
Frequently Asked Questions about Powers of Attorney

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- ◆ Guardianship



Special needs require special lawyers.

Nothing in this material should be taken as legal advice. Everyone's situation is different. You should consult a competent Elder Law attorney for legal advice and long term care planning.

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"What Do I Do Now?"

Frequently Asked Questions about Powers of Attorney

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About This Pamphlet

This pamphlet is written by and provided to you as a service of the Raymon B. Harvey Law Firm in Little Rock, Arkansas. The answers to the questions in this pamphlet are meant to be simplifications of Arkansas law. There may be finer points of the law that affect you personally. For this reason, this pamphlet should not be relied on as your only source of information. Your Attorney can explain the significance of the laws regarding Powers of Attorney and how those laws affect your rights as a principal and responsibilities as an attorney-in-fact. Your Attorney can also explain changes or new interpretations of the law that may have been made after this pamphlet was prepared.

About the Power of Attorney

What is a Power of Attorney?

A Power of Attorney is a legal document giving another person the right to do certain things for the maker of the Power of Attorney. 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.

Does the maker of a Power of Attorney surrender any rights?

No, absolutely not. The maker of a Power of Attorney loses no rights when he or she gives someone the right to act on his or her behalf.

What can a Power of Attorney be used for?

A Power of Attorney can be used to give another person the right to sell a car, home, or other property in the place of the maker of the Power of Attorney. A Power of Attorney might be used to allow another person to sign a contract for the maker of the Power of Attorney. It can be used to give another person the authority to make health care

decisions, do financial transactions, or sign legal documents that the maker of the Power of Attorney cannot do for one reason or another. With few exceptions, Powers of Attorney can give others the right to do any legal acts that the makers of the Powers of Attorney could do themselves.

What is a “principal”?

The principal is the maker of the Power of Attorney; the person who is giving the rights to another.

What is an “attorney-in-fact”?

The “attorney-in-fact” is the recipient of the Power of Attorney; the person who is given the power by the principal. This person is also sometimes referred to as the “Agent.”

What is a “third party”?

As used in this pamphlet, a “third party” is a person or institution with whom the attorney-in-fact has dealings with on behalf of the principal. This may be a bank, the buyer of something that the attorney-in-fact is selling for the principal, a broker, or anybody else with whom the attorney-in-fact must deal with for the principal.

What is a “Limited Power of Attorney”?

A Power of Attorney can be a “Limited Power of Attorney” which gives the attorney-in-fact only certain powers or the right to engage in particular transaction on behalf of the principal. For example, a person might use a Limited Power of Attorney if he or she needed to sell a home in another state and wanted a person to handle the transaction locally. The Limited Power of Attorney would be limited to selling the home.

What is a “General Power of Attorney”?

A General Power of Attorney gives the attorney-in-fact very broad powers to do almost every legal act that the principal can do. When Elder Law Attorneys draft general Powers of Attorney, they still list the types of things the attorneys-in-fact can do but these powers are very broad. People often do general Powers of Attorney to plan ahead for the day when they may not be able to take care of things themselves. By doing the General Power of Attorney, they designate someone who can do these things for them.

What is a “Durable Power of Attorney”?

Normal Powers of Attorney terminate if and when the principal becomes incompetent. Yet many people do Powers of Attorney for the sole purpose of designating someone else to act for them if they cannot act for themselves. It is precisely when persons can no longer do for themselves that a Power of Attorney is most valuable. To remedy this inconsistency, the law created a Durable Power of Attorney that remains effective even if a person becomes incompetent. The only thing that distinguishes a Durable Power of Attorney from a regular Power of Attorney is special wording that states that the power survives the principal's incapacity. Even a Durable Power of Attorney, however, may be terminated under certain circumstances if court proceedings are filed. Most Powers of Attorney done today are durable.

Must a person be competent to sign a Power of Attorney?

Yes. At the time the Power of Attorney is signed, the principal must be competent. Although a Power of Attorney is still valid if and when a person becomes incompetent, the principal must understand what he or she is signing *at the moment of execution*. That means a person can be suffering from dementia or Alzheimer's Disease or be otherwise incompetent sometimes but so long as they have a lucid moment and are competent at the moment they sign the Power of Attorney, it is valid, even if later they don't remember signing it. At the time it is signed, the principal must know what the Power of Attorney does, whom they are giving the Power of Attorney to, and what property may be affected by the Power of Attorney.

