

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
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July 29, 2010

Opinion No. 10-89

Ability of a Person Possessing Limited Communication Skills to Execute a Power of Attorney

**QUESTION**

May a person possessing limited communication skills, for example, one who is unable to write as the result of a stroke, execute a financial power of attorney?

**OPINION**

A person who is unable to communicate in writing, such as someone who is impaired as the result of a stroke, by following specific procedures may execute a financial power of attorney. Additionally, in a legal proceeding following the filing of a proper petition, a court may appoint a conservator to assist that person with the management of that person's affairs.

**ANALYSIS**

This request concerns the ability of a person with limited communication skills, for example, someone who is impaired as the result of a stroke, to execute a power of attorney for financial matters. The request inquires if a videotape could be utilized to create a power of attorney for financial matters authorizing a spouse or next of kin to act for the principal.

Tennessee has enacted the Uniform Durable Power of Attorney Act, Tenn. Code Ann. §§ 34-6-101 to -111 (2007). "Durable power of attorney" is defined in Tenn. Code Ann. § 34-6-102, as:

a power of attorney by which a principal designates another as the principal's attorney in fact *in writing* and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable, notwithstanding the principal's subsequent disability or incapacity.

(emphasis added). "The execution of a power of attorney creates a principal-agent relationship." *Tenn. Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743, 749 (Tenn. 2007)(citing, e.g.,

*Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296-97 n.1 (Tenn. Ct. App. 2001), *perm. app. denied* (2002)). “A power of attorney is a written instrument that evidences to third parties the purpose of the agency and the extent of the agent’s powers.” *Tenn. Farmers Life Reassurance Co.*, 239 S.W.3d at 749 (citing *Lempert v. Singer*, 766 F.Supp. 1356, 1360 (D.V.I. 1991); *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 454 (Del. 1982); *Ho v. Presbyterian Church of Laurelhurst*, 840 P.2d 1340, 1343 (Or. Ct. App. 1992); *Schall v. Gilbert*, 741 A.2d 286, 289 (Vt. 1999)); *see also Mitchell v. Kindred Healthcare Operating, Inc.*, 2009 WL 1684647, at \*4 (Tenn. Ct. App. June 17, 2009).

Tenn. Code Ann. § 34-6-111 (2007) provides that a written “power of attorney is effective at the date signed or may defer the effective date to the date the principal is determined to be disabled or incapacitated.” The power of attorney instrument vests powers in the attorney in fact to act for the principal “without the necessity of procuring any judicial authorization.” Tenn. Code Ann. § 34-6-109 (2007). “In the absence of specific legal requirements, a power of attorney may be in any form and may be executed in accordance with any recognized common-law method for executing written instruments.” *Tenn. Farmers Life Reassurance Co.*, 239 S.W.3d at 749 (citing *Realty Growth Investors*, 453 A.2d at 454); *see also Mitchell*, 2009 WL 1684647, at \*4.

Tennessee statutory law regarding a durable power of attorney, Tenn. Code Ann. §§ 34-6-101 to -111 (2007), does not provide for execution of a durable power of attorney except in writing. There is no provision for executing a power of attorney exclusively by videotape. There are two ways at common law to execute a written instrument even if the person granting power of attorney is unable to sign a document. The first option is that the person may mark an “X” on the appropriate line. *In re Estate of Champion*, 2004 WL 2439302, at \*2 (Tenn. Ct. App. Oct. 27, 2004). The second option at common law is that the person may have someone else sign the document at his or her direction. *Doggett v. Allstate Ins. Co.*, 1992 WL 43286, at \*2 (Tenn. Ct. App. Mar. 10, 1992), *perm. app. denied* (1992)(finding that illiterate insurance applicant’s intent to have his grandson sign the application for him was communicated by the applicant touching the pen while his grandson signed). Utilizing present technology, in lieu of an “X,” a person could also authorize the placement of a stamped, digital or other electronic signature. The person described in this request who is creating the power of attorney through a third party should be present, must be apprised of the terms of the document, and must intend to authorize the third party to sign as a result of that person’s physical disability. *See generally Cabany v. Mayfield Rehab. & Special Care Ctr.*, 2007 WL 3445550, at \*6 (Tenn. Ct. App. Nov. 15, 2007)(arbitration clause in nursing home admission contract signed by a third party was found to be unenforceable in the absence of these conditions). In situations when a third party is authorized to sign, it would be advisable to have two or more attesting witnesses, including the proxy signatory, present and signing attestation clauses. *See generally Eslick v. Wodicka*, 215 S.W.2d 12, 15 (Tenn. Ct. App. 1948), *cert. denied* (Tenn. 1948)(statutory requirement that attesting witnesses sign a will in the presence of the testator was not met when attesting witnesses signed separately and later acknowledged the signatures). Additionally, it would be advisable to have a notary witness and verify that the attesting witnesses executed the attestation clauses on the document. Finally, in practice, some parties will not honor a power of attorney unless the power of attorney has been recorded in the appropriate county clerk’s office.

Furthermore, Tennessee statutory law provides procedures by which a court may be petitioned to appoint a conservator with powers to act in whole or in part to manage the affairs of someone who is partially or totally disabled. *See* Tenn. Code Ann. §§ 34-1-101 to -131 and 34-3-101 to -109 (2007). Tenn. Code Ann. § 34-1-101 (2007) provides, in part:

(4) “Conservator” or “coconservator” means a person or persons appointed by the court to provide partial or full supervision, protection and assistance of the person or property, or both, of a disabled person;

...

(7) “Disabled person” means any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity[.]

Therefore, an appropriate procedure to assist someone who is partially disabled and has limited communication skills that prevent the person from writing would be to seek appointment by the court of a conservator. This process could involve, as is appropriate, the use of a digitally recorded deposition/statement or other admissible evidence of the person’s intent that the spouse, next of kin, or other person assist in managing his or her affairs.<sup>1</sup>

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<sup>1</sup> Tenn. Code Ann. § 34-3-103 (2007) provides:

Subject to the court’s determination of what is in the best interest of the disabled person, the court shall consider the following persons in the order listed for appointment of the conservator:

- (1) The person or persons designated in a writing signed by the alleged disabled person;
- (2) The spouse of the disabled person;
- (3) Any child of the disabled person;
- (4) Closest relative or relatives of the disabled person: and
- (5) Other person or persons.

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Requested by:

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