



# Drafting Essential Elder Law Documents

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# Brief Overview:

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# Introduction:



## Elder Law Attorney's Toolbox:

- *Durable Power of Attorney* and *Healthcare Power of Attorney and Living Will* are the most essential tools in an elder law attorney's "toolbox."
- Pursuant to Title 20 Chapter 56 (20 Pa.C.S. §§ 5601 – 5614), all *Powers of Attorney* must be drafted in conjunction with each other.
  - Powers of Attorney* shall be durable as provided in section 5604, unless provided otherwise. (20 § 5601.1). The authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.(20 § 5604.)
- Pennsylvania *POA Legislation* has recently made changes to *Power of Attorney Laws*, found in Title 20 Chapter 56 (20 Pa.C.S. §§ 5601–5612).
- Living Wills are now written with *Health Care Powers of Attorney* in a combined statutory form in 20 PA.C.S. § 5421.

# I. Durable Power of Attorney:

What makes the POA “durable?”

- Since all POA’s are presumed durable, if the Principal becomes disabled, incapacitated, or just unable to represent themselves, then in that event the authority conferred thereunder shall be exercisable notwithstanding.
- Agents under the Power of Attorney may transact business and implement health care decisions for their Principal if this authority is conveyed.
- Validly written and executed POA’s may even avoid the filing of Guardianship proceedings by third parties.
- 20 § 5608.1. Liability (a)Third party liability: imposes liability for refusal to accept a Power of Attorney, albeit, the sanctions are greatly diluted under the most recently enacted version and amendments deleting third party liability and replacing them in 20 § 5608.1(c).
- The law provides that previously executed Powers of Attorney must still be accepted if otherwise valid.
- As a practical matter, all previously drafted POAs, and other documents viewed as essential, should be reviewed at the initial interview with a prospective elder law client and periodically thereafter for changes in the law and facts.



# POA Terminology:

**Principal:** The Principal is your client.

**Agent:** A person designated by a principal in a power of attorney to act on behalf of that principal.

- As an Elder Law Attorney, you represent the Principal.
- When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and may, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian. (Rule of Professional Conduct 1.7 and Rule 1.14-Client with Diminished Capacity).



# NOTICE and Acknowledgement Requirements of a POA

- A NOTICE is always included in a Power of Attorney. This is required to be attached as the first page to every POA that is written **AND WRITTEN IN BOLD CAPITAL LETTERS**. It is to alert the Principal of the importance, gravity and purpose of the POA document they are about to sign.
- Acknowledgment of the Agent:
  - Previously, **BUT NOW REPEALED**, an agent acting under a power of attorney has a fiduciary relationship with the principal. In the absence of a specific provision to the contrary in the power of attorney, the fiduciary relationship includes the duty to:
    - exercise the powers for the benefit of the principal
    - keep separate the assets of the principal from those of an agent
    - exercise reasonable caution and prudence
    - keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.  
20Pa. C. S. Section 5601(e).
  - **THE CURRENT LAW** defines an agent as a person designated by a principal in a power of attorney to act on behalf of their principal in “good faith” and in the “best interest” of the principal. In accordance with the principals’ reasonable expectations to the extent actually known by the agent and, otherwise...Act only within the scope of authority granted in the POA... Agents Duties under Section 5601.3(a).

# Nomination of “Joint Agents”

- A principal is permitted to appoint more than one agent, who may act jointly, severally, or in any other combination that the principal may designate, but if there is no designation from the principal, then such agents shall only act jointly.
- Appropriate language to be used in the event of multiple agents: “I, PRINCIPAL, hereby appoint my sons, AGENT 1 and AGENT 2, or the survivor thereof, Agents, however,....”
- Each my Agents is empowered to act either jointly or individually and the power of Attorney shall not be affected by my subsequent disability or incapacity.”
- Problems can arise if the agents don’t agree.
- Problems can arise if the joint agents are not able to engage in financial transactions or sign checks together, so allow them to act separately.
  - It is preferable to use the first, second, or even subsequent Agents
- If updating the designation of the Agents, write an entirely new POA.

# Who may be designated as the Agent? Who may not serve as the Agent?

## May serve as the Agent:

- Banks and trust companies (Corporate Agents under Section 5607.)
- Attorneys (Grey area!)
- Trusted family members or friends
- Geriatric care managers
- Care Management Agencies
- Case Manager (if independent and neutral).

