

## The Durable Financial Power of Attorney

### **What Is a Power of Attorney?**

A power of attorney is the grant of legal rights and powers by a person (the "principal") to another (the "agent" or "attorney-in-fact"). In Colorado, two types of powers of attorney are commonly used. One is for medical decisions; the other is for financial affairs. The discussion that follows concerns only financial powers of attorney.

Most often the principal appoints the agent under a general power of attorney. Given a broad grant of powers, the agent, in effect, stands in the "shoes" of the principal and acts for the principal on financial and business matters. The agent can do whatever the principal may do -- withdraw funds from bank accounts, trade stock, pay bills, cash checks -- except as limited in the power of attorney. This does not mean that the agent can just "take the principal's money and run." The agent must use the principal's finances as the principal would for his or her benefit.

### **When Does the Power of Attorney Take Effect?**

A "springing" power of attorney takes effect only when the event described in the instrument takes place. Typically, this is the incapacity of the principal as certified by one or more physicians. Because of the delays that such a procedure for certification may cause, a "standing" power is used most often. With the standing power, the principal gives the agent powers upon signing of the document that continue until revoked by the principal. A power is *durable* if these powers may be exercised even though the principal is disabled. All powers of attorney are revoked upon the death of the principal.

### **Does the Power of Attorney Take Away a Principal's Rights?**

No, absolutely not. Only a court can take away a principal's rights through imposition of a conservatorship. An agent simply has the power to act according to the principal's authorization set forth in the document.

### **Can the Principal Change His or Her Mind?**

Certainly. A principal may revoke a power of attorney anytime. All a principal needs to do is send a letter to the agent revoking the agent's appointment. From the moment the agent receives the letter, he or she can no longer act under the power of attorney. The agent does not have the right to ignore the revocation even if the agent believes that the principal no longer has legal capacity to do so! The agent's remedy is to seek management of the principal's funds with court authorization: a conservatorship. The conservator or guardian, however, like the principal, has the power to revoke the power of attorney. Also, state law automatically revokes the principal's appointment of a spouse as agent upon a final divorce.

## **Can the Principal Hold an Agent Liable for the Agent's Actions?**

Yes. The law holds the agent to the same standard as a Trustee or Executor: the "prudent man rule." The agent must exercise "due care" and manage the funds not as if they were funds of the agent, but with the care needed for managing funds of another. Preservation of assets is extremely important. Nevertheless, the agent must take into account the principal's estate plan or goals. In carrying out the estate plan, the agent will be only liable for actions taken in bad faith. The agent has right to view and copy the principal's will, trust, if any, and other personal papers to carry out this duty.

## **Compensation?**

Yes, if the principal has agreed to pay the agent. Usually, the agent is entitled to "reasonable" compensation for the agent's services. However, commonly, the agent is a family member and does not expect to be paid. If an agent would like to be paid, the agent should discuss payment with the principal, agree on a reasonable rate of payment, and put that agreement in writing.

## **What If the Principal Appoints Multiple Agents?**

Depending on the wording of the power of attorney, you may or may not have to act together on all transactions. Often, for multiple agents, the principal appoints them "severally," meaning that they can each act independently of one another. Nevertheless, the agents should talk with each other to make certain that their actions are consistent.

## **What Records Should the Agent Keep?**

The agent should keep good records of the agent's actions under the power of attorney. That is the best way to be able to answer any questions anyone may raise. An agent should not commingle the principal's funds with the agent's own money. Keep the accounts separate. The easiest way to keep records is to run all funds through a checking account. The checks will act as receipts and the checkbook register as a running account. The agent may be forced to account by a Court.

## **What Additional Problems May I Have?**

Agents should consult an attorney regarding problems with retitling assets, real estate transactions, filing tax returns, dealing with trustees of living trusts, gifts, spousal support and Medicaid planning for the principal.