

Property Powers of Attorney:
*Are YOU Aiding and Abetting
Legalized Theft?*

L. Paul Hood, Jr. JD, LL.M., CFRE, FCEP

paul@paulhoodservices.com

www.paulhoodservices.com

© L. Paul Hood, Jr. 2020

1

Quotes of the Day

- *The greatest lesson in life is to know that even fools are right sometimes.*

- **Winston Churchill**

© L. Paul Hood, Jr. 2020

2

Quotes of the Day

- *Round up the usual suspects.*
(in Latin: *conlige suspectos semper habitos*)
- **Claude Rains' character in *Casablanca***

© L. Paul Hood, Jr. 2020

3

Disclaimer About Forms

- The forms and clauses discussed herein are submitted for purposes of discussion in a continuing education seminar and are intended to provide general guidance and to spur thinking. They do not constitute, nor should they be treated as, legal advice regarding any particular estate planning technique, clause or form or the tax consequences associated with any such technique, clause or form. Forms and independent clauses are **dangerous** if swallowed whole or interposed into documents without careful evaluation of the consequences. **My thinking can be no substitute for yours.**
- While reasonable efforts have been made to assure accuracy, L. Paul Hood, Jr. makes no warranties, express or implied, concerning them. Anyone who uses these forms without careful research and adapting them to a client-specific situation is doing so at his or her own risk. L. Paul Hood, Jr. shall be indemnified, defended and held harmless from your use of these forms.

© L. Paul Hood, Jr. 2020

4

Agenda

- After a brief introduction, including a brief discussion about how costly elder financial abuse is in the United States, I'll cover the following subjects during the course of this 60 minute webinar:
- Review several cases involving property powers of attorney and malpractice.
- Ways to minimize the potential for mischief with property powers of attorney.
- Anatomy of a property power of attorney.

© L. Paul Hood, Jr. 2020

5

Agenda

- After a brief introduction, including a brief discussion about how costly elder financial abuse is in the United States, I'll cover the following subjects during the course of this 60 minute webinar (cont.):
- Blended family powers of attorney traps for the unwary.
- Ways to hold the agent accountable.
- Ways to "encourage" third parties to accept property powers of attorney.
- Use of escrow arrangements to hold property powers of attorney.

© L. Paul Hood, Jr. 2020

6

Lies, Damn Lies, and Statistics...

- According to the National Council on Elder Abuse:
 - Approximately one in ten Americans aged 60+ have experienced some form of elder abuse. Some estimates range as high as five million elders who are abused each year. One study estimated that only one in 14 cases of abuse are reported to authorities.
 - Abusers are both women and men. In almost 60% of elder abuse and neglect incidents, the perpetrator is a family member. **Two thirds** of perpetrators are **adult children or spouses**.
 - Elders who have been abused have a 300% higher risk of death when compared to those who have not been mistreated. While likely under-reported, estimates of elder financial abuse and fraud costs to older Americans range from \$2.9 billion to \$36.5 billion annually. Yet, financial exploitation is self-reported at rates higher than emotional, physical, and sexual abuse or neglect.

Lies, Damn Lies, and Statistics...

- According to a recent study by the U.S. Consumer Financial Protection Bureau, if a **fiduciary** (agent, trustee, guardian, etc.) was behind the loss due to financial abuse, the amount of money involved was steeper than in any other category, for an average of **\$83,600** per victim. **Query: How much warning do you give to people who sign them? Could a client sue an estate planner for failure to warn? The answer is yes!!!**
- If a **nonfamily caregiver** was the culprit, the average loss was **\$57,800**;
- if it was a **family** member, the average loss was **\$42,700**;
- and if it was a **stranger**, the average loss was **\$17,000**.
- CFPB analyzed government reports of suspicious financial activity, which the bureau said involved more than **\$6 billion** in attempted and actual losses between 2013 and 2017.

© L. Paul Hood, Jr. 2020

9

Importance and Risks of Powers of attorney

- Clearly, since the likelihood of becoming incapacitated prior to death is **significantly greater** than the risk of dying at any particular time, the actuarial odds are that the power of attorney will be needed **first**.
- While many estate planners say that the property power of attorney is the **most important estate planning document**, the sad fact is that the power of attorney too often is treated as a **throw-in document** that's not even reviewed by the client prior to signing, and not many estate planners spend any time customizing a power of attorney for a particular client. Many clients believe that all powers of attorney are merely forms and most are similar and really boilerplate. **Nothing could be farther from the truth!**

© L. Paul Hood, Jr. 2020

10

Importance and Risks of Powers of attorney

- Property powers of attorney have been called **licenses to steal** in many articles in the popular press.
- **Abuse of powers of attorney** is increasing, as are situations where estate planners are being sued for, inter alia, not explaining the breadth of the instrument to the client and for not explaining the agent's powers, duties and obligations to the agent. Let's analyze several cases from the jurisprudence where a lawyer was successfully sued for malpractice for failing to do exactly that or was disciplined, e.g., reprimanded, suspended or disbarred, in connection with a property power of attorney, or was disqualified from continuing to represent a client.

© L. Paul Hood, Jr. 2020

11

Horror Stories from the Jurisprudence

- ***Meyer v. Purcell***, 405 S.W.3d 572 (Mo. Ct. App. 2013). Lawyer held **liable for malpractice in the amount of \$256,896** in litigation fees to their attorney pursuant to a contingency fee agreement in the asset recovery action in connection with a power of attorney in favor of a niece where the the lawyer was found by a jury to have been negligent because he “[1] caused the transfer of all of the assets of [Holtz] and [Boliance] to [Niece] in her own name, without regard to their estate plans, or [2] failed to advise [Niece] to cooperate with the personal representative of the Estates ... and failed to advise or assist [Niece] to return the assets [to Estates]...”

© L. Paul Hood, Jr. 2020

12

Horror Stories from the Jurisprudence

- ***Meyer v. Purcell***, 405 S.W.3d 572 (Mo. Ct. App. 2013) (cont.). The expert for the plaintiffs testified that the lawyer “*was negligent for, among other things, failing to consult with Boliance and Holtz [who were in their 90’s] prior to drafting their respective powers of attorney, failing to make any reasonable inquiries when meeting with them, and for instructing Niece to retitle Boliance’s and Holtz’s assets and property to include herself in joint capacity. Schuster testified Purcell should have consulted with Boliance and Holtz to ascertain their wishes prior to drafting the powers of attorney, and should have made reasonable inquiries into their prior estate plans and their respective capacities to execute powers of attorney.*” [Emphasis added]

© L. Paul Hood, Jr. 2020

13

Horror Stories from the Jurisprudence

- ***Meyer v. Purcell***, 405 S.W.3d 572 (Mo. Ct. App. 2013) (cont.). The lawyer prepared the powers of attorney **at the niece’s request**, and the lawyer **never instructed** the niece as to the powers and obligations of being an agent prior to the execution and delivery of the powers of attorney.
- **Moral:** Watch getting dragged into a potential “emergency” mess by one who will benefit by the power of attorney and who wants **immediate** work. Insist on representing the **real client**. If the agent is available, educate them as to their duties, powers and responsibilities. Explain the import and impact of an immediately effective power of attorney to the client **before** he or she executes it. **Put this all in writing!!!**

© L. Paul Hood, Jr. 2020

14

Horror Stories from the Jurisprudence

- ***In re Nunnery***, 320 Wis.2d 422, 769 N.W.2d 858 (2009). Lawyer **suspended for three years** for multiple grounds. One count involved a power of attorney that made the lawyer the agent for a client. The lawyer handled the client's financial affairs until his death. The lawyer continued to act under power of attorney **after** the client died, although it had expired, before opening the client's probate matter. The lawyer misrepresented the client's date of death to hide his improper post-death use of the power of attorney.
- **Comment: This guy is a finalist for fool of the decade! It seems to me that this lawyer got off lightly, for he was committing fraud every time that he used the power of attorney after the client's demise. I think that disbarment was the appropriate penalty. He's lucky that he didn't get charged criminally!**

