



## Punch Up Your Power of Attorney

A durable financial power of attorney (DPOA) is one of the most important lifetime documents our clients will sign. Unfortunately, by the time clients reach an elder law attorney, they usually have a “plain jane” DPOA that merely gives the agent the powers listed in *Tenn. Code Ann.* §34-6-109.

*“A punched up DPOA for older adults will provide more options when the client needs an elder law attorney to assist the client or her family in creating.”*

That statute provides that the attorney-in-fact has the authority to generally do any act or deed that ought to be done, receive and disburse money, borrow money, transfer property to a revocable trust created by the principal and more. However, when planning to pay for care, the DPOA needs to contain more powers than contained in the statute.

These are suggestions to “punch up” your durable financial power of attorney form. A punched-up DPOA for older adults will provide more options when the client needs an elder law attorney to assist the client or her family in creating a plan to pay for care. Other benefits include avoiding conservatorship and easing the handling of business affairs for the client and her agent.

- **Spell out the authority granted in *Tenn. Code Ann.* §34-6-109.** This is the “laundry list” statute that sets forth all the powers an agent has under a DPOA. If this section is merely incorporated by reference, the bank or any other entity will want to know what this statute authorizes the agent to do. It is better to spell out the “powers,” so that the document is clear and user-friendly.

- **Encourage your client to appoint only one person as the agent, and then another person as successor.**

Describe the circumstances under which a successor may serve and the proof necessary to show that the first agent is unable to serve, e.g., death or disability (define how disability is determined and

proved), or the agent’s written or verbal resignation. Appointing co-agents risks disputes between the co-agents that may not be resolved unless a family member pursues a conservatorship. The desire to appoint co-agents is usually a result of the client believing she will hurt a child’s feelings or that she wants each agent to police the other.

- **Include an accounting clause.** A better way to handle these issues is first, to advise the client that she needs to appoint the person who is best at handling business affairs and balancing a checkbook. Second, include an accounting clause in your DPOA form so that the agent must account to the principal and the principal’s children quarterly or annually as to how the agent has managed the funds.

- **Do not advise clients to jointly title accounts with the agent.** By jointly titling accounts with the agent, the principal is subject to the co-owner’s judgment creditors and the joint owner claiming that one-half of the account is hers. According to the Medicaid rules, the entire account belongs to the Medicaid applicant unless the joint owner can prove that she contributed money from her funds.

- **More drawbacks with jointly titled accounts.** Another drawback is that the principal loses control of the funds because a joint owner may convert those funds for her benefit

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without breaching a fiduciary duty. Jointly titling accounts may defeat the client's testamentary wishes. Since the account or cd is jointly titled, after Momma's death, the surviving co-owner may claim that the agent is entitled to all the funds, and she does not have to share with her siblings, which under the law is true, but it defeats Momma's testamentary wishes.

- **Grant the agent authority to appoint a successor agent.** This will be helpful if the original successor agent refuses or is unable to serve.

- **If using a springing power of attorney,** define how the power of attorney springs into effect. Clearly outline a description of the proof required so that the agent may act.

- **If using a springing power of attorney,** include the authority that the agent has to access medical information necessary to show that the principal is disabled and unable to handle her financial affairs.<sup>1</sup>

- **Give the agent unlimited authority to make gifts.** This is specifically allowed by *Tenn. Code Ann.* §34-6-110. In planning for payment for long-term care, elder law attorneys need the agent to have authority to give more than the annual federal gift tax exclusion.

- **Include the authority** for the agent to establish Medicaid exception trusts. Although the Uniform Trust Code provides that a person establishing a trust must have capacity to establish a trust, I do not believe that this section was intended to apply to the Medicaid exception trusts authorized by federal and state law, especially if the authority is granted in the DPOA.<sup>2</sup> These exception trusts are necessary and must be established quickly so that Medicaid will pay for the applicant's care. Usually, by the time an elderly client needs Medicaid, she may very well lack the ability or capacity to execute a trust. The Medicaid exception trusts are the pooled trust, Qualified Income Trust (QIT or Miller Trust), and a payback supplemental needs trust for a child with a

disability. The Social Security Administration accepts, and in fact requires, the agent or conservator to transfer funds to a payback special needs trust. A payback special needs trust is a tool to protect a person's Supplemental Security Income and Medicaid health care benefits. In addition, the Department of Human Services, which handles the financial aspect of qualifying for Medicaid, accepts and approves the attorney-in-fact establishing these trusts on behalf of the principal.

- **Give the agent authority to make transfers of real and personal property or income** to a trust including an Irrevocable Trust, Qualified Income Trust, Special Needs Trust, Pooled Trust or Revocable trust. The beneficiaries should be consistent with the principal's testamentary wishes.

