Berwitz & DiTata LLP

A STEP AHEAD

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Power of Attorney—Myths and Misconceptions

At Berwitz & DiTata LLP, we believe that lifetime planning is at least as important as planning for after death and that no plan is complete without a carefully drafted and thorough power of attorney. A power of attorney designates a person, called the *agent*, to make decisions and take responsibility for managing the *principal's* property. Agents, even those who are well-meaning, do not always understand their responsibilities and principals may not always understand the authority placed in the hands of their agent. This article is intended to debunk some common misconceptions.

As agent, I do not need to keep records. The agent under a power of attorney can be asked to account for all of his or her activities undertaken as an agent. It is important for the agent to maintain accurate and complete records so that a full account can be rendered, if necessary.

I am not the power of attorney, I just help my loved one with her bills. Even if you are not an agent appointed under a power of attorney, you can still be considered a *de facto* agent. As a *de facto* agent, you are making decisions

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After a loved one dies, family members frequently have unrealistic expectations as to the steps that are necessary to complete the process of distributing the decedent's assets. Chief among them is the belief that the distributive plan developed for the decedent should be implemented immediately and the property dispersed to the beneficiaries. When the fiduciary, the executor or trustee, does not distribute property on this timetable, beneficiaries start pressuring the fiduciary to make distributions prematurely. This can lead to disastrous results and greater family disharmony.

The time it takes for the fiduciary to reach the point of being able to distribute assets is affected by the manner in which the assets that comprise the estate of the decedent were owned. If the decedent's assets were titled in his or her name individually, and not in a

trust, a proceeding in Surrogate's Court is required regardless of whether or not the decedent had created a last will and testament. Where there is a will, a probate proceeding must be commenced by the executor nominated in the will. If there is no will, an administration proceeding is brought by the person(s) who wants to be appointed by the Court to administer the decedent's estate. The

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The unfortunate story of Joe H.S. Grad and his family highlights an important issue: Who has the power to make health care decisions for your "adult" children? Joe H.S. Grad, an 18 year old college student, away from home for the first time, was injured in a car accident. To their dismay, his parents had no legal authority to make health and medical decisions, or to access his confidential medical records, as he was over 18 years of age.

In New York, one is considered an adult at the age of 18 and is presumed capable of making decisions. This is true under the laws in most states. This means that college-age children are considered adults under

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the law and are able to execute legal documents and determine who will be authorized to make healthcare decisions on their behalf. This is accomplished through the execution of a valid and thorough health care proxy. A health care proxy designates a health care agent to make health care and medical decisions. An enhanced health care proxy will also allow the agent to have access to confidential medical records. A New York health care proxy will be honored, if validly executed, in all 50 states. In the absence of valid health care

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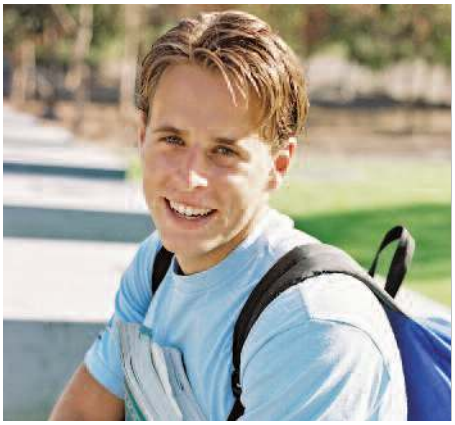

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and taking actions that a duly appointed agent would take. For this reason, you are also liable to account for your actions while serving in this role and, again, it is essential that you keep accurate and complete records.

Since I am my mother's agent I can just sign her name on checks. When you are an agent, you should be signing all documents in a way that indicates that you are acting as an agent under a power of attorney. For instance, you would sign: "Jane Doe by Mary Doe, POA" or "Mary Doe as agent for Jane Doe."

I can revoke my power of attorney simply by taking it back, ripping it or executing a new one. To revoke a power of attorney, it is not enough to destroy the document or execute a new instrument. The new instrument must specifically revoke prior instruments. You also must give notice to your agent and to any individual, bank or institution who received a copy of the power of attorney you wish to revoke.

I executed a power of attorney in another state, or years ago, and do not need another one. The standard form for powers of attorney changed in New York State after 2009 and again in 2010. Not every state has the same rules regarding what is required to execute a power of attorney or what powers it can convey. In order to ensure that your agent will not face obstacles when acting under the instrument, having an updated power of attorney executed in New York is important.

There are no limits to the actions an agent can take. While it is very important to execute a power of attorney, it is just as important that you carefully review an instrument you have executed or one which appoints you as agent. The extent of an agent's power depends upon the instrument. Powers of attorney can be very broad but they have to be properly drafted to have that effect. For example, assume you have given annual gifts to your child and your child is now your agent under your power of attorney. If you intend that your child continue to make these gifts, as you would, such power must be specifically incorporated in your power of attorney. You must also specifically provide your agent with authority to protect your assets in the event you require long term care.

Under a durable power of attorney, I can continue to access my loved one's accounts and assets after they die. A *durable* power of attorney allows the agent to continue to act even after the principal loses capacity. However, an agent is never authorized, under a power of attorney, to act after the death of the principal. Any authority granted by a power of attorney ceases upon the principal's death.

