T3. Thursday July 12

Illinois Department on Aging
2012 Elder Rights Conference

NO GOOD DEED GOES UNPUNISHED: ESTATE PLANNING, ELDER LAW AND FIGHTING FAMILIES.

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Introduction

This paper will cover several topics related to estate planning, elder law and fighting families. The first topic discusses why families fight and how the choice of the correct fiduciary under estate planning documents makes a difference in avoiding family troubles. The second topic discusses legal capacity to sign estate planning documents. The third discusses issues surrounding the documents make up an estate plan. The last section discusses the options that various professionals have to accommodate documents when issues arise.

Section 1 - Fighting Families and Fiduciary Choices

According to Wikipedia:

the phrase “No good deed goes unpunished”, is a sardonic commentary on the frequency with which acts of kindness backfire on those who offer it. In other words, because life is inherently unfair, those who help others are doomed to suffer as a result of their being helpful

While this axiom is not true in most cases, as a professional, I remember more of the cases in which it is. Frequently, I counsel families that if they undertake the path of “no good deed goes unpunished” in helping their loved ones, they are really doing it for themselves and for the way their gifts of time, money, blood, sweat and tears makes them feel now and when they look in the mirror 10 or 20 years in the future.

Why do families fight?

Most of the time, other family members are the people responsible for punishing someone for doing good deeds. The book, Blood and Money: Why Families Fight Over Inheritance and What to Do About It, by P. Mark Accentura, a Michigan Elder Law attorney, explores why families fight. He finds that:

what appears as greed and pettiness are really symptoms of survivors’ struggle to feel loved and important. The fight for money and things – Dad’s Watch, Mom’s wedding ring – is not about the object or the money itself, but about what they symbolize: importance, love, security, self-esteem, connectedness, and immortality

Mr. Accentura continues that it isn’t money that makes people do funny things, its just how people keep score “in the intangibles of love, approval, and primordial survival”.

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He says that a cocktail made up of one or more of these five factors create these family fights (directly quoted from article):

- Humans are genetically predisposed to competition and conflict
- Our psychological sense of self is intertwined with the approval that an inheritance represents, especially when the decedent is a parent
- We are genetically hardwired to be on the lookout for exclusion, sometimes finding it when it doesn’t exist
- The death of a loved one activates death anxieties of those left behind
- One or more family members has a partial or full blown personality disorder (or mental illness) that causes them to distort and escalate natural family rivalries into personal and legal battles.

With that knowledge, the design of an estate plan and the acting fiduciaries within that estate plan are especially important to avoid or minimize family discord.

**Fiduciaries During Life and Death**

The next section discusses what a fiduciary is and considerations in appointing one. However, before we get to that, there are two points in time in which it is critically important to have the correct fiduciary in place. The first is during disability and the second is after death. The reason for this is that family dynamics can be drastically different when mom and dad or a loved one is sick and dying vs. when they have already passed on.

When a loved one is sick and dying, many of the dynamics that cause families to fight are enhanced. The competition and conflict in taking care of mom or dad and the psychological sense of self during that can create a great deal of content. In addition, if information is not shared amongst all siblings during the disability process a heightened sense of exclusion can occur. Therefore, if it is possible to think ahead when choosing a fiduciary a person should take these issues into account. Frequently, in volatile family situations we will recommend that a person appointed independent third-party such as a bank, trust company, or geriatric care manager to intercede at these times. In many circumstances we do give the children the right to control and replace the fiduciary based on a unanimous vote of all involved.

After a loved one has died the issues simplify to just a fight over money and things and not access to mom and dad. Accordingly when pointing a fiduciary to administer an estate there may not need to be as much care and handholding for family members as there would be choosing the right fiduciary as agents under healthcare power of attorney for managing mom and dad’s finances during convalescence. If that all possible, these considerations must be top of mind when choosing fiduciaries.
The Choice of Fiduciary

A fiduciary is the person acting as an official agent in a trust relationship with the responsibility of acting on behalf of the beneficiary. In estate planning, fiduciaries include agents under a power of attorney, executors, guardians, and trustees. When a person establishes a fiduciary relationship, the fiduciary is responsible for carrying out that person’s instructions and must act in the best interests of that person and that person’s named beneficiaries. However, the real trick is how to watch the fiduciary and ensure that the fiduciary is acting correctly.

We explain these concepts to clients in the first person in our booklet, “The Consumer’s Guide to Estate Planning.” The next several pages contain excerpts from this guide.

You should have confidence that the fiduciary you name has the judgment to fulfill his or her responsibilities. You should note that we did not say expertise to fulfill his or her responsibilities. A fiduciary can use judgment in hiring the necessary expert (legal, accounting, tax, investment, etc.). You should also be reasonably certain the fiduciary you name is willing to do the job.

The fiduciary should physically be available and have the time to carry out his or her responsibilities. While telecommunications has made the world smaller by giving us the ability to carry on business over great distances, you may want a local fiduciary since there may be circumstances in which it is desirable to have the fiduciary’s physical presence readily available.

The fiduciary should have a natural disposition, "fit," or synergy to succeed in his or her role. For example, if Uncle Barney enjoys following financial matters, is good at dealing with legal and financial professionals, but is not so good with children, he might be a good choice for trustee or guardian of an estate (that is, money), but not as guardian of a minor. Aunt Betty, who loves children but can’t balance her checkbook, may be a good choice as guardian of the kids but not the guardian of the kids’ money.

The fiduciary should be able to avoid or manage legal and interpersonal conflicts that are often present in a will and/or estate situation.

A fiduciary is entitled to compensation. Many times nonprofessional fiduciaries (family members or close friends, for example) choose to act without being paid.

