



## Elder Law: Getting the right power of attorney

August 29, 2016 12:00 AM

By Julian Gray and Frank Petrich

It has been two years since we last wrote about the importance of having a power of attorney document. Previous discussion was prompted by the statutory revisions under Act 95 of 2014, which made significant changes to how such documents are drafted and used.

Implementation of the new law, as well as the significant consequences of failing to create the “right” power of attorney, have prompted us to revisit this topic because it is frequently the key to the success or failure of a person’s intentions for his or her estate.

While drafting and executing a power of attorney is a relatively “small” affair, the language of the document (or absence of a document) can have significant long-term negative impact.

The power of attorney is generally signed in advance of a person’s onset of a disability in order to name someone to “stand in her shoes” in order to manage all daily financial decisions should the principal become incapacitated to the point where she cannot manage her affairs. That’s where the agent — the person named to handle the affairs — steps in and takes command of a variety of business and daily transactions.

The issue is that no one knows when he or she suddenly may become incapacitated. Failure to have the document in place prior to the disability renders the principal unable to execute a document when it’s most needed.

The unpleasant alternative is a guardianship (or conservatorship in some states), which is a marathon of lifelong court oversight where typically a person steps in as the guardian and employs an attorney who helps the guardian manage the affairs of the incapacitated person and reports progress to the court periodically.

Imagine that you are “involved” with your mother’s decisions regarding her financial matters for several years and that she views you as her “adviser” in dealing with various financial, legal and accounting issues. Then one day she has an unexpected medical event rendering her unable to manage her affairs.

Without a valid power of attorney in place, all personal information held by such advisers will no longer be available to the adult child. It’s off to court to begin the process of having a judge appoint you as the guardian of your mother, a process that could have been completely avoided.

To make matters worse, many powers of attorney are (dare we say the word?) “boilerplate.”

This can result in the preparation of a document that really doesn’t meet the client’s needs or desires. We’ve seen this in the area of gifting provisions. While there are numerous examples, we find the most common oversight is that a power-of-attorney document contains the phrase “limited gifts.”

Under Pennsylvania law, this equates to a limitation of \$14,000/year, which derives from the IRS annual gifting exclusion. (Remember when it was \$10,000/year?) Just as the annual gifting exclusion has increased, so has the lifetime gift exemption from federal estate taxes — get this — from \$600,000 to \$5.45 million.

That means if a generous donor exceeds her annual exclusion (\$14,000) per donee, she can always tell the IRS to put it on her lifetime “tab.” In real numbers, if a parent makes a gift of \$100,000 to a child, the first \$14,000 is excluded and the remaining \$86,000 is credited against the lifetime amount of \$5.45 million. So, until someone exhausts the entire \$5.45 million, no gift tax is due.

Most of us will, unfortunately, not have to worry about such decisions.

However, statistically, half of us do need to worry about the costs of long-term care. A great percentage of families have a net worth between \$14,000 and \$5.45 million. Many will find themselves in circumstances requiring re-titling of assets between spouses, among children or people with disabilities. With the limited gifting power of attorney, it is difficult, if not impossible, to facilitate transactions to “save the family farm” (or just even a modest investment portfolio).

Frequently, we encounter clients who don’t understand the limitations of their power-of-attorney documents. Learning that your power of attorney is deficient should not occur during a time of

crisis. When preparing one, ask your lawyer about gifting and a host of other issues that are personal to your situation.

Julian Gray and Frank Petrich are certified elder law attorneys who practice in the Pittsburgh area at Gray Elder Law. Send questions to [elderlawguys@grayelderlaw.com](mailto:elderlawguys@grayelderlaw.com) or visit [www.grayelderlaw.com](http://www.grayelderlaw.com).