

The Elder Law Durable Power of Attorney

by

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Elder Law focuses on the fact that senior citizens are living longer, frequently while suffering from chronic illnesses that impair their ability to properly manage their affairs. These chronic illnesses include Alzheimer's disease, diabetes, arthritis and Parkinson's disease. Elder Law attorneys specialize in the laws and rules concerning the health, finances, and care of the elderly.

The elderly and their families frequently seek the assistance of an Elder Law attorney in planning for the management of the elderly person's assets, affairs and health care during the period of incapacity. It is common for the elderly person to be accompanied by his or her family to the meeting with the Elder Law attorney. The family is seeking an efficient and effective method of managing the elderly person's affairs.

The traditional legal tools included living trusts and guardianship/conservatorship. The living trust has the benefit of settled law and probate avoidance, however, the trustee's authority is limited to the management and disposition of the trust assets. The guardianship/conservatorship has the benefit of being available when the elderly person is incapacitated, but it is time-consuming, expensive, and a public proceeding. As a result of these limitations and drawbacks, Elder Law attorneys have turned to the durable power of attorney as the preferred tool for the management of an elderly person's affairs.

What Is a Durable Power of Attorney?

A power of attorney is a written instrument by which one person, the principal, appoints another person as his agent.² Under traditional agency law, the agent's authority terminates if the principal becomes disabled or incapacitated; however, since 1987 all 50 states and the District of Columbia have adopted statutes that permit a principal to create an agency relationship that survives the principal's disability or incapacity. Although these statutes vary in many respects, generally they require that the power of attorney expressly state in writing that the agent's authority will not terminate on the principal's disability or incapacity. These powers of attorney are known as durable powers of attorney.

The use of durable powers of attorney has become common among elderly persons. The AARP

¹The American Bar Association accredited the National Elder Law Foundation in 1995 to certify Elder Law Attorneys. In 2002, there are 240 Certified Elder Law Attorneys (CELAs) and the National Academy of Elder Law Attorneys has over 4000 members.

²For a detailed discussion of the laws, rules, and cases concerning durable powers of attorney see Hook, 859 T.M., *Durable Powers of Attorney* published by Tax Management Inc. (2000) and ¶21.02[4] of *Advising the Elderly or Disabled Client* by Frolik and Brown, Warren Gorham & Lamont.

reports that in the year 2000 approximately 45% of those over the age of 50 had executed durable powers of attorney and approximately 70% of those over age 70 had durable powers of attorney. The AARP reports that only 23% of persons over the age of 50 have living trusts and approximately 30% of persons over age 70 have living trusts.³ Clearly the elderly and their advisors have chosen the durable powers of attorney as the preferred method of planning for the management of the affairs of an incapacitated elderly person.

Are All Durable Powers of Attorney Created Equal?

In other words, should you use the same durable power of attorney for the 40 or 50 year old estate planning client as you use for your 75 year old Elder Law client? In our opinion, the answer is a resounding “No.” The typical 40 to 50 year old estate planning client considers his or her disability unlikely and remote. This client will place little value on the document and will pay for only a relatively standard “form.” Therefore, the typical estate planning durable power of attorney will name an agent and a successor agent and contain a standard set of broad financial powers.

The elderly client in the early or intermediate stages of an impairment and this client’s family will readily perceive that they have problems and will place value on an instrument that can efficiently and effectively solve their problems. Frequently, the elderly client will have multiple or dysfunctional family groups competing to manage the client’s affairs or disagreeing about how to manage the client’s affairs. The elderly client has an immediate problem requiring a value-added solution. Therefore, the Elder Law attorney should take the time to draft a customized durable power of attorney that provides for the effective management of the elderly person’s assets, affairs, and healthcare, and that minimizes the potential for disputes among the elderly person’s family.

How Does the Elder Law Durable Power of Attorney Differ from the Traditional Estate Planning Power of Attorney?

The legal literature is full of articles and papers on how to draft powers of attorney, however, these articles typically focus on the traditional estate planning power of attorney. These powers of attorney are drafted for a fully competent estate planning client as a standby disability planning arrangement for what is perceived as a remote possibility. Little attention has been paid to the special requirements and concerns for drafting a durable power of attorney for an elderly client who is suffering from early or intermediate chronic impairments which will likely incapacitate the client in the foreseeable future. We define these durable powers of attorney as the Elder Law durable power of attorney. An example of an Elder Law durable power of attorney can be found in Chapter 13 of our book, *Representing the Elderly or Disabled Client*.⁴ We think that the effective Elder Law durable power of attorney has the characteristics discussed below.

