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Powers Of Attorney – Use And Abuse

Drafters of document must balance flexibility with specific guidance

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A general durable financial power of attorney is one of the simplest, most flexible, efficient and cost-effective tools available to address the need for property management in the event someone becomes ill or incompetent. There is, perhaps, no more essential document to have in place when planning for possible incapacity. A well-crafted instrument can broaden options available to an incapacitated client as well as provide safeguards to restrain an overreaching agent. Most importantly, with a durable power of attorney, one can avoid an intrusive and cumbersome conservator proceeding in the event of incapacity.

A power of attorney is a written instrument by which one person (the principal) appoints an agent (attorney-in-fact) and authorizes the agent to perform various acts defined in the power on behalf of the principal. Such a power is considered "durable" if it contains language that permits the agent to continue to act on the principal's behalf, regardless of the principal's competency or ability to supervise the agent.

Generally, a power of attorney is effective from the time it is executed and remains valid until the principal's death. Connecticut has a suggested statutory form for a general durable power of attorney contained in the Connecticut Statutory Short Form Power of Attorney Act, Connecticut General Statutes §1-42, et seq.

A power of attorney creates a principal-agent relationship. The scope of the authority contemplated by this contractual arrangement is construed in accordance with general rules for interpreting contracts. If the parties' intent is clear from the language, it is controlling. In the case of a Connecticut statutory short form power, the scope of the powers is "broad and sweeping." The relevant statutory provisions define, in detail, the activities that an agent may undertake, ranging from transactions involving real estate and banking, claims and litigation, to "all other matters."

But what about powers not specifically incorporated in the statute? One can envision many acts a principal might wish to empower an attorney-in-fact to perform which are not defined by statute: making gifts (including to whom, to what extent and under what circumstances), establishing and funding a trust; dealing with retirement accounts; making tax and other statutory elections; and exercising rights in securities; signing tax returns, and dealing with tax authorities; accessing safe deposit boxes; exercising rights related to contracts and partnerships; resigning from fiduciary positions and appointing a successor; and obtaining and maintaining eligibility for public benefits. The particular circumstances of each client must be considered, and the instrument must be crafted to ensure that the power of attorney will fulfill its intended purpose.

Incorporating Safeguards

While the benefits of a power of attorney — simplicity, ease of use and flexibility — make it an effective planning tool, those very qualities also create the opportunity for abuse. Because the powers granted under a typical power of attorney are so "broad and sweeping," the success of the arrangement is entirely dependent upon the principal's well-placed trust and confidence that the agent will act in the principal's best interest. Given the ubiquitous use of this document, however, the opportunity for and incidence of abuse is on the rise, as was so dramatically demonstrated in the case of the philanthropist, Brooke Astor. (Mrs. Astor's son was convicted on criminal charges related to abuse of his authority under his mother's power of attorney).


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According to the June, 2011 Met Life Study of Elder Financial Abuse, 34 percent of the annual estimated $2.9 *billion* loss by victims of elder financial abuse was perpetrated by family members, friends and neighbors – those most likely to be selected as an attorney-in-fact. Of course, no one knows to what degree elder financial abuse is directly related to powers of attorney, but in light of the potential risks, what safeguards can be incorporated into the instrument to protect our clients?

The first order of business is to emphasize the importance of selecting a "one-thousand percent" trustworthy agent. If there is no one person who might satisfy that standard, the principal may designate more than one agent and require the agents

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to act "jointly," in which case they must carry out all transactions under the document together. In fact, under Connecticut statute, if multiple agents are named and they are not expressly empowered to act "severally," the agents are required to act jointly. There is little doubt that this mechanism can be cumbersome in practice, but the resulting check and balance may be well worth the inconvenience.

In the same way that express powers may be incorporated into the document to expand the scope of authority granted to the attorney-in-fact, an agent's authority can be limited by defining those powers which specifically are *not* granted. For example, the instrument can prohibit the agent from making gifts of the principal's property; using the principal's assets to secure or discharge the agent's legal obligations; appointing or transferring assets to the agent; or disclaiming assets passing to the principal if the disclaimed assets would pass to the agent. Some commentators have suggested incorporating an accounting provision requiring the agent to report all transactions to a trusted third party.

Another option might be a so-called "springing" power of attorney as authorized under C.G.S. §1-56h. Such a power permits the principal to define under what conditions the authority to act under the instrument will be effective (e.g., the principal's incapacity, as defined in the document) and describe the evidence necessary (e.g., an affidavit signed by the principal's personal physician) to prove that the requisite condition has been satisfied. Although a springing power, by itself, will not offer special protection after it becomes effective, it may delay or forestall an agent who is overly anxious to become actively involved in the principal's affairs.

Clients may choose, and should be encouraged, to execute a power of attorney for a number of good reasons. It is easy to implement and to understand. Although there are other planning tools available, a durable financial power of attorney generally is easier and more cost-effective to create and can provide a greater certainty of result than other alternatives.

For the draftsperson, crafting a durable financial power of attorney is a delicate balancing act: preserving the effectiveness of the document as a flexible and private arrangement for decision-making in the event of incapacity, while tailoring the document to protect the client in light of individual needs and circumstances. Clients must be counseled to consider carefully the selection of one or more agents. The instrument should provide unambiguous guidance with respect to the agent's powers and duties. The advantages of a power of attorney that has been carefully crafted to address a client's particular situation likely outweigh the potential risks which can be managed in the drafting process. ■