

WHAT'S YOUR SUPER POWER?

UNDERSTANDING AND USING POWERS OF ATTORNEY
FOR HEALTHCARE AND FINANCES



"Well, I was bitten by a radioactive lawyer and ended up with the power of attorney."

Your power is what you make it!



WHAT WE WILL COVER

- Overview—Definitions and Basics
- Agency Law
- Advance Directives for Health Care
- Financial Powers of Attorney
- Other Options
- Additional Estate Planning Q & A



OVERVIEW—DEFINITIONS

- **Principal**—The individual who creates a power of attorney to name someone else to act for the individual
- **Agent**—The person named to act in a power of attorney (also known as “attorney-in-fact”)
- **Durable**—allows the agent to act even if the principal is incapacitated

OVERVIEW—BASICS

- Generally, there are two types of powers of attorney
 - Healthcare
 - Financial
- Primary consideration: **trustworthiness**
- Qualifications of the potential agent:
 - Will follow your wishes or act in your best interest
 - Abilities
 - Availability

AGENCY LAW

- The basis of agency law is rooted in business law, where the principal, agent, and any third parties would want a clear understanding about who is authorized to act in certain situations.
- Traditionally, an agent could only act for the principal if the principal had the capacity to supervise the agent (so, non-durable).
- The idea of durability came later, primarily for personal arrangements such as healthcare decisions or managing personal finances.
- Even when an agent is appointed, the principal continues to have full authority to act regarding the principal's affairs.

ADVANCE DIRECTIVES— HEALTHCARE POWER OF ATTORNEY

- Allows you to designate someone to make healthcare decisions for you when you cannot do so for yourself.
- Decisions may involve medical care, treatment, nursing home arrangements, and use of feeding tubes.
- In most cases, a healthcare POA is “activated” by a statement signed by 2 physicians or a physician and a psychologist, nurse practitioner, or physician assistant.
- Best to name one agent to act, with alternates (but not concurrent agents).



ADVANCE DIRECTIVES— LIVING WILL

- Formally known as Declaration to Physicians.
- Allows you to give specific directions on end-of-life topics, such as feeding tubes and life support measures.
- Applies if you are in a terminal condition or a persistent vegetative state.
- Supplements but does not replace a healthcare POA.

ADVANCE DIRECTIVES— SOME OPTIONS FOR HEALTHCARE POAS

- Wisconsin Statutory Form—available from the Wisconsin Department of Health Services
- Honoring Choices
- Five Wishes
- Attorney-Drafted Document (may be based on one of the above versions)

ADVANCE DIRECTIVES— RECOMMENDATIONS FOR HANDLING YOUR HEALTHCARE POA

- Discuss your wishes and thoughts with your agent and loved ones—the conversation is key.
- Give a copy of your completed POA and other advance directives to your doctor or clinic to be included in your medical records.
- Carry your POA (paper copy or electronic file) with you when you travel.

A man with a long, full, grey beard and mustache is wearing a white headband and bright green sunglasses. He is holding a blue tennis racket with both hands, pointing it towards the camera. He is wearing a white polo shirt and is standing on a wooden floor against a solid yellow background.

Can you feel the
power?

FINANCIAL POWER OF ATTORNEY— TOPICS TO CONSIDER

- Breadth of Authority
 - General: covers all actions you could take
 - Specific: covers only certain actions (for example, signing at a real estate closing)
- When It Becomes Effective
 - Immediately: often used for spouses or others for convenience
 - “Springing”: effective only when the principal becomes incapacitated
- Whether to name multiple agents
 - Co-agents are allowed
 - Decide whether or when they may act separately



FINANCIAL POA—DANGEROUS POWERS

Some powers are considered “dangerous” or “hot” powers if they allow the agent to make gifts of the principal’s assets or take actions that may change the principal’s estate plan.

Examples:

- Power to make gifts or transfer assets.
- Power to change beneficiaries on life insurance, retirement accounts, annuities, or other types of accounts or assets.
- Power to create, amend, or revoke a trust.