There are two generic categories of fiduciaries: professional/corporate and individual. Consider the true cost of not using a professional fiduciary in some circumstances: A professional fiduciary’s fees usually include services for accounting, tax, investment, certain legal needs, and distribution evaluation. A nonprofessional fiduciary will probably have to hire advisors to
provide these services, and it may be tempting for some nonprofessional fiduciaries to use the trust as a personal “piggy bank.”

**Family Member as Financial Fiduciary**

When asked, most estate planning clients say family harmony is more important than worldly possessions. So it’s important to consider that the person who makes the decisions about your worldly possessions after you’ve died or become disabled – known as the financial fiduciary – can have a dramatic impact on family harmony.

Some sources have estimated that jealousies, disagreements and disputes resulting in life-long family feuds happen in one out of every three probate or guardianship cases where a family member is assigned the task of being the fiduciary.

Human nature can make it difficult for family fiduciaries to remain unbiased and objective when it comes to making decisions that affect their own economic interests. Unintended administrative errors are quite common and ordinarily not well received by other family members. Even if things are done correctly, other family members are prone to disagree and second-guess and add personal issues and emotional stress to already difficult situations. In fact, the size of the family, more so than the size of the estate, is what is most likely to increase the risk of family discord.

Alternatively, appointing all family members as co-fiduciaries may avoid resentment and jealousy, but it means everybody gets a say in every financial decision, which could actually end up creating more family friction as well as lengthy delays due to multiple opinions about what should be done.

Why does this happen? When the “glue” of the parental bond weakens as a result of a parent’s disability or death, adult children will often revert to a level that is virtually indistinguishable from adolescent sibling rivalry, prone to using new-found powers to be vindictive and pay back past transgressions, real or perceived.

Being a financial fiduciary is a lot of work, usually in an area in which family members have no knowledge or experience, and it requires they take time away from their own families and jobs to handle. They must liquidate assets and pay bills, manage and investigate assets, and make distributions – sometimes to jealous, biased, critical and unappreciative relatives. On top of that, family members often expect the fiduciary to take no fee for the services they perform, since it’s a family matter. But this can result in a resentful fiduciary, feeling unappreciated and undervalued, and thinking of ways to “reimburse” himself by using his position and access.

Hiring an independent and financially-astute fiduciary following the disability or death of a parent greatly reduces family stress and risk of family disharmony in the administration of the parent’s estate or trust. These fiduciaries, compared to most family members, will achieve a
greater investment return on average, maintain better records, make better income and estate
tax decisions, provide more accurate and informative accountings, and possess a greater
knowledge of the complex laws governing the administration of estates and trusts. Although
family members can achieve the same result by securing other, outside investment, tax, and
legal advice, such advice comes at an additional cost and family members frequently either will
fail to seek this advice or secure it from less competent professionals in order to save “their”
money.

Clients understandably fear that naming a non-family member to serve as financial fiduciary will
result in substantial additional costs that will materially reduce the value of their estates or trust
passing to family members. Actually, it’s the opposite that usually happens. A knowledgeable and
experienced third-party financial fiduciary frequently results in an increased amount of estate or
trust assets passing to family members. Their fees can be offset by better asset management
with less counseling from accountants and attorneys and other outside administrative agencies.
When compared to the fees and costs of a fractious and litigious family situation surrounding
the appointment of a family financial fiduciary, the cost of a third-party financial fiduciary is
almost always less in the long run.

Parents can often involve children in the decision on which third-party fiduciary to hire. Trusts
can be drafted to allow for family members to be put into a "watchdog" role to provide
adequate checks and balances on the fiduciary administration and costs. Frequently, trust
language can allow the children to be able to terminate the employment of the financial
fiduciary and to select a new one within certain bounds.

The Unlucky 13: Estate administration issues that can cause significant family
disagreements

1. The interpretation of what each family member believes is ambiguous language in the
will. This especially applies to provisions that distribute assets to people.
2. Family members may challenge the way and the circumstances under which a will or
trust was signed if the will distributes assets unequally.
3. Sometimes the ambiguities in the will or trust do not give specific instructions on how
items such as jewelry, furniture, artwork, clothing, and family heirlooms should be
distributed among children.
4. Family members frequently do not understand how long it takes to administer an estate
and distribute assets. They do not appreciate the time necessary it takes to properly
discharge administrative complexities. In addition to complaining about how long this
takes, some family members often exaggerate their immediate need for distributions.
5. The information flow to beneficiaries can cause problems. Many beneficiaries tend to
believe that there is no or not enough communication regarding how the estate is being
administered even though the fiduciary is meeting all legal requirements in
communicating how the estate administration is progressing.
6. Many beneficiaries believe that the fiduciary is hiding something when the fiduciary administers the assets. They frequently question the accuracy and completeness of the estate or trust inventory and accounting.

7. Many beneficiaries object to the expense of the fiduciary hiring legal and tax counsel even though that expertise is needed to properly administer the estate or trust.

8. Many beneficiaries question the fiduciary’s decisions on how to dispose of or distribute trust property, including whether property should be sold and at what price.

9. Many beneficiaries question whether the fiduciary properly invested and managed the estate assets. They are prone to second-guess the fiduciary’s investment decisions or the decision not to invest assets if those assets depreciate during the period of estate administration.

10. Many beneficiaries will claim that the decedent’s outstanding bills, claims against the estate or trust, and claims the decedent had against others were not settled appropriately.

11. Whether the fiduciary properly took into the account loans or gifts the decedent made to a family member in determining that family member’s share of the estate or trust.

12. Whether a child was entitled to compensation for care of a parent during the parent’s lifetime.

13. Whether property passing outside the estate or trust to a child (through joint tenancy or a beneficiary designation) should be taken into account in determining the child’s share of the assets.

**Professional/Corporate Fiduciary**

A professional or corporate fiduciary is an entity, most often a bank or trust company that acts as a fiduciary as a full-time and permanent vocation.

