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Changes come to powers of attorney

I am a member of the Advocate Charitable Foundation Gift Planning Advisory Committee and had the pleasure of being a panelist for the organization's presentation on "High Stakes Planning: Advance Directives and the Issue of Mental Capacity." The presentation, held last month and hosted by Advocate Health Care and Northern Trust, sparked much discussion on powers of attorney and new legislation effective in 2011 in Illinois and Florida.

New Illinois statutory forms for the power of attorney for health care and property became effective July 1, 2011. Powers of attorney, often referred to as "disability documents," generally come into effect during your lifetime in the event of incapacitation and terminate upon death. The powers of attorney allow you to elect someone to act as your agent in the event you are unable to make health-care or financial decisions on your own. They are instrumental in the case of an emergency and are important for anyone over the age of 18 to have in place. This has become an increasingly important issue for college students as parents wish to ensure that in an emergency they have access to the necessary medical information.

Powers of attorney forms are often statutorily driven, whereby many states offer guidance on language to incorporate or even provide a sample form. While the statutory forms in Illinois are often easily accessible, if they are not properly executed, they are deemed invalid. Therefore, clients are encouraged to work with an attorney to ensure proper execution so that their wishes can be respected.

The main purposes for the changes to the powers of attorney in Illinois (both for property and health care) were to make instructions more easily understandable and to expand the protection for the principal (the one designating these powers to a named individual agent). The documents also elevate the standard of care for agents from "due care" to "acting in good faith using due care, competence and diligence." In addition, each form includes a revocation of all prior powers of attorney to avoid any confusion regarding an agent's authority to act in the cases where multiple powers of attorney have been executed. Lastly, the new power of attorney for health care incorporates language that comports with Health Information Portability and Accountability Act (HIPAA) privacy provisions to ensure that an agent will have access to the principal's health-care records to make informed medical decisions.

Unlike Illinois, Florida does not provide statutory forms. However, last year Florida revised its Durable Power of Attorney Statute (Florida Chapter 709) to more closely conform to the Uniform Power of Attorney Act, effective Oct. 1, 2011. The new Florida law does not invalidate a power of attorney properly executed prior to Oct. 1, 2011, however, the statute applies to previously executed powers of attorney and certain terms will be subject to a new set of rules.

Clients and advisers often inquire whether Florida will respect Illinois powers of attorney statutory forms. While most other states will accept a power of attorney validly executed in another state, when relocating to a new state, clients are encouraged to get new powers of attorney to minimize any confusion for local banks or hospitals, who may not be familiar with the out-of-state documents. Powers of attorney are critical in emergency situations and I encourage clients to minimize confusion wherever possible.

THE BUZZ

Lindsey Paige Markus

Lindsey Paige Markus, a principal at Chuhak & Tecson P.C., draws on her early career in business, finance and clinically applied neuroscience to communicate with clients and develop creative solutions to fit their estate planning and asset protection needs. Lindsey was named an Illinois Super Lawyers Rising Star in 2010, 2011 and 2012. She is licensed in Illinois and Florida.

Furthermore, as discussed in last month's column, new estate planning documents provide indicia of an intent to remain in a new state, which helps to underscore a client's domiciliary in Florida. The new Florida statute considers powers of attorney properly executed in another state to be valid in Florida, even if it does not comply with Florida's requirements (provided that the document complied with the state or origin's requirements). Durable powers of attorney in Florida must now contain specific language because powers of attorney containing broad language that give an agent broad authority are no longer valid under Florida's new law. Powers of attorney must be executed in the presence of two witnesses and a notary. A photocopy or electronic copy of a powers of attorney form now has the same effect as the original, unless the powers of attorney provides otherwise.

Another important change in the Florida law provides that springing powers of attorney, or powers that do not become effective until incapacity of the principal, are no longer valid in Florida. Rather, Florida powers of attorney executed after Sept. 30, 2011, must be effective upon execution. In Florida, powers of attorney executed prior to Oct. 1, 2011, springing powers of attorney will be effective but will require special physician verification to be valid.

Under the new Florida statute, the agent acting as the attorney-in-fact must be either 1) a person who is 18 years old or 2) a financial institution with trust powers that has a place of business in Florida and is authorized to conduct trust business within that state.

One of the biggest changes under the new Florida law is all powers designated to an agent must be specifically enumerated in the document. The old law did not have such requirements, allowing the document to give broad, general authority, such as "to do all acts that I could have done and to act in my place ... " Further, the new Florida law requires specific enumerated powers be initialed to be effective. Agents are also specifically prohibited from performing certain actions, including executing or revoking any will or codicil for the principal.

Everyone over the age of 18 should have powers of attorney in place. For those with existing powers of attorney, it is advisable to execute new power of attorney documents using the updated forms.