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## Survey Results: Use of Durable Powers

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# SURVEY RESULTS

## Survey Results:

By David M. English and Kimberly K. Wolff

### **T** Use of Durable Powers

The use of durable powers of attorney (DPA) has developed rapidly over the last decade. This growth reflects the public's desire for a simple and effective method of planning for possible incapacity. Although there are other planning tools, individuals frequently prefer the DPA. It is more comprehensive and provides greater certainty of result than does a joint bank account. A DPA is much easier to create than a revocable trust. By using a DPA, one can avoid an intrusive and possibly cumbersome guardianship or conservatorship proceeding.

Not surprisingly, then, more and more individuals are turning to the DPA. The DPA is easy to implement, easy to understand and use, and inexpensive to create. Every state, as well as the District of Columbia, has statutorily ratified the DPA. A DPA allows an individual (principal) to appoint an agent (attorney-in-fact) to manage the principal's property, a relationship governed by the fiduciary law of agency. A DPA can take effect immediately after it is signed, or it can be a springing power, which takes effect on the principal's incapacity or other specified circumstance.

DPA forms are readily available and can be found at most stationery stores. A buyer can complete, sign and use a DPA without any counseling whatsoever, or a lawyer can draft a DPA to meet a client's particular needs. The lawyer can counsel the client and proposed agent on the extent of the powers granted and the importance of selecting a trustworthy agent. After an individual signs a DPA, no one need know that it exists unless it is used, in contrast to a guardianship, where the

appointment of a guardian is a matter of public record.

The DPA is not without potential drawbacks, however. Agents can and on occasion do misuse their authority, including outright theft of the principal's property. Lack of experience in managing property and business affairs can also cause problems. Finally, agents can use their granted authority, such as a power to make gifts, in legally defensible, but ethically questionable, ways.

#### The Survey

Recent reports in the news media and elsewhere have raised concerns about use of DPAs. To respond to these concerns, the ABA Section of Real Property, Probate and Trust Law surveyed its members about their practices with respect to DPAs, their knowledge of misuse and their views on any corrective action that should be taken. To obtain this information, the Section mailed a questionnaire in September 1994 to 2,242 members of Probate and Trust Division committees. A total of 854 individuals (38%) returned the questionnaires, which is a very high response rate for a mailed survey. The respondents are probate and estate planning lawyers with extensive experience in counseling on use of DPAs.

#### The Results

The survey results indicate that incidents of misuse are relatively infrequent but that when they occur, they can produce unfortunate and harmful consequences. Lawyers and others should be aware of this

problem. Alternatives to the DPA, however, such as guardianship and joint bank accounts, are not necessarily less risky. Despite the possible drawbacks, the vast majority of survey respondents concluded that the advantages of the DPA far outweighed the risks. Most survey respondents wished to retain the DPA's flexibility, which allows them to draft powers as narrowly or broadly as their individual clients wish. But a recurring theme throughout the responses is that clients should be counseled on the importance of exercising care and prudence when selecting an agent, and that agents should be given guidance on their powers and duties.

#### Specific Findings

The survey respondents have had extensive experience in counseling clients on planning for possible incapacity and in preparing DPAs. Some 82% handle guardianships and conservatorships in their practices, and 97% have prepared DPAs for clients. The number of DPAs prepared varies, of course, ranging from fewer than 15 to more than 2,000, but a majority of respondents had drafted between 50 and 500 DPAs. The DPA has also become part of the standard estate planning package; 49% of respondents prepare DPAs for over 90% of the clients for whom they do personal planning, and 71% prepare DPAs in over half of such cases.

The survey asked a series of questions about the respondent's knowledge of misuse of DPAs. Forty percent were aware of one or more DPAs that had been misused. However, based on DPAs that they had created or of

which they were otherwise aware, 62% concluded that misuse had occurred in 1% or less of these cases, and 91% found that it had occurred in 5% or less. Some respondents, however, pointed out that their estimates of misuse were based on press reports or hearsay, or involved unsubstantiated allegations. In addition, numerous respondents noted that the problem was more serious with individuals who signed forms obtained from stationery stores without benefit of legal advice. The respondents expressed concern that stationery store forms rarely contained adequate warning to the principal about the risks involved in granting such broad powers.

