Fall 23

Powers of Appointment: Your "Power" Tool for Drafting and Implementing Illinois Trusts

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Powers of Appointment:
Your "Power" Tool for Drafting and Implementing Illinois Trusts

Presented by the ISBA Trusts & Estates Section

Live Webcast
Thursday, November 9, 2023
11:00 a.m. – 12:05 p.m.

1.0 hour MCLE credit

Modern trusts should be flexible to adapt to dynamic family and investment situations, which are guaranteed to change over time and may last for generations. Powers of appointment have taken on increased importance in trust instruments, allowing Settlors, Beneficiaries and Trustees to achieve the goals of the trust instrument. This seminar addresses the powerful ways powers of appointment are being used in both the drafting and implementation of Illinois trusts, and will include the following topics:

- How to draft useful powers of appointment in both terms and scope;
- Knowing when to *not* use powers of appointment;
- How powers of appointment have been used to address common trust administration issues since the Illinois Trust Code's January 1, 2020 effective date; and
- How the Uniform Powers of Appointment Law (760 ILCS 3/1301) fills in the gaps in powers of appointment in trust instrument.

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TAB 1

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ISBA TRUST & ESTATES SECTION

Powers of Appointment: Your "Power" Tool for Drafting and Implementing Illinois Trusts

Thursday, November 9, 2023

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Agenda

- Introduction
- The Many Flavors of Powers of Appointment
- Exercising Powers of Appointment
- Powerful Planning Opportunities
- Drafting Considerations

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Introduction to Powers of Appointment

- Powers of Appointment
  - A right granted pursuant to a governing instrument (typically a Will, Trust or Deed)
  - by a third-party – the "**donor**"
  - to another person – the "**donee**" or "**powerholder**"
  - which empowers the powerholder to direct the distribution of assets – the "**appointive property**"

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Introduction to Powers of Appointment

- Powers of Appointment (cont'd.)
  - The powerholder is empowered to direct the distribution of appointive property among a class of persons, entities and/or charities – the "**permissible appointees**".
  - The powerholder is generally empowered to determine when and upon what terms the appointee(s) receive the appointive property.
  - To the extent the powerholder does not exercise the power of appointment, the appointive property passes to "**takers-in-default**".

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Introduction to Powers of Appointment

- Powers of Appointment (cont'd.)
  - Powerholder is not the legal owner of the appointive property.
    - Powerholder may (but need not) be the beneficial owner of the appointive property.
  - The exercise of a power of appointment by a powerholder is generally treated by reason of the "**relation back doctrine**" as a transfer of property from the donor to the appointee.

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Introduction to Powers of Appointment

- Powers of Appointment (cont'd.)
  - The exercise, release or lapse of a power of appointment may result in significant income, gift, estate and GST tax consequences (both favorable and not so favorable) for the donor, the powerholder and/or the appointees.
  - The existence of a power of appointment could put the appointive property at risk of the creditors of the powerholder.

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Powers of Appointment are the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out.

– Professor W. Barton Leach, 24 A.B.A. J. 807 (1938).

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The Many Flavors of Powers of Appointment

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The Many Flavors of Powers of Appointment

- For federal transfer tax purposes, a “power of appointment” is any power that is “in substance and effect” a power of appointment “regardless of the nomenclature used in creating the power and regardless of local property law connotations.” – Reg. §20.2041-1(b), §25.2514-1(b).



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The Many Flavors of Powers of Appointment

Power of Appointment under IRC §2041, 2514

***Includes*:**

- the power held by a trust beneficiary to "appropriate or consume the principal of the trust";
- the power to "affect the beneficial enjoyment of trust property or its income by altering, amending, or revoking the trust instrument or terminating the trust";
- the power, conferred upon a spouse under the community property laws of a state, of "testamentary disposition over property in which [the spouse] does not have a vested interest"; and
- the power of a donee to "remove or discharge a trustee and appoint" the donee.

Not Power of Appointment under IRC §2041, 2514

***Excludes*:**

- the power held by the decedent to appoint a successor trustee, including himself or herself, under limited conditions that did not exist at the time of his or her death without an accompanying unrestricted power of removal;
- the power to amend only the administrative provisions of a trust instrument, that cannot substantially affect the beneficial enjoyment of trust property or income;
- the mere power of asset management, investment, custody, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, if the power holder has no power to enlarge or shift any beneficial interests except incidentally; or
- the right of a trust beneficiary to assent to periodic accounting, relieving the trustee from further accountability, if the right of assent does not allow the power holder to shift or enlarge any beneficial trust interest.

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The Many Flavors of Powers of Appointment

General Power of Appointment ("GPA")

- A power of appointment exercisable in favor of any one (1) or more of:
  - the powerholder;
  - the powerholder's estate;
  - the creditors of the powerholder; or
  - the creditors of the powerholder's estate.
- Key Exceptions:
  - Power limited by an ascertainable HEMS standard
    - Remember: Federal law determines how property is taxed, but state law determines whether, and to what extent, a taxpayer has "property" or "rights to property" subject to taxation. *Aquilino v. United States*, 363 U.S. 509 (1960); *Morgan v. Commissioner*, 309 U.S. 78 (1940). Accordingly, federal tax is determined, assessed, and collected based upon a taxpayer's state created rights and interest in property.
  - Power exercisable only in conjunction with donor
  - Power exercisable only with consent of adverse party
- The holder of a presently-exercisable GPA is treated as the owner of the appointive property for debt-creditor law and income, gift, estate and GST tax purposes.

