

OCTOBER 2013 NEWSLETTER

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WHY A DURABLE POWER OF ATTORNEY IS ONE OF THE MOST IMPORTANT ESTATE PLANNING TOOLS

NEWS ALERT:

1. Before addressing this topic, Pozzuolo Rodden, P.C. are pleased to announce the following:

A) PHILADELPHIA MAGAZINE FIVE STAR WEALTH MANAGER, BUSINESS PLANNING

Pozzuolo Rodden, PC is pleased to announce that Joseph R. Pozzuolo was designated as a

2013 PHILADELPHIA FIVE STAR WEALTH MANAGER, BUSINESS PLANNING by Philadelphia Magazine. The award will appear in the November, 2013 edition of the magazine. Mr. Pozzuolo was selected after an independent survey was conducted by Philadelphia Magazine of 64,000 registered financial services professionals, high-net-worth households and subscribers of Philadelphia Magazine all of whom have an income of greater than \$190,000.

2. Free Online CLE/CPE Credits:

Pozzuolo Rodden, P.C. is pleased to announce the opportunity to obtain free CPE/CLE credits by viewing the Lawline webcast courses previously taught by Joseph R. Pozzuolo and/or Jeffrey S. Pozzuolo titled “The Negotiation and Documentation of Commercial Financing Documents Including The Use of Convertible Loans With Put and Call Options”, “How Middle Income Families Should Plan for Retirement Including Ethics” and “The Fundamentals of Starting a Business”.

* How Middle Income Families Should Plan For Retirement - <http://bit.ly/ZvgNbr>

* The Fundamentals of Starting a Business - <http://bit.ly/13Q8dei>

* The Negotiation and Documentation of Commercial Real Estate Loan Documents- <http://bit.ly/17jfXSN>

Any problems, feel free to contact Chrissy at: chrissy@pozzuolo.com

QUESTION OF THE MONTH:

CAN AN EMPLOYER CONTROL WHAT AN EMPLOYEE SAYS ABOUT THE EMPLOYER IN THE SOCIAL MEDIA?

Answer-See Page 5 of this Newsletter

WHY A DURABLE POWER OF ATTORNEY IS ONE OF THE MOST IMPORTANT ESTATE PLANNING TOOLS

As part of your overall estate plan, you should have a durable power of attorney document. You will save yourself and your family substantial time, money and stress by executing a durable power of attorney. By executing a durable power of attorney, you choose who will control your financial affairs in the event your health fails or in case of emergency. A durable power of attorney is an easy-to-setup backup plan that will serve you in the event you suffer a lifetime disability that leaves you unable to manage your affairs.

A durable power of attorney document is a legal document in which you authorize someone else to act on your behalf. You, as the person granting authority to act, are the *principal*. The person to whom you grant that authority is the *agent*. Your agent is a fiduciary

and generally held to a fiduciary standard. A fiduciary standard imposes legal and ethical responsibilities on your agent and is a high standard. An agent cannot act in his own personal interests ahead of his duty as agent. When considering who will be your agent, be sure to appoint someone who is prudent, responsible, trustworthy and able make clear decisions. Your agent must be able to put your interests first.

You should also consider appointing a co-agent and backup agents. For example, you may appoint two agents and grant them authority to act on your behalf only if they reach an unanimous decision regarding certain specific actions or singularly concerning certain administrative duties. You may also appoint your spouse as your agent, and in case your spouse dies before you do, you may appoint your child or children as a backup agent.

The fact that a power of attorney is *durable* is significant. Generally, a power of attorney is effective only as long as the principal is able to act on his own behalf. This standard power of attorney loses effectiveness upon either the incapacitation or the death of the principal. That is, under a standard power of attorney, once you cannot act for yourself, your agent cannot act for you either. A durable power of attorney, however, remains effective despite the principal's incapacitation. It will continue to remain effective until death of the principal. Thus, if you were to suffer a major stroke and be mentally incapacitated, your durable power of attorney would remain effective and your agent would continue to be able to act on your behalf.

