



**HOLZMAN**  
**LAW**

**Guardian, Conservator and other  
Representative Account Issues**

**Presented by:**

**Chuck Holzman**

**[chuck@holzmanlaw.com](mailto:chuck@holzmanlaw.com)**

**248-352-4340 ext. 225**

## DEFINITIONS

- ◉ Guardian – A person appointed by a court to manage the physical needs of another.
- ◉ Conservator – A person appointed by a court to manage the financial needs of another.
- ◉ The same person could be both a guardian and a conservator.
- ◉ Under some circumstances, guardians can have power over financial affairs.
- ◉ Protected Person – A person for whom a guardian, conservator or other representative payee is appointed. A protected person can have both a guardian and a conservator.



# DEFINITIONS

- ⦿ Representative payee – a person appointed by a government agency to receive government benefits on behalf of another.
- ⦿ Representative payees are most commonly appointed by the Social Security Administration.
- ⦿ Persons for whom guardians with financial powers, conservators and representative payees have been appointed cannot act on financial matters for themselves. (For representative payees, this may only apply to the receipt and use of the government benefits.)



## FIELD OF MEMBERSHIP

- ⦿ A credit unions may only serve persons within its field of membership.
- ⦿ For accounts involving a guardian, conservator, or representative payee, eligibility is based on the protected person.
- ⦿ If the protected person is eligible for membership then the guardian, fiduciary or representative payee may open an account for the benefit of the protected person.



## ACCOUNT OPENING

- ◉ What is different with fiduciary or representative accounts is that one person is opening an account on behalf of another person.
- ◉ All representative accounts created should be single name accounts, no joint owners and no beneficiaries.
- ◉ A representative payee, guardian, or conservator should never be joint with the protected person.



## ACCOUNT OPENING

- ◉ The credit union's account agreement will be with the actual owner, even though it is the fiduciary or representative who signs it. This means that only the owner is contractually responsible to the credit union.
- ◉ A representative would generally not be responsible to the credit union for an overdraft or deposit item return. But check with counsel if the amount is significant and the representative wrote the overdraft.

## ACCOUNT OPENING

- ⦿ Be sure the TIN (Taxpayer Identification Number) certification is completed correctly. The social security number used must be that of the actual owner, not the social security number of the fiduciary, agent or representative.
- ⦿ Some fiduciaries may actually be business entities, such as a bank trust department.



## GUARDIAN

- A guardian is a person appointed by a court to manage the physical needs of another person.
- Guardians may have financial powers under the following circumstances:
  - When the guardian has been granted “full” powers; and
  - No conservator has been appointed.
- How does the credit union determine if a conservator has been appointed?





## GUARDIAN

- ⦿ The credit union should obtain a copy of the court order appointing the guardian and/or a copy of the Letters of Authority.
- ⦿ Letters of Authority set forth the powers of the guardian.
- ⦿ The Letters of Authority do not state whether or not a conservator has been appointed.
- ⦿ The credit union may need to contact the court that appointed the guardian to determine if and to what extent they can exercise financial powers.



## CONSERVATOR

- A conservator is a person appointed by a court to manage the financial affairs of another.
- The credit union must obtain and verify a copy of the court order appointing the conservator.
- Conservators are granted powers through a document usually called “Letters of Authority”.
- Before opening a conservator account the credit union must have a clear understanding of the conservator’s powers and restrictions.

## CONSERVATOR

- If a conservator can only withdraw or use funds per court order, the account should be frozen and only specifically court authorized transactions permitted.
- If a conservator has limited powers, credit union needs to make sure it is not put in a situation of being a “watch dog”. In that situation, credit union may legally refuse to open a conservator account.



## CONSERVATOR

- If a credit union permits a conservator to exceed their powers, the credit union will be liable to the protected person for damages.
- Should conservator accounts be given cash services, online access, ATM cards or debit cards?
- If the conservator has been give full financial powers and their transactions do not raise red flags, the use of optional services should not pose excessive risk to the credit union.



