

## <sup>1</sup>FREQUENTLY ASKED QUESTIONS ABOUT POWER OF ATTORNEY IN MARYLAND

(From the June and July/August 2009 NAMI News)

### 1. What is Power of Attorney?

Power of Attorney is a written instrument through which the grantor (the “principal”) gives authority to another to act as his/her agent or attorney-in-fact (the “agent”).<sup>2</sup> For example, if you have power of attorney for someone, you may be able to transact business in their place, including writing checks or signing documents for them. The principal must be competent at the creation of the power and the grant must be voluntary.

### 2. What are the different types of Power of Attorney?<sup>3</sup>

There are multiple types of power of attorney:

- General Power of Attorney grants the agent power to manage the financial affairs and transact business for the principal.
- Durable Power of Attorney does not terminate upon disability or incapacity. It continues so that the agent may make healthcare decisions as well as financial or business decisions for the incompetent patient. In Maryland, when a principal designates an agent, it is durable power of attorney unless otherwise provided in the terms.<sup>4</sup> In addition, if the agent takes action on behalf of a principal during a period when the principal is incompetent or there is uncertainty as to whether the principal is alive or not, then any actions taken in good faith under the power of attorney remain binding and for the benefit of the principal.<sup>5</sup>
- Special Power of Attorney limits the agent’s authority to a specific matter or duration.
- Irrevocable Power of Attorney or power of attorney coupled with an interest cannot be revoked by the principal.
- Springing Power of Attorney becomes effective upon some occurrence, such as the principal’s incapacity.
- Advance Directive or Healthcare Power of Attorney is a legal document explaining the principal’s wishes in the event one becomes incompetent and unable to make his or her own decisions. The document often includes a durable power of attorney allowing an agent to make health care decisions for the principal during times of incompetence.<sup>6</sup>

A power of attorney can be revocable or irrevocable. If it is revocable, the principal can take away the agent’s power of attorney, but an irrevocable power of attorney cannot be taken away.

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<sup>1</sup> *Disclaimer: This summary provides basic information about powers of attorney and advance directives in Maryland and was prepared by the Pro-Bono Department of Hogan & Hartson LLP. This summary does not cover all the information on the subject matter, nor does it serve to provide legal advice. NAMI Montgomery County (NAMI MC) makes no representations or warranties as to the accuracy of the information contained in this summary. If you need legal advice, you should consult with an attorney. For other questions about this document please contact NAMI MC directly at 301-949-5852.*

<sup>2</sup> *Black’s Law Dictionary (8th ed. 2004).*

<sup>3</sup> *Id.*

<sup>4</sup> *Md. Code Ann., Est. & Trusts § 13-601(b).*

<sup>5</sup> *Md. Code Ann., Est. & Trusts § 13-602(a).*

<sup>6</sup> *Md. Code Ann., Health-Gen. § 5-601; Black’s Law Dictionary (8th ed. 2004).*

It is a good idea to specify what type of power of attorney you would like to create. Powers created through an advance directive are always revocable.<sup>7</sup>

### 3. What is an advance directive?

An advance directive is a document in which the principal, while competent, states his or her wishes about future healthcare upon incompetency.<sup>8</sup> This is often used in the case of mental incompetency, but is limited only to healthcare decisions. The directive must be in writing and signed by the principal prior to incompetency.<sup>9</sup> In the case of an oral advance directive it must be made in the presence of the patient's attending physician and one witness and documented as part of the patient's medical record.<sup>10</sup> In the case of both an oral and written advance directive, the statement must be both voluntary and witnessed by a third party.

Generally an advance directive designates someone as a "health care agent," which is the same as durable power of attorney for healthcare.<sup>11</sup> The principal may name any person as the health care agent with the exception of "disqualified persons" such as the owner, operator, or employee of a health care facility from which the principal is receiving care.<sup>12</sup> The directive also includes what type of care the principal would want in certain situations. It is the duty of the agent to ensure that healthcare providers give the desired care and do not give any treatment that would be against the principal's wishes.<sup>13</sup> If the principal provides no healthcare instructions, the agent must act in the principal's "best interest."<sup>14</sup>

An advance directive for mental health services may include:

- The designation of an agent to make mental health services decisions for the principal;
- The identification of mental health professionals, programs, and facilities that the principal would prefer to provide mental health services;
- A statement of medications preferred by the principal for psychiatric treatment; and
- Instruction regarding the notification of third parties and the release of information to third parties about mental health services provided to the principal.<sup>15</sup>

An advance directive may be revoked at any time by the principal, provided the principal still has legal capacity, through a signed and dated writing, physical cancellation or destruction, an oral directive to a health care practitioner, or by the execution of a subsequent directive.<sup>16</sup>

### 4. What does "best interest" mean?

Maryland law defines "best interest" as the benefits to the individual resulting from a treatment outweighing the burdens. In determining best interest the agent must consider:

<sup>7</sup> Md. Code Ann., Health-Gen. § 5-604.

<sup>8</sup> Black's Law Dictionary (8th ed. 2004).

