Executing Powers of Attorney at the MVLC

Brown Bag CLE
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Purposes of Powers of Attorney

1. Appoint a Decision Maker
   1. Financial Decisions
   2. Health Care Decisions
2. Avoid Guardianship
Wisconsin State Forms

Wisconsin has developed uniform state forms for the Power of Attorney for Health Care (HPOA) and the Power of Attorney for Finances and Property (FPOA).

Forms located at: https://www.dhs.wisconsin.gov/forms/advdirectives/index.htm

These forms are optional. They are very basic and may not work for every client.

Execution Requirements: HPOA
Wis. Stat. §§155.05 & 155.10

- Principal must be:
  - At least 18 years old
  - Of sound mind
  - Executing the document voluntarily

- HPOA must be:
  - In writing
  - Signed by principal
  - Signed by 2 witnesses who are:
    - 18 or older
    - Not related to principal
    - Not health care providers for the principal
    - Do not have knowledge that they have a claim or interest in principal’s estate
    - Not financially responsible for principal’s health care

Execution Requirements: FPOA
Wis. Stat. §244.05

- FPOA must be:
  - In writing
  - Signed by principal
  - Notarized (optional, but highly recommended)

- Non-Statutory “Requirements”:
  - Principal must be:
    - At least 18 years old
    - Of sound mind
    - Executing the document voluntarily
  - Notarized
Main Concerns When Executing Powers of Attorney (POAs)

1. Capacity
2. Voluntary

Capacity: When is client “of sound mind?”

- No clear definition – determination to be made by witnesses/attorney and requires spending time with the client
  - Ask questions
  - Review the documents
  - Take notes
- Capacity as a spectrum
- Impairment is not incapacity
- For HPOA – A person under guardianship is presumed to not be of sound mind Wis. Stat. §155.05
- When in doubt – request a doctor opinion

Testamentary Capacity

Mental ability to understand:
- The nature of testator’s property
- The objects of testator’s bounty
- What testator is attempting to accomplish with Will

In re O'Laughlin’s Estate, 50 Wis.2d 145, 183 N.W.2d 133 (1971)

Testamentary capacity is not required to execute a FPOA or HPOA, but this definition may be helpful in developing questions and making a determination, especially for the FPOA.
Determining Capacity

- HPOA
  - Why want a HPOA
  - Birth date and age
  - Current health issues/health history
  - Current medical providers
  - Current medications and what they do
  - Relationships of agents and why they were chosen
  - Guardianship
  - Why yes/no on nursing home, CBRF, feeding tube, and pregnancy questions
  - Family and relationships between family members and in relation to client

Determining Capacity (cont.)

- FPOA
  - Why want a FPOA
  - Birth date and age
  - Current assets and debts
  - Which financial institutions are used
  - Sources of income and amounts
  - Bills/expenses
  - Relationships of agents and why they were chosen
  - Guardianship
  - Family and relationships between family members and in relation to client

Capacity Example #1

Luna Lovegood meets with you at the MVLC and wishes to sign a Wisconsin form Power of Attorney for Finances and Property. She is easily distracted and spends a significant amount of time talking about Nargles moving her keys, shoes, and books around and having to find them. When asked, she tells you that she is a writer and makes about $23,000 per year.

- Would you agree to witness Luna’s FPOA?
- What other information would you want?
Capacity Example #2

Luna Lovegood meets with you at the MVLC and wishes to sign a Wisconsin form Power of Attorney for Finances and Property. She is easily distracted and spends a significant amount of time talking about Nargles moving her keys, shoes, and books around and having to find them. When you ask her what bank she uses, she explains that she can’t remember, because the Nargles move that too and take all of her money.

• Would you agree to witness Luna’s FPOA?
• What other information would you want?

Pause for Attendance Code 1

Voluntary

Allocating decision-making power to another person often brings up issues of potential inappropriate influence, threats, or other strong-arming by third parties to force a person to execute a HPOA or FPOA.

- Wis. Stat. §155.05 requires that execution of a HPOA be voluntary.
- Wis. Stat. Ch. 244 no longer specifically states that execution of FPOA be voluntary. However, best practice requires that execution be voluntary.
Undue Influence

There are a couple common-law tests for undue influence in Wisconsin. The two most common tests are:

- 4-Prong
  - Susceptibility to Influence
  - Opportunity to Influence
  - Disposition to Influence
  - Coveted Result

- 2-Prong
  - Confidential Relationship
  - Suspicious Circumstances

_In re Estate of Kamesar, 81 Wis. 2d 151, 259 N.W.2d 731 (1977)_

Determining Influence

- Meet with the client ALONE
- Ask client questions
  - Ever signed POA before? Why sign a new one?
  - Why do you want to sign a POA?
  - Why do you want to name this person as agent?
  - What is your relationship to the proposed agent?
  - Does the proposed agent get along with your spouse/children/siblings/etc.?
  - What is your relationship with your spouse/children/siblings/etc.?
- Observe behavior
  - Constantly looking for confirmation/reassurance/permission
  - Indications of coaching or isolation

Influence Example #1

Petunia Dursley comes to the MVLC and wants to sign a State Form Power of Attorney for Finances and Property, which is already filled out and names her son, Dursley as her agent. "Dursley can make gifts to himself" is written in the Special Instructions box. You learn that she lives with Dursley and thinks it will just be easier if he can write checks to pay the bills, etc. and she won’t have to worry about it. When you ask her who filled out the form, she says Dursley did and she needs to sign it.

- Would you witness the FPOA?
- What other information would you want to have?
Influence Example #2

Petunia Dursley comes to the MVLC and wants to sign a State Form Power of Attorney for Finances and Property and name her son, Dursley as her agent. Petunia insists on having Dursley in the room when you meet with her. She explains that she does not remember things very well and wants Dursley to be in the room to help her remember what you talk about.

• What do you do?

When is State Form HPOA Insufficient?

• Generally sufficient
• May be insufficient if client has very specific health care wishes
• Doesn’t allow for co-agents
• Doesn’t allow client to name more than two agents

When is State Form FPOA Insufficient?

• If client is receiving/may receive Title 19 (Medicaid) or Supplemental Security Income (SSI), consult with an elder law attorney
• If client owns any unusual assets, consult with an estate planning or elder law attorney
• Doesn’t allow gifting
• Doesn’t allow creation or funding of a trust
• Doesn’t allow changing beneficiaries on assets
• Doesn’t allow liquidating retirement assets, such as a 401(k) or IRA
• Doesn’t allow for co-agents or more than two nominated agents
Main Takeaways

- The two main concerns when witnessing a POA execution are whether the client has capacity and whether the client is voluntarily executing the documents.
- The determination as to whether to proceed is up to you, as the witnessing attorney.
- Ask questions and observe the client. Ask for a second opinion from a law student or another attorney.
- If the client's wishes are complicated, or if they have special concerns, such as SSI or other means-tested public benefits, refer them to an elder law attorney for more detailed advice.

Pause for Attendance Code 2