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Trusts & Estates Forum

The Incompetent Principal: Restraining the Attorney-In-Fact

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It is fairly common knowledge that a durable power of attorney can prove to be one of the most important documents in an estate plan. In some respects, a durable power of attorney executed pursuant to Mass. Gen. L. c. 201B, §§1-7, is akin to a poor man's trust: a person's assets can be managed, and her interests protected, during periods of disability without resort to the expense and complexity of a trust, and without court oversight or the appointment of a guardian. The person who creates the power is called the "principal" and the holder of the power is called the "attorney-in-fact." The relationship between the two parties is a characteristic principal-agent relationship, with one important difference. Under common law agency, the agent is under the control of the principal, and if the principal becomes incompetent, the agency terminates. Restatement (Second) of Agency §§13, 14, & 122. The subsequent development of the statutory agency, allowing a person to grant a "durable" power, undercuts this notion of control by extending the relationship (and the granted authority) beyond the principal's incompetency. But who controls the attorney-in-fact when the principal cannot? (Note that his article focuses on current law and does not discuss the durable power of attorney provisions of §§5-501 through 5-507 in H.B. 1042 and S.B. 877, under the proposed Uniform Probate Code, which continues to languish on Beacon Hill.)

In Massachusetts, as in all states, a durable power of attorney must be in writing, Mass. Gen. L. c. 201B, §1, and it is to the document one first looks to determine limitations of the power. Courts have often noted that a durable power of attorney will be narrowly construed so that an attorney-in-fact's authority to act must be specifically stated within the four corners of the document. Gagnon v. Coombs, 39 Mass. App. Ct. 144, 654 N.E.2d 54 (1995) . If a principal is concerned about the extent of the powers granted under the document, she could provide for the appointment of two or more attorneys-in-fact who must act jointly, or might provide that the attorney-in-fact's actions would require the consent of a third party. In such a case, the third party acts as a safeguard for the incompetent principal, assuming the third-party takes the time to read the document.

Most estate planners, however, are inclined to draft as broad a power of attorney as possible so as to avoid concerns over whether a proposed act by the attorney-in-fact is authorized by the document. See, for example, ABA specimen durable power of attorney at www.abanet.org/rppt. In the recent case of Young v. Muncey, 2002 Mass. Super. LEXIS 17 (February 11, 2002), husband and wife, creators of broad powers of attorney, sought to hold accountable an insurance company that had permitted the named attorney-in-fact, the wife's step-daughter, to change the terms of an annuity contract, including the naming of the attorney-in-fact as the death beneficiary. In holding for the insurance company, the court noted that the durable power of attorney granted both broad and specific powers to the step-daughter which the insurance company could justifiably rely upon. Once that inquiry was made, the insurance company had no duty to ". . . investigate whether the agent was breaching a fiduciary duty to the principals." (Id. at p. 5)

To insure that the document itself provides some reasonable limits or restraint, a careful estate planner should examine a client's assets with an eye towards what might be excluded altogether from the reach of the attorney-in-fact or, alternatively, excluded from the broad power and made the subject of a limited durable power of attorney, perhaps (again) with co-attorney-in-facts who must act jointly. Additionally, consideration of other techniques to achieve the same result – permissible action in spite of incompetency – must be explored. For example, rather than

authorizing an attorney-in-fact to vote shares of stock in a closely held corporation, the client should consider executing a voting trust for her shares rather than depend upon the attorney-in-fact to make important business decisions through voting of shares.

