

## PROTECT YOUR CLIENTS FROM COSTLY LITIGATION

### *Clients Who Act as Agents Under Durable Powers of Attorney Assume Risk*

By Stuart T. Shmookler, Esq.

An Agent acting under a Durable Financial Power of Attorney without proper professional guidance can encounter costly and time consuming problems. While caring for an ill or incapacitated family member, which is a time filled with sadness and stress, even Agents with the best intentions can be held personally liable if they fail to obey the law.

Financial powers of attorney are executed by the Principal and designate a person as an "Agent" who can sign the Principal's name and conduct business on their behalf. Agents acting under a financial power of attorney have a fiduciary relationship with the Principal and are required to exercise reasonable caution and prudence to avoid personal liability. Pennsylvania passed the current statute allowing powers of attorney in 1982, with major amendments in 1992 and 1999. With the elder population expanding, these new statutes provided an alternative mechanism to the formerly cumbersome court proceeding in appointing a guardian. Gross McGinley has seen a substantial increase in the number of Agents who seek our advice after they are summoned into court. Here are a few examples:

#### FAILURE TO FOLLOW COURT ORDERS

A husband was incarcerated for contempt for failure to comply with a court order to file an account of his administration as Agent.

#### NOT ACTING IN THE BEST INTEREST OF THE PRINCIPAL

An Agent mistakenly thought her job was to pay bills and anything else her aunt, the Principal, requested. Since her aunt was incapacitated, the Agent had the duty to exercise her discretion to assure payments were in the best interests of her Principal. She followed her aunt's demands to gift thousands of dollars to a drug addicted nephew. The Agent was found not to be exercising reasonable caution and prudence on behalf of the Principal and was personally liable for approximately \$80,000.

#### POOR RECORD KEEPING

An Agent was acting on behalf of his mother-in-law for over 10 years. When the Principal died, the other children petitioned the court to order the Agent to file an account. He did not keep records and requested the bank supply copies of the cancelled checks and statements. He is facing the cost of obtaining all the records, the cost to professionally prepare an account, and will be held personally liable for any shortage or improper use of his Principal's funds.

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Too many people think acting under a financial power of attorney means merely writing checks. They do not understand the responsibility and judgment required of them when acting as a fiduciary Agent. All too often, the named Agent does not take the time to seek professional guidance to learn of their exact duties and responsibilities as a fiduciary, which include: how to invest funds, proper recordkeeping, how to not co-mingle funds, and which bills should be paid. Also, triggering events such as the Principal's death often occur after years of improprieties, thereby compounding the problems. The years leading up to a Principal's passing can compound the number of errors as the cost to repair the damage increases exponentially.

Ignorance of the law is no excuse for the Agent to fail to meet their fiduciary obligations. Proper professional advice from accountants, financial advisors, and attorneys at the beginning of the process leads to the best avoidance of liability for clients.

**STUART T. SHMOOKLER** focuses his practice in the related areas of business, real estate, wills, estate planning, and estate administration. Chairperson of the Wills, Trusts & Estates Group at Gross McGinley, Stuart helps families plan for the future with wills, powers of attorney, living wills, advanced health care directives, estate planning, trusts, elder law, and business succession planning.

Protecting and maintaining the financial security of your family is our goal. **Gross McGinley's Wills, Trusts and Estates Group** has extensive experience in estate planning and the administration of estates and trusts. Our skilled and knowledgeable attorneys design a customized estate plan to fit your particular financial and familial situation including young families at the start of their journey, blended families, business owners, and professionals. If you would like to further discuss Durable Powers of Attorney and the personal liabilities your clients may be facing or any other estate planning matter, please contact us today.

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