

Powers of Attorney: What Accountability?

When an agent acts on behalf of a principal, to whom is the agent accountable? This is no small matter in the estate planning context. More than 40 million Americans are age 65 or older — 13 percent of our population — and those numbers are growing rapidly,[1] with an estimated 10,000 reaching age 65 each day. Since greater longevity correlates with greater incidence of incapacity, our aging clients are increasingly at risk[2] and will become more reliant on general powers of attorney. But what happens when there is financial mismanagement, or even abuse? If a principal is incapacitated, as is so often the case when a power of attorney is misused, who then has standing to hold the agent accountable, or even to learn of the problem?

"Thou shalt not steal."
— God, c. 1446 B.C.

"Trust, but verify."
— Ronald Reagan, 1987 A.D., quoting a Russian proverb.

NEW INFORMATION

Updated Tax Chart Available for Download

In his February 2011 column about the federal estate tax changes, Dan Holbrook included a multicolor spreadsheet showing the combined federal and Tennessee death taxes. The spreadsheet has now been updated to include the correct 2012 federal exemption (which is indexed for inflation) and to illustrate the effect of portability of the federal exemption for a married couple.

It is available for download at http://tba.org/journal_new/index.php/download/category/12-dan-holbrook-feb-2011.

The Uniform Durable Power of Attorney Act (UDPA) was adopted by most states about 30 years ago, with Tennessee's version (TUDPA)[3] enacted in 1983. However, UDPA is generally considered outdated, in large part because of inadequate guidelines for the principal and the agent, leading states to enact widely varying amendments to their versions of UDPA.

Tennessee's response was to amend TUDPA in 2007 by adding a new section.[4] It clarifies that although an agent is not necessarily required to act, an agent who undertakes to act is in fact a fiduciary, with all attendant fiduciary duties, including the duty of adequate accounting. But accounting to whom? TUDPA, as amended, explicitly grants standing to demand an accounting to only three persons: the principal, a court, or a legal representative appointed by the principal. A fourth person's standing is implicit under the common law, namely the principal's personal representative after the principal's death.

A broader response was taken in 2006 by the National Conference of Commissioners on Uniform State Laws by promulgating the Uniform Power of Attorney Act (UPOAA), which has been adopted by 10 states, but not yet in Tennessee. In contrast with Tennessee's list of four persons with standing, UPOAA[5] lists 12 categories of persons with standing to review the actions of an agent: (1) the principal, (2) a conservator or guardian, (3) another fiduciary acting for the principal, (4) a court, (5) a government agency having authority to protect the welfare of the principal, (6) a person authorized to make health-care decisions for the principal, (7) the principal's spouse, parent, or descendant, (8) an individual who would qualify as a presumptive heir of the principal, (9) a person named as a beneficiary to receive any property upon the death of the principal, (10) the principal's caregiver or another person who demonstrates sufficient interest in the principal's welfare, (11) the personal representative after the principal's death, or (12) any successor in interest after the principal's death. Interestingly, the UPOAA, while expanding the class of persons with standing, does not include the primary enforcement option in Tennessee, namely a legal representative appointed by the principal.

Since Tennessee has not yet adopted broad standing provisions such as those found in the UPOAA, and since in most cases where an accounting is needed the

principal is alive but not competent, the principal is unable to act and his presumptive personal representative does not yet have standing. Other than a "legal representative," that leaves only a court able to order an accounting. However, before any action can be filed in court there is the preliminary question of who has standing to file such a petition, and TUDPA provides no answer. How about immediate family members of the principal? If so, how "immediate" is sufficient? How about intestate takers as if the principal died today? A residuary beneficiary named in a will? The statute is silent.

