

Power to the POA: The Importance of Updating Your Durable Power of Attorney

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You say you want a revolution, we better get on right away, well you get on your feet and get out in the street and update that durable power of attorney (POA).

All right, so the words of John Lennon's 1971 ballad were slightly different, but they stress the urgency of the situation. An updated durable power of attorney (POA) is unquestionably one of the most critical elements of an effective estate plan—revolutionizing the way your estate and finances are managed.

A durable POA is a powerful instrument indeed. By authorizing an agent to perform certain financial actions and take care of legal matters on the principal's behalf, a POA provides that agent with control over crucial decisions. It's essential, then, that your agent be trustworthy. It's often said that you should not entrust anyone with your POA who wouldn't entrust you with theirs.

A durable POA is prepared as part of your comprehensive wealth and estate planning process. However, your circumstances change with the passage of time, and a durable POA drafted years ago may no longer reflect your desires. In addition, the power in a POA is a double-edged sword: Power can be abused, and the impact can be devastating. In fact, POAs are one of the leading sources of fraud and financial abuse of elderly, sick, and disabled individuals in our country.

In response, a number of states have modified their laws in recent years to impose specific requirements on the authority durable POAs confer upon their agents and the fiduciary duties of those agents. To provide further protection from misuse of these instruments, many financial institutions have implemented policies and practices regarding the acceptance and recognition of powers of attorney.

As a result of changing personal circumstances and evolving laws and practices, clients often find that the POAs they executed years ago will not function as intended when needed the most.

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Selecting your agent: The right choice can change over time

As we've noted, the agent named in your durable POA plays a critical role in carrying out your wishes and acting on your behalf. Choosing an agent, though, is not a one-time event, and you may find your original selection is no longer the best option.

For example, a typical and prudent arrangement for a number of healthy, married couples is for the husband and wife to name each other as their respective agents. For many elderly couples, however, when one spouse passes away, the other spouse may already be in a weakened state of physical and/or mental health. Unfortunately, the first-named agent under the spouse's POA drafted years ago is the now-deceased spouse.

Financial institutions will likely not accept the original POA document on its face without requiring the second-named agent to prove his/her authority. This will typically require producing a certified copy of the death certificate of the deceased spouse.

Couples with children can also encounter problems with outdated durable POAs. At the time of execution of a POA, young parents often name their oldest child as the second-named agent under their POAs. The operating assumption is that age is synonymous with financial maturity and acumen. However, by the time a POA becomes necessary, the oldest child may not be the most financially savvy of the children. It may also be that the oldest child now lives at a distance from the parents or otherwise is simply not the most logical or practical choice to serve as agent.

When parents have multiple children who are viable candidates to serve as agents under their durable POA, careful consideration should be given to the role each child will play. Will one have priority and be named the first agent, with the others designated as second and third alternates? If co-agents are desired, are they required to act independently or must decisions be unanimous? Under many states' law, for example, a principal may designate two or more persons to act as co-agents; unless the POA provides otherwise, each co-agent may exercise his/her authority independently.

Differentiating powers in a POA

While most older durable POA documents were written somewhat generically to confer agents with a broad range of financial powers, financial institutions are aware of the growing problem of abuse of elderly, sick, and disabled individuals. As a result, these institutions are increasingly reluctant to honor a durable POA that is used to execute a transaction that isn't completely routine.



Many states have enacted POA legislation to differentiate general powers from hot powers under a durable POA. Hot powers are those extraordinary powers an agent cannot perform unless the POA expressly authorizes them. A partial list of these powers includes:

- The authority to create, amend, revoke, or terminate an inter vivos trust
- The ability to make gifts on behalf of the principal in excess of the annual exclusion amount (\$15,000/year)
- The power to create or change a beneficiary designation
- The ability to delegate authority granted under the power of attorney
- The power to waive the principal's right to be a beneficiary of a joint and survivor annuity benefit under a retirement plan

Defining your agent's interaction with assets

For clients funding their revocable trusts in order to avoid some of the costs and inconveniences of probate, they should carefully evaluate the ways in which they want their agents to interact with the trust assets in an end-of-life situation. This includes assessing the tax implications of such interactions. Also, the terms of the revocable trust should mirror the language of the durable POA with respect to an agent's authority.

While the ability to deal with retirement plans in a broad range of ways is a general power, clients may benefit as a practical matter by expressly listing the ways in which they want their agent under a durable POA to interact with their retirement account, e.g., altering minimum distribution and/or withdrawal decisions, revising the investment strategy, or changing the beneficiary designation. It's important to be precise: The financial institution holding your individual retirement account (IRA) may balk at an agent's transaction request unless it is clearly spelled out in the POA.

Updating your durable POA and estate plan

An up-to-date durable POA is an important part of your overall estate and wealth plan. However, a 2019 Key Private Bank Advisor Poll on estate planning found that 60% of advisors say half or fewer than half of their clients have reviewed their plans in the last five years.

In the words of the great John Lennon, "well you get on your feet and out on the street" and make sure you take action. Revisit your power of attorney regularly. Introduce your POA to your advisors and be sure to communicate with them as a component of your estate plan. Bring your durable POA into the fold and make sure your beneficiaries have an open dialogue with them about management of funds and your wishes. Power to the POA, right on!



About the Author

As Director of Family Wealth Consulting, Tim Malloy focuses on the estate, philanthropic, and business succession needs of Key Private Bank clients. He has over 30 years of experience

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Tim specializes in providing strategic advice for: business ownership transitions, complex financial and estate planning, establishment of philanthropic foundations, and the formation of trusts to mitigate taxes and help Key Private Bank clients accomplish their values-based financial goals.

Tim graduated cum laude (BA in Philosophy) from the University of Notre Dame, and holds a J.D. from Georgetown University Law Center. He is a Certified Exit Planning Advisor and a Chartered Advisor in Philanthropy.

To learn more about creating a process and schedule for updating your durable POA and estate plan, **contact your Key Private Bank advisor.**



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