

Financial Durable Power of Attorney



This e-book informs you about the use of a financial power of attorney and includes a sample legal form.



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FINANCIAL POWERS OF ATTORNEY

Published by the Colorado Bar Association

What is a power of attorney?

This is the giving of legal rights and powers by one person to another. In Colorado, we use two common types: medical and financial. This booklet is only about financial powers of attorney.

A common scenario is that a person ("the principal") appoints another ("an agent") under a general power of attorney. In effect, the agent stands in the shoes of the principal and can act for the principal on financial and business matters. The agent can do whatever the principal may do - withdraw funds from bank accounts, trade stock, pay bills, cash checks - with any exceptions being listed in the power of attorney. This doesn't mean the agent can "take the money and run." The agent must use the principal's finances as the person would, for his or her benefit.

Why should I have a financial power of attorney?

It's good planning. If you were incapacitated in a car accident, had a debilitating physical or mental disease, your agent could handle your finances and pay your bills without having to go to court to seek a conservatorship/guardianship.

How do I create a power of attorney?

You must be at least 18 and competent so that you understand what you're doing. You create a power of attorney by writing down exactly what you want your agent to be able to do for you. Although legal counsel isn't required to write a power of attorney, help from a lawyer should ensure your intentions are clearly expressed and that you've covered everything necessary for your particular situation. Witnesses are recommended but not required, but your document does need to be notarized in order to have all the protections available under Colorado law.

Will my power of attorney be recognized by my bank, broker, Social Security and others?

A power of attorney should be written by an attorney. If you choose not to hire an attorney, using the "Statutory Power of Attorney" (Form 34S) is probably the next best form to use. This form is familiar to banks, brokers and other holders of assets, and is easily purchased from Bradford Publishing Co., 1743 Wazee Street, Denver, CO 80202. Compliance with a power of attorney can be a problem if your document doesn't address your particular situation. It's a powerful document and should be tailored to your situation by a qualified attorney.

When does the power of attorney take effect?

You'll hear two ways of describing this. Something referred to as a "springing" power of attorney takes effect only when the event described in the instrument takes place. Typically, this would be when the principal becomes incapacitated, as certified by one or more doctors. Because of the delay that such a procedure for certification may cause, a "standing" power is used most often. With the standing power, the principal gives the agent powers when the document is signed and these powers continue until they are revoked by the principal. A power of attorney is durable if these powers may be exercised even though the principal is disabled. All powers of attorney expire upon the death of the principal.

Does the power of attorney take away a principal's rights?

Absolutely not. An agent simply has the power to act according to the principal's authorization, as set forth in the document.

Think of a power of attorney as a second set of keys to your car. Both principal and agent have sets of keys. The principal can have full use and enjoyment of the car and, moreover, can request return of the duplicate set of keys at any time from the agent. Only the Court, through a conservatorship, can take away the principal's rights.

Can the principal change his or her mind?

Yes. A principal may revoke a power of attorney anytime. All that's necessary is for the principal to send a letter to the agent revoking the appointment. From the moment the agent receives the letter, he or she can no longer act under the power of attorney. The agent doesn't have the right to ignore the revocation even if the agent believes the principal no longer has legal capacity to do so. The agent can go to court and petition for a conservator to be appointed. State law automatically revokes the principal's appointment of a spouse as agent when a divorce is final.

You should send a copy of your revocation to any institution or person that was given a notice of the original power of attorney. Otherwise, those persons may rely on the power of attorney until they're given notice.

Who should I name as my agent of attorney-in-fact?

It's most important that you name someone you trust! Although having a power of attorney has many advantages, the primary disadvantage is that it gives your agent an opportunity to steal your money. Common choices for agents are your spouse, a child, sibling or any trusted friend. The person must be 21. You must get the agent's permission to name them as your agent.

