How to Avoid a Headache at the Bank

By Andrea Chomakos and Deborah King

As estate planning attorneys, we are well versed in the process of estate administration and have expectations of how others should acknowledge and respect the documents that we prepare for our clients – wills, trusts, powers of attorney. And many times things work as expected – our clients walk into a bank branch, meet with a branch manager or other employee, and present a power of attorney, letters testamentary, or trust document and the bank adds the agent to the principal’s account, closes the decedent’s account, or establishes the trust account as requested.

However, sometimes, things are not as seamless. Hiccups definitely are frustrating for our clients, in particular as these issues often arise in the context of an already stressful situation – a loved one is sick or has died, the task at hand is not routine and the legalese is incomprehensible. But, financial institutions are subject to increasing regulations from both the state and federal government, and policies have been developed to address potential risks to financial institutions and to protect customers and their confidential information. At the root of most of the frustration is a lack of understanding of the regulations to which the banks must adhere. Your Section’s Council has reached out to the North Carolina Banker’s Association (the “Association”) and invited a member from the Association to join the Section’s Council as a liaison and to co-author a series of articles to address some of the issues we have heard you raise in dealing with financial institutions in estate and planning related matters. This article will present several common situations that arise in dealings with banks and explain the North Carolina statutes applicable to the banks so that you can advise and assist your clients in being prepared in transacting with a financial institution.

Power of Attorney

It is important to remember that banks have a number of strict rules that they must comply with, which derive from federal and state laws and other regulations. Those rules are intended to protect both the bank and its clients. In the context of powers of attorney, it is important for the bank to confirm that the power of attorney is valid and the person presenting the power of attorney has the appropriate authority to act under it.

The North Carolina legislature recently adopted the Uniform Power of Attorney Act (effective Jan. 1, 2018). That new act will help address two common situations encountered by banks (and other third parties presented with a power of attorney) under the prior statute.

Previously, N.C.G.S. Section 32A-9 stated:

“(b) No power of attorney executed pursuant to the provisions of this Article shall be valid subsequent to the principal’s incapacity or mental incompetence unless it is registered in the office of the register of deeds of that county in this State designated in the power of attorney, or if no place of registration is designated, in the office of the register of deeds of the county in which the principal has his legal residence at the time of such registration or, if the principal has no legal residence in this State at the time of registration or the attorney-in-fact is uncertain as to the principal’s residence in this State, in some county in the State in which the principal owns property or the county in which one or more of the attorneys-in-fact reside. A power of attorney executed pursuant to the provision of this Article shall be valid even though the time of such registration is subsequent to the incapacity or mental incompetence of the principal.” (emphasis added).

So, if the principal was incapacitated and the agent presented a power of attorney that had not been recorded, the bank could not treat the agent as having the authority to act on behalf of the principal. The new act does not require a power of attorney to be registered subsequent to the principal’s incapacity, and extends this rule to powers of attorney executed before the effective date of the new law.

The other issue that the new act addresses is lack of clarity regarding whether a power of attorney is durable or springing. The new act provides that a power of attorney is effective immediately, unless specifically provided to be springing. This is the opposite presumption from the prior law. Practitioners should be careful in how clients execute the new statutory form, to avoid any confusion on the effectiveness of the power of attorney. Further, to the extent that a power of attorney is springing, the bank will necessarily require additional information and documentation to determine whether the power of attorney is effective. Agents should be prepared with this information and documentation when presenting a springing power of attorney to a bank.

While the new statutory form should be viewed as an improvement over the current statutory form and may be sufficient in many cases, a well drafted custom power of attorney that clearly states the powers of the agent is a helpful tool as well. While the statutory form provides for a number of powers to be granted to the agent, it is not all-inclusive and unique issues can arise that are not covered under the power of attorney.

Under certain circumstances, it may be difficult for a bank to determine if the agent is acting within the scope of the power of attorney and one option is for a bank to contact the attorney that drafted the power of attorney. Discussing the power of the attorney with the bank is a valuable service you can provide. Additionally, banks are required by regulators and the state to take steps to detect financial elder abuse and are aware that a power of attorney is a favored method for those trying to take advantage of the elderly. Providing information to the bank may avoid the filing of an unnecessary financial elder abuse report or help the bank determine that a report should be filed. Once a financial elder abuse report is filed pursuant to N.C.G.S. Section 32C-1-120(9) the person that has filed or is aware of the filing is not required to follow the directions of the agent.

Safe Deposit Box

Another area where clients may become frustrated is in trying to access a decedent’s safe-deposit box. There are specific rules in North Carolina regarding the access to a deceased person’s safe de-
posit box. N.C.G.S. Section 28A-15-13(c) allows a safe deposit box to be opened without the presence of a clerk of court when:

“[T]he person requesting the opening of the decedent's safe-deposit box is a qualified person. In that event, the qualified person shall make an inventory of the contents of the box and furnish a copy to the institution and to the person possessing a key to the box if that person is someone other than the qualified person.”

A qualified person includes a qualified personal representative, a person with an order of summary administration, co-lessee or a deputy. A deputy is "a person appointed in writing by a lessee or cotenant of a safe-deposit box as having right of access to the safe-deposit box without further authority or permission of the lessee or cotenant, in a manner and form designated by the institution.” N.C.G.S. § 28A-15-13(a)(1a).

Thus, if an individual goes to the bank with a copy of the will or just the decedent's death certificate, and no qualifying letters testamentary or administration, the bank cannot give that person – who is not a qualified person – access to the safe deposit box. Of course the quandary of "but the will is in the safe deposit box" always triggers sympathy, but is not the magic key to grant the bank authority to open the box. This is why clients should be advised not to put the will in the safe deposit box! However, when these situations arise, the clerk or representative of the clerk must access the box and take inventory of the box, including taking the will and filing it. Because of this cumbersome statutory procedure, clients should be advised not to retain the original will in a safe deposit box or to otherwise designate on the safe deposit contract a person who can access the box.

Joint Accounts

Another common issue is obtaining financial information for a decedent's accounts, to report to the court and/or IRS with the decedent's estate tax return. However, if the account is jointly owned, the bank must be cognizant of the customer information as it pertains to the other account owner. Specifically, when the decedent owns a joint account that is held as joint with right of survivorship, on the death of the decedent the account automatically becomes the property of the survivor and the bank has to guard the financial information of the surviving owner. Financial institutions understand the personal representative's needs and if informed of the situation can generally comply with the request for account statements that cover periods prior to and including the date of death. Thus, if a personal representative explains why the statements are being requested, the bank can usually comply with the request.

In addition to requesting information about joint accounts, a personal representative may believe that the estate owns a portion of a joint account. When a bank reviews a joint account after the death of the decedent to determine ownership, the bank must comply with the terms of the account agreement. A client may believe that the account is owned as joint tenants with right of survivorship, but the account application may state that the account is a joint account without a designation of rights of survivorship. In this situation, depending on when the account was established, it may be classified as a tenant-in-common account. Accordingly, the bank is obligated to treat the account as owned per the account application. While this may be frustrating to the parties who thought the account was joint with right of survivorship, the bank must comply with the applicable laws and account application.

Conclusion

The combination of statutes, regulations and coping with the sickness or death of a loved one can be stress inducing but with careful preparation estate planning attorneys can help minimize that stress for their clients. Hopefully the above tips, along with well drafted documents, can help avoid a call from a frustrated client.

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