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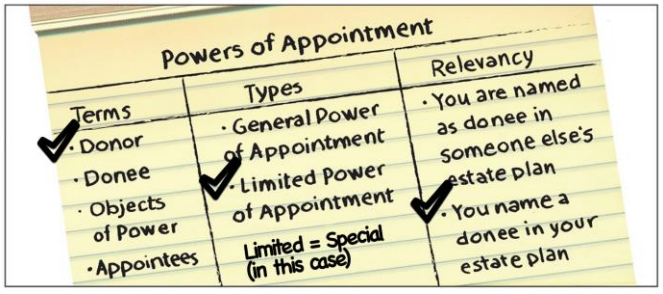
The Many Flavors of Powers of Appointment

Nongeneral (Limited or Special) Power of Appointment ("LPA")

- Any power of appointment that is not a GPA.



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The Many Flavors of Powers of Appointment



Presently Exercisable

Exercisable by the powerholder at the time in question (whether or not also exercisable by the powerholder's Will).



Postponed

Not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period of time.



Testamentary

Only exercisable by the powerholder's Will.

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The Many Flavors of Powers of Appointment

Exclusionary

- An exclusionary power is one in which the donor has authorized the donee to appoint to any one or more of the permissible appointees, to the exclusion of the others.

Nonexclusionary

- A nonexclusionary power is one in which the donor has specified that the donee cannot make an appointment that excludes any permissible appointee or one or more designated permissible appointees from a share of the appointive property.

In determining whether a power is exclusionary or nonexclusionary, the power is exclusionary unless the terms of the power expressly provide that an appointment must benefit each permissible appointee or one or more designated permissible appointees.

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The Many Flavors of Powers of Appointment

Imperative

- Imperative powers must be exercised.
- If the powerholder fails to exercise the power, a court will.

Non-Imperative

- Non-imperative powers need not be exercised by the powerholder.
- By far most common.

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The Many Flavors of Powers of Appointment

GPAs – Tax Consequences Generally

- Property subject to a GPA held by a powerholder at death is includible in the powerholder's gross estate (subject to certain exceptions) and subject to estate tax (and maybe basis adjustment) – IRC §2041, 1014(b)
- The exercise or release of a GPA during the lifetime of the powerholder is a transfer of property and subject to gift tax – IRC §2514
- Simply having a GPA, even if not exercised or released, and whether or not the powerholder is even aware of the GPA, the property subject to the GPA will cause estate tax inclusion.

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The Many Flavors of Powers of Appointment

GPAs – Tax Consequences Generally (cont'd.)

- The exercise or release of a GPA during the lifetime of the powerholder may cause the powerholder to be treated as the "deemed owner" of the appointive property for income tax purposes – IRC §678
- The exercise of a GPA during the lifetime and/or at the death of the powerholder could be transfer of property subject to GST tax if the powerholder is "generation jumping" – IRC §2652(a)(1)

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The Many Flavors of Powers of Appointment

LPAs – Tax Consequences Generally

- Property subject to a powerholder's LPA held by a powerholder at death is not includible in the powerholder's gross estate (and no basis adjustment) – IRC §2041, 1014(b)
- The possession of an LPA by certain powerholders may cause the donor to be treated as the "deemed owner" of the appointive property for income tax purposes – IRC §674

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The Many Flavors of Powers of Appointment

LPAs – Tax Consequences Generally (cont'd.)

- The powerholder's exercise or release of an LPA during the lifetime of the powerholder is **generally** not a transfer of property by the powerholder subject to gift tax – IRC §2514
  - The exercise is deemed to be a transfer by the donor (relation back doctrine) and may be subject to gift tax.

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The Many Flavors of Powers of Appointment

LPAs – Tax Consequences Generally (cont'd.)

- Exceptions to general rule
  - Property subject to an LPA will be includible in the powerholder's gross estate (if exercised at death), or deemed a completed gift by the powerholder (if exercised during lifetime), if the power is exercised:
    - By springing the "Delaware Tax Trap"; or
    - By giving up an interest in the appointive property (i.e. where the Powerholder is a trust beneficiary).

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Exercising Powers of Appointment

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Exercising Powers of Appointment

Class of Permissible Appointees

- Powers of appointment are exercisable only in favor of the "proper objects" of the power – the "**class of permissible appointees**".
  - Example: "...to any one (1) or more of the Grantor's descendants".



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Exercising Powers of Appointment

Manner of Exercise

- General rule
  - Powerholder may exercise a power of appointment in any manner that a legal owner could dispose of the appointive property.
  - Except as otherwise provided by the donor in the governing instrument, a power of appointment may be exercised to transfer appointive property in further trust.
- Exercise of a power of appointment may be invalidated if it violates an applicable rule against perpetuities ("**RAP**").

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Exercising Powers of Appointment

Methods of Exercise

- General Requirements to Exercise:
  - Intention of the powerholder to exercise the power; and
  - Compliance with donor-imposed and state-law-imposed requirements or conditions.
- Specific-exercise clause v. Blanket-exercise clause
- Conditional exercises
- Revocable exercises

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Exercising Powers of Appointment

Capacity to Exercise

- Powerholder must have legal capacity to **exercise** a power of appointment.
  - Capacity is determined under the law of the powerholder's domicile.
  - Manner / Method of exercise may impact degree of capacity required for powerholder to effectively exercise the power
  - Lack of capacity (or failure to exercise) not relevant on a GPA causing inclusion of the appointive property in the powerholder's taxable estate.

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Exercising Powers of Appointment

Governing Law Issues

- Determining which state law applies (e.g. the law of the donor's domicile or the law of the powerholder's domicile) can be critical, as state laws often differ.
- The same power, because of the limitation to an ascertainable standard, should not be treated as a GPA for tax purposes.