As agent, I can decide what I think is best for my principal. As agent you are expected to act in a fiduciary capacity, which means you must act in the best interest of the principal. You are also expected to follow the principal's directions and carry out the principal's wishes. You cannot take actions you believe are in the best interest of the principal if such actions are against the stated desire of the principal. You are required to take direction from the principal.

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amount of time it takes before the Court authorizes the executor or administrator to act on behalf of the estate can vary significantly. If the family is cooperative, there are no disputes and the all of the heirs are adults, the Court will generally authorize the fiduciary to act within two months of the filing of the completed petition. However, if the family members are uncooperative and not unified as to who should serve as the fiduciary, it could take years for the Court to render its decision. Moreover, even when the family cooperates, the process can be delayed for months if any of the decedent's heirs are minors or unknown. In such cases the Court must appoint a *Guardian ad Litem* to protect the rights of the minor or unknown heir. The *Guardian ad Litem* must investigate the estate and the circumstances and render a written report to the Court. Only after the Court reviews this report is it able to authorize a fiduciary.

In contrast, if the decedent's property is owned by a trust, no probate or estate administration proceeding is necessary and the trustee's authority to act takes effect immediately upon the death of the decedent. By using a trust, delay that would have occurred in the Surrogate's Court is eliminated. From that point, the duties of a trustee or the fiduciary of the decedent's estate are similar.

Family members often overlook the fact that, once the fiduciary is empowered to act, he is obligated to manage the affairs of the decedent. For example, the decedent's final income tax return must be filed for the last year or partial year of life. The estate may be large enough to incur federal or state estate taxes. Income or estate taxes that are owed to federal, state or local governments must be paid from the decedent's assets. A premature distribution of the decedent's assets could leave the estate with insufficient assets to pay the taxes that are due.

Creditors of the decedent are also entitled to be paid - *before* the beneficiaries. Debt incurred during the decedent's life may continue to accumulate after the decedent's death. Expenses of the last illness and funeral of the decedent must be paid. Sometimes, the extent of the decedent's debt is not fully known until months after death. The fiduciary requires time to become familiar with the decedent's financial circumstances. If the estate owns property, the fiduciary must continue to pay property taxes, insurance, upkeep and maintenance until the property is sold or disposed of otherwise.

A fiduciary who distributes the decedent's assets to the beneficiaries at the expense of the taxing authorities or creditors will be obligated to reacquire the property from the beneficiaries to make those payments. If the fiduciary cannot reacquire assets, he or she may be responsible to make payments from their own funds. Eager beneficiaries looking to enjoy their inheritance may find the wait excruciating but the fiduciary is well-advised to avoid being caught with insufficient assets to pay the liabilities of the decedent!

Even after the payment of the estate's obligations is complete, the prudent fiduciary should refrain from making distributions. Instead, the fiduciary should prepare an Accounting which reflects the assets that have been marshaled during the administration of the estate, the income earned, the expenditures made and the proposed distributions. The Accounting provides each beneficiary with an opportunity to review the fiduciary's activities and, to the extent there are questions, a means to address them. The documentation proving the Accounting should be maintained and available if the beneficiaries wish to review it. Each beneficiary is entitled to know that they have received exactly what they were entitled to receive.

At Berwitz & DiTata LLP, we recommend that the fiduciary secure a release from each beneficiary, after the Accounting has been reviewed. The release confirms that the beneficiary had the opportunity to review it, is satisfied with the manner in which the estate was administered and with the calculation of the distributions. In short, it protects the fiduciary from liability arising from the administration of the estate and from a later claim by a disgruntled beneficiary. But it also protects the beneficiaries. If the beneficiaries will not sign a release, a more formal Accounting should be submitted to the Court for approval.

When beneficiaries make unrealistic demands, it can be helpful to have a meeting to ensure that all concerned are apprised of the circumstances and the process. When the process is transparent, the beneficiaries are often more patient. Sometimes a partial distribution can be considered. When the information is not shared, beneficiaries are apt to think the worst.

It is imperative for the fiduciary to have experienced counsel to advise and guide them through a process that has many potential landmines. At Berwitz & DiTata LLP, we are available to assist the fiduciary in all aspects of meeting their obligations. We are also available to represent beneficiaries who are concerned that a fiduciary is acting inappropriately.

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proxy, default laws, which vary from state to state, will determine who or what entity will be authorized to make such decisions.

Since it is back-to-school season for most college students, it is important not to send them away without implementing a health care proxy. They should consider whom to designate to carry out their wishes regarding health and medical treatment in the event of an incapacitating illness or injury. They can select only one agent at a time but the document can specify a successor agent or agents. The agent must be familiar with the individual's wishes in regard to treatment, including artificial nutrition and hydration. By law, doctors and hospitals must respect the wishes communicated through the appointed agent.

At Berwitz & DiTata LLP we believe that every adult should execute an enhanced health care proxy while they are healthy and before any emergency arises. For college bound students it can be an important document to have in place before they enroll. Important, too, is the peace of mind it provides to their parents.

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