© L. Paul Hood, Jr. 2020

15

Horror Stories from the Jurisprudence

- Indiana Op. 2-2001 (2001). The opinion is based upon hypothetical facts . The second lawyer quickly prepared a power of attorney in favor of a related agent at the agent's urging without first interviewing the elderly principal. The Disciplinary Board observed:
 - The lawyer may have aided in perpetrating a fraud in violation of MRPC 1.2 because MRPC Rule 1.2 requires a lawyer to make further inquiry.
 - The lawyer may have violated MRPC 4.2 in having contact with a relative (a granddaughter) that the lawyer knew that another lawyer represented her.
 - If the grandfather (principal) is the lawyer's client, the lawyer may have a duty under Rule 1.14 to discover whether the client possessed the requisite capacity to execute a power of attorney, and the Disciplinary Board noted that the lawyer may need to take protective action and pursue a guardianship.
 - If both the granddaughter (agent) and the grandfather (principal) are both the attorney's clients, MRPC 1.7 would require written consent of both to represent in a concurrent conflict of interest after consultation is given.
 - The lawyer may have violated MRPC 5.3 if he failed to properly supervise the paralegal who was asked to exceed her notary duties in determining the capacity of an 88 year old gentleman and in determining whether he was free from undue influence by the granddaughter in signing the power of attorney.

© L. Paul Hood, Jr. 2020

16

Horror Stories from the Jurisprudence

- Indiana Op. 2-2001 (2001) (cont.).
- **Comment: This is a tough case, particularly if the granddaughter misrepresented the facts and her true intentions (under the facts, she definitely qualifies as a bad actor), as many are capable of doing, and the matter was pushed as urgent. However, I would have found that the lawyer violated MRPC 1.2 and 5.3, and I think that a suspension of at least one year would have been appropriate, possibly suspended in part, and probation. Additionally, I would hold the lawyer liable in part for any damage that the granddaughter reeked on the grandfather's financial situation.**

© L. Paul Hood, Jr. 2020

17

Horror Stories from the Jurisprudence

- ***Michigan RI 176* (1993).** MRPC 1.7 and 1.14 prohibit the lawyer from the simultaneous representation of the interests of a mother and daughter in connection with the revocation of a durable power of attorney and petitioning for the appointment of a guardian for the mother because their interests are **directly** adverse.
- **Comment: Once again, these people could have been in the office as a harmless looking set of clients, i.e., a daughter accompanying her elderly mother to the lawyer's office. Be careful!!! At a minimum, interview the mother outside of the presence of the daughter, and don't take no for an answer. The mother might not possess the requisite level of capacity to revoke a power of attorney or to even hire you!!! If the mother doesn't possess legal capacity to your satisfaction, I'd be very suspicious of the daughter, who probably knows about the mother's capacity. Nevertheless, MRPC 1.14 provides protection duties where the lawyer has a reasonable basis to believe that the client lacks legal capacity. If the mother is not a client, but only a prospective client, MRPC 1.18 nevertheless provides some duties to the mother.**

© L. Paul Hood, Jr. 2020

18

Horror Stories from the Jurisprudence

- **Matter of Estate of McCoy**, 844 P.2d 1131 (AK 1993). An agent under a power of attorney from the principal contacted the lawyer to revise the principal's will. "The ...will was drafted by attorney ...at request [of the attorney in fact]. [He] told [attorney] that [decedent] wished to leave everything to him. Although [decedent] was ostensibly [attorney's] client, attorney did not consult with her, did not discuss the terms of the will with her, and did not supervise execution of the will. In fact, [attorney] never met [decedent], despite his intention to do so. [Attorney in fact] arranged for a Notary and witnesses when the will was executed." The will was contested on grounds of undue influence and when the lawyer attempted to represent the agent, a contestant moved to disqualify the lawyer. Attorney was **disqualified** under MRPC 3.7 as a necessary witness.
- **Comment: Sloppy lawyering. The red flags should go up anytime someone requests documents on behalf of another that benefit the requestor. The lawyer deserved to be disqualified.**

© L. Paul Hood, Jr. 2020

19

Horror Stories from the Jurisprudence

- **In re Carnahan**, 449 Mass. 1003, 864 N.E.2d 1183 (2007). At the request of a client, the lawyer visited an elderly, hospitalized accident victim, also a client to whom the first client owed money. At the request of the elderly client, the lawyer helped him revoke a power of attorney previously conferred on his wife and helped him execute a new power of attorney in favor of the debtor client, which empowered the debtor agent to forgive the debts that he owed to the elderly client. The lawyer failed to explain the conflict of interest in representing both clients or obtain a waiver of that conflict. The lawyer was **publicly reprimanded**.
- **Comment: This lawyer was lucky that all he got was a public reprimand. His failure to appreciate the obvious conflict of interest could have exposed him to a claim for damages. He was effectively aiding and abetting a potential elder abuse situation.**

© L. Paul Hood, Jr. 2020

20

Horror Stories from the Jurisprudence

- ***Albright v. Burns***, 503 A.2d 386 (N.J. Super. Ct. App. Div. 1986). Before his uncle's death, a nephew acting pursuant to a power of attorney employed counsel to advise him in connection with the sale of certain stock of the principal and the making of a loan to the nephew's business. The lawyer performed the requested services, which included distributing the proceeds of the stock sale directly to the nephew. After the uncle's death, the attorney represented the nephew as personal representative of the estate. In an action by the estate beneficiaries against the lawyer, the court applied the *Biakanja v. Irving* multifactor balancing test and found that the lawyer had a duty to the beneficiaries for breach of which he could be held **liable**.
- **Comment: Sloppy lawyering. Representing the agent who also is serving as executor is a conflict of interest because the agent owes an accounting to the executor, which meant that the client was accounting to himself.**

© L. Paul Hood, Jr. 2020

21

Horror Stories from the Jurisprudence

- ***In re Christensen***, 2005 N.D. 87; 696 N.W.2d 495 (2005). Lawyer was **reprimanded** for misconduct in three matters, one of which involved estate planning. After preparing a trust and power of attorney for a client, the client married, and the agent questioned his competence to do so. So he authorized the lawyer to commence annulment proceedings and a guardianship proceeding, which the lawyer did on behalf of the agent. The court held that although the lawyer would have been authorized under MRPC 1.14 to commence guardianship proceedings to protect his client, whose competency he questioned, he was not entitled to do so on behalf of a third person, the agent, and the lawyer stipulated that this was a violation of MRPC 1.7. The court relied on ABA Op. 96-404.
- **Comment: Once again, this work was probably started on an expedited basis and was regarded as an emergency, which ultimately got the lawyer reprimanded.**

© L. Paul Hood, Jr. 2020

22

Horror Stories from the Jurisprudence

- ***Svaldi v. Holmes***, 2012-Ohio-6161, 986 N.E. 2nd 443 (Ct. App. 2012). Lawyer drafted a power of attorney for an elderly client that appointed two neighbors as agents. The lawyer included a protective provision in the power of attorney that required the agents to give the lawyer an inventory of the principal's assets within 30 days of appointment and to give the lawyer annual accountings. The agents proceeded to ignore those duties and purloined approximately \$800,000 from the client, and the lawyer failed to follow up with the agents on their duties, which they didn't perform.
- Nonplussed (to say the least), the client then sued the lawyer for malpractice. He alleged that the lawyer had negligently failed to monitor the neighbors as provided for in the power of attorney. The court held that by including this provision, the lawyer had increased the scope of his representation, and had assumed a responsibility to attempt to make it work. The court relied on a comment in the *Restatement (Third) of the Law Governing Lawyers* Sec. 50 (a lawyer "must exercise care in pursuit of the client's lawful objectives in matters within the scope of the representation.") The appellate court, in reversing the grant of summary judgment in favor of the lawyer and remanding for trial, as corrected, noting:

