

By Martin M. Shenkman & Jonathan G. Blattmachr

CV Article

Powers of Attorney for Our Aging Client Base

Ancillary steps to enhance the agent's function and prevent abuse

The population is aging, as are our clients.¹ Planning for the infirmities and challenges that often accompany the aging process involves increased attention to the power of attorney (POA). Practitioners too often view a POA as a "throw in" document provided along with a will or revocable trust. In reality, a POA can, and should, be a planning tool that practitioners address in detail. Merely planning and drafting the POA document won't suffice. For clients to achieve the maximum benefit and protection from a POA, practitioners will have to guide clients with ancillary steps to enhance the agent's ability to function and prevent abuse of the POA. This guidance applies regardless of where on the wealth spectrum the client stands.

Swap Power

An extremely beneficial pre-mortem planning step may be for the grantor to acquire, with cash, low basis assets held in a grantor trust, so the assets will have their bases increased on the grantor's death and the trust, which isn't included in the grantor's gross estate, will hold the cash. This strategy can be accomplished free of income tax, pursuant to Revenue Ruling 85-13. But, to accomplish this result, if the grantor becomes incompetent, her agent must be able to draw on a line of credit set up for that purpose and exercise the swap power.

Clients thus need to take some ancillary steps so that their agents can effectively exercise a swap power (that is, a power to substitute assets held in a personal name,

typically cash, for property in the trust). A high-net-worth client may designate an agent as a successor to the grantor to exercise a swap power. But, if the agent doesn't have express authority to exercise a swap power, will third parties (such as the trustee of the trust) involved respect the power? The client can take proactive steps to assure that the third parties who may be involved will respect the agent's authority. For example, the client can obtain lines of credit to facilitate the exercise of the swap power and confirm with the providers that they'll respect the agent's right to access the credit lines involved. Depending on the magnitude of appreciation inside the irrevocable grantor trusts, additional guarantees or other steps might be necessary if the client's remaining personal assets won't support adequate cash lines based on the lender's criteria.

Manage Finances During Incapacity

Assuring control and proper management of the client's finances as she ages is important for a wealthy client, as well as for a client of lesser means. White collar workers live, on average, 2.5 years longer than blue collar workers.² There's significant correlation among wealth, education and longevity. So, wealthier educated clients may live longer, but neither wealth nor education will insulate them from the ravages of aging. Approximately 47 percent of those age 85 and older have Alzheimer's disease.³ Regardless of the client's wealth level, for an agent to efficiently manage the client's financial affairs when the client can't do so, there must be advanced planning. Having meetings with those who'll serve as agents to assure they understand their role; developing a coordinated estate and financial planning team of advisors to provide guidance and continuity; consolidating and simplifying financial assets to one or a few institutions; and taking other practical steps can make it easier for an agent to operate efficiently.

Martin M. Shenkman, far left, is an attorney in Fort Lee, N.J.



Jonathan G. Blattmachr is a director at Pioneer Wealth Partners LLC in New York City

An agent may be charged with maintaining a client's lifestyle through advanced age and disability. Many POAs permit the agent to make charitable gifts consistent with historical gifts. How can an agent ascertain what these directives mean? If the client's financial affairs are maintained on a computerized financial program, such as Quicken, then the agent merely has to generate a number of reports (for example, expenses by category), to determine the client's historical expense patterns. Practitioners can address proper recordkeeping with clients (for example, encourage the client to have her accountant handle the computerization of records if the client isn't comfortable doing so), consolidation and simplification of financial accounts (too many clients have dozens of accounts when a few with one institution will suffice) and take other common sense steps to make it easier for any agent to step in when necessary.

Elder Financial Abuse

There are substantial incidences of elder financial abuse.⁴ Often, the tool the abuser uses is a POA.⁵ The cases are legion and continue to occur,⁶ and the profession has long ago recognized this risk.⁷ In response, a number of states have enacted more stringent rules governing POAs and more formal signing requirements, especially for provisions pertaining to gifts, a so-called "hot" power. Some states are considering penalties for those improperly witnessing POAs. With increasing longevity, fractionalized families and the geographic dispersion of family members, creating checks and balances on the agent acting under a durable POA will grow in importance over time.

An ABA report included the following observation:

POAs, whether general, durable, or springing, usually aren't subject to oversight by a court or third party. If the principal becomes incapacitated and can no longer monitor the agent's actions, this lack of oversight for a broadly written legal document makes it very easy for an agent to abuse the authority granted by the principal.⁸

To provide greater protection for the client, practitioners should consider both incorporating steps within the document and guiding the client to take affirmative

steps apart from the document.

