

# FINANCIAL POWERS OF ATTORNEY



you or other interested persons. The Agent is required by law to provide an accounting to you and anyone else designated in the Power of Attorney. When an Agent manages your finances, an important rule for the Agent is to maintain separate accounts. An Agent should never commingle or combine the Agent's own funds with your personal funds.

## **CAN THE AGENT BE COMPENSATED?**

Unless the Power of Attorney prohibits it, an Agent may be reimbursed for out-of-pocket expenses incurred and may receive reasonable compensation for their services. It is best to clearly define how the Agent should be compensated, for example you can identify fee amounts or rates to charge

## **CAN I HOLD AN AGENT LIABLE FOR THEIR ACTIONS?**

An Agent is a "fiduciary," which means that the Agent must act with the highest degree of good faith on your behalf, must follow any and all of your instructions, and must act in accordance with your best interests. If your wishes are not specific, the Agent is free to do what is in your best interests. If an Agent fails to act in accordance with your wishes, or in your best interests, the Agent can be held liable for his or her actions.

The law holds the Agent to the "prudent man rule," which means that the Agent must exercise "due care" and manage your 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.

## **WHAT IF I THINK SOMEONE IS MISUSING A POWER OF ATTORNEY?**

Financial exploitation, which includes the illegal and/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 account-

ing, revoke the Power of Attorney and notify any persons 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.

Also, any person interested in the welfare of the Principal who suspects an Agent is misusing a Power of Attorney can make a written complaint to a court in the county where the Principal resides. If an Agent has misused a Power of Attorney, the court can force the Agent to return any stolen assets.

## **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, doctors or family members with copies of the Power of Attorney for their files.

## **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 you in writing and if applicable the guardian and/or conservator, any Successor Agent named in the document and all reasonably ascertainable third parties who might be affected by the resignation. However, if you are incapacitated and there is no guardian, conservator, co-agent or Successor Agent, the Agent may resign by giving notice to your caregiver, another person the agent reasonably believes has sufficient interest in your welfare, or to a governmental agency having authority to protect you.

## **WHEN DOES A POWER OF ATTORNEY EXPIRE?**

For a non-durable Power of Attorney, the Power of Attorney expires when you become incapacitated.

A Durable Power of Attorney expires when one of the following occur:

10. You die (and the Agent has knowledge of the death);
11. You revoke the Power of Attorney;

12. The Agent's authority under the Power of Attorney provides that it terminates;
13. The express purpose of the Power of Attorney is accomplished;
14. The Agent dies, becomes incapacitated or resigns, and the Power of Attorney does not provide for another Agent to act.

## **IS MY POWER OF ATTORNEY VALID IN OTHER STATES?**

A Power of Attorney is valid in any state, regardless of where you lived when the Power of Attorney was created. However, laws regarding Powers of Attorney vary from state to state. Furthermore, Powers of Attorney are not binding on third parties.

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## POWERS OF ATTORNEY AND WHAT IS BEST FOR YOU

- **Financial Power of Attorney.** A Financial Power of Attorney, also known as a General Power of Attorney or General Power of Attorney for Property gives an agent authority to manage your finances and property, and to transact business on your behalf. The agent has the obligation to make decisions based upon your preferences and the authority granted in the document. An agent may not override your wishes. In general, the agent has authority to do whatever you would do, for example, withdraw funds from bank accounts, trade stock, pay bills, cash checks as expressly limited in the power of attorney. When transacting business on your behalf, the agent must use your finances as you would use them. As of January 1, 2010 all financial powers of attorneys signed are considered “durable” unless otherwise stated in the document.
- **Medical Power of Attorney.** A Medical Power of Attorney generally gives an agent the authority to make medical and personal care decisions on your behalf.
- **Durable Power of Attorney.** A Durable Power of Attorney permits an agent to make medical and financial decisions on your behalf only if you become incapacitated. 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 a court proceeding.
- **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.

## 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 the name of the person he or she wishes to designate as an agent, and include 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 assure that your intentions are clearly expressed. If you choose not to have an attorney assist you, you will find Power of Attorney forms available to the public at local office supplies stores and by searching online. The “State of Colorado Statutory Form, Power of Attorney” is probably the best form to use. You will find this form at §15-14-741, Colorado Revised Statutes.