## May not serve as the Agent:

- Individuals involved in direct care (nursing home personnel)
- Individuals not acting in the best interests of their principal or with a conflict of interest.



## POA Provisions:

- The amendments contain “hot powers” that pursuant to 5601.4, Authority that requires specific and general grant of authority, in order to be included in the Power of Attorney. As a general rule, an Agent under a power of attorney may do the following on behalf of the principal or with the principal’s property ONLY if the POA expressly grants the authority and it is not otherwise prohibited by another agreement or instrument to which the authority or property is subject.
- Generally, sections (1)-(8) require specific authorization to create, amend, revoke or terminate an inter vivos trust with certain exceptions, make a gift, create or change rights of survivorship, create or change a beneficiary designation, delegate authority under the POA, waive the principal’s right to be a beneficiary of a joint or survivor’ annuity, including a survivor benefit under a retirement plan, exercise fiduciary powers that the principal has authority to delegate, disclaim property, including a power of appointment.

## POA Provisions cont.:

- Section 5603 Implementation of Power of Attorney elaborates on the implementation of all of the aforesaid powers. Unless the POA otherwise provides, gifting is subject to Section 5603(a.1). The requirements of Section 5601.4 (d) Gifts, should be scrutinized. This section extensively proscribes and describes the types and gifts that can be made. It applies to both limited and unlimited gifts, the amounts, and standards to be utilized in making gifts, which must be consistent with the principal's objectives if known, and if unknown, as relevant factors in the principal's best interest, must guide the agent. The factors serve to circumscribe and guide the agent by providing parameters and standards upon which to base gifting, or can serve to prohibit gifting by an Agent if under 20 Section 5604 (d)(2)(v), the principal did not have a personal history of making or joining in making gifts.

## POA Provisions cont.:

- Additional powers may serve to authorize or prohibit the Agent in the following actions:
  - Disallow the Agent to agree to binding arbitration This provision in a POA will serve to void if the Agent has already signed the POA, or prevent the Agent from signing Binding Arbitration provisions in a nursing home admission agreement. Desirable because the Arbitration provisions can either be a sentence or an entire separate part of an admission contract and usually contain language that the facility selects the arbitrator and their decision is binding. The ramifications also are the resident waives their right to a jury trial whereby the resident's choices of forums for instituting a civil action and prospects of even obtaining any recovery at all for their injuries, or even their death, negligence, gross or otherwise, are extremely limited or more likely, completely waived.
  - Prohibit the Agent from waiving the Principal's right to a jury trial. This is important in preserving a nursing home resident's right to a jury trial in the event the resident is injured or a plaintiff in a medical malpractice, negligence or other civil action against a nursing home or institution, or medical providers.
  - Although a Healthcare Power of Attorney and Living Will is still absolutely necessary and essential, healthcare language can be included in the Durable POA even though its scope generally concerns financial matters and the healthcare power of attorney provisions have been moved to Chapter 54 from Chapter 56.

## Conflict between Appointment of Agent in Durable POA and Healthcare POA:

- In order to avoid potential inability of each of the Agents to act in the best interests of the Principal, draft the POAS in order that the same agents are appointed in both instruments if that is the Principal's choice and that is generally preferable.
- For example, the Principal may designate the Agent in their financial POA to be their child, who is, *only herein as an example*, an accountant, and in their Health Care POA and Living Will they may designate their other child who is a nurse to serve. In the case where different individuals or even institutions are nominated, there is a potential for conflict if their financial decisions and health care choices diverge. The Agent under the Durable POA may not pay for the medical procedure or the placement decisions made by the Agent under the Healthcare POA and Living Will.

# Powers of the Agent in regards to POA's:

- Changes of Beneficiary of Life Insurance and other provisions in a POA regarding powers of the Agent in life insurance matters are set forth in Section 5603(p) Power to engage in insurance and annuity transactions. If not included in the POA instrument, the Agent is NOT permitted to change the Beneficiary of life insurance. This is a much litigated area as is (r) Power to handle interests in estates and trusts.
- Nomination Provision in a POA: In the event a guardian is ever needed, this POA provision nominates the Agent under the POA to serve, as a preference.
- The Agent must have access to the original POA or it can even already be put in place and accepted by the financial institution in the event of current or future disability, since that is the purpose of the Durable POA.
- Agents should be allowed to authorize the admission of the Principal to a hospital's behavioral health unit or other adult psychiatric inpatient program.

