Consumer Pamphlet: Florida Power of Attorney

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Unless otherwise specified, the information in this pamphlet applies to powers of attorney signed on or after Nov. 1, 2014. Consult a lawyer regarding use and enforceability of powers of attorney executed before Oct. 1, 2011. Also, special rules for durable powers of attorney are noted.

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 (the "principal") grants the right to act on the maker's behalf as that person's agent. 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 access bank accounts, sign a contract, make health care decisions, handle financial transactions or sign legal documents for the principal. 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, including the ability to create trusts and make gifts.

WHERE MAY A PERSON OBTAIN A POWER OF ATTORNEY?

A power of attorney is an important and powerful legal document, as it is authority for someone to act in someone else's legal capacity. It should be drawn by a lawyer to meet the person's specific circumstances. Pre-printed forms may fail to provide the protection or authority desired.

DOES A POWER OF ATTORNEY NEED WITNESSES OR A NOTARY?

A power of attorney must be signed by the principal, by two witnesses to the principal's signature, and a notary must acknowledge the principal's signature for the power of attorney to be 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.

WHAT IS A "PRINCIPAL"?

The "principal" is the maker of the power of attorney – the person who is delegating authority to another. This is the person who is allowing someone else to act on his or her behalf.

WHAT IS AN "AGENT"?

The "agent" is the recipient of the power of attorney – the party who is given the power to act on behalf of the principal. The agent is sometimes referred to as an "attorney-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 agent has dealings on behalf of the principal. Examples include a bank, a doctor, the buyer of property that the agent is selling for the principal, a broker, or anyone else with whom the agent must deal on behalf of the principal.

WHAT IS A "LIMITED POWER OF ATTORNEY"?

A "limited power of attorney" gives the agent 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. 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 agent very broad powers to perform any legal act on behalf of the principal. A specific list of the types of activities the agent is authorized to perform must be included in the document.

WHAT IS A "DURABLE POWER OF ATTORNEY"?

A power of attorney terminates if the principal becomes incapacitated, unless it is a special kind of power of attorney 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 the power of attorney is being given and what property may be affected by the power of attorney.

WHO MAY SERVE AS AN AGENT?

Any competent person 18 years of age or older may serve as an agent. Agents should be chosen for reliability and trustworthiness. Certain financial institutions with trust powers also may serve as agents.

WHAT HAPPENS IF THE POWER OF ATTORNEY WAS CREATED UNDER THE LAWS OF ANOTHER STATE?

If the power of attorney was properly executed under the other state's laws, then it may be used in Florida, but its use will be subject to Florida's Power of Attorney Act and other state laws. The agent may act only as authorized by Florida law and the terms of the power of attorney. There are additional requirements for real estate transactions in Florida, and if the power of attorney does not comply with those requirements its use may be limited to banking and other non-real estate transactions. The third party also may request an opinion of counsel or an affidavit that the power of attorney was properly executed in accordance with the laws of the other state.

Power and Duties of Agent

WHAT ACTIVITIES ARE PERMITTED BY AN AGENT?

An agent may perform only those acts specified in the power of attorney and any acts reasonably necessary to give effect to the specified acts. If an agent is unsure about authorization to do a particular act, the agent should consult the lawyer who prepared the document or other legal counsel.

Two types of acts may be incorporated by a simple reference to the statutes in the power of attorney – the "authority to conduct banking transactions as provided in Section 709.2208(1), Florida Statutes" and the "authority to conduct investment transactions as provided in Section 709.2208(2), Florida Statutes." When either of these phrases is included in the power of attorney, all of the acts authorized by the referenced statute may be performed by the agent even though the specific acts are not listed in the power of attorney itself.

MAY AN AGENT SELL THE PRINCIPAL'S HOME?

Yes. If the power of attorney has been executed with the formalities of a deed and authorizes the sale of the principal's homestead, the agent may sell it. If the principal is married, however, the agent also must obtain the authorization of the spouse.

WHAT MAY AN AGENT NOT DO ON BEHALF OF A PRINCIPAL?

There are a few actions that an agent is prohibited from doing even if the power of attorney states that the action is authorized. An agent, unless also a licensed member of The Florida Bar, may not practice law in Florida. 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 car accident, the agent may not sign an affidavit stating what the principal saw or heard. An agent may not vote in a public election on behalf of the principal. An agent 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 agent 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 agent may not take over these responsibilities based solely on the authority of a power of attorney.

