

Abusing the Power in a Power of Attorney

There has been an explosion of cases nationwide dealing with whether agents acting under a power of attorney abused their power. These cases deal particularly with the durable power of attorney, which grants an agent the right to control a person's assets upon a person's inability to handle his or her own business affairs. Courts generally enforce the specific language allowing agents to take certain actions as outlined in the power of attorney, despite some rather egregious actions on the part of some of these agents. Sadly, as some cases demonstrate, family members are the most frequent abusers.

Statutory Framework

A written power of attorney that provides that it is not affected by the subsequent disability or incapacity of the principal is a "durable power of attorney." These instruments are construed according to the Uniform Durable Power of Attorney Act, found at Tennessee Code Annotated Section 34-6-101-110 (2001) (the "Act").

Tennessee Code Annotated Section 34-6-109 sets forth twenty-two powers that may be given to an agent. These powers can simply be referred to and incorporated by reference to the statute in the instrument. However, simply referring to Section 4-6-109 poses practical problems for agents when dealing with third parties who must rely on the instrument. For this reason, most instruments specify the powers. If the durable power of attorney incorporates by reference Section 34-6-109, then an agent will not be able to exercise the Section 34-6-108(c) powers set forth below.

Tennessee Code Annotated Section 34-6-108(c) provides that the powers in Section 34-6-109, do not authorize an agent to exercise powers that the principal might have in nine particular areas, including:

- 1) making transfers without consideration, unless charitable pledges;
- 2) exercising powers a principal may have over the income or principal of a trust;
- 3) acting on behalf of the principal regarding any fiduciary position the principal has except to resign;
- 4) exercising any incidents of ownership on any life insurance policies owned by the principal;
- 5) changing the beneficiary designation on account of any death benefit of the principal;
- 6) changing the right of survivorship designation on any property;
- 7) renouncing or disclaiming any interest in property to which the principal may be entitled;
- 8) exercising rights to claim an elective share; and
- 9) making any decisions regarding medical treatments or health care, except as incidental to decisions regarding property and finances.

The Act does not prohibit a principal from granting the powers contained in Section 34-6-108(c). In fact, Tennessee Code Annotated Section 34-6-108(b) states that nothing contained in

this section and Section 34-6-109 shall be construed to limit the power of the principal to grant any additional powers to the attorney in fact, including the powers otherwise excluded under subsection (c) or delete any power otherwise granted in Section 34-6-109.

Benefits of Executing a Durable Power of Attorney

The main benefit of executing a durable power of attorney is that it appoints an agent to handle the principal's business affairs in the event of disability or incapacity without the necessity of petitioning a court to appoint a conservator. Additionally, the principal determines his or her agent, whereas a court might appoint someone not acceptable to the principal.

Other benefits of a durable power of attorney include costs, control and privacy. Routinely, estate planning lawyers have clients sign a durable power of attorney when signing wills and other estate planning documents. Most estate planning attorneys are able to economically discount the costs of a durable power of attorney and include it in a package of estate planning documents in order to provide full service to the client. So long as the principal is not mentally incapacitated, a principal can revoke a durable power of attorney. Finally, unlike a conservatorship, the principal's privacy can be preserved because there is no need for court approval of the appointment of the agent, public accounting or distribution and transfer of the principal's assets.

Unrestricted Powers

Many instruments give unrestricted powers such as power to "generally act for me in all matters affecting my property, with the same force and effect to all intents and purposes as though I were personally present and acting myself, hereby ratifying and confirming whatsoever my said Attorney-in-Fact shall do by authority thereof." If the instrument does not mention Sections 34-6-108 and 34-6-109, or the instrument doesn't otherwise clearly express an intention to adopt the language contained in Section 34-6-109, then the application of Sections 34-6-108 and 34-6-109 does not apply and the language of the power of attorney solely controls the agent's power. *Tenn. Farmers Life Reassurance Co. v. Linda Rose et. al.*, 239 S.W.3d 743 (Tenn. 2007).

