

I AM THE AGENT OF A LOVED ONE'S POWER OF ATTORNEY FOR PROPERTY...NOW WHAT?

Your mother (or another loved one) just gave you her Power of Attorney for Property document, and it names you as her agent. What responsibilities do you have? Well, to begin with, you don't necessarily have to accept the job as her agent. You can decline to act. Also, your job as agent doesn't start until the document becomes effective. Most Illinois Powers of Attorney for Property are effective at the time of signature, but some, known as "springing" powers of attorney, are not effective until the time that a certain condition has occurred, for example, a physician has certified in writing that your mother has become mentally incapable of making financial decisions. Even if the document is effective immediately, your mother may be perfectly capable of managing her own finances and does not want you to act until she is unable. Your job doesn't start until your mother reasonably expects you to act.

While you do not have to accept the job of property agent, if you do act as agent, Illinois law imposes upon you duties that continue until you resign or the power of attorney is terminated or revoked. Your duties as agent include:

You, as agent, must do what you know your mother reasonably expects you to do with her property. For example, if your mother has had a long history of investing her money in Certificates of Deposit in her favorite banks and has made it clear she doesn't want her money to be in the stock market, it is reasonable for her to expect you to keep her funds in Certificates of Deposit and that's what you are expected to do. If you don't know specifically what your mother might reasonably expect and have no way to find out, then you need to act prudently and diligently.

You must act in good faith for the best interest of your mother, using due care, competence and diligence. If you have special skills or expertise, you must use them while acting as agent for the benefit of your mother. Good faith means that you must have honest and sincere intentions. You should not take action with your mother's property for some purpose other than for your mother's best interest, for example, by liquidating a Certificate of Deposit that is payable on death to your brother for the primary purpose of disinheriting your brother from receiving that Certificate of Deposit. Competence and diligence have their ordinary meanings. You should not undertake to do something you have no competence to accomplish on your own, like preparing your mother's tax returns when you have no expertise to competently prepare them. Diligence means that you must be on top of what you are doing for your mother, like paying her bills on time to avoid penalties and interest. Finally, if you do have special skills, say, you're a Certified Public Accountant, you need to use your knowledge in acting for your mother meaning that you should take into consideration the tax consequences of your actions.

You must keep a complete and detailed record of all receipts, disbursements, and significant actions conducted for your mother. Not only must you keep a detailed record of all transactions you have engaged in for your mother, for example, bank statements, cancelled checks, bills and receipts, but you must give this record to your mother if she requests it, or to any other person acting as a fiduciary to your mother, such as her health care agent, attorney, accountant or trustee. If someone makes a report to the Illinois Elder Abuse and Neglect Program, and a caseworker from that program asks you for an accounting of your actions as agent, you must also provide your records to that caseworker. The best defense to any accusations which may be made against you is to have a complete record and explanation of all actions you have taken for your mother. At your mother's death, the beneficiaries of her estate have a right to demand an accounting from you.

You must attempt to preserve your mother's estate plan, to the extent you actually know it, if preserving the plan is consistent with your mother's best interest. If your mother has set up accounts with payable on death beneficiaries or joint tenants, you should keep that in mind in spending her estate in order to preserve her overall plan. If your mother needs to spend her estate for her own best interests, the fact that there are death beneficiaries does not prevent you from spending these funds.

You must cooperate with a person who has authority to make health care decisions for your mother. If your sister is making health care decisions for your mother under a health care power of attorney, and she

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determines after consulting with your mother's physicians that your mother requires caregivers and hires them, you must cooperate by paying for those caregivers.

There are some actions which are strictly forbidden. Agents acting under powers of attorney for property must not do the following:

You must not act so as to create a conflict of interest that is inconsistent with your responsibilities as agent for your mother. For example, you would have a conflict of interest if you decided to buy your mother's house or car as you would be in a position as agent of negotiating the price with yourself, individually, which is a conflict of interest.

You must not do any act beyond the authority granted to you in your mother's power of attorney. There are certain authorities which are not granted to agents in the statutory power of attorney for property language unless specifically added. Unless added, agents have no authority to make gifts, name or change joint tenants or name or change beneficiaries. If you act to make gifts from your mother's property when her power of attorney does not include that power, you would be acting beyond your authority.

You must not commingle your mother's funds with your funds. You must keep your funds and property completely separate from your mother's. Never deposit your mother's funds into your own account, or vice versa.

You must not borrow funds or other property from your mother unless the power of attorney specifically provides for it and it is not contrary to your mother's best interests. Even if your mother's document clearly states that you are allowed to make loans to yourself, it is unlikely that there would be a circumstance where loaning yourself funds from your mother would not raise suspicion. You should not make loans to yourself without specific authority in the document and without getting legal advice.

You must stop acting as agent on behalf of your mother if you learn of any event that terminates the power of attorney or your authority under the power of attorney. The power of attorney for property terminates at your mother's death, and you are not authorized to act after you are aware of her death, or are aware that your mother has revoked your power of attorney.

You must always disclose your status as agent for your mother when acting for your mother. You are not authorized to sign your mother's name. If you are signing as agent for your mother, you must sign as follows:

"Mother's name" by "Your name", as agent.

If you violate any of these duties or act outside the authority granted to you under your mother's power of attorney for property, you may be liable for any damages, including attorney's fees and costs, caused by your violation. If you have any questions or doubts about what actions you are authorized to take as agent for your mother, you should consult an elder law attorney.

Author: Janna Dutton, JD, CELA

When you have questions related to elder law, estate planning, probate, and guardianship, think of the attorneys at Dutton Casey & Mesoloras. With over 130 years of combined legal experience, you can depend on our team for the knowledge, advice, and support you deserve to resolve your legal needs.

Resources:

National Elder Law Foundation – www.nelf.org

National Academy of Elder Law Attorneys – www.naela.org

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Chicago 312.899.0950
Suburbs 847.261.4708
contact@duttonelderlaw.com
www.duttonelderlaw.com

79 West Monroe Street | Suite 1320 | Chicago, Illinois 60603
Appointments are also available in Arlington Heights, Lisle, Skokie, and Westchester, Illinois, or via video conferencing or telephone.

