

# *Power!*

Or ... Responsibility?

# Of Attorney

Presentation by

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Let's Play...  
"Who" "What"  
"Where"  
"When" &  
"How"

### Who -

- Grant's a PoA,
- acts under PoA
- Accepts a PoA

### What -

- kind of PoA
- Authority does it Grant
- What has to be in it
- Legal Requirements to Execute

### Where –

- legal authority conferred
- is it accepted

### When –

- effective
- should it be used;
- being MIS-Used

# The Who...

- The **Principal** ('-pal – your friend gives one) grants Power of Attorney
- Must be over 18
- Must have sufficient mental capacity to grant POA (more on this later...)
- The **Agent** is the person who receives the Power of Attorney – or in my view, accepts Responsibility of Attorney
- Also over 18 and sufficient decision making capacity, otherwise no eligibility criteria
- There is no person called “POA” – they are the “**Agent**”
- Incorrect to refer to a Guardian or Conservator as “the POA”
- No one is “POA” - not parent, not adult child, **without legal authority**

# What is a POA?

- Legal authority granted by Principal (or “Declarant”) to another, an Agent, who is then authorized to act on behalf of, and in the interest of Principal
- Flavors of PoA
  - General
  - Durable
  - Healthcare
  - Springing
  - Limited
  - Special
  - Property
  - Financial

**POWER OF ATTORNEY**

I, \_\_\_\_\_, residing at \_\_\_\_\_, of \_\_\_\_\_, hereby appoint \_\_\_\_\_ as my attorney-in-fact (“Agent”) to exercise the powers and discretions described below.

If the Agent is unable to serve for any reason, I appoint \_\_\_\_\_ as my alternate or Successor Agent, as the case may be to serve with the same powers and discretions.

I hereby revoke any and all general powers of attorney and special powers of attorney that previously have been signed by me. However, the preceding sentence shall not have the effect of revoking any powers of attorney that are directly related to my health care that previously have been signed by me.

My Agent shall have full power and authority to act on my behalf. This power and authority shall authorize my Agent to manage and conduct all of my affairs and to exercise all of my legal rights and powers, including all rights and powers that I may acquire in the future. My Agent’s powers shall include, but not be limited to, the power to:

1. Open, maintain or close bank accounts (including, but not limited to, checking accounts, savings accounts, and certificates of deposit), brokerage accounts, retirement plan accounts, and other similar accounts with financial institutions.
  - a. Conduct any business with any banking or financial institution with respect to any of my accounts, including, but not limited to, making deposits and withdrawals, negotiating or endorsing any checks or other instruments with respect to any such accounts, obtaining bank statements, passbooks, drafts, money orders, warrants, and certificates or vouchers payable to me by any person, firm, corporation or political entity.
  - b. Add, delete or change beneficiaries to any financial accounts I own including insurance policies, annuities, retirement accounts, payable on death savings or checking accounts or other investments.
  - c. Perform any act necessary to deposit, negotiate, sell or transfer any note, security, or draft of the United States of America, including U.S. Treasury Securities.
  - d. Have access to any safe deposit box that I might own, including its contents.
2. Provide for the support and protection of myself, my spouse, or of any minor child I have a duty to support or have established a pattern of prior support, including, without limitation, provision for food, lodging, housing, medical services, recreation and travel;

*This suggests facts to be granted to represent proceeds withdrawn*

*I appoint to carry out believe that family my representative subject of rev:*

*It is my intent formal statement on my behalf do*

# What...

- Authority does it Grant? – **read the document!**
- What has to be in it - differs!
- The Uniform Power of Attorney Act (UPOAA) has mandatory, specific grants of authority (e.g. power to sell real estate, power to sue). If they're not spelled out, they don't have them.
- Legal Requirements to Execute
  - May be different state to state
  - In Virginia: **General** POA – NO witnesses required, only notary
  - In Virginia **Healthcare** POA – NO notary – two witnesses
  - No agreement required by Agent! (not a bad idea though)
  - Requisite mental capacity of Principal

# What – Mental Capacity for POA

- DIFFERENT from legal capacity required to make a Will – Will has relative “low” capacity bar – understands what they got and who its going to.
- DIFFERENT from “mental competency” - a term used to determine who is “competent” to stand trial
- Mental Capacity sufficient to execute a POA is the same as capacity required to sign a contract.
- *Capacity to make informed decisions in their own best interest and understand the consequences thereof.*

# Capacity to do WHAT?

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- Decide what's for breakfast?
- What to wear?
- To drive?
- Can they own guns?
- Get married?
- Have a medical procedure or take a medication that has potential risk or side effects?
- Manage their money and other personal business?