## REPRESENTATIVE PAYEE

- ⦿ A representative payee is usually appointed by a government agency to receive government benefits on behalf of the person.
- ⦿ The credit union needs to obtain a copy of the document appointing the representative.
- ⦿ Representative payees are empowered to receive government benefits and use those benefits for care and maintenance of the person for whom the benefits are paid.



## REPRESENTATIVE PAYEE

- ⦿ The credit union does not have to be a “watch dog” over the use of the funds in the account.
- ⦿ If the credit union has knowledge that the representative payee is abusing their power the credit union should close the account and report the information to the agency paying the benefits.
- ⦿ The Credit Union can be liable if it knowingly allows such abuse.



## REPRESENTATIVE PAYEE

- Funds paid to a representative payee should not be co-mingled with other funds of the protected person.
- Only funds from the applicable government agency should be paid into the account.
- Protected person may have other accounts.
- The representative payee should not have access to other accounts.
- If access is needed, conservator should be appointed.



# ESTATES

- Personal Representative – a person who is appointed by a court to act on behalf of a deceased member’s estate. Formerly known as “executor”.
- An estate may only act through a personal representative appointed by the court.
- A personal representative’s powers must be conferred by a court, not the Will.





## ESTATES

- ⦿ A personal representative is not always the person stated in the Will.
- ⦿ A Will has no legal authority until a judge gives it legal effect.
- ⦿ A personal representative's powers are set forth in Letters of Authority.
- ⦿ Letters of Authority normally only set forth restrictions. If an act is not restricted a personal representative can perform it.
- ⦿ Letters of Authority normally contain expiration dates.



## ESTATES

- A personal representative is required to assemble the decedent's assets, liquidate and/or distribute the decedent's property according to a Will or by law.
- Personal representatives are normally not given the power to borrow.
- If unsure of a personal representative's powers, require a court order or seek advice of credit union attorney.



## CHOICE OF LAW

- ◉ State courts only have the power to affect actions within the geographic boundaries of the state in which the court sits.
- ◉ Guardians, conservators and personal representatives appointed in states other than where the credit union is located generally have no power to act in the state where the credit union is located.



## CHOICE OF LAW

- Credit union can pay funds in a protected persons or deceased member account to an out of state fiduciary if the fiduciary provides proof of appointment and a sworn statement that provides;
- No proceedings are pending in this state; and
- The fiduciary is entitled to the funds on deposit.
- For deceased members you must wait 63 days after the date of death.



# QUESTIONS





**HOLZMAN**  
**LAW**

**Power of Attorney and  
Trust Accounts**

**Presented by:**

**Chuck Holzman**

**[chuck@holzmanlaw.com](mailto:chuck@holzmanlaw.com)**

**248-352-4340 ext. 225**

## DEFINITIONS

- ⦿ Power of Attorney (POA) – A written document whereby one person (Principal) grants the power to act on their behalf to another.
- ⦿ Attorney in Fact – The person who is given the power to act for another through a POA.
- ⦿ Both a Principal and an Attorney in Fact may both act on the Principal's financial matters independently of one another.



## POWER OF ATTORNEY

- A power of attorney may be used with any account, except for conservator, representative payee or trust accounts. We recommend avoiding use of a POA for business accounts.
- A POA merely allows one person to act on behalf of another.
- The power to act for oneself is not affected by a POA.
- The POA document sets forth who can act and what powers have been granted to them.





# POWER OF ATTORNEY

- ⦿ All POA's become void on upon the death of the person granting the POA (the principal).
- ⦿ A POA can be revoked by the principal at any time.
- ⦿ Some POA's become void upon the disability of the principal.
- ⦿ A durable POA survives disability of the principal.
- ⦿ All durable POA's executed after October 2012 must have a statutory acknowledgement.
- ⦿ Some POA's only "spring" into existence upon the disability of the principal.