In *Tennessee Farmers*, the decedent had designated three of her four children and a grandchild as beneficiaries of her \$50,000.00 life insurance policy. The decedent appointed her sister as decedent's attorney in fact. The decedent's power of attorney gave her sister unrestricted powers as follows:

"the full power and authority to do, execute and perform all and every other act and that whatsoever, without any limitation whatever and without being confined to the specific acts hereinabove set out, requisite or necessary to be done in and about the premises as fully and to all intents and purposes as I might or could do..."

Id. at 746. After her appointment, decedent's sister revoked the beneficiary designation of the life insurance and named herself as the beneficiary. Decedent died five months later.

Decedent's sister and the previous beneficiaries all filed claims for the policy proceeds, and the insurance company filed an interpleader action.

The Tennessee Supreme Court held that since the decedent's power of attorney did not incorporate by reference the powers listed in Section 34-6-109, it did not trigger the application of Section 34-6-108(c)(5)--the provision which disallows an attorney to change the beneficiary on a life insurance policy. *Id.* at 749-751. Without the limitation of Section 34-6-108(c)(5), the decedent's unrestricted power of attorney sufficiently authorized her sister to change her beneficiary designation. *Id.*

But the Court did not stop there. Because the Court reversed a trial court's decision regarding the legal authority of an attorney-in-fact under a power of attorney to change the beneficiary of a life insurance policy, the trial court never reached the issue of other claims raised by the original beneficiaries. At the outset, the original beneficiaries claimed that the decedent lacked the capacity to execute the instrument, the sister violated her fiduciary duty for her sole benefit and the detriment of the original beneficiaries, and the instrument was executed as a result of duress, coercion, control and/ or undue influence. After finding that its ruling did not foreclose any of the above claims, the Court remanded the case so that the trial court could determine if the other asserted claims had validity.

Similarly, in another case involving family members, the Court upheld the conduct of two children who, prior to their mother's death and pursuant to a durable power of attorney, sold a parcel of their mother's property devised to her stepson. *Stewart v. Sewell et al.*, 215 S.W.3d 815, 828 (Tenn. Feb 28, 2007). The Court found that while adding the children's names to their mother's account holding the proceeds of the sale of the parcel was improper, no improper use of the proceeds occurred, for all proceeds were used for their mother and the mother's previous checking account was in all three names. *Id.* at 822-824. Also, because the mother's original bequest was partially adeemed by the sale of the parcel, the stepson had no interest in the proceeds. *Id.* at 825.

Elderly Principals

Questions of abuse or misuse of durable powers of attorney by family members is even more evident in situations dealing with elderly principals. The fact that a family member has influence does not alone invalidate a conveyance. *Basham v. Duffer*, 238 S.W.3d 304, 310 (Tenn. Ct. App. 2007). In order to determine whether an agent's actions are illegal, in addition to looking at the terms of the power of attorney, courts typically evaluate claims such as undue influence, capacity and breach of fiduciary duty.

Under Tennessee law, a confidential relationship arises as a matter of law when an unrestricted power of attorney is granted to a dominant party. *Basham*, 238 S.W.3d at 312. A presumption of undue influence arises where the dominant party in a confidential relationship receives a benefit from the other party. *Id.*; See also, *Childress v. Currie*, 74 S.W.3d 324, 328 (Tenn. 2002); *Matlock v. Simpson*, 902 S.W.2d 385, 386 (Tenn. 1995). Clear and convincing evidence of the fairness of the transaction rebuts such presumption. *Basham*, 238 S.W.3d at 312.

In *Basham*, Estelle Ray (“Estelle”) was an elderly woman completely dependent on her husband Fred Ray until his death in January 2000. Fred and Estelle had no children together. Estelle had one son from a previous marriage, and Fred had three children, Diane, James and Martin.

At the time of Fred’s death, Estelle and Fred had approximately \$200,000.00 in joint bank accounts. Shortly after Fred’s death, stepson Martin, who was never appointed as Estelle’s attorney-in-fact, began assisting Estelle with her business affairs. Between January and July, 2000, Martin withdrew significant amounts of money from Estelle’s bank accounts. In July, 2000, Estelle appointed stepchildren Diane and James as her attorneys-in-fact in an unrestricted power of attorney. As Estelle’s agent, James sold Estelle’s house, car and drained the account in which the proceeds from the sales were deposited. The evidence failed to show any transactions executed by Diane. In May 2002, Estelle appointed her niece, Teresa Basham, and her grandson, William Collins, as her agents under a new power of attorney. They discovered that Estelle had a total of only \$10,000 in her bank account, and thereafter Estelle, through her new agents, brought suit against Estelle’s stepchildren. Estelle remained competent until she suffered a stroke in November 2002, and she died a year later on December 30, 2003.

