



POWER OF ATTORNEY GUIDE

Prepared By
James A. Rapp
and

The Schmiedeskamp Estate Planning Group
525 Jersey Street
Quincy, Illinois 62301
Telephone: 217.223.3030

Introduction

Powers of Attorney have become an important estate planning tool, particularly for the elderly. This material provides some general information regarding powers of attorney.

The Schmiedeskamp Estate Planning and Administration Group

This information has been provided for the convenience of clients and friends of the Schmiedeskamp, Robertson, Neu & Mitchell LLP Estate Planning and Administration Group. Our clients are families and individuals from all walks of life, along with individual and corporate executors, trustees, and fiduciaries, as well as public and private charities. The Group provides estate planning and administration services from the simple to the complex. Services relate to wills, trusts, beneficiary arrangements, and other estate planning techniques and approaches. We advise our clients regarding the effective and efficient transfer of wealth and succession planning. We work closely with our client's accountant, financial, insurance, and other advisors. For more information about the Estate Planning and Administration Group and all our lawyers, please visit www.srnm.com.

What is a Power of Attorney?

A power of attorney is a written instrument whereby one person appoints another as the person's agent and confers authority to perform acts or make decisions on behalf of that person. A power of "attorney" does not refer to a lawyer. Rather, it refers to an agent or representative. The person giving the power of attorney is called the principal and the person appointed is the agent. The agent is sometimes referred to as the attorney-in-fact or, commonly, the power of attorney.

What Types of Power of Attorney Exist?

There are two broad types of powers of attorney. There are powers of attorney for property and powers of attorney for health care.

The power of attorney for property allows the attorney-in-fact to handle virtually any matters regarding property. A common example is paying bills. However, other matters may also be covered such as selling real estate. A general power of attorney allows the agent to do most things the person giving the power of attorney could do personally.

A health care power of attorney allows the agent to make decisions regarding any type of health care and related matters. This could include, for example, consenting to or declining particular treatment. Unlike a living will declaring that a person does not wish extraordinary measures used to delay the moment of death if imminent, a health care power of attorney allows another person to make appropriate decisions. A power of attorney is usually considered more beneficial than a living will because someone is allowed to make decisions based on known circumstances. However, for some, living wills may be appropriate as well to make their wishes clear.

Can a Person Still Act?

A power of attorney does not take a person's authority away. Therefore, so long as a person is competent, the person may continue to act for themselves. A person can also revoke or change a power of attorney. In health care matters, in particular, health care providers will yield to what a person wants even if the power of attorney might disagree. Again, of course, the person must be sufficiently competent to make decisions.

What About Mental Health Concerns?

The usual power of attorney does not give authority with regard to mental health matters. Indeed, mental health providers generally disregard powers of attorney when mental health concerns arise.

Illinois law, as an example, has adopted the Mental Health Treatment Preference Declaration Act (755 ILCS 43/1). This law permits persons to make a declaration of preferences or instructions regarding mental health treatment. Also, a declaration may designate an agent to make decisions about mental health treatment. The declaration of preferences or instructions is valid for three years or until revoked. Therefore, it needs to be regularly reviewed and renewed. However, an agent's authority may be continued indefinitely but may be exercised only if the person making the appointment is incapable of making mental health treatment decisions.

Where a person has mental health concerns, a declaration covering this area should be considered. One circumstance where this should be considered is where a person has developed dementia or Alzheimer's disease because the treatment often requires mental health drugs. This would be in addition to the regular power of attorney.

Should Other Instructions Be Provided to the Power of Attorney?

A power of attorney gives authority to act for another person. It doesn't provide specific instructions. It is often helpful to provide separate instructions to the power of attorney. In the

case of health care decisions, in particular, it may be appropriate to describe one's position as to specific treatment. Of course, even the best of instructions will not cover every situation and so it's important to designate an agent that will exercise the sort of judgment you would want exercised.

Who Will Make Decisions Regarding Funerals or Remains?

A health care power of attorney ordinarily will have authority to make decisions regarding a funeral or the disposition of one's remains. Where there is no power of attorney, the legal representative of one's estate or next of kin will make these arrangements. If there are specific wishes one has about these matters, it is advisable to leave clear and specific directions. These may be in a will, prepaid funeral or burial contract, or some other written instrument. Every state permits anatomical gifts. Illinois law also has adopted the Disposition of Remains Act to allow a specific agent to be named to control the disposition of one's remains upon death that supersedes the authority usually vested in others. The most practical way to deal with a funeral is through a pre-arranged (not necessarily paid) funeral. Other matters, such as anatomical gifts, should be handled through other means to make certain that they are achieved.

