Florida Powers of Attorney

THE FLORIDA BAR

This pamphlet published as a public service
for consumers by The Florida Bar

FLORIDA POWERS OF ATTORNEY

Unless otherwise specified, the information in this booklet applies to Powers of Attorney signed on or after October 1st of 1995. Consult a lawyer regarding use and enforceability of Powers of Attorney executed prior to October 1, 1995.

This pamphlet is organized into eight parts: (1) About the Power of Attorney; (2) Powers and duties of an Attorney-in-fact; (3) Using the Power of Attorney; (4) Relationship of the Power of Attorney to other legal instruments; (5) Health care and the Power of Attorney; (6) Termination of the Power of Attorney; (7) Financial management and the liability of an Attorney-in-fact and (8) Where to learn more.

ABOUT THE POWER OF ATTORNEY

What is a Power of Attorney?

A Power of Attorney is a legal document delegating authority from one person to another. In the document, the maker of the Power of Attorney grants the right to act on the maker's behalf. What authority is granted depends on the specific language of the Power of Attorney. A person giving a Power of Attorney may make it very broad or may limit it to certain specific acts.

What are some uses of a Power of Attorney?

A Power of Attorney may be used to give another the right to sell a car, home or other property. A Power of Attorney might be used to allow another to sign a contract, make health care decisions, handle financial transactions, or sign legal documents for the maker of the Power of Attorney. A Power of Attorney may give others the right to do almost any legal act that the maker of the Power of Attorney could do.

Where may a person obtain a Power of Attorney?

A power of attorney is an important and powerful legal document. It should be drawn by a lawyer to meet the person's specific circumstances. Preprinted forms are often a disaster and may fail to provide the protection desired.

What is a "principal?"
The "principal" is the maker of the Power of Attorney — the person who is delegating authority to another.

What is an "attorney-in-fact?"
The "attorney-in-fact" is the recipient of the Power of Attorney — the party who is given the power to act on behalf of the principal. An "attorney-in-fact" is sometimes referred to as an "agent," but not all "agents" are "attorneys-in-fact." The term "attorney-in-fact" does not mean the person is a lawyer.

What is a "third party?"
As used in this pamphlet, a "third party" is a person or institution with whom the attorney-in-fact has dealings on behalf of the principal. Examples include a bank, a doctor, the buyer of property that the attorney-in-fact is selling for the principal, a broker, or anyone else with whom the attorney-in- fact must deal on behalf of the principal.

What is a "Limited Power of Attorney?"
A "Limited Power of Attorney" gives the attorney-in-fact authority to conduct a specific act. For example, a person might use a Limited Power of Attorney to sell a home in another state by delegating authority to another person to handle the transaction locally through a "limited power of attorney." Such a Power could be "limited" to selling the home or to other specified acts.

What is a "General Power of Attorney?"
A "general" Power of Attorney typically gives the attorney-in- fact very broad powers to perform any legal act on behalf of the principal. Often a list of the types of activities the attorney- in-fact is authorized to perform is included in the document.

What is a "Durable Power of Attorney?"
Limited and general Powers of Attorney terminate if and when the principal becomes incapacitated. Because many people would like Powers of Attorney that may continue to be used upon their incapacity, Florida law provides for a (special) power

known as a "Durable Power of Attorney." A Durable Power of Attorney remains effective even if a person becomes incapacitated; however, there are certain exceptions specified in Florida law when a Durable Power of Attorney may not be used for an incapacitated principal. A Durable Power of Attorney must contain special wording that provides the power survives the incapacity of the principal. Most Powers of Attorney granted today are durable.

Must a person be competent to sign a Power of Attorney?

Yes. The principal must understand what he or she is signing at the time the document is signed. The principal must understand the effect of a Power of Attorney, to whom he or she is giving the Power of Attorney, and what property may be affected by the Power of Attorney.

Who may serve as an attorney-in-fact?

Any competent person 18 years of age or older may serve as an attorney-in-fact. Attorneys-in-fact should be chosen for reliability and trustworthiness. Certain financial institutions and not-for-profit corporations may also serve.

