Akerman Practice Update

TRUSTS, ESTATES & FAMILY SERVICES

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Florida's New Durable Power of Attorney Statutes

Katie Everlove-Stone
katie.everlovestone@akerman.com

Richard T. Hurt
richard.hurt@akerman.com

Russell B. Hale
russell.hale@akerman.com

Earlier this year, the Florida Legislature and Governor approved changes which completely rewrote Chapter 709 of the Florida Statutes on durable powers of attorney signed by individuals. The new law is effective on October 1, 2011, and significantly changes many requirements which we have summarized below.

Blanket Powers

Many existing powers of attorney rely on "Blanket Powers" which provide that the designated agent has the authority to do any act which the principal could do. Under the new law, if a principal wishes to convey any powers to the agent, the specific powers must be stated in the document as blanket powers will no longer be effective. Two exceptions include powers for banking authority and authority to conduct investment transactions, as explained below. We have added even more detailed provisions to our durable power of attorney out of a concern that third parties will scrutinize the powers and deny some requests by agents if the action is not specifically authorized in the document. Thus we encourage clients to sign a new more extensive durable power as a precaution.

Banking and Investment Transactions

If the document specifically states that the agent has "authority to conduct banking transactions as provided in section 709.2208(1), Florida Statutes," then the agent may conduct standard banking transactions on behalf of the principal. Similarly, if the

"Springing" powers of attorney are no longer allowed under the new statutory regime."

power of attorney states the agent has "authority to conduct investment transactions as provided in section 709.2208(2), Florida Statutes," the agent may deal with the principal's "investment instruments," which are defined as stocks, bonds, mutual funds, and all other types of securities and financial instruments. We revised our durable powers to reference these statutes and add more specific language than the new law in the event banks and other institutions take a limited view of what the new law allows.

Superpowers

Certain powers, referred to as "superpowers," require the principal's signature or initials next to the enumeration of such powers in the document. These powers generally deal with the agent's authority to alter the principal's estate plan, make gifts, change beneficiary designations or other documents effective at death, and to deal with retirement plans. We have revised our forms accordingly.

Fiduciary Duties

Under 709.2114 the law enumerates duties which apply to agents. First and foremost, an agent is a fiduciary and may only act within the scope of authority granted in the power of attorney. The agent must not act in a manner contrary to the principal's reasonable expectations, as those expectations are known by the agent. Plus the agent must act in good faith and in a manner consistent with the principal's best interests.

Preserve Estate Plan

A new addition to the statutes is the agent's duty to attempt to preserve the principal's estate plan to the extent it is known to the agent, if preserving the plan is in the principal's best interests. The statute lists several factors for the agent to consider when determining if the principal's estate plan is in his or her best interests, including the value and nature of the principal's property, the foreseeable obligations and financial need, minimization of taxes, eligibility for a benefit or program, and the principal's personal history of making gifts.

Springing Powers of Attorney

Under the new law, all powers of attorney become effective upon execution. "Springing" powers of attorney that are signed after September 30, 2011, and become effective only when the principal becomes incapacitated are no longer allowed. If an agent seeks to use a springing power of attorney executed prior to October 1, 2011, then the agent must obtain an affidavit from the principal's primary physician stating that the physician believes that the principal lacks the capacity to manage property.

"Superpowers" will require the principal's signature or initials next to each of these powers included in the document."

Acceptance or Rejection by Third Parties

The new law addresses concerns that banks often reject a durable power of attorney. Banks are concerned that a power of attorney can be used for inappropriate purposes and subject the bank to liability. The new law contains a number of provisions designed to protect banks from liability and to require banks to accept or reject powers of attorney within 4 work days. Courts may order third parties to honor durable powers and award damages for failure to do so in certain circumstances.

Co or Successor Agents

Two or more agents may be appointed and, unless the document provides otherwise, they may act independently. A successor agent may be appointed, but unless the power provides otherwise, the successor may not act until the prior agent resigns, dies, or becomes incapacitated which may lead to proof issues in practice.

Execution

A durable power signed after September 30, 2011, must be signed with the formalities required for a deed which means 2 witnesses and a notary acknowledgment. If properly executed, third persons are protected in relying on the validity of the durable power.

Conclusion

Powers of attorney signed before October 1, 2011, will still be governed by the current statutory regime, but we do not know how third parties and the courts may react to existing documents in light of the more stringent requirements of the new law. So it may be worthwhile to consider updating your power of attorney to a new form that is even more detailed than your current document. You should contact your attorney if you have any questions or concerns about the new law.

For more information, please contact a member of our Trusts, Estates & Family Services practice.

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