What is a Durable Power of Attorney?

Powers of attorney are considered "durable" where the power becomes or remains effective in the event the person giving the power becomes disabled. In some states, such as Illinois, powers of attorney are durable whether or not specified. In others, such as Missouri, a power of attorney is durable only if it so states.

It is important to recognize that a power of attorney must be given by a competent individual. As such, although the power may remain effective in the event of incompetency, this assumes the person was competent when the power was given.

The great advantage of a power of attorney is that it is durable. This is a relatively new development in the law. At one time, when the person giving the power of attorney became incompetent, the power could no longer be used. Now, a power of attorney can continue to be used and, in fact, is of most benefit when the individual becomes disabled.

What are Some Risks to Powers of Attorney?

A power of attorney places significant powers with the agent. A person giving a power of attorney is bound by the actions of the agent and thus there is a risk that the agent would do something contrary to an individual's wishes. Therefore, a power of attorney should never be given to any individual in which there is not absolute faith and confidence. Despite these risks, the benefits of a power of attorney usually make them advisable.

To avoid problems, the key is to appoint a trustworthy agent. With respect to property matters, if an individual is not available, a trust company or bank may be appointed. In some cases, the risks

may be such that a trust should be established to provide for professional management where a person is no longer capable of handling their affairs.

When is the Power of Attorney Effective?

A power of attorney becomes effective at the time designated in the power of attorney itself. A power of attorney usually becomes effective immediately. Nevertheless, it may be made contingent upon certain events, such as a determination that the person giving the power of attorney is disabled or incompetent.

In most states, including the states of Illinois and Missouri, a power of attorney ceases to be effective upon the death of the person giving the power of attorney. A few states allow a power of attorney to continue to be in effect even after death. Once a person dies, no further actions may be undertaken under the authority of the power of attorney.

What Duties Exist for the Attorney-in-Fact?

It is important for an agent to understand that the agent is acting for, on behalf and in the interest of the person giving the power of attorney. It is not an opportunity for benefiting one's self. Indeed, any actions taken by the power of attorney are subject to close scrutiny. The responsibility of the power of attorney is described under Illinois law. Broadly stated, "the agent shall act in good faith for the benefit of the principal using due care, competence, and diligence in accordance with the terms of the agency." The power of attorney is "liable for negligent exercise." The agent must "keep a record of all receipts, disbursements, and significant actions taken under the agency." However, an agent is not liable for any loss due to an error in judgment. *See 755 ILCS 45/2-7.*

What Special Responsibilities Does the Agent Have?

Illinois law provides a special notice to agents. While this is only required where the statutory form it used, it provides a nice summary for powers of attorney in any jurisdiction.

The notice provides, in part:

When you accept the authority granted under this power of attorney a special legal relationship, known as agency, is created between you and the principal. Agency imposes upon you duties that continue until you resign or the power of attorney is terminated or revoked.

As agent you must:

(1) do what you know the principal reasonably expects you to do with the principal's property;

(2) act in good faith for the best interest of the principal, using due care, competence, and diligence;

(3) keep a complete and detailed record of all receipts, disbursements, and significant actions conducted for the principal;

(4) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest; and

(5) cooperate with a person who has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually in the principal's best interest.

As agent you must not do anything of the following:

(1) act so as to create a conflict of interest that is inconsistent with the other principles in this Notice to Agent;

(2) do any act beyond the authority granted in this power of attorney;

(3) commingle the principal's funds with your funds;

(4) borrow funds or other property from the principal, unless otherwise authorized;

(5) continue acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney, such as the death of the principal, your legal separation from the principal, or the dissolution of your marriage to the principal.

If you have special skills or expertise, you must use those special skills and expertise when acting for the principal. You must disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name "as Agent" in the following manner:

"(Principal's Name) by (Your Name) as Agent"

* * *

If you violate your duties as agent or act outside the authority granted to you, you may be liable for any damages, including attorney's fees and costs, caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice from an attorney.

Again, this highlights some of the responsibilities of a power of attorney.

What Limitations Exist on the Agent's Authority?

There are limits on the authority of a power of attorney.

A power of attorney is limited to the terms of the authorization given. In other words, unless authorized, actions are not permitted.

Illinois law provides, for example, that the agent "must act in accordance with the principal's expectations to the extent actually known to the agent and otherwise in the principal's best interests." 755 ILCS 45/2-7(b). When "exercising powers granted under an agency, the estate plan of the individual giving the power of attorney should be honored." 755 ILCS 45/2-9. In general, this means that joint accounts, beneficiary designations for insurance, retirement plans and the like should not be unnecessarily changed or modified unless a good reason exists for this. Also, assets should not be held, invested or sold which would result in a distribution different from the individual's will or trust.

