

Surrogate Financial Management Planning with Powers of Attorney and Revocable Trusts

In our [last article](#), we focused on the importance of lifetime planning for Mature Single Individuals and some of the impediments they face in accomplishing such planning. This article focuses on financial management planning alternatives for persons confronted with potential health crises and incapacity.

The Deceptive Ease of Creating a Power of Attorney

Because it is relatively easy to designate a surrogate to manage and control one's property by means of a document called a "power of attorney", a court-supervised guardianship of the property of a disabled person generally means that either the person failed to plan effectively for his incapacity or that he or she had no available potential surrogates from which to choose. In a power of attorney, a "principal" grants authority to an "agent" or "attorney in fact" to act for the principal. In the case of a power of attorney for property and/or financial management, the authority granted is to act with respect to the principal's property for the benefit of the principal. Under the [Maryland General and Limited Power of Attorney Act](#) ("the Act"), the agent has a legal duty to "[a]ct in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the best interest of the principal; [to a]ct with care, competence and diligence for the best interest of the principal; and . . . only within the scope of authority granted in the power of attorney." Unless otherwise provided in the power of attorney, the agent has a further legal duty to "[a]ct loyally for the principal's benefit; . . . [and] so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest; ..."

The Act facilitates the designation of naming such an agent by including two statutory forms that can be used for this purpose. However, when designating a surrogate, it's extremely important to pay attention to the details of what is provided in the power of attorney document. Because powers of attorney are such powerful instruments, the Maryland Court of Appeals has long held that it is a "well settled" rule that powers of attorney are "strictly construed as a general rule and [are] held to grant only those powers which are clearly delineated" in the instrument. One cannot merely designate that his agent has "all the powers that I have" in a simple one-page document without designating specific authorities for specific types of property. As a result, while they will work in many common situations, one cannot rely on use of just one of Maryland's statutory form powers of attorney for effective management of all potential situations. For example, the commonly used "[Personal Financial Statutory Form](#)" includes no provisions with regard to dealing with tangible personal property or business assets, and neither statutory form includes effective gifting authority to enable the agent to engage in effective tax or Medicaid planning. Maryland attorneys typically use two property powers of attorney for their clients: one of the statutory forms for ease of enforceability in

the common situations an agent is likely to face that are covered in the statutory form and a second, supplemental power of attorney for the special situations that the statutory forms don't cover.

A problem may occur with regard to when an agent is first allowed to exercise authority. Under the Act, unless the principal provides in the document that it becomes effective at a future date or on the occurrence of a future event or contingency, a power of attorney is effective when executed. Such immediate effectiveness can be contrary to the intent of the Mature Single Individual who wants to name a surrogate but, because of the parties' relationship or lack thereof, does not want to give that person immediate control over her property. While signing a power of attorney does not relinquish the principal's rights with regard to property, allowing someone else to have that control as well can be unsettling. In such cases, the person planning for a surrogate may want to employ a "springing power of attorney" that only becomes effective upon a designated future event or contingency (such as incapacity).

Pitfalls When Utilizing Springing Powers of Attorney

While springing powers of attorney are recognized in Maryland, they are not without problems of their own. As with any power of attorney, there is always a fear by banks and securities brokers that they may somehow be found liable for giving credence to a power of attorney granted fraudulently or after a disqualifying incapacity has already occurred. In the case of springing powers, there is an added concern as to whether the event initiating the power of attorney's effectiveness has actually occurred. For example, if a power of attorney states that it is not effective unless the principal is incapacitated, how does bank teller know whether this is the case? When a springing power of attorney is deemed to be appropriate, it is always better to specify an ascertainable contingency such as when two licensed doctors make a specific written certification rather than just defining the springing event as one without requiring tangible evidence conclusively proving that the event has occurred.

A second related problem with springing powers is that they are not recognized under the laws of some states. In Florida, for example, the banking industry convinced the Florida Legislature in 2011 that dealing with springing powers of attorney was so difficult that it would be better not allowing them at all. While this situation is probably not enough to preclude a Maryland resident from using a springing power of attorney when nervous about his or her potential agents, the questions involved in using such powers should not be ignored.

One poor alternative when worried about an immediately effective power of attorney while at the same time wishing to avoid the problems of springing powers is that of executing an immediately effective power of attorney but giving all copies of the document to a third person (such as a friend or an attorney) who is to decide when it's appropriate to provide the agent with the power of attorney document. In essence, this is creating a fiduciary to decide when to empower a surrogate. This alternative makes little sense. Who would want to subject himself to the potential liability of making a wrong decision about a potentially untrustworthy agent? What does the decision-making

fiduciary do if the designated agent declines to serve when the decision is made? How does a financial institution know whether the principal intended the agent's authority to be effective if the instrument was dated years before. Does the designated agent not already have effective powers even though he or she may not know what the document says?

Planning for the Needs of More than One Person

One final problem with using powers of attorney for surrogate property management is that they have historically been used only for managing property and financial assets for the benefit of the principal granting them and not for others as well. A person might want his or her agent to exercise authority with regard to his or her assets for the benefit of someone else, such a spouse, an elderly parent, or a disabled child. This problem becomes even more cumbersome if a principal wants his property used for the benefit of both himself and the person he or she designates to serve as his agent. Without specific language to the contrary in the power of attorney, the agent's duty of loyalty to the principal in this situation will prohibit him or her from using the principal's assets for the agent's benefit. While a principal may include language making clear what his wishes are and who he wants his assets to benefit, there is little or no law making it clear how a court (or financial institution) will interpret the agent's authority to share the principal's property benefits.

In short, financial powers of attorney are relatively easy to implement but not without pitfalls that can minimize their utility.

Using Revocable Trusts for Surrogate Property Management

Revocable trusts have long been touted as desirable to allow a decedent's family to avoid probate after the decedent's death. Mature Single Individuals may not, however, place much value in avoiding probate after their death or, in fact, may welcome probate as a means of making sure their designated [Personal Representatives](#) carry out their wishes. What is often overlooked is the very real utility of revocable trusts for Mature Single Individuals to allow them to maintain control of their assets for as long as possible before giving a fiduciary surrogate authority to manage them in their behalf. This utility derives from the rich and extensive history of revocable trusts as fiduciary mechanisms for carrying out the wishes of the trustmaker, the nature of trusts as relationships designed to accommodate changing situations over extended periods of time, and courts' familiarity with the use of trusts to take care of multiple parties. The shortcomings of powers of attorney noted above are routinely handled using revocable trusts.

By means of a revocable trust, the financial surrogate (i.e., the successor trustee) is not vested with authority unless and until the events designated by the trustmaker occur. Until that time, the trustmaker can act alone or with a supervised co-trustee. Financial institutions rarely question how a successor trustee (as surrogate for the original trustmaker/trustee) exercises authority over assets held in trust when they have had ample opportunity to see how the original trustmaker intended that authority to be put to work. And in those rare case where probate is desired to provide court

oversight to assure appropriate postmortem distribution, the trustmaker can provide that the revocable trust be added to her estate to be distributed in accordance with her will.

In conclusion, the importance of making plans for the occurrence of incapacity cannot be overstated. In addition, it is relatively easy to name a surrogate for management of your property and finances if and when incapacity occurs. However, this process is not without potential pitfalls and should be guided by an experienced professional. We welcome the opportunity to serve you in this role.