meet the individual client's needs. The attorney should carefully explain the DPA to the client and discuss available options to meet the client's needs. We can add value and justify our fee by taking the time to educate the client about DPAs and to customize the DPAs. In addition, we must also be prepared to assist the client in educating his agent. With the tremendous growth in the number of DPAs in use, providing legal services to agents under DPAs and to family members concerning the actions taken by agents under DPAs will be a growth area in our practices.

The drafting of a DPA requires the same skill and effort required to draft wills and trust agreements. An agent administering the affairs of an incapacitated principal requires legal advice and counsel to insure compliance with his fiduciary and legal obligations. The drafting and administration of DPAs are an exciting and challenging part of the practice of law.

## ABOUT THIS DOCUMENT

This document is not intended as a substitute for legal advice. It is distributed with the understanding that if you need legal advice, you will seek the services of a competent Elder Law Attorney. While every precaution has been taken to make this document accurate, we assume no responsibility for errors or omissions, or for damages resulting from the use of the information in this Explanation.

Reprint permission is granted only for educational purposes with appropriate citation to Oast & Hook, P.C.

**Oast & Hook, P.C.**  
**[www.oasthook.com](http://www.oasthook.com)**

---

521 Middle Street Mall  
Portsmouth, Virginia 23704  
Tel: 757-399-7506  
Fax: 757-397-1267

295 Bendix Road, Suite 170  
Virginia Beach, Virginia 23452  
Tel: 757-399-7506  
Fax: 757-397-1267