

Power Grab!

Signing Over Power of Attorney to a Loved One Has Never Been Trickier. Here's What You Need to Know.

By Kelly Greene And Jessica Silver-Greenberg – May 14, 2011

A time-tested method to protect assets as people age is starting to blow up on baby boomers.

The “power of attorney,” a legal arrangement that helps older people turn over management of their finances or other business matters to family members or friends, is emerging as a vehicle for fraud.

What to Do:

- Set up your power-of-attorney to ‘spring’ into effect only after you’ve become incapacitated.
- Renew your agreement regularly so it doesn’t get stale.
- Build in controls requiring all of your children to sign off on big financial moves.
- Prepare separate documents for every state in which you spend time.
- Set up a “fallback trust” to kick in if your power-of-attorney agreement breaks down.

Not long ago, such documents were rarely challenged or exploited. But prosecutors and elder-law attorneys say the number of cases of adult children purloining assets from parents’ accounts is rising. That is prompting lawmakers to turn their attention to power-of-attorney abuse—often the first step in a swindle.

Banks, for their part, have started rejecting financial maneuvers made under the cloak of a power of attorney, for fear of being parties to fraud. “Even with perfectly executed power-of-attorney documents, it’s still hard to get banks to honor them because they are concerned about their own liability,” says Rial Moulton, a Spokane, Wash., estate-planning lawyer.

The lesson for anyone entering into a power-of-attorney arrangement: Vigilance is essential. There are ways to bulletproof these legal documents to improve the chances that banks will honor them—and that loved ones won’t misuse them. But it takes careful planning.

Power-of-attorney abuse garnered national attention after the 2007 indictment of philanthropist Brooke Astor’s son for trying to “unjustly enrich” himself. The son was convicted in 2009 of grand larceny, among other counts, for using a power of attorney to increase his own salary, ultimately siphoning more than \$1 million from her. He is appealing the verdict.

There are few comprehensive statistics tracking power-of-attorney abuse per se, but the MetLife Mature Market Institute, a research unit of insurer MetLife Inc., in 2009 put the annual financial loss suffered by victims of elder financial abuse, including exploitation of powers of attorney, at \$2.6 billion. It was MetLife’s first such study; it is currently working on a follow-up.

A burst of legislation in the past few years has taken aim at the problem. Sen. Herb Kohl (D., Wis.) in March introduced a bill in the Senate that would create an Elder Abuse Victims Act. A similar bill soon should be introduced in the House of Representatives, says Robert Blancato, national coordinator of the Elder Justice Coalition, an advocacy group pushing to protect older people from abuse.

“People with power of attorney are trusted by those in their care. These are the worst kinds of crimes, ranging from credit-card fraud and forgery to outright theft,” Sen. Kohl says. “The Elder Abuse Victims Act will help law enforcement to identify and prosecute these crimes more effectively.”

Local regulators and state lawmakers are beefing up legal safeguards as well. New York, for example, has strengthened its protections during the past two years. Now it allows adults to name outside monitors in their power-of-attorney documents, to whom agents must provide regular accounting reports. The state also adopted a much more specific standardized power-of-attorney form.



John Kuczala

Regulators started raising concerns about the patchwork of state laws governing powers of attorney even before the financial crisis. In 2006, the Uniform Law Commissioners, a national group of state-law experts, approved the Uniform Power of Attorney Act, which gives bank employees greater protection from civil lawsuits, allowing them to exercise more discretion in deciding which powers of attorney to honor or refuse. Nine states have adopted the law, says Lori Stiegel, a senior attorney with the American Bar Association’s Commission on Law & Aging.

Banks and brokerages, meanwhile, are taking matters into their own hands, imposing tough new hurdles on power-of-attorney claims. Firms have started rejecting documents that were signed more than six months ago, that are from out of state, or for other reasons, say attorneys—making it much tougher for well-meaning adult children to take the reins when their parents’ health falters.

“In the old days, a strongly worded poison-pen letter threatening a lawsuit would work,” says Kristen Lewis, an estate-planning attorney with Smith Gambrell & Russell in Atlanta. “But in recent years, it has not done the trick.”

Janette Chisholm, for example, whose 69-year-old mother in suburban Detroit suffers from dementia, in the past two years has used a power of attorney, with help from her mother’s bank-branch manager, to reduce her mother’s credit limits. But the same bank, which also holds the mother’s home-equity credit line, has refused to send the bills to a lawyer now in charge of paying Ms. Chisholm’s mother’s bills, she says. “It really upsets my mom,” she says.

In many power-of-attorney lawsuits, the legal fees pile up quickly as adult children battle with financial institutions’ legal departments. In a recent Florida case, Deborah Butler, a partner in her father’s real-estate business and holder of his power of attorney before his death, tried to close two bank accounts worth about \$1 million in a dispute over whether the assets were intended to go to a girlfriend. Whitney National Bank refused to honor her power of attorney and filed a counterclaim asking the court to decide who would get the money.

In March, a judge in Manatee County Circuit Court ordered the Butler estate to pay more than \$1.7 million in legal fees and upheld the bank’s decision. Now, the case is on appeal, meaning the bills continue.

James Nici, Ms. Butler’s father’s estate-planning attorney, said in a statement that Ms. Butler, as the agent, provided “specific instructions” to the bank that “were within the scope of the written powers contained

in the durable general power of attorney” and within the scope of the state law governing their use. The bank “failed to honor the durable general power of attorney and did not carry out Deborah Butler’s specific instructions,” violating state law, the statement says.

