JOHNSON MCGINNIS
ELDER CARE LAW & ESTATE PLANNING

Powers of Attorney: Is This Your Most Important Document?

1. About the Power of Attorney

A Power of Attorney (POA) may be the most important of all legal documents. While many estate planning documents address your plans after you pass away, this document can have a huge impact during your lifetime. This legal document authorizes another person to do certain things for you. What those things are depends upon what the Power of Attorney says. A person giving a Power of Attorney can make it very broad or can limit the Power of Attorney to certain acts.

Most importantly, a power of attorney can make things easier for you and your loved ones by potentially avoiding complications as your situation changes over time. For example, the POA can make things easier when there is a serious and debilitating medical diagnosis. Rather than forcing someone into lengthy court proceedings for conservatorship, the chosen agent, or "Attorney-in-Fact", can step up to help without involving the courts. Furthermore, you have more control over what the POA authorizes, so your personal preferences can be honored. A POA gives you the opportunity to make sure your business as an individual continues, and your trusted person may act on your behalf when you cannot speak for yourself.

It is important to note that you can only execute a POA while you have capacity. This means that your POA must be in place before a debilitating event occurs. This is a planning document, not a response when things take a turn for the worst. Get it done early.

What can a POA be used for?

Think of a power of attorney as a copy of your rights. Rather than losing your rights, you only give them a copy to use to help you. Even though you maintain your rights and ability to make decisions, you authorize another person to act in your place. When creating a Power of Attorney, you become the "principal", and your chosen person becomes your "Attorney-in-Fact".

A POA can be used to give another person the authority to make health care decisions, do financial transactions, or sign legal documents when you cannot do this for one reason or another. With few exceptions, Powers of Attorney can give your designated person the right to do any legal acts on your behalf.

A "General Power of Attorney" typically gives the attorney-in-fact broad powers to do almost every legal act that you can do. By contrast, a "Limited Power of Attorney" is not as broad and is limited to specific acts or transactions or may be effective only for certain periods of time.

While POA can grant broad authority, there are decisions that cannot be made with a POA. An attorney-in-fact cannot change or invalidate a will, pursue a marriage on your behalf, make decision on your behalf after you die, change the POA to someone else, or generally act outside your best interests when using the POA.

What is a "Durable Power of Attorney"?

Typically, Powers of Attorney terminate when the principal becomes incompetent. Yet many people create Powers of Attorney for the sole purpose of designating someone else to act for

them if they cannot act for themselves. It is at this exact moment that a Power of Attorney is most valuable.

To remedy this issue, the law created a Durable Power of Attorney that remains effective even if a person becomes incapacitated. By adding special wording, you can ensure that your document works as intended. Most Powers of Attorney done today are durable.

People often sign a Durable General Power of Attorney to plan ahead for the day when they may not be able to take care of things themselves.

What is a Durable Power of Attorney for Health Care?

A Durable Power of Attorney for Health Care (sometimes called an "Advance Directive") is a document where you authorize another person to be able to make health care decisions if you are unable to make those decisions for yourself. A Durable Power of Attorney for Health Care is totally dedicated to health care, and this form of POA is only effective upon your incapacity by order of law.

Your specific healthcare goals are very important, but too much specificity may get in your way. As a firm, we generally recommend that your Healthcare POA grant broad authority, and you discuss your wishes with your designated and trusted person. This can be more effective than writing out your wishes in a "Living Will" and providing them to your medical provider. We have seen situations where a medical provider is forced to choose between a written statement from their patient and what the attorney-in-fact is saying you would want; this can complicate an already stressful situation. Keeping things simple for your medical provider is often best – the medical provider needs to talk things over with your chosen agent.

2. Using the Power of Attorney

When is a POA effective?

Normally, we prepare a POA that is effective immediately upon signing. This can be easier to use because there is no "springing" event that needs to be proved. Our firm prefers this type of Power of Attorney; it makes them easier to use.

Alternatively, a POA can be only effective upon the happening of some future event. These are called "springing" powers because they spring into action upon a certain occurrence. The most common occurrence states that the Power of Attorney will become effective only if and when the principal becomes disabled, incapacitated, or incompetent.

What is a "fiduciary responsibility"?

When you create a POA, your designated person becomes your "fiduciary" and has a special responsibility. This means that while your designated person is acting on your behalf, they are required to act in your best interests.

Additionally, your attorney-in-fact must act reasonably under the circumstances, and that includes seeking the help of professionals when necessary.

The third party will not accept the Power of Attorney. What now?

Call your attorney. Out of an abundance of caution, third parties are sometimes hesitant to honor a Power of Attorney. However, so long as the Power of Attorney was lawfully executed and valid, third parties may be forced to honor the document. While it is reasonable for a third party to have the time to consult with their legal counsel about the Power of Attorney, under some circumstances, if the third party's refusal to honor the Power of Attorney causes damage, the third party may be liable for damages.

