PALEY ROTHMAN
ATTORNEYS AT LAW

Navigating the Financial Powers of Attorney Conundrum

By Deborah Cohn

Financial powers of attorney, while sometimes helpful, are not always perfect solutions to the problem of reduced capacity, or even the convenience of allowing someone else, often a spouse or child, to manage one's finances. New York Times Wealth Matters columnist, Paul Sullivan noted, too, in "Power of Attorney Is Not Always a Solution," how financial powers of attorney do not always work as intended. He highlighted a situation in which the client used his sister's legal name when appointing her, even though she rarely used that name. She had a difficult time having the brother's financial institutions recognize the document.

Principal / Agent Relationship

As Mr. Sullivan noted, powers of attorney come in two flavors. The client (Principal) may designate someone (Agent) to have immediate authority to handle the principal's financial affairs. Spouses will often grant each other immediate authority, which is convenient, notably if one spouse handles investments on both spouses' accounts.

In addition to signing any broad general financial power of attorney applicable to all of a client's assets, a client should in this case also:

Sign the power of attorney forms developed by the various financial institutions where they maintain assets. Financial institutions more readily recognize authority granted on their own forms as they have been vetted by their legal counsel and the institutions have more confidence that the principal was fully competent when delegating the authority.

Read through the institution's forms carefully as they tend to be quite broad. For example, they may authorize margin accounts and authority to invest in a wide variety of derivative contracts; the principal may want to delegate more narrowly circumscribed authority.

"Springing" Power of Attorney

The institution's forms are typically available, however, only if the principal is willing to delegate immediate authority to his agent. A principal may want authority delegated only if his or her physician signs something indicating that in the physician's medical opinion, the principal can no longer manage his or her financial affairs. This form of power of attorney is often called a "springing" power of attorney because the agent's authority only springs into effect if one or more physicians write the requisite letter. Some physicians are willing to sign this type of letter and some are not. More importantly, some individuals, as they begin to lose executive function and judgment, are willing to acknowledge their diminishing faculties and be examined by their physician, while others are not.

Autonomy vs. Self Esteem

As older individuals begin to lose various strengths (hearing, vision, physical mobility and mental capacity), they often fear their loss of independence and power and have difficulty accepting the change. If the individual fails to recognize or accept his or her diminishing judgment, he or she may be unwilling to be examined by a physician. In that situation, often a guardianship is the only available remedy to a difficult situation.

There is also the delicate balance between maintaining an older individual's autonomy and self-esteem, even at some financial loss. Families differ on how they balance competing personal and financial goals as a family member loses capacity.

Power of Attorney Roadblocks

Mr. Sullivan also raises the issue that many financial institutions erect multiple roadblocks in recognizing powers of attorney. The institutions have legitimate liability concerns for wrongly accepting a delegation of authority. On the other hand, individuals have legitimate concerns in planning for their own diminished capacity. As Heather Flanagan, a lawyer and senior wealth planner at PNC Wealth Management, noted in Mr. Sullivan's article, "powers of attorney were initially a basic, low-cost way for someone without a lot of money to do some planning."

Recognizing this tension, Maryland enacted an innovative statutory power of attorney system. Essentially, if an individual signs a power of attorney document that is substantially in the same form as one of the two statutory forms, and if a court determines that a financial institution has wrongfully failed to recognize the authority of the designated agent, then the financial institution may be assessed the legal fees and costs of both sides. The law also provides the financial institutions some protection against the risk of fraudulent assertion of financial power. Of course, the whole point of this carrot and stick approach is to avoid litigation and give financial institutions the comfort to recognize validly executed statutory documents.

Anecdotal evidence is mixed. Some individuals claim that financial institutions now charge fees to "review" the statutory documents and still erect some roadblocks before honoring the delegation of authority. Other individuals are finding that these statutory forms are helpful in minimizing the roadblocks that historically were raised by some financial institutions.

 | 4800 Hampden Lane, 6th Floor, Bethesda, MD 20814-2930 | 301-656-7603 | 301-654-7354 fax www.paleyrothman.com