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Powerful Planning Opportunities

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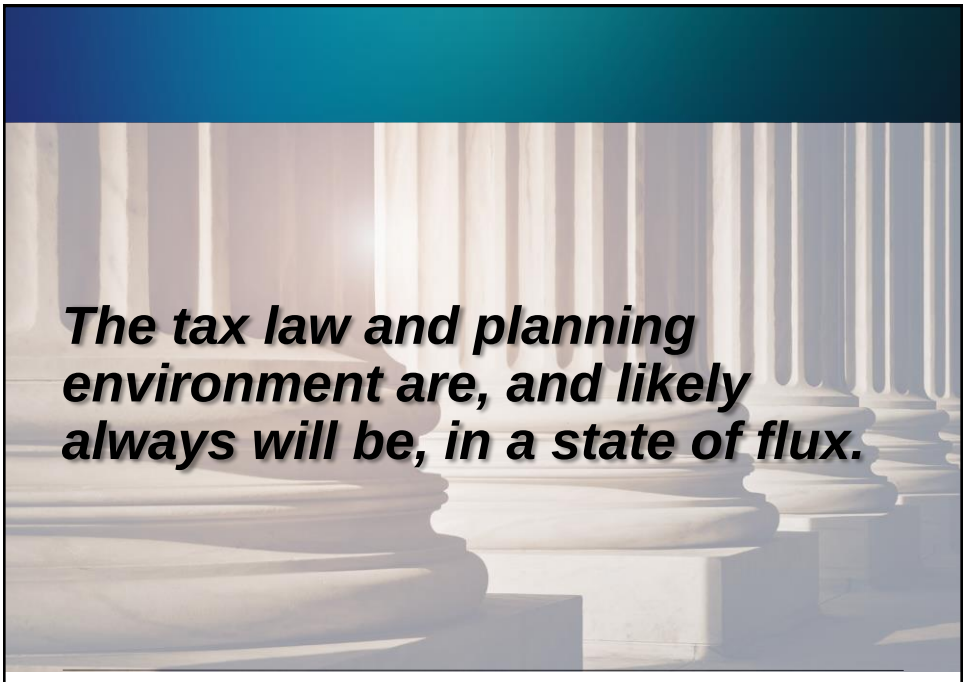

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Powerful Planning Opportunities

Why Do We Use Powers of Appointment?

- Flexibility for the long-term
- Non-reciprocal spousal lifetime access trusts ("**SLATs**")
- Representation
- Tax Planning

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Powerful Planning Opportunities

Flexibility for the Long-Term

- Allow for "second look" to address changes in circumstances, such as:
  - Changes in federal / state tax laws
  - Changes in substantive trust / property / creditor laws
  - Changes in circumstances
  - Changes in domicile
  - Changes in wealth
  - Changes in the world

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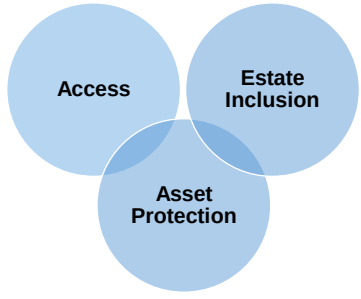
Powerful Planning Opportunities

Non-Reciprocal SLATs

- If two parties create identical trusts for each other, the Reciprocal Trust Doctrine provides that this is the same as if each party created a trust for himself or herself (i.e., self-settled trust, includible in donor's gross estate under IRC §2036).



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Powerful Planning Opportunities

Non-Reciprocal SLATs

- Two-part test under *Estate of Grace*
  - *Trusts are reciprocal to the extent that –*
    - *The trusts are "interrelated"; and*
    - *The arrangement, to the extent of mutual value, leaves the grantors in the same economic position as they would have been in had they created the trusts for themselves.*

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Powerful Planning Opportunities

Non-Reciprocal SLATs

Consider:

- If both spouses creating SLATs, make sure to grant different powers of appointment.
  - *For example, SLAT #1 created by Husband could grant Wife broad lifetime and testamentary LPAs, whereas SLAT #2 created by Wife could grant Husband a testamentary LPA in favor of descendants and/or charities.*
- Even better, have one spouse create the trust solely for descendants.
  - *But, with someone holding an LPA exercisable in favor of a class of permissible appointees that includes the donor.*

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Powerful Planning Opportunities

Representation of Trust Beneficiaries

- General rights of a trust beneficiary:
  - Right to know about the existence of a trust
  - Right to know the identity of the trustee and other fiduciaries (such as investment advisors, trust protectors, etc.)
  - Right to receive a copy of the trust instrument
  - Right to review an inventory of the trust's assets
  - Right to review accounting detailing the receipts, disbursements and distributions from the trust

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Powerful Planning Opportunities

Representation of Trust Beneficiaries

- Mandatory Illinois Trust Code Provisions (Section 105):
  - Section 813.1(b)(1) – Basic notice to all **qualified beneficiaries**
  - Section 813.1(b)(2) – Annual accounting to **current beneficiary**

Note: Sections 813(b)(3) – accountings to remainder beneficiaries – and 813(d) – certain additional notices to qualified beneficiaries – are not mandatory and can be waived or modified in the trust instrument.

Note: The reference in 302(b) that the holder of a power of appointment that is not a GPA or a broad LPA can only represent and bind if there is no conflict of interest is not a mandatory provision and can be waived or modified in the trust instrument.

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Powerful Planning Opportunities

Representation of Trust Beneficiaries

Role of Article III Representatives

- **Section 301** – Representative can bind beneficiary for all purposes – notices, accountings, NJSAs, decantings, etc.
- **Section 302**
  - (a) **GPA or Broad LPA** – holder can bind all persons, including those in class of appointees and whose interests could be eliminated by the exercise or non-exercise of the power.
  - (b) **Any other LPA** – default rule is can bind, but *only to the extent there is no conflict of interest.*
    - Important Note: This is not a mandatory provision so can draft around the conflict of interest exception.