POWERS AND DUTIES OF AN ATTORNEY-IN-FACT

What activities are permitted by an attorney-in-fact?

An attorney-in-fact may perform only those acts specified in the Power of Attorney. If an attorney-in-fact is unsure whether he or she is authorized to do a particular act, the attorney-in-fact should consult the lawyer who prepared the document or other legal counsel.

May an attorney-in-fact sell the principal's home?

Yes. If the Power of Attorney authorizes the sale of the principal's homestead, the attorney-in-fact may sell it. If the principal is married, however, the attorney-in-fact must obtain the authorization of the spouse.

What may an attorney-in-fact not do on behalf of a principal?

There are a few actions that an attorney-in-fact is prohibited from doing even if the Power of Attorney states that the action is authorized. An attorney-in-fact, unless also a licensed member of The Florida Bar, may not practice law in Florida. An attorney-in-fact may not sign a document stating that the principal has knowledge of certain facts. For example, if the principal was a witness to a car accident, the attorney-in-fact may not sign an affidavit stating what the principal saw or heard. An attorney-in-fact may not vote in a public election on behalf of the principal. An attorney-in-fact may not create or revoke a Will or Codicil for the principal. If the principal was under contract to perform a personal service (i.e., to paint a portrait or provide care services), the attorney-in-fact is not authorized to do these things in the place of the principal. Likewise, if someone had appointed the principal to be Trustee of a Trust or if the Court appointed the principal to be a guardian or conservator, the attorney-in-fact may not take over these responsibilities based solely on the authority of a Power of Attorney.

What are the responsibilities of an attorney-in-fact?

While the Power of Attorney gives the attorney-in-fact authority to act on behalf of the principal, an attorney-in-fact is not obligated to serve. An attorney-in-fact may have a moral or other obligation to take on the responsibilities associated with the Power of Attorney, but the Power of Attorney does not create an obligation to assume the duties. However, once an attorney-in-fact takes on a responsibility, he or she has a duty to act prudently. (See Financial Management and the Liability of an Attorney-in-fact).

Is there a certain code of conduct for attorneys-in-fact?

Yes. Attorneys-in-fact must meet a certain standard of care when performing their duties. An attorney-in-fact is looked upon as a "fiduciary" under the law. A fiduciary relationship is one of trust. If the attor-

ney-in-fact violates this trust, the law may punish the attorney-in-fact both civilly (by ordering the payment of restitution and punishment money) and criminally (probation or jail). The standard of care that applies to attorneys-in-fact is discussed under *Financial Management and the Liability of an Attorney-in-fact.*

USING THE POWER OF ATTORNEY

When is a Durable Power of Attorney effective?
The Durable Power of Attorney is effective as soon as the principal signs it unless the document specifies that it is conditioned on the principal's lack of capacity to manage property in which case appropriate affidavits are required in accordance with Florida law.

Must the principal deliver the Power of Attorney to the attorney- in-fact right after signing or may the principal wait until such time as the services of the attorney-in-fact are needed?
No. The principal may hold the Power of Attorney document until such time as help is needed and then give it to the attorney-in- fact. Because third parties will not honor the attorney-in-fact's authority unless the attorney-in-fact provides the Power of Attorney document, the use of the Power of Attorney may effectively be delayed.

Often, the lawyer may fulfill this important role. For example, the principal may leave the Power of Attorney with the lawyer who prepared it, asking the lawyer to deliver it to the attorney-in- fact under certain specific conditions. Since the lawyer may not know if and when the principal is incapacitated, the principal should let the attorney-in-fact know that the lawyer has retained the signed document and will deliver it as directed.

How does the attorney-in-fact initiate decision-making authority under the Power of Attorney?
The attorney-in-fact should review the Power of Attorney document carefully to determine what authority the principal granted. After being certain that the Power of Attorney gives the attorney-in-fact

the authority to act, the Power of Attorney (or a copy) should be taken to the third party (the bank or other institution, or person with whom you need to deal). Some third parties may ask the attorney-in-fact to sign a document stating that the attorney-in-fact is acting properly. (The attorney-in- fact may wish to consult with a lawyer prior to signing such a document.) The third party should accept the Power of Attorney and allow the attorney-in-fact to act for the principal. An attorney-in-fact should always make it clear that the attorney-in-fact is signing documents on behalf of the principal.

