

“YOU’VE GOT THE POWER NOW WHAT?”

UNDERSTANDING FINANCIAL POWERS OF ATTORNEY

By Robert Prior



A power of attorney is a useful, but often misunderstood, tool. Despite its name, the document has nothing to do with an “attorney.” It simply creates an agency relationship by a principal in favor of an agent (also known as an “attorney in fact”) who can perform certain authorized tasks on behalf of the principal. When properly drafted, powers of attorney provide an excellent way to handle financial matters for an aging parent or a family member who cannot be present for a transaction. But there are also certain drawbacks that that can be traps for the unwary.

One limitation of a power of attorney is that it only applies to those specific items listed in the document. For example, to be able to purchase or sell stock in the principal’s name, the document must specifically permit the purchase or sale of stock. For real estate transactions, the document must list the property to be transferred and be executed with the same formalities required for real estate transactions.

Another drawback is that the agency created by a power of attorney ceases when the principal dies. After that time, the principal’s estate (through a will or living trust) must be used to transfer assets or handle other financial matters.

Mental incapacity of the principal, on the other hand, may not necessarily terminate the agency. A “durable” power of attorney is one that expressly states it remains valid, even

if the principal becomes incapacitated. Absent this language, the agency ceases upon incapacity of the principal. Since one of the primary uses of a power of attorney is to care for an elderly family member with diminished capacity, your power of attorney should always be drafted as durable with this in mind.

Financial powers of attorney must be distinguished from healthcare powers. Healthcare powers of attorney are a different type of agency document. Under these, the principal appoints an agent to make medical decisions on the principal’s behalf regarding doctors, treatments, medications or facilities. These powers are not typically included in a financial power of attorney.

Another limitation of powers of attorney is that even if properly drafted, banks and other financial institutions may not accept a previously drafted power of attorney, instead insisting that you use their own forms. When this occurs, if an elderly parent has lost mental capacity, the child is left in a Catch-22 situation since the parent no longer has the capacity to sign the bank’s form. The only alternative is often to file a petition in probate court to be named guardian and conservator of the principal. Fortunately, Georgia has recently enacted the Uniform Power of Attorney Act (UPAA). This law provides that for powers of attorney signed after July 1, 2017, as long as certain information is included in the document and

subject to certain limited requirements, a bank or other institution must accept the previously drafted power of attorney.

Another obvious drawback to a power of attorney is the potential abuse of power. A power of attorney is a blank check. An unscrupulous agent can use the document for their own benefit, draining the principal's account or misapplying funds. Fortunately, the UPAA provides safeguards to better protect the principal from an agent's misbehaviors. Among other things, it authorizes several individuals with an interest in the principal's protection to petition a court to interpret a power of attorney or review the agent's conduct and grant appropriate relief. An agent who violates his or her duties under the UPAA is liable to the principal for the value of the principal's property lost as a result of the agent's violation and for reimbursement of attorney's fees and costs paid on the agent's behalf.

When properly drafted and used, a power of attorney can be an excellent way to manage an aging parent's financial assets. Consult your estate planning professional about whether a financial power of attorney is appropriate for you.



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Estate Planning Elder Law

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