

ACTEC[®]

THE AMERICAN COLLEGE OF
TRUST AND ESTATE COUNSEL

**GUIDE FOR AGENTS
ACTING UNDER
DURABLE FINANCIAL POWERS OF
ATTORNEY**

by the Fiduciary Matters Subcommittee
of the ACTEC Practice Committee*

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FOREWORD

Your attorney, as a Fellow of the American College of Trust and Estate Counsel (ACTEC), has commended this Guide to you because you are interested in what it means to be an Agent acting under a Durable Financial Power of Attorney. Perhaps you are considering naming someone to act as your Agent, or perhaps someone has suggested that you act as an Agent.

With that in mind, a committee within the College has prepared this Guide for the use of its Fellows and their clients. The text is a consensus of suggestions and considerations. Although reading the text will not fully equip you to act as an Agent, this Guide offers you an appreciation of what it means to be an Agent. For those considering acting as an Agent, the goal is not to encourage or discourage but rather to insure that any such decision is made with sufficient information to understand the basic ramifications of serving in this role.

The accuracy and applicability of issues raised in this Guide, and the possibility that there may be other relevant issues not raised here, should be addressed by your attorney in the context of the laws and practices in the jurisdiction whose laws govern particular Principals and Agents.

For information about the American College of Trust and Estate Counsel (and its Practice Committee, which authored this Guide), please see the Appendix.

GENERAL STATEMENT

A power of attorney (“POA”) is a document by which an individual (a “Principal”) authorizes another individual (an “Agent”) to engage in transactions on behalf of the Principal. Ordinarily, a POA is completely revocable and amendable by the Principal. In addition, if a Principal becomes disabled or incapacitated, a “normal” (i.e., non-durable) POA is revoked by operation of law and the Agent no longer has legal authority to act on behalf of the Principal.

Often, a Principal will create one POA to authorize an Agent to engage in legal and financial transactions on behalf of the Principal; and then will create a separate POA to authorize an Agent to make health care and medical decisions on behalf of the Principal. These are typically prepared as separate POA documents because they deal with very different decisions to be made on behalf of the Principal and, as a result, the Principal often desires to name different people as Agent under each document. Although many of the rules regarding POA’s apply to both financial POA’s and health care POA’s, this guide deals primarily with issues involving financial POA’s.

A “durable” power of attorney (“DPOA”) is a special kind of power of attorney that, pursuant to state law and the terms of the POA, permits an Agent to act for the Principal even if the Principal has become incapacitated. Many DPOA’s are written so that the authority of the Agent to act does not even begin unless and until the Principal becomes incapacitated. A DPOA is a very useful document for a person to have as part of his/her estate planning arsenal to authorize someone to act on his/her behalf if he/she becomes incapacitated so that it is not necessary to incur the time, expense, and aggravation that often is involved in a court proceeding to appoint someone as his/her legal Guardian or Conservator.

An Agent appointed under a DPOA is a fiduciary. As such, an Agent is held to a very high standard of care to make sure that he/she is acting in the best interests of the Principal in carrying out the Principal’s wishes as set forth in the DPOA.

TERMS OF THE APPOINTMENT AS AGENT

A. Designation as Agent

A DPOA will specify when an Agent's authority to act under the DPOA begins. Often, if the DPOA has been executed as part of an individual's estate planning "package" of documents -- which often includes a Will, a Trust, a DPOA for legal/financial matters, and a health care power of attorney (HCPOA) for health care and medical decision-making -- the Agent is not given any immediate authority to act under the DPOA. Instead, in some states the DPOA may be written as a "springing" power which provides that the Agent's authority to act does not become effective unless and until some event (e.g., the "incapacity" of the Principal) occurs. Alternatively, the DPOA may provide that the Agent's authority to act is "unconditional" or "immediate" and begins at the time that the DPOA is executed. In either event, the Agent needs to have a clear understanding that (i) the Agent has been given the authority to act, and (ii) when that authority to act begins.

