

The Durable Power of Attorney for Property (DPAP) is one of the most useful and essential parts of an estate plan; it is also often one of the most overlooked. This article will explain why every comprehensive estate plan should include a DPAP.

The main purpose of a DPAP is to allow an individual (the “principal”) to appoint someone as his or her agent, to manage his or her financial assets in the event he or she becomes incapacitated (whether physically or emotionally). In addition to the DPAP, the two most common methods for dealing with a disabled person’s assets are guardianship and the use of a funded revocable trust.

On the other hand, the negative aspects of a guardianship proceeding may actually be valuable in certain situations. As mentioned, sometimes the disabled individual is unwilling to admit their disability and relinquish control of their assets voluntarily. Having court involvement also provides judicial oversight that may be welcomed when, for example, family members do not trust each other to do what is best for the disabled relative.

The second tool that is commonly used to facilitate the transition of management of one’s assets in the event of disability is a revocable trust. The use of a funded revocable or “living” trust avoids the pitfalls associated with guardianship proceedings. The



BACK TO THE BASICS

The True Value of the Durable Power of Attorney for Property

By Stuart Kohn

With a guardianship, the court appoints a guardian who is authorized to manage and protect the disabled person’s property. Often times the guardianship process is the least desirable alternative because it can be contentious, time-consuming and expensive. The first step that must be taken involves having the disabled individual declared incompetent. This means that the family must seek the court’s declaration that the individual is no longer able to handle his or her affairs, often a determination that the individual vehemently contests. Emotions may run high. Relatives may be vying for control of the disabled individual’s assets. There is also a loss of privacy with a guardianship because the proceeding is public, allowing nosy neighbors or relatives an opportunity, with relative ease, to know what the disabled individual’s assets are and the details of the disability.

Inherent with guardianship court proceedings are delays in the process due to filing requirements, court schedules and the need to allow all interested parties an opportunity to participate in the process. In addition, even after the guardian has been appointed, he or she will be required to make annual filings of inventories and accountings. Investment powers are limited. Costs can escalate rapidly with a guardianship. Aside from the costs to care for the disabled individual, there will be attorneys’ fees, court filing fees, and the cost of the necessary bond (insurance policy) for the guardian.

revocable trust names a successor trustee whose responsibilities include managing the trust’s assets for the benefit of the settlor of the trust while the settlor is alive. Most often, at least initially, the settlor is his or her own trustee. Generally, the trust document provides that a successor trustee is to take over in the event of the incapacity or death of the settlor. The document also usually sets forth the mechanism to be used to determine whether the settlor is disabled and should no longer act as trustee. Once that determination has been made, the transition to the successor trustee can be relatively seamless, particularly compared to the guardianship proceeding.

The real value of the revocable trust can only be achieved, however, if the trust was funded prior to the onset of the settlor’s disability. The trust document only governs those assets that have been re-titled in the name of the trust. That is where the most emphasized benefit of the DPAP comes into play: The DPAP can be tailored to specifically allow the successor trustee to re-title the settlor’s assets in the name of the revocable trust in the event of the settlor’s disability. Once those transfers have been accomplished, the successor trustee of the trust takes over, distributing the assets to or for the benefit of the settlor during his or her lifetime.

Many practitioners emphasize this use of the DPAP to fund the revocable trust as the only real reason to have a DPAP as part of the estate plan.

There are, however, a number of additional uses of the DPAP that warrant the creation of a DPAP as part of every estate plan, even if the revocable trust is or will be funded. Not every asset can be transferred to a revocable trust. For example, retirement plan assets are already, in effect, in a "retirement" trust. Other assets, such as tangible personal property, do not have titles by which they can be transferred. Signing tax returns, safe deposit box and post office box transactions, dealing with social security or military service benefits, and personal insurance claims or litigation, are all generally outside the realm of the revocable trust. More often than not the only effective way to handle these transactions is through the use of a DPAP.

Because of the increased use of the DPAP over the years, and the resulting need for oversight and standardization, most states have adopted statutes governing the DPAP. The applicable statutes generally lay out the specific guidelines for the use of a DPAP and provide a recommended "statutory" form. These statutory forms have streamlined their acceptance; financial institutions, title companies and others that regularly see the forms know what the statutory forms provide. As a result, when presented with a statutory form, the institution can act on the form quickly, generally without the need for detailed review by a legal department.

These institutions see thousands of DPAPs per week, and, therefore, they try to scrutinize as few as possible.

Problems can arise, however, if the statutory form is changed. While modifying a statutory form, or creating a different form, is certainly contemplated by the applicable statutes, such actions can cause delays in the handling of the required financial transactions, removing one of the primary benefits of the use of the DPAP. Certain modifications, such as the naming of co-agents, are sure to raise a red flag with the financial institution, causing delays while the form is sent off for legal review. Therefore, care must be used when preparing the DPAP to ensure that, where possible, the benefits of the DPAP are not vitiated by careless drafting.

The DPAP should not be relied on as the sole protection against disability and is not and should not be the sole document in one's estate plan – it is most effective when included in a comprehensive plan. At the same time, an estate plan is not complete unless it includes a DPAP, as there are certain situations that can only be addressed with a DPAP, short of full guardianship proceedings.

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