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Guide for Agents with Power of Attorney

**The following information only applies to POAs assigned by a person who is 18 or older. The rules are different for juveniles.*

What is a Power of Attorney (POA)?

A POA gives someone the power to make decisions. Anyone, at almost any time, can assign his or her decision-making rights through a Power of Attorney. The person assigning his rights to someone else is called the “Principal,” and the person being appointed is the “Agent” or “Attorney in Fact.”

When does a person become an Agent?

The Agent’s appointment usually begins when the Principal signs the POA in front of a notary, two witnesses, or both. If anyone pressures the Principal to sign a POA, it may not be valid. This should be the Principal’s decision alone.

What can an Agent do under a POA?

Just because someone wants a person to be their Agent does NOT mean they have to do it. This is a voluntary appointment and can be refused.

The duties of the Agent depend on what roles the Principal assigns. There are 23 powers in the Tennessee Durable Power of Attorney Act that a Principal can assign, although assignable powers are not limited to these. A Principal can assign whatever powers they want. Every power that the Agent has under a POA should be in the POA, unless the POA “incorporates by reference” those 23 powers in the law.

How does the Agent sign for the Principal?

The Agent should sign in a way that shows they are an Agent. We recommend signing the Principal's name and then writing next to it, "Signed by [Agent's printed name], Attorney in Fact" and then the agent signing their name underneath that.

How will people know an Agent has POA?

The Agent must show them the document. Copies are just as good as the original.

What are the duties of an Agent under a POA?

An Agent is a "fiduciary," which means that an Agent is in a special relationship of trust with the Principal and that the Agent must act in the best interests of the Principal. The Agent should never go outside of powers in the POA and should carry out the Principal's decisions to the extent possible. Any act of the Agent that is self-serving or goes against the Principal's interests is a violation of the fiduciary duty.

An Agent named in a POA also has a duty make an accounting to the Principal upon request, to any legal representative of the Principal, or to a court. The accounting should only include actions taken when using the POA. Usually this means giving proof of how the Agent used the Principal's money. The Agent can easily fulfill this duty by keeping excellent records and saving receipts. The Agent may want to keep a "POA journal" where they write down decisions made and actions taken for the Principal, and make sure there is proof for each entry. An unaccounted-for transaction can lead to liability.

Can an Agent make gifts?

Unless the POA says that the Agent can do anything the Principal would do, or if it explicitly allows gift giving, an Agent should not give gifts on behalf of the Principal! If the Agent wants to give a gift on behalf of the Principal, they must get permission from a court. The court will consider several factors and either allow or deny the gift in question.

How does the Principal's capacity affect the Agent's duties?

Capacity is a person's mental state, or their ability to accomplish an act and understand the consequences. Once a person loses capacity to make decisions, a doctor or court may say they are "incompetent" or "incapacitated." People may say "capacity" or "competency" interchangeably. The Agent never determines capacity. In most cases, a doctor must declare someone incompetent, and they must do so in writing.

If the Principal assigned a "springing" POA, the Agent can only act after incapacity. Any use of this power prior to incompetency is illegal. Results of determination of capacity is a limited exception to HIPAA. A medical provider can tell the Agent the mental status of the Principal, so they know their powers have gone into effect. If the POA is "nondurable," the POA ends with

incapacity.

Unless the Principal becomes incompetent, the Agent should only use the POA in ways directed by the Principal. For example, if the Principal asks an Agent to buy them a wheelchair with their money, but instead the Agent buys a blender, the Agent has violated their duty, even if they thought their decision was in the Principal's best interests.

If a medical provider does declare the Principal incompetent, then the Agent should do their utmost to honor the wishes of the Principal. For example, if the Principal has deposited \$50 into a mutual fund every month for the last 20 years, the Agent should continue this practice.

Finally, upon the incapacity of a Principal, the next of kin of the Principal can go to court and ask the court to place a bond on the Agent. The court does not have to grant this request. We see this when someone petitions for conservatorship, but it can happen in any case. Usually, this happens because the next of kin think the Agent has used the POA in an abusive way.

What is the difference in duties between a Financial POA and a POA for Healthcare?

It is exactly what it sounds like. One is only for healthcare decisions while the other is for decisions related to finances. The duties only overlap if the Principal assigns the Agent for both.

What are the responsibilities of the Agent under a Healthcare Power of Attorney?

A POA for healthcare gives an agent the power to make healthcare decisions for the Principal. For example, the Agent may be able to make decisions about scope of treatment, use of life-saving procedures, and handling of the Principal's body after death. Just like a financial POA, an agent must act in the Principal's best interest and may not make self-serving decisions.

The only financial power this Agent has is the power to get financial records in order to make medical decisions. For example, an Agent for healthcare may need to know the Principal's financial status to decide whether to consent to a procedure. The Agent has the same right as the Principal to make fully informed medical decisions for the Principal.

Will the Agent still have powers if the Principal revokes the POA?

No! The powers the Principal has are theirs to take away. If the Principal tells the Agent in writing or orally that they are revoking POA powers, the Agent cannot use the POA. The Agent may be required to give an accounting of acts done with the POA.

If a court appoints a conservator, what happens to the POA?

Usually, the POA document says the Agent should also be the conservator should the need arise, so the POA usually becomes the conservator. Even if the document does not explicitly say this, Tennessee courts must consider the person holding POA for conservator before anyone else. Unless there is a good reason otherwise, the POA will usually be the conservator, but who ultimately becomes conservator is up to the court.

If someone else becomes conservator and the Agent remains POA, the Agent with POA retains the same powers. The only difference is that the Agent then owes a fiduciary duty to the conservator as well as the Principal. The conservator will usually have the same authority the Principal did before incapacity.

What happens if an Agent violates their duties?

An Agent who violates their duty to the Principal can face legal action. They can expect a legal challenge to any misuse of a POA. The Principal can recover damages or property lost due to the Agent's actions. In some cases, there may be additional financial penalties.

The Agent may also face criminal penalties. Because the POA gives an Agent so much access, the Agent is held to a high standard. The severity of the penalty depends on the vulnerability of the principal and the severity of the violation.

If a person believes the Agent has violated their duty, they may ask a court to stop the Agent from using the POA. They may also ask that the POA be deemed invalid.

When do the Agent's duties end?

When the Principal dies, the POA dies with them. As soon as the Agent knows the Principal has died, they should stop using the POA. There may be a limited exception to complete decisions already made while the Principal was alive, but the Agent should consult an attorney before taking any such actions. There may also be a request for accounting at this point.

A person may also withdraw from Agency. At no point must a person accept POA. Usually the Principal assigns a Secondary Agent in case the Primary Agent no longer can or is no longer willing to serve. The Primary Agent can also usually delegate their duties unless otherwise specified in the document or unless the Principal is competent and does not want the Agent to assign their duties.

What are the duties of a Secondary Agent?

Until the Primary Agent becomes unable or unwilling to serve, the next in line has no duties.

What else does the Agent need to know?

The purpose of a POA and other Agency appointments is to make the Principal's life easier. Especially for elderly or disabled people, this may be a means of maintaining independence and dignity. Abuse of POA is far too common. An Agent with POA should always keep this in mind and only use their power for the benefit of the Principal.

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