PRESSING THE "DO-OVER" BUTTON

Being Proactive, Not Reactive

A case study – Florida Durable Power of Attorney Act

The Kantner Law Firm, PL

The "Opportunity"

- What: The Florida Durable Power of Attorney Act
- When: October 1, 2011
- Where: Florida
- How: Legislative Act
- Why: To help protect our citizens and attempt at uniformity of laws among other states

The Response

- Seizing upon the "opportunity" for us meant embracing the change in the Florida law and being proactive to inform clients of the effects and how to plan
- Writing an article – published on my website and other elder law/estate planning sites
- Writing to each client to inform of change
- Speaking to community groups and organizations about the new law

Published Article

THE NEW FLORIDA POWER OF ATTORNEY LAW

INTRODUCTION:

The Florida Statute (Chapter 709) that addresses powers of attorney was recently, substantially revised by the Florida Legislature's passage of Senate Bill 670 on May 4, 2011. The new statute became effective on October 1, 2011 ("the effective date"). This article highlights some of the changes to the law that clients, their advisors, professional guardians, and others that have in the past, or may in the future, act as an agent, should be aware of in order to be protected and up to date. It should be noted that while the new law does not make a power of attorney properly executed prior to the effective date void, the new statute nevertheless applies in many respects to those powers of attorney that were executed prior to the effective date. Therefore, it is important to review existing powers of attorney to understand which terms will be subject to a different set of rules than were in place when the document was first executed and which are grandfathered in.

OVERVIEW OF NEW LAW:

The passage of the new law governing powers of attorney and similar instruments is an apparent attempt by the Florida legislature to achieve greater consistency and uniformity of Florida's power of attorney laws with those of other states who have similarly passed the Uniform Power of Attorney Act (the "Act"). Nine other states have adopted the Act.

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Letter to Clients #1

Dear ***

. . . this year October has brought us a major change in the Power of Attorney law here in Florida. Whenever there is a significant change in the law, I will always let you know about it, advise you how it may affect you, and let you know how to respond to it to best protect yourself and your loved ones. In that vein, let me bring your attention to the fact that on October 1st, a completely revised statute affecting Powers of Attorney became law, called the *Florida Power of Attorney Act*.

I have enclosed a copy of a recent article that I wrote . . . The result of the new Florida law is that there is now much uncertainty about which provisions of any power of attorney executed prior to October 1, 2011, will be acceptable moving forward. . . . I strongly suggest that you schedule an appointment with our office for a complimentary review of your current planning and consider executing a new Durable Power of Attorney so that you are fully protected in accordance with the new Florida law.

Letter to Clients #2

Dear valued clients and friends:

Once again, we take this opportunity to thank you for another great year. We continue to focus on our mission to help families plan for the future, guide them through the difficult issues that they may be experiencing, and being a trusted resource. Our greatest compliment is when one of you refers your family, friend, or neighbor, as so many of you have done.

The following is some information that may be helpful to you as you make any year-end decisions with your financial and/or tax planner. *Be sure to get professional advice before implementing any of the strategies illustrated below.*

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Most of you should have received my letter regarding the new Power of Attorney law that took effect recently. If you are still unclear about anything, please make an appointment to discuss it with me.

This time of year I also like to remind you to review your estate planning documents, as well as beneficiary designations on your life insurance, retirement accounts, and other investments, to make sure they are up-to-date and reflect changes in your family circumstances.

The Result

- 600 letters sent 2X – October & December 2011
- Solidify expertise status in the eye of the client
- Educate public
- Get name out through publication of article
- Solidify resource status to other professionals
- Gained face-time with clients
- 25% client response leading to new billings for document preparation and other matters
- Several financial planners used the change in the law and my article to contact their clients

The New Florida Durable Power of Attorney Act

By: Richard I. Kantner, Jr., Esquire, The Kantner Law Firm, PL

INTRODUCTION:

The Florida Statute (Chapter 709) that addresses powers of attorney was recently revised substantially by the Florida Legislature's passage of Senate Bill 670 on May 4, 2011. The new statute becomes effective on October 1, 2011 ("the effective date"). This article highlights some of the changes to the law that clients and their advisors should be aware of in order to be protected and up to date. It should be noted that while the new law does not make a power of attorney properly executed prior to the effective date void, the new statute nevertheless applies to those powers of attorney that were executed prior to the effective date. Therefore, it is important to review existing powers of attorney to understand which terms will be subject to a different set of rules than were in place when the document was executed and which will be grandfathered in.