Who may serve as an attorney-in-fact?

Any competent person eighteen years of age and older can serve as an attorney-in-fact. Certain financial institutions can also serve. There is no course of education that attorneys-in-fact must complete or any test that attorneys-in-fact must pass. Because a Power of Attorney is such a potentially powerful document, attorneys-in-fact should be chosen for reliability and trustworthiness. In the wrong hands, a Power of Attorney can be a license to steal. It can be a big responsibility to serve as an attorney-in-fact.

Powers and Duties of an Attorney-in-Fact

What can I do as an attorney-in-fact?

Powers of Attorney can be used for most everything but an attorney-in-fact can only do those acts that the Powers of Attorney specifies. Powers of Attorney should be written clearly so that the attorney-in-fact and third parties know what the attorney-in-fact can and cannot do. If you, as attorney-in-fact, are unsure whether or not you are authorized to do a particular act, you should consult the attorney who prepared the document.

What can't I do as an attorney-in-fact?

There are a few things that an attorney-in-fact is forbidden to do even if the Power of Attorney says otherwise. An attorney-in-fact may not sign a document stating that the principal has knowledge of certain facts. For example, if the principal was a witness to a car accident, the attorney-in-fact may not give a statement for the principal stating that the light was green. An attorney-in-fact may not vote in a public election for the principal, or create or revoke a will or codicil to a will. Nor may the attorney-in-fact perform personal services for the principal under a contract (such as paint a picture or write a book). Likewise, if the principal were appointed by a court to be a guardian or conservator for someone else, the attorney-in-fact cannot take over those responsibilities under the authority of the Power of Attorney.

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 may punish the attorney-in-fact

both civilly (by ordering the payments of restitution and punishment money) and criminally (probation or jail). The standard of care that applies to attorneys-in-fact is discussed below in the discussion on liability. No matter what, however, if the Power of Attorney legally authorizes a particular act, the attorney-in-fact cannot be held personally liable for doing that act.

Using the Power of Attorney

When is a Power of Attorney effective?

The Power of Attorney is effective as soon as the principal signs it, unless the principal states that it is only to be 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.

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

After being certain that the Power of Attorney gives you the authority to do what you want to do, take the Power of Attorney (or a copy) to the third party. Explain to the third party that you are acting under the authority of the Power of Attorney and are authorized to do this particular act.

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 are, instead, signing for the principal. If you just sign your own name, you may be held personally accountable for anything you sign. As long as your signature clearly conveys that you are signing in a representative capacity and are not signing personally, you are okay. Though lengthy, it is therefore best to sign as follows:

Howard Carver, as attorney-in-fact for Rachel Wilson

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

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

Call your attorney. For a number of reasons, third parties are sometimes hesitant to honor Powers of Attorney (see below). Still, so long as the Power of Attorney was lawfully executed and so long as it has not been terminated, third parties may be forced to honor the document. Under some circumstances, if the third party’s refusal to honor the Power of Attorney causes damage, the third party may be liable for those damages and even attorney’s fees and court costs. Even mere delay may cause damage and this too is actionable. It is reasonable, however, for a third party to have the time to consult with legal counsel about the Power of Attorney. Banks will often FAX the Power of Attorney to their

legal department for approval. There comes a time, of course, when delay becomes unreasonable. Upon refusal or an unreasonable delay, call your attorney.

Why do third parties sometimes refuse to honor Powers of Attorney?

To third parties, the Power of Attorney you have shown them is nothing more than a piece of paper with writing on it. They do not know if it was executed properly or forged. They do not know if it has been revoked. They do not know if the principal was competent at the time the Power of Attorney was signed. They do not know whether the principal has died. Third parties do not want the liability if anything goes wrong. Some third parties refuse to honor Powers of Attorney because they believe they are protecting the principal from possible unscrupulous conduct. Refusal is more common with older (“stale”) Powers of Attorney, although in fact age should not matter. If your Power of Attorney is refused, talk to your lawyer.

What is an Affidavit and do I have to sign it?

An affidavit is a sworn written statement. A third party may require you, as the attorney-in-fact, to sign an affidavit stating that you are validly exercising your duties under the Power of Attorney. If you want to use the Power of Attorney, you do need to sign the affidavit if so requested by the third party. The purpose of the affidavit is to relieve the third party of liability for accepting an invalid Power of Attorney.

What happens to the third party if they unreasonably refuse to accept the Power of Attorney?

