

The Elder Law Information Series

Q&A

Durable Powers of Attorney

SAVE MONEY, TIME AND STAY IN CONTROL

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QUESTIONS FOR THE GRANTOR

What is a power of attorney?

A power of attorney is the grant of legal rights and powers by a person, the "principal," to another, the "agent" or "attorney-in-fact." The attorney-in-fact, in effect, stands in the shoes of the principal and acts for him or her on financial and business matters. The attorney-in-fact can do whatever the principal may do--withdraw funds from bank accounts, trade stock, pay bills, cash checks--except as limited in the power of attorney. This does not mean that the attorney-in-fact can just take your money and run. He or she must use your finances as you would for your benefit.

When does the power of attorney take effect?

Unless the power of attorney is "springing," it takes effect as soon as it is signed by the principal. A "springing" power of attorney takes effect only when the event described in the instrument itself takes place. Typically, this is the incapacity of the principal as certified by one or more physicians. Section III of your power of attorney indicates that it is effective immediately.

Does the power of attorney take away my rights?

No, absolutely not. Only a court can take away your rights in a conservatorship or guardianship proceeding. Your attorney-in-fact simply has the power to act along with you.

What if I appointed more than one attorney-in-fact?

Just as you and your attorney-in-fact can have power to act at the same time, you can give more than one family member or friend the power to act on your behalf. In most cases, they are given the right to act independently--or "severally"--of one another. You can also require them both to agree to any actions, but this can be cumbersome in practice. Finally, you can name one or more alternates in case your original attorney-in-fact can no longer act.

Can I change my mind?

Certainly. You may revoke your power of attorney at any time. All you need to do is send a letter to your attorney-in-fact or attorneys-in-fact telling them that their appointment has been revoked. From the moment they receive the letter, they can no longer act under the power of attorney.

What happens if a guardian is appointed?

One of the purposes of a power of attorney is to avoid the need for the appointment of a guardian or conservator. However, depending on the circumstances, one may still be appointed. In most cases, the power of attorney includes the nomination of the attorney-in-fact or someone else you designate to be your conservator or guardian if such appointment ever does become necessary. This nomination is not absolutely binding, but will be followed by the court unless convincing evidence is presented that would not be in your best interest. Even after the appointment of a guardian or conservator, your power of attorney will continue in effect unless the person appointed takes the affirmative step of revoking the power of attorney.

How do I get a power of attorney that expresses my wishes?

See an experienced attorney who knows how to individualize your documents so you will meet your goals and have your wishes followed exactly.

QUESTIONS FOR THE AGENT

What are my duties as attorney-in-fact?

You have been appointed to represent the "principal" with respect to his or her financial affairs. In effect, you can step into his or her shoes and take whatever investment and spending measures the principal would take himself or herself. Unless limitations have been placed in the power of attorney itself, you can open bank accounts, withdraw funds from bank accounts, trade stock, pay bills, cash checks. All steps you take must be consistent with your role as a "fiduciary."

What does it mean to be a "fiduciary"?

This means that you will be held to the highest standards of good faith, fair dealing, and undivided loyalty with respect to the principal. You must always act in his or her best interest and keep his or her goals and wishes in mind in making any discretionary decision. However, you do not have the same responsibility as a trustee or executor, who has total control over the estate or trust assets since you share control with the principal himself or herself. Your duty only covers the level of care you take in your own actions as attorney-in-fact.

Can I be held liable for my actions as attorney-in-fact?

Yes, but only if you act with willful misconduct or gross negligence. If you do your best and keep the principal's interests in mind as the basis of your actions, you will not incur any liability.

When does the power of attorney take effect?

Unless the power of attorney is "springing," it takes effect as soon as it is signed by the principal. A "springing" power of attorney takes effect only when the event described in the instrument itself takes place. Typically, this is the incapacity of the principal as certified by one or more physicians. Section III of your power of attorney indicates whether it is effective immediately or is springing. In most cases, even when the power of attorney is immediately effective, the principal does not intend for it to be used until he or she becomes incapacitated. You should discuss this with the principal so that you know and can carry out his or her wishes.

What if there is more than one attorney-in-fact?

Depending on the wording of the power of attorney, you may or may not have to act together on all transactions. In most cases, when there are multiple attorneys-in-fact they are appointed "severally," meaning that they can each act independently of one another. Nevertheless, it is important for them to communicate with one another to make certain that their actions are consistent.

Can I be fired?

Certainly. The principal may revoke the power of attorney at any time. All he or she needs to do is send you a letter to this effect. The appointment of a conservator or guardian does not immediately revoke the power of attorney. But the conservator or guardian, like the principal, has the power to revoke the power of attorney.

What kind of records should I keep?

It is very important that you keep good records of your actions under the power of attorney. That is the best way to be able to answer any questions anyone may raise. The most important rule to keep in mind is not to commingle the funds you are managing with your own money. Keep the accounts separate. The easiest way to keep records is to run all funds through a

checking account. The checks will act as receipts and the checkbook register as a running account.

Can I be compensated for my work as attorney-in-fact?

Yes, if the principal has agreed to pay you. In general, the attorney-in-fact is entitled to "reasonable" compensation for his or her services. However, in most cases, the attorney-in-fact is a family member and does not expect to be paid. If you would like to be paid, it is best that you discuss this with the principal, agree on a reasonable rate of payment, and put that agreement in writing. That is the only way to avoid misunderstandings in the future.

Is there a criminal law I should know about?

Certainly. Under Michigan Compiled Law 750.174a, a "person in a relationship of trust" who uses the power to abuse a "vulnerable adult" may be guilty of a felony with a penalty of up to 10 years in prison. Abuse means that the agent obtained or attempted use the vulnerable adult's money or property to directly or indirectly benefit the agent.

To be covered under the law the agent must have been entrusted with or assumed the responsibility of handling a vulnerable adults money or property. The agent must have then used the vulnerable adult's money or property to directly or indirectly benefit the agent. The law includes persons such as caregivers or family members who have assumed management of the adult's money or property.

"Person in a relationship of trust" means a person who is a caregiver, relative by blood, marriage, or adoption, household member, court-appointed fiduciary, or other person who is entrusted with or has assumed responsibility for the management of the vulnerable adult's money or property.

MCL 750.174a (11) (c). Who is "a vulnerable adult"?

"Vulnerable adult" means an individual age 18 or over who, because of age, developmental disability, mental illness, or disability, whether or not determined by a court to be an incapacitated individual in need of protection, lacks the cognitive skills required to manage his or her property

MCL 750.174a (11) (d)

What if I have other questions?

See an attorney experienced in this area of law.