Accettura & Hurwitz

Estate & Elder Law

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SPRING 2024 UPDATE

As is our custom, this semiannual correspondence is intended to keep you abreast of developments in estate and elder law. The following is a brief summary of noteworthy developments since our last communication:

New Power of Attorney Legislation

Financial powers of attorney are an integral part of estate planning. They allow the maker to appoint trusted individuals to make non-medical decisions on the maker's behalf while the maker is alive. In late 2023, Michigan joined thirty other states in adopting the Uniform Power of Attorney Act (Act). The Act provides clarity and consistency in creation and implementation of durable powers of attorney. One of the stated goals of the Act, effective July 1, 2024, is to decrease the number of guardianships and conservatorships and thereby lessen the burden of Michigan probate courts. Health care powers of attorney are also an integral part of estate planning but are not addressed by the Act.

Powers signed prior to Sept. 29, 2012 should be updated.

Some of the basics have not changed much. The new law requires that financial powers be signed by the maker (also, *principal*) in the presence of a notary and at least one additional witness. The individual appointed to act on behalf of the principal (*agent* or *attorney-in-fact*) must sign a new Agent Acknowledgement that differs a bit from the agent acceptance we have been using in Michigan since 2012.

The Act builds in protections for all parties to the power of attorney transaction: the principal, the agent, and the recipient. It is hoped that these protections will encourage power of attorney usage and greater acceptance by the individuals and institutions to whom they are presented.

The Act does not invalidate powers executed prior to the effective date of the Act as long as existing powers meet the signing, witnessing and notarization requirements. However, powers signed prior to September 29, 2012 should be updated as they do not meet either the old or new agent acceptance requirement of the Act. Powers executed after July 1, 2024 in compliance with the Act remain effective indefinitely. However, experience tells us that powers should be updated from time to time to avoid additional scrutiny on the basis that they are "old."

Acceptance By Third Parties

It is hoped that the Act ends the inconsistent and seemingly random refusal of financial institutions to accept financial powers of attorney. Financial institutions, concerned with their own liability, have frequently failed to recognize valid powers of attorney. The Act provides tools to protect institutions from liability as well as imposing penalties for failure to accept properly presented and technically compliant powers.

A person or institution may reject a power that does not meet with the technical requirements of signature, witnessing, notarization and agent acknowledgement. Under the Act, the person or institution being asked to accept a fully executed power has seven days to request a certification (signed by an agent or legal counsel) or opinion of counsel (signed by legal counsel). Under the Act, the recipient may rely on the certification or opinion without further investigation, meaning that they are protected. Recipients who fail to accept within the 5-day period may be liable for reasonable attorney fees and costs incurred in any action or proceeding that confirms that validity of the power or mandates acceptance of the power.

Co-Agency

The new Act addresses the thorny issue of co-agency. Banks and other financial institutions have routinely rejected powers that appoint more than one agent to act at a time (*co-agents*). In response, we have been advising clients to appoint one agent to act at a time. The Act solves the co-agency problem with a provision that, unless stated otherwise in the power, co-agents exercise their authority independently. Financial institutions can now accept direction from one agent without fear of liability.

Agent Liability

Under the Act, an agent who is found to have abused their power is required to restore the value of the principal's property to what it would have been had the violation not occurred, including attorney fees and costs. An agent who embezzles, converts or refuses to return the principal's property is liable for three times (treble damages) the value of the stolen property.

Agents are not responsible for the breaches or misconducts of co-agents unless they participated in the breach or concealed it. To avoid liability, a non-breaching co-agent with knowledge of a co-agent's breach must notify the principal of the breach. If the principal is incapacitated, the non-breaching agent must take action to safeguard the principal's best interests or are themselves liable for the reasonably foreseeable damages that could have been avoided the breach. Presumably non-breaching co-agents would be protected by contacting law enforcement or petitioning the probate court.

Miscellaneous Provisions

Prior to the Act, agents were not allowed to be compensated for their services unless specifically permitted in the document. The Act reverses the presumption. Now, agents are entitled to reimbursement of expenses and reasonable compensation for their services unless the power provides otherwise.