# POWER OF ATTORNEY

- I, \_\_\_\_\_, have been appointed as attorney-in-fact for \_\_\_\_\_, the principal, under a durable power of attorney dated \_\_\_\_\_. By signing this document, I acknowledge that if and when I act as attorney-in-fact, all of the following apply:
- (a) Except as provided in the durable power of attorney, I must act in accordance with the standards of care applicable to fiduciaries acting under durable powers of attorney.
- (b) I must take reasonable steps to follow the instructions of the principal.
- (c) Upon request of the principal, I must keep the principal informed of my actions. I must provide an accounting to the principal upon request of the principal, to a guardian or conservator appointed on behalf of the principal upon the request of that guardian or conservator, or pursuant to judicial order.
- (d) I cannot make a gift from the principal's property, unless provided for in the durable power of attorney or by judicial order.
- (e) Unless provided in the durable power of attorney or by judicial order, I, while acting as attorney-in-fact, shall not create an account or other asset in joint tenancy between the principal and me.
- (f) I must maintain records of my transactions as attorney-in-fact, including receipts, disbursements, and investments.
- (g) I may be liable for any damage or loss to the principal, and may be subject to any other available remedy, for breach of fiduciary duty owed to the principal. In the durable power of attorney, the principal may exonerate me of any liability to the principal for breach of fiduciary duty except for actions committed by me in bad faith or with reckless indifference. An exoneration clause is not enforceable if inserted as the result of my abuse of a fiduciary or confidential relationship to the principal.
- (h) I may be subject to civil or criminal penalties if I violate my duties to the principal.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_



## DURABLE POA SAMPLE LANGUAGE

- "This power of attorney is not affected by the principal's subsequent disability or incapacity, or by the lapse of time", or "This power of attorney is effective upon the disability or incapacity of the principal", or similar words.



## LIABILITY LIMITATION PROVISIONS

- ◉ Recommend that the POA have the following provision:

“Third parties may rely upon the representation of my Agent as to all matters relating to any power granted to my Agent, and no person who may act in reliance upon the representation of my Agent or the authority granted to my Agent shall incur liability to me or my estate as a result of permitting my Agent to exercise any power.”



## ACCOUNT OPENING

- ◉ Some representative accounts may involve multi party accounts, such as representatives created through the use of a POA.
- ◉ If a POA is used the account may have joint owners although attorney-in-fact should not be one of the owners or beneficiary unless the POA specifically provides or the Principal opens the account personally.



## ACCOUNT OPENING

- For accounts opened using a POA, the TIN (Taxpayer Identification Number) will be the social security number of the principal not the attorney in fact.
- Attorney in fact must also satisfy all MIP screening requirements.
- For accounts opened using a POA, field of membership is based on the principal not the attorney in fact.



## ACCOUNT OPENING

- ⦿ A credit union is never required to accept a POA.
- ⦿ A credit union cannot refuse to accept a POA solely based on protected characteristics.
- ⦿ Credit unions can establish reasonable procedures for use of POA's, such as requiring the principal to submit the POA, require an opinion of counsel as to validity of POA, require the use of limited POA or other reasonable certification forms.
- ⦿ If a POA is not valid or if the attorney in fact exceeds their authority the credit union could be liable to the principal.



## DEFINITIONS

- Trust - A legal instrument through which individuals can manage their assets throughout their lifetimes (or appoint someone else to do so), and then distribute their assets after their death.
- Settlor – A person(s) that creates a trust.
- Trustee – The person(s) who has the legal power to act on behalf of a trust.





## DEFINITIONS

- ⦿ Successor Trustee – The person(s) who have the power to act on behalf of a trust when the Trustee is no longer able to act.
- ⦿ The same person may be both a Settlor and Trustee.
- ⦿ Trusts can be both revocable and irrevocable. The type of Trust may have a bearing on the Trustee's powers.



