

Chapter 23

Powers of Attorney

Shari D. Caton, Esq.*
Poskus, Caton & Klein, P.C.

SYNOPSIS

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23-1. Introduction to Powers of Attorney

Whether young or old, you should decide who will make medical and financial decisions for you in case you become incapacitated by a debilitating physical disease or mental impairment, whether permanent or temporary. In order to give legal effect to your decision, you should prepare a document granting someone the legal ability to act on your behalf. The legal document is called a durable power of attorney.

What is a power of attorney?

Essentially, a power of attorney is a legal document that grants legal rights and powers by a person (the “principal”) to another (the “agent” or “attorney-in-fact”) to make decisions on behalf of the principal. The agent has the obligation to make decisions based upon the preferences of the principal and the authority granted in the document. An agent may not override the wishes of the principal.

What is a durable power of attorney?

A “durable” power of attorney permits an agent to make decisions even if the principal becomes incapacitated. Powers of attorney signed after January 1, 2010, are durable unless the document provides that it is terminated by the incapacity of the principal. Documents signed before January 1, 2010, must contain language stating “this power of

attorney shall not be affected by disability of the principal," "this power of attorney shall become effective upon the disability of the principal," or similar words to confirm the intent for the power of attorney to continue despite the principal's subsequent disability or illness.

Why should I have a durable power of attorney?

If you become incapacitated because of an accident or illness, your agent can immediately step in and make decisions for you without going to court to obtain a guardianship and/or conservatorship. Guardianship and conservatorship proceedings may be expensive, public, and time consuming. By preparing a durable power of attorney in advance, you decide who will make your decisions and, by doing so, you may save your family the stress and expense of petitioning the court.

How do I create a power of attorney?

Any adult who understands what he or she is doing can create a power of attorney by writing down exactly what he or she wants the agent to do. Once the document has been prepared, it should be signed and notarized.

Because a power of attorney should be tailored to your particular circumstances, it should be written by an attorney to ensure that your intentions are clearly expressed. If you choose not to hire an attorney, the Colorado "Statutory Form Power of Attorney" is probably the best form to use. This form is provided as Exhibit 23A of this chapter.

When does a power of attorney take effect?

When a power of attorney takes effect depends on what the document directs. There are two primary ways a power of attorney takes effect. The first is referred to as a "springing power," which means the document will take effect only when an event described in the instrument takes place. Typically, this is when the principal is incapacitated as determined by a licensed physician. The second type is a "standing power," which takes effect as soon as it is signed by the principal. Some powers of attorney may blend these two concepts. For example, a principal may direct that a power of attorney is "standing" if the principal's spouse is acting as agent; however, if the spouse cannot act, the successor agent's power may be "springing." All powers of attorney signed after January 1, 2010, are considered "standing" powers if they are silent as to the effective date.

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

A power of attorney does not take away a principal's right to make decisions. An agent simply has the power to act along with the principal in accordance with the authorization set forth in the document. Only a court, through a guardianship and/or conservatorship proceeding, can take away a principal's rights.

Can a principal change his or her mind?

A principal may change his or her mind and revoke a power of attorney at any time, so long as the principal has capacity. All a principal needs to do to revoke a power of attorney is send a letter to the agent notifying the agent that his or her appointment has been revoked. From the moment the agent receives a revocation letter, he or she can no longer act under the power of attorney. The principal should also send a copy of the revocation to any institution or person that may have received notice of the original power of attorney, such as doctors or banks. Otherwise, those individuals or institutions may continue to rely on the power of attorney until given notice of the revocation.

State law automatically revokes the principal's appointment of a spouse as an agent when a petition for divorce, legal separation, or annulment is filed, unless the power of attorney provides otherwise. However, if a successor agent is named in the document, the power of attorney would remain in effect for the principal with the successor agent.

Whom should I name as my agent or attorney-in-fact?