<sup>9</sup> Md. Code Ann., Health-Gen. § 5-602; Uniform Health-Care Decision Act of 1993; If the power of attorney was made before October 1, 1993, the effective date of the Maryland Healthcare Decisions Act, the power of attorney will be given effect under the Act even if not executed as required by the Act. Md. code Ann., Health-Gen. § 5-616(b).

<sup>10</sup> Md. Code Ann., Health-Gen. § 5-602(d)(2); *Wright v. Johns Hopkins Health Systems Corp.*, 728 A.2d 166 (Md. 1999).

<sup>11</sup> Maryland Attorney General Homepage, <http://www.oag.state.md.us/Healthpol/AdvanceDirectives.htm> (last visited March 3, 2009).

<sup>12</sup> Md. Code Ann., Health-Gen. § 5-602(b).

<sup>13</sup> *Id.*

<sup>14</sup> Black's Law Dictionary (8th ed. 1999).

<sup>15</sup> Md. Code Ann., Health-Gen. § 5-602.1(d).

<sup>16</sup> Md. Code Ann., Health-Gen. § 5-604(a).

- The effect of the treatment on the physical, emotional, and cognitive functions of the individual;
- The degree of physical pain or discomfort caused to the individual by the treatment, or the withholding or withdrawal of the treatment;
- The degree to which the individual's medical condition, the treatment, or the withholding or withdrawal of treatment result in a severe and continuing impairment of the dignity of the individual by subjecting the individual to a condition of extreme humiliation and dependency;
- The effect of the treatment on the life expectancy of the individual;
- The prognosis of the individual for recovery, with and without the treatment;
- The risks, side effects, and benefits of the treatment or the withholding or withdrawal of the treatment; and
- The religious beliefs and basic values of the individual receiving treatment, to the extent these may assist the decision maker in determining best interest.<sup>17</sup>

5. What is the relationship between the guardian and the attorney?

If there is power of attorney there is usually no need for a guardian of the property.<sup>18</sup> It is also possible for the guardian and the attorney to be the same person. However, if the court appoints a guardian, the attorney shall account to the guardian rather than the principal.<sup>19</sup> The guardian has the power to revoke power of attorney that the principal had authorized in the past.<sup>20</sup>

6. Who should be a power of attorney?

The person you designate to be your agent should be someone you trust with your financial and health care decisions. You can name a family member, a close friend, or someone else who you trust. You should discuss your wishes with your agent so that they can follow them in the event that you become disabled or unable to make these decisions for yourself. The person you pick should be willing to take on this responsibility.<sup>21</sup>

7. What are the duties of your agent?

Your agent has a legal duty to act in your best interests.<sup>22</sup> Your agent is a fiduciary, and has a duty to be loyal to you and your interests and to avoid any conflict of interest that would prevent him or her from acting in your best interests.<sup>23</sup> You should discuss your wishes with your agent so he or she can better act in a way that is in your best interests if you are not in a position to make these decisions for yourself.

8. Should I choose a power of attorney or advance directive?

The choice depends on your particular circumstances and should be discussed with people you trust. An advance directive is limited only to healthcare and treatment decisions, including decisions pertaining to mental health and incapacity. An advance directive is fully revocable by the principal at any time. A durable power of attorney allows the agent to transact business on behalf of the principal, including during times of mental incompetence. This includes the ability to manage the principal's finances and transact business on the principal's behalf, but does not

<sup>17</sup> *Md. Code Ann., Health-Gen. § 5-601(e).*

<sup>18</sup> *Joan L. Sullivan, University of Maryland School of Law, The Guardianship Handbook (1998) at 28.*

<sup>19</sup> *Md. Code Ann., Est. & Trusts § 13-601(d).*

<sup>20</sup> *Sullivan at 33.*

<sup>21</sup> *See, e.g. Maryland Attorney General Homepage, <http://www.oag.state.md.us/Healthpol/AdvanceDirectives.htm> (last visited March 3, 2009).*

<sup>22</sup> *Md. Code Ann., Health-Gen. § 5-601(e).*

<sup>23</sup> *2 Md. L. Encyclopedia §18 (December 2008).*

include the ability to make healthcare decisions. If you decide that you would like to designate someone to make healthcare decisions as well as manage your affairs and transact business on your behalf, it might be best to put both a durable power of attorney as well as an advance directive in place.

9. Where can I obtain forms and more information about advance directives and power of attorney?

The Maryland Code §5-603 contains an advance directive form. In addition, the Maryland Attorney General webpage provides helpful sources, including forms:

**The Maryland Attorney General's Office**

410-576-7000 or 1-888-743-0023

[www.oag.state.md.us/Healthpol/AdvanceDirectives.htm](http://www.oag.state.md.us/Healthpol/AdvanceDirectives.htm)

[www.oag.state.md.us/healthpol/adirective.pdf](http://www.oag.state.md.us/healthpol/adirective.pdf)

**Caring Connections (NHPCO)**

1-800-658-8898

[www.caringinfo.org](http://www.caringinfo.org)

**Aging with Dignity**

1-888-594-7437

[www.agingwithdignity.org](http://www.agingwithdignity.org)