Advantages of using a professional fiduciary include:

- independence from pressures other than to fulfill your desires;
- objectivity and impartiality;
- knowledge;
- experience and seasoning;
- effectiveness;
- efficiency;
- ready knowledge of who to hire as additional experts;
- readily available (always has time);
- "tax effect" independence (ability to provide greater flexibility in trust provisions and still yield desired tax benefits);
- avoidance of conflicts of interest; and
- permanency.
Disadvantages of using a professional fiduciary include:

- perceived high cost;
- not as "close" or "warm" as family or friends;
- possible personnel rotation on your account; and
- additional cost to draft will and trust documents should professional fiduciary require specific language.

**INDIVIDUAL FIDUCIARY**

An individual fiduciary is someone other than a professional fiduciary, usually a family member or friend.

Advantages of using an individual fiduciary include:

- possible lower cost;
- better understanding of your beliefs, values, and thoughts; and
- may be closer, warmer, more constant, and more sensitive in relationships.

Disadvantages of using an individual fiduciary include:

- may be more likely to succumb to pressure;
- may be less objective and impartial;
- possibility of conflicts of interest;
- personal relationships may be placed in jeopardy over disagreements;
- may lack professional judgment, knowledge, and experience (which may result in costly mistakes);
- may be less effective and efficient;
- may make poor judgments in hiring experts;
- may not always be available (may not have time to appropriately devote);
- may be difficult to remove; and
- no one may be watching this person to make sure he or she is adequately performing his or her duties.

**CO-FIDUCIARIES**

Estate plans frequently name two or more persons to act together as fiduciaries. The mix can be two individual fiduciaries, two professional fiduciaries, or one of each.

Things to consider when choosing co-fiduciaries are that they:
• assist in balancing each other’s inherent strengths/advantages and weaknesses/disadvantages;
• provide inherent safeguards and checks and balances;
• create greater administrative bureaucracy;
• eliminate the need to choose between certain persons; and
• create possibility for conflict and deadlock.

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Section 2 - Legal Capacity for Signing Estate Planning Documents

To create a fiduciary document, such as a power of attorney for health care or finance, a trust or a will, a person must have the requisite legal capacity to do so.

1. Types of Legal Capacity

a. Guardianship

Guardianship applies to a person who is adjudicated by a court to be a “disabled person.”

Types of disabilities:

Mental deterioration, incapacity, mental illness or developmental disability. A court can determine that a person is not fully able to manage his or her person or estate (money) because of mental deterioration, incapacity, mental illness or developmental disability.

A developmental disability must originate before the age of 18 years, be expected to continue indefinitely, and constitute a substantial handicap.

Gambling, idleness, debauchery, or excessive use of intoxicants or drugs. A court can determine that a person so spends or waste his or her estate exposing himself or herself or his or her family to want or suffering because of gambling, idleness, debauchery or excessive use of intoxicants or drugs.

To appoint a guardian under these standards, a court must make a finding of disability and determine that because of the disability, a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of the person or the estate.

Much of the evidence used to determine this comes from the clinical standards of capacity. Clinical capacity involves both a cognitive and a functional component.

The courts use the guardianships only as is necessary to promote the well-being of the disabled person, to protect that person from neglect, exploitation, or abuse, and to encourage development of that person’s maximum self-reliance and independence. The court orders a
guardianship only to the extent necessary from the individual's actual mental, physical and adaptive limitations.

b. Testamentary Capacity

Testamentary capacity is the capacity for person to execute a will.

The legal standard is "the ability to know and understand that natural objects of one's bounty, the nature and extent of one's property, and to make a disposition of property according to some plan formed in the mind."

The natural objects of one's bounty includes those people related to the maker of the will by ties of blood or affection, that is, those who are or should be considered to be recipients of that person's bequests.

The law presumes every person to be sane until the contrary is shown. The burden of proof is on the party who asserts lack of a testamentary capacity.

c. Capacity to Make a Contract (Including Powers of Attorney for Health Care)

In general, a person who has sufficient mental capacity to transact ordinary business, has the capacity to make a contract.

The same standard applies to executing a power of attorney as applies to executing a contract.

Much of the legal precedent that sets out capacity to make a contract is based on a person's capacity to convey a deed and a person's capacity to enter into a marriage.

To make a deed there are two standards. The person who makes the deed must have sufficient mind and memory to comprehend the nature and effects of this act, comprehend his own interest and exercises at will. The person must also have the mental ability to cope with an antagonist and to understand and protect his own interests.

To enter into a marriage a person must possess sufficient mental capacity to understand the nature, effect, duties, and obligations of the marriage contract.

d. Legal Theories used to challenge powers of attorney and contracts executed by disabled persons

Incapacity - incapacity arises when a person purports to sign a contract, deed, mortgage, loan application, promissory note, power of attorney, or other legal instrument but, at the time of the execution, lacks the requisite mental capacity to understand the document's meaning, content, nature or legal effect.
Undue Influence, Coercion or Duress.

Breach of Fiduciary Duty. Fiduciary relationships are based on degree of any kinship between the parties, disparity in age, disparity in health and mental conditions, disparity in education and/or business sophistication, degree of trust placed in the dominant party, and any dependents or reliance. Any transactions or conveyances between a person and the fiduciary will be presumed invalid and the fiduciary will bear the burden of demonstrating fairness and reasonableness and they exercised undivided loyalty.

Fraud - fraudulent misrepresentation, fraudulent concealment, and constructive fraud.

Theft

e. Factors Considered in a Legal Assessment of Capacity

- Capacity is a continuum with total capacity at one end and marginal capacity at the other.
- Capacity may vary in any one person depending on the time of day, the state of health, medications taken, the place the person is asked, and the stress involved in the current situation.
- Capacity may vary over time.
- Functional limitations such as the inability to perform certain tasks may not indicate complete incapacity.
- Any capacity assessment must also take into consideration whether a decision is being made and the level of capacity that is needed for that type of decision.

