

GIFTING CLAUSES IN DURABLE POWERS OF ATTORNEY

In a durable power of attorney, the principal appoints someone to oversee his financial affairs, including in the event he becomes incompetent as a result of injury or illness. A broad durable power of attorney may authorize the agent to take any action as fully and effectually in all respects as the principal could do if personally present. However, even the most broadly stated power of attorney does not authorize the agent to make gifts on behalf of the principal unless the power of attorney expressly grants the agent such power. The law requires that gifting powers be expressly stated in the durable power of attorney in order to reduce the risk that the agent will engage in financial abuse of the principal.

Gifts are an important estate planning tool, as making gifts during life often results in significant tax savings at the principal's death. Therefore, it is advantageous for an agent under a durable power of attorney to be authorized to make gifts for estate planning purposes. Generally, it is best if the scope of an agent's power to make gifts on behalf of the principal is limited, so as to reduce the potential for abuse.

If the durable power of attorney states in general language that the agent is authorized to make gifts, without express limitations, by law the agent is authorized to make a gift up to the amount of the annual federal gift tax exclusion, or twice that amount if the principal's spouse consents to a split gift, as defined by the tax code. Further, such general language authorizes the agent to make a gift of the principal's property if the agent determines doing so is consistent with the principal's objectives, if known, or if unknown, with the principal's best interest, based on all applicable factors, including: (i) the value and nature of the principal's property; (ii) the foreseeable obligations and need for maintenance of the principal; (iii) the minimization of all taxes; (iv) the principal's eligibility for any benefit, program or assistance; and (v) the principal's personal history of making such gifts.

A durable power of attorney may expressly provide that the agent is only authorized to make gifts to specified classes of persons, such as the principal's descendants. Such a provision may be advisable if the agent is someone other than the principal's spouse or family member, in order to reduce the risk that the agent will make gifts to himself or third parties he wishes to benefit, contrary to the principal's desires or best interest.

A durable power of attorney may also expressly require that the agent make gifts only in a manner which continues the principal's previously established pattern of gift-making for estate planning purposes. Such a provision helps ensure that the agent will make gifts which align with the principal's desires and objectives.

Further, a durable power of attorney may expressly provide that the aggregate of all gifts to

any one recipient in any one year shall not exceed the amount of the annual federal gift tax exclusion. Such a provision provides the agent with the flexibility to maximize tax-free annual gifts for estate planning purposes, and reduces the risk that the agent will deplete the principal's estate.

It is also possible for the principal to expressly authorize the agent to make any gifts that the agent believes will benefit the principal or the principal's estate, including gifts to the agent himself. Such a provision grants the agent the broadest authority to make gifts on behalf of the principal, but it also provides the greatest potential for abuse. Therefore, it is crucial that a principal granting such broad authority trust the agent unconditionally.

In drafting a durable power of attorney as part of a comprehensive estate plan, it is important to consider what gifting powers should be granted in light of the principal's personal and financial situation. While gifting powers are useful for estate planning purposes, it is also important to limit gifts to those the principal might have made, and minimize the risk for financial abuse.

If you have any questions regarding this article, please contact Attorney Megan Harried at O'Neil Cannon at 414-276-5000.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING IS PLEASED TO ANNOUNCE ATTORNEY MELISSA BLAIR HAS JOINED THE FIRM

Attorney Blair recently joined the firm's Banking and Creditors' Rights Group. She will assist secured and unsecured corporate or individual creditors and other entities with the work out of commercial loans, leases, and other obligations. Ms. Blair, formerly a law clerk to the Honorable Susan V. Kelley, U.S. Bankruptcy Court of the Eastern District of Wisconsin, and a shareholder at Kravit, Hovel and Krawczyk, S.C., also represents receivers in state Chapter 128 Receivership proceedings, real estate foreclosures, the wind-up of corporations, collection matters, and with the acquisition or disposition of business assets. She is a graduate of Marquette University Law School, J.D., *magna cum laude*.

O'Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. We also assist business owners with their personal legal needs including tax and estate

planning, family law and litigation—including personal injury litigation.

MORE HONORS FOR OUR ATTORNEYS

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is proud to announce that the following nine attorneys were selected for inclusion on the *Super Lawyers* list, which is limited to 5% of all Wisconsin attorneys, as published in the December 2012 edition of *Milwaukee Magazine*:

- James G. DeJong
- Seth E. Dizard
- Peter J. Faust
- John G. Gehringer
- Dean P. Laing
- Gregory W. Lyons
- Patrick G. McBride

The Firm is proud to additionally announce that the following six attorneys were selected for inclusion on the *Super Lawyers* “Rising Stars” list, which “recognize[s] the top up-and-coming attorneys in the state—those who are 40 years old or younger, or who have been practicing for 10 years or less:”

- Joseph D. Newbold
- Laura J. Now
- Chad J. Richter
- John R. Schreiber
- Jason R. Scoby
- Timothy M. Van de Kamp

The Firm is proud to further announce that Dean Laing was selected by *Super Lawyers* as one of the “Top 10 Attorneys” in Wisconsin, regardless of practice area. Of the over 15,000 attorneys in Wisconsin, Dean was the only commercial litigator selected to the list. He was also selected by *Super Lawyers* as one of the “Top 25 Attorneys in the Milwaukee Area.”

