

INSTRUCTIONS TO POWER OF ATTORNEY AGENTS

Being named as an Agent pursuant to a Property or Health Care Power of Attorney is a significant responsibility. Agents acting under Powers of Attorney have an obligation imposed by law to use due care to act for the benefit of the Principal in accordance with the terms of the agency, and agents shall be liable for the negligent exercise or abuse of authority under a Power of Attorney. Any benefit that the Agent obtains from the Principal while acting pursuant to a Power of Attorney is presumed in the law to be a breach of the fiduciary duty that an Agent owes to a Principal, and that presumption can only be overcome by clear and convincing evidence that no fraud, undue influence or other improper behavior resulted in the benefit.

In addition to understanding the fiduciary duty, an Agent should consider the responsibility. The oversight of another person's financial affairs or health care is a significant undertaking that requires diligence. It can also be an under appreciated role, both by the Principal, especially if dementia begins to set in, and by other family member who may be jealous or suspicious. In order for an Agent to protect oneself and to fulfill the obligations that come with acting pursuant to a Power of Attorney, an Agent should observe the following principles:

Record Keeping. An Agent is required to keep records of all receipts, disbursements, and significant actions taken as an Agent, and an Agent must be prepared to provide an accounting to any government agency, court or interested individual.

Family Diplomacy. Because friends and family often view Agents acting under Powers of Attorney with suspicion, especially when viewed from a distance, maintaining openness and communication is vital. Being defensive and secretive will only invite suspicion and possibly a challenge. An Agent has broad discretion, within reason, to make decisions and to act for the benefit of the Principal and should not be overly concerned with potential criticism.

Co-Mingled Funds. Under no circumstance should an Agent co-mingle the Principal's funds with the Agent's own funds. An Agent must keep separate accounts. An Agent must never borrow from the Principal's funds, even with the Principal's permission. Any benefit an Agent obtains through the agency will be viewed by suspicion and distrust, and that benefit will be presumed in the law as a breach of the fiduciary duty.

Termination of Agency upon Death. An Agent's authority under a Power of Attorney terminates at the death of the Principal, with the exception that an Agent under a health Care Power of Attorney may dispose of remains unless that authority is limited in the Power of Attorney.

Being named an Agent of a Power of Attorney is an honor, because the Principal has reposed enormous trust in the Agent, but it is also a weighty responsibility. An Agent cannot be compelled to act. A Power of Attorney grants an Agent the authority to act, but any action taken by an Agent who has been appointed is voluntary. If an Agent does not wish to accept the grant of authority, the Agent should notify the Principal and any Successor Agent of that determination in writing. If an Agent does exercise the authority given in a Power of Attorney, the Agent should strive to handle that authority with devotion to the Principal's best interests and with the same diligence and care as the Agent attends to the Agent's own affairs.