Power of Attorney Documents Useful Tools for Good (and Liability Traps for Some)

By Robert J. Selsor and William J. Gust

There can be no doubt that the advent of the power of attorney (POA) in Missouri and elsewhere, particularly the durable variety, saw the introduction of a new and useful tool for managing an individual's affairs during disability and otherwise. With the passage of what was originally Mo Rev. Stat. § 486.550 et seq. in 1983, Missouri joined with other jurisdictions in allowing for the appointment of what is essentially a personal agent for persons wishing to facilitate the management of their healthcare and financial needs under various circumstances. An appropriate power of attorney can ensure seamless transition of such responsibilities from a principal to attorney-in-fact and often obviate the need for a guardianship or conservatorship where the principal's decline might otherwise mandate either or both of those involved proceedings.

But with the creation of the legal duties attendant with a power of attorney, duties that are fiduciary in nature and often broad in their scope, comes the risk that the authority granted by such instruments will sometimes be misused. Moreover, the mantle of fiduciary responsibility for the attorney-in-fact will also expose them to possible claims and liability for both misfeasance and malfeasance if the principal or other person with appropriate standing is dissatisfied with the actions taken—or not taken, by the agent holding the POA. As with all civil cases, the validity of these claims depends on the facts of each particular case. In the context of the power of attorney, however, liability is often driven by the terms of the instrument as well. One agent's permissible decision may be another's financial ruin if the latter acts in contravention of a duty imposed by the governing document.

It is for these reasons that estate planners and other practitioners, as well as principals and their cautious attorneys-in-fact, must carefully consider the duties and objectives to be embodied by these instruments. The failure to do so may result in an ineffective delegation of needed authority with some narrowly drafted documents, or for a delegation of unnecessary plenary authority in other circumstances that may lead to problematic temptations for the unsupervised attorney in fact. The latter situation, in fact, is a leading precursor to many instances of financial elder abuse in this country. A 2008 report commissioned by the ABA embraced the following reality regarding the potential for misuse of powers of attorney documents:

> POAs, whether general, durable, or springing, usually aren't subject to oversight by a court or third party. If the principal becomes incapacitated and can no longer monitor the agent's actions, this lack of oversight for a broadly written legal document makes it very easy for an agent to abuse the authority granted by the principal.[1]

Beyond conscious misconduct, the presence of ambiguous terms in a POA can lead to contentious litigation as well as opportunism on the part of disgruntled heirs and others who may use the threat of litigation as "leverage" over a trusted agent attempting to carry out a principal's estate planning objectives that are opposed by such would-be claimants. Proper planning and drafting, judicious selection of appropriate agents (sometimes joint agents for increased accountability), and careful use of the powers conferred to the agent are all mainstays of a successful principal-agent relationship under these instruments. A deep understanding of the attendant issues presented with this relationship is key to avoiding expensive and often emotion-laden litigation in this area.

General Powers and Other Options for Attorneys-in-Fact

Missouri's Durable Power of Attorney Law[2] provides an option to drafters to incorporate certain "general powers" into their documents that provide the holder with, other

1. Lori A. Stiegel, *Durable Power of Attorney Abuse: It's a Crime Too, A National Center of Elder Abuse Fact Sheet for Criminal Justice Professionals*, American Bar Association Commission on Law and Aging (2008).

2. Mo. Rev. Stat. §§ 404.700-404.735.

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than certain enumerated exceptions, authority that includes "each and every action or power which an adult who is nondisabled and nonincapactitated may carry out through an agent . . . with respect to all matters . . . ."[3] Conversely, the next subsection of the statute in question allows a principal to limit the use of these general powers to specific subjects or purposes that are designated in the document.[4] Certain powers, such as the ability to execute, amend or revoke a trust agreement, must be expressly enumerated in the document before the agent's authority will arise, while other delegations of authority, such as the ability to make a will, are prohibited under all circumstances.[5] In the latter regard, the statute notably prohibits an agent from acting against the later direction of the principal while such principal is not under any disability or incapacity. This potential circumstance, where the agent is given authority that is countermanded by the subsequent alleged edict of the principal, is fodder for potential litigation. The wise practitioner advising attorneys-in-fact will advocate that such agents keep detailed records, not only their actions while serving, but of their interactions with the principal and others.