Section 3 – Estate Planning Documents

I. Last Will and Testament

A will provides for the distribution of property a person owns (just in their own name — not in joint tenancy, in trust or in an account that contains a beneficiary) when they die in any manner of their choosing as written in the will. The will cannot, however, govern the distribution of property that passes outside of your probate estate (such as certain joint property, life insurance, retirement plans, and employee death benefits) unless the property is payable to your estate.

Wills can be of various degrees of complexity and can help a person achieve a wide range of family and estate tax objectives. In general, a “simple will” provides for the outright distribution of assets, a “testamentary trust will” establishes one or more trusts upon death, a “pour over will” leaves some probate assets to a trust created during a person’s lifetime. In most cases, the purpose of a trust in a pour over will is to ensure continued property management and creditor protection for the surviving family members, to provide for charities, and to minimize
taxes.

In addition to distributing assets to a spouse, children, etc., your will may accomplish other important objectives including:

- A person may designate a guardian for a minor child or children and, by judicious use of a trust and appointment of a trustee, eliminate the need for bonds and supervision by the court regarding the care of each child's estate.
- A person may designate an executor of an estate in the will.
- A person may choose to acknowledge or otherwise provide for a child (e.g., stepchild, godchild, etc.), an elderly parent, or other individuals in whom the person has an interest.
- If a person are acting as custodian for the assets of a child or grandchild under the Uniform Gift (or Transfers) to Minors Act, a person may designate a successor custodian and avoid the expense and hassle of a court appointment.

II. Powers of Attorney

The Power of Attorney Act (755 ILCS 45/1 et. seq.) (the “Act”) covers both powers of attorney for property and powers of attorney for healthcare. The Act contains three primary sections: (1) provisions that govern both powers of attorney for property and powers of attorney for health care, (2) powers of attorney for property, and (3) powers of attorney for healthcare. This outline will discuss provisions governing both kinds of powers of attorney, and the powers of attorney for healthcare.

A. Property Powers of Attorney

I. Why are powers of attorney “durable”?

Currently, many powers of attorney are called durable powers of attorney. These powers of attorney are "durable" because the agency created under the power of attorney is not terminated by the incompetency of the principal. This is why powers of attorney are such an important tool during the management of an individual during incapacity.

II. Delegated Judgment

The power of attorney allows the principal to delegate their own authority to exercise their own judgment to the agent under power of attorney. This is called "delegated judgment." This means that the agent must use the principal's judgment in making decisions under the power of attorney.

In addition, the language of the power of attorney itself is very important in the administration of someone's delegated judgment. This is because the statute first looks to the actual language
of the power of attorney and, powers of attorney and each different State, can be drastically different. Therefore, one must pay careful attention to the actual wording of the power of attorney.

III. Exercise of Power is Optional

"An agent has no duty to exercise powers granted. 755 ILCS 45/2-7. This is in sharp contrast to living trust, in which the trustee has a duty to act as long as he or she serves."

IV. Duty to Not Change Estate Plan

"In exercising powers granted under the agency, including powers of amendment or revocation and powers to expend or withdraw property passing by trust, contract or a beneficiary designation at the principal's death (such as, without limitation, specifically bequeathed property, joint accounts, life insurance, trusts and retirement plans), the agent shall take the principles estate plan into account in so far as it is known to the agent and shall attempt to preserve the plan, but the agent shall not be liable to any plan beneficiary unless the agent acts in bad faith."

"An agent may not revoke or amend a trust revocable or amendable by the principal will require the trustee of any trust for the benefit of the principal to pay income or principal to the agent without specific authority in specific reference to the trust in the agency." 755 ILCS 45/2-9.

V. The Relationship of Powers of Attorney with the Courts

One of the interesting things about power of attorney is than once of principal becomes incompetent, a durable power of attorney can take preference over the power of a guardian. This is why the guardianship statute requires the person who petition for guardianship to disclose whether powers of attorney are in effect.

Upon any finding by the court that a principal lacks the capacity to control or revoke the agency, any interested person (including the agent) may petition the court to look into the conduct of the agent.

"If the court finds that the agent is not acting for the benefit of the principal in accordance with the terms of the agency or that the agent’s action or inaction has caused or threatens substantial harm to the principal’s person or property in a manner not authorized or intended by principal, the court may order a guardian of the principal’s person or estate to exercise any powers of the principal under the agency, including the power to revoke the agency, or may enter such orders without appointment of a guardian as the court deems necessary to provide for the best interests of the principal."
"If the court finds the agency requires interpretation, the court may construe the agency and instruct the agent, but the court may not amend the agency."

“Absent a court order directing a guardian to exercise powers of the principal under the agency, a guardian will have no power, duty or liability with respect to any property subject to the agency or any personal or healthcare matters covered by the agency.” 755 ILCS 45/2-10.

These paragraphs support the Act’s purpose that control should be in an individual rather than with the court. The court will not act unless the individual cannot act; otherwise, the individual should terminate or otherwise control the agent.

VI. Self-Serving Acts of the Agent

The courts look unfavorably at any action between principal and agent that benefits the agent.

Once a petitioner in action to review the power of attorney shows that a fiduciary relationship exists between the principal and agent, there is a presumption that the transaction between the agent and the principal which profits the agent is fraudulent. In this case, the agent has the burden to show by clear and convincing evidence that a transaction between the agent and the principal was fair and equitable and that it did not result from the agent's undue influence over the principal.

In addition, the Act does not authorize any gifts. Therefore, absent specific language that permits gifting within the power of attorney, gifts are not allowed and will be deemed to be fraudulent.

