

Power of Attorney

Designating Someone to Handle Your Financial Matters

By *BRUCE M. FOGEL, Esq.*

As you may have already heard or read, a Durable Power of Attorney (DPA) is a very important and beneficial document to have available, not only as you age, but at other times as well. It is a very powerful tool in the hands of the right appointee.

The usual and best form for a DPA is a broad and unlimited grant of authority by you (the principal) to your appointee (the attorney-in-fact), which authority is effective upon signing. The execution of a DPA fundamentally gives your attorney-in-fact the ability to be you as far as all of your assets and material possessions are concerned. In the absence of a DPA, the only mechanism whereby somebody is authorized to act on your behalf is to go to the Probate Court and petition to have somebody appointed as either your Guardian or Conservator. In each of those instances, the appointee will have the power and authority to handle and manage all of your assets.

Whereas your attorney-in-fact is able to act without any supervision at all, the important and significant difference with a guardian or conservator is that the Probate Court will supervise their performance by virtue of the requirement of filing regular accountings. An accounting is the report to the court that lists assets received, their disposition, all income received, and each expense paid. While this supervision may seem desirable, it does include a degree of expense, formality, and time, which may not always be beneficial.

While the simplicity and

directness, not to mention efficiency, of a DPA is more often than not appropriate, it does open up the opportunity for concerns relative to supervision. Think about it this way: Suppose you were to take all of your assets and convert them into widely circulated 10- and 20-dollar bills and place all of it in a strong box. Then, you hid that strong box in a place that only you and your potential appointee knew about. Finally, you assured your appointee that for one week he would be able to access that strong box without anybody in the world knowing or seeing. In that situation, are you willing to appoint this person as your attorney-in-fact?

If your answer is anything but an immediate and unqualified, "yes" with regard to that appointee, then you should not appoint that person and begin thinking about someone else. In most instances, people are completely comfortable with those they appoint and are able to derive the full measure of benefits available from an effective DPA.

You should also contemplate appointing a successor attorney-in-fact, since, if the document is worth having in the first place, it is worth having it be as durable as possible. Successors should be named who can serve in the event that the first, or even second, named individual is not available, and thereby allow for action on the principal's behalf by somebody duly authorized.

Another consideration to bear in mind when appointing somebody to be attorney-in-fact is geography. Appointing somebody local rather than distant can offer

both logical and logistical benefits.

Oftentimes people say that they cannot choose among the people they are considering, and therefore seek to appoint more than one person as co-appointees. While this is permitted in the context of a DPA, it is frequently discouraged for the reason that "rule by committee" often turns out to be no rule at all. This means that any disagreement between the appointees leads to inaction, or possibly controversy, and bitterness may ensue.

It is also important in the course of thinking about whom you might appoint that you contemplate who might best discharge the responsibilities of being an attorney-in-fact, rather than simply appointing the oldest or the closest geographically. In this way, you will have someone who will exercise rational and thoughtful judgment in the course of acting on your behalf.

The final aspect of this topic involves the issue of whether to utilize a durable power attorney that has a 'springing' power, or one that is effective immediately. A springing power is one where the attorney-in-fact's authority to act comes into effect at such time as you are no longer able to function capably on your own behalf. This is to be distinguished from a DPA that is effective immediately upon signing.

As you contemplate whether your DPA should be effective immediately, consider the following: very often the point in time when you are no longer functioning capably is not a clear line in the sand. Disagreement and anxiety might arise between you and

the attorney-in-fact who believes that it would be beneficial for you to have the help at a time when you might not agree.

Furthermore, if you are willing to appoint this person and trust him or her enough to take on this significant responsibility *after* you are no longer able to function on your own behalf, why then wouldn't you want to take advantage of having them available while you are still competent to the extent that there are circumstances and/or opportunities when it might be beneficial or convenient to have that help?

There are likely to be times when you are traveling, or even if you are just feeling under the weather, when you can not get out to file a document, pay a bill, or renew a CD in a timely fashion. It can be very convenient to have your appointee available to take care of such things for you.

Despite the possible concern relative to the unsupervised authority of your attorney-in-fact, the durable power of attorney is indeed is one of the most desirable and beneficial documents to have within your estate planning arsenal.❖

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