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Major Changes Affecting Powers of Attorney Take Effect in New York State on September 1

The statutory durable power of attorney has been an effective and simple tool for both estate and Medicaid planning and financial management in New York. Fundamental changes to the state's statutory power of attorney laws, which take effect on September 1, 2009, have been made in an attempt to combat perceived financial elder abuse.

Magavern Magavern Grimm LLP is presenting this article to raise awareness about the new statute and to encourage our newsletter readers to review their individual situations and take appropriate action, as necessary.

Change Summary

These changes include:

1. The power of attorney (POA) is to be signed by both the principal and the agent whose signatures are to be acknowledged before a notary. A frequent practice is to grant a POA to several agents, often two or more adult children. Since all agents must sign the POA with signatures acknowledged, this may be cumbersome with children or other desired agents living in different states;
2. An agent is authorized to make gifts or other asset transfers only in amounts totaling \$500 per person or charity each year. Authority to an agent to exceed this small amount must be set out in a "major gifts rider" to the POA. The rider must be signed by the principal with signature notarized and witnessed by two persons who are not named in the rider as permissible recipients of gifts or other transfers (in the same manner as the execution of a will).

***"...a major gifts rider...
may be an effective means
to carry out estate, tax
and Medicaid planning."***

Your agent can change the beneficiaries of life insurance and annuity contracts or purchase new or additional life insurance or annuities and designate the beneficiaries of each. Also, your agent may be authorized to designate or change the beneficiaries on any retirement benefit or plan as well as create, amend and revoke any inter vivos trust.

Use of a major gifts rider to a POA may be an effective means to carry out estate, tax and Medicaid planning. However, such authority is not without risk for both the principal and the agent. It requires careful consideration by the principal before granting such significant authority to his or her agent or agents. It should be kept in mind that the agent or agents may not be recipients of gifts or be named as the beneficiary of any insurance or annuity policy or joint account owner unless such authority is expressly granted in a major gifts rider.

Current POAs

Statutory durable powers of attorney that have been executed prior to the September 1, 2009 effective date of the new law will continue to be valid. Anyone who does not have a POA in effect should consider making one now, particularly if one wants to grant an agent authority to attend to estate planning without the complications of a major gifts rider as required by the new statute.

Frequently, powers of attorney are used for management of the principal's everyday financial affairs, particularly when the principal is a senior residing in a healthcare facility. If estate planning is not desired or required, it would be advisable to utilize a presently signed and acknowledged POA or one under the new statute without a major gifts rider.

Other Changes

Some other fundamental changes made by the new statute are:

- ... The agent has access to the principal's medical records so that he or she may examine, question and pay medical bills without fear that the HIPAA privacy rules will prevent the agent's access to the records;
- ... An agent is not entitled to receive compensation for his or her responsibilities performed pursuant to the POA unless the POA expressly provides for compensation;
- ... Unless the principal expressly provides otherwise, the execution of a new POA revokes any and all prior powers of attorney executed by the principal;

Major Gifts Rider

The agent acting pursuant to the authority granted to him or her in a major gifts rider will have to act in accordance with the principal's instructions or, in the absence of such instructions, then in the principal's best interest.

By a major gifts rider, your agent will have the authority to make gifts up to the annual exclusion amount (currently \$13,000) to your spouse, children, other descendants and parents. Further, the maximum amount to each donee may be twice the annual gift tax exclusion amount (or \$26,000) if your spouse agrees to split gift treatment under the Internal Revenue Code.

In a major gifts rider, you may expressly authorize your agent to make gifts of any specified dollar amount or even an unlimited amount to any person or persons. Further, you can authorize your agent to open, modify or terminate any joint bank or brokerage account or account payable on death to another.

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Gifts and Loans to Children in Your Estate Plan

No parents want their children to fight among themselves after they are gone. Sadly, conflicts often arise, especially when a parent has gifted or loaned money to one child and not others. However, a few key words in your will or trust agreement can minimize the potential for conflict.



If you give money to one child, the other siblings may claim that the child should receive a reduced share of your estate. You should make your intent clear in your estate planning documents. For example, your will could state that you are not making any adjustments for gifts. This would make it clear to everyone that no one should receive a reduced share. Alternatively, you could specify the gifts that have been made and credit the amount of the gifts to the recipient's share.

Loans are another problem. They can be addressed in a number of ways, depending on your intent. Verbal loans are difficult to prove, so you may want to include a provision in your estate planning documents stating that all verbal loans are a gift. If you have any outstanding verbal loans that you don't want to be a gift, then make sure

you put these in writing. If you want the loan to be an advance against inheritance, this can also be specified in your estate planning documents. To avoid a child claiming the loan was forgiven, you can require that the forgiveness be in writing.

You want to make sure your estate planning documents clearly convey your intent. Be sure to consult your attorney to ensure your documents provide the guidance you want regarding gifts and loans.

For more information, please contact Ed Markarian at emarkarian@magavern.com, Larry Woodward at lwoodward@magavern.com, or Bruce Reinoso at breinoso@magavern.com, or call (716) 856-3500.

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Major Changes Affecting Powers of Attorney

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- ... The principal may appoint someone as a "monitor" to review the agent's actions on behalf of the principal and give the monitor the authority to request that the agent provide him or her with a record of the transactions that the agent has carried out for the principal. A "monitor" may be helpful in certain circumstances but it is fraught with potential problems;
- ... A copy of a POA may be certified by an attorney and as such is to be accepted in lieu of a County Clerk-certified copy of a recorded POA;
- ... A POA signed in another state in compliance with the statutes of that state or New York law is valid in New York regardless of whether the principal is domiciled in New York. For example, so-called "snowbirds" who live approximately six months each in Florida and New York can have a POA executed in Florida that would be valid for New York purposes.