The problem of misuse, therefore, seems to be confined to a small percentage of DPAs, but when it does occur, it is often quite serious. Respondents cited the transfer of the principal's assets as the major area of abuse; 91% of the cases fell into that category and involved an average of 50% of the principal's assets.

Would this misuse have occurred if the principals had not executed DPAs? The respondents were asked this question, and there were a variety of responses. Of the 83% electing to answer the query, 56% indicated that the availability of the DPA facilitated misuse. The other 44% of those who answered, however, indicated that misuse would have occurred in any event, and mentioned such possible situations as undue influence, forgery and, most important, the misuse of joint bank accounts. Although the questionnaire did not specifically ask about joint accounts, many respondents noted in their handwritten comments that these accounts are subject to greater abuse than are DPAs.

### Abuse by Court-appointed Fiduciaries

The questionnaire asked whether respondents were aware of abuse by court-appointed guardians or conservators, and 39% indicated they had such knowledge. This is only one percentage point less than the figure

reported for misuse by agents. As was the case with agents, the most common complaint involved the use of the ward's assets for the guardian's or conservator's personal benefit. The rate of guardian abuse was also slightly higher than the rate of misdeeds by agents. Based on the number of guardianships or conservatorships that they had handled or of which they were otherwise aware, half of the respondents concluded that abuse had occurred in 1% or less of such cases, and 85% concluded that it had occurred in 5% or less. The comparable figures noted above for agent misuse were 62% and 91%, respectively.

The findings on guardian abuse are perhaps the survey's most important contribution. Although misuse of DPAs is a significant concern, it is a mistake to focus exclusively on this single planning technique. The problem is far broader. The real issue is financial exploitation of a vulnerable population, whether by an agent, a guardian, a joint tenant or through undue influence in the preparation of a will. Regulating the DPA in the hope of reducing the risk of misuse might push many individuals to use other devices where the risk of misuse could be just as great, if not greater. It is doubtful that attempts to regulate the DPA would have much of an effect. Guardianships are regulated, yet the survey responses indicate that guardian abuse is as serious, if not more serious, than agent abuse. As many respondents concluded, a schemer will find a way to exploit a situation whatever the context.

Despite the possible problems, the respondents overwhelmingly support the use of DPAs; 98% believe the benefits to be derived from DPAs generally outweigh the risks of abuse. Yet the estate planning lawyers who were polled also believe that the problem of misuse should not be ignored. They recommend adoption of numerous precautionary steps. An area of special concern involved the authority to make gifts. The respondents did not favor mandatory court approval for all gifts; 89% objected to such a

step. By contrast, the respondents approved a number of drafting suggestions: 60% concluded that a DPA should limit the authority to make gifts to the annual exclusion amount, while some mentioned a limitation based on the principal's prior pattern of giving. Furthermore, 69% concluded that gifts to the agent should be allowed only if specifically authorized in the instrument or by a court. Finally, 60% of the respondents said that a power of attorney should be notarized and perhaps recorded.

The respondents did not believe, however, that the procedure used is the real issue. A full 95% of respondents opined that abuse occurs simply because the principal selects the wrong agent and that the abuse has little to do with the governing statute or procedure used. Many respondents stressed the importance of emphasizing to clients the potential for abuse and the extent of the powers granted. Perhaps the most telling comment was that lawyers should employ the same care, counsel and advice when preparing a DPA as they use when drafting and executing a will.

### Conclusion

The questionnaire concluded by asking whether the Section should continue investigating the DPA. Sixty-seven percent of respondents answered in the affirmative. How, then, should the Section respond?

The survey results demonstrate that misuse of DPAs is an area of concern. Although only a relatively small percentage of DPAs are abused, when such cases do occur, they tend to be quite serious. Moreover, the number of actual cases will undoubtedly grow as the many DPAs currently on the shelf are implemented. The country's changing demographics will also have an impact. The elderly population, the primary group using DPAs, will double over the next few decades.