## WHAT ARE “HOT POWERS”?

For all Powers of Attorney signed after January 1, 2010, you must state that the agent has certain powers, casually referred to as “hot powers.” These “hot powers” include the power of the agent to:

1. Make a gift;
2. Create or change rights of survivorship;
3. Create or change a beneficiary designation;
4. Create, amend, revoke, or terminate a trust;
5. Delegate authority granted under a power of attorney;
6. Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
7. Exercise various powers held by the principal in a fiduciary capacity;
8. Disclaim or release property or a power of appointment;
9. Exercise powers, rights, or authority as a partner, member, or manager of a partnership.

If the power of attorney does not include these “hot powers” then the agent lacks the authority to exercise any of these powers for you. The “hot powers” are all listed as options in the State of Colorado statutory power of attorney form mentioned above.

You may not use your authority in “hot powers” one through three above, if the Principal is not your parent, grandparent, spouse, sibling or child, even if the Power of Attorney authorizes you to take such actions.

## WHEN DOES A POWER OF ATTORNEY TAKE EFFECT?

The terms of a Power of Attorney will determine when it takes effect. In general, a Power of Attorney may take effect in two different ways:

- **Springing Power:** The Power of Attorney will take effect only when an event described in the instrument takes place. Typically, the event would be when a licensed physician determines that the Principal is incapacitated.
- **Standing Power:** Takes effect as soon as the Principal signs it.

However, Powers of Attorney may contain language that blends 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.” For all Powers of Attorney signed after January 1, 2010, if they are silent on the effective date, the Power of Attorney is considered a “standing” power.

## DOES A POWER OF ATTORNEY TAKE MY RIGHTS?

A Power of Attorney does not take away your rights to make decisions. An Agent simply has the power to act along with you in accordance with the authorization set forth in the document. Only a court, through a guardianship and/or conservatorship proceeding, can take away your rights.

## CAN I CHANGE MY MIND?

You may change your mind and revoke a Power of Attorney at any time, so long as you have the capacity to do so. You will need to send a letter to the Agent notifying the Agent that their appointment has been revoked. From the moment the Agent receives a revocation letter, they can no longer act under the Power of Attorney. You should also send a copy of the revocation to any person or institution that may have received notice of the original Power of Attorney, such as doctors, family members, or banks. Otherwise, those individuals or institutions may continue to rely on the Power of Attorney until they are given notice of the revocation.

State law automatically revokes the appointment of a spouse as an agent when a petition for divorce, annulment or legal separation is filed. However, if you named

a successor Agent in the document, the Power of Attorney would remain in effect for the successor Agent.

## WHO SHOULD I NAME AS MY AGENT?

A Successor Agent is the person named to serve as your Agent if your first choice for Agent cannot serve due to death, incapacity, resignation or refusal to accept the office of Agent. If a named individual is unable or unwilling to serve as Agent, the next person in line under the document becomes Agent.

No one can take over as an Agent under a Power of Attorney unless you name a Successor Agent (or Agents) in the document, or if you authorize the Agent to appoint a Successor Agent. If neither is possible, and you 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, or to give your Agent, or a third party, the permission to name a Successor Agent if there are no more listed in the Power of Attorney.

## CAN I APPOINT MULTIPLE AGENTS?

You may appoint more than one Agent to serve simultaneously, but this typically is not recommended. Having more than one Agent as a decision maker can create circumstances in which the Agents do not agree on a particular course of action. When the 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 tie-breaking mechanism in the document. Nonetheless, if multiple Agents are appointed, you can allow them to act independently or require them to act in unison, based on the wording of the Power of Attorney. In either case, multiple Agents should communicate regularly to assure that their actions are consistent. A Co-Agent could be liable for acts or omissions of his/her Co-Agent so it is imperative that both Co-Agents be fully informed.

## SHOULD AN AGENT KEEP ANY RECORDS?

Unless otherwise stated in the Power of Attorney document, the Agent is required to keep detailed records of their actions under the Power of Attorney, so the Agent is able to answer any questions raised by