Furthermore, a durable power of attorney may be either a *standing* durable power of attorney or a *springing* durable power of attorney. A standing durable power of attorney takes effect immediately and remains effective until the principal dies. A springing power of attorney takes effect only upon the incapacitation of the principal and remains effective until his death. A springing power of attorney document should provide rules regarding how to determine if the principal is incapacitated. For example, you may state in your springing durable power of attorney document that two or more licensed doctors must declare you incapacitated before the document takes effect and your agent may act on your behalf.

In all cases, powers of attorney automatically lose their effectiveness upon the death of the principal. Thus, if you appoint your son as your agent under a power of attorney document, your son cannot use his appointment as your agent under that document to handle your estate or your affairs after you die.

Death of the principal is not the only way a durable power of attorney loses its effectiveness. The principal may amend or revoke the power of attorney. If you amend your power of attorney document, you may change your agent's authority to act or you may change your agent. If you revoke your power of attorney document, you take away all authority from any agent to act on your behalf.

You may grant your agent as many specific powers under a durable power of attorney as you wish. Some of the more common powers granted to an agent include:

- Conduct bank transactions
- Buy, sell or manage real property
- Buy, sell or manage investments

- Borrow money
- Enter into safety deposit boxes
- To apply for, purchase, change or amend, receive or exercise any rights under retirement plans
- Prepare and file tax returns
- Deal with insurance and retirement benefits
- Dispute or assert legal claims
- Exercise stockholder rights or options, or handle investments
- Contract for services, such as lawyers and accountants
- Collect Social Security
- Exercise rights of the grantor of a trust

While it is likely that your agent will ultimately only be responsible for depositing checks, paying bills and other “everyday” transactions, your agent may have to take on more sophisticated financial responsibilities. Certainly, if your financial estate is complicated and requires a significant amount of attention, then your agent’s responsibilities will be more complicated and more demanding. The bottom line is that you should be certain your agent is comfortable handling money and, ideally, as comfortable as you are.

A durable power of attorney is not the only available remedy by which your affairs will be handled in the event of your incapacitation. However, it is probably the cheapest and easiest to execute, and they may be the most encompassing as far as granting your agent power.

For example, property owned jointly or in joint names may be managed by the other joint owner. Thus, if you and your wife have a joint bank account, she will be able to manage banking transactions from that account, like paying bills. However, even if you own property jointly with your spouse, a single joint owner may not sell certain real or personal property without the consent of the other joint owner. If you and your wife jointly owned securities, and she wanted to sell the securities to raise funds in the event of your incapacitation to pay for your care, she may not be able to because you cannot give valid consent. In other words, owning property jointly if you were to become incapacitated is not the total solution.

The only other total solution if you become incapacitated and do not have a durable power of attorney is to seek a guardianship or conservator. When you become incapacitated, in order to take over your affairs, your loved ones would have to petition a court to have you legally determined incapacitated and to have someone appointed as your guardian or conservator. Of course, going through this process is less than ideal. It is time consuming and expensive. Legal documents must be prepared, a hearing must be held, and witnesses must be called. Legal and filing fees will mount. On top of that, the proceedings may be open to the public. This makes a very private matter open for all to see. Furthermore, family members or interested parties may

fight over who may be appointed guardian. In the end, the court may not even appoint a family member but, rather, a neutral third party. The court appointed guardian will receive payment for his services and no matter who is appointed guardian, all his actions will be under court supervision. It is not a convenient way to have your financial affairs managed in the event you become incapacitated.

A durable power of attorney is a sensible, cost effective and proactive solution to a problem that, usually, catches a person off guard. Aside from protecting yourself and your financial estate in the event of your incapacitation, you protect your loved ones who depend on you. Do not leave what could be a very emotional and difficult situation for your family to chance or even to court determination. Consult with your attorney and prepare a durable power of attorney to take control of your estate now.

QUESTION OF THE MONTH:

CAN AN EMPLOYER CONTROL WHAT AN EMPLOYEE SAYS ABOUT THE EMPLOYER IN THE SOCIAL MEDIA?