Through an attorney, Whitney declined to comment, citing the bank’s policy not to discuss its customers. The girlfriend, through her attorney, declined to comment.

So what can you do to make sure your power of attorney doesn’t spark family strife or tussles with banks?

Set it up early.

Above all else, while you are still healthy and in full control of your faculties, you need to be comfortable with the person to whom you’re giving power of attorney, since it can be invoked at any time, says Jeffrey Gad, an estate-planning attorney at Akerman Senterfitt in Tampa, Fla., who represents the girlfriend in the Butler case. “You need to decide whether to make the powers you authorize narrow or broad, make sure you trust the person you’re granting them to and understand when these powers take effect.”

Once you sign away power of attorney, it takes effect immediately, giving your agent instant access to your money. One way around that is to use a “springing” power of attorney that goes into effect only after you become incapacitated. The advantage is that there is a smaller time window for abuse.

But there’s a potentially big disadvantage, too: “Just when you want the power of attorney to work most, you have to put on the brakes and go find a physician,” says Richard Breed III, an estate-planning attorney at Tarlow Breed Hart & Rodgers in Boston. While the definition of incapacitation varies by state, typically two doctors are required to confirm it before the springing power of attorney kicks in.

Keep It Current

The best way to avoid pushback from banks, fund companies and other asset-holders is to renew your power of attorney every six months, Ms. Lewis says. Even if you’re dealing with a family member developing dementia, don’t despair: “There’s a lucid interval that attorneys are trained to recognize,” she says. “Even if the client couldn’t understand the 20-page single-spaced durable power of attorney that we’ve prepared, if they’re having a good day, sometimes they are able to sign the documents.”

Check with your financial firms

At the same time that you make or update your power of attorney, check with the banks and brokerages you use to see if they have their own forms. If so, sign them as a safeguard to ensure that your agent has access to those accounts.

“If the client has the capacity and you are willing to execute one of these documents that applies only to that bank, sometimes that does the trick” of bulletproofing your planning, Ms. Lewis says.

Keep it under lock and key

If you have a good relationship with your lawyer, consider letting him or her keep your original power of at-

torney at his office, and put a copy in your home files, Mr. Breed suggests. That way, it will be more difficult for your agent to use the original copy without being vetted first. “I wouldn’t release the power [documents] to the holder unless there’s a need to do so,” he says. “It’s not perfect, but it gives a bit of protection.”

Restrict the power

Consider building in controls, such as giving one adult child the authority to write checks up to a certain dollar amount, but require all your children to agree on decisions above that limit, suggests Keith Klove-Smith, national manager of Wells Fargo & Co.’s Elder Services program.

You might let an agent pay bills and manage brokerage accounts, but block him from altering a will or changing beneficiaries on life insurance policies. Also consider having the agent provide monthly or yearly accounting statements to family members or your lawyer.

Plan for gifts

Many wealthy people plan to give away assets this year and next. The goal: to take advantage of the tax law that Congress enacted in December that upped the amount people can leave to their heirs, or give away during their lifetime, to \$5 million from \$1 million without incurring estate or gift taxes. But the exemption limits are set to lapse after 2012.

If you’re giving power of attorney to your spouse or adult child, and you’re making annual gifts, you need to make sure you say so in writing, says Henry Christensen III, who heads the private-client practice at McDermott Will & Emery in New York. For the agent, “if you’re going to be using that power to make gifts, you have to be expressly authorized to do it. You certainly have to be authorized to make gifts to yourself.”

Cover your IRA

In the past, individual retirement accounts typically held much smaller portions of older adults’ savings. But now that fewer people have traditional pensions and more have IRA rollovers from 401(k)s, powers of attorney need to address these important accounts, says Seymour Goldberg, a lawyer and accountant in Woodbury, N.Y.

If you’re married, make sure your power of attorney gives your agent the ability to roll over your IRA to your surviving spouse’s IRA, and also to designate beneficiaries for the rollover IRA. And if your agent would be among the beneficiaries, give your agent permission to name himself, Mr. Goldberg says.

Prepare separate documents.

If you spend your time in various states, set up durable powers of attorney that comply with the state laws in each place. “Every state uses these instruments a little bit differently,” says Thomas Pauloski, a trusts-and-estates executive at Bernstein Global Wealth Management.

Linda Hirschson, a shareholder at law firm Greenberg Traurig and chair of the New York office’s Trusts and Estates Group, recently created four sets of powers of attorney, along with health-care proxies and living wills, for a married couple to use in

Colorado, Utah, Florida and New York. Although financial institutions are supposed to honor out-of-state documents, “my feeling is, you might go to the bank teller, and they might not recognize it and be willing to take it,” she says.

Set up a fallback trust

You may want to set up a disability trust—technically a revocable living trust—to kick in if your power of attorney breaks down. That way, you could avoid publicizing your finances in a court case that might be needed to assign a guardian or conservator, Ms. Lewis says.

Sometimes disability trusts are used if the agent and any back-up agents named in the power of attorney have died, are disabled, or live too far away to effectively do the job. Ms. Lewis suggests also naming a corporate entity, such as a bank or trust company, “for the sole purpose of transferring assets out of your name and into the name of the disability trust.”

Why not just keep using the bank or trust company as the agent? Financial institutions typically refuse to serve in that role, because they have fiduciary responsibility for assets they might not even know about, Ms. Lewis says. Once the assets are in a trust, “the professional trustee knows exactly what it’s responsible for.”