Note: Nothing in ITC says a powerholder is a fiduciary; however, drafter should clarify that the holder of a power is not a fiduciary, whether for purposes of exercise of the power, for representation or otherwise.

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Powerful Planning Opportunities

Sample Provision: Representation of Beneficiaries by Holder of a Power of Appointment

- The holder of any presently exercisable or testamentary power of appointment, including a general power of appointment and any limited power of appointment regardless of the class of appointees, ***and regardless of any conflict of interest***, may ***represent and bind all persons***, including but not limited to those persons within the class of appointees and those persons whose interests would be eliminated by the exercise or non-exercise of such power of appointment.
- Notice, information, accountings or reports given to the holder of any such power of appointment shall have the same effect as if given directly to the person represented. Similarly, actions, including but not limited to, the execution of an agreement, taken by the holder of any such power of appointment, are binding on the person represented to the same extent as if the actions had been taken by the person represented. ***The holder of a power of appointment is not a fiduciary and shall not be subject to any fiduciary duties***.
- The foregoing representation provisions ***shall not*** apply to (i) any matter involving fraud or bad faith, or (ii) ***a power of appointment held by a person while said person is acting as the sole Trustee of such trust***. As used in this subsection, the term "power of appointment" does not include a power of a Trustee to make discretionary distributions of income and/or principal.

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Powerful Planning Opportunities

Sample Notice in Compliance with Section 813.1 of the Illinois Trust Code

NOTICE IN COMPLIANCE WITH SECTION 813.1
OF THE ILLINOIS TRUST CODE
REGARDING
JOHN DOE FAMILY TRUST U/A/D 11/9/23

RECITALS

WHEREAS, John Doe ("John"), as Grantor, and Jane Doe ("Jane"), as Trustee (the "Trustee"), established the John Doe Family Trust (the "Family Trust") pursuant to a Trust Agreement dated November 9, 2023 (the "Trust Agreement"); and

WHEREAS, the Trustee of the Family Trust desires to provide notice in compliance with Section 813.1 of the Illinois Trust Code; and

WHEREAS, pursuant to the provisions of subsection 15.1(b) of Article XV of the Trust Agreement, Jane, as the holder of a limited power of appointment over the Family Trust (Jane, in Jane's capacity as the holder of such power of appointment over the Family Trust is hereinafter referred to as the "Representative"), may represent and bind all persons, including but not limited to those persons within the class of permissible appointees of such power of appointment and those persons whose interests would be eliminated by the exercise or non-exercise of such power of appointment.

NOTICE

1. The foregoing recitals are hereby expressly incorporated herein and made a part hereof. Terms used herein which are not otherwise defined shall have the meaning given said terms in the Trust Agreement.
2. The Trustee of the Family Trust hereby provides the Representative the following notice:
   (a) Effective as of the date hereof, John, as Grantor, and Jane, as Trustee, executed the Trust Agreement.
   (b) A qualified beneficiary has the right to request a complete copy of the Trust Agreement.
   (c) A current beneficiary has the right to receive or request trust accountings.
   (d) The address and telephone number of the Trustee is as follows:

Name of Trustee: Jane Doe
Address of Trustee: _____
_____
Telephone Number of Trustee: _____

Powerful Planning Opportunities

Sample Waiver in Compliance with Section 813.1(g) of the Illinois Trust Code

WAIVER IN COMPLIANCE WITH SECTION 813.1(g)
OF THE ILLINOIS TRUST CODE
REGARDING
JOHN DOE FAMILY TRUST U/A/D 11/9/23

RECITALS

WHEREAS, John Doe, as Grantor, and Jane Doe ("Jane"), as Trustee (the "Trustee"), established the John Doe Family Trust (the "Family Trust") pursuant to a Trust Agreement dated November 9, 2023 (the "Trust Agreement"); and

WHEREAS, pursuant to the provisions of subsection 15.1(b) of Article XV of the Trust Agreement, Jane, as the holder of a limited power of appointment over the Family Trust (Jane, in Jane's capacity as the holder of such power of appointment over the Family Trust is hereinafter referred to as the "Representative"), may represent and bind all persons, including but not limited to those persons within the class of permissible appointees of such power of appointment and those persons whose interests would be eliminated by the exercise or non-exercise of such power of appointment; and

WHEREAS, the Representative desires to waive, in compliance with Section 813.1(g) of the Illinois Trust Code, all future notices and trust accountings that may be required to be provided to the qualified beneficiaries under the Illinois Trust Code.

WAIVER

1. The foregoing recitals are hereby expressly incorporated herein and made a part hereof. Terms used herein which are not otherwise defined herein shall have the meaning given said terms in the Trust Agreement.
2. The Representative hereby waives, in compliance with Section 813.1(g) of the Illinois Trust Code, all future notices and trust accountings that may be required to be provided to the beneficiary and the qualified beneficiaries of the Family Trust under the Illinois Trust Code.
3. The Representative acknowledges that the Representative may, in compliance with Section 813.1(g) of the Illinois Trust Code, withdraw a waiver previously given by an instrument in writing delivered to the Trustee.

