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Empowered by a Power of Attorney

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DISCLAIMER

This presentation is for educational purposes only and is not intended to be a substitute for legal advice.

Individual situations differ greatly and must be evaluated thoroughly before legal advice can be provided.

Empowered by a Power of Attorney

- **Financial Powers of Attorney**
- **Health Care Powers of Attorney**
- **Mental Health Powers of Attorney**

What is a Financial Power of Attorney?

- A legal document by which you can appoint an agent to manage your property
- The person appointing an agent is referred to as the principal
- The principal can define the scope of the agent's authority in the document

When does my POA take effect?

- Immediately

OR



- Upon a licensed physician's written determination that I am incapable of managing my financial affairs
 - A Springing Power of Attorney
 - Include disclosure waiver

When does my POA Terminate?

- At death
- When it is revoked
 - However, you must provide notice to your agent that the document has been revoked and the agent no longer has authority.

Why not rely on Guardianship Proceedings?

- If a person becomes incapacitated before signing a Power of Attorney or if a person never had capacity to sign a Power of Attorney, a court-appointed guardian may be necessary.
- Although a Guardian and an agent under a Power of Attorney serve similar roles, the procedure to appoint these persons is very different...

Power of Attorney	Guardianship Proceedings
Draft Power of Attorney	Obtain Medical Testimony of Physician
Meet with client to sign Power of Attorney	Draft and file Guardianship Petition and Proposed Order
	Determine which family members are entitled to receive notice of the petition; Mail petition to those persons
	Meet with Allegedly Incapacitated Person and read Citation to him or her
	Prepare for, attend Guardianship Hearing
	Serve Final Order; Advise Guardians of Duties to file Inventory and annual reports with the Court
Cost: \$350	Cost: \$5,000- \$8,000 if Uncontested

Who do I appoint as my agent?



My spouse?



Dad?



An attorney?



A bank?

Some agencies will serve as your agent:

- IKOR of Lancaster and Lebanon
- Guardian Services of PA (Serving Berks and Montgomery County)

What skill set should an agent have?

- Trustworthy
- Understands your needs and goals
- Understands your particular property
- Works well with other professionals
- Organized
 - Able to balance a checkbook
 - Keeps accurate records

The Content of a POA

- In the past, courts were willing to construe broad language in a manner that gave the agent specific authority. Consider the following language:

“ I authorize my agent to do all other acts, deeds, matters, and things whatsoever in or about my estate, property and affairs and things herein, either particularly or generally described, as fully and effectually to all intents and purposes as I could in my own proper person.”

CASE	YEAR POA SIGNED	POWER GRANTED
In re Reifsneider	1986	Right to claim an elective share against deceased spouse's estate
In re Mosteller	1989	Revocation of a Trust
Taylor v. Vernon	1992	Gifting
In re Widener	1993	Change the beneficiary of a life insurance policy

In each of the above cases, Pennsylvania Courts were willing to interpret broad language contained in a Power of Attorney to include specific powers. Please note the dates of the Powers of Attorney. The legal landscape has changed and NOW there are a number of powers that must be specifically mentioned in the document in order for an agent to have those powers...

Specific Grants of Authority

- 1999 Amendments: Gifting powers must be expressly granted
 - (effective date of this requirement: **12/12/1999**)
- 2015 Amendments: The Pennsylvania legislature identified 8 powers that must be expressly mentioned in the document in order for the agent to have those powers. Some attorneys refer to these 8 powers as...
 - (effective date of this requirement: **1/1/2015**)

The Super Powers

(Powers which must be expressly granted to the agent)



- (1) Create, amend, revoke or terminate an inter vivos trust
- (2) Make a gift.
- (3) Create or change rights of survivorship.
- (4) Create or change a beneficiary designation.
- (5) Delegate authority granted under the power of attorney.
- (6) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.
- (7) Exercise fiduciary powers that the principal has authority to delegate.
- (8) Disclaim property, including a power of appointment.

So should I grant my agent the broadest powers possible?

