

DURABLE POWER OF ATTORNEY: PLANNING FOR DISABILITY

DISCLAIMER

This article is intended for informational purposes, only. It does not constitute legal advice. Nor is it a substitute for legal advice.

In a power of attorney, a person (the principal) grants certain powers to someone else to act as his or her agent. The agent is sometimes referred to as the attorney-in-fact (as opposed to an attorney-in-law). The principal appoints the agent to manage the principal's property, finances and personal affairs.¹ This is an extensive power to give to someone. Why do it?

Perhaps the main reason for executing a durable power of attorney (DPA) is to avoid the alternative: guardianship or conservatorship. Should a person suffer a disability or incapacity, such that he or she becomes unable to manage his or her affairs, someone will need to acquire the legal authority to act for that person. In the absence of the DPA, that authority typically can be obtained only through a guardianship or conservatorship proceeding in court, with its expense, delay, difficulty and effort.²

In the past, the power that a person conferred upon an agent to act terminated upon the incapacity of the principal; the power of the agent did not continue beyond incapacity of the principal. Now, all states have laws allowing for powers of attorney that endure beyond incapacity, and thus the name *durable* power of attorney. In fact, in Nebraska, which adopted the Uniform Power of Attorney Act ("UPAA") with effect from 2013, a power of attorney is presumed to be durable unless it states otherwise.

There are a number of questions which need to be considered in preparing a power of attorney. Should the power of attorney take effect immediately upon its execution or only after incapacity occurs? Who will be the agent? What duties and liabilities are there between the principal and the agent? What powers will the agent be given? Will the agent be entitled to compensation?

When Will DPA become Effective?

A durable power of attorney may be either *springing* or *immediately effective*. In other words, the DPA may take effect immediately upon signing, or it may come into effect only on a specific date, on the occurrence of some event, or only if it has been determined that the principal is incapacitated.

There are advantages and disadvantages to each kind. As a practical matter, the immediately effective DPA works more easily, because the agent does not have to demonstrate in order to use the DPA that the springing condition has occurred. The main

¹ This article will not discuss durable powers of attorney for health care. For such a discussion, see article on *Health Care Powers of Attorney & Living Wills*.

² This article does not discuss the ability of a successor trustee under a revocable trust to act in effect as an agent. See article on *Trusts* for such a discussion.

disadvantage in the springing DPA is precisely this uncertainty. If the agent walks into a bank with the DPA in hand to transact business for the principal, how is the bank to know whether or not the conditions for effectiveness have occurred? It is possible that a third party would refuse to accept the agent's authority until it has had a chance to make sure the conditions have occurred. This could cause delays in the agent's ability to act. It is important therefore that a springing DPA be drafted as clearly as possible to define the conditions under which it becomes effective.

In some springing DPAs, the principal will name a person who, by a written statement, provides evidence of the incapacity. In the absence of the designation of such a person, the Nebraska statute provides that a springing DPA becomes effective upon a determination of incapacity in writing by a licensed physician or licensed psychologist, or by the court or an appropriate governmental official. The Nebraska statute also provides that a person named to make a written determination of incapacity is authorized to act as the personal representative of the principal for HIPAA purposes, thus assuring access to health records.³

Another possibility would be to draft the DPA so that a spouse's authority as agent takes effect immediately upon execution, but that the authority for any other agent, a child for example, only takes effect upon incapacity. Still another possibility would be for the principal to retain or escrow all copies of an immediately effective DPA, without possession of which the named agent could not act. It is worth asking, to the extent one is concerned about abuse by an agent under an immediately effective DPA, has the right agent has been chosen? This final point indicates the principal disadvantage of an immediately effective DPA, namely, that the agent might abuse his or her authority.

It is important to bear in mind that a DPA is revocable at any time by the principal. If the principal has retained all copies of the DPA, those copies may simply be destroyed. If the agent is in possession of a copy, the principal will need to inform the agent by certified mail that the DPA is revoked. And if the principal is aware of third parties or institutions which are relying on the DPA to allow the agent to act for the principal, those parties and institutions should also be notified of the revocation of the DPA.

Who Should be the Agent?