The law provides that that third party may be liable for any losses caused by the refusal as well as attorneys’ fees and court costs. The problem, however, can usually be resolved with a call from your attorney to the third party. In most cases, once the law is explained to the third party, the Power of Attorney is accepted without further ado.

Can I have other people do things for me as attorney-in-fact?

You may hire accountants, lawyers, brokers, or other professionals to help you with your duties, but you can never delegate another person to act for you as attorney-in-fact. The Power of Attorney was given to you by the principal and you do not have the right to give that power to anyone else.

Relationship of Power of Attorney to Other Legal Devices

What is the difference between an attorney-in-fact and an executor?

An Executor, sometimes referred to as a “personal representative,” is the person who takes care of another’s estate after that person dies. An attorney-in-fact can only take care of a person’s affairs while they are alive. An executor is named in a person’s will and can only be appointed after a court proceeding called “probate.”

What is the difference between a Living Trust and a Power of Attorney?

A Power of Attorney empowers an attorney-in-fact to do certain specified things for the principal during the principal's lifetime. A Living Trust also allows a person, called a "trustee," to do certain things for the maker of the trust during that person's lifetime but these powers also extend beyond death. A Living Trust is like a Power of Attorney in that it allows a person to manage another's assets. Like an attorney-in-fact, the Trustee can do banking transactions, investments, and many other tasks related to the management of the person's assets. Unlike a Power of Attorney, however, the Trustee has control only over those assets that are titled in the name of the Living Trust. For example, if a bank account is titled in the name of the person alone, the Trustee has no power over that asset. In order to give the Trustee control over an asset, the maker of the Trust must arrange for the account or property to be owned by the Trust. Also unlike an attorney-in-fact, upon death the Trustee can then distribute the person's assets in accordance with the person's written instructions. There are some transactions that a Power of Attorney is better suited for than a Trust and vice versa.

As attorney-in-fact, what can I do to assist the principal with his or her estate plan?

Estate planning involves making sure that a person's possessions and property will pass to whom they want after their death and may also involve saving money on taxes. As attorney-in-fact, you cannot make a will for the principal nor can you make a codicil to change an existing will. Likewise, you cannot revoke a principal's wills or codicils. If the Power of Attorney specifically says so, however, you, as attorney-in-fact, can transfer assets to a Trust that the principal had already created and may even be able to execute a new trust for the principal. As discussed earlier, a Trust only has powers over those assets that are titled in the name of the Trust. If the Power of Attorney specifically says so, you may change the names on accounts or property to add things to the Trust. If the Power of Attorney specifically says you can, you may also do certain transactions that will, ultimately, benefit persons after the principal's death. For example, if specifically mentioned in the Power of Attorney, you could do a document called a "Life Estate Deed" that allows the principal to own a piece of real estate for the rest of his or her life but that, immediately upon the principal's death, will pass title to the person or persons named in the deed.

Health Care and the Power of Attorney

What is the relationship between a Living Will and a Power of Attorney?

A Living Will reflects a person's own wishes as to the termination of medical procedures when they are diagnosed as terminally ill or permanently unconscious. A living will and a health care power of attorney are termed "advance health care directives" because we make them in advance of incapacity. If a person becomes unable to understand or unable to communicate with his or her doctors, the person's Living Will is a legally enforceable method making sure his or her wishes are still honored. Whether or not a person has a Living Will, the person's attorney-in-fact may make health care decisions if the Power of Attorney specifically gives this right and some very exact requirements relating to the manner of execution of the Power of Attorney are followed. For this and other reasons, the

principal should execute a separate advance directive called a “Durable Power of Attorney for Health Care.”

What is a Durable Power of Attorney for Health Care?

A Durable Power of Attorney for Health Care is a document whereby a person designates another to be able to make health care decisions if he or she is unable to make those decisions for him- or herself. A Power of Attorney can be drafted to give these same powers so there is not much difference. However, a Durable Power of Attorney for Health Care is totally dedicated to health care whereas the Power of Attorney can be much more comprehensive. Specificity is important so that the medical profession feels comfortable in honoring the health care attorney-in-fact’s decisions. If you foresee making health care decisions for the principal of your Power of Attorney, you should consult your attorney.

Termination of the Power of Attorney

When does the Durable Power of Attorney terminate?