³*Where There Is a Will ... Legal Documents Among the 50+ Population: Findings from an AARP Survey*, AARP Research Group, April 2000.

⁴*Representing the Elderly or Disabled Client*, by Thomas D. Begley Jr and Andrew H. Hook, Warren Gorham & Lamont.

Does the Principal Have the Capacity to Sign a Power of Attorney?

The typical estate planning client is over 18 years of age and is fully competent. The typical Elder Law client is over 70 years old, has some impairments, and is partially or totally dependent upon others for assistance. Frequently, the Elder Law client has multiple family groups or dysfunctional family groups that exert influence over the client. Due to these factors, it is much more likely that third parties will challenge an Elder Law durable power of attorney.

A durable power of attorney is valid only if the principal has the capacity to authorize an agent to act for the principal at the time the instrument is signed. The courts have generally held that the principal must understand the nature of the durable power of attorney and its effect.⁵

When drafting a durable power of attorney for an Elder Law client, the attorney should start with the presumption that the client is competent. The attorney should meet with the client out of the presence of family members or friends. If the attorney is confident that the client understands the nature of the power of attorney and the consequences of signing it, then the attorney should draft the document and proceed with its execution. To document the client's capacity, in addition to a notarial certificate, we recommend that two disinterested persons sign the durable power of attorney as witnesses to the client's signature. We place an attestation clause, similar to that used for wills, above the witnesses' signatures to document the witnesses' opinion concerning the due execution of the durable power of attorney and the client's capacity. The attorney and the witnesses should place notes in the file concerning the client's capacity. Where the attorney has reservations about the client's capacity, the attorney should get the client's consent to obtain the opinion of the client's treating physician concerning the client's capacity⁶ and the opinion of the client's friends and associates. The attorney should obtain these opinions in writing and place the opinions in the client's file.

If the client does not have the capacity to sign a durable power of attorney, then existing arrangements, including prior powers of attorney and joint ownership, must be used to manage the client's affairs. If these arrangements are ineffective, then the attorney should consider a guardianship/conservatorship for the incapacitated person.

Whom Should the Client Appoint as the Client's Agent(s)?

The selection of the agent is the most important decision that the principal will make in drafting the durable power of attorney. As a general rule any person (individual, corporation, partnership or LLC) may be appointed an agent.

⁵See ¶15.02[4][b] of *Advising the Elderly or Disabled Client* by Frolik and Brown, Warren Gorham & Lamont.

⁶ For an example of a request for a medical evaluation and a physician's capacity certificate see ¶15.02 of *Representing the Elderly or Disabled Client* by Begley and Hook, Warren Gorham & Lamont.

The typical estate planning durable power of attorney appoints a single agent and a single successor agent. If the client is married, the client frequently appoints the client's spouse as the initial agent.

The typical Elder Law client is a widow or widower or has a spouse who is unable to assist the client. Due to the effort of caring for an elderly person or the presence of multiple family groups, the Elder Law client is frequently assisted by several children or friends. Additionally, the presence of multiple agents who will scrutinize or who must consent to the other agent's acts can provide an important safeguard against abuse. Therefore, the elderly client will frequently appoint multiple agents.

When the elderly client appoints multiple agents, we recommend that the Elder Law durable power of attorney clearly state whether the multiple agents may act independently or must act jointly. We also recommend that the durable power of attorney contain a mechanism for resolving disputes, such as an arbitration provision.

When Does the Agent's Authority Become Effective?

The agent's authority under a durable power of attorney may become effective immediately upon the client's execution of the instrument or upon the occurrence of an event, such as the client's incapacity. The typical estate planning client executes a durable power of attorney as a standby arrangement to protect against the necessity of a conservatorship if the client becomes disabled. These clients do not want their agents to act for them unless they become incapacitated. Additionally, many estate planning clients appoint their spouses as their agents, however, approximately 40% to 50% of all marriages end in a divorce. Therefore, it is appropriate for many estate planning clients to provide that their agent's authority will become effective only upon the client's incapacity.

The typical Elder Law client requires immediate assistance or will require assistance in the near future. Therefore, the agent's authority under an Elder Law durable power of attorney should be immediately effective.

Should the Agent be Compensated?

Most state durable power of attorney statutes are silent on the issue of whether the agent is entitled to compensation for the services the agent performs on behalf of the principal. Absent an agreement to the contrary, the common law of agency states that an agent is entitled to reasonable compensation unless the relationship of the parties indicates otherwise.

The typical estate planning power of attorney appoints a family member as the agent and is silent on the issue of the agent's compensation. If asked, the estate planning client will usually state that he or she does not expect the family member to charge the client for serving as the agent.

