



Power of Attorney Agent vs. Court Appointed Guardian

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Power of Attorney



**“An instrument granting someone authority to
act as agent or attorney-in-fact for the grantor”**

- Black's Law Dictionary, Eighth Ed.

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Who is named in a POA document?



- **Principal** – one who authorizes another to act on his/her behalf
 - Example: Facility Resident
 - **Agent** – one who is authorized to act for or in place of another
 - Example: Resident's son, daughter, family member, or other third party
- ✕ The Principal authorizes the Agent to act on the Principal's behalf

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What is required in a Power of Attorney Document?*



- **Must be Dated**
- **Signed by Principal** – by signature or mark, or by another individual on behalf of and at the direction of the Principal, if the Principal is unable to sign, but specifically directs another individual to sign the Power of Attorney.
- **Witnessed by 2 people who are:**
 - Over Age 18
 - Not the named Agent
 - Not someone who signed on behalf of the Principal
 - Not the Notary Public
- **Includes a Notice** – signed and dated by Principal
- **An Acknowledgment** – contains specific language and signed by the Agent
- **Acknowledged by a Notary Public**

*Under Pennsylvania law, as of January 1, 2015, and only as it applies to a financial POA document. Does not cover Healthcare POA documents or a POA drafted under the laws of another state.

-20 Pa. C.S. § 5601

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What does the “Notice” look like?



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.

.....
(Principal)

.....
(Date)

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Powers Must be Expressly Granted in the POA



If a power is not granted in the POA document, the Agent has no authority to act regarding the same.



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Are there Different kinds of POA Documents?

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Power of Attorney

<u>Healthcare POA</u>	vs.	<u>Financial POA</u>
<ul style="list-style-type: none"> • Explains the Principal's wishes regarding Medical Treatment • Agent makes medical decisions in accordance with Principal's instructions • <u>Does not</u> give the Agent power over financial decisions for the Principal 		<ul style="list-style-type: none"> • Authorizes the Agent to transact business for the Principal • Agent may be granted over 22 powers, including: <ul style="list-style-type: none"> ○ Power to Make Gifts ○ Create a Trust for the benefit of the Principal ○ Engage in Real Property Transactions ○ Engage in Banking

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Power of Attorney



General POA

vs.

Springing POA

- The Agent may act on the Principal's behalf upon execution of the POA document



- The Power of Attorney becomes effective upon a future occurrence, such as the Principal's incapacity
- The Agent cannot act on the Principal's behalf until the "Springing" occurrence happens

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Power of Attorney—Do's and Don'ts



Do:

- Require the Agent to present the POA Document to Facility personnel
- Encourage Residents with capacity to consider a POA
- Thoroughly read the entire document... Is it for Healthcare or Financial? What specific powers are granted? What limitations are defined?

Don't:

- Never assume there is a POA without being provided a written Document
- Never add POA to Facility records if no POA document is provided to the Facility
- Never witness and/or Notarize a POA document for a Resident = **Conflict of Interest!**
- Never provide a blank or sample POA document to a resident or family member
- Do not suggest a specific person as POA Agent
- Never take an agent's word regarding the powers granted in a POA document

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Incapacitated Person



- **“Incapacitated person” (“IP”):** An adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.
- People who appear to have capacity or score high on a Mini-Mental Exam (MME) may still benefit from a Guardian.

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Less Restrictive Alternative



- **20 Pa. C.S. § 5502:**
Recognizing that every individual has unique needs and differing abilities, it is the purpose of this chapter to promote the general welfare of all citizens by establishing a system which permits incapacitated persons to participate as fully as possible in all decisions which affect them, which assists these persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources and developing or regaining their abilities to the maximum extent possible and which accomplishes these objectives through the use of the least restrictive alternative; and recognizing further that when guardianship services are necessary, it is important to facilitate the finding of suitable individuals or entities willing to serve as guardians.
- The Court determines if a permanent Guardian is necessary, or if there is a less restrictive alternative; i.e.: a Power of Attorney or Limited Guardian

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Who may serve as Guardian?



- Any qualified individual, corporate fiduciary, non-profit corporation, or county agency
- Guardian cannot have a conflict of interest with the Incapacitated Resident

* **FACILITY PERSONNEL CANNOT ACT AS GUARDIAN FOR A RESIDENT** *

- The Court prefers family members, but the family must be acting in the best interest of the Incapacitated Resident

See 20 Pa. C.S. § 5511

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Are there different types of Guardians?



Guardian Of the Estate

- A guardian responsible for taking care of the real and personal property and finances of the incapacitated person (IP)
- Example: May assist with financials and DHS MA Application

Guardian Of the Person

- A guardian responsible for assisting the incapacitated person (IP) with medical, residential, and other personal living decisions
- Example: May assist in determining medical decisions or where the IP should live

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Emergency Guardianship



- A Facility may be able to Petition for an Emergency hearing under the following conditions:
 - The AIP has an emergent medical condition;
 - Failure to appoint a Guardian may result in irreparable harm to AIP
- Emergency Guardianship Order in effect up to 72 hrs.
 - The Court may extend the Emergency Order for up to 20 days
 - After expiration, a full Guardianship proceeding must be initiated

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When to Consider Guardianship



- Resident having difficulty making care decisions and/or understanding instructions
- Resident unable to participate in the DHS MA process and gather required verification items
- Resident's family stopped visiting, participating and/or assisting the Resident
- Third party mishandling the Resident's assets and/or income
- Risk Management

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RED FLAG WARNINGS

- ✦ ABSENTEE FAMILY
- ✦ FAMILY FAILS TO SIGN ADMISSION PAPERS
- ✦ FAMILY FAILS TO COOPERATE
- ✦ FAMILY MISSES APPOINTMENTS / DEADLINES
- ✦ MISSING PATIENT INCOME (*Two (2) Month Alarm*)
- ✦ FAMILY CLAIMS TO BE POWER-OF-ATTORNEY (BUT PROVIDES NO PROOF)
- ✦ FAMILY FAILS TO PROVIDE VERIFICATION DOCUMENTS
- ✦ FAMILY IS HOSTILE
- ✦ FACILITY IS SUSPICIOUS BAD ACT(S) MAY BE OCCURRING

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Guardianship: Quick Facts

- Appoints independent advocate for Resident
- **Risk liability avoidance for Facility**
- Majority of Residents Meet Criteria
- **Efficient and cost effective strategy**
- Hearing within 45 +/- Days of Filing
- **Process to obtain information for Medicaid**
- Establishes basis for resolving disputes
- **Terminates at Death**

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POA vs. Guardian



Power of Attorney

- Principal needs capacity to appoint an Agent
- Agent **may** act on Principal's behalf, but **not** required to act
- Agent may only act at the direction of the Principal
- No reporting requirement
- May be revoked by Principal

Guardian

- Court determines incapacity
- Required to act in IP's best interest
- Must file yearly reports with the Court
- "Final Decree" - must petition the court for a new/ substitute Guardian

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End of Life Decisions: POA vs. Guardian



- **POA** – May possibly make end of life decisions if the power is granted in the Healthcare POA document
- **Guardian** – Cannot make end of life decisions. Needs to go before a judge and obtain Court permission for end of life decision making such as Hospice, DNR, DNI

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Thank-You!



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