

Chapter 23

Powers of Attorney

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SYNOPSIS

- 23-1. Introduction to Powers of Attorney
- 23-2. Financial Powers of Attorney
- 23-3. Medical Powers of Attorney
- 23-4. Glossary

Exhibit 23A. Sample Colorado Statutory Power of Attorney for Property

23-1. Introduction to Powers of Attorney

Whether young or old, you should decide who will make medical and financial decisions for you in case you become incapacitated by a debilitating physical disease or mental impairment, whether permanent or temporary. In order to give legal effect to your decision, you should prepare a document granting someone the legal ability to act on your behalf. The legal document is called a durable power of attorney.

What is a power of attorney?

Essentially, a power of attorney is a legal document that grants legal rights and powers by a person (the “principal”) to another (the “agent” or “attorney-in-fact”) to make decisions on behalf of the principal. The agent has the obligation to make decisions based upon the preferences of the principal and the authority granted in the document. An agent may not override the wishes of the principal.

What is a durable power of attorney?

A “durable” power of attorney permits an agent to make decisions even if the principal becomes incapacitated. To make your power of attorney durable, you must include language that states that “this power of attorney shall not be affected by disability of the princi-

pal” or “this power of attorney shall become effective upon the disability of the principal” or similar words to confirm that you intend for the power to continue in spite of subsequent disability or illness.

Why should I have a durable power of attorney?

If you become incapacitated because of an accident or illness, your agent can immediately step in and make decisions for you without going to court to obtain a guardianship and/or conservatorship. Guardianship and conservatorship proceedings may be expensive, public, and time consuming. By preparing a durable power of attorney in advance, you decide who will make your decisions and, by doing so, you may save your family the stress and expense of petitioning the court.

How do I create a power of attorney?

Any adult who understands what he or she is doing can create a power of attorney by writing down exactly what he or she wants the agent to do. Once the document has been prepared, it should be notarized.

Because a power of attorney should be tailored to your particular circumstances, it should be written by an attorney to ensure that your intentions are clearly expressed. If you choose not to hire an attorney, using the Colorado “Statutory Power of Attorney” is probably the next best form to use. A sample of this form is provided as Exhibit 23A of this chapter.

When does a power of attorney take effect?

When a power of attorney takes effect depends on what the document directs. There are two primary ways a power of attorney takes effect. The first is referred to as a “springing power,” which means the document will take effect only when an event described in the instrument takes place. Typically, this would be when the principal is incapacitated as determined by a licensed physician. The second type is a “standing power” that takes effect as soon as it is signed by the principal. Some powers of attorney may blend these two concepts. For example, a principal may direct that a power of attorney is “standing” if the principal’s spouse is acting as agent; however, if the spouse cannot act, the successor agent’s power may be “springing.”

Does a power of attorney take away a principal’s rights?

A power of attorney does not take away a principal’s rights to make decisions. An agent simply has the power to act along with the principal in accordance with the authorization set forth in the document. Only a court, through a guardianship and/or conservatorship proceeding, can take away a principal’s rights.

Can a principal change his or her mind?

A principal may change his or her mind and revoke a power of attorney at any time, so long as the principal has capacity. All a principal needs to do to revoke a power of attor-

ney is send a letter to the agent notifying the agent that his or her appointment has been revoked. From the moment the agent receives a revocation letter, he or she can no longer act under the power of attorney. The principal should also send a copy of the revocation to any institution or person that may have received notice of the original power of attorney, such as doctors or banks. Otherwise, those individuals or institutions may continue to rely on the power of attorney until given notice of the revocation.

State law automatically revokes the principal's appointment of a spouse as an agent when a divorce is final. However, if a successor agent is named, the power of attorney would remain in effect.

Whom should I name as my agent or attorney-in-fact?

The agent selected to act under a power of attorney should be a trusted individual who is at least 21 years of age. Common choices for agents are a spouse, an adult child, a sibling, or a trusted friend. Some principals choose professional fiduciaries to serve as agent. Either way, it is always recommended to ask the person you want to name for permission to name them as an agent to ensure that they are willing to accept the appointment.

Can a principal hold an agent liable for the agent's actions?

An agent is a "fiduciary," meaning the agent must act with the highest degree of good faith on behalf of the principal. The agent must follow any and all instructions given by the principal, and if the principal's wishes are not specific, then the agent is free to do what is in the best interest of the principal. The agent must act in accordance with the principal's best interest, not the agent's interests. If an agent fails to act in accordance with the principal's wishes or in the principal's best interest, the agent can be held liable for his or her actions.