Thus, in Tennessee, the only clear option granted by statute to provide accountability is to name a "legal representative appointed by the principal."[6] One might wonder how many powers take advantage of this statutory provision.[7]

Attorneys drafting a designation of a legal representative may face numerous questions, such as: (1) Who should be appointed? A family member (or any one of a group of family members), a trusted friend, attorney, or CPA? (2) Who should be the successor, and how is the successor able to establish that the primary designee is no longer able to serve? (3) How does the LR even know that he or she is appointed? (4) Are accountings mandatory or only upon request? (5) How frequently should or can such accountings be prepared? (6) What should the legal representative do with the accountings? (7) Is the LR also a fiduciary? (8) Is the LR indemnified for acting (or failing to act)? (9) Is there any presumption of acceptance if the legal representative takes no action within a certain time after receiving the accounting? (10) Should the designated legal representative be paid for his or her services? (11) Should the designated legal representative have power to fire the agent, and if so, does the firing require cause, and may the LR name the successor agent?

Consider this possible long form, in box at right:

Accountings. I have appointed the Agents named herein because I have full confidence in their abilities and trustworthiness. Nevertheless, because I believe that checks and balances always preserve harmony in relationships while encouraging the highest integrity, I desire that my Agent always keep excellent records and prepare accountings as set forth below.

(1) In accordance with *Tenn. Code Ann.* §34-6-107, my Agent shall prepare and deliver to my Legal Representative ("LR"), named below: (a) a copy of this power of attorney before undertaking to act for the first time, and (b) such accountings and reports as my LR shall from time to time, but no more frequently than quarterly, request in writing, including any transactions or change of ownership or beneficiary relating to my assets and property, in reasonable detail and with reasonable supporting documentation, or with such additional detail or documentation as my LR may reasonably request. The terms "accountings" and "reports" shall be interpreted broadly to require my agent to communicate information that is reasonably necessary to enable my LR to enforce my rights as principal to prevent or to redress any potential breach of fiduciary duty by my Agent.

(2) I appoint Amanda B. Recondwith as my LR for all purposes under this Power of Attorney. If Amanda is for any reason unable or unwilling to act or to continue to act as my LR, then I appoint Hugh Jeego as successor LR. If Hugh is for any reason unable or unwilling to act as my LR, then I appoint as my successor LR such licensed attorney as shall be designated in writing by the Managing Partner, President, or Chief Manager, as the case may be, of the law firm of Ewell Fain Paine & Wynn, of Knoxville, Tenn., or its successor. An affidavit of any successor LR that any prior named LR is unable or unwilling to act shall be conclusive upon any persons relying upon such affidavit.

(3) My LR may take such actions or make such disclosures as my LR believes will best protect my interests, including the power to take any action on my behalf in any court or government agency. My LR shall not be a fiduciary nor have any fiduciary duties and shall have no liability to me or my estate for acting or failing to act. If my LR takes no action within the later of six months after receipt of any accounting or 60 days after receipt of any supplemental information requested within said six-month period, the LR shall be deemed to have accepted such accounting, except in the event of fraud by my Agent.

(4) My LR may, in his sole and absolute discretion, with or without cause, but in good faith, remove any Agent then surviving. The successor Agent shall be as provided in this instrument, except that if there is no successor named, my LR shall designate a successor Agent in writing (except that my LR may not appoint himself or any person to whom he is related by blood or marriage within three degrees of consanguinity), and if this instrument has been recorded, then by recording the designation in the same public records.

(5) My LR shall be entitled to reasonable compensation and reimbursement for reasonable expenses, including reasonable attorney fees, in acting in accordance with this instrument, which shall be paid by my Agent from my available resources upon submission of appropriate documentation to my Agent.

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Where There's A Will

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Or here's a possible short form:

> **Accountings.** Any Agent serving under this instrument, other than my wife, shall prepare periodic reports at least annually, showing all actions taken by my Agent pursuant to this power of attorney during the preceding period, and shall furnish such reports to my wife, if living and *sui juris*, otherwise to my adult descendants then living, per stirpes. Those entitled to receive such reports shall have standing to demand such reports or to represent my interests in any legal proceeding and shall not be liable for acting or failing to act. My Agent shall be reimbursed for the reasonable expenses of preparing and delivering such reports, and those entitled to receive such reports shall be reimbursed for the reasonable expenses of representing my interests.