B. Healthcare Powers of Attorney

I. General Provisions

The Illinois General Assembly recognizes “the right of the individual to control all aspects of his or her personal care and medical treatment, including the right to decline medical treatment or to direct that it be withdrawn, even if death ensues. The right of the individual to decide about personal care overrides the obligation of the physician and other health care providers to render care or to preserve life and health.” 755 ILCS 45/4-1. Furthermore, the Illinois General Assembly recognizes that each individual has “the right to appoint an agent to deal with property or make personal and health care decisions for the individual but that this right cannot be fully effective unless the principal may empower the agent to act throughout the principal's lifetime, including during periods of disability, and be sure that third parties will honor the agent's authority at all times.” 755 ILCS 45/2-1.

If the individual becomes disabled, however, his or her right to control treatment may be denied unless the individual, as principal, can delegate his or her decision-making power to “a trusted agent and be sure that the agent's power to make personal and health care decisions
for the principal will be effective to the same extent as though made by the principal.” 755 ILCS 45/4-1.

The Illinois General Assembly makes it clear in the Act that the right of delegation for health care purposes is as broad as the comparable right of delegation for property and financial matters. “However, the General Assembly recognizes that powers concerning life and death and the other issues involved in health care agencies are more sensitive than property matters and that particular rules and forms are necessary for health care agencies to insure their validity and efficacy and to protect health care providers so that they will honor the authority of the agent at all times.” 755 ILCS 45/4-1.

II. Delegation of Powers by the Principal

The health care powers that a principal may delegate to an agent include, without limitation, all powers the principal may have to be informed about and to consent to or refuse or withdraw any type of health care for the principal and all powers a parent may have to control or consent to health care for a minor child. 755 ILCS 45/4-3.

Under the Act, a principal may specify the following:

- the event or time when the agency will begin and terminate;
- the mode of revocation or amendment;
- the rights, powers, duties, limitations, immunities applicable to the agent and to all persons dealing with the agent, and
- other terms applicable to the agent and to all persons dealing with the agent. 755 ILCS 45/2-4(a).

The Act states that the provisions of the agency will control notwithstanding anything else stated in the Act to the contrary, with one exception. 755 ILCS 45/2-4. “Neither the attending physician nor any other health care provider may act as agent under a health care agency; however, a person who is not administering health care to the patient may act as health care agent for the patient even though the person is a physician or otherwise licensed, certified, authorized, or permitted by law to administer health care in the ordinary course of business or the practice of a profession.” 755 ILCS 45/4-5. This means a patient should not appoint his or her personal physician (or other health care provider) as agent, and a patient’s personal physician cannot accept the appointment without ending the doctor patient relationship.

The Power of Attorney Act applies to:

- every agency, whenever and wherever executed, and all acts of the agent to the extent the provisions of this Act are not inconsistent with the agency; and
- all agencies exercised in Illinois and to all other agencies if the principal is a resident of Illinois at the time the agency is signed or at the time of exercise or if the agency indicates that Illinois law is to apply. 755 ILCS 45/2-4(b).
III. Limitations of a Power of Attorney

Nothing in the Act or form of power of attorney authorizes or encourages euthanasia, assisted suicide or any course of action that violates Illinois or U.S. criminal law or which violates any civil right. In addition, the statutory form contains a section where the principal can impose limitations on the actions of the agent, such as when to withdraw life-sustaining treatment, denial or certain treatments based on religious beliefs, or a direction to continue food and fluids in all circumstances, as just a few examples.

IV. Length of Agency

Nothing in the Act impairs or supersedes any “legal right or legal responsibility which any person may have to effect the withholding or withdrawal of life-sustaining or death-delaying procedures in any lawful manner . . .” 755 ILCS 45/4-3. Unless otherwise stated in the power of attorney, the agency continues until the principal’s death. It does not matter for how long the agency is open (contrary to what many banks and financial institutions may claim, Illinois Powers of Attorney do not get “stale”). 755 ILCS 45/2-5. It also does not matter if the principal becomes incapacitated, or if a guardian is appointed to the principal after the power of attorney is signed. 755 ILCS 45/2-5. The powers of a guardian only supersede those of an agent under a health care power of attorney when a court order directly states so. This is the reason that it is important to notify the Probate Court of existing powers of attorney when establishing the guardianship.

A health care agency may extend beyond the principal’s death if necessary to permit anatomical gift, autopsy or disposition of remains.

V. Revocation

The principal may revoke the agency “at any time and in any manner communicated to the agent or to any other person related to the subject matter of the agency.” 755 ILCS 45/2-5. However, the principal may revoke a health care power of attorney at any time without regard to his or her physical or mental condition by:

- obliterating, burning, tearing, or otherwise destroying or defacing the power in a manner that indicates the principal's intention to revoke the power;
- a written revocation that the principal or a person directed by the principal signs and dates; or
- an oral or any other expression of the intent to revoke the agency in the presence of a witness 18 years of age or older who signs and dates a writing confirming that such expression of intent was made.
The person to whom the principal communicates a revocation or amendment of the power has a duty to “make all reasonable efforts to inform the agent of that fact as promptly as possible.” 755 ILCS 45/4-6.

The case law on revocation of health care powers is scant. One case, however, discusses penalties related to failure to notify an agent of the revocation of an agency. In The Matter of Williams, 832 F.Supp. 244 (C.D. Ill. 1993), as Alzheimer’s patient’s stepson failed to notify son of revocation of prior health care power of attorney that had been executed in favor of son and the son brought an action against the stepson for statutory damages. In denying the son’s action, the Court held that any action brought by the son would have had to be as agent for patient, rather than in his individual capacity. The Court held that the Illinois Powers of Attorney for health care law had been designed to protect the principal by giving the agent notice so that it could act on behalf of principal. Accordingly, the Illinois Power of Attorney Health Care Law section imposing penalties for execution, amendment, or revocation of health care power of attorney without the principal’s consent inured to the benefit of the principal and to the agent of principal acting in that capacity, but not to the agent personally. Therefore, the son could not recovery penalty for the stepson failing to notify the son of the revocation of a proper power of attorney in favor of son.

