

PLANNING FOR THE FUTURE OF YOUR FARM

Legal tools and strategies for farm transition and estate planning



THE FINANCIAL POWER OF ATTORNEY

We can't always take care of our own financial and personal affairs. Whether due to medical issues, mental incapacity, schedule conflicts, or other unexpected circumstances, we sometimes need someone else to handle those needs. A Financial Power of Attorney (POA) is a legal instrument that can help in those times. It allows you as the "**principal**" to name an "**agent**" to perform duties such as managing your bank accounts, finances, and investments, signing your tax returns, or handling a specific business matter. It's a flexible legal document that you and your attorney can tailor to address different needs at different times. In this bulletin, we explain how financial POAs can be helpful to your situation and how they work.

HOW A FINANCIAL POWER OF ATTORNEY CAN HELP YOU

It gives you control. If you don't have a POA and become incapacitated, a court may have to appoint a legal guardian to act for you. The person the court selects as your guardian may be a person you wouldn't want to be involved in your affairs. With a Financial POA, you have control over who deals with your financial matters, and you can define the scope of that agent's authority.

It creates consistency. Authorizing someone to step in when you cannot avoids disruptions and keeps your finances and affairs running efficiently and smoothly.

It provides certainty. Third parties often want or require proof that someone has the legal authority to handle someone else's finances and dealings so that they don't end up in the middle of a fraud or theft situation. A Financial POA provides that proof to the parties you deal with.

THE UNIFORM POWER OF ATTORNEY ACT AND OHIO'S STATUTORY FORM

Many states, like Ohio, have adopted the **Uniform Power of Attorney Act**, a model law that provides default rules for POAs and standardizes requirements across states that adopt the law. The



law aims to deter financial abuse by an “agent” appointed in a POA, especially for elderly and disabled persons. Ohio’s POA Act outlines general powers of agents and includes a list of powers that a POA *does not grant* an agent unless specifically stated. These “prohibited powers” that must be stated in the POA includes power to:

- Create a trust for the principal or make changes to an existing trust
- Give away the principal’s property
- Create or change rights of survivorship
- Change beneficiary designations
- Let others act in place of the named agent
- Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

OBTAINING, EXECUTING, AND RECORDING A POA

It is possible to prepare your own Financial POA using a state’s standard form; Ohio provides an example of a POA in its statute. But you should consider **consulting an attorney** for your POA. An attorney can help you decide when you need a POA, address issues unique to your situation, help you decide what types of authority to grant an agent, and determine when the authority begins and ends. Typically, an attorney can draft a Financial POA quickly with minimal legal fees, making it well worth the investment to have a tailored document that protects you and meets your needs.

For proper execution, a person (the “principal”) must sign the POA, or if unable to sign, may direct another individual to sign for the principal while in the principal’s presence. Acknowledgement by a notary public or local official is the final step in the POA execution process.

If a POA is for the conveyance, mortgage, or lease of an interest in real property, it must be **recorded** in the county recorder’s office where the property is located *prior to* recording of the deed, mortgage, interest, or lease. A revocation of a recorded POA must also be recorded in the same county recorder’s office where the recording occurred.

GENERAL VERSUS LIMITED POAs

The two main types of Financial POAs differ according to the powers granted to the agent. A general POA grants the most authority while a limited POA limits authority to specific actions or assets.

A **general POA** typically gives the agent authority to do all things necessary to manage assets held by the principal. Examples of powers typically given by a general POA include:

- Buy, sell, lease, mortgage, and give away real and personal property.
- Contract in any manner with any person on behalf of the principal.
- Operate, buy, sell, enlarge, reduce, or terminate an ownership interest in a business.
- Open, close, invest in, and make withdrawals from an investment or bank account.
- Buy, sell, exchange, assign, settle, and exercise commodity futures contracts.
- Buy, cancel, collect, and change beneficiaries on a life insurance policy.
- Litigate for any money or other thing of value owed to the principal.
- Sign, acknowledge, seal, deliver, file, or record any instrument on behalf of the principal.
- Engage, pay, or discharge an attorney, accountant, investment manager, or other advisor.