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Powers of Attorney: What Every POA Needs to Know

1. About the Power of Attorney

A Durable Power of Attorney (POA) may be the most important of all legal documents. This legal document authorizes another person to do certain things for the creator of the POA. What those things are depends upon what the POA actually says. A person creating a POA can make it very broad or can limit the POA to certain acts.

If you are acting as the POA or "Attorney in Fact" for someone, you are being entrusted with the responsibility of making sure the business of that person continues when they cannot act for themselves.

What can a Power of Attorney be used for?

Think of a POA as a copy of someone's rights. Rather than losing their rights, the creator of the POA gives you a copy to use to help them. The creator maintains their rights and ability to make decisions while also authorizing you to act in their place. When creating a POA, the creator becomes the "principal", and the chosen agent becomes the "Attorney-in-Fact"; the chosen agent is often simply referred to as the POA.

A POA can be used to give another person the authority to make health care decisions, do financial transactions, or sign legal documents. With few exceptions, a POA can give the designated person the right to do almost any legal acts.

A "General Power of Attorney" typically gives the Attorney-in-fact broad powers to do almost every legal act. By contrast, a "Limited Power of Attorney" is not as broad and is limited to specific acts or transactions or may be effective only for certain periods of time.

What is a "Durable Power of Attorney"?

Typically, a POA terminates when the principal becomes incompetent. Yet many people create the POA for the sole purpose of designating someone else to act for them if they cannot act for themselves. It is at this exact moment that a POA is most valuable.

To remedy this issue, the law created a Durable Power of Attorney that remains effective even if a person becomes incapacitated. By adding special wording, you can ensure that your document works as intended. Most Powers of Attorney done today are durable.

People need to sign a Durable General Power of Attorney to plan ahead for the day when they may not be able to take care of things themselves.

2. Powers and Duties of an Attorney-in-Fact

Is there a certain code of conduct for attorneys-in-fact?

Yes. Attorneys-in-fact must meet a certain standard of care when performing their duties. An attorney-in-fact is looked upon as a "fiduciary" under the law. A fiduciary relationship is one of trust. If the attorney-in-fact violates this trust, the law provides both civil claims (by ordering the payments of restitution and punishment money) and criminal punishment (probation or jail).

What is a "fiduciary responsibility"?

When you create a POA, the designated person becomes a "fiduciary" for the principal and has a special responsibility. Above all else, this means that while you are acting on behalf of the principal, you are required to act in the best interests of the principal.

The fiduciary duty tied to a POA can be broken into two parts: the duty of care and the duty of loyalty. The duty of care requires you to only act within the written scope of the POA and act reasonably under the circumstances. The duty of loyalty means that when you act as the attorney-in-fact, you will put the principal's interests above your own.

It is important to note that acting in someone's best interests does not mean doing everything perfectly. While mistakes should be avoided, mistakes may happen. If you are forced to make a decision outside of your comfort zone, it would be prudent to consult with a professional. A good example would be using a financial planner or contacting the estate planning attorney.

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Okay. I'm ready to do something as an attorney-in-fact. What do I do?

After being certain that the POA actually gives you the authority to do what you need to do, take the Power of Attorney (or a copy) to the third party involved. Explain to the third party that you are acting under the authority of the Power of Attorney and you are authorized to do this particular act. Some third parties may ask you to sign a document stating that you are acting properly. The third party should accept the Power of Attorney and allow you to act for the principal. When acting as an attorney-in-fact, always make that clear when signing any document.

If you are confused about the Power of Attorney, or your ability to use it in a given scenario, you may want to consult your attorney.

How should I sign when acting as an attorney-in-fact?

You always want it to be clear from your signature that you are not signing for yourself but rather signing for the principal. If you just sign your own name, you may be held personally accountable for anything you sign. If your signature clearly conveys that you are signing in a representative capacity and are not signing personally, you are okay. Though lengthy, this is the best way to sign:

Rachel Wilson, by Howard Carver as her attorney-in-fact

In this example, Howard Carver is the attorney-in-fact and Rachel Wilson is the principal.

The exact wording is not important. Just make sure you indicate that you are signing for your principal, not for yourself.

The third party will not accept the POA. What now?

Call your attorney. Out of an abundance of caution, third parties are sometimes hesitant to honor a Power of Attorney. However, so long as the Power of Attorney was lawfully executed and valid, third parties may be forced to honor the document. While it is reasonable for a third party to have the time to consult with their legal counsel about the Power of Attorney, under some circumstances, if the third party's refusal to honor the Power of Attorney causes damage, the third party may be liable for damages.