B. Acceptance of Nomination/Appointment

Because it can sometimes be unclear when an Agent may be able to act under the DPOA (such as when the authority to act does not begin unless and until a Principal is determined to be "incapacitated"), it can be important for the Agent to provide some objective evidence indicating that the Agent has accepted the nomination to act and that the Agent now believes that he/she is acting as Agent. Many DPOA documents provide that the Agent may sign the DPOA evidencing the Agent's intention to accept the nomination as Agent and to begin acting under the DPOA.

C. Scope of the Agent's Authority

Some DPOA documents provide an Agent with specific, limited authority (e.g., to engage in a particular transaction, to transfer the Principal's assets to the Trustee of the Principal's revocable trust, etc.). In the case of a "limited authority" DPOA, the Agent needs to make sure that the Agent understands the limits of the Agent's authority and that the Agent does not try to do anything that exceeds the scope of that authority.

In many instances, however, a DPOA provides the Agent with broad authority to deal with most or all of the Principal's assets and to engage in "any transaction" in which the

Principal might have been able to engage. If the Agent has been given broad authority, the Agent needs to determine what the Agent knows about the Principal's legal and financial matters. Once the Agent begins to act on behalf of the Principal, the Agent may need to make sure the Agent has made a concerted effort to identify all assets (and any other legal or financial arrangements) of the Principal so that the Agent can adequately deal with all of them. It is fairly easy for an Agent to identify and deal with assets of which the Agent is aware (e.g., the Principal's residence, autos, bank accounts, etc.). It may be much more challenging to determine other matters (e.g., savings accounts, retirement accounts, businesses, life insurance policies, secondary residences, lawsuits, tax matters, etc.) for which the Agent may also need to take action.

GENERAL DUTIES OF AN AGENT

In general, an Agent's duty is to act on behalf of a Principal to carry out the Principal's wishes and directions (to the extent the Agent knows what they are) and to act in the Principal's best interests. These duties may sometimes conflict (e.g., what a Principal has requested an Agent to do may not, in the opinion of the Agent, be in the Principal's best interests). Nonetheless, usually they are more or less the same.

To carry out these duties, an Agent normally needs to identify and take possession of all of the Principal's assets. The Agent must also determine the Principal's legal obligations (e.g., monthly payments) to make sure that they are being met in a timely manner.

In order to protect a Principal, it is often desirable (and may be necessary) for the Agent to contact third parties (e.g., bankers, investment advisors, realtors, etc.) with whom the Principal has business relationships to make sure the third parties know that the Agent has authority to act on behalf of the Principal and is exercising that authority. If the Agent has any concerns about the appropriateness or wisdom of the Principal transacting business, the Agent may want to make the third parties aware of those concerns so that the third parties will deal solely with the Agent (or at least make the Agent aware of whatever efforts the Principal might be making to transact business as well).

POWERS OF AN AGENT

A broad general DPOA may authorize an Agent to act on behalf of the Principal to engage in any transaction, and to behave in any manner, that the Principal may have been able to do individually. Alternatively, a DPOA may, by its terms, limit the authority of an Agent to engage in only certain transactions on behalf of the Principal. Therefore, it is always important for the Agent to be very familiar with the DPOA document and what authority it does (or does not) confer upon the Agent.

Many states have statutes that set forth a lengthy itemization of the powers that an Agent under a general DPOA may exercise. In addition, it is common for most DPOA documents to itemize, in great detail, a variety of powers (often with language such as “including but not limited to the following”) to make it clear that the Principal intended the Agent to have very broad authority to act on behalf of the Principal. There is usually a great deal of overlap between the state statutes and the powers set forth in DPOA documents.

KEEPING ASSETS SECURE

Once an Agent begins to act under a DPOA, one of the Agent’s most important responsibilities is to keep the Principal’s assets secure. At a minimum, that means identifying the assets, confirming they are secure, and taking appropriate steps to be sure that they will remain secure. Ordinarily, the Agent can secure assets by taking possession of them or notifying third parties (e.g., banks, financial institutions, etc.) that the Agent has a DPOA and, therefore, has authority to act with respect to the assets.

