



# 2015 Summit Webinar Series

Bring us your problems, issues & conflicts and we will solve them together!

## **Beyond The Form: Financial Powers of Attorney Drafting Provisions and Maximizing Acceptance**

*Presented by : Andy Hook and Stu Zimring*

Areas of knowledge you need to know to get the most out of this session at The Summit:

- Agency
- Fiduciary Duties
- Disability Planning

What you will gain after attending this session at The NAELA Summit:

- Better understanding of one of the most used and misused tools in Elder Law
- Appreciation of the attorney's role in counseling principal and agent to protect both from misuse

Look us up at [www.naela.org/2015Summit](http://www.naela.org/2015Summit) Newport Beach, CA | Jan 29-31 | The Island Hotel  
Webinar recorded - 9/30/2014 | Session Presented - 1/31/2015

Powers of Attorney are complex, powerful legal instruments.

Agents are fiduciaries.

# Failure of Agent to conform to legal requirements

- Criminal Penalties
- *Natho v. Texas*
- 25 years in prison for misapplication of principal's assets
- Civil Consequences
- *Pennewill v. Harris*
- Disgorgement of assets placed into joint account; no intentional wrongdoing



# *Natho v. Texas*

- Texas Court of Appeals upheld 25 year sentence of agent under durable power of attorney for misapplication of principal's assets.
- Agent transferred title of car, life insurance policy and remainder interest in home to himself.
- Agent had power under Texas statutory form to act with regard to Medicaid issues but no power to make gifts (must be expressly stated).

# *Natho v Texas*

- Agent consulted with elder law attorney to discuss qualifying for Medicaid.
- Attorney advised agent he could either “spend down” the money until reaching the maximum allowable amount and then apply for Medicaid OR make gifts to himself because he was the sole beneficiary under the Will.
- Court held there was sufficient evidence to support the jury’s verdict: there was no power in power of attorney to make gifts, gift of car was made prior to consultation with attorney, principal did not consent to transfers, assets transferred were excluded from Medicaid calculations (so transfers DID NOT benefit principal) and agent refused to return car and life insurance policy when told power of attorney had been revoked.

# *Pennewill v. Harris*

- Agent held broad power of attorney that did not include gifting powers.
- Principal added agent to bank account as joint account holder with right of survivorship prior to incapacity and named agent as 1/3 residuary beneficiary in Will.
- After incapacity, agent sold principal's home to meet increased expenses of nursing home and put proceeds into joint account.
- Another residuary beneficiary of estate sued agent, charging breach of fiduciary duty and self-dealing.

# *Pennewill v. Harris*

- Court found no intentional wrongdoing on part of agent.
- Agent used funds for principal's support as long as she lived.
- Nonetheless, the Court found self-dealing because agent converted property held by principal in her name alone into joint property. Balance of proceeds remaining at principal's death ordered disgorged and distributed as part of residuary estate under Will.

## Attorney's Role as Counselor

Often overlooked but vital part of professional responsibility.

- Know your client.
- Know the law and default rules in your state.
- Educate client AND agent regarding responsibilities, duties and precautions.
- Be aware of possibility of financial elder abuse.