© L. Paul Hood, Jr. 2020

23

Horror Stories from the Jurisprudence

- ***Svaldi v. Holmes***, 2012-Ohio-6161, 986 N.E. 2nd 443 (Ct. App. 2012) (cont.). *We conclude that, by incorporating the inventory and accounting scheme into the power of attorney, Holmes **expanded the scope of his representation** of Svaldi beyond the mere drafting of legal documents. By setting up the inventory and accounting scheme, Holmes assumed a responsibility to attempt to make it work. Thus, Holmes had a **duty to follow up** with Johnson and Esquibel regarding their obligation to complete an inventory and the annual accountings and encourage Johnson and Esquibel to comply with the scheme.* *Svaldi v. Holmes*, 986 N.E.2d 443, 448 (Ohio Ct. App. 2012). [Emphasis added]
- **Comment: This one had to hurt because the lawyer got half of it right, but he failed to monitor obvious miscreant thieves pursuant to the accountability scheme that he devised, which meant that he had to go to trial wearing a duty that portended his future liability for approximately \$800,000 in damages as a result of the failure to monitor the agents.**

© L. Paul Hood, Jr. 2020

24

Horror Stories from the Jurisprudence

- **Atty. Grievance Comm'n of Md v. Hodes**, 441 Md. 136 (Ct. App. Md. 2014). The lawyer represented an elderly woman. After she entered assisted living, he and staff at his firm took over management of her finances. He used his positions as her attorney-in-fact while she was alive to make self interested distributions to himself; after she died, as trustee of a foundation set up under her Will, he transferred funds to his separate financial consulting business contrary to the terms of the trust. He argued that he was not subject to discipline because his actions were taken in a "personal or non-legal capacity." The court rejected this argument, on the ground that some of the misconduct occurred while his client was alive and he was still representing her; but also because his roles as attorney-in-fact and trustee arose from the attorney-client relationship, and his intentionally dishonest conduct was a violation of MRPC 8.4. He was **disbarred**.
- **Comment: Novel argument by respondent, but no cigar.**
- **Akron Bar Ass'n v. Watkins**, 120 Ohio St. 3d 307; 898 N.E.2d 946 (2008). Asked to help manage the financial affairs of an elderly client in residential care, attorney prepared a power of attorney naming himself as agent and then, acting on that power, set up a trust for the client, naming himself as trustee. In that role, he paid himself more than \$46,000 in fees over the space of 20 months, taking some of this in advance of services but failing to place funds in his trust account. The court found that the **fees charged were excessive by \$28,000 for the services rendered**, and that lawyer had violated the trust account rules. He was **suspended for six months**, but the suspension was stayed on conditions.
- **Comment: Sometimes, what looks enticing, i.e., a vulnerable elderly client, turns out to be poisonous.**

© L. Paul Hood, Jr. 2020

25

Is a lawyer under a duty to warn a client about the risks of a power of attorney?

- As a general rule, lawyers are **required** to discuss with the client all of the material risks, and pro's and con's of a particular strategy. MRPC 1.4.
- Because of the sheer amount of jurisprudence and popular press involving abuses of powers of attorney, the risks of letting one out are **real and significant**.
- **Tip:** Based upon the identity of the parties, there may be situations where the lawyer shouldn't permit the client to sign an immediately effective power of attorney, and the lawyer recommends establishment of a springing power of attorney or an escrow system for an immediately effective power of attorney.

© L. Paul Hood, Jr. 2020

26

What is a Power of Attorney? A View from 30,000 Feet

- A power of attorney is a **written** document that enables an individual, who is known as the **“principal,”** to designate another person or persons as his **“agent”** or **“attorney-in-fact,”** that is, to act on the principal’s **behalf**.
- The **scope** of a power of attorney can be severely **limited** (“only to pay my utility bills”) or quite **broad** (“all the legal powers that I myself have, including, but not limited to, the following –”).
- The financial power of attorney governs only property an individual **owns** in his or her **own name**, not as trustee, since a **successor trustee** handles **trust assets** when the settlor becomes incapacitated.
- While approximately 30 states have adopted the Uniform Powers of Attorney Act (“Act”), you must look to **state law**, as there are some significant differences in the laws from state to state. I also will review ARS 14-5501, the Arizona power of attorney statute.

© L. Paul Hood, Jr. 2020

27

What is a Power of Attorney? A View From 30,000 Feet

- Normally, a principal’s ability to deputize an agent terminates upon the principal’s **incapacity** because the incapacitated principal lacks capacity to continue the deputization of the agent.
- A **“durable”** power of attorney is a power of attorney that is **not** terminated by subsequent **disability or incapacity** of the principal, which is exactly when the power becomes **useful** to the principal, i.e., when they **can’t** act for themselves, in order to avoid a potentially **costly** and **delay ridden** guardianship or conservatorship proceeding.

© L. Paul Hood, Jr. 2020

28

Durable Powers of Attorney

- Whether a power of attorney is “**durable**” or not is a function of what the instrument **says** and **applicable state law**. Act Secs. 102(2) and 104.
- Part of it depends upon whether the state has adopted the Act, where **all** powers of attorney are **durable**, i.e., survive the incapacity of the principal, **unless** the instrument provides otherwise. Act Sec. 104. This is not true in Arizona, where the principal must choose between a durable power of attorney or a springing power of attorney. ARS 14-5501A and B.
- In other states, a power of attorney is **not** durable unless it says so with words to the effect of “this power **survives** the principal’s disability or incapacity.” See, e.g., Cal. Probate Code Arts. 4124, 4215 and 4128. Arizona provides similarly. ARS 14-5501A.
- It is always **best practice** to always **affirmatively** say that the power is **durable**, since you never know where the power will have to be **used**.

© L. Paul Hood, Jr. 2020

29

Can a Power of Attorney Become Stale?

- Act Sec. 110(c) provides that unless otherwise provided in the power of attorney, the answer is **no**. Arizona provides similarly. ARS 14-5501A2.
- Nevertheless, third parties frequently assert this as an explanation of a decision not to honor the power of attorney.

© L. Paul Hood, Jr. 2020

30

Do I need to give the third party an original of the power of attorney, or will a copy suffice?

- The answer to the first part of the question is no. Arizona doesn't seem to provide with respect to this question.
- The answer to the second part of the question is yes. Act Sec. 106(d). The copy can be electronically sent too. Arizona doesn't seem to provide with respect to this question.

When is a Power of Attorney Effective?

- This depends upon what the instrument provides. Under Act Sec. 109(a), a power of attorney is effective upon **execution unless** the instrument provides for a **future effective date**. Arizona provides an option here, i.e., either immediately or upon incapacitated.
- However, applicable state law also plays a role here, because some states have adopted statutes that expressly provide for so-called **“springing”** powers of attorney, which aren't effective until the principal's incapacity.
- There are **logistical** problems with springing powers of attorney in that you've got to go **outside** of the four corners of the instrument to determine whether it is presently in effect. **Tip: I discourage** their use for that very reason. A power of attorney is **only** helpful if you can get someone to honor it, i.e., acknowledge the authority of the agent. The chances of reliance **diminish precipitously** if someone has to look past the four corners of the instrument. **Tip: I prefer** some type of escrow arrangement.

© L. Paul Hood, Jr. 2020

33

When Does a Power of Attorney Terminate?

