Massachusetts Lawyers Weekly

May The Power Be With You, or Maybe Not

By Alexander A. Bove, Jr. and Melissa Langa

Q. A few years ago I drafted a durable power of attorney for an elderly client who is still competent, but homebound. The document named one of the client's children as attorney-in-fact but he has since had a serious and angry falling out with the child. Of course, we executed a new durable power, revoking the earlier one, and we sent certified notice to the estranged child, but we now find that the child has withdrawn funds from one of my client's bank accounts, and worse, has entered into a purchase and sale agreement for my client's vacation home which my client wanted to keep in the family. Where do we stand?

A. In the Town of Plymouth, Mass there is a large rock with the date "1620" engraved in it. The rock is surrounded by a concrete superstructure that protects and commemorates it. We would say that you (or your client) stand between the two.

As you know, a durable power of attorney is a very powerful document that in many cases can "save the day" by avoiding the need for expensive and time-consuming court proceedings, but in other cases, such as yours, unfortunately, it can be the cause of expensive and time-consuming court proceedings.

The first thing you should consider doing to stem further problems would include seeking immediate notification to every party that is connected with financial matters of your client, notifying them of the revocation of the first power. Typically, this would include banks, brokers, insurance companies, mutual fund companies, and possibly even credit card companies. You should also record the revocation of the first power in the registries where any real estate in your client's name is recorded.

As for the withdrawn funds and the purchase and sale agreement, you may still be standing between the rock and the hard place. Unfortunately, though it may seem unfair, it may not matter that the notice of revocation of the first power pre-dated either act with respect to the act itself. That is to say, the law is clear that a party dealing in good faith with the attorney-in-fact and without notice or actual knowledge of the revocation of the power is entitled to rely on it. Thus, it follows that unless the bank was somehow put on notice, it would have no liability to your client for paying funds out to your attorney-in-fact. Of course, the withdrawn funds would be recoverable from the rogue attorney-in-fact, provided he is reachable, still has the funds, or

has other assets to make compensation. Your bigger problem is going to be the real estate that is now under agreement to sell.

Under Massachusetts law regarding the actions of an attorney-in-fact and their effect on the principal, the applicable statute (Mass. Gen. Law Ch. 190B, Article V, Section 5-504 (c)) says in relevant part: "Any action so taken or relied upon [i.e., in good faith and without actual knowledge of the revocation] unless otherwise invalid or unenforceable, binds the principal and successors in interest of the principal. (Emphasis and comment added.) In other words, unless you can show that the buyer had actual notice of the revocation, did not deal in good faith, or that for some other reason the contract was unenforceable, your client may be required to go through with the sale, like it or not. And to make matters worse, your client would not be entitled to sue the attorney-in-fact for damages, because, assuming the sale was "arm's length", there would be no damages.

To help avoid situations as this, many attorneys recommend using two attorneys-in-fact who must act together. In addition, many make it a practice to hold the original document in safekeeping until receipt of a direct request from the client, or proper notice that the client is unable to act for herself. Without the original or a copy, the attorney-in-fact would be unable to act. But there is a further risk that it is wise to consider. Here, your client is competent and could revoke the power. If the client is not competent, however, unless the document provides otherwise, the power may only be revoked by a court-appointed personal representative (guardian or conservator); a process that the very power was drafted to avoid.

In the meanwhile, with an incompetent principal, there is no one to revoke the power, and a vengeful attorney-in-fact can wreak havoc with the principal's assets. With this concern in mind, it is possible to include a provision in the document allowing another party to remove the attorney-in-fact and appoint a successor, typically in a written, acknowledged statement attached to the original power. It would not be a good idea to grant a party the power to revoke the original power, because then the client would be without a power at all, and a personal representative would have to be appointed. In this regard, it is always a good idea to name a successor attorney-in-fact if the first ceases to serve for any reason.

830 words