Powerful Planning Opportunities

Example 1 – ILIT or SLAT

- **Assumed Facts**
  - **Trustees**: Spouse and John Doe
  - **Current Beneficiaries**: Spouse and all descendants
  - **Qualified Beneficiaries**: Spouse and all descendants
  - **Appointing Person**: Spouse in favor of descendants, their spouses and/or charities
- **Additional Documentation to Address ITC Requirements**
  - **Section 813.1(b)(1)** – basic notice to spouse, as holder of power, binds all persons
  - **Section 813.1(b)(2)** – spouse will waive annual accountings and waiver binding on all persons

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Powerful Planning Opportunities

Example 2 – Marital Trust

- **Assumed Facts**
  - **Trustees**: Spouse and John Doe
  - **Current Beneficiary**: Spouse
  - **Qualified Beneficiaries**: Spouse and all descendants
  - **Testamentary LPA**: Spouse in favor of descendants and/or their spouses
- **Additional Documentation to Address ITC Requirements**
  - **Section 813.1(b)(1)** – basic notice to spouse, as holder of power, binds all persons
  - **Section 813.1(b)(2)** – spouse will waive annual accountings and waiver binding on all persons

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Powerful Planning Opportunities

Example 3 – Discretionary Trust Funded at Death

- **Assumed Facts**
  - **Trustees**: Beneficiary (age 52) and John Doe
  - **Current Beneficiary**: Beneficiary
  - **Qualified Beneficiaries**: Beneficiary and all descendants of beneficiary
  - **Lifetime and Testamentary LPA**: At 35, exercisable in favor of anyone other than the beneficiary
- **Additional Documentation to Address ITC Requirements**
  - **Section 813.1(b)(1)** – basic notice to beneficiary, as holder of power, binds all persons (this is an ITC Section 302(a) power of appointment)
  - **Section 813.1(b)(2)** – beneficiary will waive annual accountings and waiver binding on all persons (this is an ITC Section 302(a) power of appointment)

Powerful Planning Opportunities

Formula General Powers of Appointment

- One of the main objectives of estate planning: minimization of gift / estate / GST taxes. Often this involves lifetime gifts to irrevocable trusts or testamentary transfers of assets to trusts
  - Gifted assets – retain carryover basis
  - Assets transferred at death have a stepped-up basis to date of death values
  - Over time, trusts can hold appreciated assets with significant built-in gain

Powerful Planning Opportunities

Formula General Powers of Appointment

- Increased gift / estate / GST tax exemptions mean many individuals (e.g. trust beneficiaries) will not be subject to the wealth transfer tax system, but the income tax liability for appreciated trust assets remains.
  - 2023 gift / estate / GST tax exemption = $12,920,000
  - 2024 gift / estate / GST tax exemption – estimated to increase to approximately $13,600,000
  - Scheduled decrease in the gift / estate / GST exemption in 2026, estimated to be around $7,000,000
  - Many irrevocable trusts containing appreciated assets are inefficient
    - Will not function to save estate taxes for beneficiaries who do not have substantial wealth, but will deprive family of stepped-up basis treatment at beneficiary's death

Powerful Planning Opportunities

Formula General Powers of Appointment

- Beneficiaries with General Powers of Appointment
  - GPA causes trust assets to be included in beneficiary's estate
  - Circumstances when estate inclusion is a good thing
    - Basis step up
    - Avoiding imposition of GST tax
      - Where GST non-exempt trust assets are distributed to beneficiaries two (2) or more generations below the grantor
      - Where trusts have a mixed Inclusion Ratio
    - Allocating GST to non-GST exempt assets
    - Restarting the RAP

Powerful Planning Opportunities

Formula General Powers of Appointment – PLR 202206008

- Issue – whether a modification to a GST grandfathered trust to grant the trust beneficiary a testamentary GPA will result in only the trust property subject to the testamentary GPA to be included in beneficiary's gross estate
- Proposed modification – to grant the current trust beneficiary a testamentary GPA to appoint a "**Defined Portion**" of the trust principal to the beneficiary's estate
  - "Defined Portion" – largest portion of Trust B that could be included in beneficiary's federal estate without increasing the total amount of "Transfer Taxes" actually payable at beneficiary's death over and above the amount that would have been actually payable absent this provision
  - "Transfer Taxes" – all inheritance, estate, and other death taxes, plus all federal and state GST taxes, actually payable by reason of beneficiary's death

Powerful Planning Opportunities

Formula General Powers of Appointment – PLR 202206008

- **Ruling**: Modifying the trust to grant the beneficiary a testamentary GPA will result in *only the trust property subject to the beneficiary's testamentary GPA* to be included in the beneficiary's gross estate under IRC §2041(a)(2).

Powerful Planning Opportunities

Formula General Powers of Appointment – PLR 202206008

- Why is this interesting?
  - — Trust was grandfathered, so no GST tax anticipated upon death of the beneficiary when trust assets were to be distributed to the beneficiary's children
  - — By granting a GPA over only the "Defined Portion" of the trust, the appointed property would receive an income tax basis step up without causing the value of the entire trust to be included in the beneficiary's estate and to be subject to estate or GST taxes
  - — Ruling approved a formula GPA to cap the estate tax inclusion so that no estate tax will be due while maximizing the amount that received a basis step up
  - — First ruling approving a formula GPA over an irrevocable trust

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Powerful Planning Opportunities

Formula General Powers of Appointment

- Situations where a formula GPA can be useful:
  - — Trust beneficiaries who have estate tax exemption remaining at death
  - — GST exempt and GST non-exempt trusts
  - — Basis step up and allocation of GST exemption
  - — Downstream and upstream planning
    - With upstream planning, step up and GST exemption allocation will occur much earlier than granting the GPA to the Grantor's children
    - Need to include a cap marked to senior generation's GST exemption so no inadvertent GST tax is imposed when transferor is shifted to senior generation
  - — Allocating GST over a non-exempt GST trust maximizes the benefits of this planning, as prior GST allocation is not wasted on the same assets (but consider other relevant factors)

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Powerful Planning Opportunities