- Pursuant to Act Sec. 110(a), a power of attorney terminates upon the occurrence of the following events:
 - **Death** of the principal;
 - **Incapacity** of the principal, **if** the power of attorney is **not durable**;
 - **Revocation** by the principal;

© L. Paul Hood, Jr. 2020

34

When Does a Power of Attorney Terminate?

- Pursuant to Act Sec. 110(a), a power of attorney terminates upon the occurrence of the following events (cont.):
 - Pursuant to the **terms** of the power of attorney;
 - Accomplishment of the **purpose** of the power of attorney; or
 - The principal **revokes** the agent's authority, or the agent **dies**, becomes **incapacitated** or **resigns**, **and** the power of attorney does **not** provide for another agent to act under the power of attorney.
 - Arizona law has no similar provision.

© L. Paul Hood, Jr. 2020

35

When Does the Agent's Authority to Act Terminate?

- Under Act Sec. 110(a), an agent's **authority** under a power of attorney **terminates** when:
 - the principal **revokes** the authority;
 - the agent **dies**, becomes **incapacitated** or **resigns**;
 - an action is filed for the dissolution or annulment of the agent's **marriage** to the principal or their legal separation, **unless** the power of attorney otherwise provides; or
 - the power of attorney **terminates**.
- Arizona has no corresponding provision.
- Note that the selection of a **relative** of a spouse as agent **doesn't** automatically terminate upon the filing for divorce. **Tip:** Best practice is to terminate this service as well.

© L. Paul Hood, Jr. 2020

36

Does Execution of a Power of Attorney Affect Previously Executed Powers of Attorney?

- The execution of a power of attorney does **not** revoke a power of attorney **previously executed** by the principal **unless** the subsequent power of attorney provides that the previous power of attorney is **revoked** or that all other powers of attorney are revoked. Act Sec. 110(f). Arizona law seems to be the same.
- **Tip:** It is best practice to affirmatively and automatically **revoke** all prior powers of attorney when executing a **new** power of attorney, especially where the principal **changes** agents.

© L. Paul Hood, Jr. 2020

37

What About Naming Co-Agents? How Does That Work?

- A principal may designate two or more persons to act as **co-agents**. Unless the power of attorney otherwise provides, under Sec. 111(a) of the Uniform Powers of Attorney Act, each co-agent may exercise its authority **independently** of the other named co-agents, i.e., **not** by majority rule or unanimously. Arizona has no corresponding provision but may have the same rule.
- **Tip:** As a practical matter, it is best practice to simply name **one** agent at a time, but it is prudent and strongly suggested to name **successors as well as a method of appointing additional successors after the principal's incapacity**. For reasons discussed in greater detail later in the presentation, I recommend one co-agent be the **acting agent** and the other co-agent be the **accounting agent**, and the two will keep track of each other.

© L. Paul Hood, Jr. 2020

38

Operation of Powers of Attorney

- A principal may designate one or more **successor** agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve or declines to serve. **Tip:** The principal should observe the **“rule of two”** and select at least two backup agents and allow the last serving agent to appoint a successor if the principal is incapacitated. **Tip:** If desirable, a principal may give the original agent authority to delegate the agent’s authority during periods when the agent is temporarily unavailable to serve. Act Sec. 201(a)(5). Arizona law is silent on this issue.
- A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office or function. **Unless** the power of attorney **otherwise** provides, under Act Sec. 111(b), a successor agent:
 - has the **same authority** as that granted to the original agent; and
 - may **not** act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve or have declined to serve.
- Arizona has no corollary to Act Sec. 111(b).

© L. Paul Hood, Jr. 2020

39

Operation of Powers of Attorney

- Unless the power of attorney **otherwise** provides, an agent is entitled to reimbursement of expenses **reasonably** incurred on behalf of the principal **and** to **compensation** that is **reasonable** under the circumstances. However, many principals want to alter this provision either by providing that the agent is to serve **without** compensation or to have someone else review the agent’s **request** for reasonable compensation. Act Sec. 112. The Arizona statute is silent on this issue.
- Except as **otherwise** provided in the power of attorney, a person **accepts** appointment as an agent under a power of attorney by **exercising** authority, by **performing** duties as an agent or by any **other** assertion or conduct that indicates acceptance, so **formal written acceptance is not required**. Act Sec. 113. Arizona law is silent on this issue.
- Nevertheless, formal **written** acceptance is **strongly encouraged**. **Tip:** It’s best practice to get the agent to expressly accept for a couple of reasons. First, to ensure that the agent knows about the appointment and is willing to serve. Second, it can be a teaching opportunity for the estate planner to teach the agent what’s entailed in being an agent under the particular power of attorney. **You should document these instructions in writing.**

© L. Paul Hood, Jr. 2020

40

Operation of Powers of Attorney

- Pursuant to Act Sec. 114(a), notwithstanding any other provision in the power of attorney, an agent who has accepted **appointment** shall:
 - act in accordance with the principal's **reasonable expectations** to the extent that they actually are known by the agent and, otherwise, in the principal's **best interest**;
 - act in **good faith**; and
 - act only within the **scope of authority** granted in the power of attorney.
- Even though the Arizona statute is silent on this issue, it probably has a similar rule.

© L. Paul Hood, Jr. 2020

41

Operation of Powers of Attorney

- Pursuant to Act Sec. 114(b)(6), except as otherwise provided in the power of attorney, an agent who has accepted appointment **shall**:
 - act **loyally** for the principal's benefit;
 - act so as **not** to create a **conflict of interest** that impairs the agent's ability to act impartially in the principal's best interest;
 - act with the **care, competence and diligence** ordinarily exercised by agents in **similar** circumstances;

© L. Paul Hood, Jr. 2020

42

Operation of Powers of Attorney

- Pursuant to Act Sec. 114(b)(6), except as otherwise provided in the power of attorney, an agent who has accepted appointment shall (cont.):
 - keep a **record** of all receipts, disbursements and transactions made on behalf of the principal;
 - **cooperate** with a person that has authority to make **health-care decisions** for the principal to carry out the principal's **reasonable expectations** to the extent that they actually are known by the agent and, otherwise, act in the principal's **best interest**; and

© L. Paul Hood, Jr. 2020

43

Operation of Powers of Attorney

- Pursuant to Act Sec. 114(b)(6), except as otherwise provided in a power of attorney, an agent who has accepted appointment shall (cont.):
 - attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:
 - the value and nature of the principal's property;
 - the principal's foreseeable obligations and need for maintenance;
 - minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
 - eligibility for a benefit, a program, or assistance under a statute or regulation.
- Arizona has no express provision on this point.

© L. Paul Hood, Jr. 2020

44

Operation of Powers of Attorney

- Except as **otherwise** provided in the power of attorney, an agent is **not** required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the **death** of the principal, by the personal representative or successor in interest of the principal's estate. Act Sec. 114(h). Arizona has no corresponding provision.
- **Tip:** In a **blended family**, where a representative from one side of the family is serving as agent, it is best practice to **require** the agent to **account** to the other side of the family or to some independent **third party**, at least after the principal is incapacitated. **Tip:** It also is prudent to name **different** people as agent **and** as executor, or it should require an agent-executor to **account** to someone other than themselves, which can be **dangerous** in a blended family.

© L. Paul Hood, Jr. 2020

45

What is the Standard of Liability for an Agent?

- Pursuant to Act Sec. 115, a provision in a power of attorney that relieves an agent of liability for breach of duty is **binding** on the principal and the principal's successors in interest, **except** to the extent that the provision:
 - relieves the agent of liability for breach of duty committed **dishonestly**, with an improper **motive** or with **reckless indifference** to the purposes of the power of attorney or the **best interest** of the principal; or
 - was inserted as a result of an abuse of a **confidential or fiduciary relationship** with the principal.
- Arizona has no corresponding provision.

© L. Paul Hood, Jr. 2020

46

Who May Question the Agent's Work or Authority?

