Do This, Not That!

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Power of Attorney and Statutory Gifts Rider

The Power of Attorney ("POA"):

- Allows individuals to appoint agent(s) for financial and/or property purposes.
- Permits family involvement to assist a principal who may not have capacity to help him- or herself.
- Permits property management and authority without need of guardianship.
- Sometimes a necessary part of a successful long-term care plan.

Powers of Attorney – The New Law

Effective **9/1/2009**, GOL § 5-1501 et seq. was amended and later modified effective **9/12/2010**. The law and the "statutory short form power of attorney" changed drastically and substantially.

The most dramatic changes are as follows?

- Agent(s) and successor agent(s) must now sign;
- Gift transactions now require a separate Statutory Gifts Rider ("SGR");
- Principal may appoint a "Monitor"; and
- The imposition of specific fiduciary responsibilities and liabilities on the agent – new statute provides a "prudent person standard of care".

Powers of Attorney – The New Law

Prior to 9/1/2009 – Statutory Short-Form Powers of Attorney validly executed prior to 9/1/2009 remain valid.

9/1/2009 – 9/11/2010 – Statutory Short-Form Powers of Attorney validly executed on the applicable form after 9/1/2009 through and until 9/11/2010 remain valid.

On or after 9/12/2010 – However, Statutory Short-Form Powers of Attorney executed on or after 9/12/2010 must use the new statutory form.

Powers of Attorney – The New Law

Summary of changes to new POA Law:

- POA is "durable" unless the POA expressly provides otherwise.
- May not be modified except in the "Modifications" section.
- POA must now be signed, dated, and duly acknowledged by principal and agent(s).
- Agent(s) must accept and acknowledge the appointment.
- Gift giving powers must be expressed in separate rider (i.e., the SGR).
- Principal may now appoint "monitor".
- New POA does not revoke prior POA, unless the POA expressly provides otherwise.
- Third parties MUST accept duly executed POA.
- Third parties MAY NOT require use of own form

Powers of Attorney – The New Law

Gift transactions to be stated in the SGR:

- New statute carves out any gifting authority and expressly provides that such gifting authority be given in the SGR.
- Power to do anything gift related must now appear in the SGR. Such as:
  - to create and fund trusts;
  - to create joint accounts, remove existing joint owners, or modify a "totten trust" beneficiary;
  - to designate or change beneficiaries on insurance or retirement benefit plans.
- When in doubt, put the power in both the POA and SGR.

Power of Attorney and Statutory Gifts Rider

Planning considerations:

- Drafting and Execution.
  - From both an **Estate Planning point-of-view** and an **Elder Law* point-of-view**, care should be had in the counseling, drafting, and execution of the POA and SGR.
- Modifications. This is an opportunity to tailor the POA and/or SGR to your client and their needs. The outline contains sample modifications for your consideration.
  - From an **Estate Planning point-of-view**, don't add more modifications than the client will tolerate.
  - From an **Elder Law point-of-view**, we need the POA/SGR will work when the client needs it to.

*** Meaning Elder Law and Special Needs**

Power of Attorney and Statutory Gifts Rider

Planning considerations:

- Granting Authority to the Agent.
  - From an **Estate Planning point-of-view**, clients don't like even the thought of losing control. Especially in an SGR.
  - From an **Elder Law point-of-view**, sometimes the only way to properly care for the incapacitated loved one is through a POA and SGR. Not granting the necessary authority may jeopardize the client's plan and leaving off the SGR will potentially subject the client to greater difficulty in the future. Not having the necessary authority in a POA/SGR may necessitate a guardianship.

Power of Attorney and Statutory Gifts Rider

Planning considerations:

- Dangerous Financial Weapon. A POA/SGR carries a lot of power over financial decisions/property management.
  - From an **Estate Planning point-of-view**, the POA can be a dangerous weapon in the hands of an agent who is not trustworthy and does not act in the best interest of the principal.
  - From an **Elder Law point-of-view**, if the client is worried about the rogue agent, the fault may lie in the choice of agent or the effective date of the POA, more than the powers themselves.

