Powers of Attorney: The Basics

Tax and Estates Alert | **February 2, 2015**

By: William C. Hussey, II and Suzanne A. Prybella

Pennsylvania generally permits an individual (the "Principal") to appoint another individual(s) (the "Agent(s)") to act on his or her behalf with respect to his or her assets through a power of attorney. A power of attorney is a valuable financial and estate planning tool that may authorize a wide variety of actions by an Agent acting on behalf of the Principal. However, as with all legal documents, it is important to understand the implications of creating a power of attorney and the scope of power it grants an Agent.

On July 2, 2014, Pennsylvania amended its laws governing powers of attorney. These changes not only addressed two prior Court rulings with which the Legislature disagreed, but also added new provisions to address perceived and actual abuses perpetrated by Agents when acting under these powers of attorney. Many of these new provisions took effect on January 1, 2015 and so now is an opportune time to review the current state of the law governing these important estate and financial planning tools.

TYPES

A power of attorney can either be general (grants an Agent broad rights over the Principal's assets and financial affairs) or limited (grants an Agent narrow rights for a specific situation or set of circumstances). Unless a power of attorney states otherwise, it is presumed to be durable, meaning that the powers granted to an Agent continue even after the Principal becomes incapacitated. However, a power of attorney can be specifically drafted to be effective for a limited term. For purposes of this article, references to a "power of attorney" refer to a general, durable power of attorney ("POA").

EXECUTION

In order to be valid, a POA must be dated and signed by the Principal. The execution of the POA must be acknowledged before a notary public and witnessed by two individuals, neither of whom are the Agent or the notary. In addition, a POA must include (1) a Notice, signed by the Principal, containing specific statutory language advising the Principal of the potential consequences of executing a POA, and (2) an Acknowledgment, signed by the Agent, confirming the Agent's acceptance of his duties and fiduciary obligations. A third-party may legally refuse to accept the instructions of an Agent under a POA that does not contain the required Notice or Acknowledgment.

DUTIES OF AN AGENT

The most important decision when creating a POA is deciding who to appoint as Agent. As a fiduciary, an Agent has the legal responsibility to be faithful to the interests of the Principal. The Agent must act to protect, safeguard and benefit the Principal by exercising his powers properly. Pennsylvania law imposes mandatory duties, not subject to modification or

waiver, on all Agents to act (1) in accordance with the Principal's reasonable expectations to the extent actually known by the Agent, and otherwise in the Principal's best interest, (2) in good faith, and (3) only within the scope of authority granted in the POA. In addition to the mandatory duties, unless otherwise provided in the POA an Agent is also expected to:

- act loyally for the Principal's benefit,
- keep the Agent's funds separate from the Principal's funds,
- act so as not to create a conflict of interest that impairs the Agent's ability to act impartially in the Principal's best interest,
- act with the care, competence and diligence ordinarily exercised by Agents in similar circumstances,
- keep a record of all receipts, disbursements and transactions made on behalf of the Principal,
- cooperate with a person who has authority to make health care decisions for the Principal to carry out the Principal's reasonable expectations to the extent actually known by the Agent and, otherwise, act in the Principal's best interest, and
- attempt to preserve the Principal's estate plan, to the extent actually known by the Agent, if preserving the plan is consistent with the Principal's best interest based on all relevant factors, including the minimization of taxes and the eligibility for benefits or programs,

SPECIFIC VS. GENERAL GRANTS OF AUTHORITY

Most POA's prepared for estate planning purposes grant the Agent broad, general powers over the Principal's assets. That is, the Agent may transact business to the same extent that the Principal could do in his or her own capacity.

Under Pennsylvania law, however, a specific grant of authority in a POA is required in order for an Agent to take certain actions, such as:

- create, amend, revoke or terminate an inter vivos trust (with a few statutorily defined exceptions),
- make a gift,
- create or change rights of survivorship,
- create or change a beneficiary designation,
- delegate authority granted under the power of attorney,
- waive the Principal's right to be a beneficiary of a joint and survivor annuity (including a survivor benefit under a retirement plan),
- exercise fiduciary powers that the Principal has authority to delegate, or
- disclaim property (including a power of appointment).