The problem of misuse, however, is not limited to DPAs. The survey results demonstrate that misuse can occur whenever a surrogate is

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better education. Principals need to be taught the risks inherent in using a DPA and the importance of selecting a trustworthy agent. Agents need to be educated about their responsibilities. Lawyers should continually remind themselves that they need to respond with care to their clients' particular needs and to provide them with expert counsel. To begin this educational process, the Section is preparing a consumer brochure that will provide the needed advice.

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managing the property of another, whether that surrogate is an agent, a guardian or the joint holder of a bank account. Any corrective action, particularly legislative action, should not focus on DPAs exclusively but should address the problem on a broader front.

Changes to the DPA should be approached with great caution. Because the general public makes widespread use of the DPA, any change to this instrument must be consumer-conscious. No regulation is acceptable that will substantially impede the use of DPAs. The public will simply select other devices that may pose greater opportunities for abuse or that may be less efficient and more expensive. The reality is that regulations cannot ensure goodness. Short of totally banning the DPA, we must be willing to accept a certain degree of failure.

This does not mean, however, that the ABA and the Section should sit by idly. The real need is not to increase regulation but rather to provide

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## March/April Issue

# Employee Benefits UPDATE

**Employee Benefits Update** provides information on developments in the field of employee benefits law. The editors of *Probate & Property* welcome information and suggestions from readers.

## Voting ESOP Shares

In Revenue Ruling 95-57, the IRS determined that shares allocated to a participant's account for which the ESOP trustee had not received voting instructions could be voted by the ESOP trustee without violating Code § 409(e).

Under § 409(e), if the employer has a registration-type class of securities, participants and beneficiaries are entitled to direct the trustee in voting securities allocated to their accounts. If the employer does not have a registration-type class of securities, participants and beneficiaries are entitled to direct voting of securities allocated to their accounts on corporate matters involving merger or consolidation, recapitalization, reclassification, liquidation, dissolution or sale of substantially all the assets of the trade or business.

Before the ruling, the IRS had issued no guidance on whether an ESOP trustee who voted securities for which no instructions had been received was in violation of § 409(e). A plan would not meet the definition of an ESOP under § 4975(e)(7) if it failed to satisfy the pass-through voting requirements of § 409(e). The extension of credit by an employer to a plan to finance the purchase of employer securities is a prohibited

transaction unless the plan is an ESOP under § 4975(e)(7).

## DOL Voting Rights Guidance

In an "information letter" addressed to counsel for the AFL-CIO, dated September 28, 1995, the Department of Labor (DOL) has also issued guidance regarding the obligations of employee benefit plan fiduciaries to vote shares held in an ESOP. In that letter, the DOL reiterated its well established position that where a plan provides for "pass-through" of voting rights or tender-offer decisions, the plan's trustee may accept directions from participants acting as "named fiduciaries." Moreover, the DOL indicated that a trustee must honor such participant voting decisions "unless the trustee can articulate well-founded reasons why doing so would give rise to a violation of [ERISA]."

The DOL letter is consistent with earlier pronouncements regarding pass-through voting provisions, but it does reflect a change in emphasis. Earlier letters have emphasized the duty of a trustee to vote shares that have not been allocated to participant accounts for which the trustee has received no voting directions, and to disregard improper participant instructions. The recent letter emphasizes the trustee's duty to honor proper participant directions.

## New Dollar Limits for 1996

On October 17, 1995, the IRS released the cost-of-living adjustments for the dollar limits

applicable to tax-qualified retirement plans. The new limits are effective January 1, 1996.

The maximum amount a participant can defer under a 401(k) plan has been increased from \$9,240 to \$9,500. The annual § 415 limit on the maximum benefit amount under a defined benefit plan for 1996 is \$120,000, unchanged from 1995. If a participant separates from employment in 1996, the maximum defined benefit compensation limit under § 415 is computed by multiplying the participant's compensation by 1.0264. The annual § 401(a)(17) compensation limit for 1996 stays at \$150,000. The threshold amount for determining whether a distribution is treated as an excess distribution has increased to \$155,000 from \$150,000. The compensation amounts used to determine highly compensated employees for plan purposes are unchanged for 1996.

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