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

Yes. The law holds the agent to the "prudent man rule," the same as it does for trustees or executors. The agent must exercise "due care" and manage any funds not as if they were the funds of the agent, but with the care needed for managing funds of another. Preservation of assets is extremely important. Still, the agent must take into account the principal's estate plan or goals. In carrying out an estate plan, the agent will only be liable for actions taken in bad faith. The agent has the right to see and copy the principal's will, trust, or other personal papers to carry out this duty.

If the agent has been named because of special skills, he must use that expertise.

Can the agent compensate himself for work?

Yes, if the principal has agreed. Usually, the agent is entitled to "reasonable" compensation for his services. If an agent wants to be paid, he should discuss payment with the principal and put the agreement in writing. Often, the agent is a family member and doesn't expect to be paid.

What if the principal appoints multiple agents?

Appointing multiple agents is legal, but not advised because it can create deadlock if agents don't agree. It's usually better to appoint one person with several backups, in case the first choice is unable to serve. The statutory form power of attorney doesn't allow you to name co-agents, but does allow for successor agents.

However, if multiple agents are appointed, they may act independently or they may have to act together, depending on how the power of attorney is worded. In either case, they should talk to each other to make sure what they do is consistent.

What records should the agent keep?

The agent should keep good records of what he does under the power of attorney so he can answer questions anyone may raise. The principal's funds shouldn't be mixed together with the agent's own money - it's best to establish a separate checking account and run all funds through that. The checks will be receipts and the checkbook register will act as a running account of what's been done. At some point, a member of the family, etc. may ask for an accounting by going to court.

What additional problems may I have?

Talk to a lawyer about problems with retitling assets, real estate transactions, filing tax returns, dealing with trustees of living trusts, gifts, spousal support and Medicaid planning for the principal.

What do I do with my power of attorney document?

Give the original document to the agent you appoint to show to people or institutions who need to see it. If the power of attorney will be used to transfer real estate, it should be recorded with the deed in the county where the real estate is situated.

Be sure to keep a copy for yourself with other important papers.

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

Any interested person can go to court in the county where the principal resides (or in the county where the guardian or conservator resides if one has been appointed) to control the agent or replace the agent with a guardian or conservator or both.

(1999) This pamphlet is published as a public service by the Colorado Bar Association. It was written by Jan Meyers, Jeanne Thompson, Paul Mitchell, 1999. Its purpose is to inform citizens of their legal rights and obligations and to provide information regarding the legal profession and how it may best serve the community. Changes may have occurred in the law since the time of publication. Before relying on this information, consult an attorney about your individual case.

How a Financial Power of Attorney Works by Shae Irving, J.D.

Durable powers of attorney for finances -- a simple way to arrange for someone to handle your finances if you can't.

A durable power of attorney for finances, or financial power of attorney, is a simple, inexpensive, and reliable way to arrange for someone to make your financial decisions if you become unable to do so yourself. It's also a wonderful thing to do for your family members. If you do become incapacitated, the document will likely appear as a minor miracle to those close to you.

That's because if you become incapacitated (unable to make decisions for yourself) and you haven't prepared a durable power of attorney, a court proceeding is probably inescapable. Your spouse, closest relatives, or companion will have to ask a court for authority over at least some of your financial affairs.

When a Financial Power of Attorney Takes Effect

A financial power of attorney can be drafted so that it goes into effect as soon as you sign it. (Many spouses have active, financial powers of attorney for each other in effect at all times in case something happens to one of them -- or for when one spouse is out of town.) You must specify that you want your power of attorney to be "durable." If you don't, it will automatically end if you later become incapacitated.

Or, you can specify that the power of attorney does not go into effect unless a doctor certifies that you have become incapacitated. This is called a "springing" durable power of attorney. It allows you to keep control over your affairs unless and until you become incapacitated, when it springs into effect. Again, you must specify that you want your power of attorney to be "durable." If you don't, in this case, your document will never take effect at all.