A question also arises as whether the estate plan taken as a whole can serve as a restriction upon the attorney-in-fact. For example, it is well-settled that a specific gift of property is adeemed when a testator, during her lifetime, disposes of property which would have been the subject of the gift. Walsh v. Gillespie, 338 Mass. 278, 280, 154 N.E.2d 906 (1959), quoting Richards v. Humphreys, 32 Mass. (15 Pick.) 133, 135 (1833). But what if it is the attorney-in-fact, rather than the testator, who transfers the property? It has been held that where a conservator sold Dupont stock that had been specifically devised by the ward, the devisee was entitled to the unexpended proceeds of the sale. Walsh v. Gillespie, 338 Mass. 278, 154 N.E.2d 906 (1959). An attorney-in-fact stands in a fiduciary relationship with the principal, similar to the relationship between conservator/guardian and ward. The attorney-in-fact must act in utmost good faith and owes a duty of absolute loyalty to the principal. Where the principal's wishes are known, say by a specific gift of real estate in a Will, this should act as a restriction upon the attorney-in-fact's ability to manipulate that property, unless there is some compelling independent reason to dispose of it for the principal's well-being.

A different result may occur when the gift is made by a revocable trust, rather than a Will, since an attorney-in-fact may be empowered to amend the principal's trust, but may not be empowered to create or amend the principal's Will. In Galante v. Galante, 1995 Mass. Super. LEXIS 629 (1995), a daughter was both the trustee of her infirm mother's revocable trust and also the appointed attorney-in-fact. While acting as her mother's attorney-in-fact, the daughter amended the trust twice, altering the allocation of gifts among the siblings. A brother whose share had been reduced brought an action enjoining the trust amendments. The court first rejected the brother's contention that the terms of the trust had to specifically authorize amendment by an attorney-in-fact; rather, the court noted that it was sufficient if the durable power of attorney granted that authority (which the court broadly construed), and the trust did not negate it. Finally, the court rejected the brother's claim that the sister violated her trustee duty of loyalty towards him as a trust beneficiary when she caused the trust to be amended since she was acting in her

capacity as attorney-in-fact, rather than as trustee, and there was no evidence that as such she was not acting in her mother's best interest. Interestingly, the court noted that even if bad faith was present, only the mother or her estate could raise that issue, not the brother.

Again, thoughtful drafting might encourage the attorney-in-fact to stay the course in the event of the principal's incompetency. For example, the durable power might grant the authority to create and amend trusts, while excluding the power to alter the principal's dispositive scheme. But what about the situation where the principal is competent, although so infirm that she is physically unable to sign an amendment to the trust herself and wishes to change beneficiaries? Have we unwittingly tied the hands of the client and the attorney-in-fact? Not at all! A judicial doctrine entirely separate from the statutory durable power of attorney would permit the physical signing of a trust document by someone other than the settlor if certain conditions are met. Known as the "amanuensis rule", it provides that where, for example, a settlor's signature is made with the express authority of the settlor and involves no exercise of discretion whatsoever on the part of the signer, the person signing the name is not the "agent" of the settlor, but is instead a mere instrumentality of the settlor, and the signature is considered the signature of the settlor. This rule has been applied even where the there is an "interested amanuensis", one who benefits from the change. For a recent and extensive discussion of this rule see Estate of Stephens, 122 Cal. Rptr. 2d 358, 366 n. 4 (2002) citing Bartlett v. Drake, 100 Mass. 174 (1868).

Finally, the authors find it interesting that while it is standard practice to provide for the removal of trustees in a trust, durable powers of attorney, in our experience, do not normally provide for the removal and substitution of an attorney-in-fact by an outside party. Of course, while the principal is competent she has the power to revoke the durable power of attorney, thereby revoking the authority of the attorney-in-fact (except against unknowing innocent third parties), but where the principal is incompetent, the attorney-in-fact continues on virtually unsupervised, unless some interested party goes to the trouble and expense of petitioning the probate court for remedial action. Perhaps the durable power of attorney might be drafted to include an independent party akin to a "trust protector" who would hold the power of removal and substitution should incompetency descend upon the principal. This removal power would render moot the need to have a guardian appointed to remove the attorney-in-fact as provided in Mass.

G.L. c. 201B, §3(a) and Mass. G.L. c. 201 §38. Knowing that such oversight exists within the durable power of attorney itself might make attorneys-in-fact who are tempted to act capriciously think twice.