## FIELD OF MEMBERSHIP

- For trusts, eligibility is based on;
  - For Michigan state-chartered credit unions, eligibility is based on any settlor or, if no settlor is living, on any beneficiary.
  - For federal credit unions, ALL settlors, beneficiaries and trustees must be eligible for membership



## ACCOUNT OPENING

- Revocable trusts use the TIN of the grantor. If there is more than one grantor, the TIN of any grantor may be used.
- Upon death of grantor whose TIN was used, the trust must obtain a new TIN or use the TIN of a surviving grantor.
- Irrevocable trust must have a separate TIN issued by the IRS.



## TRUST ACCOUNTS

- A trust can be either revocable or irrevocable.
- The difference is assets placed in an irrevocable trust cannot be removed from the trust, except in specific circumstances. The person who set it up cannot undo it.
- Accounts for irrevocable trusts require greater oversight and thus some credit unions choose not to permit such accounts or limit the services provided to such trusts (such as no remote access arrangements being allowed).



## TRUST ACCOUNTS

- ◉ When the grantor of a revocable trust dies, there is no longer anyone with the power to revoke the trust.
- ◉ Whether or trust is revocable or irrevocable should be determined at the time the trust was created.



# IRREVOCABLE TRUST ACCOUNTS

- The difference is assets placed in an irrevocable trust cannot be removed from the trust, except in specific circumstances. The person who set it up cannot undo it.
- Accounts for irrevocable trusts generally require greater oversight and thus some credit unions choose not to permit such accounts or limit the services provided to such trusts (such as no remote access arrangements being allowed).



## TRUST ACCOUNTS

- ◉ The Trust itself identifies the Trustee(s) and sets forth its powers and those of the Trustees.
- ◉ A Trustee can only exercise those powers properly delegated.
- ◉ The credit union should obtain a valid Certificate of Trust Existence that complies with Michigan law.



# TRUST ACCOUNTS

- ◉ A Certificate of Trust Existence complies with Michigan law if it contains the following:
  1. The name and date of the trust and the date of any amendments.
  2. The name and address of the currently acting trustee.
  3. The powers of the trustee relating to the purposes for which the certificate is being offered.





## TRUST ACCOUNTS

4. The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust.
5. The authority of co-trustees to sign. Can they act independently or must they act together.
6. A certificate of trust shall state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certificate of trust to be incorrect.

Certificate may be signed by the settlor, trustee or attorney for trust.



# POWERS EXAMPLE

- To make, draw, sign, deliver, and accept checks, drafts, receipts for moneys, notes, or other orders for payment of money against or otherwise make withdrawals from checking or savings accounts which I may have in my sole name or in joint name with any other person, in any bank or financial institution, for any purpose which my representative or trustee may think necessary, advisable, or proper; and to endorse and negotiate in my name and deliver checks, drafts, notes, bills, certificates of deposit, commercial paper, money market instruments, bills of exchange or other instruments for the payment of money and to deposit same, as cash for collections, and cash into checking or savings accounts which I may have in my sole name or in joint name with any other person, in any bank or financial institution; and to carry on all my ordinary banking business.



## POWERS EXAMPLE

- To deposit trust property in a financial institution, including a financial institution operated by or affiliated with the trustee and to invest and reinvest trust property as would a prudent investor acting in accordance with the Michigan prudent investor rule and to deposit securities with a depository or other financial institution.



## POWERS EXAMPLE

- To borrow money or property, with or without security, for any purpose from the trustee or others and to mortgage or pledge trust property for a period within or extending beyond the duration of the trust as security or collateral for the repayment of such borrowing.



## CERTIFICATE OF TRUST

- A person who acts in reliance upon a certificate of trust without knowledge that the representations contained in the certificate are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certificate.
- A person who in good faith enters into a transaction in reliance upon a certificate of trust may enforce the transaction against the trust property as if the representations contained in the certificate were correct.



## CHOICE OF LAW

- Trusts can be created and governed based on the laws of any state.
- Credit unions should avoid maintaining accounts for trusts governed by the laws of other states without obtaining a certificate of trust that meets the requirements of Michigan law.
- A certificate of trust that meets the requirements of Michigan law can be used for any type of trust account.



QUESTIONS?