A durable power of attorney is a document that permits one person to designate another to transact his or her business on their behalf. The person who has been given the authority to transact this business is referred to as the agent or "attorney in fact." The person granting this authority is known as the "principal." The durable power of attorney applies to any real or personal property interests owned by the principal, unless the document specifically states exceptions. Powers of attorney are commonly used in estate planning as a technique to avoid court-ordered guardianship. The last major change to this law was October 1, 1995.

OVERVIEW OF NEW LAW:

The passage of the new law governing powers of attorney and similar instruments is an attempt by the Florida legislature to achieve greater consistency and uniformity of Florida's power of attorney laws (and thus documents) with those of other states who have similarly passed the Uniform Power of Attorney Act (the "Act"). Nine other states have adopted the Act (Colorado, Idaho, Indiana, Maine, Maryland, Nevada, New Mexico, Virginia, and Wisconsin).

Execution and Termination: Florida still requires the principal to sign the document in the presence of two subscribing witnesses, all before a notary public. Interestingly, the new Act considers a power of attorney executed in another state to be valid here even if it does not comply with Florida's requirements, as long as it complied with the state of origin's requirements.

The power of attorney is not durable unless it explicitly contains language to that effect. The new law does away with most springing powers of attorney (those that "spring" into effect upon a certain event such as incapacity). To revoke a prior power of attorney, the principal executes a written document so expressing that desire (it need not be witnessed or notarized, though I think it advisable nonetheless). An interesting provision in the new law is that it provides that a photocopy or electronic copy of the power of attorney have the same effect as the original.

The power of attorney is suspended upon the initiation of a judicial proceeding to determine capacity of the principal or for a guardianship proceeding. A power of attorney terminates upon the death of either the principal or the attorney-in-fact. A common misconception clients often have is that the power of attorney continues even after the death of principal.

Agents: The agent ("attorney-in-fact") must be: (1) a person who is at least 18 years old; or (2) a financial institution with trust powers, that has a place of business in Florida, and which is authorized to conduct trust business in the state. The principal may name a single agent or multiple co-agents and in the event that co-agents are named, each may exercise its authority independent from the others. Under the previous law, unless the document specifically stated, all agents were required to act jointly.

Compensation: Under the new Act, an agent is entitled to reimbursement for expenses reasonably incurred while acting in the capacity as the attorney-in-fact; however, a big departure from the prior law is that only a "qualified agent" may receive compensation for services rendered. A qualified agent is defined as a spouse or an heir of the principal, a financial institution with trust powers and a place of business in Florida, an attorney or accountant licensed in Florida, or a natural person who is a resident of Florida and who has never been an agent for more than three principals at a time.

Powers: One of the biggest changes in the law with this Act is all of the powers must be specifically enumerated in the document and that certain of those powers require that the principal must sign or initial next to each one so enumerated. The previous law had no such requirement and the document could specify dozens of specific powers and also include a general power such as "to do all acts that I could have done and to act in my stead . . ." Under the new Act, this type of grant of power would be ineffective to grant such power. The Act actually lists the types of powers that require the principal to endorse and a few of those are:

- Create a living trust;
- Amend, modify, revoke or terminate a trust created by the principal (if the trust also permits it);
- Make a gift; and
- Create or change a beneficiary designation;

In an apparent attempt to curb financial abuse theft, at least by non-family members, the agent may not create in himself or herself, an interest in the principal's property, whether it is through gift, by beneficiary designation, title change to an account or asset, or otherwise. This prohibition does not apply to a spouse, ancestor, or descendant of the principal.

Acceptance: When a power of attorney is presented to a third party, the new law requires that third party to accept or reject the power of attorney within a reasonable time (four business days) and to provide a written explanation for rejection. The new law also provides for damages, including attorney's fees and costs, for a third party who refuses to accept the new power of attorney that is in proper form and properly executed.

CONCLUSION:

The new Act adds, deletes, and modifies many additional powers not addressed here that may be of no less importance to the reader than those described above. Accordingly, you should contact a qualified Florida attorney to explain the changes to you and how they may affect your planning and whether it would be appropriate for you to execute a new Durable Power of Attorney on or after October 1, 2011, to ensure that you will have the full rights, privileges, and protections provided by the new law.

Richard ("Rick") I. Kantner, Jr., was admitted to the Florida Bar in 1993, and his practices areas include Estate Planning, Elder Law, Probate Administration, and Medicaid and V.A. Benefits Planning. Mr. Kantner is a member of the National Academy of Elder Law Attorneys ("NAELA") and the Elder Law Section of the Florida Bar. Offices in St. Petersburg, Largo/Belleair, Palm Harbor and Lutz.