How should the attorney-in-fact sign when acting as an attorney-in-fact?

The attorney-in-fact will always want to add after his or her signature that the document is being signed "as attorney-in-fact for" the Principal. If the attorney-in-fact only signs his or her own name, he or she may be held personally accountable for whatever was signed. As long as the signature clearly conveys that the document is being signed in a representative capacity and not personally, the attorney-in-fact is protected. Though lengthy, it is, therefore, best to sign as follows:

Howard Rourk, as attorney-in-fact for Ellsworth Toohey.

In this example, Howard Rourk is the attorney-in-fact, and Ellsworth Toohey is the principal.

What if the third party will not accept the Power of Attorney?

If the Power of Attorney was lawfully executed and it has not been revoked, suspended or terminated, third parties may be forced to honor the document. Due to changes in the law, Durable Powers of Attorney executed on or after October 1, 1995, have more clout. An older document may be enforced as well. Under some circumstances, if the third party's refusal to honor the Durable Power of Attorney causes damage, the third party may be liable for those damages and even attorney's fees and court costs. Even mere delay may cause dam-

age and this too may be actionable. It is reasonable, however, for the third party to have the time to consult with a lawyer about the Power of Attorney. Banks will often send the Power of Attorney to their legal department for approval. Delay for more than a short period may be unreasonable. Upon refusal or unreasonable delay, consult an attorney.

Why do third parties sometimes refuse Powers of Attorney?

Third parties are often concerned whether the document is valid. They do not know if it was executed properly or forged. They do not know if it has been revoked. They do not know if the principal was competent at the time the Power of Attorney was signed. They do not know whether the principal has died. Third parties do not want liability for the improper use of the document. Some third parties refuse to honor Powers of Attorney because they believe they are protecting the principal from possible unscrupulous conduct. Refusal is more common with older Powers of Attorney. If your Power of Attorney is refused, talk to your attorney.

What if a third party requires the attorney-in-fact to sign an affidavit prior to honoring the Power of Attorney?

A third party is authorized by Florida law to require the attorney-in-fact to sign an affidavit (a sworn or an affirmed written statement), stating that he or she is validly exercising the authority under the Power of Attorney. If the attorney-in-fact wants to use the Durable Power of Attorney, the attorney-in-fact may need to sign the affidavit if so requested by the third party. The purpose of the affidavit is to relieve the third party of liability for accepting an invalid Durable Power of Attorney. As long as the statements in the affidavit are true at that time, the attorney-in-fact may sign it. The attorney-in- fact may wish to consult with a lawyer prior to signing it. (You may find a sample Affidavit of Attorney-in-fact at the end of this booklet.)

May the attorney-in-fact employ others to assist him or her?

Yes. The attorney-in-fact may hire accountants, lawyers, brokers or other professionals to help with the attorney-in-fact's duties, but may never delegate his or her responsibility as attorney-in-fact. The Power of Attorney was given by the principal and the attorney-in-fact does not have the right to transfer that power to anyone else.

RELATIONSHIP OF POWER OF ATTORNEY TO OTHER LEGAL INSTRUMENTS

What is the difference between an attorney-in-fact and an executor or personal representative?

An executor, termed a "personal representative" in Florida, is the person who takes care of another's estate after that person dies. An attorney-in-fact may only take care of the principal's affairs while the principal is alive. A personal representative may be named in a person's Will and is appointed by the court to administer the estate.

What is the difference between a "trustee" and an "attorney-in- fact?"

Like a power of attorney, a trust may authorize an individual to act for the maker of the trust during the maker's lifetime. Like an attorney-in-fact, the trustee may manage the financial affairs of the maker of the trust. A trustee only has power over an asset that is owned by the trust. In contrast, an attorney-in-fact may have authority over all of the principal's assets (except trust assets). Another important distinction is that a trustee may continue acting for the maker of the trust after the maker of the trust dies. In contrast, the Power of Attorney expires upon the death of the principal.