Medicaid Income-Only Trusts

- When properly drafted and funded, allows individuals with assets over the limit to qualify for Medicaid.
- Grantor has right to all or some of the net income.
- Grantor has no right to principal.
- Contributions/transfers to the Trust result in a penalty period for purposes of Institutional Medicaid.
- But, if the transfer is beyond the look-back period, then no effect on Institutional Medicaid.
- Because there is no look-back period for Community Medicaid, no penalty period.
- Not a completed gift for Federal gift tax purposes.
- Income (e.g., interest, dividends, bond income, rent, loan payments) from Trust will be counted in the Applicant's budget.*

Medicaid Income-Only Trusts

Planning considerations:

- Too Much Control. The client transfers his or her available resources to the Trust. The Trust now owns and controls the client's available resources. The client is not the Trustee.
  - From an **Estate Planning point-of-view**, drastic shift of control from the Grantor to the Trustee(s). The Elder Law attorney would be wrong to not fully appreciate the client's apprehension over transferring hard-earned assets into someone else's control.
  - From an **Elder Law point-of-view**, the Medicaid Trust is a precise tool for qualifying an individual for Medicaid. The drafter must be careful not to be too liberal or generous with discretionary provisions without thinking of the practical ramifications.

Medicaid Income-Only Trusts

Planning considerations:

- Funding. Clients may not be comfortable with a permanent loss of control over the principal transferred to the Medicaid Trust.
  - From an **Estate Planning point-of-view**, it may be better to do long-term care planning when the client needs long-term care.
  - From an **Elder Law point-of-view**, the Medicaid Trust cannot protect assets that are not owned by it. Moreover, the client's long-term care plan may be drastically affected by postponing the funding of the Medicaid Trust. Creating and funding the Medicaid Trust as soon as possible may minimize and, potentially, avoid problems with a potential look-back period.

Medicaid Income-Only Trusts

Planning considerations:

- Budget Planning. A fully-funded Medicaid Trust means the client contributed their available resources to the Trust and no longer has a right to receive or enjoy the principal thereof. Medicaid Trust planning presents a problem for the client who has to dip into savings to make up their monthly budget.
  - From an **Estate Planning point-of-view**, the Elder Law attorney may not always appreciate this nuance.
  - From an **Elder Law point-of-view**, Medicaid benefits are intended only for those who qualify. To qualify, an applicant cannot have more than the threshold amount in available resources. Planning, therefore, may necessitate a change in a client's budget.

The Homestead and other Real Property

Planning considerations:

- When the Equity is Less than the Threshold. Currently, the home equity limit for Medicaid purposes is $840,000.
  - From an **Estate Planning point-of-view**, if the primary residence is exempt because its equity value is $840,000 or less, then there is nothing more to do. The home can be left to the client's loved ones in their Will or through intestacy. Right?
  - From an **Elder Law point-of-view**, there are other planning considerations than whether or not the equity is less than $840,000. Or whether or not the home can simply be left to the client's loved ones through their Will or through intestacy. For example, appreciating Medicaid's right of recovery against a recipient's probate estate.

The Homestead and other Real Property

Planning considerations:

- Medicaid's Right of Recovery. Medicaid has the statutory right after death to recover Medicaid benefits paid to someone over the age of 55, but only from his or her probate or intestate estate.
  - From an **Elder Law point-of-view**, we want to avoid leaving the home to the client's loved ones in his or her Will or through intestacy. On the other hand, contributing the homestead to a properly drafted Revocable Trust (a/k/a Revocable Living Trust) should (a) avoid probate of the homestead, (b) mirror the dispositive provisions the applicant-recipient would otherwise have in his or her Will, and (c) not affect the applicant-recipient's eligibility for Medicaid benefits.

The Homestead and other Real Property

Planning considerations:

- Retaining the Right to Live in the Premises. Transferring the residence can, generally, take one of the following forms:
  - selling the homestead,
  - deeding/transferring the homestead and retaining a life estate,
  - deeding/transferring the homestead without retaining a life estate,
  - contributing the homestead to a Medicaid Trust (discussed above).

Each of these has its own pitfalls and perils so each has to be reviewed and analyzed for its advantages and relevancy.

The Homestead and other Real Property

Planning considerations:

- Retaining the Right to Live in the Premises.

  - From an **Estate Planning point-of-view**, clients (and their loved ones) are sometimes worried if a transfer of the homestead triggers a "due on sale" clause in the mortgage, as well as basis and tax issues. Or whether or not they may still deduct property taxes and mortgage interest.
    - Don't over-complicate the issue and/or the applicant-recipient's ownership of the homestead.
    - Don't ruining any future tax ownership or benefit.

