



OLD NORTH STATE TRUST, LLC

POA Pitfalls: Potential Problems to Ponder in Granting Powers of Attorney

In our work of helping people manage their financial affairs, we constantly wrestle with a legal tool that's often misunderstood, and sometimes misused. We're talking about the POA, which can stand for either "power of attorney" or "power of appointment."

The legalities are complex and can be eye-glazing, so we won't get too deep into the technicalities. We do want to make the case that exercising a POA can be a tricky problem for someone who doesn't have the expertise to handle it properly. There's also the danger that mismanaged POAs can create huge problems and ill-will in families.

The best way to think about a POA is that it's a document. It may be part of a will, or could be a stand-alone piece of paper, depending on which acronym it stands for. Either way, it grants to a person or a company the right to act in someone's behalf. That person or company becomes "attorney in fact," who can make certain decisions about certain assets. (That doesn't mean a lawyer; an "attorney at law" has a very different sort of relationship to the client.) Where this gets even more confusing is that these attorneys in fact are often referred to (incorrectly), for convenience, as POAs.

Are your eyes glazed over yet? We understand, but bear with us, because it's important to understand how this arcane business can create a crisis.

First, a simple example. If your mother named you as her attorney in fact, the document she signs is the POA. It might be what the law considers a "limited" POA, the most common type. Maybe she's going to be out of the country and needs you to be her attorney in fact in case she needs something done while she's gone. Or maybe she needs you to sign a deed on her behalf and doesn't want to have to travel back just to write her name on the dotted line.

The other type, a "general" POA, lasts longer and grants more powers. For instance, if your father recognizes that he is developing dementia, he would need a POA that would remain in force even into his incapacity. Because it lasts, this instrument is called a "durable power of attorney." That would let you act on his behalf when he couldn't do so for himself.

A somewhat different wrinkle, a "general power of appointment," is something built into a will or trust, and governs what happens when the grantor or primary beneficiary dies. The person named in this type of POA has the power to name other beneficiaries to receive the remainder of the estate or trust. The key word in this is "general," because it gives POAs carte blanche to do whatever they want. Before we get too far into the weeds on this, let us offer a cautionary example.

In two different cases we've handled recently, with family members at odds with each other, conflicting POAs created disastrous situations. A POA is controlled by state laws, which

means each state recognizes its own POA. That also means that you can create as many POAs as you want—and name as many attorneys in fact as you want! Now that might not be a problem if those POAs are all carefully limited and define responsibilities that don't overlap or clash. But too often that's not how it works.

And if you should decide to name somebody new to act on your behalf, be sure to revoke any previous POA. If you don't, every one of those dueling attorneys in fact can act in your name, often at cross purposes.

We worked with a family in which the father was the one who handled all of the finances. As so often happens, he died first, and his widow soon developed dementia. One of the couple's four children moved in to take care of her mom and was named attorney in fact. The other three siblings lived in other states. But then, while the mother was visiting her two sons in Pennsylvania, they decided to keep her there. Despite her full-blown dementia, they took her to a lawyer and got her signature on a POA. This named one of the brothers as her attorney in fact. Suddenly this woman had two POAs in two states, and two different people empowered to make decisions for her.

Meanwhile, the daughter here had been paying all the bills, writing checks on an account in her mother's name. Suddenly she couldn't do this, as the brother had the bank account changed to his name. He accused his sister of stealing money from their mother.

We knew that wasn't true, but rules of confidentiality didn't allow us to say anything to the brother. To resolve this mess, we called a family meeting and told them that we couldn't work with any of them. Because of the conflicting POAs, we warned them, their mother would be the one to suffer.

Finally, the feuding siblings agreed to let our company be their mother's attorney in fact and returned her to her home here. Working everything out came at the cost of hard feelings within the family and a lot of stress on the mother.

Had the parents done better planning much earlier, this family crisis could have been avoided.

Some take-aways from this:

- You can't know who will die first, that's why we always say, "Plan for the worst and hope for the best."
- It's essential that the POA is held by a completely trustworthy person or institution. You can't always trust even your loved ones to do the right thing.
- A disinterested third party is sometimes the only way to go.

Aside from having no stake in family disputes like we just described, a professional management company like Old North State Trust has one other important asset, that is our expertise in the tricky legalities and practicalities of POAs.

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