The Duties Owed by an Attorney-in-Fact

Missouri law imposes a number of duties on attorneys in fact, many of which appear very similar to the default duties imposed on trustees and other fiduciaries.[6] Several of these duties are generalized,[7] while a number are specific and may or may not apply depending on the wording of the power of attorney document.[8] Thus, for example, the important duty to preserve the principal's estate plan, including trust instruments, joint ownership and beneficiary designations among others, can be negated by countervailing explicit language in the document. Likewise, the benchmark duty to act as a prudent person under the document can be alleviated by allowable exculpatory language in the document or in a separate agreement.[9]

Among the attorney-in-fact's general duties is the obligation to "act in the interest of the principal and avoid conflicts that impair the ability of the attorney-in-fact to so act."[10] Elsewhere, the statute restates those precepts in slightly different language: the attorney-in-fact must exercise the powers conferred "in the best interests of the principal, and to avoid self-dealing and conflicts of interest, as in the case of a trustee . . . ."[11] As referenced above, absent explicit written exculpation, the attorney-in-fact "shall exercise the authority granted in a power of attorney with that degree of care that would be observed by a prudent person dealing with the property and conducting the affairs of another . . . ."[12] And basic to the principal-agent relationship is the additional overarching duty to follow the terms of the instrument setting forth the powers.[13]

In addition to the general duties, Mo. Rev. Stat. § 404.714 outlines several very specific duties that an attorney-in-fact must follow.[14] Besides the default duty to maintain the principal's estate plan without modification,[15] the attorney-in-fact must also keep the principal's accounts separate,[16] clearly indicating that they are acting in the capacity as attorney-in-fact,[17] and, as with trust law, use any special skills that the agent possesses on the principal's behalf.[18] The attorney-in-fact is obliged to communicate with the principal,[19] consult with others to determine if the principal may be incapacitated or disabled,[20] follow the instructions of any court-appointed representatives of the principal,[21] and, if so required by the document, act only upon the happening of certain future events, conditions or contingencies.[22]

An attorney-in-fact is required to discharge certain additional duties upon the principal's death.[23] First, the attorney-in-fact must follow the

3. Mo. Rev. Stat. § 404.710.1.
4. Mo. Rev. Stat. § 404.710.2.
5. Mo. Rev. Stat. § 404.710.6-7.
6. *See* Mo. Rev. Stat. § 404.714. See also provisions governing conservator and protectee relationships, Mo. Rev. Stat. § 475.130.
7. *Id*.
8. *Id*.
9. Mo. Rev. Stat. § 404.714.1.
10. Mo. Rev. Stat. § 404.714.1.
11. Mo. Rev. Stat. § 404.714.1.
12. Mo. Rev. Stat. § 404.714.1.
13. Mo. Rev. Stat. § 404.714.7.
14. Mo. Rev. Stat. § 404.714.
15. Mo. Rev. Stat. § 404.714.1.
16. Mo. Rev. Stat. § 404.712.1.
17. Mo. Rev. Stat. § 404.712.1.
18. Mo. Rev. Stat. § 404.714.1.
19. Mo. Rev. Stat. § 404.714.2.
20. Mo. Rev. Stat. § 404.714.4.
21. Mo. Rev. Stat. § 404.714.5.
22. Mo. Rev. Stat. § 404.714.8.

instructions of the court, if any, having jurisdiction over the principal's estate.[24] Similar to the duty to communicate with the principal when alive, an attorney-in-fact must communicate with and be accountable to the principal's personal representative, or if none, the principal's successors.[25] Upon the principal's death, the attorney-in-fact also has a duty to promptly deliver the principal's property and also to deliver copies of any records of the attorney-in-fact relating to transactions undertaken on the principal's behalf that could be necessary or helpful in the administration of the decedent's estate.[26] Breach of any of these duties can lead to a claim for damages by anyone able to timely establish standing and damages as a result of the breach.

The Attorney In Fact's Ability to Delegate

Subject to any directions or limitations of the principal expressed in the power of attorney, Missouri law allows for an attorney-in-fact to revocably delegate any or all of the powers granted to them.[27] However, such delegation does not relieve the attorney-in-fact of liability if the duties owed to the principal are breached in some fashion.[28] In this regard the law pertaining to attorneys-in-fact is more onerous than the default rule applicable to trustees who have delegated a task or function to a properly selected agent.[29] Thus, the attorney-in-fact should be cautious in choosing a delegate or agent since, absent effective exculpation in the terms of the instrument or separate agreement, the attorney-in-fact in many respects becomes the insurer of these subagents.

