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Estate Planning with Certainty

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POWER OF ATTORNEY - An essential planning tool that makes financial institutions nervous.

A recent New York State Supreme Court Case, *Matter of Application of Imre B.R., 2013 N.Y. Misc. LEXIS 3912*, is representative of the current conflict between individuals and financial institutions.

BACKGROUND: There has always been an inherent tension between financial institutions and agents operating under the authority of a Power of Attorney. This tension has ranged from some banks insisting that any Power of Attorney for its depositors must be on a bank form, to questioning the transactions the agent has the legal authority to enter into because of the Power of Attorney. The latter seems to be more prevalent in our upstate region. This tension has heightened due to the publicity surrounding lawsuits involving agents operating under Powers of Attorney about four or five years ago. The upshot is that financial institutions are even more nervous now about agents conducting business under the authority of a Power of Attorney. Some years ago there was enough of a problem with financial institutions not allowing agents to conduct transactions that the State Legislature amended the Power of Attorney Law to specifically provide that these institutions **must** accept a New York State Statutory Power of Attorney. Some of our agent clients experienced this difficulty and we had to be involved in convincing several financial institutions that they had no authority to block the duly appointed agent from conducting business with the institutions.

ABOUT THE CASE: In the Matter of Application of Imre B.R., the petitioning Power of Attorney agent brought a special proceeding in Supreme Court, Dutchess County, against Merrill Lynch to force it to accept the Power of Attorney that Ilona R. gave to the agent, so the agent could conduct business with Imre B.R.'s investment account at Merrill Lynch. Instead of accepting the Power of Attorney on its face, Merrill Lynch looked beyond the document and suggested to the Court that Ilona R. "may have lacked capacity at the time the Power of Attorney was executed." Merrill Lynch based its opinion on a letter it acquired from a doctor, indicating that Ilona R. was admitted to a facility in January of 2011 and suffered from moderate to severe dementia. The doctor's letter further stated that she was unable to care for herself or make sound legal decisions.

The Court analyzed the facts and concluded that Ilona R.'s capacity may have been in question in January of 2011, but there was no proof of her diminished capacity to sign the Power of Attorney in December of 2010. Further, the Court notes that "...the fact that Ilona R. was diagnosed with 'moderate to severe dementia' does not in and of itself create an issue of fact as to her mental capacity..." Accordingly, the Judge granted the agent's application and forced Merrill Lynch to accept the Power of Attorney. In our opinion, the Court made the correct analysis. A person's capacity to sign a Power of Attorney, or other legal document, must be established as of the date and time the document is signed, not at a subsequent time. Furthermore, the general law of our state is that every person is considered competent until proven otherwise.

Free Workshops

October 23, 2013

Springville Country Club
with Manning & Napier
6:30 to 8:30 p.m.

November 7, 2013

Westfield YWCA
with Andersen Cuddihy, Inc
6:30 to 8:30 p.m.

November 21, 2013

Jamestown Hampton Inn
with Summit Financial
6:30 to 8:30 p.m.

POWER OF ATTORNEY, cont'd from page 1

CAUTION: In order to take advantage of the provision of law that allows an agent to force an institution to accept a Power of Attorney, as the above case points out, it is imperative that the Power of Attorney qualify as a "statutory" Power of Attorney. It is very clear in the Law that if a Power of Attorney is not a statutory one, then a financial institution does not have to accept it. Certainly the institution can accept a non-statutory Power of Attorney, but the point is that it does not have to.

We at Brooks & Brooks have worked very hard over the years to not only have a "statutory" Power of Attorney, but also one that has been enhanced with many extra powers and authorizations that we have found to be at least useful, if not critical, to our clients.

Quick Health Care Law Basics
The Affordable Care Act

We all know the ACA requires everyone to have "minimum essential" health insurance coverage … or pay a penalty, which the Supreme Court has called a "tax." Coverage can come from one of several sources:

1. Employer-sponsored insurance plans;
2. Government sponsored programs of Medicare, Medicaid and children's health insurance program;
3. Plans purchased in the individual insurance market;
4. Certain grandfathered group health plans;
5. Other coverage recognized the US Department of Health and Human Services.

If you are an individual without insurance and do not sign up for coverage, then you must pay what the ACA calls a "penalty" and which the United States Supreme Court calls a "tax" under Section 5000A of the Internal Revenue Code. The "tax" would be paid as part of a taxpayer's federal income tax return.

The "tax" would apply to the taxpayer and any non-exempt dependents claimed on the taxpayer's tax return who also do not have the minimum essential coverage.

The IRS has issued final regulations, which include the categories of people who are exempt from the requirements and the penalty. They are:

1. Individuals who cannot afford insurance (whatever that should mean);
2. Members of recognized religious sects who are eligible for consciences exemption;
3. Individuals eligible for a short gap in coverage;
4. Those with household income below the tax return filing threshold;
5. Members of healthcare sharing ministries;
6. Exempt non-citizens;
7. Incarcerated individuals;
8. Members of Indian tribes;
9. Others with hardship situations.

The American Institute of CPA's conducted a telephone survey of 1,008 American adults and found that 51% could not accurately describe *at least one* of the health insurance terms - premium, deductible and co-pay. Additional, one-third thought a premium was an expense paid at the time a patient received medical service and 27% thought a co-pay was the cost of obtaining insurance.

Whether we like it or not, the Affordable Care Act is a reality and everyone will be affected. With the cost of premiums, deductibles and co-pays, whether or not health care will really be "affordable" will be a decision each person must make personally.

Quote of the Day: "An elephant is a mouse drawn to government specifications."