VI. Divorce

Once a court enters a judgment of dissolution of marriage or legal separation between the principal and his or her spouse following the signing of the agency, the spouse is treated as dead for purposes of the agency at the time of judgment. 755 ILCS 45/2-6. A successor agent may act as agent under the power of attorney.

VII. Duties of the Agent under the Power of Attorney Act

The agent is not under any duty to exercise the powers granted by the agency or to assume control of or responsibility for any of the principal's property, care or affairs, regardless of the principal's physical or mental condition. Whenever a power is exercised, the agent must use due care to act for the benefit of the principal in accordance with the terms of the agency and shall be liable for negligent exercise. 755 ILCS 45/2-7 and 2-10(b).

An agent who acts with due care for the benefit of the principal will not be liable or limited “merely because the agent also benefits from the act, has individual or conflicting interests in relation to the property, care or affairs of the principal or acts in a different manner with respect to the agency and the agent’s individual interests.” 755 ILCS 45/2-7.

The Act requires the agent to keep a record of all receipts, disbursements, and significant actions taken under the agency. 755 ILCS 45/2-7.
The Act states that unless the agent has knowledge of an amendment or termination of the agency, the agent is “not affected” by the amendment or termination until the agent has actual knowledge. The agent is not liable for any loss due to error of judgment, and is not liable for the act or default of any other person. The agent or patient has the duty to notify the health care provider of the existence of the health care agency and any amendments or revocations to that agency.

Under the Act, health care providers and others in relation to health care agencies have additional duties and responsibilities. These include:

- When a health care provider is given a copy of a power of attorney, the provider must make it a part of the principal's medical records. The provider must also note any changes to the power in the medical recorders when it learns of such.
- If a health care provider believes that a patient may lack capacity to give informed consent to necessary health care services, the Act requires the provider to consult with any available health care agent known to the provider who then has power to act for the patient under a health care agency. 755 ILCS 45/4-7(a).

The Act requires every health care provider to comply with an agent's directive as long as health care provider is aware of the agency. The provider retains the right to administer treatment for the patient's comfort care or alleviation of pain regardless of the wishes of the agent. In addition, if the provider is unwilling to comply with the agent's decision, the provider must inform the agent. The agent will then be responsible for making the necessary arrangements for the transfer of the patient to another provider. 755 ILCS 45/4-7(b).

The Act gives the agent the same rights the principal has to examine and copy any part of the principal's health records the agent deems relevant to the exercise of the agent's powers, whether the records relate to mental health or any other medical condition and whether they are in the possession of or maintained by any physician, psychiatrist, psychologist, therapist, hospital, nursing home or other health care provider. This may be done at the patient's expense, and is subject to reasonable rules of the health care provider to prevent disruption of the patient's health care. 755 ILCS 45/4-7(c). Since HIPAA became law, however, we have noticed difficulty with carrying out this provision with some health care providers.

Lastly, if the principal empowers the agent to (1) make an anatomical gift on behalf of the principal under the Illinois Anatomical Gift Act, as now or hereafter amended, (2) authorize an autopsy of the principal's body, or (3) direct the disposition of the principal's remains, the agent's decisions in these matters will have priority over the decision of other persons who might otherwise have priority to make the decisions. 755 ILCS 45/4-7(d).
VIII. Liabilities of the Agent for Actions under the Power of Attorney

“No agent who in good faith acts with due care for the benefit of the patient and in accordance with the terms of a health care agency, or who fails to act, shall be subject to any type of civil or criminal liability for such action or inaction.” 755 ILCS 45/4-8(d). In addition, “if the patient’s death results from withholding or withdrawing life-sustaining treatment in accordance with the terms of a health care agency, the death shall not constitute a suicide or homicide for any purpose under any statute or other rule of law and shall not impair or invalidate any insurance, annuity or other type of contract that is conditioned on the life or death of the patient, any term of the contract to the contrary notwithstanding.” 755 ILCS 45/4-8(e).

IX. Penalties Related to Health Care Agencies

The Act imposes the following sanctions in relation to health care agencies:

• Civil liability for willfully concealing, canceling, falsifying or altering a health care agency without the principal's consent;
• Involuntary manslaughter charges for falsification or forging a health care agency or willfully concealing or withholding personal knowledge of an amendment or revocation of a health care agency with the intent to cause a withholding or withdrawal of life-sustaining or death-delaying procedures contrary to the intent of the principal and directly causing life-sustaining or death-delaying procedures to be withheld or withdrawn and death to the patient to be hastened; and
• A Class A misdemeanor and civil liability for requiring or preventing execution of a health care agency as a condition of insuring or providing any type of health care services (this provision specifically targets insurance companies and health care providers). 755 ILCS 45/4-9

X. Definition of Incapacity and Reporting Requirements

Unless otherwise stated in the power of attorney, a principal is deemed to be incapacitated if he or she is under a legal disability as defined in the Probate Act. 755 ILCS 45/2-7.5(a). In addition, principal is also considered incapacitated under the Act if:

• “(i) a physician licensed to practice medicine in all its branches has examined the principal and has determined that the principal lacks decision making capacity; and
• (ii) that physician has made a written record of this determination and has signed the written record within 90 days after the examination; and
• (iii) the written record has been delivered to the agent.” 755 ILCS 45/2-7.5(a)

In addition to being accountable to the principal's estate and have certain reporting obligations under the power, the agent under a power of attorney must also provide records of all receipts, disbursements, and significant actions taken under the authority of the agency when the following parties request them:
• a representative of a provider agency, as defined in Section 2 of the Elder Abuse and Neglect Act, acting in the course of an assessment of a complaint of elder abuse or neglect under that Act;
• a representative of the Office of the State Long Term Care Ombudsman acting in the course of an investigation of a complaint of financial exploitation of a nursing home resident under Section 4.04 of the Illinois Act on the Aging; or
• by a representative of the Office of Inspector General for the Department of Human Services acting in the course of an assessment of a complaint of financial exploitation of an adult with disabilities pursuant to Section 35 of the Abuse of Adults with Disabilities Intervention Act. 755 ILCS 45/2-7.5(b).

