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If you have any questions about this Advisory, please contact:

MICHAEL T. CLEAR

203.363.7675
mclear@wiggin.com

CHRISTOPHER CLARK

212.551.2849
ccclark@wiggin.com

About the Private Client Services Department

Experience the boutique feel of Wiggin and Dana's Private Client Services team, which includes over four dozen skilled lawyers and dedicated staff members conveniently located in the communities where our clients live and work.

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IMPORTANCE FOR RECORD KEEPING FOR AGENTS UNDER A POWER OF ATTORNEY

Serving as an agent under a Power of Attorney entails certain fiduciary obligations, including the duty to act in good faith in all dealings on behalf of the principal. A key component of this duty is maintaining accurate and detailed records of all actions taken as agent and, upon request, being able to provide evidence of such records. For agents who fail to maintain accurate and detailed records, there can be serious legal consequences.

CAUTIONARY TALE OF *IN RE CONSERVATORSHIP OF BJH*

In this recent Michigan Court of Appeals case, the principal appointed her daughter as attorney-in-fact (also known as an agent) under a durable power of attorney. Years later, the daughter petitioned the probate court for guardianship over her mother. The mother, through counsel, objected, citing "financial mismanagement and mistreatment." The court appointed a third-party temporary guardian, suspended the daughter's power of attorney, and required an accounting of her actions. After multiple submissions, the court found the daughter failed to substantiate numerous transactions, resulting in the disapproval of tens of thousands of dollars in expenses. The court also found the daughter breached her fiduciary duty by failing to maintain accurate records and keep her mother informed.

On appeal, the daughter argued an exoneration clause in the Power of Attorney excused her from liability for any loss to the principal, her mother, resulting from "a judgment error made in good faith." She asserted there was no evidence of bad faith, and the probate court abused its discretion by not approving expenses outlined in her accountings. The appellate court disagreed, finding the losses were to the daughter, not the mother, and the fault lay with the daughter for failing to document and manage the expenses. Importantly, the court noted that even if the exoneration clause applied, the record did not show the daughter acted in good faith and would not have excused her from liability. Among the examples cited, the court noted the daughter (i) chose not to maintain good records, (ii) failed to maintain proper billing practices for laborers and caregivers she hired as an agent, including paying in cash without writing receipts and failing to obtain 1099s, (iii) made withdrawals from the mother's accounts for personal expenses, violating the power of attorney's provisions on gifting, (iv) misrepresented certain expenses made on behalf of her family as being for the

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benefit of the mother, and (v) failed to provide adequate supporting documentation for expenses allegedly made on the mother's behalf.

TAKEAWAYS

The above case is a strong reminder that accepting the role of agent under a power of attorney is a serious fiduciary responsibility, and that proper recordkeeping is not only a best practice but a legal requirement.

In New York State, for example, in Sec. 5-1505 2.(a)(3) of the General Obligations Law, an agent under a Power of Attorney has the fiduciary duty to "keep a record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and to make such record and power of attorney available to the principal or to third parties at the request of the principal."

The State of Connecticut has adopted the Uniform Power of Attorney Act, codified in Title, Chapter 15c of the Connecticut General Statutes. Section 1-350m(b)(4) of that statute requires that, unless the power of attorney provides otherwise, an agent that has accepted appointment shall "keep a record of all receipts, disbursements and transactions made on behalf of the principal."

In Re Conservatorship of BJH illustrates several practical steps agents should take to fulfill their fiduciary obligations as it applies to recordkeeping:

- Maintain clear and detailed records of all actions taken as agent.
- Obtain receipts for all monetary transactions, particularly those made in cash.
- Adhere strictly to the authority granted in the power of attorney, including the agent's ability (or lack thereof) to make gifts of the principal's property to the agent or to others.
- Keep the principal up to date on all actions taken as agent and be prepared produce a record of such actions upon the request of the principal or other parties.

If you have any questions concerning your role as a fiduciary under a power of attorney, please reach out to your Wiggin and Dana attorney for counsel.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

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