

1 **Power!****Or ... Responsibility?
Of Attorney**

Presentation by
Doris W. Gelbman, Gelbman Law PLLC
GACCAA Training
Weyer's Cave, VA
May 8, 2018

2 **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
-

3 **The Who of Powers of Attorney**

- 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"
- Incorrect to refer to a Guardian or Conservator as "the POA" nor is any other person who may have some legal responsibility or authority to act.
- No one is legally authorized Agent without legal authority - not parent, guardian, adult child

4 **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

•

5 **What...**

- Authority does it Grant – read the document!
- What has to be in it - differs!
- see also Uniform Power of Attorney Act (UPOAA) for mandatory specific grants of authority (e.g. power to sell real estate, power to sue, power of appointment)
- 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

•

6 **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.*

7 **Momentary frolic back to “Who”
Capacity**

- Who has capacity?
 - Virginia presumption is any adult over 18 has legal mental capacity unless s/he legally deemed otherwise
- Who can determine?
 - Medically – default is is two licensed doctor’s (or one psychologist)
 - Legally – A robe (Judge or Magistrate)
- When drafting POA, who is responsible for assessing principal’s capacity?
 - ????
 - Lawyer drafting?
 - Doctor?

8 **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 new, shiny red Mustang
- Buyer, although they could read, and sign name, had no understanding they are now obligated make \$349/month car payment.
- Buyer believes he bought & paid for the car.
- Has no understanding that the consequences are likely to be: car will be re-possessioned, buyer has

no wheels and credit damaged

9 **Back to What – more on Capacity**

- Always ask, “Capacity to do WHAT?” We are concerned with decision making:
 - What’s for breakfast
 - What to wear
 - drive
 - Have drug treatment w/ potential for side effects
 - Take part in clinical research
 - OK to own guns
 - Make an investment
- Then what are the consequences – does principal understand the them?
- If it requires “*Informed Consent*” – then it requires sufficient Mental Capacity to make that decision.

10 **Where...**

- To get a POA
 - Lawyer
 - Form at Staples
 - Download from Legal Zoom
 - Medical POA from 100-zillion medical and online sources Dr. or other Medical Provider
 - Medical 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)
-

11 **Where...**

Legal authority and code related to General Powers of Attorney L, 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;

12 **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 HCPOA exists!

13 **Brief Detour Back to “Who”...**

§ 54.1-2986. Procedure in absence of an advance directive [...]

A hierarchical list:

1. guardian
2. spouse (unless divorce has been filed)
3. adult child
4. parent
5. adult siblings
6. Any other relative of the patient in the descending order of blood relationship; or
7. 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.

•

14 **Where**

- is POA accepted
 - General: see also UPOAA
 - 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

15 **When**

- effective ?
 - General: By “default” it is effective immediately upon signing
 - Can create “springing” POA that becomes effective upon certain event occurring, usually loss of capacity
 - (if this is the case, should define how capacity is determined)
 - HCPOA – *only* upon determination of incapacity
 - should it be used?
 - 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)
-

16 **How....**

- 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

17 How....

- 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

18 How....

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

19 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 requisite mental capacity
- Principal's ability to resist is overcome
- Principal's decision making ability is overpowered
- Is not able to legally consent to granting a POA if subject to undue influence.

20 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 wrongful acts – civil or criminal - might be accomplished.
- e.g. – Joe Pufflenick 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.

21 What Are You Doing About It?

- *Criminal* Context
 - Larceny
 - Embezzlement
 - Fraud
 - Wire Fraud
 - Credit Card Fraud
 - Computer Crimes

22 Can They Be Sued? (Civil Complaint)

- 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 prosecute
- That may not be entirely accurate
-

23 **Can They Be Sued? (Civil Complaint)**

- Barriers to civil litigation:
- Who will pay cost? Victim probably cannot.
- 2014 Virginia law allows for 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, by clear and convincing evidence, that the instrument was obtained by fraud or undue influence
-

24 **Can They Be Sued? (Civil Complaint)**

- Barriers to civil litigation:
- For what? What is the “cause of action”?
- Virginia law now allows for a demand for “Accounting” by Agent/Fiduciary (Executor, Trustee)
- Allows “discovery” without filing a lawsuit – no subpoena duces tecum or other court procedures.
- See *Virginia Code 64.2 Duties of Agent* – sub-paragraph H and I – may demand accounting going back as far as 5 years.
- Follow the money!

