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Power of Attorney Considerations: Managing Finances During Life

In addition to taking care of one's financial matters after death, it may be just as important to make sure that a plan is in place for the management of one's finances during life if one becomes unable to do so.

By **Rebecca Rosenberger Smolen** and **Amy Neifeld Shkedy** | May 02, 2022



Rebecca Rosenberger Smolen, left, and Amy Neifeld Shkedy, right, of Bala Law Group.

Oftentimes new clients come to us saying they “need a will,” so that they can make sure that their financial affairs are properly managed after death. In addition to taking care of one’s financial matters after death, it may be just as important to make sure that a plan is in place for the management of one’s finances during life if one becomes unable to do so. As such, in addition to a will, part of every comprehensive estate plan, no matter how simple or complex the plan itself may be, should include a financial power of attorney.

A power of attorney is a legal document in which a person, known as the principal, appoints another person or institution to act as his agent or attorney-in-fact for certain financial decisions. The agent is given authority to perform certain acts for the benefit of the principal, such as signing checks, paying bills, managing investments, signing contracts, handling bank accounts, making gifts or charitable donations and so forth. The power of attorney can be drafted to be broad, known as a “general” power of attorney, or may only grant powers limited to specific matters, such as selling a piece of real estate (known as a “limited” or “special” power of attorney).

Each state has its own statute governing powers of attorney, including certain required provisions and execution requirements. In Pennsylvania, powers of attorney must be witnessed by two witnesses plus a notary, none of whom may be named as an agent under the document. That means that in addition to the signer, three additional disinterested people must be present for the signing—something not so easy to accomplish these days during COVID. Pennsylvania powers of attorney should also have a specific notice provision. This notice appears at the beginning of a power of attorney, is in all capital letters and contains certain statements advising the principal to seek an attorney’s advice prior to signing the document and warning the principal of the broad authority being granted to the agent. While the failure to sign a notice does not affect the validity of the power of attorney, it does change the burden of proof on challenges to the authority of the agent. For that reason, we always make sure to include it. Pennsylvania powers of attorney also require that certain powers, as set forth under 20 Pa. C.S. Section 5601.4, must be expressly granted in the power of attorney to be effective for an agent, while other powers can be granted with blanket language. Thus, it is important that a power of attorney be carefully tailored and reviewed by an attorney to ensure that the correct powers have been effectively granted to the agent.

When we prepare general powers of attorneys for clients, we almost always prepare “durable” powers of attorney. Durable powers of attorney become effective from the moment they are signed and continue the agency relationship even if the principal becomes incapacitated and cannot act on his own behalf. It typically contains words like: “This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or a lapse of time.”

Sometimes our clients worry about signing a durable power of attorney and giving up too much power too soon since a durable power of attorney becomes effective at the moment it is signed. When this comes up, we are sometimes asked whether a “springing” power of attorney makes more sense. That type of power of attorney does not become effective when it is signed, but only “springs” to life after the occurrence of a specific event named in the document, such as incapacity. While springing powers of attorney may seem appealing to many people, we prefer, and almost always recommend, that clients execute durable powers of attorney for their ease of use and immediate effect. With a springing power of attorney, our concern is having to delay the process of securing recognition by a third party of an agent’s authority if the agent needs to first obtain evidence that the principal is incapacitated, such as certifications by doctors (considering delays due to doctors are worried about divulging information under the Health Insurance Portability and Accountability Act without a court order). In the case of an emergency, any such delay could defeat the very purpose of having the power of attorney in the first place. In order to avoid this potential pitfall, we have

found that a durable power of attorney in which a principal is careful to only name trusted individuals is the better approach, perhaps paired with asking the lawyer to hold onto the original and not release it to the agent unless and until it is clearly needed.

Many times, power of attorney documents never end up being used and instead serve as dust and space collectors in one's safe deposit box or in a law firm office's fireproof vault. In an ideal world, we would all live long healthy lives and be able to manage our own financial affairs without requiring anyone's help. However, having a power of attorney is sort of like an insurance policy (although substantially cheaper) because when and if it becomes needed, it's crucial that a power of attorney is in place. Without a proper power of attorney in place, if one becomes incapacitated or unable to manage his affairs, a loved or trusted one may need to petition the court to be appointed guardian of that person's estate, which can be quite costly and time consuming, requiring regular court supervision of the guardian's actions on behalf of the principal. Further, the need for such measures, in the worst case scenario, could produce unpleasant conflict among interested parties that can be obviated, or at least minimized, by implementing a carefully thought-out power of attorney far before the time it may become necessary to put it to use.

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