

Powers of Attorney: An Important Estate Tool

At one time or another, all of us probably have encountered, used or heard of a power of attorney. Years ago, when I traveled extensively, my wife would sometimes travel with me. While away, we often wanted someone to have authority to act on our behalf with respect to our children or if emergency repairs became necessary to our home. To accomplish this, we prepared a power of attorney (“POA”) and granted someone we trusted with the legal power and authority to act for us, particularly to make decisions concerning our children.

When granting power to someone else 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? And, what happens to the POA if I die or become incapacitated?

The statutes in Utah (§§ 75-5-501-502, Utah Code Annotated) which govern the use of powers of attorney are quite brief and mostly deal with the durability of the POA. In this context, “durability” refers to whether the POA is still effective if you become incapacitated. Unless the POA expressly states that the POA continues to be effective upon the disability or incapacity of its grantor, the POA ceases to be effective upon such disability. The POA also automatically terminates upon the grantor’s death.

Are there dangers in using a POA? Yes. 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 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 necessary mental and cognitive capacity to effectively manage your agent’s actions.

Quite often, an elderly person grants a broad POA to an adult child, believing that such POA is essential in case the person can no longer manage his or her affairs. While this generally works to the benefit of the elderly person, it creates great temptation for that adult child. And, the harm may not be detectable by the elderly incapacitated person.

Until recently, there was no requirement for the holder of the POA to account to anyone else except the grantor of the POA. Under an amendment enacted in 2001, the agent holding the Power of Attorney of an incapacitated person must now:

- (1) notify all interested persons of his or her status as agent within 30 days;
- (2) provide to any interested person upon written request a copy of the Power of Attorney and a statement of the assets to which the Power of Attorney applies;
- (3) provide an annual accounting of the assets; and
- (4) notify all interested persons upon the death of the principal.

Without this new amendment, the agent, the one holding with the POA, did not have to report or account for his or her actions. Even with the new amendment, only financial accounting is required. No other details about decisions concerning the incapacitated person need to be disclosed.

While a POA is generally an important and useful tool in estate planning, you should be demand accountability from your agent. You can always revoke a POA, provided you still have the mental capacity to do so.

If you have any concerns, you should revoke your POA. You can create a new POA that becomes effective only upon your incapacity. Such a POA is sometimes referred to as a “Springing Power of Attorney.” That way you have control until you lose your ability to manage your affairs. When that happens, the POA becomes effective and someone you trust can then manager your affairs.

You should determine whether the POA you have granted is durable or whether it is a springing POA. If you are about to have estate documents prepared, you should seriously consider having a springing POA.