Although the trial court stated it was uncomfortable with its ruling, the trial court found no breach of fiduciary duty by the three stepchildren declaring the deceased to have been competent at the time of the dissipation of her funds, and therefore dismissed the case. The Court of Appeals affirmed the trial court’s decision as to Martin citing the record failed to establish the existence of a confidential relationship that would result in a presumption of undue influence. As to Diane, the Court determined she was not liable, for she had not executed any transactions pursuant to the power of attorney. Because James, who as an attorney-in-fact was in a confidential relationship with Estelle, could not satisfy his burden of proof that the transactions which benefited him were fair to Estelle, the decision of the trial court as to James was reversed and the case remanded for a determination of damages owed by James.

Practice Pointers

Elderly principals often need assistance with their financial affairs, particularly from family members. Thus, an important function of the attorney is to assist the elderly client in determining the proper person to designate as the attorney in fact. If one child or relative is being favored over another, ask the individual to explain the circumstances. It is always a good idea to discuss the pros and cons of having co-agents and successor attorneys in fact.

An attorney should always reasonably attempt to determine whether the principal has the capacity to execute the document. Although few attorneys are in the position to medically diagnose an individual’s mental competence, an attorney should ask questions regarding the principal’s capacity to sign the instrument, such as inquiring about the individual’s family status, health and overall need and rationale for a durable power of attorney. *See Carpenter v. Sims*, No. E2007-06220-COA-R3-CV, *10-12 (Tenn. Ct. App. November 7, 2007) (for discussion of mental competency). Taking this small measure of time will protect both the principal and the attorney in the event litigation follows.

In the case of elderly principals, it is not unusual for an existing client to ask an attorney to draft what is considered a simple document for his or her family members. Without careful consideration and thought, this practice could prove problematic. For example, if an attorney is approached by a longtime client to prepare a durable power of attorney for the client's parent, appointing the client as the agent in fact, can the attorney prepare it? Keep in mind Rules of Professional Conduct 1.7, *Conflict of Interest*, and 2.2, *Lawyer Serving as an Intermediary Between Clients*, regarding joint representation. Be sure to make this written disclosure to your client and keep a record of it in your file.

There has been some confusion as to when certain powers come into play with the durable power of attorney for business affairs versus the durable power of attorney for health care when making medical decisions. For that reason, a paragraph stating which document controls is helpful. See *Hendrix v. Life Care Centers of Am., Inc.*, No. E2006-02288-COA-R3-DV, 2007 Tenn. App. LEXIS 791, *3-4 (Tenn. Ct. App. Dec. 21, 2007).

Many forms for a durable power of attorney contain unrestricted powers. This form is generally easy to understand, but often principals don't realize how broad these powers are and need to be advised on the particulars. Forms can have several formats. Our firm uses a form in which specific powers are granted along with an unrestricted power subject to any limitations. The limitations are specified in a separate paragraph. The client can choose limitations or state that there are no limitations. This form can be accessed on <http://www.dodsonparker.com>.

Conclusion

Given the combination of potential abuse by an agent and the validity courts ascribe to of these powers, it is incumbent upon an attorney to carefully draft a power of attorney that specifically addresses what is needed in the event a client has diminished abilities. An attorney should not simply fill out the same power of attorney form for each client. An attorney needs to ask thorough questions about the client's assets and agent and determine the level of control the grantor wants the agent to assume.

Without question, if the attorney in fact is trustworthy, the unrestricted power is the most flexible and helpful to deal with unforeseen circumstances. However, as has been the case since the beginning of time, the power and control of money can affect people in ways that harm persons, particularly elderly or disabled persons who are unable to take care of themselves. For that reason, it is important to make sure the client is comfortable with the powers granted.

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