It Depends:

- Who is the agent?
- Will a broad grant of powers provide flexibility for long-term care planning?
- Might my agent need to change a beneficiary designation to prevent an adverse result?
- What about future changes in the law?

An Agent's Mandatory Fiduciary Duties

Notwithstanding any provision in the Power of Attorney, an agent **must**:

- Act in accordance with the principal's reasonable expectations to the extent actually known by the agent, and otherwise, in the principal's best interest.
- Act in good faith (honesty in fact).
- Act only within the scope of authority granted in the Power of Attorney

An agent can be ordered to account for the transactions taken on behalf of a principal

- A petition for an accounting might be filed by a beneficiary of the principal's estate or other third party who is dissatisfied with actions that the agent has taken
- The agent must then produce an accounting for the court detailing receipts and disbursements of the principal's assets
- The petitioners can file objections to the accounting

What will my bank accept? What do they look for?

- Banks are concerned about elder abuse and some bank's employees are subject to frequent training to spot elder abuse
- Banks prefer a Power of Attorney that complies with the current laws (i.e., a Power of Attorney that has the current legal notice and that is properly witnessed and notarized).

Current Statutory Notice

THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY, WHICH MAY INCLUDE POWERS TO SELL OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU.

THIS POWER OF ATTORNEY DOES NOT IMPOSE A DUTY ON YOUR AGENT TO EXERCISE GRANTED POWERS, BUT WHEN POWERS ARE EXERCISED, YOUR AGENT MUST USE DUE CARE TO ACT FOR YOUR BENEFIT AND IN ACCORDANCE WITH THIS POWER OF ATTORNEY.

YOUR AGENT MAY EXERCISE THE POWERS GIVEN HERE THROUGHOUT YOUR LIFETIME, EVEN AFTER YOU BECOME INCAPACITATED, UNLESS YOU EXPRESSLY LIMIT THE DURATION OF THESE POWERS OR YOU REVOKE THESE POWERS OR A COURT ACTING ON YOUR BEHALF TERMINATES YOUR AGENT'S AUTHORITY.

YOUR AGENT MUST ACT IN ACCORDANCE WITH YOUR REASONABLE EXPECTATIONS TO THE EXTENT ACTUALLY KNOWN BY YOUR AGENT AND, OTHERWISE, IN YOUR BEST INTEREST, ACT IN GOOD FAITH AND ACT ONLY WITHIN THE SCOPE OF AUTHORITY GRANTED BY YOU IN THE POWER OF ATTORNEY.

THE LAW PERMITS YOU, IF YOU CHOOSE, TO GRANT BROAD AUTHORITY TO AN AGENT UNDER POWER OF ATTORNEY, INCLUDING THE ABILITY TO GIVE AWAY ALL OF YOUR PROPERTY WHILE YOU ARE ALIVE OR TO SUBSTANTIALLY CHANGE HOW YOUR PROPERTY IS DISTRIBUTED AT YOUR DEATH. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD SEEK THE ADVICE OF AN ATTORNEY AT LAW TO MAKE SURE YOU UNDERSTAND IT.

A COURT CAN TAKE AWAY THE POWERS OF YOUR AGENT IF IT FINDS YOUR AGENT IS NOT ACTING PROPERLY.

THE POWERS AND DUTIES OF AN AGENT UNDER A POWER OF ATTORNEY ARE EXPLAINED MORE FULLY IN 20 Pa.C.S. Ch. 56.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER OF YOUR OWN CHOOSING TO EXPLAIN IT TO YOU.

I HAVE READ OR HAD EXPLAINED TO ME THIS NOTICE AND I UNDERSTAND ITS CONTENTS.

• Dated: _____ Signed: _____
Principal

Your bank will also likely request photo identification for the principal and the agent. Be sure to list your legal name as it appears on your identification and other legal documents in your Power of Attorney.

Banks must comply with the Patriot Act and collect reliable identification from individuals with whom they transact business.

An older Power of Attorney that does not contain current statutory notice provisions or the formalities required under the current statute will likely be sent to the bank's internal review team and an opinion of counsel may be needed to explain the validity of older Powers of Attorney.

