



Important Legislation Regarding Estate Planning Part 1: Durable Powers of Attorney

South Carolina's Legislature passed two key pieces of legislation in regards to the area of Estate Planning. The first, which is the topic of this article/blog, deals with the changes to the Probate Code surrounding Durable Powers of Attorney. The second, which will be discussed in another article, created the South Carolina Uniform Fiduciary Access to Digital Assets Act.

Effective January 1, 2017, the South Carolina Probate Code will include an eighth article, dedicated solely to Durable Powers of Attorney. While the new article reaffirms the majority of the already existing law, there are some key changes.

First, any power of attorney drafted after January 1, 2017, will be presumed to be durable.

As it stands today, for a power of attorney to be durable, the documents must specifically state something to the effect of, "this power of attorney is durable upon execution and is not effected by incapacity."

Second, Co-Agents are presumed to have the ability to act independently, unless otherwise specified.

This change is significant because it automatically deems Co-Agents to have independent authority to act. Meaning, a single agent may act alone and without the signature or permission of the other agent appointed. Co-Agents might not always be able to handle the necessary affairs at the same time when they arise, for an array of reasons. This change prevents a hindrance in having to wait to act until both named agents are available.

Third, the statute clarifies the recording requirements for a power of attorney.

Recording of a power of attorney is always been a grey area and interpreted differently by different attorneys. This change require that a power of attorney must be recorded in order to be effective after a person become incompetent or incapacitated.

Fourth, the statute specifically addresses the gifting power.

DISCLAIMER: All Materials contained herein are made available by The Elder Law & Estate Planning Center for informational purposes only and should not be construed as legal advice. The transmission and receipt of information contained herein and on our website does not form or constitute an attorney client relationship. Persons should not act upon information found herein or on the website without first seeking professional legal counsel.

The gifting power is one of the most important powers the Principal can grant to an Agent. It is also a power that is most easily abused. The current law does not specifically address this power, but the new statute requires specific reference in the power of attorney of this power in order to grant the power. The new statute also goes into detail about this power and how it is to be used.

Fifth, the statute addresses certain changes that will affect the way attorneys draft powers of attorneys.

The new statute will affect how attorneys are to draft powers of attorneys after January 1, 2017. Some of the changes are basic, i.e. using the term “agent” instead of “attorney in fact” or “incapacity” instead of “disability”. Other changes that effect drafting deals with how the durable power of attorney functions and changes the powers of the agent.

Please be aware that these changes will only effect powers of attorneys drafted after January 1, 2017. Any powers of attorney, legally drafted prior to this effective date, are not rendered invalid by the new statute. You do not have to have your powers of attorneys redone just because the statute changed.

However, if you power of attorney is more than five to ten years old, it might behoove you to have them reviewed by a competent attorney. Similarly, if you powers of attorneys were drafted in a state other than the one you current reside, it would not hurt to have a competent attorney review your powers of attorney as well.

Statutes are always changing. Without change, the laws would not be able to effectively govern in an ever changing world. This is why is vital when wanting to draft estate planning documents, you visit a licensed and qualified estate planning attorney.

DISCLAIMER: All Materials contained herein are made available by The Elder Law & Estate Planning Center for informational purposes only and should not be construed as legal advice. The transmission and receipt of information contained herein and on our website does not form or constitute an attorney client relationship. Persons should not act upon information found herein or on the website without first seeking professional legal counsel.