POWERS OF ATTORNEY

A Brief Overview

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Powers of attorney are perhaps the most commonly executed legal documents. They are largely considered a crucial element to every estate plan because they allow the principal to nominate a third party to act for them in the event the principal is unable to act, thereby avoiding the necessity of expensive guardianship proceedings. This brief overview should provide practitioners and professionals with some ideas on how to approach powers of attorney in their respective practices.

When Does the Fiduciary Obligation Begin?

To be valid, a power of attorney must be in writing and be executed in the presence of a notary (I.C. §30-5-4-1). A well-drafted power of attorney document should describe the event that triggers the effectiveness of the document. Most attorneys draft the document to become effective either immediately or upon the incapacity of the principal. While an appointee is under no obligation to exercise any powers conveyed to him by a durable power of attorney, any action taken by the appointee must be exercised with due care for the benefit of the principal (I.C.§§30-5-6-1,-2,-3). All powers of attorney are durable, unless terminated pursuant to statute or the terms of the power of attorney (I.C. §30-5-10-1).

If the principal's wish is that the powers become effective immediately upon execution, then the analysis is simple: the attorney-in-fact may act for the principal at any time until an event terminates such power (discussed below). However, where the document is contingent upon the incapacity of the principal, there should be some language describing what is required to satisfy the requirement of incapacity. It is not uncommon to require that a physician (sometimes two) issue an opinion as to the capacity of the principal, prior to the effectuation of the document. As a practical matter, making the power effective only on incapacity may make the power less useful because the attorney in fact is often unable to expeditiously obtain documentation of "incapacity." Without such documentation, the powers under the power of attorney do not spring into effect.

The Indiana Code does not require a person relying on the power of attorney (*e.g.* bankers, financial advisors, etc.) to investigate as to whether the power of attorney is valid, whether the attorney in fact is authorized to act, or what the attorney in fact will do with the property he or she received (I.C. §30-5-8-4). However, professionals should be cautious about issuing property to attorneys in fact *carte blanche*. A person dealing with an attorney in fact is immune from liability as if the person dealt directly with the principal, as long as that person acted in good faith reliance on the power of attorney (I.C. §30-5-8-7).

It is not a bad practice for the professional to require the person purporting to be authorized to act under the power of attorney to execute an affidavit in the form described under Indiana Code §30-5-8-7. The affidavit provides an affirmation that to the best knowledge of the

attorney in fact, the power of attorney is effective, and that the attorney in fact is authorized to take the requested action. It also affirms that if the power is a springing power (*i.e.* it becomes effective upon the occurrence of an event, such as incapacity), the contingency that effectuates the power has come to pass. Under that section, a person who relies on such an affidavit is "immune from liability that might otherwise arise from the person's action in reliance on the power of attorney that is the subject of the affidavit" (I.C. §30-5-8-7(c)).

What Does the Fiduciary Obligation Require?

Indiana law requires that the attorney in fact exercise such powers "in a fiduciary capacity" (I.C. §30-5-6-3). Indiana courts have looked to the Uniform Power of Attorney Act to determine what duties are owed to a principal. In *In re Miller*, 935 N.E.2d 729 (Ind. Ct. App. 2010), the Indiana Court of Appeals stated that an attorney in fact shall act in "accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest." Accordingly, a fiduciary duty may be met by taking action that is not necessarily in the principal's best interest, so long as it is "in accordance with the principal's reasonable expectations." *Id.* The policy behind this rule is that the law should protect "an incapacitated person's self-determination interests." *Id. citing* Unif. Power of Attorney Act §114 Cmt.

Attorneys in fact must refrain from self-dealing. Self-dealing occurs where an attorney in fact exercises the delegated powers to benefit himself or herself. While an attorney in fact may benefit from a transaction from the principal to the attorney in fact, there is a rebuttable presumption that the principal made the transfer as a result of undue influence if the power of attorney was used to make the transfer. *See, e.g., In re Estate of Rickert*, 934 N.E.2d 726 (Ind. Ct. App. 2010). Where the power of attorney was not used to make the transfer, there is no such presumption. *Id*.

To avoid uncertainty, the attorney in fact should be aware of the estate plan of the principal. This will inform the attorney in fact as to the reasonable expectations of the principal. If there is any question, the attorney in fact should err on the side of doing what is in the best interest of the principal.

What Powers Can be Delegated?

The powers that an attorney in fact may be delegated to exercise are described by statute, and a citation to the statute in the power of attorney is sufficient to delegate such power – that is, it is not required that the power be specifically described, as long as the statute permitting the power itself is referenced (I.C. §30-5-5-1). The attorney in fact may be authorized to engage in any "possible matters and affairs affecting property owned by the principal that the principal can perform through an attorney in fact" (I.C.§30-5-5-19).

When Does A Power of Attorney Terminate?

A duly executed power of attorney may be revoked by the principal, or may terminate upon the death of the principal. If the principal revokes the power of attorney, there are specific

procedures that must be followed in order to revoke. The power of attorney may also terminate on a specific date and time described in the power of attorney.

The procedure for the principal to terminate the power of attorney requires a writing. The writing must identify the power of attorney sought to be revoked and it must be signed by the principal (I.C. §30-5-10-1). The revocation is ineffective as to the attorney in fact unless the attorney in fact has actual knowledge of the revocation. *Id.* Finally, if the power of attorney was recorded (to permit the attorney in fact to conduct real estate transactions on behalf of the principal), the revocation must also be recorded in order to be effective. *Id.*

The death of the principal also terminates a power of attorney. In this event, however, if an attorney in fact acts in good faith and without knowledge of the death, the actions so taken are binding upon the principal and the principal's successors (I.C. §30-5-10-4(b)).

A power of attorney may also expire by its own terms. A principal may specify a date and time at which the power of attorney is to terminate (I.C. §30-5-10-2). This type of termination is most useful in the transactional context, where a principal wishes to appoint an agent to execute documents on the principal's behalf in the principal's absence. Here, a principal who anticipates closing a transaction on January 11, 2018 can execute a power of attorney that terminates by its own terms on that date.

Conclusion

In sum, a power of attorney is a powerful legal instrument that, when properly executed and effectuated, can provide extensive benefits. However, estate planners dealing with attorneys in fact must be diligent ensuring the actions of an attorney in fact are in compliance with the reasonable expectations of the principal and the principal's best interests.