This is the most important decision in preparing a DPA. The short answer is that the agent should be someone the principal trusts, a person that the principal believes to be honest and competent. Other factors to consider include the following:

- Where does the agent live?
- Is the agent willing to act as agent?
- Does he or she have the necessary experience or education to manage the principal's affairs?
- Does the agent have a potential conflict of interest?

³ HIPAA, the Health Insurance Portability and Accountability Act, seeks, among other things, to protect patient health care information with certain privacy requirements.

- Is the person able to navigate family conflicts?

In considering the agent, it might be helpful to consider what kinds of things the agent will have to do. Will he or she be called upon to make business decisions? To run the family farm or ranch? How complicated are the financial affairs of the principal? How even-handed can the agent be in dealing with potentially conflicting family desires?

It is important to try to name a successor agent in the DPA, in case the first choice is unavailable or unwilling to serve. Under the statute, a successor is extended the same authority that the first-named agent has been given.

Should a person choose co-agents, that is, two or more agents to act under the DPA? As a general matter, it is simpler for a single person to act. There is less opportunity for confusion and conflicting actions. However, co-agents may represent a useful safeguard to abuse of authority by an agent. In addition, if the appointment of a single agent would create family resentments and potential conflict, it might be advisable to name more than a single agent. It is also possible to draft a DPA to provide for a co-agent only with respect to certain decisions. Those joint decisions might involve only certain dollar amounts, or particular kinds of transactions, say in real estate. It is important, in using co-agents, that the extent of their respective authority be clearly defined. The Nebraska statute, for example, provides that unless the DPA states otherwise, co-agents are presumed to be able to act independently of one another. Is this what the principal wants? If not, the DPA needs to spell it out.

Duties and Liabilities

An agent is a fiduciary. Stated in another way, the agent owes a fiduciary duty to the principal. This is a duty of trust, an obligation to act in good faith, in the principal's best interests, within the scope of the authority granted under the DPA. The statute spells out additional duties as follows:

- Act loyally for the principal's benefit;
- Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
- Keep a record of all receipts, disbursements, and transactions made on behalf of the principal ;
- Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent known by the agent and, otherwise, act in the principal's best interest; and
- Attempt to preserve the principal's estate plan, to the extent known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
 - The value and nature of the principal's property;
 - The principal's foreseeable obligations and need for maintenance;

- Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
- Eligibility for a benefit, a program, or assistance under a statute or regulation.

The duties that an agent owes are legally enforceable against the agent, should he or she violate those duties. An agent who violates the Nebraska statute will be held liable to the principal and the principal's successors in interest (typically, the heirs) to restore the value of the principal's property to what it would have been in the absence of the violation. The agent may also in some circumstances be held liable for attorney fees and costs. An agent under the Nebraska statute is not liable in the absence of such a violation of duty for declines in the value of the principal's property.

A DPA may be drafted in a way to protect the agent from certain liability, as well as to allow an agent to benefit personally from the agent's actions. The statute does not permit a principal to shield an agent from liability for acts that are dishonest or improperly motivated, or done in reckless disregard of the principal's best interests.

The principal owes certain duties to the agent as well, namely to act consistently with the terms of the DPA, and to indemnify the agent for payments he or she makes for the benefit of the principal.

There are a number of people, or categories of persons, who are giving what is called *standing* to come into court either to challenge what an agent does, or to seek the court's guidance in interpreting the meaning of a DPA. These people include:

- The principal or the agent;
- A guardian, conservator, or other fiduciary acting for the principal;
- A person authorized to make health care decisions for the principal;
- The principal's spouse, parent, or issue;
- An individual who would qualify as a presumptive heir of the principal or would otherwise qualify as a devisee under a will that remains unrevoked;
- A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
- A governmental agency having regulatory authority to protect the welfare of the principal;
- The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and
- A person asked to accept the power of attorney.

The extension of this standing to these people is yet another safeguard against an agent's abuse of power.

