Durable Powers of Attorney - Other Perspectives Related to a Financial Institution by Samantha Davis

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A typical part of personal estate planning for a client includes a durable power of attorney. A durable power of attorney permits an authorized attorney-in-fact to act on behalf of an individual in handling matters such as personal, financial and legal affairs after the individual is unable to do so due to incapacity.

When an estate planning attorney provides advice to a client about the options and issues to consider in preparation of the power of attorney instrument, the attorney must consider with the client the appropriate person to act as the attorney-in-fact because the individual may have broad access and authority over the assets of the client. Another aspect is the range of authority that should be granted in the attorney-in-fact.

Not as commonly considered may be the third parties that become involved in transactions with the named attorney-in-fact by presentation of the power of attorney - such as a financial institution.

The ultimate goal is that the power of attorney is used for the benefit of the client. However, there are several risks that may face a financial institution in acceptance of the power of attorney which include fraud, revocation of the power of attorney and the risk that the attorney-in-fact will exceed the authority granted in the power of attorney. A financial institution normally protects itself through its own acceptance procedures but estate planners may be able to make the "acceptance process" easier.

1. Drafting both comprehensive and specific language. When drafting, general authority language is helpful but not always sufficient to authorize specific actions. Think prospectively about the types of accounts that a client may later own that may need specific language. Add specific language to reflect client wishes (i.e. execution of beneficiary designations).

2. Backstop with broad authority but don't rely on it. Although it may be the case that broad general authority may be sufficient on its own, the broad general language can give additional comfort to the financial institution as to its customer's intent.

3. Minimize limitations that make acceptance difficult. Material limitations on the ability of the attorney-in-fact can present issues. When drafting, minimize restrictions on the attorney-in-fact's ability to access, trade or deal with the principal's assets. Some examples of material limitations include expiration dates or events, restrictions on the attorney-in-fact's ability to act on behalf of some assets (i.e. certain stock transactions are prohibited) or conditions that terminate authority that are outside the purview of the financial institution (i.e. "my agent's authority shall last so long as I reside in X Assisted Living Center").

4. Plan ahead when drafting springing power provisions. The planner needs to draft the springing power in such a way that it is absolutely clear what is required to prove incapacity.

5. Draft specific guidelines regarding attorney-in-fact succession. Be clear who serves, in what order and if the attorney-in-fact is named jointly, whether they may act independently or not.

Attorneys

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