



“It’s For your Own Good”

Representative Payees, Power of Attorney and Guardianship Proceedings in New York State

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IN A NUTSHELL

What is a Representative Payee?

What is a Power of Attorney?

What is a Guardian?



What is a Representative Payee?

Representative Payee (“Rep Payee”):

According to the Social Security Administration:
A representative payee is a person or an organization. We (SSA) appoint a payee to receive the Social Security or SSI benefits for anyone who can't manage or direct the management of his or her benefits. A payee's main duties are to use the benefits to pay for the current and future needs of the beneficiary, and properly save any benefits not needed to meet current needs. A payee must also keep records of expenses. When we request a report, a payee must provide an accounting to us of how he or she used or saved the benefits. In order to be a Rep Payee, an individual must apply for and be appointed by Social Security.

A representative payee may be an individual or may be the Home, but it is only appointed with reference to the receipt and administration of government benefits.

Guidelines for Representative payees can be found at the link below:

<https://www.ssa.gov/payee/NewGuide/toc.htm#Terms>



WHO CAN BE A REPRESENTATIVE PAYEE?

Individual payees – These include relatives, guardians, friends, or any other interested person who is in a position to care for the beneficiary.

Organizational payees – These can include social service agencies, institutions, State or local government agencies, or financial institutions.

What a Representative Payee is *Not*

Important: Having power of attorney, being an authorized representative, or having a joint bank account with the beneficiary is **not** the same as being a payee. These arrangements do not give you legal authority to negotiate and manage a beneficiary's Social Security or SSI payments. For that, you must apply to SSA and be appointed as a payee.



Duties of a Representative Payee

Be aware of the beneficiary's current day-to-day needs (i.e., food, clothing, shelter, medical expenses and personal items);

Use his or her payments to meet the beneficiary's needs;

Conserve any money left over, after meeting the beneficiary's current needs, in a checking or savings account (preferably interest-bearing), U.S. savings bonds, or other appropriate investment(s) that is titled in a way that clearly establishes the beneficiary's ownership;

Plan to spend wisely, or conserve, in the best interests of the beneficiary, any large payment you receive;

Report any event that may affect the beneficiary's entitlement to benefits or payment amount such as a return to work. (See [Reporting Events to SSA](#) and [Additional Reporting Events for SSI Beneficiaries](#).);

Return any overpayment promptly (i.e., any payment we determine the beneficiary is not due);

Keep separate records, for each beneficiary for whom you are payee, for at least 2 years. You must keep records of all payments we make to you, all bank statements, and receipts or cancelled checks for rent, utilities, and any major purchases made for the beneficiary. For example, if you withdraw \$100 from the beneficiary's account and buy an \$80 item, then there must be a receipt for the \$80 and a record reflecting the disposition of the remaining \$20;

Notify SSA of any changes or circumstances that would affect performance as a payee;



Duties of a Representative Payee, *Continued*

Be aware, if you are a payee for an SSI beneficiary, of all the beneficiary's income and funds, and all items a beneficiary owns that could be converted to cash. Income and resources may impact the beneficiary's payments and eligibility for SSI;

Return to SSA any of the beneficiary's funds you have conserved after you stop serving as payee;

Notify SSA if a beneficiary dies while you are payee, and turn over any conserved funds owned by the beneficiary to the legal representative of the beneficiary's estate for disposition under State law. If you received payments after the death of a beneficiary and they are not due, you must return them to us. (See [Payments Received After Death of the Beneficiary](#).);

Assist in obtaining prescribed treatment for an SSI child beneficiary when that treatment is expected to improve or restore the child's functioning. Failure to provide help in obtaining necessary medical treatment for the child may result in your removal as the child's payee;

Notify SSA if a beneficiary's condition improves to a point where he or she no longer needs a payee;

Submit the appropriate forms for periodic reviews or redeterminations of SSI eligibility factors. SSA will ask you to supply information about the beneficiary's income, resources and living arrangements to help determine if the SSI beneficiary is still eligible for SSI and is receiving the correct payment amount;

Submit a written or online report, upon request, of how you spent or conserved benefits for each beneficiary you serve (See [Payee Monitoring and Accounting](#) and [Exhibits](#), exhibits 1 and 2 for examples of written accounting reports); and

Promptly report misuse or employee theft of beneficiary funds to SSA.