# Requirements for a Durable POA to be validly executed:

- The Durable POA must be signed by the Principal before a Notary Public pursuant to Section 5601(b).
- There needs to be witnesses to the Principal's signing of the POA. The Agents nominated and their successors *CANNOT* serve as witnesses, and attorney *may* serve as a witness, but not if attesting for the purposes of subsequent notarization. There must be two witnesses. Witnesses and the Principal can sign twice to emphasize the durability of the POA, as follows, " It is my desire, and I so freely state, that this Power of Attorney shall not be affected by my subsequent disability or incapacity."
- If the Principal is not able to sign their name, the power of attorney can be signed by the mark of the principal. There are rigorous requirements for the signature of another individual signing a power of attorney on behalf of and at the direction of the principal, in the event the Principal is unable to sign due to serious illness. An "X" is not required. The requirements for the number of witnesses and who may serve as a witness, and specifically regarding attorneys taking an acknowledgment of the principal who are members of the PA Bar, who may then not serve as witnesses, are very important to follow.

## Termination of a POA:

- The statute provides in Section 5605 that Powers of attorney are not revoked until notice. The death of a principal does in fact serve to prevent the agent from acting in furtherance of the deceased principal as power of attorney but does not retroactively revoke actions taken pursuant to the valid power of attorney.
- Filing a complaint in divorce results in revocation of the POA if the spouse was designated as the Agent. POAs can be drafted to permit the spouse to continue to serve in the event of divorce, if specified therein.
- The POA can be revoked by the Principal for any reason such as to expand or limit the powers they are delegating, or more frequently, to change the Agent if they have fallen out of favor or are no longer a good choice to serve.
- In the event of a vacancy in the position of agent, a new POA should be drafted, if capacity to do so exists. This is to prevent the necessity of filing for a Guardian if no one is nominated as the POA, since neither a spouse nor a relative or heir have an automatic right or statutory priority to serve.

# Types of POA's for Limited Purposes:

- IRS POA Form 2828 : It must be completed and executed before a notary in order for an Agent to act for their Principal. The IRS will generally NOT accept any other POA.
- Real Estate Powers of Attorney. A Principal may draft a POA for the limited purpose such as the sale of real estate or other related matters due to their being unable to attend settlement due to illness or disability or even being on vacation or too far away to attend settlement. Their Agent then has the authority to sell or take whatever actions have been delegated to them under the POA.
  - The original POA must be recorded at the Recorder of Deeds with the Deed and it will subsequently be returned. This is a concern if there is only one comprehensive POA since it is required to be relinquished in order to be recorded since the original POA is then not available if needed. That may be a good reason to prepare a POA for each property with the address of the real estate, if it is anticipated to ever be needed.
  - However, title companies are increasingly resistant to accept POA's and frequently there are time constraints in waiting for a title company's legal department to review and scrutinize your properly drafted POA. There are alternative arrangements whereby a Principal with capacity, can sign a "Deed Package" prior to settlement before a notary, subsequent to their attorneys review, of course, and an authorization to their Agent or another person, to sign the Settlement Statement and other documents at settlement.





# Abuse and Fraud by an Agent under a POA:

- The goal of POA laws are to prevent abuse, neglect, exploitation or abandonment of the older adult principal. The paramount concern is to allow all remedies, such as Court hearings on petitions filed, to protect the person or estate of the older adult principal.
- Jurisdiction and venue in proceedings under Chapter 20, are in Orphans' Court, in the county in which the principal is domiciled, a resident, or residing in a long term care facility.
- PA county District Attorney's Offices and the PA Attorney General's Office are creating and staffing Elder Abuse Units and Economic Crimes divisions to educate and prosecute crimes against seniors committed not only by scammers, but increasingly, by their Agents under their POAs and family members.
- Financial Institutions are on constant alert for POA fraud and abuse.

