



CHAPTER 7: FINANCIAL POWERS OF ATTORNEY

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Generally, a "power of attorney" is a document through which an individual confers authority on another person to act on her behalf when the individual is unable or unavailable to make decisions herself. Powers of attorney can include authority to make physical health care decisions, mental health care decisions, financial decisions, or other decisions. For instance:

- An individual travelling to a foreign country for an extended period may create a power of attorney to allow another person to attend to his financial decisions in his absence (e.g., have access to his checking account to pay bills).
- An individual who is in the early stages of a terminal illness may create a power of attorney to allow another person to have access to his finances and make financial decisions in the event that he becomes incapacitated and unable to make those decisions himself.
- An individual can create a health care power of attorney to appoint another person to make health care decisions for him if he becomes unable to make such decisions for himself due to illness, disability, or an accident.
- A young adult with a serious emotional disorder can make a power of attorney to give his parents or another person authority to make post-secondary education decisions in the event that his disability renders him unable to make those decisions himself.

Appointing a substitute decision-maker through a power of attorney can have many benefits. It may help to avoid guardianship proceedings, which can be costly for families. It also helps to assure that the substitute decision-maker is a person who is trusted by the individual and is likely to make decisions that accord with the individual's wishes.

This chapter addresses only financial powers of attorney. Issues relating to health care powers of attorney are addressed in Chapter 4 and issues relating to mental health powers of attorney are addressed in Chapter 6.

I. CREATING A FINANCIAL POWER OF ATTORNEY

Only adults (people age 18 years or older) who are able to make an informed decision can create a power of attorney. It is not necessary to consult with an attorney to create a power of attorney, but it may be a good idea to do so to assure that the document is technically valid and accurately reflects the wishes and intents of the individual who makes it. A sample power of attorney is attached.

The power of attorney must be in writing. In the power of attorney, the individual (who is called the "principal") identifies another person (who is called the "agent") who will have authority to handle certain facets of the principal's affairs under specified circumstances. The power of attorney may identify more than one agent, but should state whether each agent has authority to make decisions, whether they both must consent to any decision, or whether each agent only has authority to exercise specific powers. The power of attorney may also specify a successor agent or agents in the event that the initial agent is unable or unwilling to act or may authorize the initial agent to designate a successor.

The power of attorney should state with specificity precisely what aspects of the principal's finances the agent will be empowered to handle. These can include:

- power to engage in real property transactions (such as buying or selling property for the principal or collecting rents owed to the principal);
- power to engage in personal property transactions (such as buying or selling furniture, cars, appliances, or equipment for the principal);
- power to engage in stock, bond, or other securities, commodities, or options transactions;
- power to borrow money for the principal;
- power to engage in insurance transactions for the principal (including purchasing or terminating insurance);
- power to engage in retirement plan transactions for the principal (including withdrawal or deposit of funds, making contributions, selecting or changing payment options);
- power to pursue claims and litigation for the principal;
- power to receive government benefits for the principal; and
- power to pursue tax matters.

A principal may also nominate in a power of attorney a person who she would like to be appointed as guardian of her estate or her person in the event that guardianship proceedings are filed in the future. The court in such proceedings will appoint the person nominated by the principal unless there is good cause not to do so or the person nominated is disqualified from acting.

The power of attorney should also state with specificity when it will become effective. Usually, it will become effective only in the event the principal becomes incapacitated to make financial decisions, but it may become effective immediately or at a specific time chosen by the principal.

The principal must sign and date the power of attorney. If the principal signs using a mark or has someone else sign for him, the power of attorney must also be signed by two witnesses aged 18 or older and neither can be the person who signed the power of attorney for the principal.

The power of attorney must also include a specific notice that appears in the beginning of the document and that must be signed by the principal.

The notice indicates that the principal understands the power of attorney. The agent is also required to sign the document to acknowledge that she recognizes and accepts her responsibilities under the document. The language of the notice and acknowledgement is dictated by Pennsylvania law.

The power of attorney may be filed with the clerk of the Orphans' Court Division of the Court of Common Pleas in the county where the principal resides. The power of attorney also can be recorded in the office for the recording of deeds of the county where the principal resides and in each county where the principal has real property that will be affected by the power of attorney.

II. TERMINATION OF A FINANCIAL POWER OF ATTORNEY

A power of attorney is presumed to be "durable." In other words, the power of attorney will continue in effect indefinitely after the time or event when the power of attorney becomes effective unless it is revoked by the principal. A principal, however, can include language in the power of attorney that makes it non-durable by stating the circumstances that will result in its termination (such as a specific date). If there is no termination date or event in the power of attorney, it will continue in effect and actions by the agent under the power of attorney will be binding regardless of how long ago it was made.

A power of attorney can be revoked by the principal at any time when the principal gives notice to the agent. The notice can be oral, but it is preferable to put it in writing to document that the agent had actual knowledge that the power of attorney was revoked.

A power of attorney will be terminated upon the death of the principal. However, actions taken by the agent under the power of attorney will be binding until the agent has notice of the principal's death as long as the agent acted in good faith.

If a principal has executed a non-durable power of attorney, it will be terminated upon the principal's incapacity. However, actions taken by the agent in good faith will be binding until the agent has notice of the principal's incapacity and acted in good faith. Incapacity will not terminate a durable power of attorney.