OTHER FINANCIAL ARRANGEMENTS— TRUSTS

- Trusts can serve a variety of purposes, most often for estate planning and management of property and assets
- Terminology:
 - Settlor or Grantor—the person who creates the trust
 - Trustee—the person who manages the trust
 - Beneficiary—the person who receives the benefit of the trust
- A trust can provide management of assets during lifetime (similar in many ways to a financial POA)
- A trust can settle an estate—avoids probate, with greater flexibility and privacy



OTHER FINANCIAL ARRANGEMENTS— ACCOUNT-SPECIFIC OPTIONS

- Bank-specific POA—You can complete a POA that only applies to accounts at a specific financial institution.
- Joint Accounts—Gives your joint owner full access to the account, plus transfers the account to the joint owner at the death of an owner.
- Designated Signor—Allows someone other than the account owner to sign checks, but no other action.
- Representative Payee—Designation by the Social Security Administration for someone to receive and manage Social Security benefits for an individual.

OTHER FINANCIAL ARRANGEMENTS— SUPPORTED DECISION MAKING AGREEMENT

- A **supported decision-making agreement** is a formal document to designate a “supporter” who can
 - Help gather information
 - Help make decisions
 - Help communicate decisions
- A supporter is not a substitute decision maker, power of attorney, or guardian.
- The person making the agreement has an impairment that limits one or more major life activities.

OTHER FINANCIAL ARRANGEMENTS— CONSERVATORSHIP

- Voluntary court proceeding to transfer authority to the **conservator**.
- An individual petitions the county court, stating they cannot manage their own financial affairs.
- The conservator typically will have broad financial authority to act.
- The court does not declare the person incompetent.
- A conservatorship can only be ended with court approval.
- A conservator is not authorized to make healthcare decisions.



You can learn more from various legal guides and articles. For example, the State Bar of Wisconsin has resources for the general public, and many of its articles for attorney are open to all. Start at wisbar.org.

ADDITIONAL ESTATE PLANNING Q & A— TRUSTS

- Key terms:
 - **Trust** is the legal arrangement to manage and distribute the assets in the trust.
 - **Settlor or Grantor** is the one who creates the trust.
 - **Beneficiary** is the one for whose benefit the trust exists.
 - **Trustee** is the individual or entity to manages the trust.
- A trust can be created for nearly any purpose:
 - Multi-generational legacy
 - Pets
 - Beneficiary with disabilities

ADDITIONAL ESTATE PLANNING Q & A— SPECIAL NEEDS TRUSTS

- A primary purpose of a special needs trust is to **preserve the beneficiary's eligibility** for means-tested public benefits, often based on the beneficiary's disability.
- Secondarily, a special needs trust provides **long-term management** if a beneficiary does not have the ability to manage assets on their own.
- Fully **discretionary** distribution standard.
- **First-party special needs trust** contains assets of the individual with the disability—this type of trust requires **payback** to the state for Medicaid benefits received.
- **Third-party special needs trust** contains assets of someone other than the beneficiary.

ADDITIONAL ESTATE PLANNING Q & A— PAY-ON-DEATH, TRANSFER-ON-DEATH

- **Pros:**

- Easy to make or change.
- Fairly straightforward for beneficiary to claim and receive assets.
- Asset does not go through probate or other estate administration.
- No legal fees to set up or settle, in most cases.

- **Cons:**

- May be difficult to keep track of all accounts for changes or consistency.
- May not include contingencies if a beneficiary predeceases the owner.
- No structure to claim and distribute assets.

ADDITIONAL ESTATE PLANNING Q & A— COMPENSATION FOR FIDUCIARIES

- Fiduciaries may include agent in a financial power of attorney, personal representative of a will, or trustee of a trust.
- Compensation is usually described in the document—often the term “fair and reasonable” is used to describe compensation. Yes, this is a fluid term.
- Under Wisconsin statutes, a personal representative for an estate is entitled to a fee of 2% of the value of the estate.
- Corporate trustees have a fee schedule, with fees that often range from 1.5%-2% of assets under management as an annual fee.

ADDITIONAL ESTATE PLANNING Q & A— AUDIENCE QUESTIONS

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