The Attorney-in-Fact's Job

When you create and sign a durable power of attorney, you give another person legal authority to act on your behalf. This person is called your "attorney-in-fact" or, sometimes, your "agent." The word "attorney" here means anyone authorized to act on another's behalf; it's most definitely not restricted to lawyers.

Commonly, people give an attorney-in-fact broad power to handle all of their finances. But you can give your attorney-in-fact as much or as little power as you wish. You may want to give your attorney-in-fact authority to do some or all of the following:

- use your assets to pay your everyday expenses and those of your family
- buy, sell, maintain, pay taxes on, and mortgage real estate and other property
- collect Social Security, Medicare, or other government benefits
- invest your money in stocks, bonds, and mutual funds
- handle transactions with banks and other financial institutions
- buy and sell insurance policies and annuities for you
- file and pay your taxes
- operate your small business
- claim property you inherit or are otherwise entitled to
- transfer property to a trust you've already created
- hire someone to represent you in court, and
- manage your retirement accounts.

The attorney-in-fact is required to act in your best interests, maintain accurate records, keep your property separate from his or hers, and avoid conflicts of interest.

Creating a Durable Power of Attorney for Finances

To create a legally valid durable power of attorney, all you need to do is properly complete and sign a fill-in-the-blanks form that's a few pages long. Some states have their own forms, but it's not mandatory that you use them.

Some banks and brokerage companies have their own durable power of attorney forms. If you want your attorney-in-fact to have an easy time with these institutions, you may need to prepare two (or more) durable powers of attorney: your own form and forms provided by the institutions with which you do business.

You must sign the document in front of a notary public. In some states, witnesses must also watch you sign. If your attorney-in-fact will have authority to deal with your real estate, you must put a copy of the document on file at the local land records office. (In two states, North and South Carolina, you must record your power of attorney at the land records office for it to be durable.)

Financial Power of Attorney Forms

Quicken WillMaker Plus (software published by Nolo) will create a durable financial power of attorney for you, along with a will, living trust, and other important documents.

When a Durable Power of Attorney Ends

Your durable power of attorney automatically ends at your death. That means that you can't give your attorney-in-fact authority to handle things after your death, such as paying your debts, making funeral or burial arrangements, or transferring your property to the people who inherit it. If you want your attorney-in-fact to have authority to wind up your affairs after your death, use a will to name that person as your executor.

Your durable power of attorney also ends if:

- You revoke it. As long as you are mentally competent, you can revoke a durable power of attorney at any time.
- You get a divorce. In a handful of states -- including Alabama, California, Colorado, Illinois, Indiana, Kansas, Minnesota, Missouri, Ohio, Pennsylvania, Texas, Washington, and Wisconsin -- if your spouse is your attorney-in-fact and you divorce, your ex-spouse's authority is automatically terminated. In other states, if you want to end your ex-spouse's authority, you have to revoke your existing power of attorney. You can then prepare a new document, naming someone else to act for you.
- A court invalidates your document. It's rare, but a court may declare your document invalid if it concludes that you were not mentally competent when you signed it, or that you were the victim of fraud or undue influence.
- No attorney-in-fact is available. To avoid this problem, you can name an alternate attorney-in-fact in your document.

Financial Durable Power of Attorney

KNOW ALL MEN BY THESE PRESENTS, that

_____ (Principal) has made, constituted and appointed, and by these presents does make, constitute and appoint

_____ (Agent), as true and lawful attorney for Principal and in the name, place and stead of Principal, to make financial decisions for Principal, if and when Principal is incapacitated or incompetent, as certified by one or more physicians or psychiatrists.