Can the agent be reimbursed for expenses and compensated for work?

An agent may be reimbursed for reasonable expenses and compensated for his or her work. If a principal would like to ensure that his or her agent will be reimbursed for expenses and compensated for work, especially an agent who is a close family member, the principal should include this direction in the power of attorney.

What if a principal appoints multiple agents?

A principal may appoint more than one agent, but this is not usually recommended. Having more than one agent as a decision-maker can create a circumstance in which the agents do not agree on a particular course of action. When agents do not agree, a court may have to resolve the dispute. It is usually better to appoint only one person to be the decision maker or to provide a tiebreaking mechanism in the document. Nonetheless, if multiple agents are appointed, the principal can allow them to act independently or require them to act in unison, depending upon how the power of attorney is worded. In either case, multiple agents should regularly communicate to make sure their actions are consistent.

What is a successor agent?

A successor agent is the person named to serve (the backup) if your first choice for agent cannot serve due to death, incapacity, resignation, or refusal to accept the office of agent. Unless the document provides otherwise, if a named agent is unable or unwilling to serve as agent, the agency is revoked and the next person in line under the document becomes agent.

No one can take over power of attorney unless the principal names a successor agent (or agents) in the document or if the principal authorizes the agent to appoint a successor agent. If neither is possible, and the principal has become incapacitated, it may be necessary to petition the court for appointment of a guardian and/or conservator. Therefore, it is always best to name at least one successor agent in your power of attorney.

Should an agent keep any records?

The agent is required to keep detailed records of his or her actions under the power of attorney so the agent is able to answer any questions the principal or other interested persons may raise.

What do I do with my power of attorney document?

You should give your original power of attorney to the agent you appoint and keep a copy of the document for yourself with your other important papers. Additionally, you may want to provide banks or doctors with copies of the power of attorney to keep on file.

What if I think someone is misusing a power of attorney?

Although having a power of attorney has many advantages, the primary disadvantage is that it gives an agent the opportunity to take advantage of the principal. Financial exploitation, which includes the illegal or unauthorized use of an individual's funds, property, or resources for profit or advantage, is on the rise and requires prompt reporting. If you suspect that an agent is misusing a power of attorney, you should take immediate action.

If you suspect your agent is misusing your power of attorney, you should immediately request an accounting, revoke the power of attorney, and notify any people or institutions that may have been given a copy of the document. If you suspect someone else's agent is misusing a power of attorney or if you suspect that a principal was coerced to sign a power of attorney the principal did not (or could not) understand, you should contact Adult Protective Services to report your concerns.

Any interested person can also go to court in the county where the principal resides (or in the county where the guardian and/or conservator resides if one has been appointed) to control the agent or to request that the court replace the agent with a guardian or conservator or both. If an agent has misused a power of attorney, the court can force the agent to return any stolen assets.

What if my agent wants to resign?

An agent may resign according to the terms and conditions stated in the power of attorney. The agent must notify, in writing, the principal, the guardian and/or conservator (if any), any successor agent named in the document, and all reasonably ascertainable third parties who might be affected by the resignation. However, if the principal is incapacitated and there is no successor agent available, the agent should take steps to ensure someone is available to take his or her place as the decision-maker.

When does a power of attorney expire?

If you give a non-durable power of attorney, the power of attorney expires when you become incapacitated.

A durable power of attorney expires when the principal dies and the agent has knowledge of the death (unless the document identifies a specific date or condition for expiration). After the principal's death, the personal representative named in the will (or appointed by the court) is responsible for making decisions for the estate of the principal.

Is my power of attorney valid in other states?

A power of attorney is valid in any state, regardless of where the individual lived when the power of attorney was created.

What is a limited power of attorney?

A Limited Power of Attorney, also known as a Special Power of Attorney, grants an agent the legal authority, in writing, to perform a specific act or acts on behalf of the principal. For example, if you do not want to grant an agent full control over your financial matters, but would like an agent to cash your checks, you can limit the agent's powers by preparing a Limited Power of Attorney.

What is the difference between a medical and a financial power of attorney?

A Medical Power of Attorney generally gives an agent the authority to make medical and personal decisions. A Financial Power of Attorney gives an agent authority to manage the principal's finances and property and to transact business on behalf of the principal. The following sections describe these two powers of attorney in greater detail.

23-2. Financial Powers of Attorney

A Financial Power of Attorney, also known as a General Power of Attorney or General Power of Attorney for Property, is a very flexible and inexpensive method of giving another person the legal authority to manage some or all of your financial affairs. 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. When transacting business on behalf of the principal, the agent must use the principal's finances as the principal would for the principal's own benefit.