The typical Elder Law client may require nursing home care in the immediate future. Most elderly people eventually require Medicaid assistance for the payment of their nursing home care.

Uncompensated transfers of assets to qualify for Medicaid assistance result in periods of ineligibility. The payment of reasonable compensation for services rendered does not result in periods of ineligibility. For Medicaid eligibility purposes, Health Care Finance Administration (HCFA) Transmittal 64 (November 1994) provides that HCFA presumes that payments to family members for the care that they provide to the principal are uncompensated transfers unless the obligation to make the payments is supported by tangible evidence or a prior agreement to pay for the services.⁷ Therefore, we recommend that the Elder Law durable power of attorney clearly state that the agent is entitled to compensation for services rendered and establish a method to determine the agent's compensation.

What Authority Should the Principal Grant the Agent?

Generally courts strictly construe the authority granted by durable powers of attorney and hold that they grant the agent only that authority which is clearly stated in the document. Some drafters attempt to create a broad grant of authority by stating that the agent may do anything that the principal could have done personally. The majority of courts have discounted or disregarded such all-embracing expressions of authority.

An elderly client generally should grant the agent broad authority to act for the principal. This grant of broad authority is known as a general durable power of attorney. In light of the rule of strict construction, a general durable power of attorney normally consists of a long list of numbered acts that the principal authorizes the agent to perform on the principal's behalf. In addition to the customary financial authority granted in the traditional estate planning power of attorney, what additional authority should the Elder Law power of attorney grant the agent? Since the Elder Law durable power of attorney is an alternative to a guardianship and conservatorship and is intended to provide for the principal's personal care as well as the management of the principal's finances, the drafter should consider including the following authority:

- To change the principal's state of domicile and residency.⁸
- To change the designated beneficiary of the principal's life insurance, annuities, IRAs, 401(k)s, etc.
- To amend or revoke the principal's revocable trust or to add assets to or withdraw assets from the trust.
- To redirect the principal's mail.
- To apply on the principal's behalf for public benefits, such as Supplemental Security Income or Medicaid, and for public entitlements, such as Medicare and Social Security.
- To provide and pay for caregivers to permit the principal to remain at home, even if this care is more expensive than care provided in a facility.
- To make necessary arrangements for the principal's care at any hospital, nursing home, or

⁷¶3258.1 A 1 of the *CMS State Medicaid Manual*.

⁸This authority is important, but often overlooked. Families are frequently separated and live in many different states. This provision authorizes the agent to relocate the principal to another state to be near a child or to another state in which it would be easier to qualify for Medicaid long-term care services.

- assisted living facility and to pay for such care.
- To dispose of the principal's tangible personal property and pets if the principal is unable to remain at home.
- To make healthcare decisions and to obtain and pay for medical or healthcare services for the principal.
- To make advance arrangements for and prepay the principal's funeral and burial.

What Gift Authority Should Be Granted?

The general durable power of attorney statutes of the various states address the issue of gifts with one of two approaches. The first approach requires specific authority for an agent to make gifts. The second approach provides that a grant of broad authority includes the authority to make gifts. The grant of authority to make gifts has several potential presents several potential problems. First, the grant of authority to make gifts to anyone including the agent may be considered a grant of a general power of appointment for estate and gift tax purposes.⁹ Second, a grant of authority to make gifts may give rise to conflicts of interest, self dealing, the risk of abuse or gifts that distort the principal's estate plan.

To address these concerns, the traditional estate planning durable power of attorney typically deals with gifts in one of three ways: (1) it is silent or denies the agent the authority to make gifts, (2) it limits the agent's authority to make gifts to any one person to the amount of the annual gift tax exclusion (currently \$11,000 per year per person), or (3) it requires the agent to make gifts in accordance with the terms of the principal's will.

These limitations will restrict the principal's ability to implement Medicaid asset protection planning. The federal Medicaid rules¹⁰ state that no period of ineligibility is imposed for transfers to:

- a spouse.
- a child under the age of 21, or any child who is blind or disabled (or to a trust for the child's benefit).
- a Special Needs Trust for the sole benefit of a disabled person under the age of 65.

These rules also authorize the transfer of the client's interest in the client's home to a sibling with an equity interest in the home or to a caregiver child.¹¹ These transfers are called exempt transfers for Medicaid eligibility purposes.

⁹For a discussion of the tax implications of gifts by agents under durable powers of attorney see §2.03 of *Tax Planning for Family Wealth Transfers with Forms* by Howard Zaritsky, Warren, Gorham & Lamont .

¹⁰42 U.S.C. § 1396p(c)(2)(B).

¹¹42 U.S.C. § 1396p(c)(2)(A).