Powers

The agent can be given specific or general powers under the DPA. For example, an agent may be appointed only for a specific real estate transaction. More often, however, a durable POA will grant broader, if not fully general, powers to the agent. A general POA is sometimes also called a *plenary* POA. The principal is typically free to authorize an agent to do anything the principal could do, with a few limitations for actions that are either too personal to be delegated, or which public policy discourages, such as marriage or divorce, voting, execution, amendment or revocation of wills, and amending or revoking revocable trusts (further discussion below). In addition, certain government agencies, such as the USDA/Farm Service Agency, Social Security Administration, and Veteran’s Administration may require a special form of POA or impose certain restrictions on the use of DPAs.

The Nebraska statute provides a “check-the-box” (actually initial-the-box) power of attorney form, as part of its adoption of the UPAA. This form breaks the grant of powers or authorities into two general sections. The first is called the Grant of General Authority, and the second the Grant of Specific Authority. Each section contains initial-the-box descriptions of matters for which a delegation of authority can be made. The general authority section contains the following description of matters (identified as *subjects*) and concludes by offering a catch-all, or general, power, which includes all of the named subjects:

- Real Property
- Tangible Personal Property
- Stocks and Bonds
- Commodities and Options
- Banks and Other Financial Institutions
- Operation of Entity or Business
- Insurance and Annuities
- Estates, Trusts, and Other Beneficial Interests
- Claims and Litigation
- Personal and Family Maintenance (includes HIPAA)
- Benefits from Governmental Programs or Civil or Military Service
- Retirement Plans
- Taxes

- All Preceding Subjects

The Grant of Specific Authority also contains an initial-the-box list of specific acts for which power may be delegated to the agent, and contains warnings to consider the seriousness of such delegations.

- Create, amend, revoke, or terminate an inter vivos trust
- Make a gift, subject to the limitations of the Nebraska Uniform Power of Attorney Act and any special instructions in this power of attorney
- Create or change rights of survivorship
- Create or change a beneficiary designation

- Delegate to another person the exercise of authority granted under this power of attorney
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- Exercise fiduciary powers that the principal has authority to delegate
- Renounce or disclaim an interest in property, including a power of appointment

An edited version of the statutory DPA is available as a part of this series, in which the form has been expanded to include descriptions of what each of the authorities means. (Making this form available in an expanded version is not intended to encourage the reader to make use of the form without consultation with his or her attorney.) A DPA is a legal document which extends significant power to another person and which creates important duties. A person should understand what the DPA is doing and match it to their desires and their circumstances. This kind of consideration and analysis should come from discussions with your lawyer. It is hoped that reading this article and reviewing the expanded statutory form will help to make those conversations fruitful and efficient.

There are a number of factors to consider in preparing a DPA, including, in addition to the choice of agent, the following:

- Should your agent be compensated
- how much accounting should your agent be required to provide to family members
- should your agent be able to make gifts on your behalf, or to alter your estate plan
- should your agent be free to engage in self-dealing
- should he or she be able to own an account jointly with you
- should your agent be protected from liability for honest mistakes

As mentioned, it is important to consider the kinds of things that your agent will be called upon to do, to try to anticipate what his or her work as an agent will amount to. Deciding whether or not to grant your agent the specific authorities as set forth in the statutory form, like gifting and changing estate plans, are momentous decisions. There may be important tax advantages and implications in such powers. Useful advice on those issues requires a familiarity with the principal's circumstances.

It is also possible in the statutory form DPA to designate a person(s) who would act as guardian or conservator for the principal should that become necessary. The principal purpose of a DPA is to avoid the need for guardianship or conservatorship, however, there are circumstances in which such an appointment might still become necessary. Although the court is not bound by the principal's designation of a person to act as guardian or conservator, it is likely to honor the designation unless compelling reason not to do so are shown.

DPA for Family

It is worth bearing in mind that once a person reaches the majority age (19 in Nebraska), a DPA will be needed to act on that person's behalf. A parent, after all, is no longer legally the guardian of an adult, whether child or no.

Conclusion

The durable power of attorney for management of property is an important part of estate and end of life planning. It is a part of planning for incapacity, and the probability of a person suffering some kind of incapacity or long term incompetence is significant statistically. The lack of a DPA confronts family members with difficult and sometimes expensive alternatives, which may lead to the incapacitated person's actual legal loss of rights.

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