BOARD ON AGING & LONG TERM CARE
1402 PANKRATZ ST, STE 111 • MADISON, WI 53704-4001 • BOALTC@WISCONSIN.GOV • 1-800-815-0015 • BOALTC.WI.GOV

BOALTC Position Paper on Revocation and Execution of Power of Attorney for Health Care after Incapacity

This document does not constitute legal advice. This analysis reflects general legal principles and cannot address every situation. For questions about a specific situation, consult with an attorney.

Position Statement

It is the position of the Board on Aging and Long Term Care (BOALTC) that a Power of Attorney for Health Care (POA-HC) can be revoked at any time, including after the document has been activated due to a finding of incapacity. It is also the position of this agency that an individual of sound mind can execute a new POA-HC, including after an individual has been found incapacitated and a prior POA-HC has been activated.

Analysis

I. Purpose of Power of Attorney for Health Care

A Power of Attorney for Health Care (POA-HC) is a legal document that allows an individual (principal) to name another person (agent) to make healthcare decisions on their behalf in the event they lose capacity. The agent has authority to act on the principal's behalf only because that authority was granted to them by the principal. The purpose of a POA-HC is to allow the principal to choose who makes health care decisions on their behalf. The agent must act in good faith, following the wishes of the principal as written in the POA-HC document or as directed by the principal at any time.

II. The Right to Revoke a POA-HC

The law states that a principal can revoke their POA-HC "at any time."[1] The statutes do not indicate that a principal must be in any particular state of mind to revoke a POA-HC. The right to revoke a POA-HC does not end because an individual has been found incapacitated.

A POA-HC document is considered revoked if the principal:

- Physically destroys the document (e.g., tears it up);
- Signs and dates a statement of revocation;
- Verbally expresses intent to revoke before two witnesses; or

[1] Wis. Stat. § 155.40

- Executes a new POA-HC document.[2]

III. Sound Mind, Incapacity and Incompetency

Sound mind, incapacity and incompetency have different legal meanings. The standard to execute a POA-HC is sound mind, while the standard for activation of a POA-HC is incapacity. Incompetency is a determination made by a court in a guardianship proceeding. Sound mind is determined by two disinterested witnesses, incapacity is determined by two qualified medical professionals, and incompetency is determined by a court of law.

Execution of a POA-HC

To execute a POA-HC, the principal must be of sound mind. Whether or not a person is of sound mind is a judgment call of two disinterested witnesses who are present at the time of signing.

Sound mind is not defined in Wisconsin law, however it is generally thought to mean that the principal understands:

- the general nature of the document,
- the specific powers the document conveys and those it does not, and
- the rights and limitations established in the document.[3]

Adults are presumed to be of sound mind. The only time a person is presumed not to be of sound mind is when the court has appointed a guardian of the person upon a finding of incompetency.[4]

Activation of a POA-HC

Generally, a POA-HC is activated, or becomes effective, upon a finding that the principal is incapacitated. This finding is made by two physicians, or one physician and one licensed advanced practice clinician, who personally examine the principal and sign a statement specifying that the principal has incapacity.[5]

Incapacity means the inability to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage their health care decisions.[6]

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[2] Wis. Stat. § 155.40(1)(a) thru (d)
[3] See *Matter of Estate of Sorensen*, 87 Wis. 2d 339, 274 N.W.2d 694 (1979).
[4] Wis. Stat. § 155.05(1)
[5] Wis. Stat. § 155.05(2)
[6] Wis. Stat. § 155.01(8)

Sound mind can exist after incapacity.

A prior finding of incapacity does not mean that the principal is not, or can never be, of sound mind. Activation of a POA-HC does not prohibit the principal from executing a new POA-HC if they are of sound mind at the time of signing the new POA-HC document. A principal may be capable of understanding the purpose of a POA-HC document even though there was a prior finding of incapacity. While a principal may lack capacity to make complex medical decisions, such as consenting to a complicated surgery, they may still be of sound mind to pick who they do or do not want to make decisions for them. A principal could even meet this standard during a period of lucidity, including after incapacity.[7]

If a principal meets the standard of sound mind after they have been found incapacitated, the principal can execute a new POA-HC. Execution of a new POA-HC automatically revokes the prior POA-HC document. Consequently, the principal retains the ability to revoke a POA-HC even after that document has been activated.

Incapacity is not incompetency.

The law states that an individual who has been adjudicated incompetent and appointed a guardian of the person is presumed not to be of sound mind and is therefore unable to execute a POA-HC. [8] The law also states that if a principal has been found incompetent by a court, the executed POA-HC remains in effect unless revoked by the court. [9] This implies that a principal cannot revoke a POA-HC after being adjudicated incompetent.

No such language exists related to a finding of incapacity, indicating that the principal retains the right to revoke their POA-HC and execute a new POA-HC even after they have been found incapacitated.

IV. Recommendations for Executing a New POA-HC after Incapacity

There is no requirement that a principal regain capacity and a POA-HC be deactivated for a principal to be of sound mind to execute a new POA. However, if a principal has regained capacity, it is recommended to have the prior document deactivated and documented.

If a new POA-HC is executed, it is recommended that the principal should be reassessed for capacity and the new statement of incapacity should be attached to the new POA-HC, effectively activating that document.

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[7] See *O'Brien v. Lumphrey (In re Estate of O'Laughlin)*,50 Wis. 2d 143, 183 N.W.2d 133 (1971) and *Estate of Becker*, 76 Wis. 2d 336, 251 N.W.2d 431 (1977).
[8] Wis. Stat. § 155.05(1)
[9] Wis. Stat. § 155.40(2m), Wis. Stat. § 54.46(2)(b)