Limits to What a Payee May Do

Being a payee does ***not*** give the authority to:

- Manage the beneficiary's non-social security income;
- Use the beneficiary's Social Security or SSI benefits for anything other than the beneficiary's needs;
- Spend the beneficiary's Social Security or SSI funds in a way that would leave him or her without necessary items or services (housing, food, clothing, medical care);
- Deposit the beneficiary's Social Security or SSI benefits in your, or another person's, account or in your organization's operating account;
- Lend the beneficiary's Social Security or SSI funds to anyone else, including other beneficiaries you serve (this includes using funds held in a collective account to make up a shortfall when another beneficiary's expenses exceed his/her ownership interest in the account);
- Use the beneficiary's "dedicated account" funds for purposes not related to the child's impairment (see [Using Dedicated Account Funds](#), [Misapplication of Dedicated Funds](#), and [Reporting on Monthly Benefits and Dedicated Account Funds](#));
- Keep the beneficiary's conserved funds when you are no longer the payee;
- Charge the beneficiary for payee services unless your organization has our written authorization to do this (See [Fee for Service \(FFS\) Payees](#), [Getting Approved as a FFS payee](#), [Fee Amounts](#), and [Restrictions on FFS Payees](#) for information on collecting a fee for payee services);
- Make medical decisions for the beneficiary;
- Sign legal documents on behalf of the beneficiary; or
- Manage or control the beneficiary's wages, pensions, dividends or any income from sources other than Social Security or SSI benefits.



NY GOL 5-1501 2 (J)"Power of attorney means a written document, other than a document referred to in section 5-1501(C) of this title, by which a principal with capacity designates an agent to act on his or her behalf and includes both a statutory short form power of attorney and a non-statutory power of attorney".

Common usages of Power of Attorney:

- Buy or sell real estate and other real property
- Manage property
- Conduct banking transactions
- Investments
- Make Legal decisions and litigation
- Manage tax issues
- Manage retirement funds
- Sign contracts on the Principal's behalf
- Sign agreements to live in Nursing or Adult Care Facilities
- Make gifts on the Principal's behalf

What is a Power of Attorney?



What a Power of Attorney is *Not*

A power of attorney is *not* a guardianship. Before executing a power of attorney, both the Principal and their Agent(s) should understand:

- The Principal is not relinquishing ANY of their personal freedoms or legal rights simply by executing a power of attorney. They are not “signing away” any legal rights.
- The Agent may *not* act on the Principal’s behalf in any way that is counter to their wishes. If the Principal is no longer capable of making decisions themselves, the Agent must act in a way that they believe is consistent with the wishes of the Principal.
- *An example: The Principal wants to move money to a different bank or give a gift of money to an individual. The Agent may NOT in any way block the Principal, unless capacity is an issue, and even then the Agent must proceed with caution.*



All Powers of Attorney, whether Statutory or not, must meet four criteria: (NY GOL 5-1511 B(1))

- a. Be legible and of type no less than twelve point in size, or, if in writing, a reasonable equivalent thereof;
- b. Be signed and dated by the principal and notarized and witnessed;
- c. be signed, dated notarized by any agent(s) acting on behalf of the principal; and
- d. Substantially conform to the wording of the “Caution to the Principal” and “Important Information for the Agent.”

NY GOL 5-1512 provides that a power of attorney executed in another State or Jurisdiction that is in compliance with that State or Jurisdiction, or the laws of New York, is deemed valid in New York.

Question: Can a Principal reside outside of New York State, and have their signature notarized in their home State?

Answer: Yes, they can.

Nondurable Power of Attorney is often used for a specific transaction, like the closing on the sale of residence, or managing the Principal's financial affairs while Principal otherwise unavailable. Once the designated task is completed, the Power of Attorney is no longer valid.

A **Durable Power of Attorney** enables the Agent to act for the Principal even after the Principal is permanently disabled. The "Durable" Power of Attorney is in effect until the Principal's death, unless it is revoked by the Principal while the Principal has capacity.

A **Springing Power of Attorney** becomes effective at a future time. The trigger is often in the event of illness or disability of the Principal.



Types of Power of Attorney



Durable Power of Attorney

Although there are many reasons for executing a power of attorney, unless the power of attorney is for a specific transaction, the most commonly used power of attorney is a *Durable Power of Attorney*.

A power of attorney in New York State is considered durable unless otherwise specified.