It is also possible to transfer, and therefore protect, a portion of the client's assets to third persons while retaining sufficient assets to pay for the client's nursing home care during the resulting period of ineligibility. These transfers are frequently called "half a loaf" gifts.

An Elder Law durable power of attorney should expressly authorize the agent to make gifts necessary to qualify the principal for Medicaid long-term care assistance. As a protection against abuse, the power of attorney could require that: (1) all nonexempt transfers be made in accordance with the principal's estate plan, or (2) the agent consult with an Elder Law attorney experienced in Medicaid planning prior to making the gift.

What Accounting or Disclosure Provisions Should Be Included?

As a fiduciary, the agent owes a duty to the principal to account for the actions that the agent has taken on behalf of the principal. Under the common law of agency, the agent may not disclose to the principal's family the actions taken by the agent unless the power of attorney expressly authorizes the disclosure; however, the durable power of attorney statutes for some states require agents for incapacitated principals to permit inspection by certain persons of the actions taken by the agent.¹²

Most traditional estate planning powers of attorney are silent concerning the agent's authority to disclose information to the principal's family. Therefore, the agent usually has no authority to disclose information to the principal's family unless authorized by a state statute.

When an agent is acting for a incapacitated or impaired elderly person, often there are interested family members who are concerned about the principal's property, care and affairs. If the agent does not keep these family members informed and does not consult with them, misunderstandings or disagreements may arise. Also, an agent's conduct may be "better" if the agent's actions are subject to review or scrutiny. Therefore, to avoid misunderstandings or disputes among the principal's family, the Elder Law power of attorney should expressly state the principal's desires concerning whether the agent should or can make disclosures to and consultations with interested family members or others. In some cases, the principal may not want any disclosures made to or consultations with any or some family members. In other cases, the principal may want to require the agent to consult with family members or make disclosures of the agent's actions either upon demand or upon a regular basis.

Should Certain Fiduciary Duties Be Waived?

A durable power of attorney creates a fiduciary relationship between the principal and the agent. As a fiduciary, the agent owes the principal many duties, including the avoidance of self-dealing and compliance with the prudent investment rules.

¹²For example, see Va. Code §11-9.6.

An elderly principal will frequently appoint a child, spouse or other a close family member as an agent. In many cases self-dealing may be appropriate and natural, for example, to make gifts, sales, and loans of the principal's assets to the agent or members of the agent's family. If the principal does not object to the agent's entering into these transactions in which the agent is benefitted or interested, then the durable power of attorney should include a provision expressly authorizing these transactions. Where the principal does not want the agent to engage in self-dealing, the drafter should expressly prohibit self-dealing to call this to the agent's attention and to avoid inadvertent breaches of the agent's fiduciary duty. This prohibition may be wise where there are multiple or dysfunctional family groups.

As a fiduciary, the agent, may be subject to rules relating to the investment of the principal's assets. Where a power of attorney authorizes the agent to manage the principal's assets, the agent owes the principal the duty to: (1) promptly invest the principal's assets, (2) invest only in assets that a prudent investor would purchase for his or her own account and (3) make changes in the investments when necessary. Some states have imposed upon agents the investment duties contained in the Prudent Investor Act, including the duty to diversify investments and to develop an investment plan.¹³ If the agent fails to fulfill these duties, then the agent may be held liable to the principal or the principal's estate for investment losses in the principal's assets.

Some elderly principals will have concentrated investments and will not want to impose an obligation on their agents to sell assets in order to diversify. For example, the elderly person may be a farmer with the majority of his or her assets consisting of the family farm that has been owned by the principal's family for generations. The farmer may not want the farm sold. Other elderly principals may appoint close family members as their agents. These family members may not be experienced investors. If there are multiple or dysfunctional family groups, then the agent may be sued by other family members if the principal's investments perform poorly. This threat may make designated agents reluctant to serve or may induce them to pay for investment advice to protect them from liability. The elderly person may not want to impose this threat on the agent or impose the obligation to purchase investment advice. If the principal does not want to impose some or all of these investment duties upon the agent, then the drafter should include an express waiver within the durable power of attorney.

Conclusion

A durable power of attorney is not a form. Each durable power of attorney should be customized to meet the needs of the individual client. An elderly person with impairments and his or her family have unique needs and requirements. As a result, the drafter should assist the elderly person in preparing a durable power of attorney that provides an efficient and effective plan for the

¹³For example, see Va. Code Section §26-45.13.

management of not only the elderly person's assets, but also his or her personal affairs and healthcare. It should also assist in the minimization of controversy among the principal's family by providing customized solutions rather than relying on default common law agency rules. We call this unique but powerful document an Elder Law power of attorney.