When an agent manages the finances for a principal, the most important rule for the agent is to maintain separate accounts. An agent should never commingle the agent's own funds with those of the principal. The easiest way for an agent to keep track of the basic financial records is to establish a separate checking account because the checks will act as receipts and the checkbook register as a running account. Likewise, the agent should avoid cash transactions whenever possible because such transactions are more difficult to account for and may be more heavily scrutinized. A principal should ensure that the agent understands that the agent has a legal obligation to furnish the principal, or his or her designee, with information about the agent's activities.

When an agent acts for the principal's benefit under a Financial Power of Attorney, the law holds the agent to the "prudent man rule," which means that the agent must exercise "due care" and manage the principal's funds not as if they were the funds of the agent, but with the care needed for managing funds of another. The agent should avoid speculative investments even if the agent would be willing to take more risk with his or her personal funds.

An agent under a Financial Power of Attorney must also take into account the principal's estate plan or goals. As such, the agent has the right to see and copy the principal's will, trust, or other personal papers in order to carry out this duty. In carrying out the principal's estate plan, the agent will only be liable for actions taken in bad faith.

As a word of caution, as previously mentioned, financial exploitation is on the rise. The principal should be careful when empowering an agent through a Financial Power of Attorney. These documents are helpful tools and people should be encouraged to use them. However, a principal needs to carefully consider his or her choice of agent, monitor the agent, and consider other appropriate safeguards, such as including language in the document that allows successor agents or other family members to have some oversight of the agent currently serving.

23-3. Medical Powers of Attorney

A Medical Power of Attorney, also known as a Power of Attorney for Health Care, allows you to name an agent who will make health care decisions for you when you are not able to do so. In the document, you can give specific instructions to your agent about various issues like surgery, medical treatment, or the need for nursing home care. Unlike a living will, a Medical Power of Attorney's use is not limited to terminal illness or persistent vegetative state situations. Instead, the agent under a Medical Power of Attorney is authorized to make *any* decisions that the principal could make, with certain limitations, if the principal had capacity to do so. Although an agent acting under a Medical Power of Attorney may direct medical treatment while the principal is still medically capable of making his or her own medical decisions, it is uncommon. Typically, medical providers will look to the principal to make decisions relative to medical courses of action so long as the principal is able to provide informed consent. Nevertheless, no agent may consent to or refuse any proposed medical treatment for a principal over the principal's objection.

A Medical Power of Attorney can be as simple or as sophisticated as the principal and the principal's attorney wish to make it. In addition to the basic elements of a Medical Power of Attorney addressing medical care, the principal can consider adding language which permits the agent to complete the documentation necessary for insurance, Medicare, Medicaid, and medical facility admissions. A Medical Power of Attorney should also include language sufficient to satisfy the requirement of the Health Insurance Portability and Accountability Act of 1996, commonly known as "HIPAA." HIPAA is intended to ensure the privacy of medical information. Although an agent legally is entitled to access the medical records of the principal, by including specific HIPAA language which authorizes an agent to be considered a "personal representative" (the HIPAA term for an agent), the principal will ensure that the agent can discuss medical issues and access medical records so he or she can make informed decisions when the principal is unable to do so.

It is recommended that the principal discuss all medical issues and beliefs concerning medical treatment with his or her doctor and the agent under a Medical Power of Attorney, since the agent is required to follow the principal's wishes and intent as to medical care and treatment. If the principal's specific wishes are not known to the agent, the agent must act in accordance with the best interests of the principal as determined by the agent.

23-4. Glossary

Adult. A person over the age of 18 years.

Agent/Attorney-in-Fact. The person whom you designate to act and make decisions for you under a power of attorney.

Capacity. The ability to make and communicate responsible decisions.

Conservator. The person appointed by a court to manage the financial affairs and property of a person in need of protection.

Conservatorship. A legal proceeding giving a person, the conservator, the power to manage the finances and property of a minor or a protected person.

Due Care. The care a reasonable person would exercise under the circumstances.

Durable Power of Attorney. A power of attorney that is valid even if the principal becomes incapacitated or unable to manage his or her affairs.

Financial Exploitation. The illegal or unauthorized use of an individual's funds, property, or resources for profit or advantage.

Financial Power of Attorney. Also known as a General Power of Attorney or General Power of Attorney for Property. A document whereby the principal gives legal authority, in writing, to another person to handle all (or some) of the financial affairs for the person creating the power of attorney. Such a power may also be durable.

Guardian. A person appointed by a court to be responsible for the care and custody of the person of a minor or incapacitated person.

