



**Talking with attorneys about the DPOA, there is no sure solution. Yet, I do believe there are decision criteria that may be helpful.**

- Choose someone who is local. Distance in time zones and miles creates great difficulty in fulfilling the role.
- Have two people be on the DPOA, with either having the power to act independently when distances are significant. This should allow for a sibling or adult child to be involved with decisions, while allowing the local person to carry out the duties of DPOA agent.
- Try to choose someone who can be an advocate for you. The DPOA is not just a check writer or a gatherer of medical information. The DPOA must be persistent in achieving the best outcome for the person they serve.
- If you are selected as a DPOA, have a copy of the document so you know the terms under which you can act.

# THE DURABLE POWER OF ATTORNEY (DPOA)

## Key Considerations in Choosing Your DPOA Agent and Why

Most people understand that a will is a good thing to have. Most people know a trust is an important document. What most people do not know is that the Durable Power of Attorney for Health, and the Durable Power of Attorney for Property are essential for a broad range of situations in their lives. Let's refer to these two documents as the DPOA.

Every trust includes DPOAs for health and for property. Property includes financial assets, such as investment accounts. Yet, while the attorney preparing these documents undoubtedly explained the purpose of the documents, it was unlikely that the issues with using the documents were explored in much depth.

Having just been working with a client for the last 2 months on bringing the DPOA agents (designated persons) into play, I see this can be a fraught process.

### The case of "Gina"

Gina is 90 years old. She had a heart event that put her into the ICU for 10 days, followed by care at a rehab facility, then was moved to an assisted living residence pending the possibility of moving back to her home where she lives alone. The client left the hospital not knowing details of her condition. Due to the Pandemic, she was put into quarantine at the rehab facility to which no one was allowed access. Her hospital abides strictly by privacy protocols and has their own internal rules for responding to informational requests or a doctor's note.

My repeated calls to the hospital to have the doctor call the sister with the health DPOA went unanswered. The rehab facility had non-existent cell reception and no landline phone was in the room. No communication with Gina was possible. Arrangements for moving Gina between rehab and assisted living were never discussed with anyone who could help Gina.

The DPOA for health lives 3,000 miles and 2 time zones away. The DPOA for property is local but was stymied by the DPOA requirements.

### Three factors that make using DPOA documents critical.

The first difficulty is in the naming of the agents. Who is in the best position to provide the needed assistance? Usually, the named party is a sibling or an adult child of the DPOA grantor. The fact of being related is not necessarily a sufficient condition.

For example, if the agent does not live locally, or is not persistent in obtaining needed information, the choice will not be helpful. In Gina's case her sister has had limited interactions with doctors and hospitals in general. When the one time the doctor called her, she accepted what she was told, but did not ask follow-up questions such as "What kind of care will Gina need post-hospital?" "What are the long-term effects of her heart condition?" "Did the medications cure the condition?" The DPOA agent cannot make a direct call to the doctor's office and be assured that the doctor is available. Further, the doctor may not provide the level of detail that will allow the agent to make an informed decision. In the client's case, the sister was a willing participant, but was not successful in eliciting the information about the client's prognosis. The result is that we do not know best how to care for Gina in the long term.

The second difficulty is the terms under which the DPOA may be used. The classic requirement designed to protect the grantor is that two doctors must write a note saying the grantor is mentally incompetent. Mental incompetence should not be a sufficient condition for determining if someone needs a DPOA to step in, especially for the DPOA for property. Gina is competent, though she does not hold new information as well as she used to do. She is unable to handle her financial affairs since after the hospital stay, she did not have the energy or focus for dealing with her banks, arranging for the assisted living residence, or purchasing the supplies needed to aid her in recovery. Doctors are reluctant to write competency notes. In fact, the ICU doctor, the person with the most intimate knowledge of Gina's condition was not allowed by his hospital to write a note because it was requested after Gina left the ICU. Magically, the doctor is absolved of any duty to declare her condition. Gina's attorney needed to determine her competency, and then agree to eliminate the need for the 2 doctors' notes by creating a new document allowing the DPOA to act immediately. Immediately, that is, after getting the DPOA and Gina to sign the new document, and then get signed by the attorney and conveyed to the DPOA.

The third difficulty is the institutions' requirement. You might think that with a DPOA document in hand, it is a simple matter to have a bank honor it, allowing access to the account. The banks want their own attorneys to bless the DPOA. Further, trust bank accounts will not be accessible to the DPOA. Only by disclaiming Gina's right as a trustee on her trust in favor of the next trustee or executor, can the trust accounts be accessed. Three of four bank accounts in Gina's case are trust accounts, as are her investment accounts.

After consulting with Gina's sister, I arranged for an assisted living residence, assuring them that Gina has sufficient funds to cover a long-term stay. Yet, the bank account to which the DPOA has access will not last for too many months. I can transfer funds from her investment accounts. The money would go into a trust account that the executor - not the DPOA - can access. It would be preferable, however, to use the bank accounts first rather than sell investments that can sustain her for many years.

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