- Under Act Sec. 116(a), the following persons may **petition** a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:
- the **principal** or the **agent**;
- a **guardian**, conservator or other fiduciary acting for the principal;
- a person authorized to make **health-care decisions** for the principal;
- the principal's **spouse**, **parent**, or **descendant**;
- an individual who would qualify as a **presumptive heir** of the principal;

© L. Paul Hood, Jr. 2020

47

Who May Question the Agent's Work or Authority?

- Under Act Sec. 116(a), the following persons may **petition** a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief (cont.):
- a person named as a **beneficiary** to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;
- a **governmental agency** having regulatory authority to protect the welfare of the principal;
- the principal's **caregiver** or another person that demonstrates **sufficient interest** in the principal's welfare; and
- a person asked to **accept** the power of attorney.
- Arizona has no corresponding provision.

© L. Paul Hood, Jr. 2020

48

What Must Someone Who Has Been Asked to Accept a Power of Attorney Do?

- A person to whom a power of attorney has been **presented** with a request by the agent to take action on the principal's behalf must **either** accept an **acknowledged power** of attorney **or request** a certification, a translation or an opinion of counsel no later than **seven business days** after presentation of the power of attorney for acceptance.
- If a person requests a **certification**, a translation or an opinion of counsel, the person shall accept the power of attorney no later than **five** business days after receipt of the certification, translation, or opinion of counsel; and that person may **not** require an additional or different form of power of attorney for authority granted in the power of attorney presented. Act Sec. 120(a).
- **Tip:** Not every state, e.g., Ohio, adopted Act Sec. 120's teeth provision. Arizona has no corresponding provision.

© L. Paul Hood, Jr. 2020

49

What Can Happen If the Person Asked to Rely on the Power of Attorney Refuses?

- A person who refuses to accept a power of attorney can be assessed **attorney's fees** for the costs of going to court to enforce the power of attorney and be **ordered** by the court to accept the power of attorney. Act Sec. 120(a).
- Some powers of attorney provide for **damages, including attorneys' fees**, for failure to **timely comply** with the power of attorney to be assessed against the person who failed to **timely** accept the power of attorney. **Tip:** I always recommend **including** such a provision, if for no other reason as a **deterrent** against refusal. Arizona has no corresponding provision.

© L. Paul Hood, Jr. 2020

50

What About Powers of Attorney Executed Outside of the State—What is Their Effect in the State?

- A power of attorney executed other than in the state of execution is valid in that state if, when the power of attorney was executed, the execution complied with the law of the **jurisdiction** that determines the meaning and effect of the power of attorney pursuant to Act Sec. 107 or with the requirements for a military power of attorney pursuant to 10 U.S.C. 1044b. Sec. 106(c). Arizona has a similar rule. ARS 14-5501C.
- The meaning and effect of a power of attorney is determined by the law of the jurisdiction **indicated** in the power of attorney and, in the **absence** of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was **executed**. Act Sec. 107. Arizona has no corresponding provision. **Tip: There will be times that you will want to expressly provide which state's laws govern the interpretation of the power of attorney.**

© L. Paul Hood, Jr. 2020

51

© L. Paul Hood, Jr. 2020

52

Anatomy of a Power of Attorney

- We will take a brief look at the Act power of attorney form in Act Sec. 301. Arizona has some very specific attestation language that is required for powers of attorney. ARS Sec. 14-5501D4.
- I always preferred drafting my **own** forms when I was in practice, but today I'd work with one of the document drafting systems.
- **Tip:** Powers of attorney should be in writing, signed, witnessed by two people who aren't involved, dated and **notarized**. You never know where or why it is needed.
- As with the form that we use in this webinar, we make **no representation or warranty** about their effectiveness. Our thinking is no substitute for yours.

© L. Paul Hood, Jr. 2020

53

Anatomy of a Property Power of Attorney

- **Appointment and Revocation of Prior Powers of Attorney.** In this section, the principal **appoints** the agent, identifying him or her, and **revokes** all prior powers of attorney.
- **Example:** *I, GEORGE JEFFERSON, currently of 2316 Movin-On-Up Drive, Toledo, Ohio 43606, appoint my spouse, LOUISE JEFFERSON, of 2316 Movin-On-Up Drive, Toledo, Ohio 43606, as my Agent. I revoke any and all prior powers of attorney, except for any health care powers of attorney, living Wills, or advance directives regarding my health care.*

© L. Paul Hood, Jr. 2020

54

Anatomy of a Power of Attorney

- **Durability. Tip:** Despite the fact that Act powers of attorney are **durable** unless they say otherwise, it is **best practice to specifically** so provide because this is not the law in every state, and around 30 states have specifically adopted the Act as of this time, although all states recognize durable powers of attorney. I believe that the word **durable** should be included, together with an **affirmative** statement about incapacity having no impact on its continuing viability. Arizona requires the durability language. ARS Sec. 14-5501B.
- **Example:** *This power of attorney is durable and shall not be affected by my incapacity, disability, or other condition making express revocation impossible or impractical, but shall remain effective until I revoke it or I die.*

© L. Paul Hood, Jr. 2020

55

Anatomy of a Power of Attorney

- **Powers-General.** The Act contains a laundry list of areas that one can cover in a power of attorney by mere reference to the applicable section of the Act. Arizona has no corresponding provision. Does one incorporate those powers by reference, or should they be expressly separately stated? There is a difference of opinion here. **Tip:** I believe in a **“belts and suspenders”** approach where you incorporate by reference and specifically provide for certain enumerated powers.
- **Example:** *In addition to all powers granted to an Agent under [the Act], I authorize my Agent to do the following on my behalf:*

© L. Paul Hood, Jr. 2020

56

Anatomy of a Power of Attorney

- **Powers-Specific.** If the agent is given general authority, the agent has all of the powers in Act Sec. 201 **except** for those powers that must be **expressly included** in order to be part of the agent's powers (the so-called "hot powers"). Arizona has no corresponding provision.
- **Act Sec. 202** expressly permits **incorporation by reference** of the powers provided in Act Secs. 204-217, except for those that must be expressly included, so despite incorporation by reference of those powers, what of the powers that can be incorporated by reference should nevertheless be **expressly** included? Arizona has no corresponding provision.

© L. Paul Hood, Jr. 2020

57

Anatomy of a Power of Attorney

- **What does the Uniform Power of Attorney Act include by way of powers that can be incorporated by reference?** Act Sec. 202 contains authority in the following areas:
 - **201(c)-General Authority.** Includes, inter alia, hiring lawyers, etc. and communications, including mail. **Tip:** Nevertheless, in light of the fact that it is a federal crime to open mail addressed to someone else, we believe that this power should be **expressly** so stated, in some form such as: **Example:** *My Agent shall have access to all postal, video and electronic messages and communications (including, without limitation, e-mails, chat rooms, all forms of instant messages and text messages), machines, meters, computers, mail boxes and drawers and files, electronic or otherwise, registered, jointly or singly, in my name, or on the premises of any property owned or rented in whole or in part by me; to open, and, if necessary as determined by my Agent, reply to or return, all mail, e-mails, texts, instant communications, letters of correspondence, packages and parcels addressed, jointly or singly, to me; and to review all audio and electronic messages and information.*

© L. Paul Hood, Jr. 2020

58

Anatomy of a Power of Attorney

- What powers may be expressly incorporated by reference in an Act power of attorney (cont.)?
 - **Sec. 204-Real Property.**
 - **Sec. 205-Tangible Personal Property.**
 - **Sec. 206-Stocks and Bonds.**
 - **Sec. 207-Commodities and Options.**
 - **Sec. 208-Banks and Other Financial Institutions.**
 - **Sec. 209-Operation of Entity or Business.**
 - **Sec. 210-Insurance and Annuities.**

© L. Paul Hood, Jr. 2020

59

Anatomy of a Power of Attorney

- What powers may be expressly incorporated by reference in an Act power of attorney (cont.)?
 - **Sec. 211. Estates, Trusts, And Other Beneficial Interests.**
 - **Sec. 212. Claims And Litigation.**
 - **Sec. 213. Personal And Family Maintenance.**
 - **Sec. 214. Benefits From Governmental Programs Or Civil Or Military Service.**
 - **Sec. 215. Retirement Plans.**
 - **Sec. 216. Taxes.**
 - **Sec. 217. Gifts.** But this is somewhat limited.
- Arizona has no corresponding provision.