There can be a further problem, however. Because the assets still belong to the Principal, there is the possibility that, although the Agent has the DPOA (with the authority and responsibility to manage the Principal’s assets for his/her benefit), the Principal may attempt to assert dominion and control over the same assets, thereby undermining the efforts of the Agent to secure and protect the assets. Depending upon why the Agent is acting on behalf of the Principal (e.g., due to the “incapacity” of the Principal), it may be necessary for the Agent to take steps to prevent the Principal from attempting to assert control over the assets. Those steps may include

such things as (i) taking physical possession of assets (e.g., automobiles); (ii) moving assets from accounts in the Principal's name into new accounts in the Agent's name (expressly disclosing the "Agency" arrangement for the accounts); (iii) notifying third parties (i.e., banks, investments advisors, brokerage houses, etc.) that the Agent is now acting and that the third parties should not permit the Principal to deal with the assets; and/or (iv) recording the DPOA and/or some declaration by the Agent that now the Agent, rather than the Principal, will be dealing with the Principal's interests in real property. In taking these steps, the Agent may want to notify the Principal's attorney or obtain the Agent's own legal advice.

INVESTING ASSETS

Once an Agent has secured the Principal's assets, the Agent must make sure that the assets are (or continue to be) invested properly. This may involve working with the Principal's investment advisor(s) to continue to carry out the Principal's investment objectives. Often, however, an Agent may discover that the Principal does not have a well-thought-out investment program and that the Agent (with professional help) needs to step in and alter the investments to those more suitable for the Principal.

Because an Agent is a "fiduciary" and, therefore, is held to a very high standard of care in acting in the best interests of the Principal, the Agent may need to revisit a Principal's investment plan and change it to be more "prudent" and more consistent with the objectives and obligations imposed on Trustees and other fiduciaries under the Prudent Investor Act applicable in the particular state where the Principal lives. This may require making changes to a Principal's investments even though the Agent knows that the Principal, if competent and able to act, would object to those changes. Also, such changes may have adverse income tax consequences (since changes in investments may cause the Principal to have income realization events or to incur capital gains or losses arising from the sale of assets). These investment decisions can get complicated and controversial. Therefore, often it is advisable, and even necessary, for the Agent to consult with investment advisors, accountants, and lawyers before embarking on any significant changes in a Principal's investment plan.

COMMUNICATIONS WITH PRINCIPAL AND OTHER INTERESTED PARTIES

Regardless of how and when the Agent becomes appointed and begins acting on behalf of the Principal, it is incumbent upon the Agent to maintain regular communication with the Principal to make sure that the Agent is acting in the manner that the Principal intended. This may involve regular conversations with the Principal and periodic written communications and/or accountings to the Principal. It may also involve consultation with the Principal's other advisors (e.g., lawyer, accountant, investment advisor, etc.).

Beyond the communications with the Principal, a more delicate question has to do with the extent (if any) to which the Agent may or should provide information to other "interested parties" besides the Principal. Ordinarily, the legal and financial information of the Principal is confidential. Typically, the Agent becomes aware of that confidential information only because of the authority granted to the Agent by the DPOA. Therefore, ordinarily the Agent should not be sharing that confidential information with others without express authority from the Principal. If the DPOA does not expressly authorize the Agent to provide that information to third parties, the Agent may not be comfortable sharing that information with others unless the Agent (or the others) has obtained a court order authorizing the Agent to share that information.

COMPENSATING THE AGENT AND ADVISORS

An Agent acting under a DPOA may be entitled to compensation. At the outset, the Agent must determine if there is anything in the DPOA document expressly authorizing or prohibiting compensation. Often, a DPOA is used to authorize a family member – e.g., an adult child – to act as Agent on behalf of the Principal. In such instances, it may be expressly stated (or implied) that the Principal expects the Agent to act without compensation.

