

TRUSTS & ESTATES



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Safe Powers of Attorney

Minimizing the risk of abuse

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Powers of attorney (POAs) are one of the most basic and important estate planning documents. Even most nonprofessionals are well aware of what a power of attorney

is and why they need one. A problem with POAs is merely obtaining a good, even great, legal document, will rarely suffice on a number of levels. For example, a document alone won't prepare an agent to act. A well-crafted document might reduce the risk of an agent or third party using the POA to steal funds from the principal, but the document alone isn't enough to really accomplish this goal. More is needed.

Many of the comments below were drawn from a presentation at the AICPA "Advanced Estate Planning Conference" chaired by Robert S. Keebler, CPA in Salt Lake City, Utah on July 21, 2015 from a session entitled "Estate and Financial Planning for Chronic Illness."

Abuse of Powers

Elder financial abuse is rampant and growing. Family members, not strangers, often commit the abuse.

Statistics on the family member who abuse old relatives have been estimated as : Adult children of the victim- 47 percent, Spouses- 19 percent, Grandchildren-9 percent, other relatives-9 percent.

"In more than eighty percent of cases, those abused by an agent under a durable power of attorney are victimized by relatives, most of whom are immediate family members. Although financial elder abuse is often viewed as involving vulnerable victims, more often than not, the victims are competent. One national study of abuse patterns by agents under a durable power of attorney for finances revealed that 57 percent of the principals were competent when the abuse occurred. The agents in those cases misappropriated more than one half of the principals' assets in 70 percent of the cases. "

How To Minimize the Risk of Abuse

While stronger laws and penalties for those committing elder abuse and violating their fiduciary role as agents under a POA and greater publicity to those penalties and the resulting cases imposing them may be a deterrent, everyone involved in POAs: the principal creating it, the lawyer drafting it and the family or others who might be affected, should take proactive steps in advance to minimize the risk of problems in the future.

Revocable Trusts are a Better Solution

The best answer to the issue is to ask a different question. Simply, POAs aren't the optimal approach to protect someone as they age. Yes, POAs are indispensable, and every adult should have one to assure control over assets during incapacity, but a revocable trust will prove a safer path. Your client can make the POA a less important document and instead obtain a revocable living trust and name a corporate or institutional co-trustee or successor trustee. The client can fully fund the trust now by transferring all assets to the trust that are permissible to be held in a revocable trust (for example, your client can't transfer individual retirement accounts and qualified retirement plan assets and interests in professional practices). The institution will have internal safeguards to monitor for abuse and will have internal safeguards to prevent its employees from committing abuse. Also, the professionalism and experience the institution brings to the process can be invaluable in not only preventing abuse, but also in providing better services and care to the principal creating the trust as he ages and needs more assistance. A long-time commissioned-based broker may impede the transaction and be one of the common impediments to this type of planning being implemented. In many cases, it's the client who doesn't wish to emasculate the role of a long-time adviser. The solution to this dilemma is for more financial institutions to create arrangements to retain the involvement of a long-time advisor, while still involving an institutional trustee.

Escrow the Original POA Document

Your client should use an escrow arrangement for the release of the POA. Instead of making the document available to the agent today, you, as the attorney, should hold the original POA subject to an escrow agreement that permits you to release the POA to the named agent whenever your discretion it's appropriate to do so. You should also be permitted great latitude to choose not to release the document. In this way, the agent has to meet with you before obtaining the POA document. That meeting will afford you an opportunity to instruct the agent on how to act and operate as an agent, the liability for failure to do so properly and other vital facts. The gravity of that meeting alone might have a chilling impact on the agent's consideration of future financial improprieties. This technique has rarely been used but could be a tool to enhance the protection of our aging population.

Build in Checks and Balances

The fox should never be given the sole responsibility to guard the hen house. Nor should an agent be permitted the unfettered right to operate without any oversight. This is rarely done because it hasn't been the historic norm to do so. Everyone with a POA, and every advisor, should take proactive steps to create checks and balances:

Team effort: The steps to monitor an agent require a collaborative effort of various advisors (wealth manager, CPA and attorney), and too few clients demand a collaborative team effort. In spite of the widespread talk of the team approach to planning, too many advisors remain territorial under a misconception that this behavior somehow will protect their turf/business. Clients should demand the flow of communication between all their advisors and insist on annual review meetings with all advisors involved. The team effort will pick up the points to otherwise "fall between the cracks." An annual review where the client's finances are discussed is an excellent mechanism to identify possible problems or inadequacy in controls that could lead to future abuse.

All assets should be consolidated into one or as few institutions as possible. When an elderly individual has accounts spread to a dozen or more institutions, it's simply too complicated for anyone to really track what occurs, and accounts that "fall off the

radar” are more susceptible to abuse than other assets. If all investment accounts are in one institution and real estate or business interests are properly tracked or held in a revocable trust so that one trustee has knowledge of them, there will be more visibility and accountability. Stocks or bonds in street name held in a safe deposit box are more easily pilfered than securities in a brokerage account that can be monitored.

Duplicate statements: Someone other than the agent under the POA should receive a duplicate copy of every monthly statement. That will enable this individual to monitor activities and identify unusual transactions or excessive disbursements and inquire as to the appropriateness of them. The ideal “someone” to fulfill this role is a certified public accountant who has the skill set to monitor a client’s finances, the ethical standards that assure a greater level of protection, and often already serves in the role of the client’s trusted advisor.

Joint agents: Your client should appoint co-agents to create checks and balances on actions. The negative aspect of this, which must be weighed, however, is the potential difficulty of having both agents available to address an emergency. But with an aging population, the focus will shift from an agent under a POA acting in an emergency situation to an agent handling an aging or ill principal’s finances for decades. In the latter case, the logistics of co-agents may be insignificant compared to the protection it affords.

Monitor: A monitor can be appointed in the POA itself and designated to oversee the actions of the agent. Because there’s little law on this and the liability and responsibility of someone serving in that capacity isn’t clear, it may take many years for that concept to come into common use, if at all.

Automate Finances: If deposits and bills are set up to be on auto-pay as a client ages, there’s less involvement for the agent in the future, and it may prove less likely for an agent to shut off an automatic payment or deposit. Automation of routine transactions will result in less mail and other statements that all may be potential opportunities for abuse.

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