

DURABLE POWER OF ATTORNEY – WHAT IS IT?

May, 2015

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Generally speaking a Durable Power of Attorney gives another person (known as the Attorney in Fact or Agent) the ability to step into the shoes of the person who signed the instrument (known as the Principal) and do everything they can do. The purpose of most Durable Powers of Attorney are used to manage property (real, personal and monetary) transactions when the Principal is unable to do so because of incapacity. Although this general concept remains in effect, Florida's Durable Power of Attorney laws have added some additional options to protect the principal but also grant the Agent greater responsibilities.

A bank can now require that an affidavit be executed by the Agent stating that the Principal is not deceased and there has been no revocation by adjudication or other event referenced in the instrument that would suspend the Attorney in Fact's authority. A financial institution may also require that the person who will be signing the affidavit agree not to exercise any powers granted under the Durable Power of Attorney if he or she obtains knowledge that the instrument has been revoked, suspended or is no longer valid because of the death or adjudication of incapacity of the Principal.

The law also provides a section as to who may serve as an Agent for the Principal. They include persons who are at least 18 years old and are of sound mind. They also include financial institutions with trust powers located in Florida. The law identifies who may act as a qualified agent for the Principal and include: 1) financial institutions with trust powers and a place of business in Florida; 2) an attorney or certified public accountant licensed in Florida; 3) the principal's spouse or heir within the meaning of §732.103, Fla. Stat.; or, 4) any Florida resident provided that person is not serving as a an agent for more than three principals simultaneously. Qualified Agents are allowed to charge a fee for their services.

When multiple Agents are authorized to handle the day-to-day business of a Principal, each co-Agent may exercise authority independently of the other unless the Durable Power of Attorney provides that decisions must be made unanimously.

An important feature of the law protecting a Principal is the specificity that a Durable Power of Attorney provides with regard to an Agent's duties. Some mandatory duties include: 1) to not act in a manner that is contrary to the Principal's known expectations; 2) not to act in a manner that is contrary to the Principal's best interest; 3) act in good faith; 4) preserve the Principal's estate plan; 5) perform personally (with some exceptions) and not assign duties to others; 6) keep adequate records of all receipts, disbursements and transactions made on behalf of the Principal; 7) maintain a safe deposit box inventory; 8) act with care, competence, and diligence; 9) act loyally for the sole benefit of the Principal and to avoid conflicts of interest; and, 10) cooperate with health-care decision makers.

A Principal can grant his or her Agent the ability to effect changes to their trust documents provided that both the Durable Power of Attorney and the Principal's trust instrument grant such reciprocal power. The authority must be specific; for example, the Durable Power of Attorney must at least state "my agent may create, amend and fund a revocable trust on my behalf." However, when granting this type of authority the Principal must sign or initial the paragraph expressing such authority. In addition, if the authority granted in the Durable Power of Attorney is to amend a trust instrument, the trust instrument must also grant the power to amend by the Agent. Florida's Durable Power of Attorney law goes on to further allow an Agent the right to create or change rights of survivorship, beneficiary designations, waive the right to be a beneficiary of a joint and survivor annuity, disclaim property and disclaim powers of appointment. Each grant of these types of express authority to an Agent must be initialed or signed off by the principal in the Durable Power of Attorney document.

Originally, third parties would have a policy to only accept original blue ink signed copies of a Principal's Durable Power of Attorney before recognizing an Agent's authority. However, a photocopy or electronically transmitted copy of an original power of attorney now has the same effect as an original. This creates a potentially dangerous situation with the only means of protecting your Durable Power of Attorney from misuse is to keep your instrument in a safe location.

Because the power provided to an Agent through a Durable Power of Attorney is quite extensive, you should carefully consider who your agent will be and protect your instrument from being misused. To that end, talk to your attorney about where to store your original Durable Power of Attorney. You can have your attorney keep your original Durable Power of Attorney with the understanding that copies may only be released after confirmation from the Principal to do so; or, medical personnel declare the Principal incompetent and you authorize your attorney to release copies of your Durable Power of Attorney under those conditions.

Remember this, other than your Will or Trust instrument, a Durable Power of Attorney is one of the most powerful testamentary documents you will possess. If you are not sure whether a Durable Power of Attorney is suited for you, contact the Attorney of your choice and talk about it to him or her about what it can do for you.

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