Formula General Powers of Appointment

- Other items to consider:
  - — Draft trusts that give Trustee the power to add a testamentary GPA in the future and to amend any existing testamentary GPAs
  - — Consider including language that limits the GPA so no income tax becomes due if basis step up is eliminated
  - — Trust assets may depreciate
  - — State estate taxes
    - "Defined Portion" will be reduced, so income tax savings will be lower
  - — State law, beneficiary's circumstances
  - — Structuring the formula so that the cap is just under the beneficiary's estate tax exemption to prevent estate tax return filing requirement (increased flexibility)

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Powerful Planning Opportunities

Sample Trustee Power to Grant / Modify Testamentary General Powers of Appointment

(cc) notwithstanding the provisions of the Section entitled "Restrictions on Exercise of Limited Powers of Appointment", to amend this Trust Agreement to grant in whole or in part a testamentary general power of appointment to any beneficiary of any trust, or to eliminate a testamentary general power of appointment granted to any beneficiary of any separate trust, with respect to all or any part of the trust estate of such trust, such grant or elimination to be made by means of a written instrument signed by the Trustee and delivered to the beneficiary of such trust; provided, however, the Trustee shall have no duty to make a determination of whether or not to exercise this power unless requested by the beneficiary of such trust by a signed written instrument delivered to the Trustee and the Trustee shall have no liability for any exercise or failure to exercise this power; provided, further, however, that no person who is a Restricted Trustee with respect to any trust shall have any voice, vote or otherwise participate in any decision to grant or eliminate a testamentary general power of appointment with respect to such trust;

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Drafting Considerations

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Drafting Considerations

Avoiding Mistakes in Granting Powers of Appointment

- Consider the powerholder
- Specify if the power is general or nongeneral (identify permissible appointees)
- Consider tax consequences
- Consider governing law (including application of Uniform Powers of Appointment Law 760 ILCS 3/Art. 13)
- Valid instrument creating the power
- Include an effective gift-in-default clause

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Drafting Considerations

Avoiding Mistakes in Exercising Powers of Appointment

- Use “specific exercise” clause to refer to the power and details of how the property is to be appointed
- Consider using a “nonexercise” clause
- Comply with any formalities imposed by the donor in exercising the power
- Valid instrument exercising the power

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Drafting Considerations

Avoiding Problems

- Use caution when appointive property is directed to be added to powerholder's revocable trust (unless it's a GPA)
- Beware of appointing to "impermissible appointees"
  - Review definition of "descendants" in governing instruments
  - Review provisions regarding "Final Distributees"

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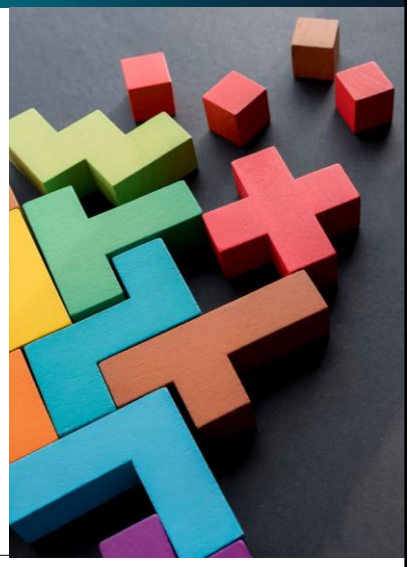
Drafting Considerations

Avoiding Problems (cont'd.)

- Do not exceed the scope of the power of appointment
- Do not exercise a power of appointment in a manner that violates the applicable RAP



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TAB 2

Adam Damerow assists ultra-high-net-worth individuals in creating tax- efficient estate plans to preserve, protect and transfer wealth to future generations. He also guides fiduciaries and beneficiaries through disputes over estates and trusts, often helping them avoid the time, expense, and burden of litigation.

Adam focuses solely on private client matters. He knows that wealth creators do not just want to transfer their wealth in tax-efficient ways; they want to give their beneficiaries the fflexibility to use and maintain that wealth for future generations. He works to understand his clients' values and goals with their tax planning, and then achieve those goals as efficiently and creatively as possible. Toward that end, Adam undertakes varied strategies for his clients — from the formation and funding of family investment holding companies and family offices to the creation of dynasty trusts. The thoughtfulness of his planning stands the test of time; years after working with a first-generation wealth creator, for instance, the second generation of family members asked Adam to reinforce the planning that had positioned them so well.

Adam also advises individual and corporate fiduciaries on the often- challenging task of administering trusts and estates. When he is not advising the fiduciary, Adam will represent estate and trust beneficiaries and zealously advocate for their rights under the governing documents of the estate plan. While he represents clients in contested court proceedings, he more often helps fiduciary clients find creative ways to resolve disputes before they evolve into litigation. In one matter involving a multibillion-dollar estate and litigious beneficiaries, he facilitated two different settlements among the beneficiaries and the tax authorities, avoiding further litigation.

Adam helps public charities, foundations and charitable trusts ensure their compliance with state and federal laws. He also represents clients before the Internal Revenue Service in controversies over estate and gift tax filings and audits.

Daniel P. Felix is a licensed Illinois attorney using his legal expertise & people management skills to help families by serving as an independent trustee.

Designated a Master Trustee by the Independent Trustee Alliance, Dan helps families and advisors achieve their goals efficiently. Specifically, Dan serves as financial fiduciary: trustee, successor trustee, trust protector or power of attorney.

Dan also serves as a pro-active successor trustee. Having extinguished a lot of trustee fires that have cost money, time and worst of all, family harmony, Dan has developed a unique preparedness offering to help his client families invest in the ounce-of-prevention.

Insured and, on a project basis, bonded, Dan employs staff along with a roster of subcontractors as needed to provide professional continuity as well as efficient support.