# Momentary frolic back to ... Who

Virginia presumption is any adult over 18 has mental capacity unless s/he deemed otherwise



- Who can determine?
  - *Medically* – default is two licensed doctor's (or one psychologist) – or specially trained
  - *Legally* – A robe (Judge)
- When drafting POA, who is responsible for assessing principal's capacity?
  - ????
  - Lawyer drafting?
  - Doctor?



# Example of one who LACKS Mental Capacity

- Normal 'looking' adult has a developmental disability
- Goes to car lot, picks out car
- Hands \$1500 to car salesman, says he wants the red Mustang
- Salesperson has contract drawn up
- Buyer signs contract and drives off with red Mustang
- Buyer cannot read, does not understand what they are now obligated to pay
- Buyer has bought & paid for the car.
- Has no understanding that the *consequences* are likely to be: car will be re-possessed, buyer has no wheels and credit damaged



- To get a POA
  - Lawyer
  - Form at Staples
  - Download from Legal Zoom (a.k.a. “Doom”)
  - healthcare POA from 100-zillion medical and online sources. Medical Providers
  - Healthcare POA not to be confused with POLST/POST or DNR (both are doctor’s orders)
- Legal authority honored – In what setting?
  - Financial – banks, brokers, bill paying, starting & stopping services
  - Legal – real estate transactions, ability to contract, sue, collect debts
  - Healthcare – anything to do with the “person” where admitted, treatment options
  - Limited to specific circumstances (e.g. for *specific* real estate transaction or to deal with a particular creditor)

Where

# Where...

- Legal authority and code related to Powers of Attorney **GENERAL, financial, property – Stuff**
- Virginia's implementation of the Uniform Power of Attorney Act (UPOAA): Virginia Code **§64.2-1600** et. seq.
- UPOAA specifically excludes applicability in a several circumstances – including:
  - § 64.2-1601. Applicability.
  - This chapter applies to all powers of attorney except:
  - [...]
  - 2. A power to make health care decisions;



# Where...



- **Healthcare** POA (HCPOA)
- usually part and parcel of an Advanced Medical Directive.
- HCPOA is NOT part of a General (financial) POA even if the language in the POA says otherwise (they often do).
- Authority and rules regarding HCPOA is regulated under the **Health Care Decisions Act** which is encoded at **Va. Code § 54.1-2981**
- Unlike General POA under UPOAA, **Healthcare** POA has a “default” provision when no HPCOA exists!

# Brief Detour Back to “Who” ...

- § 54.1-2986. Procedure in absence of an advance directive [...]
- A hierarchical list:
  - guardian
  - spouse (unless divorce has been filed)
  - adult child
  - parent
  - adult siblings
  - Any other relative of the patient in the descending order of blood relationship; or
  - Any adult! Unless it involves the withholding or withdrawing of a life-prolonging procedure; and excludes any director, employee, or agent of a health care provider currently involved in the care of the patient.

