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New law, new problems

Is your power of attorney valid?

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There has been increasing concern over the abusive use of the power of attorney (POA) by the agent appointed to act when the POA contains broad gifting authority. Consider this scenario, a person signs a POA during estate planning, which allows his appointed agent to access and gift his assets for planning purposes. Is the principal aware of the vast power just given to his agent – the power to potentially transfer away his assets?

In an attempt to curb potential abuse, the state Legislature approved and Gov. Paterson signed into law a sweeping new statutory short form POA. The effective date of the new law was Sept.1, 2009 and affects any POA signed from that date forward. Unfortunately, while the law had good intentions, it continues to wreak havoc with all disciplines of law, business, real estate, personal finance and planning.

By way of background, the POA is a critical component of lifetime planning. It is a document in which you appoint an agent (aka "attorney-in-fact") to make a wide range of financial and other decisions and to enter into transactions that one defines as being in his or her best interest. The power given to the agent in a POA can be limited to certain powers or can be unlimited (i.e., the agent basically stands in your shoes for property, financial or other matters) and may take effect immediately or in the future.

The POA is important for a number of reasons. For example, in the event of your incapacity, your agent may need to act for long-term care, estate planning, tax, real property and business transactions, investment, gifting, banking or other matters. The absence of a properly executed POA may require the court appointment of a guardian for your property. If incapacity is not an issue, the POA can be used in routine real estate transactions if you cannot attend the closing. Also, in the business, investment and real estate arenas, the POA serves a vital role to effectuate the execution of stock powers to facilitate a transfer of shares.

In the event of your incapacity, your agent may need to act for long-term care.

Under the new law, however, such transactions have been turned upon their heads. There is a dramatically different statutory short form POA that provides significant cautions to the principal and will not be effective until it is also signed by the agent – a significant departure from prior law. Most importantly, however, the new statutory short form is anything but "short" due to the introduction of a required statutory major gifts rider ("SMGR") if the POA authorizes any gifting in excess of $500. When drafting a POA, it is common practice for attorneys well versed in their specialty areas to custom draft significant modifications to the statutory form to provide for situations that are not addressed by the form.

Unfortunately, however, good intentions and poor statutory drafting of the new law has not only made executing the new form and rider unduly burdensome, but has caused unintended consequences in practice. In particular, the form explicitly states that any modifications that affect "changes to interests in your property" must only be made in the SMGR; however, the statute fails to define "changes in interests in your property." This phrase has been interpreted to require any additional power that may affect changes in interests to property to be listed in the SMGR. Thus, the term statutory major gifts rider is a misnomer since non-gratuitous transfer powers must be included in the SMGR. For example, for the power to enter into business succession agreements or the power to create trusts to be valid, those powers must be listed in the SMGR.

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