A **limited POA** grants an agent the authority to act *only* for a specific purpose, during a certain period, or for particular assets. A limited POA will specify actions an agent may take on behalf of a principal and clarifies that the agent has no authority to act beyond that limited scope of authority. For example, a principal selling real estate might execute a limited POA that gives an agent authority to sign the deed for the principal on the day of the real estate closing. The agent does not have authority to act for the principal on any other matter or at any other time.

THE AGENT'S FIDUCIARY DUTIES, LIABILITY, AND COMPENSATION

An agent has "fiduciary" responsibilities when performing under a Financial POA, which means the agent must act in accordance with the principal's best interest, in good faith, and only within the scope of the authority granted by the POA. Ohio law details the specific level of competence, care, and diligence required by an agent, as well as duties for maintaining records of receipts and disbursements and cooperating with the principal's Health Care POA to carry out health care needs, if applicable. Ohio law also states that an agent who violates the agent's duties can be financially liable for the violations. On the other hand, an agent who acts in good faith is not liable to the principal's beneficiaries or liable if the principal's property declines in value. Unless a POA states otherwise, the law states that an agent is entitled to compensation and reimbursement of expenses for performing duties, if costs are reasonable.

WHEN POA AUTHORITY STARTS AND ENDS

There are different approaches to setting the times for starting and ending a Financial POA, and it can be quite beneficial to review the options with your attorney before making decisions.

The start of POA authority. When exactly can an agent begin dealing with matters authorized by the POA? This is a very important provision of the POA to discuss with an attorney because the document will be effective immediately *unless* stated otherwise. It's typical for a principal to sign a Financial POA because the need exists at the current time, such as when a farm business owner needs an agent to assist with immediate business matters. But a second option is for a Financial POA to "**spring**" into effect only when triggered by a certain event. This type of POA can be difficult, as third parties might question whether the triggering event has occurred. For example, if a Financial POA is only effective in the event of a medical emergency, a bank might require the agent to offer proof of the medical emergency. For this reason, Ohio law allows a principal to authorize a person, such as the principal's doctor, to make a written statement that the triggering event has occurred, providing the proof necessary to confirm that the POA is valid.

Durability and incapacity. Ohio's Uniform POA Act law states that unless provided otherwise by the principal, a POA is "**durable**." This means that the Financial POA remains in effect if a principal becomes incapacitated. In the above example of a Financial POA triggered by a medical emergency, the POA would continue beyond the emergency if the principal is incapacitated by the emergency. The law provides a definition of "incapacity," which is an inability to manage property or business affairs for because a person is impaired in the ability to receive and evaluate information or make or communicate decisions, even with technological assistance, or because a person is missing, detained, or outside the United States and unable to return.

A principal may authorize someone to determine when the principal is incapacitated, or the law allows a physician or psychologist to establish incapacity and permits an attorney, judge, or government official to determine if a principal is missing, detained or unable to be in the United States.

The end of POA authority. It is also necessary to clarify when POA authority ends, or Ohio law will establish its end. If a POA states that it is not “durable,” the agent’s authority ends if the principal becomes incapacitated. For all POAs, the law states that an agent’s authority ends if the principal dies, when the purpose of the POA is accomplished, or if the agent dies, resigns, or becomes incapacitated. A principal can change or terminate the agent’s authority at any time if the principal has mental capacity. Giving notice that a POA has ended to financial institutions can ensure the agent no longer acts for the principal. Note that if the POA grants powers to convey interests in property and has been recorded, the revocation must also be recorded in the same county recorder’s office.

CHOOSING AND COMMUNICATING WITH AN AGENT

Appointing someone to handle your financial and business affairs is a serious matter and exposes you to risk, regardless of how well you know the person. Choose carefully, appointing a person who will adhere to the fiduciary responsibilities the appointment requires. You can also reduce your risk by communicating the terms of the POA and your needs and wishes to your agent. Proper forethought can ensure that the POA helps you through those times when you need another to act on your behalf.

REFERENCES

Uniform Power of Attorney Act, Ohio Revised Code Sections 1337.21 to 1337.64,
<https://codes.ohio.gov/ohio-revised-code/chapter-1337>

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Find all our **Planning for the Future of Your Farm** resources at
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