If compensation is permissible, the Agent needs to determine whether or not the Agent desires to be compensated. If so, then the Agent needs to determine the basis by which the Agent expects to be compensated. Often, the Agent may expect to be compensated for the

Agent's time expended acting under the DPOA on behalf of the Principal. In such circumstances, the Agent will need to determine what amounts of time are reasonably required to carry out the Agent's responsibilities under the DPOA and what is a reasonable rate of compensation to pay that particular Agent for that time. In other circumstances, the Agent may determine that it is appropriate to compensate the Agent on the basis of the value of the assets for which the Agent has responsibility.

In either event, the Agent needs to determine how the Agent thinks the Agent should be compensated and why that arrangement is "reasonable" for both the Principal and the Agent. In addition, at some point the Agent will need to justify that compensation to the Principal or to the Principal's successors in interest (i.e., at the Principal's death). If there is any uncertainty regarding the appropriateness of the compensation arrangement, the Agent may seek to obtain prior approval of the compensation arrangement from (i) the Principal, if competent; (ii) the Principal's presumptive successors in interest; or (iii) a court.

COMPLIANCE WITH TAX LAWS

Often an Agent will need to make sure that the Principal is complying with the Principal's income tax filing and payment responsibilities. Even if the Principal is "incompetent," the Principal is the Taxpayer and the Agent simply is making sure that the Principal complies with the Principal's responsibilities as a Taxpayer.

In addition to worrying about tax compliance, the Agent may need to engage in some "tax planning" on behalf of the Principal. In making investment decisions (particularly whether to sell assets), the Agent needs to consider the Principal's income tax basis in the Principal's assets and what (if any) taxable gain might result from a sale. Particularly when dealing with a Principal who is elderly and/or has a short life expectancy, it may be necessary to consider retaining an asset with a low income tax basis (relative to its fair market value) until the Principal dies (at which time the asset should get a new income tax basis equal to date-of-death value so that a sale can then be made without any taxable gain). Alternatively, if the Agent is considering selling the Principal's residence, the Agent may want or need to sell the residence while the Principal still is alive but at a time when the sale may permit the Principal to exclude some of the

gain from the sale (under present tax law, up to \$250,000 for an individual and \$500,000 for a married couple if the sale occurs within certain time parameters) from the Principal's taxable income.

Separately, the Agent needs to be concerned whether or not the Agent, under the terms of the DPOA, holds any powers (e.g., the power to make gifts from the Principal to others, including the Agent) that might be treated as general powers of appointment in the hands of the Agent, such that the Agent might be deemed to be the "owner" of the Principal's assets and/or might be deemed to be the "transferor" if the Agent makes gifts to third parties. The Agent should seek advice from appropriate tax advisors.

COMPLIANCE WITH OTHER LAWS

A DPOA creates an "agency" relationship between the Principal and the Agent. Ordinarily, this is a "fiduciary" relationship that requires the Agent to act solely and exclusively in the best interests of the Principal and not to act for the personal benefit of the Agent.

Many states have strict rules regarding what an Agent may and may not do while exercising the Agent's authority and carrying out the Agent's responsibilities under the DPOA. In particular, many states now have statutes dealing with the "financial exploitation" of "vulnerable adults" by individuals who are in a position of "trust and confidence" to those vulnerable adults – including, of course, Agents acting under DPOA's. Therefore, Agents need to be sure that they understand what they may and may not do under the DPOA without running afoul of such statutes.

Also, many Principals execute DPOA's in the hope that, if the Principal becomes incapacitated or otherwise unable to transact business or make decisions on the Principal's behalf, the named Agent will be able to act on the Principal's behalf without the need for a court proceeding to obtain the appointment of a Guardian and/or Conservator for the Principal. Nonetheless, there are situations in which a Guardian or Conservator may be appointed for an individual notwithstanding the fact that the individual has a DPOA. In those instances, ordinarily the court-appointed Guardian or Conservator will have primacy and the Agent under the DPOA either will have no authority or will have authority to act but will be required to take

direction from, and be accountable to, the court-appointed fiduciary (rather than just to the Principal). In such circumstances, an Agent may need to seek legal advice to make sure the Agent is not acting beyond the scope of his/her authority.