One issue that sometimes arises is whether a power of attorney permits creation of joint accounts or beneficiary designations. Powers of attorney prepared may include this power. Where not specifically provided, however, this power does not exist. Also, a power of attorney unless specifically stated does not allow revisions of wills, trusts or the like. If these powers are desired, it must be specifically noted.

What Forms of Powers of Attorney Exist?

Some states have adopted statutory forms of powers of attorney. The State of Illinois has. Other states, such as the State of Missouri, have not.

The statutory forms have certain advantages and disadvantages. One advantage of using the statutory form is that it is widely accepted and recognizes. A great disadvantage is that the powers given do not include some of the powers that would be appropriate to give. The statutory forms are not required to be used.

Should I Have Alternate or Multiple Powers of Attorney?

Powers of attorney may designate alternate or multiple agents. Many individuals, particularly those who are younger, will name a single power of attorney. As time goes on, it is usually advisable to name one or more alternates or additional powers of attorney. It should be noted that some statutory forms of power of attorney do not allow the designation of multiple powers of attorney but only alternates.

Alternate powers of attorney will usually serve only if the primary power of attorney is unable to serve. Because this might require that the primary power of attorney be certified as unable to service, it eventually is advisable to name more than one power of attorney. This avoids the need to have such a certification.

Where multiple powers of attorney are named, it is important that they are able to work cooperatively. If not, problems can ensue. The remedy would be to revoke a power of attorney. Where a person is not competent to do so, disputes would require a court resolution.

Can an Agent Delegate Authority?

A power of attorney may delegate authority or name a substitute, either temporarily or permanently. This is a helpful alternative to naming multiple powers of attorney. The agent, for example, may authorize someone to handle health care or property matters. The agent can then revoke this authority if warranted.

How are Powers of Attorney Utilized?

Where a power of attorney is utilized, a photocopy should be furnished to the financial institution, health care provider, or other person with which one is dealing. The original should always be retained.

Where an agency is being registered for any specific asset, only the agency relationship should be designated. The account should not be put in joint tenancy or otherwise in the name of the agent unless already established in that manner by the person giving the power of attorney.

Checks are sometimes printed noting the power of attorney relationship. This is probably advisable where the agent is handling all checks for an individual. It is usually not done where all banking is not being handled by the agent. Accounts are frequently registered in the name of the individual but also noting the name of the power of attorney and the fact that the individual is a power of attorney.

A power of attorney should always indicate that action is being taken as an agent rather than as an individual. This is done by noting this when signing one's name.

The most common format for signing one's name as an agent is as follows:

Abraham Lincoln
By: *Mary Todd Lincoln,*
His agent

Instead of “agent,” the phrase “Attorney in Fact” or “Power of Attorney” is commonly used.

Is a Power of Attorney Liable?

A power of attorney is liable for negligence or wrongdoing. However, provided the power of attorney acts properly and in good faith, actions taken are generally not the liability of the power

of attorney if the agency relationship is disclosed. Therefore, it is very important to disclose the agency relationship.

What is an Affidavit of Power of Attorney?

A person to whom a power of attorney is provided may rely on it in the absence of actual knowledge that the person who granted the power has died or revoked the power of attorney. Even so, some persons will request an affidavit certifying that the power of attorney is in full force and effect. Illinois law actually recognizes this and provides that a person to whom a power of attorney is presented may request an affidavit regarding its validity. The fact that an affidavit is not requested, however, does not affect a person's right to rely on a power of attorney.

Are Powers of Attorney All I Need?

Powers of attorney are generally accepted. However, they are not always recognized. The Social Security Administration, for example, will not deal with a power of attorney. Instead, it requires that an individual apply to become and be approved as a "representative payee." Some other government programs follow this approach as well. The representative payee may be, but is not necessarily, the same as the power of attorney. If a person becomes disabled, therefore, it may be necessary to separately apply to be a representative payee.

Should I Make Certain that the Power of Attorney Will Be Accepted?

As the need for actually using a power of attorney becomes more likely, it may be a good idea to provide a copy to those with whom the power of attorney might likely deal. Banks and financial institutions as well as health care providers, of course, would be likely. In this way, the acceptability of the power of attorney can be confirmed. It is also possible to make changes to the power of attorney or sign other forms if needed.

<p>Please note that this discussion provides general information. It is not intended to provide specific or personal legal advice.</p>
--

Last Updated: 8/2016