Super Lawyers is a national rating service which rates attorneys in all 50 states. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. As part of its process, *Super Lawyers* surveyed more than 15,000 attorneys and judges in Wisconsin, looking for the best attorneys in the State.

The New Jersey Supreme Court recently upheld the findings of a Special Master who made the following determinations about *Super Lawyers*:

“[T]he selection procedures employed by [Super Lawyers] are very sophisticated, comprehensive and complex.

It is absolutely clear... that [Super Lawyers does] not permit a lawyer to buy one’s way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one’s inclusion in the lists.”

O’NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. NAMES ATTORNEY DOUG DEHLER AS SHAREHOLDER

O’Neil Cannon is pleased to announce that Attorney Douglas P. Dehler has been elected a shareholder of the Firm. Mr. Dehler’s legal practice involves business litigation, class action litigation, whistleblower (*qui tam*) lawsuits, ERISA fiduciary litigation, and the representation of clients in a wide range of insurance matters, including insurance bad faith litigation. He is a University of Wisconsin Law School graduate, and a member of the *pro bono* committee for the Eastern District of Wisconsin Bar.

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ATTORNEY RICHTER RECEIVES OUTSTANDING LEADERSHIP AWARD

On December 6th 2012, Chad Richter received the 2012 Outstanding Leadership Award from MBBI. The award was presented at MBBI’s annual Private Equity Connection held at the

Milwaukee Athletic Club, which included over 20 different Private Equity firms and approximately 150 attendees.

MBBI is one of the largest organizations of M&A advisors and professionals in the Midwest, and is comprised of brokers, intermediaries, investment bankers, attorneys, accountants, commercial bankers, individual buyers, and private equity groups, all assisting businesses on transactions with a value in the \$1M-\$30M range.

ATTORNEY DIZARD QUOTED IN LIVING LAKE COUNTRY REPORTER

Money woes not snowing in Highlands of Olympia ski hill plans

The two tenants at Highlands of Olympia aren't letting problems with ownership of the property slow them down. Casey Bingham and Brent Milkey who manage the ski hill, have been working diligently to reopen this season with improvements.

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ATTORNEY DIZARD QUOTED IN MENOMONEE FALLS PATCH

Radisson Subcontractors Move Closer to Getting Paid

Four contractors petitioned to appoint a receiver for the contractor, Gil-Her Limited, that hired them for work at the Radisson Hotel. The move could help all parties reach a settlement in the hotel's ongoing foreclosure suit.

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Posted on [November 19, 2012](#)

Attorney Seeks Expanded Authority to Market, Sell Radisson Hotel

The receivership attorney appointed by the village to monitor day-to-day business at the Radisson Hotel wants the power to market and sell the hotel, as well as address issues with the members of the ownership group.

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ATTORNEY GREGORY S. MAGER GRANTED FELLOWSHIP IN THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

Attorney Gregory S. Mager has been granted Fellowship in the American Academy of Matrimonial Lawyers. He is recognized by judges and attorneys as a preeminent family law attorney with a high level of knowledge, skill, professionalism, and integrity, as well as having substantial experience and ability to handle all facets of complex family law matters. These areas include divorce, annulment, prenuptial and postnuptial agreements, marital settlement agreements, child custody and visitation, business valuations, property valuations and division, alimony, child support and other family law issues. To be represented by a Fellow of the American Academy of Matrimonial Lawyers is to be represented by a leading practitioner in the field of family law.

Attorney Mager is a shareholder with the law firm of O'Neil Cannon He graduated from Marquette University with an undergraduate degree in political science and philosophy, and has a graduate degree in political science. He received his Juris Doctor degree from Marquette University Law School.

BEST LAWYERS® RECOGNIZES 10 ATTORNEYS FROM O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C.

Ten attorneys from the law firm of O'Neil Cannon were selected for inclusion in the 2013

edition of *The Best Lawyers in America*®. Nearly 1/3 of the Firm's attorneys were listed in 16 distinct practice areas to include:

- James G. DeJong – Corporate Law; Mergers and Acquisitions Law; Securities/Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights; Insolvency and Reorganization Law; Litigation-Bankruptcy
- Peter J. Faust – Corporate Law
- John G. Gehringer – Commercial Litigation; Construction Law; Corporate Law; Real Estate Law
- Dennis W. Hollman – Corporate Law; Trusts and Estates
- Dean P. Laing – Commercial Litigation; Personal Injury Litigation-Plaintiffs; Product Liability Litigation-Defendants
- Thomas A. Merkle – Family Law

Since its inception in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. Because *Best Lawyers* is based on an exhaustive peer-review survey in which more than 39,000 leading attorneys cast almost 3.1 million votes on the legal abilities of other lawyers in their practice areas, and because lawyers are not required or allowed to pay a fee to be listed, inclusion in *Best Lawyers* is considered a prestigious honor. *Corporate Counsel* magazine has called *Best Lawyers* “the most respected referral list of attorneys in practice.”

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ATTORNEY DIZARD QUOTED IN THE MILWAUKEE JOURNAL SENTINEL'S JSONLINE

“Cook and Franke law firm dissolved”

Cook and Franke SC, one of Wisconsin's oldest and at one time one of the largest law firms, has been dissolved as a corporation.

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