SELECTING THE RIGHT PEOPLE

INTRODUCTION

Selecting the people to carry out the provisions of an estate plan is one of the most important and difficult tasks involved in the estate planning process. This chapter concerns three of the most essential parties in the estate planning process: the executor, the trustee, agent under powers of attorney, and the estate planning team, which can consist of an attorney, accountant, financial planner, investments professional, life underwriter, planned giving consultant or development officer, family business consultant, family wealth coach, trust professional, and in many cases, valuation expert. This chapter discusses practical guidelines in the selection process from the point of view of the person who ultimately must make those choices: the client.

It is impossible to make a proper selection of any member of the estate planning team without understanding in general terms what each member of the team should be doing and how that person interacts with others who have important roles to fulfill. For this reason, you'll find a brief discussion of the duties of the executor, trustee, and estate's attorney before the attributes and selection criteria of each are covered.

At the outset, not only is the choice of fiduciary and the members of the client's estate planning team critical, it is even more critical that these appointments be carefully coordinated with each other. Consider the following questions. Is it wise to, in the context of a blended family, put members from both sides in the fiduciary ranks?[2] Generally, the answer is an enthusiastic "No!" This is because of the likelihood for increased costs as well as an increased prospect for dispute. Is it wise to name the same person as agent under a power of attorney and as executor without requiring the agent in the power of attorney to account to persons other than himself or herself as executor either during the principal's incapacity or at the principal's death? Again, the general answer is "No," because every fiduciary should be accountable to someone other than themselves.

Is it wise to put one side of the family, e.g., the step-parent, in as agent under the durable power of attorney, while putting someone from the other side of the family in as executor or as successor trustee under a revocable living trust, to whom the agent must ultimately account? Once again, the general answer is "No," because there needs to be coordination between these two offices so that things run smoothly and seamlessly in the transition from agent administration to post-death administration. Is it wise for one blended family partner to name someone from his or her blood family as executor or successor trustee and for the other blended family partner to do the same thing in an overall QTIP estate plan, where the two sides are going to have some interactions, particularly after the death of the surviving spouse? Again, the general answer is "No," because there needs to be cooperation in both the valuation of the QTIPed property and reimbursement of the estate taxes under Code section 2207A that are attributable to the QTIP trust's inclusion in the surviving spouse's estate under Code section 2044. Is it wise to name someone as fiduciary or as co-fiduciary of two estates or trusts where conflicts of interest in the roles are reasonably expected to occur? Same answer as above. It is very important that the client give serious consideration to the appointment of at least two backups as agent and as executor or successor trustee in case the original choice either resigns or is removed, because the chances for either to occur are much higher in a blended family.

SELECTING AGENTS UNDER POWERS OF ATTORNEY

Definitions and general rules. An "agent" under a power of attorney is appointed by the person for whom he acts, the "principal," under a document known as a "power of attorney."[8] While the deputation of the agent historically was terminated at the moment of the principal's incapacity (because the principal lost the ability to continue to approve the actions of the agent on his or her behalf), the modern view is that powers of attorney are "durable," i.e. they survive the principal's incapacity unless the power of attorney expressly provides otherwise.[9] The power of attorney is effective immediately unless it stipulates that it springs into effect at some point in the future.[10]

We advise against so-called "springing powers of attorney" because it often is impossible to determine the occurrence of the principal's incapacity with enough specificity to satisfy a third party who is asked to rely upon the agent's authority. Springing powers are impractical because they require a determination, i.e., incapacity, that has to be made from outside of the four corners of the power of attorney document.

Unless and until revoked, a durable power of attorney is extinguished by the principal's death.[11] However, a power of attorney in favor of a spouse is deemed revoked as to the spousal appointment upon the suit for dissolution of the marriage unless the power of attorney expressly provides otherwise.[12] A power of attorney does not revoke a *prior* power of attorney unless the later power of attorney specifically so provides.[13] As a result, it is essential that old powers of attorney be expressly revoked in a new power of attorney if the principal changed agents or the provisions of the power.

Powers and duties of the agent. The power of attorney document itself is the font of the agent's specific powers and duties. The agent is a fiduciary vis-à-vis the principal.[14] Applicable state law often requires that certain powers have to be expressly provided for in the power of attorney, or the agent does not have them. These express powers include (1) create, amend, revoke or terminate an *inter vivos* trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; (5) delegate authority granted under the power of attorney; (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or] (7) exercise fiduciary powers that the principal has authority to delegate; or (8) disclaim property, including a power of appointment.[15]

Some powers of attorney go to great lengths to spell out the powers that the agent has, while some powers of attorney simply incorporate statutory powers by reference.[16]

We prefer a "belts and suspenders" approach that carefully spells out in great detail the powers, as well as the limitations on the powers, of the agent and then also adopts the statutory powers to the extent not otherwise modified in the power of attorney. It is important that the attorney know applicable state law on powers of attorney and coordinate the power of attorney to be valid under the laws of each state in which the principal owns property.

Conclusion. In conclusion, the office of agent under a power of attorney perhaps is the hardest job to have, particularly in a blended family where the agent is on one side or the other, because the principal is still alive. The agent's job could last for a very long time, so it is important to select at least two backup agents in case the originally named agent either resigns, dies or is removed.