Consider Making a POA Now

We urge our clients and friends to review their POAs currently in effect (if any). Consideration should be given to making a POA before September 1, 2009. Further, for some people it may be more appropriate to execute a new POA with a major gifts rider after September 1, 2009 to ensure that important estate or tax planning is carried out.



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Estate Taxes: What's a Taxpayer to Do?

After almost a decade of changes in the federal estate tax code, and many states, including New York, changing their tax structure in response to the federal changes, clarity appears to be on the horizon. Congress recently passed a budget resolution that would make the current federal estate tax rules permanent, taxing only estates over \$3.5 million in value with the tax rate set at 45%. Although legislation has not yet been voted on, the nonbinding budget resolution sets guidelines for Congress to follow when writing tax and spending legislation later this year.



Simplify if possible. The increase in the tax threshold from \$600,000 at the beginning of the decade to \$3.5 million today, coupled with the drop in most taxpayers' net worth over the past year, means that some people who had taxable estates no longer do. You may be able to significantly simplify your estate plan by deleting provisions that were necessary in the past to eliminate or decrease taxes due at death.

Be aware of state tax laws. In the past, most states had very similar estate tax laws that were tied to the federal laws. As a result of changes in the federal estate tax, those states, including New York, found that their estate tax revenue was dropping to zero. To increase their revenue, these states "decoupled" and passed their own estate tax laws. The New York estate tax exemption remains \$1 million and with the state's budgetary problems no increase is expected. Is your existing plan up to date?

Review life insurance. You should review your life insurance policies if you have had them for more than a few years. Some universal life policies that were based on projections made when the economy was stronger may be "under water" and may need more robust premium payments to sustain them over the long term. With other policies where the premiums were based on old tables measuring life expect-

tancy, you may be able to lower your premium payments or increase the death benefit. Finally, you should never simply drop policies that you no longer need or can afford. You may be giving up a large benefit for your heirs and you may be able to sell the policy for a larger return than your policy's cash surrender value.

Refocus estate planning. The threat of the estate tax had the beneficial effect of prompting many people to do estate planning. But it also sometimes diverted people from the real purpose of estate planning: to leave net assets to your beneficiaries in the manner and for the purposes intended. The estate plan that people establish can benefit children and grandchildren for decades to come, or it can cause familial strife that tears the family apart. The choice of executor and trustee and the terms under which heirs will receive property are vital issues that deserve your full consideration, regardless of whether taxes are an issue.

For more information, please contact Larry Woodward at lwoodward@magavern.com, Bruce Reinoso at breinoso@magavern.com, or Ed Markarian at emarkarian@magavern.com, or call (716) 856-3500.

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Magavern Firm Partner Obtains \$360,000 Arbitration Award For Injured Client

Representing a small business owner from Amherst who was injured in a fall at a warehouse loading area, Magavern Magavern Grimm LLP partner Richard A. Grimm, III, recently obtained a \$360,000 arbitration award.

The man injured his neck in the fall, requiring two surgeries. Shortly before the case was scheduled for a jury trial in Erie County Supreme Court, the parties agreed to binding arbitration. A panel of three arbitrators awarded \$360,000, which is more than three times the settlement offer made by the defendant's insurance carrier.

"I really believe that the arbitrators were impressed by the fact that this individual never missed any time from work other than immediately following his surgeries," Grimm said. "He is a tenacious guy and the arbitrators appreciated the fact that he was willing to work despite his pain."

Area Leukemia & Lymphoma Society Benefits From Aven Rennie's Run, Sponsorships



A. Rennie

The Leukemia & Lymphoma Society, Western New York Chapter, received \$2,295 through the participation and sponsorships raised by Aven Rennie, Magavern Magavern Grimm LLP partner, who completed a 13.1-mile half marathon. The annual event was held in Buffalo on May 24.

Ms. Rennie ran in memory of Chris Sachs, who died last November at age 36 of acute myeloid leukemia (AML). His step-mother is Susan M. Lankenau, special counsel to the Magavern firm. The funds raised are targeted for research and treatment of blood cancers.

Meals on Wheels for Western New York Elects Rich Grimm to its Board of Directors



R. Grimm, III

Magavern Magavern Grimm LLP partner Richard A. Grimm, III, has been elected to the Board of Directors of Meals on Wheels for Western New York.

Last year, he volunteered to chair a special fund-raising campaign to help the agency provide nutritious home-delivered meals to frail elderly and special needs persons during December. The effort surpassed its goal and raised \$70,350.

Meals on Wheels for Western New York provides more than 865,000 meals annually to 3,400 recipients.

This fall, the not-for-profit organization will open a newly constructed Commissary adjacent to its Buffalo service center at 100 James E. Casey Drive. The facility will become a disaster-ready first responder serving the region during emergencies such as severe weather conditions.

MusicalFare Theatre Taps Talent Of Magavern Attorney Theresa Quinn



T. Quinn

When "Man of LaMancha" takes the stage at MusicalFare Theatre this fall, audiences will enjoy a unique production of the classic musical with the score arranged by Magavern firm attorney Theresa E. Quinn.

The show will feature a cast of actors who play musical instruments as part of their performances and musicians who double as actors. Ms. Quinn is tailoring the score to showcase the levels of musical expertise among the cast members.

Based on Cervantes' "Don Quixote," the musical will premiere on October 28 at the theater on the Daemen College campus, and run through November 29.

Attorney Quinn also is a musician, vocalist, conductor and composer.