What if the principal has a "guardian" appointed by the court?

If no less restrictive appropriate alternative is available, then a guardian may be appointed by the court for a person who no longer can care for his or her person or property. A person who has a guardian

appointed by the court may not be able to lawfully execute a Power of Attorney. If an attorney-in-fact discovers that a guardian has been appointed prior to the date the principal signed the Power of Attorney, the attorney-in-fact should advise his or her lawyer. If a guardianship court proceeding is begun after the Durable Power of Attorney was signed by the principal, the authority of the attorney-in-fact is automatically suspended until the petition is dismisssed, withdrawn or otherwise acted upon. The law requires that an attorney-in-fact receive notice of the guardianship proceeding. If a guardian is appointed, the Power of Attorney is no longer effective unless the court allows certain powers to continue. The power to make health care decisions, however, is not suspended unless the court specifically suspends this power. If the attorney-in-fact learns that guardianship or incapacity proceedings have been initiated, he or she should consult with a lawyer.

May a Power of Attorney avoid the need for guardianship?

Yes. If the alleged incapacitated person executed a valid Durable Power of Attorney prior to his or her incapacity, it may not be necessary for the court to appoint a guardian since the attorney-in-fact already has the authority to act for the principal. As long as the attorney-in-fact has all necessary powers, it may not be necessary to file guardianship proceedings and, even when filed, guardianship may be averted by showing the court that a Durable Power of Attorney exists and that it is appropriate to allow the attorney-in-fact to act on the principal's behalf.

HEALTH CARE AND THE POWER OF ATTORNEY

What is the relationship between a Declaration of Living Will and Power of Attorney?

A declaration of living will specifies a person's wishes as to the provision or termination of medical procedures when the person is diagnosed with a terminal condition, has an end-stage condition, or is in a persistent vegetative state. A living will and a

health care surrogate designation are termed "health care advance directives" because they are made in advance of incapacity and need. If a person is unable to understand or unable to communicate with a doctor, a living will is a legally enforceable method of making sure the person's wishes are honored. Whether or not a person has a living will, a person's attorney-in-fact may make health care decisions if the Durable Power of Attorney specifically gives this right.

What is a Health Care Surrogate Designation and how does it differ from a Power of Attorney?
A Health Care Surrogate Designation is a document in which the principal designates someone else to make health care decisions if the principal is unable to make those decisions. Unlike a Power of Attorney, a health care surrogate decision-maker has no authority to act until such time as the attending physician has determined the principal lacks the capacity to make informed health care decisions. (In instances where the attending physician has a question as to whether the principal lacks capacity, a second physician must agree with the attending physician's conclusion that the principal lacks the capacity to make medical decisions before a surrogate decision-maker's authority is commenced.) Many medical providers prefer a designation of health care surrogate for health care decisions because the document is limited to health care.

TERMINATION OF THE POWER OF ATTORNEY

When does the attorney-in-fact's authority under a Durable Power of Attorney terminate?
The authority of the attorney-in-fact of a Durable Power of Attorney automatically ends when one of three things happens: (1) the principal dies; (2) the principal revokes the Power of Attorney, or (3) when a court determines that the principal is totally or partially incapacitated and does not specifically provide that the Power of Attorney is to remain in force. In any of these three instances, the Durable Power of Attorney is terminated. If, after having knowledge

of any of these events, a person continues to act as attorney-in-fact, he or she is acting without authority. The power to make health care decisions, however, is not terminated when a court determines that the principal is totally or partially incapacitated unless the court specifically terminates this power.

What is the procedure for a principal to revoke a Power of Attorney?

Written notice must be served on the attorney-in-fact and any other party who might rely on the power. The notice must be served either 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. Consult with your lawyer to be sure proper procedures are followed.

When does a general Power of Attorney terminate?

In addition to the three events detailed above, a general (non-durable) Power of Attorney terminates when the principal becomes incapacitated. If the principal of a non-durable power of attorney is believed to be incapacitated, then the attorney-in-fact should consult with his or her lawyer before exercising any further powers on behalf of the principal.