© L. Paul Hood, Jr. 2020

60

Anatomy of a Power of Attorney

- Notwithstanding the laundry list of powers that can be incorporated by reference merely by mentioning **general authority** in each of the preceding cited sections, what powers should a power of attorney **expressly** include?
- I believe that the power of attorney form should nevertheless **carefully** and **expressly** provide for the powers that the principal wants the agent to have, because the incorporation by reference powers are **very broad**, and, in fact, can be more than your client principal wants them to have. In addition, what happens if the power of attorney is needed in a jurisdiction that doesn't have the Act. Incorporation by reference may cause a delayed acceptance during which damage occurs while the third party confirms what the law provides. **Tip: It's best practice** to not solely rely upon incorporation by reference.

© L. Paul Hood, Jr. 2020

61

Anatomy of a Power of Attorney

- The following is a selected list and discussion of some powers that should be fleshed out in greater detail.
 - **Taxes. Example:** *My Agent shall represent me generally in all federal, state, local or foreign tax matters and in all tax proceedings; to sign and file any and all Federal, state, local or foreign tax returns which may be due, including, but without limitation, income, excise, property and gift taxes, and to pay my ratable share of any such tax due; to execute, file and prosecute claims for refund of taxes and to represent me in connection with examination of tax returns and to institute such administrative and court proceedings as my Agent may determine necessary or advisable in connection therewith; and to execute tax consents, tax elections, disclaimers, and other tax-related documents and power of attorney forms for all tax years from the date of my birth to the present required by the Internal Revenue Service or any foreign, state or local taxing authority. I waive all privileges that I may have against disclosure of any confidential tax information to my Agent.*

© L. Paul Hood, Jr. 2020

62

Anatomy of a Power of Attorney

- **Financial Accounts. Example:** *My Agent shall have access to, and may establish and maintain, accounts of all kinds (including checking and savings) on my behalf, with any financial institution, including, without limitation, banks, savings and loans, brokerage firms, credit unions, trust companies, insurance companies, and to maintain signatory authority thereover; to make checks and draw money out of any bank, savings and loan association or other financial institution where the same may have been deposited in my name, or for my account; and to deposit drafts, bills of exchange, acceptances and promissory notes or other obligations for collection in any financial institution, and to withdraw the same or any amount thereof, at pleasure, by check, or otherwise to receive on my behalf any and all notices which may be given or required under law. My Agent is hereby authorized to sign whatever additional forms or powers of attorney forms the financial institution may require in order to transact business or to have access to the information concerning my accounts, including electronically.*

© L. Paul Hood, Jr. 2020

63

Anatomy of a Power of Attorney

- **Nominate Guardian or Conservator.** Typically, the principal nominates the agent to serve in the fiduciary capacity of guardian or conservator, which action almost always is filed by someone other than the agent, i.e., in a contested situation. Act Sec. 108.
- **Example:** *If a guardian of my person, estate, or both needs to be appointed for me by a court, I nominate my Agent designated or otherwise appointed under this power of attorney to serve without bond. If my Agent determines, in the discretion of my Agent, that such proceedings are necessary or in my best interest in order to protect my person and/or my property, then I authorize my Agent to commence and pursue such proceedings, and I further authorize my Agent to be represented in such proceedings by my attorneys. I authorize my Agent to expend my funds to pay for me to be represented by a separate attorney in any such proceeding if my Agent deems, in my Agent's discretion, that I need legal counsel, or if I am requesting legal counsel, or if the court determines that I need legal counsel in connection with such proceeding.*

© L. Paul Hood, Jr. 2020

64

Anatomy of a Power of Attorney

- **Compensation and Reimbursement of Expenses.** Unless a power of attorney provides otherwise, an agent under a power of attorney is entitled to **reasonable compensation** and **reimbursement of expenses** reasonably incurred on behalf of the principal. Act Sec. 112. Arizona has no corresponding provision.
- **Example:** *In addition to reimbursement for expenses reasonably incurred for my benefit, my Agent is entitled to reasonable compensation for services rendered.*
- **Liability Standard. Example:** *I release and discharge my Agent from any and all liability to me or my heirs, successors and assigns arising out of any acts or omissions of my Agent, except for willful misconduct or gross negligence. I agree to indemnify, defend and hold my Agent harmless with respect to claims made against me arising out of my Agent's actions, except for willful misconduct or gross negligence.*

© L. Paul Hood, Jr. 2020

65

Anatomy of a Power of Attorney

- What are some **off-the-beaten-path** provisions to consider including in a power of attorney?
- **Power to change domicile.**
- **Governing law provision. Example:** *This power of attorney shall be governed by and construed according to the laws of the State of [].*
- **Accounting. Accounting; Expanded Accounting Upon Incapacity and Death.** *My Agent shall provide a written accounting of receipts, disbursements and actions taken and agreements signed on my behalf to me within ten days of any such request. Upon my death or incapacity, the latter of which shall be presumed if _____ is denied reasonable access to me, my Agent shall promptly provide a full and complete accounting not less often than _____ to _____ of all of the affairs and activities of my Agent on my behalf, specifically including all self-dealing or changes made to any of my estate planning documents, including, without limitation, deeds and beneficiary designations, or upon the request of _____; provided, however, that such requests shall not be made more often than _____.*

© L. Paul Hood, Jr. 2020

66

Anatomy of a Power of Attorney

- What are some **off-the-beaten-path** provisions to consider including in a power of attorney (cont.)?
- **Inducement to Rely; Damages for Refusal to Acknowledge.** *Example: In order to induce third parties to act under this Power of Attorney, I agree that any third party receiving a copy of this power of attorney together with my Agent's certificate may act hereunder, and that revocation or termination hereof shall be ineffective as to such third party unless and until actual notice or knowledge of such revocation or termination is received by such third party. I agree to indemnify and hold harmless any such third party from and against any and all claims that may arise against such third party by reason of such third party having relied on the provisions of this Power of Attorney. If any third party fails to acknowledge or accept this Power of Attorney, my Agent shall be fully authorized to institute and prosecute legal proceedings to enforce this Power of Attorney through injunctive relief and/or to sue for damages and costs, including, without limitation, attorney fees and other costs of pursuing the claim.*

© L. Paul Hood, Jr. 2020

67

Anatomy of a Power of Attorney

- What are some **off-the-beaten-path** provisions to consider including in a power of attorney (cont.)?
- **Self-Dealing Expressly Prohibited.** *Notwithstanding anything in this Power of Attorney to the contrary, but excepting the power to make gifts in accordance with my past established pattern and practice of gifting, my Agent shall be prohibited from self-dealing. For purposes of this instrument, the term "self-dealing" means dealing on my behalf on any basis other than at arm's length and for fair value, including, without limitation, any direct or indirect (A) sale or exchange, or lease, of my property between my Agent, a relative or affiliate of my Agent, or any affiliate of any relative of my Agent, and my Agent acting with my property; (B) loan of money or other extension of credit by me to my Agent, a relative or affiliate of my Agent, or any affiliate of any relative of my Agent; (C) furnish my goods, services, or facilities to my Agent, a relative or affiliate of my Agent, or any affiliate of any relative of my Agent, and my Agent acting with my property; (D) payment of compensation (or payment or reimbursement of expenses) from my property by my Agent to my Agent, any affiliate or relative of my Agent, or any affiliate of any relative of my Agent; and (E) transfer to, or use by or for the benefit of, my Agent, an affiliate or relative of my Agent, or any affiliate of any relative of my Agent, of my income or assets.*