If a principal designates his spouse as his agent and thereafter a divorce proceeding is started, the designation of the spouse as the agent will be revoked as of the filing of the divorce unless it appears from the language in the power of attorney that the principal intended the spouse to continue as his agent even in the event of divorce.

If a principal is adjudicated by a court to be incapacitated in a guardianship proceeding and the court appoints a guardian for his estate, the agent designated in the power of attorney will be accountable to the guardian as well as to the principal. The guardian will have the same power to revoke or amend the power of attorney as the principal would have if he were not incapacitated.

APPENDIX 1

POWER OF ATTORNEY SAMPLE FORM

NOTICE

THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY, WHICH MAY INCLUDE POWERS TO SELL OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU.

THIS POWER OF ATTORNEY 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 THIS POWER OF ATTORNEY.

YOUR AGENT MAY EXERCISE THE POWERS GIVEN HERE THROUGHOUT YOUR LIFETIME, EVEN AFTER YOU BECOME INCAPACITATED, UNLESS YOU EXPRESSLY LIMIT THE DURATION OF THESE POWERS OR YOU REVOKE THESE POWERS OR A COURT ACTING ON YOUR BEHALF TERMINATES YOUR AGENT'S AUTHORITY.

YOUR AGENT MUST KEEP YOUR FUNDS SEPARATE FROM YOUR AGENT'S FUNDS.

A COURT CAN TAKE AWAY THE POWERS OF YOUR AGENT IF IT FINDS YOUR AGENT IS NOT ACTING PROPERLY.

THE POWERS AND DUTIES OF AN AGENT UNDER A POWER OF ATTORNEY ARE EXPLAINED MORE FULLY IN 20 Pa.C.S. CH. 56.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER OF YOUR OWN CHOOSING TO EXPLAIN IT TO YOU.

- Create a trust for my benefit.
- Make additions to an existing trust for my benefit.
- Claim an elective share of the estate of my deceased spouse.
- Disclaim an interest in property.
- Renounce fiduciary positions.
- Withdraw and receive the income or corpus of a trust.
- Authorize my admission to a medical, nursing, residential, or similar facility and to enter into agreements for my care.
- Authorize medical and surgical procedures.
- Engage in real property transactions.
- Engage in tangible personal property transactions.
- Engage in stock, bond, and other securities transactions.
- Engage in commodity and option transactions.
- Engage in banking and financial transactions.
- Borrow money.
- Enter safe deposit boxes.
- Engage in insurance transactions.
- Engage in retirement plan transactions.
- Handle interests in estates and trusts.
- Pursue claims and litigation.
- Receive government benefits.
- Pursue tax matters.
- Make an anatomical gift of all or part of my body.

[Note -- You do not have to list all of these. Choose only those authorities you want your agent to have.]

Effective Date: This Power of Attorney will become effective (check one):

Immediately

In the event I am out of the country for more than ____ consecutive days.

On (fill in specific date)

In the event I lack capacity to make informed decisions on the matters listed above.

Spouse as Agent: If an agent named above is my spouse, I understand that the Power of Attorney will be revoked as to that agent if either I or my spouse files for divorce unless I indicate otherwise by checking below:

This Power of Attorney shall remain in full force and effect, even if my agent or I file for divorce.

Durable or Non-Durable: I understand that a durable Power of Attorney is meant to continue despite any incapacity or disability I may experience. I also understand that a non-durable Power of Attorney cannot continue if I choose to have it terminated on a specific day or if I become incapacitated or experience a disability. I intend as follows (check one):

This Power of Attorney is durable and will continue even if I become incapacitated or have a disability that impedes my decision-making.

This Power of Attorney is non-durable and will terminate on (date) or in the event I become incapacitated or experience a disability that impedes my decision-making, whichever comes first.

Signature of Principal Date

Principal's Printed Name

If you are physically unable to sign your name, then you may sign this form by making your mark on the Principal's Mark line below. By making this Mark you are also acknowledging that you understand the contents of the Notice on the first page. You must have two witnesses sign their names and write their addresses in your presence.

Principal's Mark

Principal's Printed Name

We, the undersigned witnesses, hereby attest that the principal placed his or her mark above, that we observed the principal make the mark above, that the principal's name was subscribed near the mark in the principal's presence before or after he or she made the mark, and that we then signed our names below in the presence of the principal and in the presence of each other.

1. _____

Witness's Name Address

2. _____

Witness's Name Address

ACKNOWLEDGEMENT OF AGENT(S)

I, (name of agent(s)) , have read the attached Power of Attorney and am the person identified as the agent for the principal. I hereby acknowledge that in the absence of provision to the contrary in the Power of Attorney or 20 Pa.C.S. when I act as agent:

I shall exercise the powers for the benefit of the principal.

I shall keep the assets of the principal separate from my assets. I shall exercise reasonable caution and prudence.

I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

Agent's Signature Date

Agent's Signature Date

Contact Information

If you need more information or need help, please contact Disability Rights Pennsylvania (DRP) at 800-692-7443 (voice) or 877-375-7139 (TDD). The email address is: intake@disabilityrightspa.org.

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PLEASE NOTE: For information in alternative formats or a language other than English, contact Disability Rights Pennsylvania at 800-692- 7443, Ext. 400, TDD: 877-375-7139, or intake@disabilityrightspa.org

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