Create Checks and Balances

Practitioners may consider a number of mechanisms to enhance the security of a client creating a durable POA:

- **Joint agents.** While it's not uncommon for practitioners to recommend single agents be appointed to facilitate quicker action in an emergency, the specter of a long-term debilitating illness presents a different concern. Perhaps, for older clients, using joint agents to provide checks and balances may be preferable over using a single agent, even if it impedes quicker action in an emergency.
- **Care manager.** The agent can be required to hire and pay for a care manager to evaluate the client periodically, for example once a year, and to issue a report to

Reporting to a health care agent who's independent of the person named as financial agent can serve as strong checks and balances on the financial agent.

the client's health care agent. This procedure can provide an independent, objective, professional review of the client's status in the client's home (or other living facility) to ascertain if the care the agent is supposedly paying for is, in fact, being provided. Reporting to a health care agent who's independent of the person named as financial agent can serve as strong checks and balances on the financial agent. Generally speaking, as a client ages, care managers should become more common members of the client's estate and financial planning team.

- **Reporting.** The agent could be mandated to arrange for financial institutions to send duplicate monthly statements to an independent CPA who can review the statements, input them into an accounting

program and generate reports. Ideally, the client should arrange for this procedure as she ages or her capacity begins to wane and well before an agent may step in.

- **Monitor.** A more formal review structure can be incorporated into the POA by having the client appoint an individual, other than a named agent, to serve as a monitor. The monitor could be given the authority to request documents and reports from the agent, such as: a copy of the POA; affidavit as to power continuing in force; court or other legal documents relating to the power; gift tax returns; copies of all checks or other disbursement documentation; receipts or deposits made by the agent; general books

The use of a funded revocable trust, naming an institutional co-trustee or successor trustee, can provide a viable solution for single elderly clients.

and records reflecting the agent's activities; and contracts or agreements executed by the agent. The POA can provide consequences to the agent's failure to respond; for example, it can mandate that such failure constitutes grounds for a court to dismiss the agent.

Gift Provisions: A New Perspective
The use of gift provisions in POAs has frequently been discussed in professional literature. In light of the new tax paradigm of high exemptions and income tax rates that can exceed estate tax rates for many clients, as well as the benefit of the income tax-free automatic change in basis at death for most assets then owned, consider:

- Most POAs should expressly exclude gifts. Many standard forms include gift language. However, the vast majority of clients won't have to pay estate tax and won't benefit from making gifts. Also, gift provisions open the door to financial abuse. A gift provi-

sion may be appropriate if the client has family or loved ones who need financial assistance. In those situations, practitioners should consider custom crafting a provision that permits gifts of the amounts appropriate for the circumstances, but sufficiently circumscribed to minimize that provision from serving as a means of financial abuse.

- For charitable bequests, most clients won't receive any estate tax benefit under the current tax system. For these clients, consider including an express right for an agent to make charitable gifts as an advancement of charitable bequests under the client's will to generate a lifetime income tax deduction for the client. Practitioners should counsel agents to obtain the appropriate written acknowledgement from the recipient charity that such a donation is received as an advancement.
- For wealthier clients, capturing the annual inflation adjustments to the lifetime exemption amount may be a critical tax minimization step. In the current low inflationary environment, the annual increases have been in the neighborhood of \$100,000. In the future, the annual amounts may be substantially greater. Consider including express language to facilitate such inter vivos gifts.

Single Elderly Clients

One of the fastest growing demographic cohorts is the single elderly client.⁹ It will be more common to have clients who've outlived not only spouses, but also siblings and friends. Many of these clients will have no one reliable to name as agent. The use of a funded revocable trust that names an institutional co-trustee or successor trustee can provide a viable solution for clients fitting this profile. However, given that there's no assurance that every asset or claim can be transferred to the revocable trust, such clients should still have a durable POA. (For example, certain retirement benefits may not be transferred during lifetime.) It may be feasible to have the same institution serving under the revocable trust agree to serve in a limited capacity as agent under the client's POA. For a corporate trustee to be comfortable serving as agent, consider:

- The role the corporate agent will serve should be limited to focus primarily on the transfer of assets from the client's name to the revocable trust under which the corporate agent is also serving as trustee.

