Power of attorney

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A **power of attorney** (**POA**) or **letter of attorney** is a written authorization to represent or act on another's behalf in private affairs, business, or some other legal matter. The person authorizing the other to act is the *principal*, *grantor*, or *donor* (of the power), and the one authorized to act is the *agent*, *donee*, or *attorney*[1] or, in some common law jurisdictions, the *attorney-in-fact*. Formerly, a power referred to an instrument under seal while a letter was an instrument under hand, but today both are under hand (i.e., signed by the donor), and therefore there is no difference between the two.[*citation needed*]

Contents

Attorney-in-fact

The term *attorney-in-fact* is used in several states of the United States in place of the term *agent* in power of attorney documents and should be distinguished from the term *attorney-at-law*. An attorney-at-law in the United States is a lawyer — someone licensed to practice law in a particular jurisdiction. The Uniform Power of Attorney Act employs the term *agent*.[2]

As an agent, an attorney-in-fact is a fiduciary for the principal, so the law requires an attorney-in-fact to be completely honest with and loyal to the principal in their dealings with each other. If the attorney-in-fact is being paid to act for the principal, the contract is usually separate from the power of attorney itself, so if that contract is in writing, it is a separate document, kept private between them, whereas the power of attorney is intended to be shown to various other people.

In the context of the unincorporated reciprocal inter-insurance exchange (URIE) the attorney-in-fact is a stakeholder/trustee who takes custody of the subscriber funds placed on deposit with him, and then uses those funds to pay insurance claims. When all the claims are paid, the attorney-in-fact then returns the leftover funds to the subscribers.

Structure and requirements

Capacity of the grantor

Main article: Capacity (law)

The person creating a power of attorney, also known as the "grantor", can only do so when he/she has the requisite mental capacity. However, if the donor loses capacity (from, for example, Alzheimer's disease or a head injury in a car crash) to grant permission at any time after the power of attorney has been created, the document will probably stop being effective and enforceable unless the grantor specifically states in that power of attorney that he/she wishes the document to remain in effect even if he/she becomes incapacitated. This type of power of attorney, that stays in effect even after the grantor becomes incapacitated, is commonly referred to as a durable power of attorney. It is important to note that if someone is already incapacitated, it is not possible for that person to sign and/or execute a valid power of attorney. A person must have capacity in order to validly sign legal documents, including a power of attorney. If a person does not have the capacity to execute a power of attorney (and does not already have a durable power of attorney in place), often the only way for another party to act on their behalf is to have a court impose a conservatorship.

Oral and written powers of attorney

Depending on the jurisdiction, a power of attorney may be oral and whether witnessed or not, will hold up in court, the same as if it were in writing.[3] For some purposes, the law requires a power of attorney to be in writing. Many institutions, such as hospitals, banks and, in the United States, the Internal Revenue Service, require a power of attorney to be in writing before they will honor it, and they will usually keep an original copy for their records.

Equal dignity rule

The **equal dignity rule** is a principle of law that requires an authorization for someone performing certain acts for another person to have been appointed with the same formality as required for the act the representative is going to perform. This means, for example, that if a principal authorizes someone to sell the principal's house or other real property, and the law requires a contract for the sale of real property to be in writing

(which is required under the Statute of Frauds in most U.S. jurisdictions), then the authorization for the other person to sign the sales contract and deed must be in writing too.

Signatures and notarization

In order for a power of attorney to be a legal document it must be signed and dated at a minimum by the principal.[4] This alone, however, is not usually considered sufficient if the legality of the document is ever challenged by a third party.[*citation needed*] Having the document reviewed and signed (and often stamped) by a notary public increases the likelihood of withstanding such a challenge.[*citation needed*] However, such notarization is *not* always necessary for such a document to be considered legal — in California and in South Carolina a power of attorney is considered legally valid by the state if it is signed by the principal, by the agent, and then either by **two witnesses** OR by a **single** notary public;[5] in Arizona and Illinois, a power of attorney requires notarization and the signature of at least one witness. Each state has a specific process and it is important to confirm the most recent version.

Types of power of attorney

A power of attorney may be *special* or *limited* to one specified act or type of act, or it may be *general*, and whatever it defines as its scope is what a court will enforce as being its scope. (It may also be limited as to time.)

