

Kathleen Martin is an attorney with O'Donnell, Weiss & Mattei, P.C., and a newspaper columnist for The Mercury, which gave permission for this article to be reprinted.

---

June 3, 2012

## Issues with powers of attorney for finances

Financial Durable Powers of Attorney are an extremely important aspect of estate planning for everyone, but especially as people age and the potential for incapacity increases. Related to this, older persons should be extremely careful in agent selection and also should consider evaluating certain provisions of standard forms, especially regarding gifting. A relatively recent court case in Pennsylvania illustrates this need.

In the *Houck Estate* (1 Fiduc.Rep.3d 279), Ms. Houck named an employee of the nursing home where she resided to be her agent under her Power of Attorney, although Pennsylvania law prohibits nursing home employees from serving as agents for residents unless ordered to do so by a court. Furthermore, if the facility assists with financial management or holds resident funds, no staff member can serve as an agent for a resident. You can imagine why this prohibition is in place, since a nursing home resident might feel obligated to staff members in a facility. After all this is her home now, and she might feel, rightly or wrongly, that staff and other personnel in the facility are her family, and her care and fate is in their hands. In some cases, the resident has no one else that they can depend upon, and are very grateful for the care and attention that they receive. Fortunately, most nursing home staff and management are trustworthy, and do not take advantage of residents. However, Ms. Houck's agent, Phoebe A. Walker, took Ms. Houck's money (\$220,000.00) for her own personal use.

In this instance, the court did not even need to look to the law related to nursing home personnel being able to serve as agents under a Power of Attorney. The document in this particular instance was declared invalid since it did not have a Notice page, agent acknowledgement, or any gifting powers. Since the document was invalid, the agent had no power to act, and was surcharged \$220,000 for the money that she took. This is a good example of why a Power of Attorney should be written by an attorney. These documents are widely available on the internet or in office supply stores, and rarely meet the guidelines required by law in Pennsylvania. Furthermore, even a Legal Zoom type document may have the "skeleton" of a properly drafted document, but the drafter may not know what provisions to consider altering for an individual according to their specific needs, or how to know if the principal has capacity to sign such a document. Third parties, such as financial institutions, may not accept a document that appears to be valid, thanks to a recent Pennsylvania Supreme Court case in which the Court failed to protect the Pennsylvania State Employee retirement fund when they accepted an apparently valid Power of Attorney from an employee's husband.

There has been an increased incidence of financial abuse of older persons, especially those who no longer have sufficient capacity to comprehend what a potential agent might be asking of them. Gifting provisions that prevent Agent abuse of that power, and properly drafted documents that have been fully explained to the principal have become even more important in this internet age. A "slapped together" document may appear to work in the short term, but agents can find themselves in serious difficulties, and principals can find themselves financially at risk when signing a document prepared by those who do not understand the importance of a well drafted and properly executed Power of Attorney.

(Thank you to the author of a recent article in the *Elder Law Section E-Newsletter* for information to develop this column).