

POWER OF ATTORNEY: A LICENSE TO STEAL?

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It is fair to say that most people have heard of the term “power of attorney.” I will often hear clients indicate that they “have the power of attorney” and can, therefore, act on behalf of a loved one. However, far fewer fully understand the import of a power of attorney document or the harm that can follow from its abuse.

The “power of attorney” is a legal document that is often used for estate planning and other purposes. It is a useful tool that can provide broad authorizations to an agent to act on behalf of a principal as to the principal’s legal, financial, business or other matters. The extent of any such authorization will be set forth in the power of attorney document itself. The agent’s power can be limited to a specific purpose or a specific time frame. This legal document is voluntarily signed by the principal, who must be competent at the time of signing, and although witnesses are not required, the principal’s signature must be notarized. The power granted to the agent will continue after a principal becomes incompetent. However, a principal does have the right to revoke the power of attorney document at any time.

Although a power of attorney document is often a good alternative to a guardianship or conservatorship, which may involve expensive and time-consuming court proceedings, there are certainly drawbacks. There is a distinct lack of safeguards. An agent acts without the supervision of any court or governmental agency and has no automatic reporting duty to the court. An agent has no duty to provide an accounting to a principal unless specifically requested, and even when a principal seeks to revoke her agent’s power under this legal document, notification of financial institutions or others as to this revocation can often be difficult or impossible. As such, the power of attorney document, although appropriate in many instances, is an imperfect tool.

What is more, this legal tool can certainly be a double-edged sword. Because it may provide broad authority to act on behalf of a principal, an unscrupulous agent can easily take advantage of this power, especially since there is no automatic court or governmental agency oversight. As such, the power of

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attorney document has at times been described as a “license to steal.”

Can anything be done to prevent the improper use of a power of attorney document – to prevent an agent from effectively stealing from his or her principal? The answer to this question is a definitive yes. However, just as the power of attorney document is an imperfect tool, the remedies to halt the improper use of this tool are likewise imperfect.

In New Hampshire, the power of attorney statute provides for a broad range of individuals that can seek court guidance and assistance regarding the actions of an agent. The principal, spouse, child, or parent of the principal, and any other “interested party” may file an action with our courts to challenge the improper actions of an agent and to bring these actions to light. Effectively, just about anyone, as in “interested party,” could bring such an action. A petition may be brought for numerous reasons, including determining the legality of the agent’s acts, to compel an agent to submit an accounting to the court, to terminate the power of attorney document because of the agent’s breaches, or to determine whether certain transactions and gifting by the agent should be authorized. Importantly, our power of attorney statute also provides for the discretionary award of attorneys’ fees against the agent. This is not a mandatory attorneys’ fees award, but this provision may provide significant leverage against the challenged agent to step down, or to bring certain funds back into the principal’s estate, for fear of at least the real potential of an attorneys’ fees award.

Power of attorney documents routinely find their way into probate litigation matters. Family members accused of “stealing” a loved one’s assets will often find themselves defending their actions by reference to a power of attorney document that provided them with broad powers over their loved one’s finances. It is a shield that often justifies the challenged actions – indeed, it can be difficult to undo the actions of the agent under a power of attorney document after the principal has passed away. If Mom signs a power of attorney document, giving broad powers to her son to manage her finances, upon her passing it can often be impossible to prove with any degree of certainty that the financial transactions taken by the agent were somehow contrary to Mom’s intent or Mom’s interests.

So, although power of attorney documents are frequently used, and for good reasons, we must all be reminded that constant vigilance over agents is warranted. Once the “power” is given, it can be easily abused.

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