



POWERS OF ATTORNEY

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INTRODUCTION

A power of attorney ("POA") can be granted when an individual, referred to as a principal, appoints another individual, known as an agent, to act on his behalf. Usually this occurs when the principal cannot attend or carry out a specific purpose for himself. ("POA's") are granted in Illinois under 755 ILCS 45-1-1 *et seq.*

TYPES OF POWERS OF ATTORNEY

There are two types of POA:

1. Statutory ("POA's"), a model form of which is set forth in the Illinois ("POA") Act; and
2. Non-statutory ("POA's"), which are all other types.

STATUTORY FORM V. NON-STATUTORY FORM

The difference between the two is that statutory ("POA's") can be used after the incapacitation or incompetency of the principal; a non-statutory cannot. However, neither statutory nor non-statutory ("POA's") survive the death of the principal.

Statutory ("POA's") can be limited in time. A principal can include a termination date or state that they do not want the ("POA") to survive the incompetency of the principal. A statutory ("POA") may thus state a beginning and/or end date.

POWERS OF ATTORNEY AND THE ELDERLY

If a ("POA") is being used for an elderly principal in the mortgage or sale of property, it is important to find out whether the principal is incapacitated or incompetent. There is also a concern about possible elder abuse or fraud. If the principal is incompetent, a title company can only rely on the ("POA") if it was executed *before* the principal became incompetent.

SPECIFIED POWERS

If a ("POA") is being used for a person's property, the title company must confirm that the powers granted or described are those for which the ("POA") is being used. For example, if the principal is taking out a mortgage, the following powers should be permitted to the agent: "borrowing transactions" and "real estate transactions". The powers granted to the agent must be specific. Any powers not granted can be struck out from the statutory form.



REQUIREMENTS FOR A POWER OF ATTORNEY

Every ("POA") (statutory and non-statutory) must meet the following requirements:

1. ("POA") must be executed by the principal;
2. ("POA") must designate an agent;
3. ("POA") must set forth the powers or duties of the agent;
4. ("POA") must be notarized;
5. ("POA") must be witnessed by at least one witness.

LIMITATIONS ON WITNESSES AND NOTARIES TO A POWER OF ATTORNEY

To minimize elder abuse, there are limitations on witnesses and notaries to a ("POA"). The following cannot be a witness or a notary:

The attending physician or mental health service provider or a relative of the physician or provider; an owner, operator, or relative of an owner or operator of a health care facility in which the principal is a patient or resident; a parent, sibling, descendant, or any spouse of such parent, sibling, or descendant of either the principal or agent; the agent; the notary; the witness.

POWERS OF ATTORNEY BETWEEN SPOUSES

("POA") between spouses are valid only if the spouses are not divorced. Once a judgment for dissolution of marriage has been entered, the ("POA") is terminated.

WHO CAN ACT AS AGENT?

Aside from an individual, an agent can be a partnership or corporation. In this situation, the examiner must review the resolutions or agreement, to see whether they grant this power and state who the individual is that is authorized to act as agent.

ASSIGNING POWERS OF ATTORNEY

A statutory ("POA") allows an agent to assign their duties to a third party. A non-statutory form has to be reviewed, to see whether the ("POA") allows for the assignment to a third party.

EXECUTORS USING POWERS OF ATTORNEY

An executor of an estate has broad powers under the Probate Act, which allows them to prepare a ("POA") and employ agents.

INDIVIDUAL TRUSTS AND POWERS OF ATTORNEY

A trustee of a personal trust can execute a ("POA"), provided the trust agreement and amendments confirm that the provisions do not limit or prohibit the trustee from assigning her duties to a third party.



CAN AN AGENT USE A POWER OF ATTORNEY TO CONVEY LAND TO HIMSELF?

An agent can use a (“POA”) to convey land to himself, if the agent is acting in good faith. The agent cannot violate his duties, or act outside the authority granted to him. Much care should be given in reviewing the document establishing such agency.

CAN A FIDUCIARY EXECUTE A POWER OF ATTORNEY?

A fiduciary, such as a court-appointed guardian of a disabled adult, *cannot* delegate his authority. The fiduciary needs a court order providing for the delegation of authority.

AGENT’S CERTIFICATION AND ACCEPTANCE OF AUTHORITY (755 ILCS 45/2-8)

755 ILCS 45/2-8 protects third parties who rely in good faith on a (“POA”). For additional protection, a third party may ask the agent for an Agent’s Certification and Acceptance of Authority form. This form assures third parties that the power of attorney is still in full force and effect.

SUCCESSOR AGENTS

A principal can name successor agents if an agent is unable or unwilling to act as agent. A third party will be protected if it relies on the act of a successor agent in good faith. Additional protection is available with a Successor Agent’s Certification and Acceptance of Authority.

CO-AGENTS

Co-agents *cannot* be named in a statutory form (“POA”) but can be named in a non-statutory form. Co-agents can only exercise their authority by consent of a majority of the co-agents. However, if there are only two co-agents and one is not present, the other can execute a co-agent certification and acceptance of authority, if prompt action is required to accomplish the (“POA”).

FOREIGN POWERS OF ATTORNEY

A (“POA”) executed in another state or country is valid if created:

1. Under the law of the state or country where it is executed;
2. Under Illinois law;
3. Under the law of the principal's domicile or place of business; or
4. Under the law of the agent's domicile or place of business.

This article was written by Jad Fischer, edited by Douglas M. Karlen and incorporates Chicago Title Insurance Company underwriting guidebooks and manuals and Powers of Attorney article by Richard F. Bales, dated December 2015.

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