## Abuse and Fraud by an Agent under a POA cont.:

- The IRS, as aforesaid, does not accept a POA other than their own Form 2828.
- Social Security offices do NOT accept POAS and instead require “Representative Payees” to be appointed to transact business and make inquiries and provide instructions to their office. There is a preference for appointment of a family member by Social Security and they must qualify and then file a short form annually to state what whether they have used the SS recipient’s money for the SS recipient.
- Recorders of Deeds, the US postal service and other government agencies are increasingly taking proactive measures to prevent fraud and abuse under POA’s and otherwise, against seniors. The county Area Agency on Aging can also initiate and investigate concerns and complaints involving abuses of POA’s sua sponte and otherwise.
- The Orphans’ Court Bench and Elder Law Bar, government agencies and elder care professionals in Montgomery County, PA, formed the Equal Access to Justice Roundtable. They are instrumental in taking the lead to protect and educate on this topic.

## II. HEALTHCARE POWERS OF ATTORNEY AND LIVING WILLS:

- 20 Pa. C.S. Section 5421 et seq. codifies the Health Power of Attorney law.
- One of the most important provisions is wherein the Principal appoints a Health Care Agent, and an Alternative or alternatives, and includes their address and telephone number where they can best be contacted, to serve to enforce the instructions of the Principal.
  - The nomination of Agents and alternatives prevents avoid and absence of authority whereby it might be necessary to file a Petition for an Emergency Guardian to be appointed.
- Healthcare and Living Will Decisions: The principal selects by writing “I DO WANT” and also by initialing their choices from a menu of healthcare options in the event of end-stage medical condition or other extreme irreversible medical condition. If they do not want to receive any life prolonging procedures, they leave the spaces blank.

# HEALTHCARE POWERS OF ATTORNEY AND LIVING WILLS cont.:

- A grant of HIPAA authority should be included whereby, upon my agent's request, any information, oral or written, regarding my physical or mental health, including, but not limited to, medical and hospital records and what is otherwise private, privileged, protected or personal health information, such as health information as defined and described in the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191, 110 Stat. 2024 1936) (a/k/a "HIPAA"), 42 U.S.C. 1320(d) and 45 CFR 160-164.)
- Principal's Instructions to their Agents:
  - The Principal can initial whether their decisions must be followed by their agent or are guidance to their agent.
  - Joint or several, or multiple Agents: The same guidance as set forth above in the POA section, applies, where conflicts or lack of agreement between Co-Agents can result in the agents, families, or health care providers' legal counsel filing for and Emergency Guardianship Order or clarification by an Orphans' Court Judge. Absent the appointment of an Agent, such as in an older, internet or deficient Health Care POA and Living Will, Advance Directive or some other document purporting to serve as one, litigation can ensue at this very difficult time of life.
  - An appropriate selection of Agent who will act in the best interests of their Principal, and their alternatives in the event of inability to serve, is most important.
  - Absent a written Health Care Power of Attorney and Living Will, reference may be made to the Medical Consent Act (11 PS 2513) and Standby Guardian Act (23 Pa. C.S. 5601).

### III. LAST WILL AND TESTAMENT:



- Although Wills are an essential tool of elder law planning, this discussion will deal only with some limited aspects of drafting Wills of concern to elder law attorneys since there are many exhaustive treatments of this essential estate planning document.
- The same concerns surrounding capacity issues and undue influence, etc. determine who is present when meeting with our client, and inquiries about who is the client.

## IV. OUT OF HOSPITAL DO NOT RESUSCITATE ORDERS

- Although clients may request that this order be prepared by an elder law attorney, only a physician can sign an Out of Hospital DNR.
- Act 169 incorporated this section in chapter 54 although it is now contained in Chapter 54 of the PEF Code.
  - The Act provides that bracelets, necklaces, and instruction cards for the refrigerator, for example, can be issued, again by the physician to supplement, not supplant a Living Will. It is designed to prevent the imposition of life prolonging measures by EMS technicians, family members and others, so they are not initiated in contravention of the patient's wishes.
- POLST is a Pennsylvania Order for Life Sustaining Treatment. See [www.portal.state.pa.us/portal/server.pt/document/0001974/polst form pdf](http://www.portal.state.pa.us/portal/server.pt/document/0001974/polst%20form.pdf).



## V. RETENTION AND STORAGE OF DOCUMENTS

- Safe deposit box vs. Fireproof Safe in home or elsewhere.
- See PBA Non-Binding Formal Opinion 99-120. Retain until client's death plus probate period.
- Proper pre-planning including preparation and execution and providing of financial and healthcare POAs , will enable the Agent to act on behalf of their Principal when needed.

**That is why the Durable Power of Attorney is such an integral, essential component of your elder law practice.**