TERMINATION OF AGENT'S APPOINTMENT AND AUTHORITY

Because an Agent, once acting, may have substantial authority and responsibility in acting on behalf of the Principal, it is important that the Agent (and others) have a clear understanding regarding if and when the Agent's authority has terminated. Often, this will occur when the Principal dies. Upon the death of the Principal, the Agent's authority to act terminates by operation of law (whether or not this is expressly stated in the language of the DPOA). Nonetheless, many times the Agent (and third parties interacting with the Agent) may not be aware that the Principal has died. In those circumstances, typically any acts performed by the Agent after the Principal's death but before the Agent is aware of the death are valid; and third parties who rely upon the apparent authority of the Agent to act are protected in so relying.

In other circumstances, an Agent may stop acting as Agent even though the Principal still is alive, perhaps because the Principal no longer is incapacitated, the Agent no longer desires to act as Agent, or a court has appointed someone else to act as the Guardian or Conservator for the Principal. In such circumstances, the Agent needs to make sure that the Agent has communicated to the Principal (and probably others) that the Agent has stopped acting as Agent so that there is no confusion on the part of the Principal or others regarding whether the Agent still has, and is exercising, the Agent's authority to act on behalf of the Principal.

When the Agent stops acting as Agent, whether due to the death of the Principal or for some other reason, the Agent needs to deliver to a successor (e.g, the Principal, a successor Agent, a court-appointed Guardian or Conservator, a Personal Representative for the Principal's probate estate, a Trustee of the Principal's Trust, etc.) any assets that belong to the Principal; account to the Principal (or others) for what the Agent has done while acting as Agent; and obtain some kind of release from further accountability or liability for the Agent's conduct as Agent.

AFTERWORD

Durable Financial Powers of Attorney are enormously useful documents. By executing a DPOA, a Principal can designate a person of his/her choosing to act on his/her behalf without the need for a court proceeding. By the same token, an Agent acting under a DPOA may have enormous authority. He/she may be able to access a Principal's bank and investment accounts, sell real property, or enter into contracts (e.g, senior living arrangements) that may impact on the Principal significantly.

An Agent acting under a DPOA needs to have a clear understanding regarding when his/her authority begins or ends; what he/she may (or may not) do; what he/she must (or must not) do; how he/she may terminate the arrangement; and how he/she can be assured that he/she has no responsibility or potential liability once he/she is done acting.

This Guide is provided as a starting point to help an Agent address these issues. Ultimately, an Agent should consult with an attorney in his/her jurisdiction to make sure he/she is complying with his/her responsibilities as Agent. If there is any uncertainty in that regard, it may be necessary or desirable for the Agent to obtain direction and guidance from an appropriate court to be sure that the Agent is acting properly.

APPENDIX

The American College of Trust and Estate Counsel (ACTEC) is a professional association comprising approximately 2,500 lawyers from throughout the United States. Fellows of the College are nominated by other Fellows in their geographic area and are elected by the membership at large. Fellows are selected on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing, and teaching.

Among the purposes of ACTEC are improving and reforming estate and trust laws, maintaining an association of lawyers skilled and experienced in the preparation of wills, trusts, and related documents (e.g., powers of attorney), and bringing together qualified lawyers whose character and ability will contribute to these purposes.

Within ACTEC there are various national working committees of Fellows, among which is the Practice Committee, whose members concentrate on how trust and estate lawyers can increase the efficiency of their practices, how they should deal with practical and ethical problems, and how they can expand the scopes of their practices.

Information about ACTEC may be found at www.actec.org.