- **Give the agent the authority to transfer real property to a caregiver child, spouse, sibling joint owner or child with a disability.** These are exceptions to the Medicaid penalty rules regarding transfers for less than fair market value. Explain this authority by spelling out the conditions under which these transfers may be made and how to prove the exception is applicable. Include a hold harmless clause so that the other heirs will not sue the agent for making transfers to these special people.

- **Grant the agent the authority to make a transfer to himself from the principal's assets** *if so advised by an elder law attorney.* Consult with a title attorney if transferring real property to the agent. The first agent may need to resign temporarily so that the successor agent may execute the actual transfer of real property.

- **Brokerage accounts.** Even though the authority to "establish, utilize and terminate brokerage accounts" is stated in *Tenn. Code Ann.* §34-6-101, encourage your clients to file the DPOA with the brokerage company. The company may also require the principal to execute the company's DPOA. This will make access easier if your client follows the company's policy rather than waiting on the company's legal department to review

the DPOA you have prepared.

- **Grant the agent authority to change beneficiary designations on life insurance or other accounts.**

While this seems dangerous, there are many issues with beneficiary designations, including retirement accounts when developing a plan to pay for long-term care. First, beneficiary designations may defeat the client's testamentary wishes. Often, the client has designated different children on various certificates of deposit (cds). Most children will refer to the cd as "my cd." Then, when the agent must withdraw funds from a cd in order to pay for care, he has a conflict of interest in determining which cd to access. If agent Billy Joe accesses the cd with a beneficiary designation to Sally Sue, then she is going to be upset that he did not access "his" cd to pay for Momma's care. This issue may be resolved by agent Billy Joe changing or removing the beneficiary designations so that the funds remaining at Momma's death flow through her will to all the children. Changing beneficiary designations on retirement accounts may be needed when planning for a married couple.

- **More reasons to grant the agent authority to change beneficiary designations:** Often, we see life insurance policies that have only one beneficiary designation. That beneficiary may be deceased, and there is no contingent beneficiary. These are usually policies with very little pay out. If the beneficiary issue is not addressed, then after your client's death it may be more expensive to open probate<sup>3</sup> to access that \$500. The same is true of any type of account that does not have a contingent beneficiary. Include language in your DPOA that the beneficiary designation must be consistent with the client's testamentary wishes.

- **Consider adding a statement regarding arbitration.** Nursing homes often ask that the patient agree to binding arbitration if there is a dispute, such as a personal injury lawsuit. "If the client has been admitted to the facility and is eligible for Medicare or Medicaid payment, federal law prohibits the

nursing home from asking any more from the resident than the payment of co-payments and deductibles authorized by law.”<sup>4</sup> Consider adding language to your form that “my agent does not have the authority to waive my right to a jury trial or agree to binding arbitration.”<sup>5</sup>

- **Remind agents to sign documents in their representative capacity.** When signing nursing home documents, often the agent will merely sign his name as the “responsible party.” However, the actual responsible party is the principal. The agent should sign the principal’s name, by “Billy Joe, POA”. “The Nursing Home Reform Law prohibits a nursing home from requiring a family member or friend to become financially liable for nursing home expenses.”<sup>6</sup> This rule does not apply to assisted living facilities.

- **Add the client’s preference for persons to serve as conservator,** if a conservatorship is necessary. Consider adding language that principal waives bond.<sup>7</sup>

- **Provide authority for agent to be compensated** for services such as financial and property management, care services, etc.

- **Burial? Cremation? Donation of Body?** Consider including the client’s wishes regarding disposition of her remains in both the DPOA and the Healthcare Advance Directive.<sup>8</sup>

With these additions to the DPOA, you will empower your clients and their agents to move forward with the assurance that important and necessary activities related to aging and its many challenges can be completed with a minimum of drama and confusion. Given the increasing “hoops” for financial management and healthcare, the “punched up” DPOA will pack the power clients and their agents need. ⚖️

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## Notes

1. *Tenn. Code Ann.* §34-6-111.
2. *Tenn. Code Ann.* §35-15-402.
3. Using a small estate affidavit would not be an available tool if there were creditors. This hypothetical assumes that TennCare would be a creditor.
4. See CMS Transmittal June 9, 2003, Ref. S & C-03-10; Carlson, Eric, 20 Common Nursing Home Problems — and How To Resolve Them. (Available for downloading at [www.nslc.org](http://www.nslc.org).)
5. See *Nina McKey v. Nat’l Healthcare Corp.*, 2008 Tenn. App. LEXIS 477.
6. Carlson, Eric, 20 Common Nursing Home Problems — and How to Resolve Them; Centers for Medicare and Medicaid Services (CMS) Transmittal, June 9, 2003, Ref. S & C-03-10.
7. *Tenn. Code Ann.* §34-3-103.
8. See: *Seals v. H & F Inc.* 301 S.W.3d 237, 2010 Tenn. LEXIS 12 (Tenn. 2010).

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