

DUTIES AND RESPONSIBILITIES OF AN AGENT UNDER A FINANCIAL POWER OF ATTORNEY

What Is an Agent?

As an agent (or “attorney-in-fact”) under a financial power of attorney, you have been appointed to act on behalf of the principal with respect to his or her property and financial affairs. This is a serious responsibility as you, in effect, step into the principal’s shoes to manage his or her property and finances. You do not have authority over the principal; instead, you act for the principal according to the principal’s wishes and otherwise in the principal’s best interest as outlined in the document. All steps you take must be consistent with your role as a “fiduciary.”

What Does it Mean to Be a Fiduciary?

A fiduciary is held to the highest standards of good faith, fair dealing, and undivided loyalty to the principal. You must always act in the principal’s best interest and consistent with the principal’s goals and wishes to the extent they are known. You must also act only within the scope of authority granted in the power of attorney.

What Are My Duties as an Agent?

In addition to the duties mentioned above, the Maine Uniform Power of Attorney Act imposes certain duties on agents. Except as otherwise provided in the document, as an agent you must:

- act loyally for the principal’s benefit;
- act so as not to create a conflict of interest that impairs your ability to act impartially;
- act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
- keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- cooperate with any person that has the authority to make health care decisions for the principal to carry out such decisions; and
- attempt to preserve the principal’s estate plan, to the extent that you know what it is, based on all relevant factors, including:
 - the value and nature of the principal’s property;
 - the principal’s foreseeable obligations and need for maintenance;
 - minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes; and
 - the principal’s eligibility for a benefit, a program, or assistance under a statute, rule, or regulation.

Keeping Records. It is very important that you keep good and complete records of your actions as an agent because it is the best way to answer any questions that may arise in the future about your actions. Keep receipts from every transaction you make on behalf of the principal. The best way to do this may be to run all of the principal's funds through a checking account; the checks will serve as receipts, and the checkbook register will serve as a running account. Remember that you must never commingle the principal's funds and your own money. Always keep the principal's funds in an account separate from your personal money.

What Authority Do I Have as an Agent?

Unless the financial power of attorney specifically limits the agent's authority, an agent has general authority to take care of the principal's affairs. Those general authorities include, among other things:

- opening and closing bank accounts;
- cashing checks;
- trading stocks;
- paying bills;
- filing tax returns;
- negotiating sales of property;
- signing deeds;
- entering into contracts; and
- initiating lawsuits.

In addition to the general authorities that you may have as an agent, the principal may also have chosen to give you other, specific authorities. Such specific authorities would be listed in the document, and may include such powers as:

- creating, amending, revoking, or terminating an *inter vivos* trust (a trust created during the principal's lifetime);
- making gifts;
- creating or changing rights of survivorship;
- delegating authority granted under the financial power of attorney;
- waiving the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- exercising fiduciary powers that the principal has authority to delegate; and
- disclaiming property, including a power of appointment.

Making Gifts. If you have this authority under the power of attorney, gifts should be made *only* if they are in the best interests of the principal. You may want to seek legal

advice before making gifts as this could be an abuse of your authority and could place the principal at risk.

When Does a Financial Power of Attorney Take Effect?

Unless the financial power of attorney is “springing,” it takes effect as soon as it is signed by the principal. A springing financial power of attorney takes effect only upon the occurrence of an event described in the document—for example, if one or more physicians have certified the incapacity of the principal. In most cases, even when the financial power of attorney is effective immediately, the principal does not intend for it to be used until he or she becomes incapacitated. In some cases, however, the principal may intend for you to act on his or her behalf immediately as a matter of convenience if, for example, the principal is away on a trip. You should discuss this with the principal so that you know his or her expectations.

Can I Be Held Liable for My Actions as an Agent?

Generally, as an agent, you can be held liable if you breach your duty as a fiduciary or violate the Maine Uniform Power of Attorney Act. Often, however, a principal will include a provision in a financial power of attorney that exonerates the agent for breach of the agent’s duties unless the breach was done dishonestly, with an improper motive, or with reckless indifference. This means that, so long as you act in good faith and with care, competence, and diligence for the sole interest of the principal, you will not be liable for your actions as the agent.

Important Note About Assisted Living. If the principal is living in a nursing home or assisted living facility, you are required to ensure that the facility is being paid and to either apply for MaineCare long-term care benefits on the principal’s behalf or assist the facility in doing so, if needed. If you fail to fulfill these duties, the facility may file a lawsuit for review of your performance and request that you pay the attorney fees and costs associated with that suit.

What if There Is More than One Agent?

A principal may appoint more than one agent in a financial power of attorney, or may execute multiple financial powers of attorney naming different agents in each one. Depending on the wording of the documents, the agents may be required to work jointly or independently. Even if authorized to act independently, it is important for multiple agents serving the same principal to communicate with one another to be sure that their actions are consistent and in the best interests of the principal.

May I Be Compensated for My Work as an Agent?

In general, an agent is entitled to “reasonable” compensation for services. In many cases, however, the agent is a family member and does not expect to be paid. If you and the principal decide that payment is in order, you should discuss a reasonable rate of payment and put that agreement in writing. This is the best way to avoid misunderstandings in the future.

Can I Be Fired by the Principal?

The principal may revoke the financial power of attorney at any time so long as he or she is competent to do so. The principal simply needs to send you a letter to that effect. The appointment of a conservator or guardian for the principal by the Probate Court does not immediately revoke a financial power of attorney, but like the principal, a conservator or guardian has the power to revoke a power of attorney at any time. In addition, the Court may limit, suspend, or terminate the agent's authority. If the financial power of attorney continues in effect after the appointment of a guardian or conservator, the agent is then accountable to both the principal and the guardian or conservator.

This article is intended to provide information of a general nature only. It does not provide or replace professional legal advice, and it does not establish an attorney-client relationship with the Maine Elder Law Firm or Rudman Winchell. Please consult an attorney for advice regarding your specific circumstances.

1/1/18