Dan typically works on hourly or flat fees. He does not tolerate conflicts, and so does not accept or offer referral fees, commissions, or any other compensation.

Dan speaks frequently on successful trusts, trust structure, trust vision, trust administration, and trusts in crisis, teaching attorneys as well as lay audiences. His articles have appeared in various state, national and international journals, and include a series on Keys to Successful Trust Administration. His articles on the Illinois Trust Code were featured in the Illinois State Bar Journal and their Newsletter for Trust & Estate Attorneys.

Jeffrey D. Glickman has practice dedicated to estate planning and trust administration, he helps clients at all levels of wealth with their myriad and unique legal issues — both for matters during their lifetime and legacy planning beyond. A CPA and former tax accountant, Jeff combines his nuanced legal acumen of estate planning with the complex tax considerations of transferring wealth. Jeff's clients appreciate his attention to detail and his robust analytical skills. Jeff believes that estate planning is too important and can be too costly to correct. So, Jeff puts extensive effort into ensuring clients achieve their goals, no matter what unknowns may eventually surface. With extensive and comprehensive experience working with corporate trustees, Jeff is a sought-after counselor for trust modifications, providing the best service possible — and creative solutions — for all types of clients. He is licensed to practice law in Florida and Illinois and is a trusted resource in advising clients on establishing Florida residency.

Jeff makes it a point to ensure his clients truly understand the mechanics of their estate plans so clients can see for themselves that their wishes have been properly addressed. He firmly believes estate planning is too important to simply rely on an attorney's say so. Estate planning (and the tax strategies that go with it) are often not intuitive. Jeff breaks down the various estate planning components, using terms and illustrations that make the abstract much more understandable. He also helps clients with transferring their ownership interests in their businesses to best leverage their available estate planning techniques. In addition, he helps ensure that business owners have a well-designed succession plan in place for the next generation so that uncertainty regarding the direction of the business can be mitigated to the greatest extent possible.

A large portion of Jeff's practice focuses on assisting corporate trustees in their administration of trusts. Many trusts can quickly become outdated or no longer perform in the way the trust was initially intended. Jeff and his team identify tailored and creative solutions to enhance the administration of the trust (either by a trust modification or a change in approach to the administration of the trust) that help strengthen the trustee-beneficiary relationship for all involved. Jeff drafts all types of wealth transfer documents, including wills, revocable living trusts, dynasty trusts, charitable trusts, insurance trusts, grantor retained annuity trusts, QTIP marital trusts, and other complicated non-grantor trusts and grantor trusts, as well as various agreements to modify irrevocable trust instruments (including nonjudicial settlement agreements and trust decanting's). He also prepares gift tax returns; estate tax returns and handles all aspects of probate estates in Illinois and Florida.

Previously employed as a tax associate at PwC in Chicago, Jeff has experience drafting corporate and partnership tax returns. This familiarity with the tax code and tax strategies adds immeasurably to his ability to effectively counsel clients in estate planning and administration.

Benjamin Lavin represents high-net-worth individuals, including equity fund principals and business owners, in wealth transfer and estate planning matters on income, gift, estate and GST tax optimization and asset protection. He also is experienced in designing and implementing sophisticated and personalized estate plans. He knows that only by fully understanding a client's personal and business problems can an attorney craft the right strategy to resolve them.

Benji designs estate plans which allow high-net-worth individuals to leverage use of their gift, estate, and generation-skipping transfer tax (GST) exemptions and to pass wealth to the next generation in a manner which is both tax efficient and creditor protected. His practice often involves the implementation of sales to grantor trusts, grantor retained annuity trusts (GRATs), charitable lead and remainder trusts, and business entities designed to achieve numerous non-tax and tax objectives.

Benji advises principals in private equity, venture capital and hedge funds regarding strategies for transferring their fund interests to minimize the impact of income, estate, gift and GST taxes. He advises business owners concerning business succession planning and has substantial experience with an array of asset protection techniques, including offshore and domestic asset protection trusts. Benji also represents fiduciaries in the administration of estates and trusts, the formation and operation of private foundations and sophisticated charitable giving techniques.

