OHIO STATE BAR ASSOCIATION
LAW FACTS
Connect. Advance. Succeed.

Financial Powers of Attorney

What is a financial power of attorney?

A financial power of attorney (POA) is a legal document an individual (the "principal") can use to appoint someone (the "agent") to act on his or her behalf regarding personal, financial and business matters. Typically, a POA is used when an individual becomes unable to handle his or her own affairs. A principal can name one agent, or two or more co-agents, each of whom can act alone, unless the POA specifically states that they must act together, by majority, or in any other manner. If the principal names a single agent, it is wise to name at least one successor agent.

When a person becomes mentally incapacitated and has not signed a POA, the probate court may appoint a guardian for that person. It is far more efficient and cost effective to use a POA, although a standard POA document lacks the safeguards existing under a court-supervised guardianship. Unless there are co-agents or special provisions in the POA, no one oversees the agent's conduct once the principal loses capacity. It is extremely important to choose an agent carefully, and to grant only those powers the agent may need to exercise.

How has Ohio's POA law changed?

Ohio's version of the Uniform Power of Attorney Act (UPOAA), effective March 22, 2012, changed the law governing POAs. A key focus of UPOAA is preventing financial elder abuse, and, when it does occur, uncovering it and providing a remedy. The law now includes a statutory form with language designed to help prevent agents from abusing their power. The form lists actions that an agent may not take and includes a section called "Important Information for Agent," describing in plain English the agent's duties and responsibilities.

While most POA agents are honest, some have abused their power, especially in cases where the principal is disabled, elderly, or suffering from dementia. Third parties such as financial institutions are not required to honor POAs, but the 2012 statutory form may increase their willingness to accept them. A POA created before March 22, 2012, will still be valid, but ask an attorney to review it in light of current law and consider using the current statutory POA form.

Some people intend for a POA agent to handle their day-to-day affairs, but not to make changes to their estate plan. Recognizing this, UPOAA prohibits agents from performing certain acts unless the POA specifically authorizes them. Because financial POA documents give significant, far-reaching powers to another person, they should be granted only after careful consideration. When drafting a financial POA document, it is wise to consult an attorney.

What does an agent do?

An agent must always act in good faith and in accordance with the principal's reasonable expectations, to the extent known to the agent; in other words, the agent must act in the principal's best interest, and only within the scope of the authority granted in the POA. Also, an agent must act in a way that preserves the principal's estate plan, if the agent knows about the plan and preserving it is in the principal's best interest. For this reason, the principal should tell the agent about his or her estate plan, provide the name of the attorney who prepared it, and perhaps even include the attorney's name in the POA. Unless stated otherwise in the document, the agent must act loyally, avoid conflicts of interest, cooperate with the principal's health care agent and keep accurate records of acts performed under the POA.

What powers does an agent have?

The principal determines the scope of the agent's authority. Current Ohio law sets forth the details about various powers. When using the current statutory form, the principal only needs to write his or her initials on the form next to each of the following classes of powers to be granted: Real Property; Tangible Personal Property; Stocks and Bonds; Commodities and Options; Banks and Other Financial Institutions; Operation of Entity or Business; Insurance and Annuities; Estates, Trusts, and Other Beneficial Interests; Claims and Litigation; Personal and Family Maintenance; Benefits From Governmental Programs or Civil or Military Service; Retirement Plans; Taxes; and, Digital Assets.

Can the agent access digital assets?

In 2017, there were changes to Ohio's POA law to allow an agent to access the principal's digital assets. If there is general language allowing power over digital assets, then the agent is considered the authorized user under Ohio law. The agent may access: any catalogue of electronic communications sent or received by the principal; any other digital asset in which the principal has a right or interest; any device owned by the principal capable of receiving, storing, processing, or sending a digital asset; or, the content of electronic communications sent or received by the principal. The agent may also take any action the account holder could. Any online direction of the user overrides the authority in a POA. A user's direction in a POA overrides a term of service to the contrary that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

Are there things an agent cannot do?

Yes. Ohio law now says that, unless the powers are specifically granted, an agent *cannot* (1) create a trust for the principal or make changes to an existing trust; (2) give away the principal's property; (3) create or change rights of survivorship; (4) change beneficiary designations; (5) let others act in place of the named agent; or (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan. Such powers are the types most likely to be abused. Although the principal can grant one or more of the powers in the section of the statutory form titled "Special Instructions," the form was not designed for this purpose.

The principal who grants any of the above-named powers should consider specifying which persons are eligible to be beneficiaries. Because some of these powers can potentially be abused, the principal might want to name co-agents and require them to act together. Another option is to require the agent to report to another family member or trust advisor about how he or she is exercising the powers. The principal should consult with an attorney before granting any of these powers.

Can a POA simply say, "I want my brother to handle my finances"?

Yes, but this is not usually advisable because a financial institution is less likely to accept such a POA. It is better to use the statutory "short" form which allows the person to pick from many powers which is recognized by financial institutions. For example, a person can simply state that his or her brother, the agent, has the power to handle "banking and other financial institution transactions." The principal should clearly state what authority is being given so that the agent and third parties know what the agent can and cannot do. Ohio law sets forth the details of these powers, and an attorney can help decide how much power to give to an agent. If, for example, a person wants his brother to handle his finances, the brother should not be named as a joint owner on any bank accounts, even if a bank teller suggests it. Such an approach may change who will receive the account at the principal's death. The brother might be listed either as the agent under a POA *or* as an authorized signer on the bank account.

Who can challenge an agent's actions?

To reduce instances of financial elder abuse, Ohio law now recognizes a number of individuals who may ask a court to review the agent's actions. However, if the principal asks the court to dismiss the case, then the court must dismiss it, unless the court finds that the principal is incapacitated.

Can a financial power of attorney be changed?

Yes. The principal who still has sufficient mental capacity can always change or revoke (cancel) his or her financial power of attorney. It is best to sign a written revocation of the POA and provide a copy to all banks and other financial institutions where the principal has accounts. Simply destroying the original document is not enough. If the power of attorney was recorded, or if the agent had authority over real property, then the revocation should be recorded with the county recorder.

Can an agent act when the principal becomes incapacitated?

Yes. Under current Ohio law, all powers of attorney are durable, meaning that the agent can act even if the principal becomes incapacitated, unless the document states otherwise.

When does an agent's authority begin?

The agent's authority begins when the POA says it will begin. If the POA does not state when the powers begin, the agent can begin acting immediately. Some POA documents state that the agent's authority will "spring" into effect at a future date or upon a particular event. For example, some people want the agent's authority to begin if and when the principal loses mental capacity. It is best to discuss the use of a "springing" POA with an attorney, as the springing provision may be difficult to demonstrate to banks and financial institutions. It is usually better to allow the POA to take effect immediately, especially since many third parties may not be willing to accept a springing POA. If the agent is not completely trustworthy, the principal should consider naming a different agent, naming co-agents and requiring them to act together, or perhaps not creating a POA. If there is no POA, the probate court will name a guardian if and when necessary.

When do the agent's powers end?

An agent's authority ends when the POA states that it will end or when the principal revokes the POA. Many POA documents do not specifically state when the agent's authority ends. If the document does not include a specific end date, then the agent's authority will end only when the POA is revoked or when the principal dies. An agent can never act after knowing the principal has died.

04/08/2016

Funding from the Ohio State Bar Foundation

This is one of a series of Law Facts public information pamphlets. Others may be obtained through www.ohiobar.org/LegalHelp

The information contained in this pamphlet is general and should not be applied to specific legal problems without first consulting your own attorney.