

How to Use a Power of Attorney to Care for Your Aging Parents

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It's common for aging parents to need some help with their business and legal affairs. Adult children frequently reach this conclusion at the beginning of a new year, after they have spent time with their parents over the holidays.

Many adult children choose to assist their parents by opening joint bank accounts with them. However, this is not the best option, because it can result in unwanted legal problems that can later become intractable. Joint accounts are normally set up with "survivorship" rights, so that if the parent dies, the remaining child on the account is legally entitled to the remaining assets. If that child has siblings, this child's inheritance of the account assets outside the will may be in direct conflict with how the parent's inheritance is divided in the parent's will document. Even if the parent does not have a will, N.C. laws of intestate succession, which govern inheritance for people without a will, may directly conflict with the adult child's receipt of the remaining joint account proceeds following the parent's death. Either problem may be difficult to fix, and can create unpleasant disagreements that lead formerly congenial family members to litigate against each other. The best solution is to use a durable power of attorney (also called a "financial power of attorney" or a "general power of attorney"—a durable POA (in short) which offers the most economical and legally straightforward method to assist aging parents with their business and legal affairs. The person who signs the durable POA document, called the "principal," grants significant powers to an agent or agents, allowing them to manage the principal's business and legal affairs. In order for this document to be legally valid, the principal must be mentally competent, or have "capacity" (the mental ability to comprehend both the nature and consequences of one's acts) when he or she signs the document. Before the document may be used by the selected agent(s), it must be properly recorded in the appropriate county Register of Deeds office.

It is a frequent misconception that durable POA documents are designed only to allow the agent to assist an aging parent following his or her incapacity (mental incompetence). Most become "live" when the principal signs and executes the document. Thus, these documents allow the agent(s) to start helping the principal right away, without waiting for the principal's incapacity. If used correctly, this type of durable POA provides the most flexibility to both parent and child.

- Banks and other financial institutions are very familiar with durable POA documents and accept those that are properly and professionally prepared.

Beware of versions of durable POA documents available on the Internet. Legal fees to an estate planning attorney or elder law attorney for properly prepared, executed and filed durable POA documents are normally very modest. Unless you are a legal professional, you can't judge the quality of a form that you download from the Internet.

When a bank receives a POA document, it is carefully reviewed by the bank's legal professionals, who will only accept a document that is proper in every way. If the bank rejects your Internet durable POA when your family needs it, and your parent is no longer competent, the family may then be forced to resort to a much more expensive and complicated guardianship proceeding before a family member is able to legally take care of the impaired parent's business and legal affairs.

Estate planning attorneys and elder law attorneys normally try to screen out improper family members from serving as agents or "fiduciaries" on behalf of their clients. (For example, I have had to remove a family member addicted to hard street drugs from serving as a fiduciary for a client.) A durable POA becomes highly dangerous in the wrong hands—it can give away the principal's keys to his entire financial portfolio. It is essential to keep the durable POA in the hands of only honest and proper agents.

Another more costly alternative is to create revocable living trusts, with children serving as co-trustees with the parents. This type of estate planning is more expensive and complicated, and should only be conducted with the assistance of an experienced estate planning or elder law attorney.