Can my agent manage digital assets?

State and federal privacy laws, computer fraud laws, and restrictive terms of service agreements have posed barriers to a fiduciary's access to online accounts.

- Electronic Communications Privacy Act
- Computer Fraud and Abuse Act
- Copyright Laws
- Stored Communications Act

To remedy the unintended consequence of blocking duly appointed fiduciaries from a principal's online accounts, the Uniform Law Commission created the Uniform Fiduciary Access to Digital Assets Act (UFADAA). The act would vest fiduciaries with the authority to manage and distribute digital assets.

You've carefully selected your agent and have read and signed your Power of Attorney. Now where do I keep it?

- Provide your agent with an original
- Keep an original at home
- Maintain an electronic version
- Ask your attorney to retain an original

Empowered by a Power of Attorney

- **Health Care Powers of Attorney**
- **Mental Health Powers of Attorney**

Health Care Powers of Attorney

- **What is an Advance Health Care Directive?**
- PA statute defines it as *a health care power of attorney, living will, or a combination of both.*
- Most attorneys include a Health Care Power of Attorney and Living Will in a single document.

Health Care Powers of Attorney

What is a Health Care Power of Attorney?

- A writing made by a principal designating a health care agent to make health care decisions for the principal.



Health Care Powers of Attorney

What is a Living Will?

- A writing that expresses the principal's wishes and instructions for health care and health care decisions when the principal is determined to be incompetent and has an end-stage medical condition or is permanently unconscious.



Health Care Powers of Attorney

Health Care Power of Attorney v. Living Will

- HCPoA – as the name implies, requires someone else be named to act on your behalf.
- Living Will – document stands on its own if an agent under a HCPoA is not named.

Health Care Powers of Attorney

Who is eligible to execute a HCPoA/LW?

- An individual of sound mind may execute a HCPoA/LW if the individual is:
 - 18 years of age or older;
 - Has graduated from high school;
 - Is married; or
 - Is an emancipated minor.

Health Care Powers of Attorney

What are HCPoA/LW execution requirements?

- The individual must sign and date the document.
- It must be signed by two witnesses who are 18 years of age or older (notarization not required).
- Must identify the principal and agent and authorize agent to make health care decisions for principal.
- A HCPoA/LW that is properly executed in another state is considered valid in Pennsylvania.



Health Care Powers of Attorney

When does a HCPoA become *operative*?

- When a copy is provided to the attending physician;
- And the attending physician determines that the principal is incompetent.
- Note: Many HCPoAs provide that they are effective without a finding of incompetence.
- Once provided to a health care provider, the HCPoA becomes part of the medical record.

Health Care Powers of Attorney

When does a Living Will become *operative*?

- When a copy is provided to the attending physician;
- And the attending physician determines that the principal is:
 - Incompetent and in an end-stage medical condition;
or
 - Permanently unconscious.

Health Care Powers of Attorney

When does a Living Will become *operative*? (cont.)

- Once provided to a health care provider, the Living Will becomes part of the medical record.
- Physician must certify in writing that the principal has an end-stage medical condition or is permanently unconscious.
- The absence of a Living Will does not create a presumption as to the individual's preference regarding life-sustaining treatment.

Health Care Powers of Attorney

How is the term “incompetent” defined?

- A condition where an individual, as determined by a health care provider, is either:
 - Unable to understand a proposed health care decision;
 - Unable to make that health care decision; or
 - Unable to communicate that health care decision to anyone else.

Health Care Powers of Attorney

How is the term “end-stage medical condition” defined?

- An incurable and irreversible medical condition caused by injury, disease, or illness that will, to a reasonable degree of medical certainty, result in death, despite the introduction or continuation of medical treatment.

Health Care Powers of Attorney

How is the term “end-stage medical condition” defined? (cont.)

- The term is not intended to preclude treatment of a disease, illness, or condition, regardless of severity, even if incurable and irreversible if:
 - The patient would benefit from treatment, including palliative care; and
 - Such treatment would not merely prolong the process of dying.