The authority of the attorney-in-fact automatically ends when one of three things happen: (1) The principal dies; (2) the principal revokes the Power of Attorney; or (3) when a court determines that it should be revoked. If any one of these three things occurs, the Power of Attorney is terminated. If, after having knowledge of any of these events, you continue to act as attorney-in-fact, you are acting in violation of the law.

The principal wants to revoke the Power of Attorney but is not competent or is not acting wisely. What do I do?

Consult your attorney. People who are suffering from a mental infirmity such as Alzheimer’s Disease sometimes make decisions that are not in their own best interest. An incompetent person cannot validly revoke the Power of Attorney. It is not for the attorney-in-fact to decide whether the principal is or is not competent, however. Your attorney can advise you on the proper course of action.

Court proceedings were filed to appoint a guardian for the principal or to determine whether the principal is competent. How does this affect the Power of Attorney?

If court proceedings are brought to determine the principal’s incapacity, it is up to the court to decide whether you can continue to exercise your powers under the Power of Attorney. The courts encourage people to execute Powers of Attorney to avoid guardianship proceedings, so it is likely that you will be able to continue to exercise those powers unless the court believes that it would be in the best interests of the principal that someone else be appointed. The court may appoint a guardian and permit you to remain as attorney-in-fact.

Financial Management and the Liability of an Attorney-in-Fact

What is “fiduciary responsibility”?

As an attorney-in-fact, you are fiduciary to your principal. A “fiduciary” is a person who has the responsibility for managing the affairs of another, even if only a part of that person’s affairs are being managed. A fiduciary has the responsibility to deal fairly with the principal and to be prudent in managing the principal’s affairs. You, as an attorney-in-fact, are liable to third parties only if you act imprudently or do not use reasonable care in performing your duties. If ever you are acting as an attorney-in-fact and are unsure as to whether you are doing the right thing, seek out professional advice not only to protect yourself but to protect the principal.

What if I make a bad investment decision? Am I liable for any loss?

So long as you act prudently, use care, and are cautious about managing the principal’s affairs, you will probably not be liable for individual bad investments. The law looks at your management of the entire investment portfolio and determines whether, as a whole, your conduct was not proper. The law says that no one specific investment is enough to show you acted imprudently. Still, anyone can sue for any reason. Whether a person can sue you and be successful is another question altogether. If a person believes that you made bad investment decisions and that those decisions affected him or her, the person may sue you but the court will look at your management of the entire investment portfolio, not just the bad investment or investments. You may be liable for any losses only if the court finds that, as a whole, you were not prudent in your investments.

Should I diversify the principal’s investments?

If you have responsibility for managing the financial affairs of the principal, the general rule is that you must diversify the principal’s investments. This means that you should spread out the principal’s money so that you spread out the risk. In this way, if one or two investments go bad, there are other monies that survive. If you feel that it is in the principal’s interest not to diversify, you are free not to do so, but by not diversifying the investments you increase your exposure to liability.

Am I liable if I acted as prudently as possible but the investments still did poorly?

The law is a test of conduct and not resulting performance. In other words, so long as you were reasonably cautious and prudent with the investments, you are not liable. Even the most experienced and conservative of investors lose money from time to time.

Can I sacrifice a gain in principal in favor of more income?

Principal is the mass of assets or capital accumulated by the principal. Income is money that comes in and adds to the principal’s principal or gets spent. You, as a fiduciary, have the responsibility to consider both the safety of the principal’s capital and the reasonable production of income. This is a balancing act in which you need to decide how much income the principal requires and how much capital must be sacrificed, if any, to generate

that income. If an asset is producing no or little income, you need to consider trading off that asset for a more productive one.

Is there such a thing as being too cautious when investing the principal's money?

Yes. An attorney-in-fact may keep the principal's money very safe but if it produces no income, the attorney-in-fact could still be said to be mismanaging the principal's affairs. The law states that you have a duty to pursue an investment strategy that considers both the reasonable production of income and the safety of the capital.

What things should I consider when making investment decisions?

When making investment decisions as an attorney-in-fact, you should first weigh the size and complexity of the principal's estate against your own ability to manage finances. In certain instances, the most prudent investment decision is to seek professional advice on asset management. Otherwise, you should consider such things as: (1) the general economic conditions, for example, whether a recession is looming; (2) the possible effect of inflation; (3) the expected tax consequences of investment decisions or strategies; (4) the role each investment or course of action plays within the overall portfolio; (5) the expected total return, including both income yield and appreciation of capital; and (6) the costs incurred in a transaction such as brokerage fees or commissions.