WHAT ARE THE RESPONSIBILITIES OF AN AGENT?

While the power of attorney gives the agent authority to act on behalf of the principal, an agent is not required to serve. An agent 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 agent takes on a responsibility, there is a duty to act prudently. (See “Financial Management and the Liability of an Agent.”)

IS THERE A CERTAIN CODE OF CONDUCT FOR AGENTS?

Yes. Agents must meet certain standards of care when performing their duties. An agent is looked upon as a “fiduciary” under the law. A fiduciary relationship is one of trust. If the agent violates this trust, the law may punish the agent both civilly (by ordering the payment of restitution and punishment money) and criminally (probation or jail). The standards of care that apply to agents are discussed under “Financial Management and the Liability of an Agent.”

Using the Power of Attorney

WHEN IS A POWER OF ATTORNEY EFFECTIVE?

The power of attorney is effective as soon as the principal signs it. However, a durable power of attorney executed before Oct. 1, 2011, that is contingent on the incapacity of the principal (sometimes called a “springing” power) remains valid but is not effective until the principal’s incapacity has been certified by a physician.

MUST THE PRINCIPAL DELIVER THE POWER OF ATTORNEY TO THE AGENT RIGHT AFTER SIGNING OR MAY THE PRINCIPAL WAIT UNTIL SUCH TIME AS THE SERVICES OF THE AGENT ARE NEEDED?

The principal may hold the power of attorney document until such time as help is needed and then give it to the agent. Often, a 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 agent under certain specific conditions. Because the lawyer may not know if and when the principal

is incapacitated, the principal should let the agent know that the lawyer has retained the signed document and will deliver it as directed. If the principal does not want the agent to be able to use the power of attorney until it is delivered, the power of attorney should clearly require the agent to possess the original, because copies of signed powers of attorney are sufficient for acceptance by third parties.

HOW DOES THE AGENT INITIATE DECISION-MAKING AUTHORITY UNDER THE POWER OF ATTORNEY?

The agent 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 agent 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 the principal needs to deal). Some third parties may ask the agent to sign a document such as an affidavit, stating that the agent is acting properly. (The agent may wish to consult with a lawyer before signing such a document.) The third party should accept the power of attorney and allow the agent to act for the principal. An agent should always make it clear that documents are being signed on behalf of the principal.

HOW SHOULD THE AGENT SIGN WHEN ACTING AS AN AGENT?

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

Howard Rourk, as agent for Ellsworth Toohey. (In this example, Howard Rourk is the agent, 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. The third party is required to give the agent a written explanation of the refusal to accept the power of attorney within a reasonable time after it is presented to the third party.

Under some circumstances, if the third party's refusal to honor the power of attorney causes damage, the third party may be liable for those damages and even attorney's fees and court costs. Even a mere delay may cause damage, and this, too, may be actionable. It is reasonable, however, for the third party to have the time to consult with a lawyer or an internal legal department about the power of attorney. 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. If your power of attorney is refused, talk to your attorney.

WHAT IF A THIRD PARTY REQUIRES THE AGENT TO SIGN AN AFFIDAVIT BEFORE HONORING THE POWER OF ATTORNEY?

A third party is authorized by Florida law to require the agent to sign an affidavit (a sworn or an affirmed written statement), stating that the agent is validly exercising the authority under the power of attorney. If the agent wants to use the power of attorney, the agent 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 power of attorney. As long as the statements in the affidavit are true at that time, the agent may sign it. The agent may wish to consult with a lawyer before signing it.

WHAT ELSE MAY THE THIRD PARTY REQUIRE?

A third party also may make a reasonable request for an opinion of counsel as to any legal matter concerning the power of attorney, including its proper execution under the laws of another state. A third party may request a certified English translation if any part of the power of attorney is in a language other than English.

MAY THE AGENT EMPLOY OTHERS FOR ASSISTANCE?

Yes. The agent may hire accountants, lawyers, brokers or other professionals to help with the agent's duties but generally may not delegate the responsibilities as agent. The power of attorney was given by the principal to the agent, and the agent does not have the right to transfer that power to anyone else. It is important that the agent keep in mind the fiduciary duties when hiring professionals to help. The agent is allowed to delegate investment responsibility if the requirements of Florida Statutes Section 518.11 are followed by the agent, unless the power of attorney prohibits such a delegation.