- The corporate agent may prefer to have no obligation to serve unless it has actual notice of the principal's incapacity, even if the POA isn't a springing power (that is, one that becomes effective only when the principal becomes incapacitated). An alternative or additional but acceptable trigger may be the receipt of written notice from the client requesting that the corporate agent commence serving. This option is important so that the client can request assistance even if she doesn't meet the strict definition of being "incapacitated."
- The corporate agent may be given the unfettered right to resign at any time without regard to other restrictions in the power, other than to give notice to any successor agent, guardian or committee.
- Expressly address compensation so that the corporate agent can receive compensation based on its regularly published fee schedule even if it's greater than what state law might provide. Institutions may develop more specific fee schedules for this role as corporate agents become more common.

Single elderly clients can take additional steps to assure a smoother transition to the corporate trustee and to minimize the opportunities for elder financial abuse. The client could consolidate all financial accounts at the institution named as agent or trustee. Even credit cards may be held at that institution. If the client owns real estate (such as a primary or vacation home) in a state other than where the institution is based, that real estate may be held in single member disregarded limited liability companies owned by the client's revocable trust. In this way, all assets are structured to minimize the potential issues of the corporate trustee assisting in the management of that property.

Springing vs. Immediate POAs

There are many views regarding the merits and detriments of using a springing POA versus one that's effective immediately (leaving aside the issue of some states not recognizing springing POAs). Clients almost universally find some comfort in springing POAs because clients believe they aren't giving up control until a disability occurs. It also provides a sense of security that there's protection in preventing the agent from acting under the POA until necessary. Because that security is often more apparent than real, it's appropriate to note that it isn't the full picture of planning considerations:

- Disability, barring an acute event or injury, generally isn't an on/off switch. A common historical approach has been to use a springing POA that's activated when the principal becomes incapacitated. But, springing POAs don't contemplate the common reality of capacity that slowly wanes over time. This approach is thus fraught with problems when applied to the gradual declines that most older or chronically ill clients experience. During the early stages of many diseases that affect cognition, for example, executive functioning such as balancing a brokerage statement, the client may experience difficulties with which an agent could help, even though the client can't be characterized as "incapacitated." A more practical and realistic approach to help many aging or ill clients is to have an immediate POA so that an agent can assist to the extent needed, but the client can continue to remain in charge of her finances.
- A funded revocable trust with a successor trustee conceptually provides an approach similar to the use of a springing POA. The successor trustee steps into the role of acting trustee when the client can no longer serve. There may be fewer legal problems with a successor trustee taking over for an

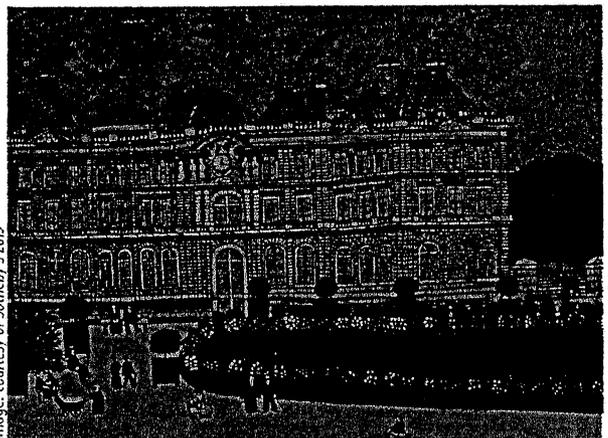


Image: Courtesy of Sotheby's 2015

SPOT LIGHT

Afternoon Stroll

"The Luxembourg" (21½ in. by 29 in.) by Louis Vivin, sold for \$5,000 at Sotheby's recent Impressionist & Modern Art auction in New York on May 28, 2015. Vivin's works were known for their melancholic mood. A master of French naïve painting, Vivin was also known for his ability to paint from memory.

incapacitated grantor or trustee than for an agent triggering a springing POA, but that alone doesn't address the reality of waning capacity. The revocable trust arrangement is also optimal to involve the independence and professionalism of a corporate trustee. But, most revocable trusts take a similar and inadequate approach as a springing POA. By naming the client as the sole initial trustee, passing the baton to the successor can be problematic. It also doesn't provide the increasing assistance many clients require as their capabilities slowly wane. At some point before the need is urgent, a client should consider serving as a co-trustee so that the other co-trustee can assist the client with tasks without diminishing the client's control.

