

# **Power of Attorney – It may not be what you think**

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# EVOLUTION OF THE POWER OF ATTORNEY

- **General Power-of-Attorney**

- Durable Power-of-Attorney

- Health Care Representative

- Supported Decisionmaking

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# TERMS

- **POWER OF ATTORNEY (POA)** – A written document in which the Principal appoints an Agent (Attorney in Fact) to act on his or her behalf, giving the authority to perform certain acts or functions.
- **PRINCIPAL** – The person who signs the Power of Attorney and grants authority and power to another person.
- **ATTORNEY IN FACT** – The person granted authority under Power of Attorney, also known as an Agent.
- **GENERAL POWER OF ATTORNEY** – Allows the Attorney in Fact to perform all functions for the principal. Usually terminated if Principal loses capacity.

# TERMS

- **LIMITED POWER OF ATTORNEY** – Designates only certain functions for the Attorney in Fact to perform, or allows Attorney in Fact to act only in specific circumstances.
- **DURABLE POWER OF ATTORNEY** – Similar to General Power of Attorney, survives if Principal becomes incapacitated.
- **GUARDIANSHIP** – Most restrictive form of assistance. Guardians appointed by the Court have complete control over the Person, the Estate, or both.
- **CONSERVATOR** – Guardian of an estate.

# CAPACITY

WHETHER A PERSON IS ABLE TO UNDERSTAND IN A REASONABLE MANNER THE NATURE AND EFFECT OF HIS ACT”

A Principal cannot assign or revoke a Power of Attorney if he or she lacks Capacity.

It is FAR TOO EASY to abuse  
authority under Power of  
Attorney

# MOST POAs ARE VERY GENERAL

- Allow Attorney in Fact to handle all matters for principal
- Not limited by time or circumstance
- Place no restrictions on the actions of the Attorney in Fact
- [POA.docx](#)
- [RE POA Powers.docx](#)

# POA IS PRESUMED VALID

- Attorney in Fact only needs to present the Power of Attorney to a third party.
- Third parties have little or no duty to verify the validity of the Power of Attorney

# POAs MAY BE USED WITHOUT THE KNOWLEDGE OF THE PRINCIPAL

- Effective date of the Power of Attorney is the date of signature, unless the documents specifies a date or condition.
- A copy is as good as the original.
- Many Powers of Attorney allow the Attorney in Fact to delegate the duties to another person – and may not require notification to the Principal.

# LACK OF REPORTING

- In many states, Attorneys in Fact are not required to report their activities to the Principal, or provide an accounting.
- Attorneys in Fact are usually required to keep records – even in states which don't require recordkeeping, it is best practice.
- Exploitation and theft may continue for years before it is discovered.

# MANY PEOPLE DO NOT UNDERSTAND THE PURPOSE AND LIMITS OF A POA

- The Attorney in Fact does not have authority to direct the activities of the Principal.
- The Principal remains the primary decision-maker.
- Residential Care Facilities, in particular, should take care to remember:
  - Attorney in Fact cannot restrict visitors, activities, or amenities of Principal.
  - In cases of disagreement, the wishes of the Principal are controlling.
  - If the Principal has capacity, he or she can revoke the Power of Attorney at any time, and this should be facilitated upon request of the Principal.

# Power of Attorney is not a Guardianship

## Power of Attorney

- Established by the Principal
- Principal can revoke at any time
- Attorney in Fact has fiduciary duty to Principal
- **Attorney in Fact must defer to the wishes of the Principal**
- Power of Attorney is not monitored
- Reporting is not required automatically

## Guardianship

- Ordered by Court when Principal (Ward) is incapacitated
- Must be terminated or amended by Court, if appropriate
- Guardian has fiduciary duty to Ward
- **Guardian makes all decisions for Ward**
- Guardianship is monitored by Court
- Guardians must make regular reports

STRUCTURING A POWER OF  
ATTORNEY TO LIMIT CHANCES OF  
MISUSE

# LIMIT POWERS

- Consider the needs of the Principal
- Powers may be very limited if needed for a specified period.
- Powers may be selectively limited to allow for broad authority if Principal becomes incapacitated
- Use Supported Decisionmaking Language
- [SDM language for poa or HCPOA.docx](#)

# REQUIRE REPORTING

- Standard – “Attorney in Fact must provide accounting upon request”
- Consider – Annual reporting requirement
- In many states, children of the principal may request accounting
  - (In some cases, it is to the benefit of the Principal that children do not have this information)

# MANAGE THE EFFECTIVE DATE

- “Springing POA” – Document is drafted so that it becomes effective only upon the incapacity of the principal.
  - Will require a breach of confidentiality, since third parties will need medical evidence of incapacity
- “Escrowing the POA” – Attorney at Law retains the POA with a letter designating when to deliver it to the Attorney in Fact

# IN THE CASE OF ABUSE...

- REVOKE THE POWER OF ATTORNEY
  - Ensure that a copy of the revocation is delivered to the Attorney in Fact and to any institution where the original Power of Attorney may be or may have been used.
  - If the Power of Attorney was recorded, the revocation must be recorded
  - If Principal does not have capacity to revoke Power of Attorney, a Guardianship may be appropriate
  - [POA Revocation.docx](#)
- Request an Accounting
  - In Indiana, the Attorney in Fact is required to deliver an accounting to the Principal or the Principal's children within sixty days of request.
  - [POA Accounting Demand letter.docx](#)
  - [POA Accounting Demand letter 2.docx](#)
- Demand a return of property

# KNOW WHO YOUR ATTORNEY IN FACT IS

- In Indiana, an Attorney in Fact may delegate his or her authority to another person
- The Power of Attorney should limit who may be appointed as a successor Attorney in Fact

# GO TO COURT

If Attorney in Fact has transferred property to himself or herself and  
refuses to return it

Or

Refuses to provide an Accounting

Or

Has misused the assets of the Principal

Then

The Attorney in Fact has breached Fiduciary Duty – Principal may  
bring Legal Action for remedy

[Complaint.docx](#)

## CASE OF MS. S.

Ms. S. 91 years old, was severely depressed after her husband died. Her daughter “bad Teri” urged her to sign a POA. Bad Teri used her mother’s assets to restore her guest house, so that Ms. S. could live there. Over time, Bad Teri began to isolate Ms. S. and misappropriate her assets. Ms. S. appealed to her ex-daughter-in-law, “Good Teri”, to rescue her. Bad Teri tried to convince Good Teri that Ms. S. was suffering from “Stage 5 Alzheimer’s”. Ms. S., forbidden from leaving the house, did exercises to ensure her stamina and walked ten miles to Good Teri’s home. Bad Teri threatened to report Good Teri as a kidnapper, sent manipulative, then abusive, then threatening messages to Ms. S., appeared at the day center that Good Teri took Ms. S. to, and refused to release her personal property or Medicare card.

## CASE OF MS. B.

Ms. B. executed a General Power of Attorney naming her Son as Attorney in Fact. The document was standard, with no safeguards included. Ms. B. gave the document to Son, in case she became incapacitated. Ms. B. told Son repeatedly not to use the Power of Attorney unless she became incapacitated. It was not until Ms. B. reviewed bank statements that she realized that Son had taken the Power of Attorney straight to the bank and began making large withdrawals.