



The Winter 2022 Newsletter

The Winter 2022 Newsletter contains an Estate and Gift Tax Update and discusses durable powers of attorney.

Estate and Gift Tax Update

The Federal Estate and Gift Tax exemption increased from \$11.7 million to \$12.06 million on January 1, 2022, due to the automatic inflation riders in place set by the current law. However, absent a change in estate and gift tax law, for those persons dying on or after January 1, 2026 that have not used their estate tax exemption, the estate and gift tax exemption will drop to five million adjusted for inflation from 2016 (estimated to be around \$6.2 million). The annual gift tax exclusion, which for years has remained at \$15,000, has increased for 2022 to \$16,000 per donee.

The topic of the Winter 2022 Newsletter is the role of a durable power of attorney in an estate plan. A durable power of attorney is an important part of an estate plan. This newsletter will discuss what are they, how do they work, their limitations, and my observations over the course of my law practice regarding some of the issues in how they are used.

What Is A Durable Power of Attorney?

A durable power of attorney (DPOA) is a written authorization to act on someone else's behalf in a legal or business matter. The person authorizing the other to act is the *principal*, *grantor*, or *donor* (of the power), and the one authorized to act is the *agent*, the attorney-in-fact. It is considered "durable" because it survives the principal's disability.

How and When to Use A Durable Power of Attorney

The "durable power-of-attorney" is one of the most powerful and important planning tools that an attorney can recommend to a client, not only for estate planning but also for Medicaid and other public benefits planning. When a person (the principal) signs a power-of-attorney, he gives another person (the agent) the power to act in his place and on his behalf in managing his assets and affairs. The agent's powers may be broad and sweeping so as to include almost any act that the principal might have performed. It should be noted, however, that in general, acts that are inherently testamentary in nature, such as the authority to make or revoke a will, may not be performed by an agent.

A power-of-attorney can be either a "general" power-of-attorney, where the agent may perform almost any act the principal might have performed himself regarding the financial management

of his affairs, or a "limited" power-of-attorney where the agent has one or more specific powers, such as the power to sell a particular property to a particular purchaser at a particular time. A single principal may name one or more agents who can be authorized to act either "jointly" or "severally" (alone without the signature of the other agent or agents). The "durable" power-of-attorney is unlike the ordinary power-of-attorney which becomes inoperative upon the incapacity of the principal. The durable power of attorney provides that those powers granted to the agent shall not be affected by the subsequent disability or incapacity of the principal or by the lapse of time.

Using A Springing Power

Most powers of attorney become effective immediately upon execution by the principal. Many principals, however, are justifiably wary about giving a currently exercisable power-of-attorney to the agent. Accordingly, most states, including New Hampshire, allow a durable power-of-attorney to be drafted in such a way that it becomes effective only upon the principal's incompetency. Such a legal instrument is called a "springing" power-of-attorney, signed when the principal has the capacity and is not effective until the occurrence of a triggering event such as the onset of incompetency of the principal. The primary disadvantage of the use of the springing durable power is that because its operation is triggered by incompetency, the occurrence of the event may have to be conclusively established to the third person in order to induce such person to accept the authority of the agent. The document, therefore, should contain a clear definition of the term "incompetency." We use Escrow Agreements for clients that want a springing durable power of attorney.

Drafting Considerations

In most states, the principal, in planning for asset management, should consider granting to the agent other important specific powers in addition to those enumerated by statute and found on the conventional pre-printed power-of-attorney form. Unless such additional powers are specifically drafted into the document, the agent will have no authority to act. The following are a few of many specific powers which the principal should consider including in the power-of-attorney:

- The power to make gifts. In states where there is no specific legislative gift-making power, the attorney drafts person of the power-of-attorney should consider providing "gifting" authority for the agent. Such a power may be vital for both estate tax planning, in the event of the principal's incapacity, for Medicaid and other public benefits planning. Caution must be exercised, however, in drafting the "gifting" power since, if drafted too broadly, the Internal Revenue Service may argue that the agent had what is called a "general power of appointment" so as to include the entire amount of the principal's assets in the agent's own estate for estate tax purposes should that agent die before the principal.
- Power to change the principal's domicile to another state where the Medicaid eligibility rules are more favorable.

- The power to renounce or disclaim an inheritance and/or insurance proceeds. This power could be another powerful estate and Medicaid planning tool where not prohibited under state law.
- Power to settle, pursue or appeal litigation on behalf of the principal.
- Power to revoke or amend the power-of-attorney itself.