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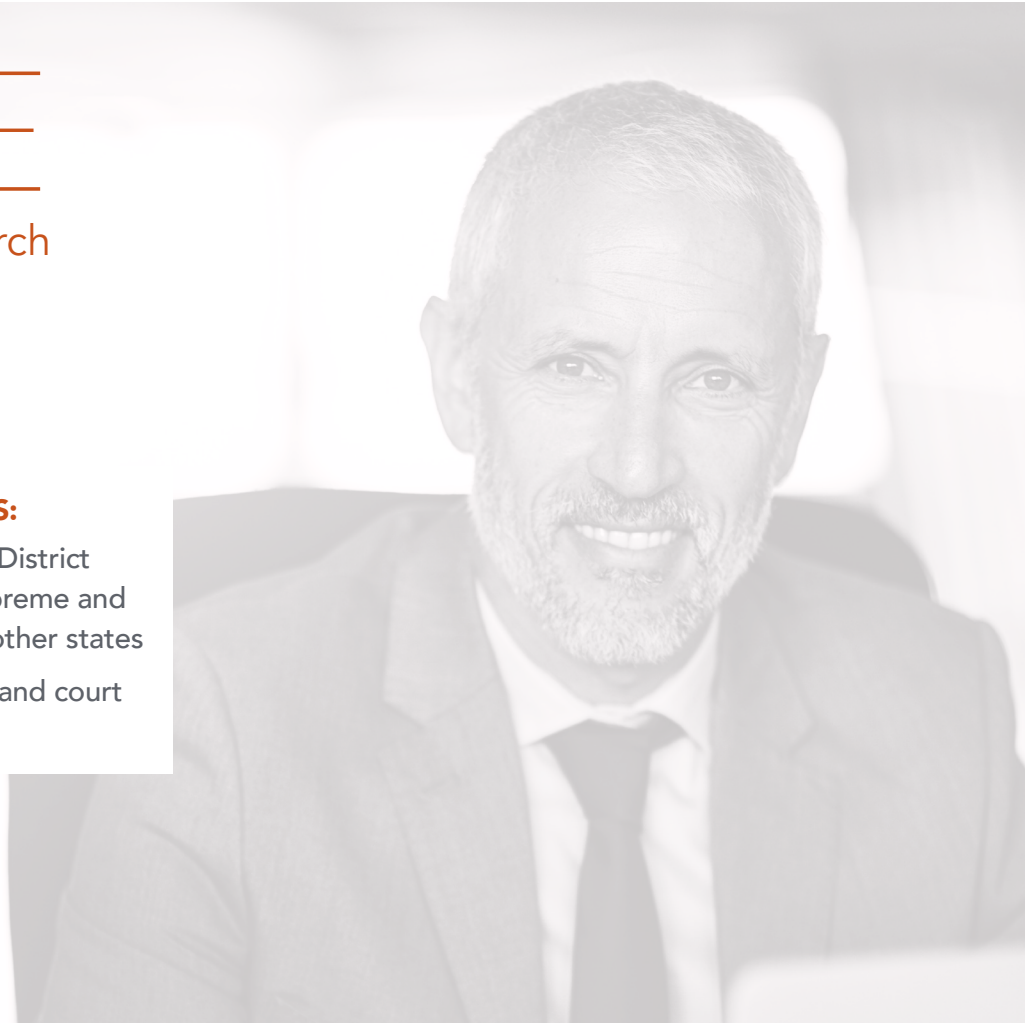

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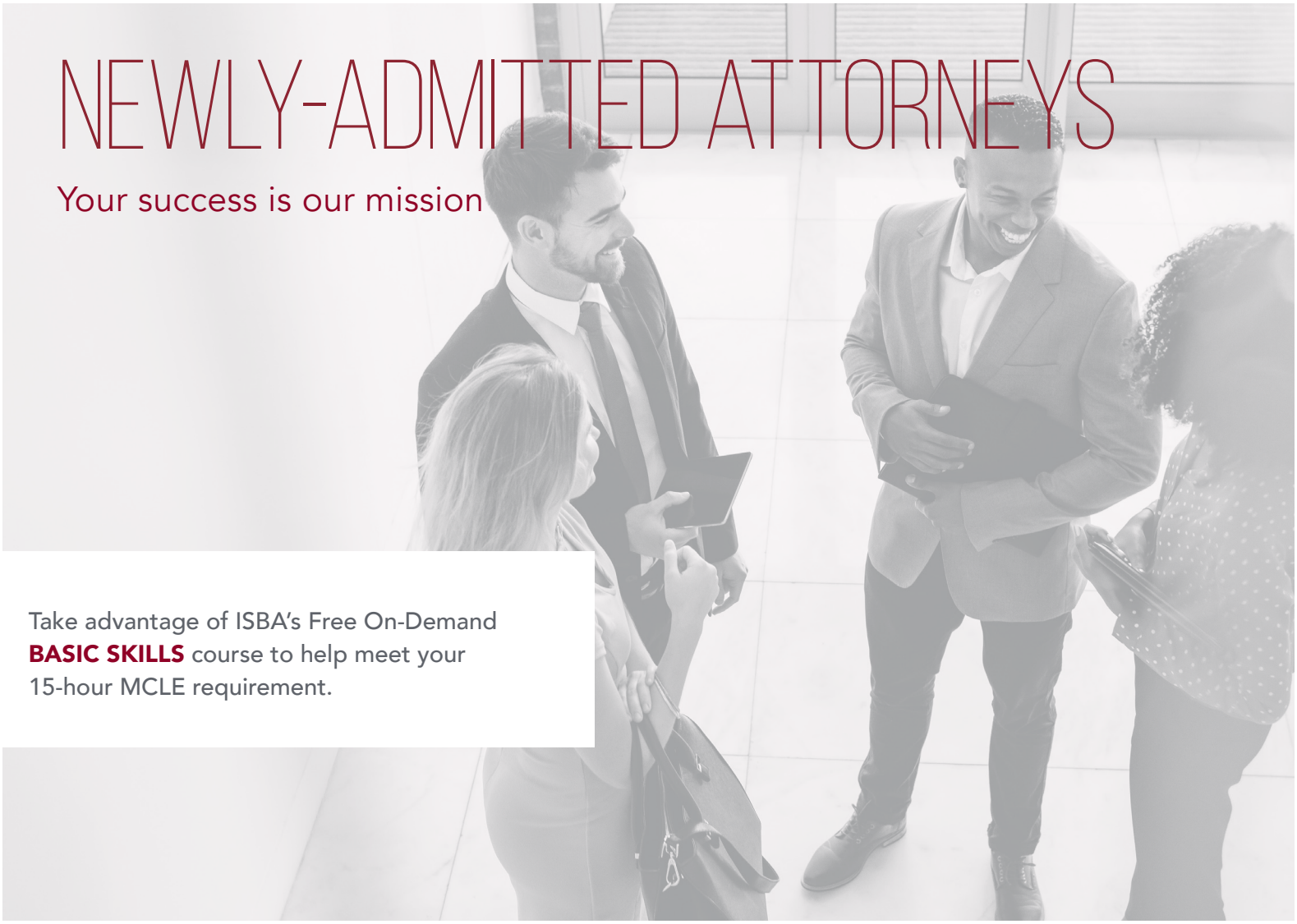

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