Health Care Powers of Attorney

How is the term “permanently unconscious” defined?

- A condition diagnosed with reasonable medical certainty as a total and irreversible loss of consciousness and capacity for interaction with the environment.
- Includes an irreversible vegetative state and irreversible coma.

Health Care Powers of Attorney

Who may serve as agent?

- Unless related to the principal by blood, marriage, or adoption, the agent may not be:
 - The principal's attending physician or other health care provider.
 - An owner, operator, or employee of the health care provider where the principal is receiving care.

Health Care Powers of Attorney

Who *should* serve as agent?

- Spouse, child, sibling, friend?
- Person with medical background?
- Combination of these?
- Agents may serve jointly.
- Successor agents may be named.



Health Care Powers of Attorney

What are the typical HCPoA/LW powers?

- An agent has “the authority to make any health care decision and to exercise any right and power regarding the principal’s care, custody, and health care treatment that the principal could have made or exercised,” including the right to request and examine medical or health care information.
- Note: The principal may limit this authority.

Health Care Powers of Attorney

What is a “health care decision”?

- A decision regarding an individual’s health care, including, but not limited to, the following:
 - Selection and discharge of a health care provider;
 - Approval or disapproval of a diagnostic test, surgical procedure or program of medication;
 - Directions to initiate, continue, withhold or withdraw all forms of life-sustaining treatment, including instructions not to resuscitate;



Health Care Powers of Attorney

What is a “health care decision”? (cont.)

- A decision regarding an individual’s health care, including, but not limited to, the following:
 - Admission to a medical, nursing, residential or similar facility, or entering into agreements for the individual’s care;
 - Making anatomical gifts, or after the death of the individual, disposing of the remains or consenting to autopsies.

Health Care Powers of Attorney

What is “life-sustaining treatment”?

- Any medical procedure or intervention that, when administered to a patient or principal who has an end-stage medical condition or is permanently unconscious, will serve only to prolong the process of dying or maintain the individual in a state of permanent unconsciousness.

Health Care Powers of Attorney

Countermand

- If competent, the principal, by informing the attending physician, may countermand any health care decision made by the agent.
- If *not* competent, the principal may countermand any health care decision made by the agent that would remove life-sustaining treatment.
- A countermand does not affect the agent's authority under a HCPoA/LW.

Health Care Powers of Attorney

Physician Compliance with HCPoA

- Once a HCPoA is operative, attending physicians and health care providers must comply with decisions of the agent to the same extent they would decisions of the principal.
- Health care that is necessary to preserve life shall be provided if the principal is neither in an end-stage medical condition or permanently unconscious.



Health Care Powers of Attorney

Physician Compliance with Living Will

- Once a Living Will is operative, attending physicians and health care providers must either:
 - Comply with the Living Will and decisions of the health care agent; or
 - Must inform the agent that they are not able to comply and make “every reasonable effort to assist” in transferring the principal to another health care provider that will comply with the Living Will.



Health Care Powers of Attorney

Duration and Effect of HCPoA/LW

- Unless the document states a time for termination, it remains valid until revoked, notwithstanding passage of time.
- If one part of a HCPoA/LW is found to be invalid, the balance of the document continues in effect.
- A health care decision made by an agent is effective without court approval.

Health Care Powers of Attorney

Guardianship

- The principal may nominate a guardian of the person in the HCPoA to serve if the principal is later adjudicated an incapacitated person.
- If a guardian is appointed, the court's order should determine the extent to which the agent's authority remains in effect.
- If the agent is still authorized to act, the agent is accountable to the principal *and* to the guardian.

Health Care Powers of Attorney

Expenses

- A health care agent may incur reasonable expenses on behalf of the principal.
- E.g., purchase of insurance or authorization of a partially covered medical procedure.
- Reimbursement may be made by an agent under a financial PoA or by guardian of the estate.

Health Care Powers of Attorney

What if no health care agent has been named?