The Act states that a photocopy or electronically transmitted copy of the original power has the same effect as the original.

Where an agent is the principal's spouse, the grant of power terminates when an action is filed for dissolution or annulment of the marriage or legal separation.

Action Required

- Powers of attorney signed September 29, 2012 or earlier should be updated as soon as possible after the effective date of the new law, July 1, 2024.
- Powers of attorney signed between September 29, 2012 and June 30, 2024 should be updated the next time you meet with us after July 1, 2024.
- Powers of attorney drafted after July 1, 2024, like all powers of attorney, should be reviewed from time to time to keep them fresh.

How Does Divorce Affect My Estate Plan?

Unfortunately, some marriages just don't work out. Divorce is an extremely stressful process that often consumes couples for months if not years. In the midst of the swirl of physically moving and dividing assets, newly single spouses frequently fail to update their estate plan to reflect their new circumstances.

Married couples routinely name each other to make their health care and financial decisions and appoint each other as their personal representative and trustee. They also typically leave all of their assets to each other at death. How does divorce affect these appointments and bequests?

For the most part, Michigan law addresses these issues in the *revocation on divorce* provisions of the Estates and Protected Individuals Code (*EPIC*). However, and somewhat surprisingly, does *not* apply to retirement plans like 401ks and in some cases IRAs.

EPIC revokes all fiduciary appointments upon divorce. Appointments of a former spouse under powers of attorney (patient advocate or agent), a will (personal representative) or trust (trustee) are automatically voided in divorce. Contingent appointees, if any, would simply move up in the order of authority.

Bequests to a former spouse under a will, trust, life insurance policy, annuity, TOD (transfer-on-death), POD (pay-on-death), or deed are also voided under EPIC. While it would seem that the revocation on divorce provisions of EPIC would extend to retirement plans such as 401k plans and employer group life insurance plans, they do not.

The U.S. Supreme Court in *Egelhoff v. Egelhoff* (2001) clearly states that federal law (in this case, ERISA) preempts state law in matters of employee benefits. Thus, Michigan's revocation on divorce provisions do not void designation of a former spouse as beneficiary of a 401k, company retirement plan or group life insurance policy. As IRAs are not covered by ERISA they would seem to be protected by Michigan's revocation on divorce laws. However, it is unclear whether the protection extends to inherited IRAs (IRAs inherited from others). Estate planning documents and beneficiary designations should be revised to remove the former spouse and name new fiduciaries and beneficiaries.

It is thus critical that immediately upon divorce each spouse revise his or her estate plan and all beneficiary designations.

Action Required

It is thus critical that immediately upon divorce each spouse revise his or her estate plan and all beneficiary designations. The historic rise in the value of retirement assets as a percentage of personal wealth only ups the ante on taking action especially with regard to 401ks, retirement plans, group life insurances and all types of IRAs (traditional, Roth, and inherited).

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Call Us Immediately When…

Call us from the hospital *before* you are discharged to "rehab." While hospital discharge planners may suggest a facility, it is ultimately your right to choose the nursing home (nursing homes provide both rehabilitation and long-term care services) where you wish to continue your recovery. Hospital discharge planners often choose facilities that only accept Medicare. Since at least 90% of rehab facilities accept both Medicare and Medicaid, it would be a shame to accept a discharge to a facility that you will have to leave when your Medicare days (potentially up to 100 days) run out. Also, **please call us if we haven't seen you since 2018**.

Please Say Nice Things About Us!

If you are unhappy with our service please contact our office and speak with our office manager, Kim Rapp, and we will do our best to remedy the issue. If you are happy with our service, please visit our Facebook page called "Accettura & Hurwitz: Estate and Elder Law" and/or Google Review and give us a good review so others will know of our good work. This Newsletter is considered general information and is not intended to constitute individual legal advice. Please contact us if you think the information herein impacts you directly. We look forward to speaking with you soon. Please visit our website ***www.elderlawmi.com***

Very truly yours,

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