

The Law and You

New Danger Lurking in Your Power of Attorney

A power of attorney (“POA”) is a common estate planning tool. It is often used to allow your spouse, child or other person to act for you when you can’t act for yourself.

But there is a new danger lurking out there as a result of a recent court decision.

More than a decade ago, a married couple had their estate documents prepared by an attorney. The documents included a joint Trust Agreement, and for each of them a Will, a Medical POA, and a Durable POA for Asset Management.

In their individual Wills, they first left all of their personal property to their respective “issue” and all remaining assets to the Trust.

The couple had been previously married with children. This meant that the husband and wife each had different “issue.”

In about 2002, the husband died. At the time of his death, the wife went into the hospital and was then transferred to a rehabilitation center.

One of the husband’s sons had been appointed as the agent for both husband and wife when the estate documents were created. The agent son, not an issue of the wife, immediately took charge of all property.

In less than 6 weeks after the death of the husband, the agent son distributed all of the personal property from the couple’s home. That is, all furniture, appliances, paintings, books, furnishings, clothing, and personal belongings were distributed among all of the children as though the wife had also died.

But the wife was still living and in a care center. Moreover, she lived for another three years. Selling her personal property would have brought needed financial support for her care. Or, she may have wanted to return to her home.

The agent son also sold the couple’s home within weeks of the husband’s death.

So the wife couldn’t return to her home if she had wanted.

Upon the wife’s death, her daughter was appointed as Personal Representative (“PR”).

As the PR she attempted to marshal the assets in her mother’s estate. In particular, she requested that all of the personal property that had been given to all of the children be returned.

Remember, the wife’s Will directed that her personal property be distributed to her issue, meaning to her children and not to her husband’s children. This is a common practice in second marriages that include children from prior marriages.

The husband’s children refused to return any items. A lawsuit was then filed by the PR against those children.

The judge ruled that the agent son had the power to gift away all of the wife’s property even though she was still living. Under the judge’s theory, the agent could strip the house clean and gift away the surviving wife’s property because the POA contained the word “gifts.”

The POA was subtitled “For Asset Management.” In one sentence listing the powers of the agent son, the word “gifts” was included. Based on that single word, the judge ruled that the agent son could gift away all of his stepmother’s personal property whenever he wanted to do so.

The judge’s ruling is being appealed. But if the ruling were to be upheld, it would be tragic. It would give any agent under a POA the power to gift away a person’s property while that person was still alive.

The term “gift” is often included in POAs to allow small gifts such as for birthdays and Christmas. The term is also to allow gifts for tax planning purposes.

But the term “gifts” is rarely or never intended to allow an agent to gift everything away while the principal is still alive.

There are statutes in Utah that govern powers of attorney. They have been amended several times during the past six years, evidencing the on-going concerns over how POA’s are being used and what limitations are appropriate.

Now there is a new danger. Hopefully, an appellate court will reverse the trial court. If not, we may need further amendments to our POA statutes.

While the recent case I related involved a second marriage with prior children from each spouse, the danger still exists in any POA. Your property could be distributed by your agent at the very time you are vulnerable and unable to fend for yourself while in a hospital or care center.

If you are considering a POA that survives your incapacity, be aware of the dangers. You should consult a knowledgeable Elder Law Attorney. Check your local Yellow Pages or the National Academy of Elder Law Attorneys at (520) 881-4005, or on their web site at www.naela.com.