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THE UNIFORM POWER OF ATTORNEY ACT: THE INDIVIDUAL-PRINCIPAL AND ENTITY-PRINCIPAL DISTINCTION BY STEPHEN TAYLOR

Powers of attorney (“POAs”), while relatively new, are rapidly evolving as commonplace legal tools. They are frequently used by individuals in disability planning, whereby the individual, as principal, appoints an agent to manage the principal’s property, finances, and personal affairs. In the business world, POAs are routinely used by banks and other financial institutions to execute a variety of commercial and business transactions. Many states throughout the U.S., including Virginia in 2010, have enacted the Uniform Power of Attorney Act (“UPOAA” or “the Act”). While the UPOAA was clearly designed to address the appointment of an agent by an individual acting as principal, many were left wondering about the applicability of the Act in everyday business transactions. For example, consider a bank that, acting as a principal, grants authority to an agent to transfer title to a repossessed home. It may be surprising to some attorneys that this type of transaction is not governed by the provisions of the UPOAA, and, therefore, the modern default rules and protections afforded to principals and third parties under the UPOAA are inapplicable. Instead, one must look to common law for an entity’s authority to act as a principal under a POA.

A careful examination of the language of the UPOAA reveals that the statute applies only to POAs created by individuals, not entities. In other words, an individual can create a POA under the Act, but an entity, such as a financial institution, cannot. This distinction is attributed to the UPOAA’s use of the terms “individual” and “person.” The UPOAA defines a “principal” as an individual who grants authority to an agent, while an “agent” is a person granted authority to act on behalf of a principal. While this subtle variation in terminology is easy to overlook, the drafters of the UPOAA purposefully chose these terms, as evidenced by the Act’s definition of “person,” which is held to mean “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public

corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.” Thus, the UPOAA was intentionally drafted to provide that only an individual can act as a principal, while a person – a term that encompasses both individuals and entities – can act as an agent.

So what is the rationale underlying the distinction between individuals and entities serving as principals under the UPOAA? The UPOAA takes into account that its provisions may not be appropriate for certain transactions and delegations of authority, and accordingly provides that when the UPOAA is silent, the common law prevails. Therefore, since the UPOAA does not contemplate entities as principals, entities such as the bank in the example above must rely on the common law of agency when it desires to grant authority to an agent using a written instrument.

Under the common law, an agency relationship is created “when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf.” Similar to the UPOAA definition, the common law holds a “person” to be an individual, an organization or association, a governmental entity, or any other entity that has legal capacity to possess rights and incur obligations. Merely establishing that an entity can act as principal at common law, however, does not end the inquiry. An attorney advising such an entity must recognize that for common law POAs, the rule of strict construction applies. An agent’s authority will have to be clearly spelled out in the common law POA, as the doctrine of incorporation by reference and the UPOAA’s statutory short form will not be available. Similarly, the principal under a common law POA should clearly define the duties of its agent since the fiduciary duties defined in the UPOAA will not be applicable. Without such express authority, common law principles with respect to fiduciary duties will apply.

So why is this individual-principal, entity-principal distinction important? The UPOAA affords third parties with significant protection against liability for rejecting a power of attorney by providing clear safe harbors for legitimate refusals. Under Virginia's common law, however, “one who deals with an agent does so at his own peril and has the duty of ascertaining the agent’s authority. If the agent exceeds his authority, the principal is not bound by the agent’s act.” Accordingly, when an entity is the principal in a POA transaction, third parties will have to act at their own risk in accepting or rejecting the POA. To circumvent this harsh reality, the common law POA should carefully define the protections provided to third parties for good faith acceptance of the document.

Stephen Taylor is an elder law attorney with Oast & Hook, and he practices in the areas of estate planning, estate and trust administration, business planning and litigation. Mr. Taylor is licensed to practice in both Virginia and North Carolina.

The attorneys at Oast & Hook can assist clients with their estate, financial, insurance, long-term care, veterans' benefits and special needs planning issues.

Ask Allie

O&H: Allie, we've heard that in the areas affected by the recent floods and tornadoes, there are animals that need help. Please tell us about it.

Allie: Sure! The ASPCA is the lead agency in the effort to assist approximately 7,000 dogs, cats, and horses that have been injured or displaced as a result of the recent storms and need emergency assistance or medical care. PetSmart Charities® has dispatched seven Emergency Relief Waggin® vehicles, each stocked with \$60,000 worth of critical supplies to aid pets and rescuers hit hardest by the storms in the South and Midwest. The vehicles are stocked with pet food, wire crates, plastic carriers, fenced kennels, bowls, leashes, fans, a generator, a battery charger, and lights to help the animal rescuers on scene. These supplies will be used to set up emergency animal shelters. "PetSmart Charities also dispatches teams of specially trained volunteers to the scene," says Susana Delia Maddalena, executive director of PetSmart Charities. "The volunteers are able to unload supplies and set up temporary shelters very quickly, enabling on-the-ground rescuers to immediately attend to the animal victims. We are happy to assist in this way and help these animal victims receive the care and comfort they need and deserve." For more information, including how to donate to help, please visit www.petsmartcharities.org/emergency-relief. What a great program! I hope my readers will help out. Time to check in on the latest news on the PetSmart Charities website. See you next week!

Speakers

If you are interested in having an Oast & Hook attorney speak at your event, phone Jennifer Harris at 757-399-7506 or e-mail her at harris@oasthook.com. Past topics include estate planning, long-term care planning and veterans benefits.

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