The primary advantage of a durable power of attorney is the ability of the Agent to act for the Principal in the event that the Principal is unable to transact their own business or express their wishes, such as in the event of illness or dementia. This power of attorney lasts until it is revoked by the Principal, or the Principal's death.



A power of attorney is *not* a health care proxy, and in fact a different individual altogether may be given that responsibility, or no one at all.

A Warning: Many institutionalized settings such as Hospitals, Adult Care Facilities and Skilled Nursing Facilities prefer dealing with the Agent, to the exclusion of the wishes of the Principal. This is not acceptable, unless that is what the Principal has requested, or unless the Principal is no longer able to express their own wishes.



Considerations Before Executing a Power of Attorney

CAPACITY: An individual must have the capacity to request your legal assistance. This does *not* mean they must have 100% capacity.

REASON(S) FOR THE POWER OF ATTORNEY: What are the reasons for requesting a Power of Attorney?

THE AGENT: Who does the Principal wish to appoint as an agent? Is it a family member? A friend? A romantic partner?



What are the elements to consider?

Capacity is not a straightforward assessment. A medical incapacity and a legal incapacity may be different standards depending on the circumstances.

The American Bar Association and the American Psychological Association have published a handbook on the Assessment of older adults with diminished capacities. Even if you are dealing with younger adults with diminished capacity, many of the issues to consider remain the same.

<https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>

Capacity



Reasons for the Power of Attorney

Usually, it is not appropriate to second guess the reason someone wants to execute a power of attorney. However, rationality must enter into it. Not only is this a subset of capacity, but it also goes towards possible exploitation.

COMMON REASONS FOR POA

1. Degenerative capacity diagnosis
2. Serious medical diagnosis
3. Institutionalization (nursing facility, Adult Home, etc.)
4. Estate planning

RED FLAG REASONS FOR POA

1. Pressure from the Agent
2. To conceal/hide assets
3. To “give” the agent money.

The Agent

Who is the proposed Agent? Is it a family member? A friend? A romantic partner? An individual can have anyone designated as their Agent (with very limited exceptions).

What are qualities to look for in an Agent? The Principal should consider:

1. Geographic proximity
2. Age of the Agent
3. Ability to deal with paperwork/reliability
4. Look for an Agent who is good with money
5. The Agent should be someone who will take the Principal's wishes seriously and execute them accordingly.





Major Changes to Power of Attorney Effective as of June 13, 2021

- Under the new law, “**substantially conforming**” language is acceptable, notwithstanding if it contains insignificant wording or spelling mistakes; uses language that is essentially the same, but not identical to, the statutory form, or failing to include clauses not relevant to a given power of attorney. (NY GOL 5-1501(2)(n)).
- **Statutory gifts rider eliminated**, and gifting provisions are included in the “Modification” section, although you still must initial (g) “certain gift transactions,” if you want to include gifting provisions in the modifications section (h).
- *Question: Can I draft my own Power of Attorney Form?*
- *Answer: Yes, you can, providing it fulfills the provisions of GOL 5-1500 et seq., but it is not recommended that you draft your own form unless you are an attorney. There are blank POA Forms that can be purchased. A widely used form is published by the New York State Bar Association, and can be found here:*
- <https://nysba.org/products/power-of-attorney-2021-word/>



Witnessing Requirements

Witnessing requirements. All Powers of Attorney must be witnessed by two persons who are neither the designated Agents, nor permissible recipients of gifts. Witnessing is done in the same manner as witnesses to a will.

Question: Can the Notary or attorney act as a witness?

Answer: Yes, as long as they are not an Agent or permissible recipient of gifts, in which case they should not be notarizing or acting as the attorney!



What is a Guardianship?

Guardianship is a legal arrangement where a court gives a person the legal right to make decisions for another person who is unable to make decisions for themselves. Depending on the type of guardianship asked for and the person over whom guardianship is requested, the case is handled by the the Family Court, the Supreme Court or the Surrogate's Court.



There are three types of guardianships for Adults:

Guardianship of An Incapacitated Adult

An Incapacitated Person (AIP) is an adult (older than 18 years of age) and needs help to care for their personal needs or manage their property or financial affairs. This kind of guardianship case is brought in Supreme Court under Article 81.

Guardianship of Developmentally Disabled Person

If a person is "intellectually disabled or developmentally disabled" and has difficulty making decisions for themselves, an Article 17-A petition can be brought in Surrogate's Court.