There is a recent trend in employment law of employers drafting social media policies to place regulations on an employee's use of social media as it relates to the employer. However, an employer should take care to ensure its social media policy does not violate the National Labor Relations Act ("NLRA"), a law which was enacted to protect employee rights and regulate working conditions.

In May 2012, the National Labor Relations Board ("NLRB"), an independent federal agency that investigates unfair labor practices and enforces in the NLRA, issued a Report of the General Counsel ("Report"), which specifically addressed an employer's regulation of employee's social media usage. The General Report examined recent cases involving social media regulations and provided guidance for employers when drafting social media policies. The Report provided a model policy that the Board concluded effectively balances the interests of employers and employees' use of social media.

In general, the NLRB's Report found that employers had a tendency to draft over broad social media policies that were unlawful under the provisions of the NLRA. The NLRA protects employee's rights, whether unionized or not, to discuss the terms and conditions of their employment, their employer's labor policies and treatment of their employees among other protections. Accordingly, an employer cannot completely ban an employee's use of social media to discuss their employment, because such a ban would be unlawful under the NLRA.

Mainly the NLRB Report cautioned employers against using overbroad and ambiguous language in their social media policies. For example, the NLRB found portions of an employer's social medial policy which instructed employee's not to reveal "non-public company information" to be overbroad and to unlawfully prohibit employees from discussing the terms

and conditions of their employment. The NLRB Report also found that if an employer's policy was ambiguous the employer should include examples of how that policy applies in different contexts to help clarify the rule and ensure that it could not be interpreted by employees to prohibit them from discussing the terms and conditions of their employment.

Employers must always be cautious in drafting their social media policies and should seek legal counsel to ensure they are adequately protecting their needs and reputation, as well as, drafting a legal policy which does not illegally limit an employee's rights. If you would like further guidance on drafting such a social media policy please contact this office. A copy of the Report is available upon a request to our firm at joe@pozzuolo.com.

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- If there are any legal questions you would like this office to answer in the future, please email the question to us at info@pozzuolo.com. Each month, the question with the most relevance to our privately held business clients, advisors, and friends will be answered in our monthly newsletter. The questions can relate to any of the areas practiced by this office including business planning and transactions, corporate law, commercial litigation, employment law and litigation, commercial real estate and development, construction law and litigation, estate planning, estate administration, tax and pension law, family law litigation.
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PUBLICATIONS

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: [http://pozzuolo.com/Pubs Articles.shtml](http://pozzuolo.com/Pubs%20Articles.shtml)

- **Corporate/Tax Articles**
- Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business
- Deferred Compensation Rewards And Retains Key Employees
- Design Buy-Sell Agreements For Maximum Utility
- How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend
- How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations
- How To Look, Act And Sound Like A Professional Corporation
- How to Structure a Suitable Buy-Sell Agreement
- How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool
- Money Purchase Pension Plan Falls Out Of Favor
- Protecting A Client's Business From Unfair Competition Using Restrictive Covenants

- Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules
- What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs
- Why An Employment Contract Is Mandatory
- **Estate Planning Articles**
- Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples
- College Funding Tool Offers Estate Planning Advantage
- Diversify Strategies For An Effective Estate Plan
- Divorce and Estate Planning
- Divorce Raises The Need For Performing An Estate Planning Review
- Drafting The Durable Power Of Attorney For Wealth Protection Purposes
- Estate Planning For Pet Owners
- Remarriage Situations Can Raise Special Estate Planning Considerations
- Six Proven Estate Planning Techniques
- Special Needs Trust - An Estate Planning Tool For The Disabled
- The Limited Liability Company -A Sophisticated Tool For Estate Planning
- Using Trusts To Maximize Family Protection And Minimize Estate Tax
- Why Living Wills- Advance Directives Are An Essential Part Of Estate Planning

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.

This newsletter is courtesy of Pozzuolo Rodden, P.C.

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