Rights and Remedies of Both Principals and Third Parties

Mo. Rev. Stat. § 404.727 allows a principal to petition for an accounting. If the principal is disabled, incapacitated or deceased, an accounting may be sought by the principal's legal representative, an adult member of the principal's family or "any person interested in the welfare of the principal."[30] At least one Missouri court has held that the latter category vests broad standing to initiate a proceeding to enforce the principal's rights.[31] If the principal's capacity is in question, the principal, the attorney-in-fact, an adult member of the principal's family or any interested person may file a petition in the probate division of the circuit court in the county or city where the principal is located to determine whether the principal is disabled or incapacitated.[32]

Beyond ordering an accounting and making determinations of capacity, a court may also issue orders modifying the power of attorney or its usage.[33] For example, upon the filing of a petition and for good cause shown, the court may: order the attorney-in-fact to exercise or refrain from exercising authority under a durable power of attorney,[34] modify the authority of an attorney-in-fact under a durable power of attorney,[35] suspend a power of attorney that is not durable,[36] and terminate a durable power of attorney.[37] Likewise, a court may remove an attorney-in-fact under a durable power of attorney,[38] confirm the authority of an attorney-in-fact or successor attorney-in-fact to act under a durable power of attorney,[39] and issue orders that the court finds to be in the best interest of the disabled or incapacitated principal, including appointment of a guardian or conservator for the principal.[40] Notably, the court can authorize the attorney-in-fact under a durable power of attorney to enter into any transaction, or approve ratify, confirm and validate any transaction entered into by the attorney-in-fact that the court finds is, was or will be beneficial to the principal.[41] This essentially allows the attorney-in-fact to seek instruction and prospective approval from the court on issues for which there is uncertainty or a risk of liability. This is similar to a trustee's ability to request instructions and to request review and approval of actions pur-

23. Mo. Rev. Stat. § 404.714.9; *see also* Mo. Rev. Stat. § 404.717.1(4).

24. Mo. Rev. Stat. § 404.714.9.

25. Mo. Rev. Stat. § 404.714.9. The term "successors" is undefined. Black's Law Dictionary (6th Ed.) provides a definition from the Uniform Probate Code, section 201(42), as follows: "Those persons, other than creditors, who are entitled to property of a decedent under his will or succession statute."

26. Mo. Rev. Stat. § 404.714.9.

27. Mo. Rev. Stat. § 404.723.

28. Mo. Rev. Stat. § 404.723.

29. Mo. Rev. Stat. § 456.8-807.

30. *See* Mo. Rev. Stat. § 404.727.

31. *See Ewing*, 883 S.W.2d at 550 ("Standing to initiate the proceeding is broadly vested by the statute").

32. Mo. Rev. Stat. § 404.727.4.

33. Mo. Rev. Stat. § 404.727.5.

34. Mo. Rev. Stat. §404.727.5(1).

35. Mo. Rev. Stat. §404.727.5(2).

36. Mo. Rev. Stat. §404.727.5(3).

37. Mo. Rev. Stat. §404.727.5(4).

38. Mo. Rev. Stat. §404.727.5(5).

39. Mo. Rev. Stat. § 404.727.5(6).

40. Mo. Rev. Stat. § 404.727.5(7).

41. Mo. Rev. Stat. § 404.727.8(2).

suant to the Missouri Uniform Trust Code.[42] While such preapproval will not be practical for most transactions, where the agent's authority is in question or where third parties may be expected to challenge such action, seeking the court's imprimatur may provide an effective shield against later liability.

Liability Hot Spots

There are at least two significant areas of liability for attorneys-in-fact. The first category involves attorneys-in-fact who erroneously purport to exercise powers that must be expressly authorized under Mo. Rev. Stat. § 404.710.6. Many such cases deal with gifting to the agent when such gifting is not expressly authorized by the power of attorney.[43] As a general rule, a gift by an attorney-in-fact to themselves, or a third party, must be clearly and explicitly authorized in writing by the principal.[44] "It is for the common security of mankind . . . that gifts procured by agents from their principals, should be scrutinized with a close a vigilant suspicion."[45] Thus a general power to make gifts is insufficient to support an agent's self-directed gift. In *Williams v. Walls*, the court analyzed whether the power of attorney in question authorized the attorney-in-fact to gift any of the principal's assets to the attorney-in-fact or her husband.[46] The document at issue provided that the attorney-in-fact was authorized "[t]o make or revoke gifts or transfers . . . as such attorney may deem appropriate and proper."[47] The court held that this language did not permit the attorney-in-fact to gift any of the principal's assets to herself or her husband because there was "no express provision" permitting the gift.[48]

In addition to requiring that such gifting to an agent be expressly authorized in writing, courts broadly define what constitutes a "gift." For example, deposit of a principal's proceeds into a joint bank account in which the attorney-in-fact had a right of survivorship has been held to be a gift to the attorney-in-fact.[49] Moreover, if an attorney-in-fact initiates a transaction on behalf of the principal that benefits the agent--even if the transaction does not constitute a gift, it is still improper unless the power of attorney specifically authorizes the attorney-in-fact to engage in self-dealing.[50] Once again, appropriate exculpatory language can make the difference between an act of outright malfeasance and one that is firmly sanctioned in the eyes of the law.