- A health care *representative* may make health care decisions under the following circumstances:
 - The individual is eligible to execute a HCPoA/LW;
 - No guardian of the person has been appointed; and
 - No agent has been named or the agent is not available.
- A health care representative's authority is similar to that of a health care agent.

Health Care Powers of Attorney

Who may serve as health care representative?

- In order of priority:
 - Spouse (unless action for divorce is pending)
 - Adult child
 - Parent
 - Adult sibling
 - Adult grandchild
 - Adult individual familiar with the principal's values, religious and moral beliefs, and preferences regarding health care



Health Care Powers of Attorney

What if health care representatives disagree?

- If more than one member of a class assume authority to act and other members do not agree, the decision of the majority shall prevail.
- If the class is equally divided, no decision shall be made and health care treatment shall be provided “in accordance with accepted standards of medical practice.”

Health Care Powers of Attorney

Revocation of HCPoA

- A principal who is competent may revoke a HCPoA in writing or by personally informing the health care provider that the HCPoA is revoked.
- A HCPoA may also be revoked by the court or by a guardian of the person.
- Terminates at death, save for anatomical gifts, disposal of remains, and consenting to autopsies.

Health Care Powers of Attorney

Revocation of Living Will

- A Living Will may be revoked at any time and in any manner by the principal, regardless of the principal's physical or mental condition.
- The revocation becomes part of the medical record.

Health Care Powers of Attorney

Divorce

- If a spouse is named as agent under a HCPoA and, thereafter, either spouse files an action in divorce, the designation of agent is automatically revoked unless the HCPoA clearly indicates that the designation was meant to survive.

Health Care Powers of Attorney

Adverse Consequences?

- Withholding life-sustaining treatment from the principal, such that death results, does not constitute suicide or homicide.
- Withholding life sustaining treatment from an insured individual shall not invalidate or impair the life insurance policy, even if the policy provides otherwise.

Mental Health Powers of Attorney

What is a mental health power of attorney?

- A writing made by a principal designating an individual to make mental health care decisions for the principal.



Mental Health Powers of Attorney

What is mental health care?

- Any care, treatment, service, or procedure to maintain, diagnose, treat, or provide for mental health, including any medication program and therapeutic treatment.

Mental Health Powers of Attorney

Who is eligible to execute a MHPoA?

- An individual of sound mind may execute a MHPoA if the individual:
- Is 18 years of age or older or an emancipated minor; and
- Has not been deemed incapacitated or severely mentally disabled.

Mental Health Powers of Attorney

What are the MHPoA execution requirements?

- The individual must sign and date the document.
- It must be signed by two witnesses who are 18 years of age or older (notarization not required).
- Must identify the principal and agent and authorize agent to make mental health care decisions on behalf of the principal.



Mental Health Powers of Attorney

When does a MHPoA become *operative*?

- When a copy is provided to the attending physician; and
- The triggering condition in the document is met (e.g., when the principal is deemed to be incapable of making mental health care decisions).

Mental Health Powers of Attorney

What are the typical MHPoA powers?

- Examples include:
 - Choice of treatment facility.
 - Preference regarding medications for psychiatric treatment.
 - Preference for participation in experimental studies or drug trials.
 - Preference regarding electroconvulsive therapy.

Mental Health Powers of Attorney

Duration and Effect of MHPoA

- Remains effective until the earlier of:
 - Revocation by the principal; or
 - Expiration of two years after the date of execution.
- Provided, however, that the MHPoA will not expire if it is operative at the time of two-year expiration date.

Mental Health Powers of Attorney

Guardianship

- If a court appoints a guardian, the court shall give preference to allowing the agent under the MHPoA to continue to serve.
- If the court transfers the agent's authority to the guardian, the guardian is bound by the provisions in the MHPoA.

Mental Health Powers of Attorney

Revocation

- A principal may revoke a MHPoA at any time unless it has been determined that the principal is not capable of making mental health decisions or has been involuntarily committed.
- Revocation is effective when it has been communicated to the attending physician.
- A MHPoA may also be revoked by the court or by a guardian of the person.



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QUESTIONS & ANSWERS

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