The Homestead and other Real Property

Planning considerations:

- Retaining the Right to Live in the Premises.

  - From an **Elder Law point-of-view**, we need to take into account all of the issues expressed from an Estate Planning point-of-view, but also make sure we are maximizing the client's Medicaid eligibility/qualification.

Wills and Testamentary Trusts

Wills are the most used method of transferring property from one generation to the next. In practice, we must be careful to draft Wills with the proper execution requirements and requisite legalities. We must also be aware of the availability of certain provisions necessary to tailor a Will to a client's particular circumstantes.

Wills and Testamentary Trusts

Planning considerations:

- Minor Child Provisions for Guardian. When a client has minor children, discuss with them whether or not they want to appoint a guardian(s) for their minor children. The guardian(s) will assume responsibility for the minor children upon the death of the client(s).
  - From an **Estate Planning point-of-view**, nominating the guardian(s) in the client's Will is not enough. The Will has no force until it is probated.
  - From an **Elder Law point-of-view**, the guardianship language in the Will should be supplemented by also executing a Standby Guardianship (in the outline) to allow the minor child(ren) to reside with the named guardian until the Will is probated and the court can name a permanent guardian.

Wills and Testamentary Trusts

Planning considerations:

- Minor Child Trust Provisions. Clients with minor children should contemplate the opportunity to control when and how their children will receive funds from the estate, for example through the use of a testamentary minor trust built into the Will.
  - From an **Estate Planning point-of-view**, clients don't always appreciate trying to control assets "from beyond the grave". Clients also think trusts are "too complicated", "too sophisticated", and "too inflexible".
  - From an **Elder Law point-of-view**, we want to draft as much flexibility as possible into the minor trust provisions. For example, mandatory age distributions (i.e., postponement provisions) promote rigidity and not flexibility.

Wills and Testamentary Trusts

Planning considerations:

- Testamentary Special Power of Appointment. A testamentary power of appointment may be included in the trust language. It often directs the trustee(s) to wait for the Grantor's Will to be probated to see if and how the Grantor exercises the power of appointment. The practitioner simultaneously drafts a Will for the client stating the client executed a trust document and exercises their power of appointment over the trust property (or some portion thereof).

Wills and Testamentary Trusts

Planning considerations:

- Testamentary Special Power of Appointment.
  - From an **Estate Planning point-of-view**, this may be unnecessary or, at least, unclear why a grantor of a trust may need to appoint such property in his or her Will.
  - From an **Elder Law point-of-view**, if a trust includes minor beneficiaries, then it cannot be revoked under EPTL 7-1.9, which provides that the grantor of an irrevocable trust may amend (or revoke) the trust upon the consent of "all persons beneficially interested". Minor beneficiaries cannot give legal consent to an amendment/revocation (nor can their guardians). The testamentary power of appointment has the potential of fixing this.

Wills and Testamentary Trusts

Planning considerations:

- Supplemental Needs Trusts. A trust established for the benefit of a person with a severe and chronic or persistent disability and which supplements, but does not supplant, impair, or diminish the government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.
  - From an **Estate Planning point-of-view**, clients don't always contemplate what might happen in the event of an incapacity or disability. A client's fear of losing control over assets may dissuade them from discussing the SNT.
  - From an **Elder Law point-of-view**, be careful when drafting an SNT for the benefit of a spouse as part of the clients' Revocable Living Trust-based estate plan.

Designations of Guardian

Mental Hygiene Law ("MHL") Section 81.17 provides, in pertinent part, "in a written instrument duly executed, acknowledged, and filed in the proceeding before the appointment of a guardian, the person alleged to be incapacitated may nominate a guardian.".

A Designation of Guardian is the client's written instrument nominating the individual or individuals whom the client wants as their guardian of the person and/or property, in the event such an appointment is necessary.

Designations of Guardian

Planning considerations:

- From an **Estate Planning point-of-view**, a guardianship should not be necessary if the client has a properly drafted and executed power of attorney, health care proxy, and living will.
- From an **Elder Law point-of-view**, there are several scenarios (discussed in the outline) where a Designation of Guardian may be helpful even if the client has a POA, HCP, or Living Will.

Thank You!

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Have a great rest of the Annual Meeting!