In drafting powers-of-attorney, care should be given to confer powers with as much specificity as possible in order to avoid the possibility of a court construing a specific omission as an intent to fail to grant that specific power. Such an adverse finding could be to the detriment of the principal's assets.

Advantages for the Seriously-Ill

The use of a power-of-attorney for the management of the assets of a seriously ill or incompetent person has several advantages. It is especially useful in situations where the incompetent person's assets may be modest and, accordingly, do not warrant the greater expense associated with other planning techniques such as trusts, conservatorships, or guardianships. The greatest advantage of the durable power of attorney is that it remains effective **after** the principal's incapacity. The agent, therefore, can act immediately, upon the principal's incapacity, to manage his assets in a falling stock market or to take various emergency measures without initiating costly and time consuming court guardianship proceedings to attain court authorization for such transactions.

The durable power of attorney is also a useful planning tool for married couples where the property is jointly owned. When one spouse becomes incapacitated, the other acting as the agent, can avoid a court proceeding and act promptly in situations where, although assets are held jointly, one spouse cannot act alone to sell, transfer or refinance a property or registered securities without having to obtain the consent of the other joint owner.

Legal Interaction with the Trustee of Your Trust:

Trustees manage trust assets, not agents under the durable power of attorney other than in limited circumstances. Therefore, consideration must be given to who the trustee is and whether the agent should also be the successor trustee of your trust. Keep in mind that it is common for clients of advanced age to no longer serve as trustees of their trust prior to their deaths.

The durable power of attorneys can be a valuable part of your estate plan. However, they are voluntary documents, meaning that you can revoke a durable power attorney (fire the agent) if you are not happy with their performance as a fiduciary for you.

Termination of an Agents Powers at Death of Principal:

An agent's power under the durable power of attorney is terminated at the later of the death of the principal or the agent learning of the death of the principal. The agent should not take any actions after learning of the death of the principal other than record keeping and coordinating the transfer of powers to the principal executor or the trustee.

Other Considerations:

It's important to recognize the difference between an agent under a durable power of attorney and a Guardian appointed by a Judge. If a guardianship has been imposed on you, it means that you have been legally determined to be incompetent and therefore can no longer make decisions regarding your financial affairs. However, even when a springing durable power of attorney is enacted, you still have retained your legal rights to manage your finances. It's best to think of your agent as working for you, and that you and your agent possess concurrent powers. You are free to overrule your agent and, as previously stated, terminate the fiduciary relationship (fire them). However, sometimes your attempt to overrule your agent or fire them if it is not well-founded is, in fact, a symptom of your incompetency. Many clients develop a form of dementia with symptoms that include paranoia and unfounded fear of losing control. Unfortunately, this has sometimes led to the need of family members to obtain guardianship over the principal in which, as stated above, the principal's decision-making powers are removed by a Judge. Keep in mind that in the rare circumstance this happens, its purpose is to protect your assets from your actions, deemed to be a threat to them.

With all that in mind, what are some of my observations regarding the use of durable powers of attorney? They do in most situations avoid the need for a court-appointed Guardian, but as stated above, many times a Guardianship is inevitable, if the principal or agent is acting unreasonably. Most times, they work well. When they do not, it's typically due to the rash actions of either the principal or the agent. The improper behavior of the agent, such as a breach of their fiduciary duties (for example co-mingling of the principal's funds), is another challenge to the effectiveness of a durable power of attorney, that can lead to court intervention.

Once a durable power of attorney is enacted, there is the need to educate the agent regarding their proper role. Agents need to keep good records and to communicate and seek guidance from the principal. Agents cannot ignore instructions from the principal. The agent cannot overrule the principal. In my law practice, I have seen situations in which the agent ignores explicit instructions from the principal and takes action contrary to those instructions. This is not allowed under N.H. law except in extraordinary circumstances if to do so would result in financial loss. On multiple occasions, I have had to intervene and stop agents from taking action contrary to the instructions from the principal. Again, if disagreements persist, it may be necessary for a Guardianship to be filed with the court or for the agent to resign or be removed as fiduciary.

Our Spring Newsletter will discuss Advance Directives(Health Care Power of Attorneys and Living Wills): What are they, how are they implemented, and their benefits and limitations.

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