When Co- is a No-Go: The Practical Absurdities of Co-Agents under Durable Powers of Attorney



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By Gerarda M. Culipher

In Virginia, like so many other states, a power of attorney instrument permits a principal to elect their "people" who will assist them in the event that the principal ages to the point of dependence. Sometimes the protected person, the principal, is "Mom," sometimes it's "Pop Pop," sometimes it's "Aunt Fran." Formally, and legally, the chosen ones are called "agents" and when they spring into action, they have certain duties to their principal. But notably, they may *not* have any particular duties to their co-agent if another person has been appointed to serve with them. Conflicts can arise when power is shared…just ask Julius Ceasar.

Durability Outlives Decline

Powers of attorney can be what the law calls "durable," meaning that the legal authority of the agents survives the slow-drip physical or mental decline of the principal– often as they age or wrestle with a tough disease. This is the explicit, contemplated, and very worthy purpose of a durable POA. But where there is power, there is peril. Agents, banks, doctors, nursing homes, and other third parties, to whom the power of attorney is presented must honor these legally-binding documents. Many DPOAs have "enforcement" provisions, which aim to incentivize third parties to honor the document or face potential litigation for driving up costs to the principal with their hemming and hawing.

Just this past summer, the Virginia General Assembly, recognizing the potency of powers of attorney, passed a new law to ensure that the principal understands the complete scope, breadth, and depth of these powers given to their agents. With last spring's passage of HB 510, Virginia now requires that the principal affirmatively acknowledge the waiver of their rights, which may be baked in to their POAs (Va. Code. §64.2-1612(J)). "Knowing waiver" is what the law seeks here.

And while banks, doctors, landlords, creditors, and yes, even the courts, must recognize these valid, legal POAs, what are these third parties to do when two adult children are named as "co-agents" in a durable power of attorney, and:

- The two siblings cannot agree on Mom's care?
- The two siblings disagree on how and when to cash out accounts?

The two siblings cannot agree on what expenses are reasonable for Mom's care?

What Does "Co" Mean?

In Virginia, when two fiduciaries are named by a competent principal, they are often described as having independent authority to act; each one. Virginia law specifically presumes that co-agents "may exercise their authority independently," unless the power of attorney instrument specifically directs otherwise (Va. Code §64.2-1609(A)). So, sometimes the POA will read that

Mom instructs that the co-agents can only “act jointly;” in unison and *in agreement*. This is a tremendous difference in the application of shared powers, and it is worth a close examination of your durable power of attorney instrument itself. Many trust and estate lawyers will caution their clients about how conflicts in co-agency can develop, what the impacts are on efficacy of the instrument, and its utility to the principal. Consumers should consider carefully how troublesome co-agency can be for third parties like banks and hospitals when there are conflicting instructions from two Fiduciaries with equal power to act, and how costs may develop in the face of such a conflict.

These are good conversations to have if you are developing your smooth and clear estate plan. Nonetheless, many principals feel the strong pull of equity and seek *the perception of equality among their children*, or chosen ones, so that no person feels ‘left out’ of tough family decisions. But “co-agency” does not necessarily mean “joint” decision-making.

100% and 100%: Entire Authority to Act Alone

When a durable power of attorney instrument names two “co-agents” and gives each one power to act alone–notwithstanding the other agent’s opinions– you gift terrific flexibility, true. If the one co-agent is on a once-in-a lifetime trip to Europe, and Mom gets ill back home, the other “co-agent” can handle the emergency ***swiftly, singularly,*** and ***completely***. Not interrupting the vacation which was on the books for years. Good, right? Yes, but…

Just as equally, a “co-agent” can– ***swiftly, singularly,*** and ***completely***– empty Mom’s long-held savings account, sign a lease agreement committing her to a new residence, list her home for sale, or gift away valuable heirlooms.

In such a scenario, co-agents both have ***unlimited power*** to act over decidedly ***limited funds***. This can place third parties in an untenable position. So long as this power is wielded for “the best interests” of the principal, they are properly-ordered and well-placed. The conflict can arise when the second co-agent disagrees that the exercise of power was, in fact, in Mom’s best interest. Or, more often, when each co-agent has a distinct idea of what “best” is for Mom. Two co-agents can be at loggerheads; and the principal, naturally, does not have legal capacity to make the tie-breaking judgment.

Absurdity in Action

Imagine the absurdity in small-dose assets.

HYPO ONE
On Monday, one of Mom’s co-agent goes into Mom’s bank and takes out $300 to make in-person payment of Mom’s electric bill in town, leaving just $5 in Mom’s account. The next day, the second co-agent, who lives in Colorado, schedules Mom’s electricity bill payment of $290 to auto-draft from that account. Both had authority to conduct the act. Arguably, both were acts performed in service of Mom’s best interests. Nonetheless, Mom is harmed through bank fees for overdraft.

Now imagine the absurdity with listing Mom’s family home, often a person’s largest-dose asset.

HYPO TWO
On Monday, one of Mom’s co-agents signs a listing agreement with Susie Salesman. The very next day, the second co-agent terminates Susie Salesman, and hires Brenda Broker to list the home. On Wednesday, the original co-agent terminates Brenda Broker, and rehires Susie Salesman. *Ad infinitem.* Mom is harmed by the inefficiency of conflict and exposure to potential competing listing contract obligations.

Has her durable power of attorney failed her? No, it is not invalid. It is plenty-valid. It is just inefficient, and embeds a stalled-power structure, with no tie-breaker mechanism. And where the principal is ill, she may not have the capacity to change the terms of her durable power of attorney to repair this. The benevolent intent of the POA is thwarted. Litigation ensues.

While a durable power of attorney establishing co-agency presumes a shared-lift among the co-agents serving together, if not carefully structured, it cannot guarantee harmony among the agents. Under Virginia law, if a co-agent has actual knowledge of breach of fiduciary duty by the other agent (or even knowledge of a looming breach), they must take “any action reasonably

appropriate to safeguard the principal's best interests," (Va Code §64.2-1609(D)). This creates a power-contest, which can lead to competing claims of breach, and reciprocal duties to "safeguard" Mom, where each Agent believes they are in the right.

Talk to your estate planning lawyer and ask the hard questions. Because what is durable should also be sensical.