Furthermore, unless the POA states otherwise, language in a POA to make limited gifts or granting general authority with respect to gifts only authorizes the Agent to make gifts in limited situations and which do not exceed (in the aggregate) the annual exclusion permitted for Federal gift tax purposes (currently $14,000 per year per donee).

In preparing to execute a POA, it is incumbent on the Principal to discuss the ramifications of these specific items, as well as the broader powers granted generally, with his or her advisor to ensure that it is consistent with his or her overall estate and financial planning objectives.

CAUTIONARY NOTE TO PRINCIPALS AND AGENTS

Many of the recent changes to Pennsylvania's laws governing POAs were made to address recurring problems confronting Principals and the Agents acting for them. While the vast majority of Agents act responsibly and in the best interests of their Principals, their actions are often called into question many years after those actions may have been taken by the Agent. This is particularly true if the Agent made either limited or unlimited gifts of the Principal's assets when authorized under the governing instrument. These problems can be further exacerbated where the Principal still makes financial decisions and transactions on her or his own behalf. To mitigate these concerns, it is imperative that both the Agent and the Principal keep meticulous, contemporaneous records of all these transactions. When possible, it is also recommended that the parties regularly consult with the Principal's attorney, accountant and other advisors to develop a comprehensive written financial plan for the Principal, particularly if gifts or other transfers of the Principal's assets are being considered.

IMMEDIATE OR SPRINGING?

In preparing a POA, another important decision to be made by the Principal is whether it should be effective immediately upon execution (the statutory default in Pennsylvania) or upon the determination that the Principal is disabled and unable to make his own decisions (springing). Proponents for a springing POA argue that the possibility for abuse by an Agent who is tempted by the immediate grant of power is too high. Proponents for an immediately effective POA argue that POAs are generally used in emergency situations and the delay caused by jumping through hoops to make the POA effective incurs unnecessary costs and delays in taking urgently needed action. Furthermore, it can be difficult to determine at what point a "disability" has occurred such that the POA is effective. Ultimately, the decision as to whether a POA should be effective immediately upon execution or spring at a future point in time is a decision that the Principal will need to make for himself. However, given the above arguments, we typically advise clients to make POAs effective immediately, to avoid both uncertainty and delay in emergent situations. Clients who have reservations about giving their Agent immediate unfettered power can limit such Agent's access by asking their attorney or other trusted advisor to hold the original POA and any duplicates and instruct that they be delivered to the Agent only if the attorney or trusted advisor agree that the circumstances warrant the use of the POA by the Agent. Furthermore, a POA can be revoked at any time. That being said, if a client is having concerns about their designated Agent's ability to handle the power and duties under a POA, then the client should strongly consider whether they have named an appropriate individual to act as their Agent in the first instance.

Given the recent changes in the law governing powers of attorney, we urge our friends and clients to consider reviewing their existing documents, including their Wills and Medical Powers of Attorney/Living Wills, to ensure that each of them is consistent with their current estate, tax and financial planning objectives and desires.

If you would like to discuss how a power of attorney could impact your estate planning, or if you have any other tax or estate planning questions, please contact, Bill Hussey (215.864.6257; husseyw@whiteandwilliams.com), John Eagan

(212.868.4835; eaganj@whiteandwilliams.com), Warren Kauffman (215.864.7092; kauffmanw@whiteandwilliams.com), Kevin Koscil (215.864.6827; koscilk@whiteandwilliams.com) or Suzanne Prybella (215.864.7188; prybellas@whiteandwilliams.com).

The Tax and Estates Practice Group at White and Williams is committed to keeping our friends and clients up to date with important tax developments. For current information, please refer to the Tax and Estates page on our website, www.whiteandwilliams.com.

***IRS Circular 230 Notice**: To ensure compliance with certain regulations promulgated by the U.S. Internal Revenue Service, we inform you that any federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, by any taxpayer for the purpose of (1) avoiding tax-related penalties under the U.S. Internal Revenue Code, or (2) promoting, marketing or recommending to another party any tax-related matters addressed herein, unless expressly stated otherwise.*