## Where

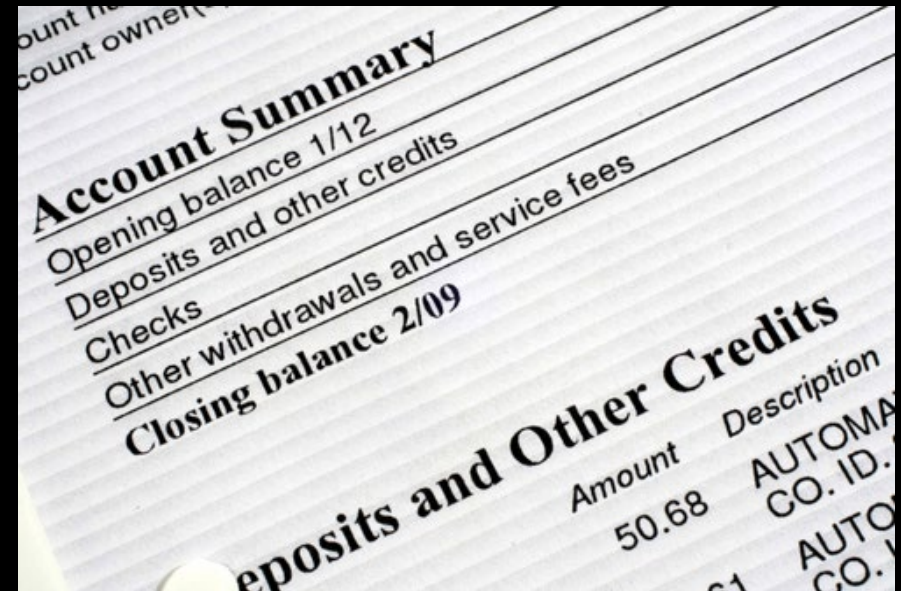
- is the POA accepted
  - See also UPOAA for general POA
  - Healthcare – if properly executed – any medical provider or agency that needs “informed medical consent” (e.g. pharmacy, health insurance)
- Is it found?
  - Gathering dust in Safety Deposit box
  - Copies with Fiduciaries (agent or other trusted advisors/family members)
  - Recorded at Circuit Court
  - Online in Central Registries (e.g. VDH Registry for AMD/HCPOA) or other online registries

# When

- effective ?
  - By “default” it is effective immediately upon signing
  - “springing” POA becomes effective upon certain event occurring, usually loss of capacity
    - if this is the case, should define how capacity is determined
- should it be used
  - HCPOA – only upon determination of incapacity
  - POA – only in Principal’s best interest and at Principal’s direction unless/until Principal is not able.
- being MIS-Used – anytime it is not in Principal’s interest or against Principal’s will (if sound of mind)

# How.... MIS-used...

- Legally (properly) acquired and executed but may **misuse** by unintentionally failing to
  - Keep detailed records
  - Maintain separate accounts (must not commingle funds)
  - Spend or act only for best interest of principal





## How.... MIS-used

- Legally (properly) acquired and executed may **misuse** by
  - Wrongly dissipating assets or property (“waste”)
  - Using money or property for benefit of self or another (not principal) or ‘self dealing’
  - Neglect – accepting authority to act and failing to do so
  - Abandon – similar to Neglect – but abandons altogether, not just certain acts

# How...ILLEGALLY used



- Improperly/illegally acquired
  - Thru “undue influence”
  - Threat/extortion
  - Fraudulently (incapacitated person or forgery)
- Improperly/illegally used – steals or dissipates assets

# The issue of “Undue Influence”

- *Undue Influence* defined:
- *one person taking advantage of a position of power over another person. The unequal power between the parties may corrupt one party's consent if they are unable to freely exercise their independent will.*
- May still have “mental capacity”
- ability to resist is overcome
- decision making is overpowered
- Is not able to legally consent to granting a POA (or anything else!) if subject to undue influence.

# The issue of “Undue Influence”

- Undue Influence by itself...
- Is NOT a crime
- Is not a legal cause action – in civil proceedings
- It is the means by which crimes and such things as breach of fiduciary might be accomplished.
- e.g. – Joe Adult Child withholds mother’s food and water. While she is weak and vulnerable, Joe gets mother to sign a POA. She has the requisite capacity, but is unable to assert her will to refuse.
- It is next to impossible to prove.

# What can be done?

## • *Criminal Context*

- Larceny
- Embezzlement
- Fraud
- Wire Fraud
- Credit Card Fraud
- Computer Crimes

## • *Civil Context:*

- Breach of Fiduciary Duty
- Conversion
- Breach of Contract
- Fraud by Undue Influence

And what do I do?

