Trust Connection

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MCF Private Trust

A Monthly Report on Trust News and Information

Our trust services enable us to seamlessly serve you and your family in a manner that is both cost-effective and efficient. We are able to serve as an investment advisor to your trust without sacrificing protection for trust beneficiaries. MCF Private Trust is a Trust Representative Office of National Advisors Trust Company, a national independent advisor-owned trust company.

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Powers of Attorney

A power of attorney is an incredibly powerful instrument that all people, regardless of wealth or status, need to consider. Powers of attorney generally fall into two types: healthcare and financial. A power of attorney for healthcare, also called a living will in some instances, directs what medical treatment and life-sustaining measures are to be taken in the event of incapacity of the principal. Advisors rarely deal with healthcare in their professions, but financial powers of attorney are commonly used to substitute another individual to handle financial affairs. However, these documents may present challenges to the advisor dealing with them.

A financial power of attorney may be regular or durable. A regular power of attorney does not survive the incapacity of the principal. If the principal is unable to handle their financial affairs due to physical or mental illness, the regular power of attorney is automatically revoked. The durable power of attorney does survive incapacity. Most powers of attorney being drafted now are durable and most states require that "durable" be in the title or body of the document. State laws vary greatly on the powers that can be exercised by the holder of the power, called either the attorney-in-fact or the agent. From the advisor's perspective, they must ascertain whether the agent has the power to perform certain acts concerning the principal's investment management account. Similarly, powers concerning individual retirement accounts and other employee benefit plans may have to be specifically enumerated in some states. All powers of attorney are automatically revoked upon the death of the principal. If advisors have actual knowledge of the principal's death, they cannot accept direction from the attorney-in-fact or agent. For regulatory reasons, they should always retain a copy of the power of attorney in your account files.

Generally, there are certain things that an agent is never empowered to do. For example, an agent cannot execute a Last Will and Testament, cannot change survivorship interest in financial accounts, and cannot amend or revoke a Revocable Living Trust made by the principal. The document itself will enumerate the powers of the agent or incorporate by reference the powers defined by the state statute. Many states, however, require a specific listing of certain powers to enable the agent to perform them. The bottom line is that advisors must carefully examine the power of attorney document to ensure that they can accept an agent's directions on the account.

There are certain legal presumptions that can assist advisors in working with a durable power of attorney. There is a presumption that the power presented was the free and voluntary act of the principal and that the principal had the capacity to execute the document. This is evidenced by the power of attorney being notarized. There is also a presumption that the power of attorney has not been revoked unless the advisor

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has actual knowledge to the contrary. Another presumption is that the power of attorney is valid under the laws of the state in which it was executed. If, however, the document does not look right, e.g. illegible photocopy of the document or signature of principal doesn't match the one the advisor has in their account document, they can require a certified copy of the power, or, in some states, require an attorney's opinion that the power of attorney is valid.

How powers of attorney work with other estate planning documents can sometimes present issues. For example, a durable attorney-in-fact may have some of the same responsibilities and powers as a court-appointed guardian or conservator of the estate (who could be different people). State law governs the relationship, with some states prescribing that the power of attorney is revoked by the appointment of a guardian or conservator. Unless they are the same person, a successor trustee retains power over the administration of the trust of which the principal is a beneficiary and exercises that power independently of the attorney-in-fact. A question may arise if the attorney-in-fact can request a distribution from a trust on behalf of the beneficiary, again governed by the terms of the trust and state law. If the advisor's investment management agreement has a non-probate transfer (TOD) designation in it, the attorney-in-fact may not normally change that designation.

Special powers of attorney are used for limited purposes. For example, if you are going to be out of the country and anticipate a real-estate closing in your absence, you may grant someone a special power of attorney to execute documents in your name. The same type of document may be given to the caregivers of your minor children in your absence, particularly the power to initiate emergency medical treatment. Adding an additional named signatory to a bank account is also a duty of a special power of attorney. Special powers may be limited in time or scope depending on the situation.

There is a cardinal rule to remember while dealing with a power of attorney; read it carefully to understand what powers the attorney-in-fact or agent actually have in your account dealings.

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