Relationship of Power of Attorney to Other Legal Instruments

WHAT IS THE DIFFERENCE BETWEEN AN AGENT AND AN EXECUTOR OR PERSONAL REPRESENTATIVE?

An executor, termed a "personal representative" in Florida, is the person who takes care of another's probate estate after that person dies. An agent may take care of the principal's affairs only 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 "AGENT"?

Like a power of attorney, a trust may authorize an individual (the "trustee") to act for the maker of the trust during the maker's lifetime. Like an agent, the trustee may manage the financial affairs of the maker of the trust. A trustee has power only over an asset that is owned by the trust. In contrast, an agent may have authority over all of the principal's non-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. Whether a trust or an agent is the most appropriate tool for a specific situation is a question that should be addressed to an attorney.

MAY A POWER OF ATTORNEY AVOID THE NEED FOR GUARDIANSHIP?

Yes. If the incapacitated person executed a valid durable power of attorney before the incapacity, it may not be necessary for the court to appoint a guardian, since the agent already has the authority to act for the principal. As long as the agent 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 agent to act on the principal's behalf.

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 agent discovers that a guardian was appointed before the date the principal signed the power of attorney, the agent should advise a lawyer. If a guardianship court proceeding is begun after the power of attorney was signed by the principal, the authority of the agent of certain individuals is automatically suspended until the petition is dismissed, withdrawn or otherwise acted upon. The law requires that an agent receive notice of the guardianship proceeding. A power to make health care decisions, however, is not suspended unless the court specifically suspends this power. If the agent learns that guardianship or incapacity proceedings have been initiated, the agent should immediately consult with a lawyer.

Termination of the Power of Attorney

WHEN DOES A POWER OF ATTORNEY TERMINATE?

The authority of any agent under a power of attorney automatically ends when one of the following things happens:

- The principal dies.
- The principal revokes the power of attorney.

- 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.
- The purpose of the power of attorney is completed.
- The term of the power of attorney expires.

In any of these instances, the power of attorney is terminated. If, after having knowledge of any of these events, a person continues to act as agent, he or she is acting without authority.

WHEN DOES A PARTICULAR AGENT'S AUTHORITY TERMINATE?

The authority of an agent under a power of attorney automatically ends when one of the following things happens:

- The agent dies.
- The agent resigns or is removed by a court.
- The agent becomes incapacitated.
- There is a filing of a petition for dissolution of marriage if the agent is the principal's spouse, unless the power of attorney provides otherwise.

WHAT IS THE PROCEDURE FOR A PRINCIPAL TO REVOKE A POWER OF ATTORNEY?

The revocation must be in writing and may be done by a subsequent power of attorney. Notice should be served on the agent and any other party who might rely on the power. The notice should 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 a lawyer to be sure proper procedures are followed.

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 power of attorney is automatically suspended for certain agents, and those agents 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 AGENT HAS BEEN SUSPENDED BECAUSE GUARDIANSHIP PROCEEDINGS ARE PENDING FOR THE PRINCIPAL. NOW THERE IS AN EMERGENCY, BUT NO GUARDIAN HAS BEEN APPOINTED YET. WHAT NOW?

The agent may ask the court for special permission to handle an emergency, even though the power of attorney remains otherwise suspended. Contact a lawyer.

Financial Management and the Liability of An Agent

WHAT IS "FIDUCIARY RESPONSIBILITY"?

An agent is a fiduciary and as such has multiple duties when acting for the principal. These include an overriding duty to do only those acts authorized by the power of attorney, and when performing those acts to act in accordance with the principal's reasonable expectations, to act in the principal's best interest and to attempt to preserve the principal's estate plan. The preservation of the estate plan is dependent on a number of factors, including the agent's knowledge of the plan and the needs and desires of the principal. If the agent assumes responsibility for the principal's investments, the agent has a duty to invest and manage the assets of the principal as a prudent investor. This standard requires the agent to exercise reasonable care and caution in managing the assets of the principal. The agent must apply this standard to the overall investments and not to one specific asset. An agent possessing special financial skills or expertise has an obligation to use those skills. The agent is required to keep careful records and may be required to provide an accounting. Everything the agent does for the principal should be written down, and the agent should keep all receipts and copies of all correspondence and consider logging phone calls so if the agent is questioned, records are available. Agents should consult with lawyers to be sure they understand all of the duties applicable to them.

Where to Learn More

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**. 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 765 deals with Health Care Surrogate Designation. 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 or **online**.

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.

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