# Is it a CRIME?



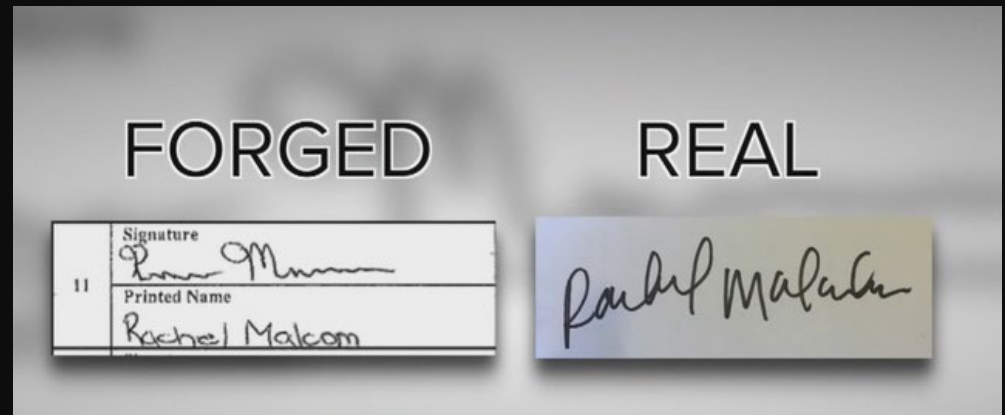
- Police – especially in instances where a POA has been used...
- “That’s a Civil problem, you need to go get a lawyer and sue them.”
- Or...
- “You ‘consented’ we can’t help
- That may not be accurate
- you should ask more questions!

# Is It a Crime?

- Some cases have clear cut criminal elements – outright theft or blatant forgery.
- Other crimes – most commonly with a POA – also clearly “embezzlement”
- Embezzlement is when property is converted, used, concealed or disposed of with the intent to permanently deprive owner of the use of it
  - property had been entrusted to the defendant by through employment, office or position. *THAT'S AN AGENT UNDER POA!!*
  - felony theft crime if >\$300.

# Barriers to Criminal OR Civil litigation

- Victim is incapacitated. “Bad” witness, lack of memory cannot provide credible testimony.
- Seek other evidence – documents,, other witnesses
- #1 reason police won’t want to bring a criminal case... “It’s too hard!”





# Can They Be Sued?

(Civil Complaint)

- YES! For lots of reasons:
- Who will pay cost? Victim probably cannot.
- recovery of attorneys-fees in cases
- *§ Va. Code 8.01-221.2 Action for rescission of deed or other instrument on grounds of undue influence; attorneys fees*
- *In any civil action to rescind a contract or other instrument, may recover attorneys' fees and litigation costs if court finds that the instrument was obtained by fraud or undue influence*

# Can They Be Sued?

(Civil Complaint)

- For what? What is the “cause of action”?
- Virginia law now allows for a demand for “Accounting” by Agent/Fiduciary (Executor, Trustee)
- Allows us to get documents - evidence **without filing a lawsuit** – no subpoena or other court procedures.
- Certain parties – **including APS** and other family members - may demand accounting going back **5 years**.
- Follow the money!
- There is now also the ability to ask the Court to “Construe” a POA and provides for Attorney’s Fees to victim!

# Can They Be Sued?

- Barriers to civil litigation:
- Victim may lack the capacity to engage an attorney or bring suit.
- The Agent under POA (who can) is probably the defendant and controls all the evidence/testimony.
- Requires a different judicial proceeding because ...
- Victim needs a **Guardian** to bring the civil suit.



# What you should you do....

- Direct report to Law Enforcement
- Report to APS and DSS/APS requirement to report to law enforcement:
- 2016 statute :

*Upon receipt of a report or during an adult protective services investigation of **suspected** financial exploitation of an adult who is 60 years old or older or incapacitated in which financial losses to such adult resulting from the exploitation the local department of social services or adult protective services hotline shall immediately refer the matter to the local law-enforcement agency for investigation.*

# Some measures I recommend

- READ THE DOCUMENT. Does the document actually allow the Agent to do what they are wanting to do?
- Make sure it is properly executed (signatures, notary, witnesses etc.)
- If you suspect a POA is being misused, contact Law Enforcement first. OR DSS who must report to LE.
- if one is available to you, talk to an attorney to review the situation.
- Refer your Client (the *principal*) to a competent Elder Law Attorney for assistance.



**Power of Attorney** gives someone legal authority to do things **ONLY** in the best interest of their **principal**

- Agent has no “Power over...” anyone or anything
- Agent has a “Responsibility to...” *Principal*
- Under the law, Agent has high level of responsibility called a “Fiduciary Duty” a position of extraordinary trust.
  - includes the duty of **loyalty**
  - and a duty of **care**.
- Agent can be held liable - sued - for Breach of Fiduciary Duty and similar reasons
- Agent can be charged with a **CRIME** for misuse

# CONTACT



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