XI. Third Party Reliance on Agency

Under the Act, “[a]ny person who acts in good faith reliance on a copy of a document purporting to establish an agency will be fully protected and released to the same extent as though the reliant had dealt directly with the named principal as a fully-competent person.” 755 ILCS 45/2-8. The third party may request an affidavit from the agent that states “that the instrument relied on is a true copy of the agency and that, to the best of the named agent’s knowledge, the named principal is alive and the relevant powers of the named agent have not been altered or terminated.” 755 ILCS 45/2-8. However, the affidavit is not necessary to show good faith reliance.

A person may presume a power of attorney is valid. Any person dealing with an agent named in a copy of a document purporting to establish an agency may presume, in the absence of actual knowledge to the contrary, that the document purporting to establish the agency was validly executed, that the agency was validly established, that the named principal was competent at the time of execution, and that, at the time of reliance, the named principal is alive, the agency was validly established and has not terminated or been amended, the relevant powers of the named agent were properly and validly granted and have not terminated or been amended, and the acts of the named agent conform to the standards of this Act.” 755 ILCS 45/2-8.

Any person who fails to comply with the agent under a power of attorney arbitrarily or without reasonable cause can be subject to civil liability for any damages resulting from noncompliance. 755 ILCS 45/2-8.

XII. Immunities for Reliance on Agent’s decisions

The Act protects and releases each health care provider and each other person who acts in good faith reliance on any direction or decision by the agent that is not clearly contrary to the terms of a health care agency. The Act protects and releases these parties to the same extent as though the party had dealt directly with the principal as a fully-competent person. 755 ILCS 45/4-8. In addition, the party will not be subject to any type of civil or criminal liability or discipline for unprofessional conduct if:
• death or injury to the patient occurs as a result of a party following the agent’s direction. 755 ILCS 45/4-8(a)
• the party does not follow the agent’s directions because the direction violates the party’s conscience rights, provided the party promptly informs the agent of this fact. 755 ILCS 45/4-8(b) [see § II.I, supra]
• the actions of a health care provider who fails to comply with any direction or decision by the agent are substantially in accord with reasonable medical standards at the time of reference and the provider cooperates in moving the principal to another facility. 755 ILCS 45/4-8(c).

XIII. Court Review of Powers of Attorney

Upon petition by any interested person (including the agent) and a finding by the court that the principal lacks the capacity to control or revoke the agency:

• A court may order a guardian of the person’s person or estate to exercise any powers of the principal under the agency (including the power to revoke it) or enter such orders as the court deems necessary to provide for the best interests of the principal without appointment of a guardian if the court finds that the agent is not acting for the benefit of the principal in accordance with the terms of the agency or that the agent’s action or inaction has caused or threatens substantial harm to the principal’s person or property in a manner not authorized or intended by the principal; or
• The court may construe the agency (but not amend it) and instruct the agent if the court finds that the agency requires interpretation;

Absent court order directing a guardian to exercise powers of the principal under the agency, a guardian will have no power, duty or liability with respect to any property subject to the agency or any personal or health care matters covered by the agency. 755 ILCS 45/2-10.

XIV. Health Care Surrogate Act

If a person does not have any advanced healthcare directives in place, the Health Care Surrogate Act applies. 755 ILCS 40/1 et seq. This Act provides an alternative means for decision making on behalf of someone who is incapacitated. It only applies in situations where a valid and unrevoked health care power exists. 755 ILCS 40/15. The act contains four provisions. It permits a surrogate decision maker to make decisions only when someone lacks decisional capacity or has a “qualifying condition” (e.g., terminal condition, unconsciousness, etc.). 755 ILCS 40/10. The second provisions permits the surrogate decision maker to consent to treatment in consultation with a treating physician but does provide a fail safe (two consenting physicians) if life sustaining treatment is to be removed. The third provision provides a list, in order of priority, of who can be a decision maker: guardian, spouse, adult children, parent, sibling, etc. The fourth provision permits a DNR to be executed.
Section 4 - Practical Issues With Powers of Attorney (No Theory Here)

Health care providers and asset contradictions either love or hate advanced directives. Depending on your experience, you probably do, too. The key to handling powers of attorney is understanding when they work, and knowing how to fix the situation when they don’t.

A. Drafting Custom Language – Or, Do Health Professions Actually Read Powers of Attorney?

Some individuals choose to draft very specific custom language into their health care powers of attorney. They are very specific about how they what life-saving measures they do and do not want and when, or about what hospital and doctor they prefer. However, an advanced directive is only as good at providing the principal with what he or she wants as the people who read it and enforce it.

Health care providers are very busy people. If the principal has a medical condition requiring emergency treatment, no health care provider is going to take the time to read a power of attorney carefully – simply because there is no time to spare. Maybe they will have time after the emergency has passed to read the power and see whether or not the person wants life-sustaining treatment. If there are fighting family members, a health care provider will usually check over the power to make sure they can rely on the decision-making agency of the person purporting to be the agent.

As estate planning attorneys, it is very important that we explain to our clients the reality of getting health care providers to follow a Power of Attorney. First and foremost, we need to explain to our clients that they need to go over their advanced directives with their agent, successor agents, and treating physicians and other health care providers. The client needs to be sure the person they choose as agent will follow his wishes exactly, understands those wishes, and will advocate for him in urgent and emergency health situations.

