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THE CASE FOR NAMING A POWER OF ATTORNEY FOR AN IRA By Randy Spiro

People who have signed and funded revocable trusts have a decreased need for financial powers of attorney because the Trust has within it a mechanism to change the Trustee (manager) of the Trust on the death, resignation or incapacity of the Creator of the Trust. But IRAs (and other retirement plans) cannot be transferred into a trust because to do so would amount to withdrawing the IRA assets which would in turn accelerate income taxation of the IRA assets.

One might ask ‘what about the beneficiary designation form that can be filled out?’ Such form is only effective on the death of the Creator of the IRA and is specifically not effective on the incapacity of the Creator of the IRA.

One might further ask ‘Can’t the Creator of the IRA just withdraw assets (without penalty if he or she has reached at 59 ½) whenever he or she needs the money? If the Creator has become incapacitated, he or she will not be able to exercise the withdrawal power, whether or not this person has reached age 59 1/2 .

The solution is that for IRAs and other retirement plans, the Creator can use a Power of Attorney to designate a person to access the IRA at any time. If it is a durable power of attorney, it will not be rendered ineffective by the person’s subsequent incapacity.

Prior to signing such power, the IRA Creator needs to understand that it is a license to steal. Unless the Creator of the IRA has total trust in the proposed agent/attorney-in-fact, he or she should not sign a power of attorney.

Many stationary stores have powers of attorney forms and many attorneys routinely prepare power of attorney forms, either of which can be adapted for use with an IRA or retirement plan. But IRAs are maintained by custodians such a banks and brokers. Many banks and brokers have their own power of attorney forms which they insist must be used instead of stationary store or attorney prepared forms.

The IRA Creator (or his attorney) may prepare a power of attorney for the IRA and give it to his or her agent. The Creator may instruct the agent not to present it to the IRA Custodian until the Creator has become incapacitated. By waiting, the agent will learn that the Custodian does not accept the power at a time when it is too late (because of the Creator's incapacity) to use the Custodian's power of attorney form.