

private client services

September 18, 2009

2009 VIRGINIA LEGISLATIVE UPDATE

Sarah E. Messersmith, Esq.

The 2009 Virginia legislative session resulted in several important changes to trusts and estates law, effective July 1, 2009. First, several amendments were made to the Health Care Decisions Act, which addresses medical advance directives. A health care directive now may permit an agent to enroll the incapacitated person in health care studies and research. The legislature also heightened the criminal penalties for willful concealment, destruction or damage to an advance directive or falsification or forgery of an advance directive or a revocation of an advance directive. Understandably, the penalties are especially heavy if such action results in life support being applied or withdrawn in a manner inconsistent with the incapacitated person's wishes.

The legislature also adopted a Virginia version of the Uniform Power of Attorney Act. The Act will not become effective until July of 2010, but because it will include a number of important changes, it is not too early to start becoming familiar with it. Like most uniform acts, it creates only default rules; therefore, it is possible to draft around almost all of the provisions of the Act. Under the Act, a new Power of Attorney must specifically revoke a former Power of Attorney; otherwise the former Power of Attorney and the new Power of Attorney both are effective. This could result in a principal having multiple agents at one time, and possibly even multiple agents taking inconsistent actions. If a principal names multiple agents in his Power of Attorney, the agents may act independently of one another unless the Power of Attorney specifically provides that the agents must act jointly. The new Act includes a provision that the agent has the duty to attempt to preserve the principal's estate and estate plan. The Act includes a laundry list of grants of specific authority that can be incorporated in a Power of Attorney by reference to the Code section listing the powers. However, other powers of the agent must be added to the Power of Attorney by specific mention in the document, including gifting, revising inter vivos trusts, changing beneficiary designations, delegating authority and transferring property into the name of the agent. The new Act also will permit a statutory short-form Power of Attorney, such as that currently used in New York.



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