FIRST THINGS FIRST

Reasons to Recommend Updates:
- The Act has many changes from current law; clients may be interested in an up to date document intended to dovetail with the Act.
- A new POA will not have any problems with the effective date provisions, if any.
- It is a good way to ask questions of clients we all should have asked before.

FIRST THINGS FIRST

Reasons to Recommend Updates (cont):
- The current forms may not adequately address the conflict and/or self dealing issues, although gift and accounting language is included in the current Bar Form.
- The Act has a very good, detailed laundry list of Powers that can be incorporated by reference or by copying and pasting.

The Act’s Effective Date is July 1, 2014.

Should you recommend your clients update their POA’s as soon as possible after July 1?
FIRST THINGS FIRST

• Reasons to Relax and Update Over Time
  – The Act applies to POA’s, whenever signed.
  – The current bar form is detailed, and contains specific provisions that can easily work within the new statutory structure
  – It may be more costly for clients and not efficient for attorneys drafting only a POA.

• Another Option – Contact clients with standard estate plans giving opportunity to update using the statutory form.
  – Opportunity to use Technology or can send form.
  – Opportunity to update if clients interested.
  – Opportunity to provide a low/no cost service.

Statutory Form or Customized Form

• Statutory form is appropriate for many situations.
  – When individual’s assets are not complicated.
  – When the individual’s family situation is not complicated.
  – When the succession of agents is simple.

Statutory Form vs. Customized

• Customized will be more appropriate when:
  – There is a conflict of interest, such as ongoing business dealings with the agent or successor (farm tenancies, family owned businesses).
  – Substantial and ongoing gifts are contemplated.
Statutory Form vs. Customized

• Customized may be appropriate if there is a complicated estate planning structure, with inter vivos trusts, with a desire that the agent have authority to create, amend or revoke trusts.

Listing of Powers or Incorporate by Reference

• Statutory form incorporates by reference. A customized form may also do so.
• Benefit is brevity.
• Does the client know the powers that are being granted? Should we provide our clients with a separate ‘cheat sheet’ enumerating the powers.

DEFAULT STATUTE

• Most of the provisions and rules of the Act can be changed in the provisions of the POA.
• Mandatory fiduciary duties not waivable:
  – Duty to act in good faith, within the scope of the POA and in accordance with principal’s expectations.

DEFAULT PROVISIONS

• 633.114 – Fiduciary duties that can be overridden by the POA:
  – Acting loyally for the principal’s benefit
  – Avoiding conflicts of interest;
  – Acting with required care competence and diligence; and
  – Attempting to preserving the principal’s estate plan.
Gifts – Section 201(b)

- Even if a general authority to make gifts is granted under section 633B.217, an agent who is not an ancestor, spouse, or descendant of the principal may not exercise the power in favor of an agent, unless the POA specifically provides.
- Different rules for family and non-family agents.

Gifts – Section 201(a)(2)

- The default rule is that an agent may not make a gift, including creating or changing trusts, making gifts, creating or changing rights of survivorship, change beneficiary designation, waive a right to be a beneficiary of a joint and survivor annuity, or disclaim property, unless otherwise stated.

Gifts

- Section 633B.217 – General Power to Make Gifts
  - Gifts includes a gift to a trust, an account under the UTMA, and a gift to a 529 Plan.
  - This list of indirect gifts is not intended to be exclusive. The definition of gifts is broad.

Gifts (633B.217)

- Default rule is that if there is general authority granted with respect to gifts, the power is as follows:
  - Make outright gifts, exercise general power of appointment, in an amount per donee not to exceed the annual exclusion amount.
  - Consent to the splitting of gift by spouse.
  - Gift must be consistent with the principal’s objectives, if known.
GIFTS (633B.217)

• If principal's objectives are not known, agent must act in the principal's best interest based on the following non exclusive list:
  – Value and nature of principal's property.
  – The principal's foreseeable obligations and need for maintenance.
  – The minimization of taxes.
  – Eligibility for a benefit, a program, or assistance.
  – The principal's personal history of making or joining in making gifts.

GIFTS (continued)

• Note that the statutory form in the Iowa Act does not include the ability to make gifts. It can be added to the form.
• If complicated gifting is anticipated, customized drafting is appropriate.

APPLICABILITY OF ACT

• Section 633B.103 provides that the Act applies to all delegation of decision-making authority over financial affairs and property except:
  – A power coupled with an Interest (creditor, pledged collateral, etc.);
  – Health Care POA covered under Iowa Code Chapter 144B;

APPLICABILITY OF ACT

– Proxy rights or delegation of voting rights.
– A power created on a government form for a government purpose.
WHAT’S NEW

• The POA must be acknowledged (different from current law)
• The POA revokes most prior POA’s
• The “attorney-in-fact” is now the “agent”
• Use the word “incapacity” instead of “disability.”
• The POA is assumed to be durable. No longer need to state that the POA will survive disability.

WHAT’S NEW

• There is a laundry list of individuals who have the authority to request court review of agent’s actions. Section 633B.116.
• Section 633B.117 specifically provides civil liability to the principal if the agent violates the Act.

WHAT’S NEW

• Section 633B.115 authorizes an exoneration provision but it cannot relieve an act committed ‘in bad faith, with an improper motive, or with reckless indifference to the purposes of the POA or the principal’s best interest. Not generally recommended to include this type of clause.

WHAT’S NEW

• The default effective date is at the date of execution.
THIRD PARTY ACCEPTANCE and LIABILITY

• Sections 633B.119 and 120 provide that persons, including financial institutions, are required to accept an acknowledged POA.
• Those sections protect third persons who accept the POA’s from liability if the acceptance was in good faith.

SPECIFIC POWERS

• Section 633B.203 is an enabling provision. It grants the authority to take specific actions to carry out the guidance provided in the POA or incorporated by reference.
• Sections 633B.204 through 633.217 enumerate the types of powers authorized:

  SPECIFIC POWERS
  – Section 633B.204 – Real Property
  – Section 633B.205 – Tangible Personal Property
  – Section 633B.206 – Stocks and bonds
  – Section 633B.207 - Commodities and Options
  – Section 633B.208 – Banks and other financial institutions.

  SPECIFIC POWERS
  – Section 633B.209 – Operation of entity or business
  – Section 633B.210 – Insurance and annuities
  – Section 633B.211 – Estates, trusts and other beneficial interests.
  – Section 633B.212 – Claims and litigation
  – Section 633B.213 - Personal and Family Maintenance
SPECIFIC POWERS

– Section 633B.214 – Benefits from governmental programs or civil or military service
– Section 633B.215 – Retirement Plans
– Section 633B.216 – Taxes
– Section 633B.217 – Gifts

EFFECTIVE DATE OF STATUTE

• Section 633B.403 provides that the Act applies to a POA created on or after July 1, 2014
• Section 633B.403 also provides that the Act applies to a POA created before July 1, 2014, except as otherwise provided in the Act. Generally, a pre 7/1/14 POA is to be interpreted under prior Iowa law, as then in effect.

EFFECTIVE DATE

• But, the provisions of the Act dealing with matters other than the meaning and effect of a POA are applicable to a pre 7/1/14 POA.
• Section 633B.403 specifies that the Act applies to a judicial proceeding with respect to any POA, whenever effective, unless the court determines otherwise. Pre 7/1/14 acts are not affected by the Act.

Thank you
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