Guardianship. A legal proceeding giving a person, the guardian, the power to provide for the care and custody of a minor or an incapacitated person.

HIPAA (Health Insurance Portability and Accountability Act of 1996). A privacy rule that establishes federally protected rights under which an individual can control the uses and disclosure of protected health information.

HIPAA Authorization. A written directive authorizing your personal representative (the HIPAA term for an agent) to discuss your medical records, conditions, and medical treatment with your medical professionals.

Incapacity. The inability to make or communicate responsible decisions.

Limited Power of Attorney. Also known as a Special Power of Attorney. It gives legal authority to perform a specific act or acts for another person. Such a power of attorney may also be durable.

Medical Power of Attorney. Also known as a Power of Attorney for Health Care. A legal document appointing an agent to make medical decisions for you in the event you are unable to make your own medical decisions. Such a power may also be durable.

Power of Attorney. A written instrument by which one person, called the principal, appoints another as his or her agent or attorney-in-fact, and gives the agent the authority to perform certain specified acts or kinds of acts on behalf of the principal.

Principal. The person who signs a power of attorney granting powers to an agent/attorney-in-fact.

Protected Person. A person subject to a conservatorship.

Prudent Man Rule. An agent must exercise the care a reasonable person would exercise under the circumstances and manage the principal's funds not as if they were the funds of the agent, but with the care needed for managing funds of another.

Springing Power of Attorney. A power of attorney that becomes effective on the happening of some later event, such as a declaration by a physician that the principal is incapacitated.

Standing Power of Attorney. A power of attorney that is effective immediately and is not contingent upon the happening of a later event.

Ward. A person found by a court to be an "incapacitated person" and subject to a guardianship.

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Exhibit 23A.

Sample Colorado Statutory Power of Attorney for Property

NOTICE: UNLESS YOU LIMIT THE POWER IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER TO ACT FOR YOU, WITHOUT YOUR CONSENT, IN ANY WAY THAT YOU COULD ACT FOR YOURSELF. THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE "UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT", PART 13 OF ARTICLE 1 OF TITLE 15, COLORADO REVISED STATUTES, AND PART 6 OF ARTICLE 14 OF TITLE 15, COLORADO REVISED STATUTES. IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY AND AFFAIRS, WHICH MAY INCLUDE POWERS TO PLEDGE, SELL, OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU. THIS FORM DOES NOT IMPOSE A DUTY ON YOUR AGENT TO EXERCISE GRANTED POWERS; BUT WHEN POWERS ARE EXERCISED, YOUR AGENT MUST USE DUE CARE TO ACT FOR YOUR BENEFIT AND IN ACCORDANCE WITH THE PROVISIONS OF THIS FORM AND MUST KEEP A RECORD OF RECEIPTS, DISBURSEMENTS, AND SIGNIFICANT ACTIONS TAKEN AS AGENT. YOU MAY NAME SUCCESSOR AGENTS UNDER THIS FORM BUT NOT CO-AGENTS. UNTIL YOU REVOKE THIS POWER OF ATTORNEY OR A COURT ACTING ON YOUR BEHALF TERMINATES IT, YOUR AGENT MAY EXERCISE THE POWERS GIVEN HERE THROUGHOUT YOUR LIFETIME, EVEN AFTER YOU MAY BECOME DISABLED, UNLESS YOU EXPRESSLY LIMIT THE DURATION OF THIS POWER IN THE MANNER PROVIDED BELOW.

YOU MAY HAVE OTHER RIGHTS OR POWERS UNDER COLORADO LAW NOT SPECIFIED IN THIS FORM.

I, _____, (insert your full name and address)
appoint _____ (insert the full name and address of the
person appointed) as my agent (attorney-in-fact) to act for me in any lawful way with
respect to the following initialed subjects:

TO GRANT ONE OR MORE OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING. TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

- _____ (A) Real estate transactions (when property recorded).
- _____ (B) Tangible personal property transactions.
- _____ (C) Stock and bond transactions.
- _____ (D) Commodity and option transactions.
- _____ (E) Banking and other financial institution transactions.
- _____ (F) Business operating transactions.
- _____ (G) Insurance and annuity transactions.
- _____ (H) Estate, trust, and other beneficiary transactions.
- _____ (I) Claims and litigation.
- _____ (J) Personal and family maintenance.
- _____ (K) Benefits from social security, Medicare, Medicaid, or other governmental programs or military service.
- _____ (L) Retirement plan transactions.
- _____ (M) Tax matters.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED OR TERMINATED AS SPECIFIED BELOW. STRIKE THROUGH AND WRITE YOUR INITIALS TO THE LEFT OF THE FOLLOWING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME DISABLED, INCAPACITATED, OR INCOMPETENT.

