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Wills & EPAs - Commonly Occurring Issues

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The Resistant Grantor: Best Practices and Ethical Considerations for Attorneys

Wills & EPAs - Commonly Occurring Issues

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THE RESISTANT GRANTOR: BEST PRACTICES AND ETHICAL CONSIDERATIONS FOR ATTORNEYS

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INTRODUCTION

There are many considerations of an ethical and legal nature that come into play when preparing for, executing and acting pursuant to a Power of Attorney (“POA”). This paper will address some of those considerations and specifically explore: (i) considerations when dealing with the resistant grantor; (ii) considerations for attorneys; (iii) considerations for financial institutions; and (iv) case law summaries regarding the capacity of grantors and other issues that have arisen in the course of challenging a POA in various contexts. In discussing these topics, this paper will identify challenging issues for grantors, attorneys and financial institutions. It will also highlight best practices for legal practitioners as we explore these considerations and issues.

CONSIDERATIONS WHEN DEALING WITH THE RESISTANT GRANTOR

Making the decision to execute and in fact, activate, a POA can be a difficult decision for any person. However, dealing with a family member or close friend who may not believe that they require a POA can be even more challenging. As legal practitioners, we need to consider whether there are mental capacity issues, the presence of any undue influence or other factors that might affect a grantor’s ability to validly execute a POA. Given the importance of capacity, the case law review section of this paper will provide an in-depth discussion respecting the principles surrounding the assessment of mental capacity as it relates to POAs.

Aside from capacity issues, a grantor may resist the notion of a POA as a result of the lack of understanding he or she may have concerning the options, parameters and utility of a POA. For example, a grantor who is uncomfortable with executing an immediate POA may not know that there are different types of POAs, one of which only comes to effect upon a triggering event such as the incapacity of the grantor. This type of POA is known as a Springing Power of Attorney (“SPA”)¹. This is commonly perceived as a risk mitigation tool and will be cost and time effective in the event of incapacity. This type of POA will also ensure that there are limited or no challenges with respect to handling the grantor’s financial affairs.

¹ SPAs “Spring” into effect upon a triggering event whereas an immediate POA takes effect upon signing. Both types of POAs are enduring in the sense that they remain valid if the grantor becomes mentally incapable. Limited Access POAs, create parameters around the authority provided to the attorney so as to restrict his or her dealings with the property of the grantor, such as an inability to sell or otherwise deal with real property.