© L. Paul Hood, Jr. 2020

68

Anatomy of a Power of Attorney

- What are some **off-the-beaten-path** provisions to consider including in a power of attorney (cont.)?
- **Self-Dealing Expressly Prohibited.** (cont.) *The term “relative” of my Agent shall include his or her spouse, ancestors, siblings of ancestors, siblings, children, grandchildren and great grandchildren, and the spouses of siblings of ancestors, siblings, children, grandchildren and great grandchildren. The term “affiliate” shall include (1) any person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with my Agent or any affiliate or relative of my Agent; (2) any officer, director, manager, owner, employee or relative of my Agent; (3) any entity in which the fiduciary, or any affiliate or relative of my Agent, is an officer, director, manager, employee or owner; (4) any trust for the benefit of my Agent or any relative of my Agent; and (5) any estate of any relative of my Agent.*

© L. Paul Hood, Jr. 2020

69

Anatomy of a Power of Attorney

- What powers must be **express** in a power of attorney? Act Sec. 201 provides a list of nine such powers (the so-called “hot powers”). Arizona has no corresponding provision, but the rule must be the same.
- Usually, the client should affirmatively **negate** these powers if that is what the client intends, because, again, agents in other places may have these powers under the law applicable in that jurisdiction.
- Quite often, the client wants to authorize some part, but less than all, of the powers that must be **expressly** authorized, so you should **discuss** that list with the client.

© L. Paul Hood, Jr. 2020

70

Anatomy of a Power of Attorney

- What powers must be **express** in a power of attorney? Act Sec. 201 provides a list of nine such powers (the so-called “hot powers”):
- (1) create, amend, revoke, or terminate an inter vivos trust;
- (2) make a gift;
- (3) create or change rights of survivorship;
- (4) create or change a beneficiary designation;

© L. Paul Hood, Jr. 2020

71

Anatomy of a Power of Attorney

- What powers must be **express** in a power of attorney? Act Sec. 201 provides a list of nine such powers (the so-called “hot powers”) (cont.):
- (5) delegate authority granted under the power of attorney;
- (6) waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or]
- (7) exercise fiduciary powers that the principal has authority to delegate; or
- (8) exercise authority over the content of electronic communications, as defined in 18 U.S.C. Section 2510(12)[, as amended,] sent or received by the principal; or
- (9) disclaim property, including a power of appointment].

© L. Paul Hood, Jr. 2020

72

Anatomy of a Power of Attorney

- What types of powers should the agent expressly **not** be given?
- **Tip:** A well-drafted power of attorney should expressly not create a transfer tax issue for the agent and should cull out of the power certain prohibited powers, as follows:
- **Example:** *Notwithstanding the breadth of powers granted herein to my Agent, my Agent shall not have or exercise any of the following powers:*
 - A. **Life Insurance.** *Any power or incident of ownership over any policy insuring my Agent's life; or*

© L. Paul Hood, Jr. 2020

73

Anatomy of a Power of Attorney

- What types of powers should the agent expressly **not** be given (cont.)?
- B. **Gifts.** *Any power or authority over any irrevocable trust created by my Agent, if I am a trustee or beneficiary of that trust, nor shall my Agent have any power over any property that my Agent may have donated to me.*
- C. **Other Powers.** *Any power or authority to appoint any of my property to my Agent, to my Agent's estate, to my Agent's creditors, or to the creditors of my Agent's estate. My Agent shall have no power or authority to disclaim any assets on my behalf if the result would cause them to pass directly or indirectly to my Agent or to his or her heir or estate in any one calendar year. My Agent shall have no power or authority to discharge any of my Agent's legal obligations out of my property, including any obligation of support that my Agent may owe to others unless my Agent and I are equally obligated to render such support.*

© L. Paul Hood, Jr. 2020

74

Document Modifications

- Powers of attorney issues-modifications often are necessary to your regular forms, several of which are contained in the sample power of attorney included with this webinar.
- The power of attorney should not permit an agent partner to significantly alter the principal's estate plan; likewise, the powers of an agent child should be similarly restricted.
- The limitations might need to be both **affirmative** and **negative** (negative) e.g., restricting beneficiary changes and gifts that are not in accord with the principal's estate plan; (affirmative) requiring continuation of annual gifts, etc.
- In order to dispel uncertainty, the power of attorney should require the agent to give the children of the principal **access** to financial and medical information, or to the partner, if a child is the agent.

© L. Paul Hood, Jr. 2020

75

Document Modifications

Powers of attorney issues (cont.):

- Should limit giving away precious family heirlooms (e.g., silverware, china and pictures).
- Limit changing beneficiary designations.
- Limit changing distribution provisions in IRAs and retirement plans.
- Should automatically terminate on separation or divorce, including appointments of relatives of the now former spouse.

© L. Paul Hood, Jr. 2020

76

Document Modifications

Powers of attorney issues (cont.):

- Should limit the exercise of powers of appointment.
- Should not waive any accountings, and in fact should probably require periodic accountings by the agent, including to a third party, particularly after the principal's incapacity.
- Should affirmatively and broadly restrict self-dealing, including hiring relatives or affiliates.

Ways to minimize the potential for mischief

with property powers of attorney

- What follows is a discussion of various means of minimizing or eliminating the potential for mischief with a property power of attorney, which has been repeatedly called a “license to steal:”
 - Select two agents instead of one.
 - Require accountability to a person other than the principal upon the principal’s incapacity.
 - Use a springing power of attorney.
 - Retain the original of the power of attorney in an informal “escrow” arrangement.
 - Use a formal escrow arrangement with an independent third party.
- Each of these options have pro’s and con’s, which will be discussed in the following slides.

© L. Paul Hood, Jr. 2020

79

Ways to minimize the potential for mischief

with property powers of attorney

- Select two agents instead of one.
- Pro’s:
 - Have two agents who can keep each other accountable.
 - More flexibility.
- Con’s
 - One more unrestrained person to worry about.
 - The potential for collusion between the co-agents.
 - Unless the power of attorney allows each agent to operate independently, the power of attorney instrument should provide for what happens when the agents disagree in a matter that requires the consent of both agents, i.e., a way to settle the dispute.
- **Tip:** A twist on this idea: Make one person the “**acting agent**” and the other person the “**accountability agent**,” where that agent’s sole role is to review the actions and accountings of the agent and empower that agent to take whatever actions are necessary to protect the principal.

© L. Paul Hood, Jr. 2020

80

Ways to minimize the potential for mischief

with property powers of attorney

- Ways to minimize blended family powers of attorney traps for the unwary.
- I really covered most of what modifications should be made in a blended family situation in the anatomy of a power of attorney discussion earlier in this presentation.
- But what follows on the next slides are some modifications to consider.

© L. Paul Hood, Jr. 2020

81

Ways to minimize the potential for mischief

with property powers of attorney

- The power of attorney should **not** permit an agent partner to significantly alter the principal's estate plan; likewise, the powers of an agent child should be similarly restricted.
- The limitations might need to be both affirmative and negative (**negative**) e.g., restricting beneficiary changes and gifts that are not in accord with the principal's estate plan; (**affirmative**) requiring continuation of annual gifts, etc.
- In order to dispel uncertainty, the power of attorney should require the agent to give the children of the principal access to financial and medical information, or to the partner, if a child is the agent.