1. () This power of attorney will continue to be effective even though I become disabled, incapacitated, or incompetent.

YOU MAY INCLUDE ADDITIONS TO AND LIMITATIONS ON THE AGENT'S POWERS IN THIS POWER OF ATTORNEY IF THEY ARE SPECIFICALLY DESCRIBED BELOW.

2. The powers granted above shall not include the following powers or shall be modified or limited in the following manner (here you may include any specific limitations you deem appropriate, such as a prohibition of or conditions on the sale of particular stock or real estate or special rules regarding borrowing by the agent):

3. In addition to the powers granted above, I grant my agent the following powers (here you may add any other delegable powers, such as the power to make gifts, exercise powers of appointment, name or change beneficiaries or joint tenants, or revoke or amend any trust specifically referred to below):

4. SPECIAL INSTRUCTIONS. ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS TO YOUR AGENT:

YOUR AGENT WILL BE ENTITLED TO REIMBURSEMENT FOR ALL REASONABLE EXPENSES INCURRED IN ACTING UNDER THIS POWER OF ATTORNEY. STRIKE THROUGH AND INITIAL THE NEXT SENTENCE IF YOU DO NOT WANT YOUR AGENT TO ALSO BE ENTITLED TO REASONABLE COMPENSATION FOR SERVICES AS AGENT.

5. () My agent is entitled to reasonable compensation for services rendered as agent under this power of attorney.

THIS POWER OF ATTORNEY MAY BE AMENDED IN ANY MANNER OR REVOKED BY YOU AT ANY TIME. ABSENT AMENDMENT OR REVOCATION, THE AUTHORITY GRANTED IN THIS POWER OF ATTORNEY IS EFFECTIVE WHEN THIS POWER OF ATTORNEY IS SIGNED AND CONTINUES IN EFFECT UNTIL YOUR DEATH, UNLESS YOU MAKE A LIMITATION ON DURATION BY COMPLETING THE FOLLOWING:

6. This power of attorney terminates on _____
(Insert a future date or event, such as court determination of your disability, when you want this power to terminate prior to your death).

BY RETAINING THE FOLLOWING PARAGRAPH, YOU MAY, BUT ARE NOT REQUIRED TO, NAME YOUR AGENT AS GUARDIAN OF YOUR PERSON OR CONSERVATOR OF YOUR PROPERTY, OR BOTH, IF A COURT PROCEEDING IS BEGUN TO APPOINT A GUARDIAN OR CONSERVATOR, OR BOTH, FOR YOU. THE COURT WILL APPOINT YOUR AGENT AS GUARDIAN OR CONSERVATOR, OR BOTH, IF THE COURT FINDS THAT SUCH APPOINTMENT WILL SERVE YOUR BEST INTERESTS AND WELFARE. STRIKE THROUGH AND INITIAL PARAGRAPH 7 IF YOU DO NOT WANT YOUR AGENT TO ACT AS GUARDIAN OR CONSERVATOR, OR BOTH.

7. () If a guardian of my person or a conservator for my property, or both, are to be appointed, I nominate the agent acting under this power of attorney as such guardian or conservator, or both, to serve without bond or security.

IF YOU WISH TO NAME SUCCESSOR AGENTS, INSERT THE NAME AND ADDRESS OF ANY SUCCESSOR AGENT IN THE FOLLOWING PARAGRAPH:

8. If any agent named by me shall die, become incapacitated, resign, or refuse to accept the office of agent, I name the following each to act alone and successively, in the order named, as successor to such agent:

For purposes of this paragraph 8, a person is considered to be incapacitated if and while the person is a minor or a person adjudicated incapacitated or if the person is unable to give prompt and intelligent consideration to business matters, as certified by a licensed physician.

I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party learns of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed on _____/_____.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, IT MAY BE IN YOUR BEST INTEREST TO CONSULT A COLORADO LAWYER RATHER THAN SIGN THIS FORM.

(Your signature)

(Your Social Security number)

YOU MAY, BUT ARE NOT REQUIRED TO, REQUEST YOUR AGENT AND SUCCESSOR AGENTS TO PROVIDE SPECIMEN SIGNATURES BELOW. IF YOU INCLUDE SPECIMEN SIGNATURES IN THIS POWER OF ATTORNEY, YOU MUST COMPLETE THE CERTIFICATION OPPOSITE THE SIGNATURES OF THE AGENTS.