Guardian Ad Litem

In some cases, a Judge will assign a Guardian Ad Litem (GAL) to help a person during a court case to protect their rights and interests.

Types of guardianships



Guardianship powers

A guardian can have guardianship over different aspects of a ward's life:

- **Guardian of the person.** A guardian of the person can make life decisions for the ward like health care, education and welfare decisions.
- **Guardian of the property.** A guardian of the property handles decisions about the ward's money, investments and savings as directed by a Judge. A guardian of the property must file an annual report about the property.
- **Guardian of the person and property.** This kind of guardian has responsibility of both the ward's life decision and the ward's property.



Extreme Measures

A Guardianship is a legal process that essentially strips an individual of some or all of their legal rights and independence. It is an extreme measure, which is why it is safeguarded in New York by Court procedures. If there is a reliable support system for an individual, and some advanced planning is done, often a Guardianship can be circumvented using alternate tools such as:

Representative Payee

Power of Attorney

Joint names on bank accounts/mortgages

Trusts

Living Wills

Health Care Proxy

Initiating the Guardianship

Who can initiate a Guardianship?

The individual

A concerned friend/family member

A Facility such as a Hospital, Nursing Home, or Adult Care Facility

Who can fight a Guardianship?

The individual **The Mental Hygiene Legal Service (MHLS)** is a New York State agency responsible for representing, advocating and litigating on behalf of individuals receiving services for a mental disability. Mental Hygiene Legal Services will provide free representation to the Individual fighting an Article 81 Guardianship

A concerned Friend/family member

A facility such as a Hospital, Nursing Home or Adult Care Facility





Potential Abuse

Rep Payees, Powers of Attorney, and Guardianships are powerful tools. In the right hands, they can vastly improve the quality of a compromised individual's life. In the wrong hands, it can lead to fraud, financial abuse, and even destitution. The Principal should be aware of this potential for fraud, so that they can be vigilant against it.

Common Types of abuse:

Financial: An obvious and common misuse of the POA, both in terms of mingling funds, monetary gifts, signing over property, and other forms of financial malfeasance. This can be a grey line area if the Agent is taking care of the bills of the Principal adequately; the Principal may sometimes know of the Agent's financial activities, but not say anything for a variety of reasons.

Emotional: A Principal may come to depend on the Agent in a way that can lead to emotional abuse and stress.

Physical: If the Principal is confined, either physically or mentally, the Agent may create an environment of physical fear to maintain control of the Principal and their assets.



Abuse (continued)

If you suspect that there may be a potential for abuse, you should have a frank discussion with the Principal about your concerns.

If you suspect that abuse may already be occurring, there are several organizations you can contact;

The Police;

The County District Attorney's Office

Nassau: 516 571-3800 Suffolk: 631 853-4161

Adult Protective Services

Nassau: 516 227-8405 Suffolk: 631 854-3232

If the person is over 60, the County Enhanced Multidisciplinary Team (E-MDT) may be an option: you can contact me, or look on their website: <https://aging.ny.gov/enhanced-multidisciplinary-team-initiative-e-mdts>

Abuse
(continued)



In Conclusion

All legal instruments that share or restrict the ability of the individual to manage their own affairs should be considered carefully.

Representative Payees are the least restrictive, because the practical application is the narrowest.

Guardianships are the most restrictive, but as such, have the most stringent requirements, both in appointment of a guardian and the annual accounting a guardian must submit to the Court.

Power of Attorney is by far the most common, and also has the greatest potential for abuse. An individual can appoint whomever they please as a POA, and there are virtually no third-party oversights on the Agent, should they wish to abuse their power.

A Hypothetical

You receive a phone call from Ms. Y, the ex-wife of Mr. X.

She tells you that Mr. X, who is 70 years old, was living independently and had his own business. He suffered a sudden stroke. Two days after the stroke, while still in the Hospital, his son and daughter (not the children of Ms. Y), had him execute a power of attorney, naming the son as the Agent. According to Ms. Y, the son/Agent opened a joint bank account on behalf of Mr. X with the daughter. The two siblings drained Mr. X's bank accounts and liquidated his property, routing the funds through the joint bank account and then into their own personal accounts. According to Ms. Y, Mr. X knew nothing of any of this until he obtained bank statements. Mr. X is out of money and is in danger of eviction from his Facility.

What steps do you take?



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