25 **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.
- Requires a different judicial proceeding
- Victim needs a Guardian to bring the civil suit.

26 **Can They Be Sued?**

- Barriers to civil litigation:
- Victim is incapacitated. “Bad” witness, lack of memory cannot provide credible testimony.
- Seek other evidence – documents, bank clerks, other witnesses
- #1 reason police/commonwealth won’t want to bring a criminal case

27 **Is It a Crime?**

- Some – not many – cases have clear cut criminal elements – outright theft or blatant forgery.
- But there are other crimes – most commonly with a POA – look for embezzlement.
- Embezzlement is defined in Va criminal code at § 18.2-111
 1. property is converted, used, concealed or disposed of with the intent to permanently deprive owner of the use thereof,
 2. property had been entrusted to the defendant by through employment, office or position.
 3. is a felony theft crime if >\$200.

•

28 **How Investigated as a Crime?**

Direct report to Law Enforcement

DSS/APS requirement to report to law enforcement:

In 2016 new statute enacted:

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 are suspected to be greater than \$50,000, the local department of social services or adult protective services hotline shall immediately refer the matter to the local law-enforcement agency for investigation.

Amended Statute – effective July 2017 – NO \$\$ Limit

29 **Some measures I recommend**

- If presented with a POA – READ THE DOCUMENT. What is it being presented for? Does the document actually empower the Agent to do that?
- Make sure it is properly executed (signatures, notary, witnesses etc.)
- Take a few minutes to look at the Virginia implementation of the UPOAA – it tells you what is and isn't acceptable.
 - Google: Virginia Code § 64.2-1600
- If you suspect a POA is being misused, contact an attorney to review the situation – if you are DSS – your County/Municipal attorney should be able to help
- If you draft and execute POAs....

30 **Some Practices I Recommend for ATTORNEYS**

31 **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 a very 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 win money damages or restitution

32 **Combatting Misuse and Exploitation with POA**

- 1 June 2016 – Launched Jefferson Area Coalition Against Elder Abuse - JACEEA
- 2 • Law Enforcement – Cville and AC Police Department, Sheriffs Dept, VSP and FBI
 - Prosecutors – Albemarle and Cville Commonwealth's Atty; Federal DoJ, OIG and Va. A.G. MFCU
 - Social Services/APS
 - Civil Attorneys, Private, Legal Aid and County/Municipal Attorneys
 - Ombudsman – Advocate for folks in Long Term Care settings
 - Banks/Financial Advisors
 - Care Providers

33 **Combatting Misuse and Exploitation with POA**

- Memorandum of Understanding (MOU) for all team members
- Wider Group meets monthly face to face – case discussion to assist on active investigations, what's working, what's not? Brainstorm other investigative avenues
- Training, training, and training – VBA panel, How to Investigate/Prosecute
- Electronic presence (Google Groups) to exchange information regularly (no spamming!)
- Smaller teams meet as needed.
 - strategize on individual cases, e.g. APS caseworker, investigating officer, commonwealth's attorney, ombudsman, private attorney and any other relevant discipline. Where possible, get waiver of confidentiality from victim so information may be freely exchanged

34 **Combatting Misuse and Exploitation with POA**

- Portal to JACEEA is via APS
- When potential criminal activity is suspected, APS reports to law enforcement and Commonwealth's attorney
- Where appropriate, civil attorney or other agency participates.
- Case monitored by C.A. for possible escalation and follow up
-

35 **Success Stories – Begin Trickling In!**

- Caregiver convicted of \$6,000 fraud against DMAS. DoJ, Va. A.G. MFCU, CMS OIG, Albemarle County DSS all worked together to convict. Brief jail time, Restitution, probation, loss of license.
- Cville PD and APS investigate contractor building 'fences' – (and other theft crimes) convicted. Jailed pending sentencing; CA expects 8 years jail time, restitution.
- Daughter/caregiver investigated for fraud, embezzlement, forgery other financial wrongdoing still pending, but removed access to funds, placed new fiduciary to restore and protect victim.

36 **Questions? Comments? War Stories?**

Doris W. Gelbman
 GELBMAN LAW PLLC
Center for Elder Services
 525 Meade Ave.
 Charlottesville, VA 22902
 www.gelbmanlaw.com
 Telephone (434) 906-7022
 Email: dwgelbman@gelbmanlaw.com
 Exclusively practicing Elder Law!