

The Law and You

Power of Attorney Issues

At one time or another, most of us have likely encountered or used a power of attorney (“POA”). This column is intended to highlight some of the issues surrounding the use of a POA.

Years ago, when I traveled extensively, my wife would sometimes travel with me. While away, we left our children with responsible adults. But they needed some authority to act on our behalf with respect to our children. To accomplish this, we prepared a POA and granted to those responsible adults that we trusted with our children the legal power and authority to act for us.

When granting to someone else the power to act for you, several questions should be asked and answered. For example, (1) For what period of time should the POA cover? (2) What should be the limits or scope of the POA? (3) Should I precisely list only those actions that the holder of the POA can take?

Other questions and concerns should also be raised. For instance, can I revoke the POA once I have granted it to someone? What if the person to whom I granted a POA has gone beyond the scope of the POA? Or, what if the holder of the POA has engaged in self-dealing with my property?

There are statutes in Utah (§§ 75-5-501-504, Utah Code Annotated) that govern the use of powers of attorney. And, they have been amended several times during the past five years, evidencing the on-going concerns over how POA’s are being used and what limitations are appropriate.

A POA is often misunderstood. First, a POA is valid only during the lifetime of the person granting the POA (i.e., the “principal”). It automatically terminates upon death. After death, the person’s Last Will and Testament takes over.

Second, a POA is valid only during the time when the principal retains capacity, unless the POA expressly states that it continues to be effective upon the disability or incapacity of the principal. Otherwise, the POA ceases to be effective upon such disability or incapacity.

Now, are there dangers in using a POA? Yes there are.

If you have sufficient competence and capacity, you can monitor the actions of the individual to whom you granted your POA. In other words, the person holding the POA (or your “agent”) is accountable to you and you can effectively hold your agent accountable.

However, assume that your capacity has diminished. This may be caused by dementia, by a stroke, or by some other ailment, disease or accident. In this diminished state, you may no longer have the mental capacity to effectively determine whether your agent is acting properly and in your best interests.

Quite often an elderly person grants a broad POA to an adult child on the belief that such POA is essential in case the person can no longer manage his or her affairs. While the POA generally works to the benefit of the elderly person, it can also create great temptation for his or her agent. And, the harm that might result may not be detectable by the principal upon his or her incapacity.

There is no requirement for the agent to account to anyone else except the principal, unless a conservator has been appointed by the court.

To protect against mischief that may occur, the POA statutes were amended to require accountability by the agent whenever the principal becomes incapacitated.

Under the amended statutes, the agent must now notify all beneficiaries of the principal’s estate of the existence of a POA.

In addition, the agent is required to provide an annual accounting to such beneficiaries.

These new requirements provide greater protection for the principal's estate upon his or her incapacity. The new reporting requirement should be a substantial deterrent against an agent's possible mischief.

If a beneficiary of the principal's estate suspects some wrong doing by an agent, he or she can bring the matter before a District Court.

An alternative to a POA is to do nothing. Upon incapacity, a conservator and/or guardian can be appointed to act on behalf of the principal. A conservator, however, is required to report to the Court in addition to other family members.

If a family member believes that a conservator is not acting properly, he or she can object to the approval of the conservator's Annual Report and thereby cause the Conservator to defend such actions in the Court. This protects the elderly person's assets and makes sure that all actions can stand the test of scrutiny by other interested family members.

If you are considering a POA that survives your incapacity, be aware of some of the problems. You should consult a knowledgeable Elder Law Attorney. Check your local Yellow Pages or the National Academy of Elder Law Attorneys at (520) 881-4005, or on their web site at www.naela.com.