TAKACS MCGINNIS
ELDER CARE LAW

# Powers of Attorney: Frequently Asked Questions

***How to Use This Information***

This memorandum is organized in eight parts:

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## *1.* About the Power of Attorney

A Durable Power of Attorney may be the most important of all legal documents. This legal document authorizes another person 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.

***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 (the person who makes a power of attorney is called the "Principal").

It can be used to give another person the authority to make health care decisions, do financial transactions, or sign legal documents that the principal 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.

A "General Power of Attorney" typically gives the "Attorney-in-Fact" (the legal name of the person who is authorized to act for the principal) broad powers to do almost every legal act that the principal can do. By contrast, a "Limited Power of Attorney" is not so broad and is limited to particular acts or transactions or is effective only for certain periods of time. The most common limited power of attorney is probably the one in which a car buyer authorizes the car dealer to register the vehicle and obtain a license plate.

***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 incapacitated. 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.

When Elder Law Attorneys draft Powers of Attorney, they still list the types of things the attorneys-in-fact can do but these powers are usually very broad. This document is often referred to as a "Durable General Power of Attorney."

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. By doing the Power of Attorney, they designate someone who can do all of these things for them.

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

Yes. But first, let's distinguish between the terms "competent" and "capacity."

"Competent" is a term that refers to an individual's capacity to carry out an act or make a decision that is legally enforceable, such as to make a contract or a will or give informed consent to medical treatment.

"Capacity" relates to an individual's soundness of mind and an intelligent understanding and perception of one's actions.

For example, in most states a minor (someone under age 18) is *incompetent* to enter into a contract even though the minor has the mental *capacity* to do so.

At the time the Power of Attorney is signed, the principal must have capacity. 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.

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 otherwise lack capacity at times; however, so long as they have a lucid moment and have capacity at the moment they sign the Power of Attorney, it is valid, even if later they don't remember signing it.

### *Who may serve as an attorney-in-fact?*

Any "competent" person 18 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.

## *2*. 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. An attorney in fact cannot stand in a marriage ceremony nor sign a marriage license for the principal. 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 was 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.

## *3.* 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. Some third parties may ask you to sign a document stating that you are acting properly. You may wish to consult your attorney prior to signing it. 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.

### *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 signa-

ture 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:

*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 Power of Attorney. What now?*

Call your attorney. For a number of reasons, third parties are sometimes hesitant to honor Powers of Attorney. Still, so long as the Power of Attorney was lawfully executed and so long as it has not been revoked or has 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.

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 legally competent when 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 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?*

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. An affidavit is a sworn written statement. To use the Power of Attorney, you do need to sign the affidavit if 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. Prior to signing it, you may want to consult your 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.

## *4*. 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 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 will 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?***

Look at the wording in the Power of Attorney document. Does it guide you on how to make investment decisions for your Principal?

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.

***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 cannot 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.

## *5.* 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; therefore, the Power of Attorney ends when the principal dies. 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. Some transactions are better suited for a Power of At-

torney than a Trust and vise versa.

***Might there be a conflict between my actions as attorney-in-fact and the Trustee's actions?***

If the principal of your Power of Attorney also has a Trust and if your powers overlap, your attorney may have to prepare a document notifying the Trustee of the Power of Attorney. For example, you, as attorney-in-fact, may be authorized to sell the principal's home but the principal's home is owned by the Trust. The document that your lawyer can prepare is called a "release" because it allows the Trustee to release you the power, as in this example, to sell the home. Whether a release needs to be delivered to the Trustee is a question for your lawyer to decide. If your principal had a Trust, you should raise the issue with your attorney.

***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.

## *6*. Health Care and the Power of Attorney

***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 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 more comprehensive.

Because the statutes creating the Durable Power of Attorney for Health Care are more detailed about health care than the Power of Attorney statutes, it is best that the Durable Power of Attorney for Health Care be used. 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.

### *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 in an irreversible coma. 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."

## *7.* Conservators and Powers of Attorney

### *What is a Conservator?*

Conservators (called "Guardians" in some states) are appointed by the courts for people who are not able to act in their own best interests. A person who has a conservator appointed by the courts may not be able to lawfully execute a Power of Attorney. If you find out that a conservator had been appointed prior to the date the principal signed the Power of Attorney, you should advise your lawyer.

The law requires that whoever starts the conservatorship proceeding give the attorney-in-fact notice. If a conservator is appointed after the Power of Attorney was given to you, the court will probably allow those powers to continue unless good cause is shown why you should not continue as attorney-in-fact or the court determines that the principal was not competent to sign the Power of Attorney. If you learn about a conservatorship proceeding being brought against your principal, you should consult with your attorney.

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

If a conservatorship court proceeding is begun after the Power of Attorney was signed by the principal, the Power of Attorney may be suspended until the courts decide whether the Power of Attorney should remain in force. 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 conservatorship 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 conservator and permit you to remain as attorney-in-fact. If you have the right to make health care decisions for the principal, the court may not appoint someone to make those decisions in place of you unless you have abused those powers or the principal was not competent when he or she executed the Durable Power of Attorney for Health Care.

TAKACS MCGINNIS
ELDER CARE LAW

# Affidavit by Attorney-in-Fact

State of _____

County of _____

Before me, the undersigned authority, personally appeared _____ [name of attorney-in-fact] ("Affiant") who swore or affirmed:

1. Affiant is the attorney-in-fact named in the Durable Power of Attorney executed by _____ ("Principal") on _____ (Date).
2. To the best of Affiant's knowledge after diligent search and inquiry:
   a. The Principal is not deceased, has not been adjudicated, incapacitated or disabled; and has not revoked, partially or completely terminated, or suspended the Durable Power of Attorney;
   b. A petition to determine the incapacity of or to appoint a conservator for the Principal is not pending.
3. Affiant agrees not to exercise any powers granted by the Durable Power of Attorney if Affiant attains knowledge that it has been revoked, partially or completely terminated, suspended, or is no longer valid because of the death or the adjudication of incapacity of the Principal.

Pursuant to the provisions of TENN. CODE ANN. § 34-6-105(c), an affidavit executed by the attorney-in-fact stating the above is conclusive proof of the nonrevocation or nontermination of the power of attorney.

_____

Affiant

Sworn to and subscribed before me on _____, 20___.

_____

Notary Public

My Commission Expires:_____