- Use of an escrow arrangement can provide another option. The attorney or other professional can hold the original immediate POA. When the attorney deems it beneficial to release the power to the agent, he can do so. The risks the attorney may face in this capacity (releasing too soon or too late) may largely be dealt with in an appropriately crafted escrow agreement that includes broad indemnification provisions for the attorney. This approach hasn't widely been used, but with the aging population, it has the valuable potential of balancing a client's objectives. This approach also obviates the issues of when a springing POA becomes effective. The POA can be released before the client is incapacitated but when he'll benefit from the assistance of the agent. The escrow arrangement also forces a meeting when the original power is released between the attorney releasing the POA and the agent. And, perhaps, most important, the effectiveness of this approach requires regular meetings between the client and his attorney so that the attorney is aware of the client's physical and mental status. Those meetings may be one of the most crucial steps to protecting a client. ③

Endnotes

1. National Center on Elder Abuse, "Statistics Data," www.ncea.aoa.gov/Library/Data/index.aspx#problem (by 2050, individuals age 65 and older are expected to comprise 20 percent of the total U.S. population; the fastest growing segment of America's population consists of those 85 and up; in 2010, there were 5.8 million people 85 or older; by 2050, it's projected that there will be 19 million people 85 or older) (citations omitted).
2. Mark Miller, "Why Cutting-Edge Healthcare Will Help The Rich Live Longer,"

Reuters (May 8, 2015), www.reuters.com/article/2015/05/07/column-miller-longevity-idUSLINOXX2HX20150507.

3. *Ibid.*
4. "Major financial exploitation was self-reported at a rate of 41 per 1,000 surveyed..." Lifespan of Greater Rochester, Inc., Weill Cornell Medical Center of Cornell University and New York City Department for the Aging (2011), "Under the Radar: New York State Elder Abuse Prevalence Study," cited in www.ncea.aoa.gov/Library/Data/index.aspx#problem.
5. Michele M. Hughes, "Remedying Financial Abuse by Agents Under a Power of Attorney for Finances," *Marquette Elder's Advisor*, <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1264&context=elders>.
6. See, e.g., *Estate of Julius Gargani* (Accounting by Joan K. Conklin, as Attorney-in-Fact for Julius Gargani, a/k/a Julius J. Gargani, Deceased), McCarty, *New York Law Journal* (April 6, 2015).
7. Lori A. Stiegel, "Durable Power of Attorney Abuse: It's a Crime Too A National Center on Elder Abuse Fact Sheet for Criminal Justice Professionals," American Bar Association Commission on Law and Aging (2008), www.ncea.aoa.gov/Resources/Publication/docs/DurablePowerOfAttorneyAbuseFactSheet_CriminalJusticeProfessionals.pdf.
8. *Ibid.*
9. According to the U.S. Census Bureau, 800,000 people are widowed each year in the United States. "Nearly 700,000 women lose their husbands each year and will be widows for an average of 14 years," U.S. Bureau of the Census (1999), www.widowshope.org/first-steps/these-are-the-statistics/.

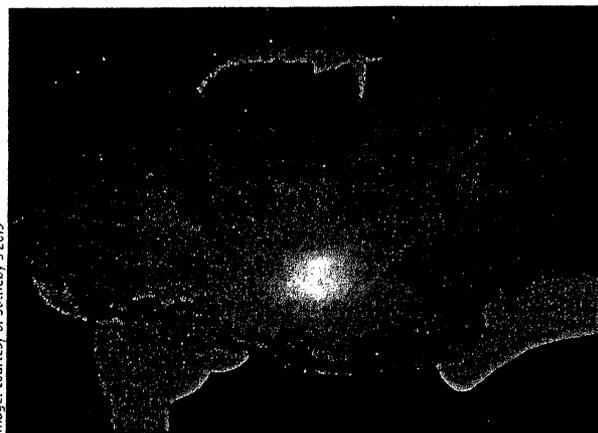


Image: Courtesy of Sotheby's 2015

SPOT LIGHT

Flower Power

"Nephaster Cyaneus (Cloudstar)" (38 1/2 in. by 51 1/4 in.) by Dorothea Tanning, sold for \$68,750 at Sotheby's recent Impressionist & Modern Art auction in New York on May 28, 2015. A self-taught artist, Tanning started out as a Surrealist, but her art became progressively more abstract over the years.

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Make a Splash—"High and Shy, Brown & Bigelow calendar illustration" (30 in. by 24 in.) by Gil Elvgren, sold for \$161,000 at Heritage Auctions' Illustration Art Signature Auction in Beverly Hills, Calif. on May 14, 2015, p. 3.

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