Until the Tennessee legislature broadens the categories of persons with standing to require accountings from agents acting under a power of attorney, such as those found in the UPOAA, our clients should consider designating a "legal representative" with power to review the actions of an agent under a financial power of attorney.

DAN W. HOLBROOK practices estate law with Holbrook Peterson Smith PLLC in Knoxville. He is certified as an estate planning specialist by the Tennessee Commission on Continuing Legal Education and Specialization and is a Fellow and past state chair of the American College of Trust and Estate Counsel. He can be reached at dholbrook@hpestatelaw.com.

Notes

1. www.transgenerational.org, "The Demographics of Aging." Some unattributed but widely circulated wisdom is that 6.5 percent of all human beings who ever lived are alive today, that two-thirds of all human beings who ever lived and who reached age 65 are alive today, and that 90 percent of all scientists who ever lived are alive today. See for example www.prb.org, ""How many people have ever lived on earth?" and Peter G. Peterson, *Gray Dawn: How the Coming Age Wave Will Transform America — And the World* (Three Rivers Press, 2000), chapter one.

2. Other probable consequences of an aging population will be more conservatorship filings and disputes, more well-founded will contests, a growing service industry to meet the legitimate needs of seniors, and a growing industry intent on defrauding seniors.

3. *Tenn. Code Ann.* §34-6-101 et seq.

4. *Tenn. Code Ann.* §34-6-107 reads as follows: An attorney in fact is in a fiduciary relationship with the principal, but only to the extent that the attorney in fact undertakes to act under the power of attorney. Among the fiduciary duties required by law, an attorney in fact has a duty to adequately account to the principal, or to any legal representative of the principal appointed by the principal or by a court, for actions taken by the attorney in fact in the exercise of the power of attorney. It is the intent of the general assembly that this section have retroactive application.

5. Uniform Power of Attorney Act §114(h) reads as follows: (h) Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

The official comments to §114(h) read as follows: Subsection (h) codifies the agent's common law duty to account to a principal (see Restatement (Third) of Agency §8.12 (2006); Restatement (First) of Agency §382 (1933)). Rather than create an affirmative duty of periodic accounting, subsection (h) states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. If the principal is deceased, the principal's personal representative or successor in interest may request an agent to account. While there is no affirmative duty to account unless ordered by the court or requested by one of the foregoing persons, subsection (b)(4) does create a default duty to keep records.

Uniform Power of Attorney Act §116(a) reads as follows: (a) The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief: (1) the principal or the agent; (2) a guardian, conservator, or other fiduciary acting for the principal; (3) a person authorized to make health-care decisions for the principal; (4) the principal's spouse, parent, or descendant; (5) an individual who would qualify as a presumptive heir of the principal; (6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate; (7) a governmental agency having regulatory authority to protect the welfare of the principal; (8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and (9) a person asked to accept the power of attorney.

The official comments to §116(a) include the following: The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (a) sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (a)(8)). Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions.

6. It should be remembered that the statute lists those who have automatic standing. Nothing prevents any principal from naming his own list of those to whom standing is granted, including any of those listed in the UPOAA.

7. The author ordered a power of attorney from LegalZoom.com. Besides the common law grants of standing to the agent, the agent's personal representative after death, and a court, the power of attorney grants standing to "a fiduciary acting on my behalf." This would most likely be either a trustee of the principal's revocable trust or a court-appointed conservator, yet one of the main purposes of most powers of attorney is to avoid the need for either of such other fiduciary offices. The LegalZoom power of attorney does not take advantage of any of the other ideas suggested by either the Tennessee statute or the UPOAA. The cost was $44.95, and the author thought the following statement on the purchase site interesting: "A typical lawyer would charge you approximately $522.95 for a Power of Attorney. You save $478.00 with LegalZoom."