

UPDATE ON THE LAW

FINANCIAL POWERS OF ATTORNEY

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THE BASICS

Powers of Attorney appoint another person to make decisions for you. A Power of Attorney can be used for healthcare decisions or financial. It can take effect immediately or at some point in the future. It can last until death or until a date or event. It can be broad, giving many powers, or very specific, granting only limited powers.

The person you name to act on your behalf is called an “Agent” or “Attorney-in-Fact.” You are called the “Principal.”

Powers of Attorney are very powerful tools enabling your Agent to assist you if you are unable to take care of business matters on your own. It can be very dangerous if the wrong person is named as your Agent. No institution or person is obligated to accept your Power of Attorney.

Texas has a statutory form which may be used to create a durable Power of Attorney. Before you make a Power of Attorney think about the following information and discuss it with your legal advisor.

DURABLE v. NON-DURABLE

A Durable Power of Attorney is a Power of Attorney that lasts through the Principal’s incapacity. Without the word ‘durable’, the Power of Attorney ceases at the time of incapacity of the Principal. If the Power of Attorney is being created as a tool to be used to assist the Principal at incapacity it must clearly state that it is durable. The Texas statutory form assumes that the Principal intends to create a durable Power of Attorney.

SPRINGING v. IMMEDIATE

A springing Power of Attorney takes effect at a specific date or event, such as the Principal becoming incapacitated. The Power of Attorney should define just what this event is and how the Agent is to prove to a third party

that the event took place.

An immediate Power of Attorney takes effect at signing. The Agent under an immediate Power of Attorney does not need to prove any event has taken place. The Agent may immediately use the Power of Attorney to manage the Principal’s assets.

Most abuses of Powers of Attorney take place when someone is incapacitated and unable to monitor the Agent effectively.

Texas’ statutory form allows the Principal to select a springing Power of Attorney in the event of incapacity or an immediate Power of Attorney that takes effect on signing.

GENERAL v. LIMITED

A general Power of Attorney grants the Agent broad powers to handle all of the Principal’s business.

The Texas Statutory Durable Power of Attorney provides a long list including banking, taxes, government benefits, pensions, litigation, insurance, stocks and real estate. The statute defines exactly what each of these powers includes. Before you sign your Power of Attorney, you may cross out the powers you do not wish your Agent to have. You may also wish to have an attorney draft a Limited Power of Attorney granting your Agent specific powers such as authority to transfer the car title or sell a house.

WHO SHOULD BE YOUR AGENT?

The person you appoint as your Agent must be someone you trust implicitly. Your Agent should be selected with care. Your Agent needs to understand the types of decisions you would make.

The Agent named in a financial Power of Attorney should have good financial skills, be trust- worthy to handle your financial matters and be available when needed.

You can name successor Agents in your Power of Attorney. The successor will take over when the first Agent named is unable to act or resigns. It is possible but not recommended to name "co-Agents" who act at the same time. Your Power of Attorney must specify if co-Agents may act independently. The co-Agents must act unanimously. It is not recommended to name co-Agents because of the logistical problems and the likelihood of a disagreement.

An Agent is not required to accept the appointment of Agent. They may also resign. It is very important to discuss this job with anyone you are planning to appoint.

WHAT ARE THE DUTIES OF THE AGENT?

The Agent under a Power of Attorney carries a heavy responsibility. The Agent is a fiduciary, a Latin word for "faith. The Agent has the legal duty to be more careful in conducting business for you, the Principal, than the Agent might be in conducting his or her own personal business. An Agent may not be careless with the Principal's property or affairs. The Agent must keep all of the Principal's property separate from the Agent's own property. Bank accounts must be set up in the Principal's name with the Agent merely on the account as an Agent. The Agent is required to keep accounts and records.

At the Principal's request, the Agent must provide an accounting for all of the Agent's acts. The Agent must follow the guidelines set out in the written Power of Attorney. The Agent must always act in the Principal's best interest, which may not be the Agent's best interest.

The Agent may hire professionals like attorneys, CPA's and financial advisors to assist him. If you are acting as an Agent and have any questions about your job, it is extremely important that you seek legal advice to insure that you meet your responsibilities.

HOW DO I USE A POWER OF ATTORNEY?

Once you have executed a Power of Attorney, take it to your bank, stock broker or financial advisor. Ask them if they will honor your Power of Attorney. You may even wish to add your Agent to your accounts (as an Agent, not owner). Many financial institutions will not accept the Texas Durable Statutory Power of

Attorney. If your institution does not, ask them what they will accept. Often, the institution will have its own Power of Attorney which they will honor. If this is the case, work with your attorney to execute the financial institution's Power of Attorney.

If you plan to use the Power of Attorney for real estate transactions, the Power of Attorney must be filed in the county deed records where the real property is located.

Third parties like banks or title companies are not required to take Powers of Attorney. If an institution has reason to believe the Power of Attorney is not valid, it may decline the Power of Attorney. This can be extremely troublesome when the Principal is incapacitated and could necessitate a guardianship.

REVOCATION

The Principal may revoke a Power of Attorney at any time. This must be done in writing. There are specific statutory notice requirements when a Power of Attorney is revoked. It is wise to have an attorney at law assist you if you wish to revoke a Power of Attorney.

All Powers of Attorney cease at the death of the Principal.

SUMMARY

Powers of Attorney are very powerful tools that can be used to provide for your financial care when traveling or if incapacitated. It is important to choose your Agent wisely and plan ahead by presenting the Power of Attorney to financial institutions early.

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