Durable power of attorney

Under the common law, a power of attorney becomes ineffective if its grantor dies or becomes "incapacitated," meaning unable to grant such a power, because of physical injury or mental illness, for example, unless the grantor (or principal) specifies that the power of attorney will continue to be effective even if the grantor becomes incapacitated. This type of power of attorney is called "power of attorney with durable provisions" in the United States or "enduring power of attorney" elsewhere. In effect, under a durable power of attorney, the authority of the attorney-in-fact to act and/or make decisions on behalf of the grantor continues until the grantor's death.[6]

Health care power of attorney

In some jurisdictions, a durable power of attorney can also be a "health care power of attorney". Such a power of attorney is commonly called a "living will". This particular affidavit gives the attorney-in-fact (proxy) the authority to make health care decisions for the grantor, up to and including terminating care and ending life supports. The grantor under a living will can typically modify or restrict the powers of the agent to make end-of-life decisions. [7] In many jurisdictions, a health care power of attorney is also referred to as a "health care proxy" and, as such, the two terms are sometimes used interchangeably.[8]

Relationship with advance health care directive

Related to the health care power of attorney is a separate document known as an advance health care directive or "living will". A living will is a written statement of a person's health care and medical wishes but does not appoint another person to make health care decisions.[9] Depending upon the jurisdiction, a health care power of attorney may or may not appear with an advance health care directive in a single, physical document. For example, the California legislature has adopted a standard power of attorney for health care and advance health care directive form that meets all the legal wording requirements for a power of attorney and advance health care directive in California.[10] Compare this to New York State, which enacted a Health Care Proxy law that requires a separate document be prepared appointing one as your health care agent.

Springing power of attorney

In some U.S. states and other jurisdictions it is possible to grant a *springing power of attorney*; i.e., a power that only takes effect after the incapacity of the grantor or some other definite future act or circumstance. After such incapacitation the power is identical to a durable power, but cannot be invoked before the incapacity. This may be used to allow a spouse or family member to manage the grantor's affairs in case illness or injury makes the grantor unable to act.[11] If a *springing* power is used, care should be given to specify exactly how and when the power *springs* into effect. As the result of privacy legislation in the U.S., medical doctors will often not reveal information relating to capacity of the principal unless the power of attorney specifically authorizes them to do so.

Determining whether or not the principal is "disabled" enough for the power of attorney to "spring" into action is a formal process. Springing powers of attorney are not automatic, and institutions may refuse to work with the attorney-in-fact. Disputes are then resolved in court, which is of course a costly, and usually unwanted, procedure.

Unless the power of attorney has been made *irrevocable* (by its own terms or by some legal principle), the grantor may revoke the power of attorney by telling the attorney-in-fact it is revoked; however, if the principal does not inform third parties and it is reasonable for the third parties to rely upon the power of attorney being in force, the principal may still be bound by the acts of the agent, though the agent may also be liable for such unauthorized acts.[12]

Standardized forms

Standardized forms are available for various kinds of powers of attorney, and many organizations provide them for their clients, customers, patients, employees, or members. However, the principal, or donor, should exercise caution when using a standardized POA form obtained from a source other than a lawyer because there is considerable variation in approved formats among the states.[*citation needed*] In some states statutory power of attorney forms are available.[13] Care in using these forms is important because some agents have used their authority to steal the assets of vulnerable individuals such as the elderly (see elder abuse).[*citation needed*]

Specialized uses

Proxy voting

Robert's Rules of Order notes that proxy voting involves granting a power of attorney. The term "proxy" refers to both the power of attorney itself and the person to whom it is granted.[14]

Finance

In financial situations wherein a principal requests a securities broker to perform extensive investment functions on the principal's behalf, independent of the principal's advice, power of attorney must be formally granted to the broker to trade in the principal's account. This rule also applies to principals who instruct their brokers to perform certain specific trades and principals who trust their brokers to perform certain trades in the principal's best interest.

Legal situation by country

England and Wales

In English law, anyone with capacity can grant a power of attorney. These can be general (i.e., to do anything which can legally be done by an attorney), or relate to a specific act (e.g., to sell freehold property). A power of attorney is only valid while the donor has the capacity to ratify the attorney's actions, unless it is made in the form of a lasting power of attorney and registered with the Office of the Public Guardian.[*citation needed*] This new form of power of attorney was introduced in 2007 under the Mental Capacity Act 2005 and replaced the former enduring power of attorney, although EPAs correctly made before the law changed are still valid. EPAs only need to be registered if the donor has since lost capacity.

It should be noted that many of the provisions in the earlier paragraphs above use terminology different from either common usage in the UK or terms used in the Mental Capacity Act 2005. Examples are enduring power of attorney, advance directive, and notary public.