You can draft all the fancy language you want, but if no one reads the directive or if the agent does not follow the directions, it will not work.

B. Power Struggles Among Family Members – Or, When Families Fight

When dealing with advanced directives, family fights occur because everyone wants to control the situation, and the loser is the person most in need of help. One child may have power of attorney for health care, but the spouse may argue she should be making the decisions. More commonly, the spouse or one child has power of attorney, and another child believes the first person is not acting in the best interest of the principal and so wants to obtain guardianship over the principal. Or, the children just do not get along and are angry that Mom or Dad “trusted” the other sibling more and made that person the agent, while they can obviously do a better job (or just do the job, period). Maybe child number 1 wants to take Dad out of the
nursing home because he is so depressed and care for him at her house, while child number 2 (the agent) firmly believes that he needs the nursing care provided at the facility.

The creators of the Illinois Power of Attorney Act obviously thought about these issues, since the Act speaks directly to what document controls. Accordingly, powers granted by a power of attorney survive any guardianship order unless the court specifically orders that the guardian control the rights given to an attorney-in-fact. 755 ILCS 54/2-10. Absent such a specific court order, the agent under the Power of Attorney still has the right to make health care decisions. Do not forget that the guardian would have other powers not included in a power of attorney, however.

Sometimes family members get sneaky, and realize they can terminate an agency under a power of attorney by petitioning the court outside of a guardianship proceeding (any interested person can so petition). To terminate the agency in this manner, the “interested person” must convince the court that the principal lacks the capacity to control or revoke the agency. The court must also find that the agent is not acting for the benefit of the principal in accordance with the terms of the agency, or that the agent’s action or inaction has caused or threatens to cause substantial harm to the principal’s person or property in a manner not authorized by the principal. Only in this event may the court terminate the agency or take other action for the “best interests” of the principal. 755 ILCS 45/2-10.

**C. Dueling Powers of Attorney**

How does the situation arise that a principal will have two valid powers of attorney? To avoid fights, sometimes the principal will draft two powers of attorney for healthcare and name one child as agent in one, and another child as agent in another. Does this work, you ask? If the family situation is contentious, it simply doesn’t. (If the parties all get along, there is no problem.) In another instance, the principal executed a power of attorney naming one child as agent 20 years ago, never revokes that power of attorney, and then executes another power of attorney naming another child as agent. Both children show up at the hospital wanting different treatments for the principal and demanding that they be treated as the “real” agent. The new power of attorney forms have a phrase that will revoke prior powers of attorney. Use it if there are potential conflicts.

Health care providers and asset custodians are stuck in these situations. Whom do they accept as the agent? Both parties seem to have valid powers of attorney. Health care providers’ and asset custodians (such as banks) attorneys tell them to take the safest choice: do not accept either power of attorney and do nothing. This, of course, is often the most detrimental course of action for the principal. If providers throw up their hands and say, “we can’t do anything here,” then a court-ordered guardianship for the principal is necessary to clarify who is in control – usually on an emergency basis. As an estate planning attorney, it is thus a good idea to explain to your client that two powers of attorney are almost never a good idea, and if he is
executing a new power of attorney, he needs to make sure any old powers are revoked and the agents under those powers of attorney are aware of the revocation.

D. Powers of Attorney Drafted Under Suspicious Circumstances

Every now and then you’ll find a Power of Attorney signed under less than ideal circumstances. Was the principal competent when she executed the power? Does a person have to be competent to execute a Power of Attorney? Or does the person only have to know what he or she is signing? Is that even a requirement? Perhaps you suspect Dad wasn’t quite “with it” when he signed, but the document looks valid on its face and you have no proof of fraud or incapacity. What if the kids get Mom to sign an advanced directive they know “Mom would want to read exactly this way,” even though Mom would buy the Brooklyn Bridge with her house as collateral if they put the deed in front of her? What if the signature on the document looks shaky and not exactly the same as the specimen you have in your office, but you know the principal had an illness that caused his fine motor skills to degenerate?

The statute says that any person who “acts in good faith reliance on a copy of a document purporting to establish an agency will be fully protected . . .” Further, the law states that “any person dealing with an agent named in a copy of a document purporting to establish an agency may presume, in the absence of actual knowledge to the contrary, that the document purporting to establish the agency was validly executed.” 755 ILCS 45/208.

Still not sure whether or not to believe a Power of Attorney is valid? Ask for an affidavit.

E. Incorrect Completion

One of the most important features of the power of attorney is the principal’s ability to make their wishes known, in writing, about what they want regarding life-sustaining treatment. This guides the agent in obtaining or withholding medical treatment for the principal. This choice is invalidated when the principal signs or initials all three options regarding life-sustaining treatment. It is the authors’ position that such an error invalidates that part of the power of attorney and severely limit’s the agent’s powers to carry out the principal’s wishes.

Principals like to fill in commencing and termination dates for the power to be in effect. This is usually fine, except when they fill in the dates but do not initial their writing. This could invalidate the entire power of attorney. Better not to have the principal write anything, because the Illinois law and the statutory form say that absent a contrary direction, a power of attorney becomes effective when signed and terminates at death.

F. Erroneous Belief of Power’s Scope

Principals and agents alike often believe that when the principal executes a power of attorney, the principal gives up all control in making their own health care decisions. This is not the case.
Clients need to understand that a power of attorney does NOT invalidate the principal’s choices regarding health care, or make the agent solely able to make decisions on the principal's behalf. A power of attorney merely allows the principal to delegate all health care powers the principal may have to be informed about and to consent to or refuse of withdraw any type of health care for the principal. The principal, of course, can still exercise all of these powers, and their decisions trump those of an agent so long as the principal can make such decisions.

Once a person cannot make health care decisions for himself, however, the agent will make those decisions based on their understanding of the principal's wishes when able to make such decisions.