

Advisor Alert

Beware the Durable Power of Attorney!

Every responsible estate planning advisor will recommend that their client have a durable power of attorney ("DPOA") in the client's estate plan. It is common knowledge that a DPOA can give the named person (the attorney-in-fact -"AIF") tremendous authority over the client's (also known as the "principal") assets. For this reason, many advisors recommend that instead of naming a single AIF, the client name a second, so that co-AIFs must act together. This provides a certain comfort level, so that one acting alone may not be tempted to sun off with the money. While it may be a bit more involved to get two signatures every time a major decision is needed, such a safeguard can prove to be worth it. Here's a case where such a precaution would have prevented more than a million dollar loss.

In a recent U.S. District Court case in Louisiana, an elderly widow developed dementia and could not manage her affairs. Her son fraudulently caused her to sign a DPOA naming him as her sole AIF, granting himself broad powers, and proceeded to withdraw large amounts from her traditional IRA account. Oddly, the son filed income tax returns for his mother, paid the income taxes due (he'll steal from Mom but not Uncle Sam!), deposited the balance in Mom's account, then spent it all on himself. When the mother's court-appointed conservator sued the IRS for a refund of the taxes paid by the son on the IRA withdrawals, arguing that the money was fraudulently withdrawn and Mom never received any of it, the IRS refused the refund (over a half a million dollars), arguing that although Mom may

not have actually known about the withdrawals, they were deposited in her account, which, under the tax law, constituted her receipt of it. The court agreed with the IRS.

Lesson: While a broadly drafted durable power can be a lifesaver when advisors are trying to work on behalf of an incapacitated client, under the aforementioned circumstances and without someone to monitor check on the AIF's activities, such as a co-attorney-in-fact, it can also be a source of trouble.



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