

Understanding the POWER of Power of Attorneys

Douglas G. Chalgian, Certified Elder Law Attorney ©2011



It is not uncommon to become involved in legal disputes where someone is troubled by the way a “power of attorney” is behaving. Often, I find that part of the problem is that the people involved are confused about some basic rules regarding power of attorneys in Michigan, what they are authorized to do, and when. These documents play a critical role in the legal system. With our aging population, disputes involving their use are increasing rapidly. This article will hopefully allow the reader to be more sophisticated about this important topic.

In Michigan there are two kinds of power of attorneys (POAs): medical power of attorneys, more accurately referred to as “patient advocate designations” (PADs), and durable financial power of attorneys (DFPOAs). To understand what a POA can do and when, it is first of all important to determine which of these two types you are talking about.

Other terms that are important to understand the meaning of when discussing POAs are “principal” (which means the person who created the document) and “agent” (which means the person who is nominated to act). For a PAD, the agent is also appropriately referred to as the “patient advocate.”

Michigan’s Medical Power of Attorney (“PAD”)

What the person nominated to act in a PAD can do, and when they can do it, is strictly prescribed by Michigan law. A patient advocate can only make decisions about the principal’s medical care, and then, only when that person is unable to make their own decisions.

A PAD is never valid unless two doctors (or one doctor and one licensed psychologist) certify that the principal is unable to make their own decisions.

Further, for a PAD to be activated, the nominated agent must sign an “acceptance,” the provisions of which are also specifically spelled out in Michigan law.

Michigan’s Durable Financial Power of Attorney (DFPOA)

An agent appointed under a DFPOA can manage the property (assets and income) of the principal.

Unlike the PAD, with a DFPOA it is not required that the

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principal be unable to make their own decisions for the agent to have authority to act. A DFPOA can be drafted to include this requirement, in which case the DFPOA would be called “springing,” but most DFPOAs are not springing and are instead “immediately effective.”

Likewise, at this time, it is also not required that an agent appointed under a Michigan DFPOA sign an acceptance before acting, although many DFPOAs include acceptances and the Michigan legislature is currently considering imposing such a requirement.

Most importantly, unlike the PAD in which the things the agent can do are carefully limited by law, the breadth of the power of an agent appointed under DFPOA is a function of what the DFPOA actually states. For instance, a DFPOA can be very narrow, authorizing the agent to only handle matters related to a particular piece of real estate and only for a limited period of time; or it may be very broad, allowing the agent to amend the principal’s trust agreement, change the beneficiaries on the principal’s life insurance policies, or even give away the principal’s property. It is also the law that the powers granted to an agent under a DFPOA will be narrowly interpreted. This means that even if the DFPOA says that an agent has the authority to do “anything the principal could do if competent,” extraordinary powers, such as making gifts, will not be implied but instead must be specifically stated in the document.

Court Appointed Decision Makers

When a person is unable to make their own decisions about money or medical care, and where there is no PAD or DFPOA in place, the remedy is often to go to court and have someone appointed “guardian” (person who can make medical decisions) or “conservator” (person who can make financial decisions). In most cases, the court will not impose a guardianship or conservatorship over someone who has created a PAD or DFPOA because doing so would be unnecessary in light of the existence of those documents.

Conclusion

In both cases, a PAD and DFPOA, the agent is required to act in the principal’s best interest. Legally, we say the agent has a “fiduciary duty” to the principal. When an agent misuses their authority under these documents, they are said to have “breached” their fiduciary duty, and courts may become involved in addressing such breaches.

While the importance of POAs is most keen for older people (due to the increased likelihood of becoming incapacitated), any adult can create them, and nearly everyone is well advised to do so. In discussing POAs with clients, I often tell them that my wife and I asked each of our children to sign both a PAD and a DFPOA as soon as they turned 18. Our reasoning was that if something unexpected should occur, we would want the authority to talk to their doctors, and to be involved in their care and management of their finances, without having to rush to court.

ATTORNEY DOUGLAS G. CHALGIAN is the only lawyer in Michigan who is both certified in elder law by the National Elder Law Foundation, as well as a Fellow with the American College of Trust and Estate Counsel. Mr. Chalgian is the current Chair of the Probate and Estate Planning Section of the Michigan State Bar, and former Chair of the Elder Law and Disability Rights Section. Mr. Chalgian was one of about a dozen attorneys on the Michigan



Trust Code Drafting Committee, and has been selected twice as one of the top 100 lawyers in Michigan by Super Lawyers Magazine. Mr. Chalgian writes and speaks regularly on the topics of estate planning, elder law, and probate court litigation.

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