



Planning Ahead

Powers of Attorney



Did you know?

**“Springing Powers” are
no longer permitted by Florida law.**



A Power of Attorney is a legal document delegating authority from one person to another. Pursuant to the document, the maker of the Power of Attorney grants someone else the power to act on his/her behalf as his/her agent.

A person giving a Power of Attorney may make the powers very broad or may limit the powers to specific acts.

Examples:

- Right to sell a car
- Right to make gifts
- Right to access bank accounts
- Right to sign contracts
- Right to sign other legal documents



Forms downloaded from the internet may fail to provide you with protection.

A Power of Attorney, if effectively executed, allows someone to stand in your shoes and make decisions on your behalf. It is a very powerful document that should be reviewed by an attorney to ensure that you have thought through all of the scenarios.

Some Basics

Witnesses and a Notary

A Power of Attorney must be signed by the Principal (i.e., the person giving the powers) and by two witnesses to the Principal's signature. A notary must acknowledge the Principal's signature for the Power of Attorney to be deemed properly executed and valid under Florida law.

There are exceptions for military Powers of Attorney and for Powers of Attorney created under the laws of another state.

Agents

The person you designate as your agent must be 18 years of age or older. Certain financial institutions with trust powers may also serve as agents.

Restrictions

An agent may not sign a document stating that the Principal has knowledge of certain facts. (For example, if the Principal was a witness to a bar fight, the agent may not sign an affidavit stating what the Principal observed.) An agent may not vote in a public election on behalf of the Principal. An agent may not revoke a will or a codicil for the Principal. An agent may not stand in the shoes of the Principal to perform acts the Principal has obligated himself/herself to do. (For example, if the Principal has agreed to paint a house for pay,

the agent cannot do the work for the Principal, unless otherwise agreed to by the contracting parties).

Fiduciary Duty

Agents must meet certain standards of care while performing their duties. The law considers agents as "fiduciaries". A fiduciary relationship is one of trust, and if that trust is broken, the agent may be punished both civilly (by ordering payment as restitution) and criminally (probation or jail).

Effectiveness

The Power of Attorney is effective as soon as the Principal signs it. Prior to September 30, 2011, you could sign a "springing" Power of Attorney which would come into effect upon the happening of a certain event, such as your incapacity. As of October 1, 2011, Durable Powers of Attorney may not be contingent upon the happening of an event.

The Principal may hold the Power of Attorney until such time as help is needed. At that time, the Principal may give the document to the agent. Another option is to give the Power of Attorney to the lawyer who drafted it and let him/her keep it in a safe place with instructions to release it upon a certain event.

What happens if the third party does not accept the Power of Attorney?

The third party is required to give the agent a written explanation of the refusal to accept the Power of Attorney within a reasonable amount of time.

Under some circumstances, the third party's refusal to honor the Power of Attorney causes damages. In that case, the third party may be liable for those damages and possibly attorney's fees and court costs.

Why would a third party refuse to honor the Powers of Attorney?

They may question its validity. They may question whether the Principal was competent at the time he/she signed it. They may feel a sense of obligation to protect the Principal from unscrupulous conduct.

If the Power of Attorney is rejected, you should talk to an attorney.

Can a third party require the agent to sign an affidavit?

Yes. A third party is authorized under Florida law to require the agent to sign a sworn statement stating that he/she is validly exercising the authority under the Power of Attorney. The purpose of the affidavit is to relieve the third party of liability for accepting an invalid Power of Attorney.



Relationship to Other Legal Instruments

Agent vs. Executor

An executor (aka a personal representative) is the person who takes care of another person's probate estate after that person dies. An agent may take care of the Principal's affairs only while the Principal is alive. An executor is named in the Last Will & Testament.

Agent vs. Trustee

A Trust may authorize a person to act for the maker of the trust during the maker's lifetime. Like an Agent, a Trustee may manage the financial affairs of the maker of the Trust. A Trustee only has power over the assets of the trust. Unlike an Agent, a Trustee may continue acting for the maker after the maker of the Trust dies.

Agent vs. Guardian

A Guardian may be appointed by a Court for a person who can no longer care for his/her own property. A person who has a Guardian appointed by the court may not be able to lawfully execute a Power of Attorney. If a Guardian is appointed, the Power of Attorney is no longer effective unless it is a Durable Power of Attorney and the court approves.

It's Over!

How to Revoke a Power of Attorney

Your revocation must be in writing and may be done by a subsequent Power of Attorney. The agent and any other party who might rely on the Power of Attorney must receive notice, by any form of mail that requires a signed receipt or by certain approved methods of personal delivery.

Special rules exist for serving notice of revocation on banks and other financial institutions.

Check with your lawyer about proper procedures.



You are always
free to
change your
mind. Just make
sure that you
follow through
with action.

Multiple Agents

Under the old law (pre-October 2011), if two agents were named in a Power of Attorney to act on behalf of the Principal at the same time, they had to act unanimously. If three or more agents were named, a majority vote was required.

The 2011 legislation changed the landscape. Now, multiple agents named to act at the same time can act independently of each other unless the Power of Attorney specifically states otherwise.

Divorce

The mere filing of a petition for divorce terminates the authority of the Principal's spouse to act under the Principal's Power of Attorney. The divorce need not be final in order for the termination to take effect.



Specific Authorities Must Be Granted.

This catch-all phrase commonly appeared in older powers of attorney:

“In general, to do all other acts, deeds, matters and things whatsoever in or about my estate, property and affairs, whether or not particularly or generally described and any and all other acts, deeds, matters, and things not particularly or generally set forth herein, as fully and effectively to all intents and purposes as the undersigned could do if personally present; and to employ, retain in employment and discharge such persons (both professional and otherwise) as my agent may deem necessary to assist in the performance of any of the foregoing.”

This provision can no longer be relied upon. **A power of attorney must list with specificity the authority or authorities being granted.**

If you've granted someone power of attorney or you're considering doing so, consult with a Florida estate planning attorney. You can also read the entire content Florida's Power of Attorney law at: Florida Statutes, Chapter 709, Powers of Attorney and Similar Instruments, Part II, Powers of Attorney.



Please contact us if we can be of any assistance to you with your estate planning needs.

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