Gifting is not the only act that requires express and explicit authorization. The power to change beneficial designations also requires the same level of explicit authorization.[51] Changing the beneficial designations on a principal's account is essentially the same as gifting the account to a different person. This rule is also consistent with an attorney-in-fact's key default duty to maintain, without modification, the principal's estate plan.[52]

A second category of familiar liability in this area involves violation of fiduciary standards, even if the agent has the legal ability or power to act or engage in a transaction. As referenced above, attorneys-in-fact are fiduciaries and are held to strict standards that sometimes mandate that they refrain from engaging in certain conduct even if they have the mechanical ability to transfer an asset, sign a contract or bind their principal in some other fashion. Thus, for example, the attorney-in-fact who fails to act prudently or with due care, or who does not act in the best interests of the principal, may face liability, depending on the facts, for actions that may be said to violate these standards. Of course, violations of this type are sometimes in the eye of the beholder. But the ultimate beholder in a lawsuit will be a jury or judge and if a claim has reached the stage where such finder of fact has been convened, then the agent may have already paid a dear price.

The most onerous remedies against an errant attorney-in-fact are found in Mo. Rev. Stat. § 404.717.5. Under that section, if an attorney-in-fact undertakes to act but does so "in bad faith, fraudulently or otherwise dishonestly . . . thereby causing damage or loss to the principal or the principal's successors in interest, such attorney-in-fact . . . shall be liable to the principal or to the principal's successors in interest, or both, for such damages, together with reasonable attorney's fees, and punitive damages as allowed by law."[53] The statute provides that the same consequences can apply to an attorney-in-fact who acts after receiving notice that the power of attorney has been revoked or terminated. Whatever the fact pattern, liability under this statute presents some of the harshest consequences that the law pro-

42. Mo. Rev. Stat. § 456.2-202.3.

43. *See Williams* 964 S.W.2d at 848; *Estate of Lambur*, 397 S.W.3d 54, 64 (Mo. Ct. App. 2013); *Antrim v. Wolken*, 228 S.W.3d 50, 54 (Mo. Ct. App. 2007); *Armbula v. Atwell*, 948 S.W2d 173, 177 (Mo. Ct. App. 1997).

44. *Williams*, 964 S.W.2d at 847-848; *see also* Mo. Rev. Stat. § 404.710.6.

45. *Arambula v. Atwell*, 948 S.W.2d 173, 177 (Mo. Ct. App. 1997) (*citing Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214, 218 (1958)).

46. *Williams*, 964 S.W.2d at 839.

47. *Id.* at 848.

48. *Id*.

49. *Lambur*, 397 S.W.3d at 63.

50. *See Antrim*, 228 S.W3d at 54.

51. *Parker v. Parker*, 971 S.W.2d 878, 882 (Mo. Ct. App. 1998).

52. *See* Mo. Rev. Stat. § 404.714.1.

vides.[54] Other remedies that can be imposed on an attorney-in-fact for breach of duty include imposition of a constructive trust [55] as well as tracing of assets and setting aside transfers initiated by the agent.[56]

Conclusion

Power of attorney documents are now a bedrock aspect of modern estate planning and few could argue credibly that the risks presented by such delegations of authority outweigh the benefits that such instruments provide. But, as with any fiduciary relationship, the temptations of power combined with opportunity sometimes lead to loss for the principal and those who will benefit from thier tangible estates. And, for the sake of fairness, the mantle of responsibility undertaken by many honest and honorable attorneys-in-fact can sometimes lead to angst and even litigation involving claimants who sometimes have valid claims under the law, and sometimes do not. Greater familiarity with the standards and duties imposed by the law, and the multitude of options available for tailoring those obligations to fit specific circumstances, will be a benefit to principals, their agents and their attorneys alike.

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53. Mo. Rev. Stat. § 404.717.5. See also *Taylor-McDonald v. Taylor*, 245. S.W.3d 867, 878(Mo. App. S.D. 2008).

54. The terms "bad faith" and "otherwise dishonestly," which serve has benchmarks for culpability under the statute, are arguably problematic for their lack of clarity. In recognition of the argument that these terms could provide a jury with a "roving commission" if left undefined, a bill is currently pending the in the Missouri legislature that would modify this standard to exclude those terms and replace them with "willful misconduct" and likewise hold the attorney-in-fact liable who "acts with willful disregard for the purposes, terms or conditions of the power of attorney . . . ."

55. *Miller v. Miller*, 872 S.W.2d 654, 658-659 (Mo. Ct. App. 1994).

56. *Herbert v. Herbert*, 152 S.W.3d 340, 346 (Mo. Ct. App. 2004).