If Agent listed above is not available, not willing or is unable to act as my Agent, then I appoint the following person(s) to serve, in the order listed below:

_____ (Agent),

_____ (Agent),

When in effect, this Power is given to enable the Agent to hold and administer all of the assets of the Principal, both real estate and personal property, and this Power includes the right to perform all of the following functions: To purchase flower bonds; to form corporations and other entities; to reorganize corporations and other entities of which Principal is a stockholder, member or other party; to purchase, cancel or renew life, health, long term care or other insurance or annuities without the necessity of seeking court approval; to allow the Agent to make tax-free gifts of the Principal's assets; to authorize the Agent to claim or disclaim property interests which the Principal may be entitled to receive; to fund revocable trusts of which the Principal is trustor or settlor; to buy and sell and transfer real estate, securities and other investments or property; and to do all other acts which the Agent deems to be in the best interest of the Principal, including, but not limited to, the following:

1. The Agent is specifically given the power to perform all of the tasks which the Principal would perform for and on behalf of the Principal and in addition thereto the Agent is given the power to act as Guardian for the Principal and the Principal hereby appoints the Agent as Guardian for the Principal during times when the Principal is incapable of acting.
2. Agent is specifically given the power to manage the financial affairs of the Principal, including managing real estate, investments, bank accounts, retirement accounts, records, personal property, collecting income and benefits, selling of assets required to meet additional expenses of the Principal, and reinvesting income and proceeds received from investments.
3. Agent is specifically given the power to pay bills and other obligations of Principal, and to pay those bills on a current basis. Agent is given authority to borrow money in order to meet obligations rather than liquidate assets at depressed prices. Agent is specifically given the power to borrow from banks and insurance companies or other sources as needed.
4. Agent is specifically given authority to operate, continue, dissolve, merge or sell any business that the Principal may own, and to use all assets that may be necessary to fulfill this decision, even those assets not previously committed to the business.

5. Agent is specifically given authority to create trusts and to manage Principal's security holdings, and to employ or discharge professional financial advisors and managers if the Agent believes this to be important. Agent is authorized to transfer securities to the trustee for continued management in the trust. Agent is further given authority to withdraw assets from the trust to meet the needs of the Principal. Securities and other investments shall be managed in a prudent manner. If income is needed, investments should emphasize income generation. In addition, Agent is given the authority to transfer assets from the Principal's name to any revocable living trust that Principal may have established during Principal's life.

6. Agent is specifically given authority to commence any litigation for and on behalf of Principal or to continue any litigation for and on behalf of Principal. Agent is specifically given the power to prosecute or defend claims, including the right to settle matters and grant releases. Agent is specifically given the authority to employ or discharge attorneys and to make binding arrangements on behalf of Principal.

7. Agent is specifically given the authority for filing tax returns and handling all other matters related to the Principal's taxes, including handling tax disputes with the Internal Revenue Service. Agent is given specific authority to represent the Principal in tax matters including the right to sign Internal Revenue Service Power of Attorney, Form 2848.

8. Agent shall keep a record of all financial decisions and transactions made. Agent shall be entitled to receive reasonable compensation of \$_____ per hour for services rendered.

9. Agent shall be authorized to see and copy any books, records, files, and papers of the Principal, including any will, trust, other estate planning documents, insurance policies and annuities.

The Principal exonerates the Agent from liability for all non-negligent acts of the Agent.

This Financial Power of Attorney shall take effect if Principal is incapacitated or incompetent, as certified by one or more physicians or psychiatrists, and shall be durable and remain in effect while Principal remains incapacitated or incompetent, or until revoked. Upon execution of this Financial Power of Attorney, any Financial Power of Attorney previously executed by Principal shall be revoked. All acts done by Agent pursuant to the powers conferred herein, during any period of incapacity or incompetence, shall have the same effect and inure to the benefit of and bind the Principal or his/her heirs, devisees and Personal Representative, as if the Principal was competent and not incapacitated;

GIVING AND GRANTING unto said Agent full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done, as fully to all intents and purposes as the Principal might or could do if personally present and able; hereby ratifying and confirming all that said Agent shall lawfully do or cause to be done by virtue of these presents.