© L. Paul Hood, Jr. 2020

82

Ways to minimize the potential for mischief

with property powers of attorney

- Should limit giving away precious family heirlooms (e.g., silverware, china and pictures).
- Limit changing beneficiary designations.
- Limit changing distribution provisions in IRAs and retirement plans.
- Should automatically terminate on separation or divorce, including appointments of relatives of the now former spouse.
- Broadly restrict self-dealing.

© L. Paul Hood, Jr. 2020

83

Ways to hold the agent accountable.

- The inherent problem with the power of attorney is that when it's abused, there usually is little that can be done because the abusing agent often has a problem of some sort, e.g., debt, gambling, substance abuse, etc. and spends or secretes the funds with little left to recover. So, with that said, there are a couple of things to consider, which I'll discuss on the next slide.

© L. Paul Hood, Jr. 2020

84

Ways to hold the agent accountable.

- **Tip: Choose** your agents and backups **wisely**. Inquire as to the mental health and financial condition of the person chosen to be an agent or a backup.
- **Tip: Really** hold the agent **accountable**, i.e., don't take no or "I'll get around to it" excuses. Demand, receive and **review** the accountings, which should look like a trustee's accounting.
- **Tip:** Have the agent **formally accept** the duties and agent and educate the agent as to his fiduciary duty, and explain the powers, duties and obligations under the power of attorney and make it clear that any violations would be considered serious and would be pursued and prosecuted to the fullest extent of the law.
- **Tip:** Prohibit **self-dealing**.
- **Tip:** Have a **different person** serve as agent and as successor trustee of a revocable trust or as executor because the agent has an accounting obligation that would be considered effectively moot if the agent is accounting to himself wearing a different hat.

© L. Paul Hood, Jr. 2020

85

Ways to "encourage" third parties to accept property powers of attorney

- **Tip:** You should ask the client for the **right to contact** the banks, brokerage houses and other financial institutions to review the power of attorney **in advance** for their input and blessing or acceptance.
- **Tip:** Expressly authorize the agent to sign any **additional powers of attorney** on forms required or preferred by the third party.
- **Tip:** Put a **formal certification process** in the power of attorney instrument.
- **Tip:** Authorize the agent to **pursue damages and costs of litigation** where a recalcitrant third party either refuses to accept the power of attorney or drags its feet in so doing, and you should indicate to the agent that they should aggressively pursue that third party.

© L. Paul Hood, Jr. 2020

86

Use an “informal escrow” arrangement.

- In this method, the estate planner would hold the original and all copies of the power of attorney until such time as the principal was in distress or incapacitated, at which time the estate planner would release the property power of attorney.
- Pro’s
 - Provides a level of protection.
 - The estate planner doesn’t have to determine whether the principal is incapacitated legally, so there’s some flexibility here, which many like.
 - It helps to retain the client long term.

© L. Paul Hood, Jr. 2020

87

Use an “informal escrow” arrangement.

- Con’s.
 - Usually uncompensated.
 - Run the risk of having a “dormant client” that’s actually still a real client.
 - There are storage concerns, i.e., what happens if the estate planner dies or retires?
 - What happens when you want to retire and can’t find the principal? See, e.g., NYSBA Ethics Opinion 1182 (Jan. 23, 2020).
 - There are real liability concerns, i.e., liability to the principal for wrongful release, especially if the power of attorney is abused.
- On balance, I don’t generally recommend this approach.

© L. Paul Hood, Jr. 2020

88

Use of formal escrow arrangements to hold property powers of attorney.

- In this approach, the client actually puts the original and all copies of the power of attorney in a formal escrow with a third party escrow agent, who is authorized to release the instrument and copies upon the occurrence of some event, e.g., the principal's incapacity, which would have to be formally defined.
- Pro's
 - Stronger protection for the principal than the informal "escrow" arrangement.
 - It's better for the estate planner, who doesn't have to worry about holding and releasing a power of attorney.
 - It's the core business for a company in the escrow business.

© L. Paul Hood, Jr. 2020

89

Use of formal escrow arrangements to hold property powers of attorney.

- Con's.
 - Probably has a cost associated with it.
 - It's not as flexible as the informal arrangement where the estate planner, who's probably more familiar with the family and psychological dynamics of the principal, could release it on his decision.
 - There's another contract to interpret.
 - Delays.
 - Interpretation of the defined term "disabled" in the escrow agreement, although better practice may be for a third party to make that determination, which escrow agents probably don't want to make.
- **Tip:** On balance, the escrow arrangement is best in my opinion, but could be saved for what I believe to be "high risk" situations, e.g., a blended family, a non-family member, particularly a care giver, as agent, etc. and the informal escrow then used for other cases.

© L. Paul Hood, Jr. 2020

90

Use a “springing” power of attorney

- In a classic “springing” power of attorney, the powers aren’t immediately in effect upon execution, but they “spring” into existence upon satisfaction of some criteria, e.g., a disability determination.
- **Tip:** However, a springing power of attorney needn’t be solely sprung on the principal’s incapacity but on the decision of some neutral third party, which is more flexible and doesn’t necessarily require a formal determination of incapacity, particularly if the instrument requires a formal determination by a qualified physician, because a principal might be teetering on the edge of capacity and might frustrate the process by refusing to submit to the capacity examination, which I’ve seen happen several times. Or a physician, sensing an unpaid witness deposition in his future, declines to get involved.

© L. Paul Hood, Jr. 2020

91

Use a “springing” power of attorney

- Pro’s.
 - Provides a layer of protection and comfort not provided by any of the other methods because, in the case of a springing power of attorney, the **powers aren’t effective immediately**. Even in a formal escrow arrangement, there’s a small chance that the power of attorney is released imprecisely.
- Con’s.
 - That the **powers aren’t immediately effective** creates its own set of problems for third parties asked to rely upon the power of attorney because the third party **must go outside of the “four corners” of the instrument**. This greatly troubles many third parties, particularly financial institutions.
 - **Potential delays** between the principal not being able to care for himself and the formal determination of incapacity or whatever other means by which the power of attorney springs into existence.
 - The power of attorney spring is subject to **potential conflicting interpretations, particularly around the definition of “disability.”**

© L. Paul Hood, Jr. 2020

92

Use a “springing” power of attorney

- Con’s (cont.).
 - Sometimes, the principal frustrates the process by refusal to submit to an examination.
 - Some physicians balk at getting involved in these potentially contested matters.
 - Suppose that the principal **disappears**, e.g., a mountain climber or spelunker. Since the principal is not available to be examined, and since the laws of declaring someone deceased require significant time, measured in years, etc., the power of attorney literally doesn’t spring into existence unless that possibility is baked into the agreement.
- On balance, I prefer **immediately effective** powers, with appropriate protections offered either by the informal escrow arrangement and the formal escrow arrangement.

© L. Paul Hood, Jr. 2020

93

Conclusion

- Contrary to popular practice of many, the power of attorney used for estate planning purposes **isn’t a throwaway document** filled with regular boilerplate, so you shouldn’t treat it like one—it’s a **real potential source of liability**. In fact, in the hands of the wrong person, a power of attorney is in fact a license to steal, which makes it a more **dangerous document than a will!** As I discussed earlier, the sad fact is that most money or other property purloined by a crooked agent is never recovered. It can be literally a **license to steal** and change the principal’s estate plan beyond recognition.
- With that said, the grieving principal or the principal’s beneficiaries want to be made whole, and they start **looking for deep pockets to sue**. Guess what, **your malpractice insurance policy is low hanging fruit**, particularly if you didn’t go over the form and what it meant with the principal before he signed it, and confirmed these instructions and explanations in writing, in my opinion, you’re at risk.

© L. Paul Hood, Jr. 2020

94

Thanks!!!

- Comments?
- Questions?
- E-mail me at paul@paulhoodservices.com
- I want to thank you for your attention and business today.
- Have a great rest of your day!!!