Understanding the Importance of Power of Attorney Documents

Kathryn Beck and Monica Davidson

A power of attorney (POA) is a legal document that grants a person(s), known as the agent, the authority to act on behalf of another person, known as the principal, in various matters. This authority can cover a wide range of actions, from managing financial affairs to making health care decisions. Without a POA, a conservator or guardian might need to be appointed for the principal.

A financial POA grants the agent the authority to manage the principal's financial affairs, such as paying bills, managing investments and selling property. Most often, attorneys use general durable powers of attorney. A durable POA remains in effect if the principal becomes incapacitated. This type of POA ensures that the agent can continue to manage the principal's affairs without interruption, even when the principal is unable to make decisions due to illness or injury. In Kentucky, a POA created under KRS 457 is durable unless the document expressly provides otherwise. *See* KRS 457.040.

As to when the POA becomes effective, it can either be effective immediately or upon the occurrence of a specified event, typically the incapacitation of the principal. The latter provides a safeguard, allowing the principal to retain control over their affairs until the triggering event takes place. This is commonly referred to as a springing POA. In Kentucky, unless the document indicates the POA is to become effective at a future date or upon the occurrence of a future event or contingency, it is effective immediately. *See* KRS 457.090.

For health care decisions, the key documents usually include a health care POA, Health Insurance Portability and Accountability Act (HIPAA) authorization and living will. A health care POA allows the agent to make medical decisions on behalf of the principal, such as consenting to or refusing treatment and selecting health care providers. The HIPAA authorization ensures that those named in the authorization have access to your medical records. Without HIPAA authorization, they might face obstacles in obtaining necessary information to make informed decisions. A living will outlines your preferences for medical treatment in critical medical situations, such as life sustaining support and hydration and nutrition. It often works in conjunction with the health care documents to ensure comprehensive coverage of your medical wishes.

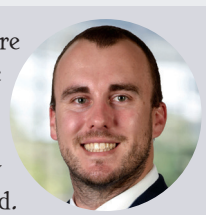
Understanding the fundamentals of POA documents is important for effective estate planning. Below, estate planning attorneys in Louisville – Jeremy P. Gerch at Dentons Bingham Greenebaum, Katherine P. Langan at Stoll Keenon Ogden PLLC, Matthew H. Burnett at Dinsmore & Shohl LLP, Phillip A. Pearson at McBrayer PLLC, and W. Seth Todd at Wyatt Tarrant & Combs LLP – answer common questions regarding POAs.

What advice do you give when helping clients choose who to name as POA or health care surrogate?

JEREMY: It is such a personal matter, and so my advice is to name someone who you think can handle the matters and will do what is in your best interest at every step.

MATTHEW: Make the decisions as if you were going to become disabled *tomorrow*. I see a lot of the following line of thinking: "My kids are in their late teens, but by the time I am old and disabled, I'll feel comfortable with them being my agent or health care surrogate." I wouldn't recommend that – if you aren't comfortable with your young children acting as your agent or health care surrogate *right now*, do not name them. You can always update your designations later.

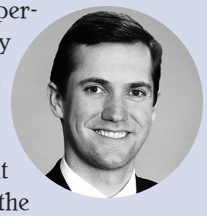
PHIL: Pick the best person available. That isn't necessarily the oldest child. This is no honor bestowed, but a "burden" on the family member or friend, so pick the person who will do the best job. For example, if one child lives in California and one lives here in Kentucky, it might be best to choose the "local" child, as the usage of these documents often comes from emergency situations.



SETH: Whoever you name as agent under POA or your health care surrogate, we have to trust them completely. These individuals have substantial power to act on your behalf, and if we don't trust them 100% now while you have capacity, why would we trust them when you are incapacitated and they have little oversight? Particularly with the agent under POA, you want them to be extremely organized.

Is it a good idea to name co-agents?

KATIE: This depends on the family situation. Often if I have clients with adult children in different cities, I advise appointing them jointly and severally, assuming that is otherwise appropriate, so that they do not have to have multiple signatures and either child can act. This makes things much easier to administer when the time comes. If parents want to make sure their kids agree on everything and that both are involved, then we appoint as co-agents, not joint and several.



MATTHEW: It can be. I typically like to recommend naming one person at a time if it makes sense. However, if a client has a physically ailing spouse but the client feels emotional about not including them on their documents, the client can name the ailing spouse and the client's children jointly and severally. Or if the client has children who live all over the country but nowhere near the client, the client could name all of the children jointly and severally (each with the authority to act independently of the other, i.e., they do not have to act unanimously – so, whoever is around and available to assist at a given time would have authority to do so). If a client wants to name co-agents who must act unanimously, I typically try to encourage the client to instead name one agent at a time. With unanimous co-agents, you are just asking for an eventual disagreement between two people who have equal decision making authority over your care. Too many cooks in the kitchen.

PHIL: No. There is a reason "too many cooks in the kitchen" is a saying. People often have differing opinions, and if there are two agents, this could lead to a fight deadlock. Sometimes, people want their agents to work "jointly and independently," but a lot of banks and hospitals don't like these arrangements, because they don't know who has the ultimate authority.

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Is it best to combine the health care surrogate and HIPAA authorization with a POA, or should these documents be separate?

JEREMY: I tend to separate them out. I do not see any reason why a hospital or medical facility would need to have a copy of anything other than health care specific information/authorizations.

KATIE: I typically use a Health Care Power of Attorney, Living Will Directive and potentially a separate HIPAA Waiver. If, for example, I have someone who wants a spouse to be agent but wants spouse and children to be able to speak with doctors and get health information, then I use a HC POA that does not include HIPAA waiver language, and use a separate HIPAA waiver that gives authorization to the broader group of people.

PHIL: I prefer separate documents, as I believe the institutions relying on them do as well. Hospitals prefer a separate health care surrogate and HIPAA document for their records. I think they are valid if combined, but it could muddy the water with the institutions and we never want to set up a scenario where the document is refused.

Can a POA make gifts?

PHIL: I'm fine with POA making gifts, but it should be pointed out to the client. There are many good tax reasons to grant this power, but it needs to be clear to the client what the ramifications might be. And, if the client doesn't feel comfortable, then to take out this power. I tend to draft to "empower good actors," instead of "bad actors," as I'm of the opinion that a bad actor is going to take the money, regardless of the what the document might say.

SETH: My preference is always yes, including adjusted taxable gifts. I do put limits on the gifts to include that it either must align with the principal's estate planning or be directed to their spouse or descendants. The gifting power can be extremely useful if Medicaid planning is needed.

Kathryn Beck is a Member of Stoll Keenon Ogden PLLC. She focuses her legal practice on business services and litigation, as well as trusts and estates and trust and estate litigation. Beck serves on the Firm's Board of Directors and chairs the Personnel Committee. She received her JD from the University of Kentucky College of Law.

Monica Davidson is the Senior Vice President and Director Trust and Estate Settlement at Baird Trust. She focuses on estate administration and client service. Davidson received her JD from the University of Louisville Brandeis School of Law.

Beck and Davidson are co-chairs of the LBA Probate & Estate Section. ■

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