Court proceedings were filed to appoint a guardian for the principal or to determine whether the principal is incapacitated. How does this affect the Power of Attorney?

If a court proceeding to determine the principal's incapacity has been filed or if someone is seeking to appoint a guardian for the principal, the Durable Power of Attorney is automatically suspended and an attorney-in-fact must not continue to act. The power to make health care decisions, however, is not suspended unless the court specifically suspends this power.

Authority as attorney-in-fact has been suspended because guardianship proceedings are pending for the principal. Now there is an emergency but there is no guardian and no attorney-in-fact to do something. What now?

The attorney-in-fact may ask the court for special permission to take care of the emergency even though the Power of Attorney remains otherwise suspended. Contact your lawyer.

FINANCIAL MANAGEMENT AND THE LIABILITY OF AN ATTORNEY-IN-FACT

What is "fiduciary responsibility?"

An attorney-in-fact is a fiduciary and as such has a duty to invest and manage the assets of the principal as a prudent investor. This standard requires the attorney-in-fact to exercise reasonable care and caution in managing the assets of the principal. The attorney-in-fact must apply this standard to the overall investments and not to one specific asset. If an attorney-in-fact possesses special financial skills or expertise, he or she has an obligation to use those skills. The attorney-in-fact should keep careful records. Everything the attorney-in- fact does for the principal should be written down, and the attorney-in-fact should keep all receipts and copies of all correspondence, and consider logging phone calls so if the attorney-in-fact is questioned, records are available.

WHERE TO LEARN MORE

Florida Call-a-Law: A service of the Florida Bar, Florida Call-a Law is a collection of recorded messages that can be accessed by a touch-tone telephone. The phone number to call is (850) 561-1200. A menu of choices is available or you can ask for tape number 1144 which explains how people can protect their estates if they become sick or disabled. The information on Powers of Attorney is very brief but the service offers good advice on related issues all for the cost of the phone call.

Florida Department of Elder Affairs: The DOEA is a helpful resource on a variety of issues relating to aging. The general jurisdiction, mission and purpose of the Department are found in Chapter 430 of the Florida Statutes. The DOEA maintains the Elder Helpline, a statewide toll-free number, 1-800-96ELDER, as well as a website located at **http://elderaffairs.state.fl.us.** The department also co-sponsors publication of the *Older Floridians Handbook*.

Florida Statutes: Chapter 709 of the Florida Statutes contains the full statutory law on Powers of Attorney. Chapter 744 deals with guardianship law. Chapter 518 deals with investment of fiduciary funds. You may find a set of the Florida Statutes at your public library or at most courthouses. You may access the Florida Statutes on the Internet at **http://www.leg.state.fl.us/Statutes/index.cfm?**

The material in this pamphlet represents general legal advice. Since the law is continually changing, some provisions in this pamphlet may be out of date. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.

AFFIDAVIT OF ATTORNEY-IN-FACT

STATE OF FLORIDA
COUNTY OF _____

Before me, the undersigned authority, personally appeared _____ ("Affiant"), who swore or affirmed that:

1. Affiant is the attorney-in-fact named in the Durable Power of Attorney executed by _____ ("Principal") on _____ _____.

2. This Durable Power of Attorney is currently exercisable by Affiant. The principal is domiciled in _____.

3. To the best of the Affiant's knowledge after diligent search and inquiry:

a. The Principal is not deceased; and

b. There has been no revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the durable power of attorney, or suspension by initiation of proceedings to determine incapacity or to appoint a guardian.

4. Affiant agrees not to exercise any powers granted by the Durable Power of Attorney if Affiant attains knowledge that it has been revoked, partially or completely terminated, suspended, or is no longer valid because of the death or adjudication of incapacity of the Principal.

_____
Affiant/Attorney-in-fact

Sworn to (or affirmed) and subscribed before me this _____ day of _____ by Affiant who is personally known to me or who produced _____ as identification.

_____
Notary Public

SEAL

This affidavit was prepared pursuant to Section 709.08(4), Florida Statutes (2001).

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Rev. 8/02
45- Florida Powers of Attorney (Eng).pmd