Russian Law

In accordance with the laws of Russia i.e. the clause 185 of the Civil Code, a power of attorney can be made both in written form and notarized[15]. The power of attorney to act, requiring a notarial certificate (so-called «notarial form»), shall be certified by a notary.

There is a requirement of notarization of POA in the case of making a contract which is subject to a special state registration (particularly, real property[16]).

POA, as stated in the clause 186 of the Civil Code of Russian Federation, must contain a date issue[17]. A POA without such information is void.

Predstavitelstvo, Doverennost Power of attorney can only be made revocable. The grantor

is entitled to cancel the POA at any time at his sole discretion. Any waiver of this right is void, as it is stipulated by Civil Code.

Ukrainian Law

Predstavnytstvo see chapter 17 of Civil Code of Ukraine

- by law
- by agreement
- commercial

See also

- *Cestui que*
- *Delegata potestas non potest delegari*
- Enduring power of attorney
- Estate planning
- Escrow
- Lasting power of attorney
- Advance health care directive

References

1. **^** Under Louisiana state law only, the agent is referred to as a "mandatary". See Louisana Civil Code Art. 2989 (http://www.legis.state.la.us/lss/lss.asp?doc=110025)
2. **^** Uniform Power of Attorney Act, 2006 (http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm)
3. **^** "Power of Attorney" (http://www.law.cornell.edu/wex/power_of_attorney) . Cornell Legal Information Institute. http://www.law.cornell.edu/wex/power_of_attorney. Retrieved 22 September 2011.
4. **^** "Making a Financial Power of Attorney" (http://www.nolo.com/legal-encyclopedia/durable-financial-power-of-attorney-29936.html) . Nolo. http://www.nolo.com/legal-encyclopedia/durable-financial-power-of-attorney-29936.html. Retrieved 27 July 2011.
5. **^** CA Codes – SECTION 4120-4130 (http://www.leginfo.ca.gov/cgi-bin/displaycode?section=prob&group=04001-05000&file=4120-4130)
6. **^** Clark et al., Elias (2007). *Gratuitous Transfers: Wills, Intestate Succession, Trusts, Gifts, Future Interests, and Estate and Gift Taxation*. St. Paul, MN: Thomson/West. pp. 310. ISBN 978-0-314-16040-9.
7. **^** "Living Wills And The Durable Power Of attorney For Health Care" (http://www.ksbar.org/public/public_resources/pamphlets/living_wills.shtml) . Kansas Bar Association. http://www.ksbar.org/public/public_resources/pamphlets/living_wills.shtml. Retrieved 2008-05-03.
8. **^** "Health Care Power of Attorney & Health Care Proxy" (http://shrvl.com/5gj9q) . CSHIP. http://shrvl.com/5gj9q. Retrieved 22 September 2011.
9. **^** "Health Care Power of attorney" (http://www.nupplegal.com/health-care-power-attorney.html) . NUPP Legal. http://www.nupplegal.com/health-care-power-attorney.html. Retrieved 2008-05-03.
10. **^** Clark et al., Elias (2007). *Gratuitous Transfers: Wills, Intestate Succession, Trusts, Gifts, Future Interests, and Estate and Gift Taxation*. St. Paul, MN: Thomson/West. pp. 311. ISBN 978-0-314-16040-9.
11. **^** "What is a Power of Attorney?" (http://www.multiurl.com/s/0tWj) . POAH.

http://www.multiurl.com/s/0tWj. Retrieved 27 July 2011.
12. **^** See Power of Attorney Revocation (http://www.medlawplus.com/askalawyer/poa/poarevocation.tpl)
13. **^** Examples are California Statutory Form Power of Attorney (http://www.ssrplaw.com/files/ca_stautory_pofa.pdf) , New York Form Power of Attorney (http://easternabstractny.com/pdf/POA-new.PDF) and Wisconsin Form Power of Attorney (http://www.dhs.wisconsin.gov/forms/advdirectives/F00036.pdf) . See Link To Power of Attorney Statutes for all 50 States (http://www.medlawplus.com/library/legal/durablepowerofattorney.htm) .
14. **^** RONR (10th ed.) p. 414
15. **^** See the Civil Code of Russian Federation (in Russian) [1] (http://base.garant.ru/10164072/10/#1010)
16. **^** See the clause 16 of the Law of Russian Federation #122-ФЗ "On state registration of rights to real property and related transactions" (in Russian) [2] (http://base.garant.ru/11901341/3/)
17. **^** See the Civil Code of Russian Federation (in Russian) [3] (http://base.garant.ru/10164072/10/#1010)

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