The agent selected to act under a power of attorney should be a trusted individual. Common choices for agents are a spouse, an adult child, a sibling, or a trusted friend. Some principals choose professional fiduciaries to serve as agent. Either way, it is always recommended to ask the person you want to name for permission to name them as an agent to ensure that they are willing to accept the appointment.

When does an agent accept appointment?

Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent, or by any other assertion or conduct indicating acceptance.

What are an agent's duties?

Unless otherwise stated in the power of attorney, an agent that has accepted appointment must act in accordance with the principal's reasonable expectations to the extent that they are actually known, and must otherwise act in the principal's best interest. The agent must act within the scope of authority granted in the power of attorney, in good faith, with care, competence, and diligence. The agent must also keep detailed records of all receipts, disbursements, and significant transactions taken under the power of attorney.

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

An agent is a "fiduciary," meaning the agent must act with the highest degree of good faith on behalf of the principal. The agent must follow any and all instructions given by the principal. If the principal's wishes are not specific, then the agent is free to do what is in the best interest of the principal. The agent must act in accordance with the principal's best interest, not the agent's interests. If an agent fails to act in accordance with the principal's wishes or in the principal's best interest, the agent can be held liable for his or her actions.

Can the agent be reimbursed for expenses and compensated for work?

Unless otherwise stated in the power of attorney document, an agent may be reimbursed for reasonable expenses and compensated for his or her work. If a principal would like to ensure that his or her agent will be reimbursed for expenses and compensated for work, especially an agent who is a close family member, the principal should include this direction in the power of attorney.

What if a principal appoints multiple agents?

A principal may appoint more than one agent, but this is not usually recommended. Having more than one agent as a decision-maker can create a circumstance in which the agents do not agree on a particular course of action. When agents do not agree, a court may have to resolve the dispute. It is usually better to appoint only one person to be the decision-maker or to provide a tiebreaking mechanism in the document. Nonetheless, if multiple agents are appointed, the principal can allow them to act independently or require them to act in unison, depending upon how the power of attorney is worded. Unless the document provides otherwise, each co-agent may exercise its authority independently. In either case, multiple agents should regularly communicate to make sure their actions are consistent.

What is a successor agent?

A successor agent is the person named to serve as your agent if your first choice for agent cannot serve due to death, incapacity, resignation, or refusal to accept the office of agent. Unless the document provides otherwise, if a named agent is unable or unwilling to serve as agent, the next person in line under the document becomes agent.

No one can take over as agent under a power of attorney unless the principal names a successor agent (or agents) in the document or if the principal authorizes the agent to appoint a successor agent. If neither is possible, and the principal has become incapacitated, it may be necessary to petition the court for appointment of a guardian and/or conservator. Therefore, it is always best to name at least one successor agent in your power of attorney.

What do I do with my power of attorney document?

You should give your original power of attorney to the agent you appoint and keep a copy of the document for yourself with your other important papers. Additionally, you may want to provide banks or doctors with copies of the power of attorney to keep for their files.

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

Although having a power of attorney has many advantages, the primary disadvantage is that it gives an agent the opportunity to take advantage of the principal. Financial exploitation, which includes the illegal or unauthorized use of an individual's funds, property, or resources for profit or advantage, is not uncommon and requires prompt reporting. If you suspect that an agent is misusing a power of attorney, you should take immediate action.

If you suspect your agent is misusing your power of attorney, you should immediately request an accounting, revoke the power of attorney, and notify any people or institutions that may have been given a copy of the document. If you suspect someone else's agent is misusing a power of attorney or if you suspect that a principal was coerced to sign a power of attorney the principal did not (or could not) understand, you should contact Adult Protective Services to report your concerns.

Any interested person can also go to court in the county where the principal resides (or in the county where the guardian and/or conservator resides if one has been appointed) to control the agent or to request that the court replace the agent with a guardian or conservator or both. If an agent has misused a power of attorney, the court can force the agent to return any stolen assets.

What if my agent wants to resign?

An agent may resign according to the terms and conditions stated in the power of attorney. The agent must notify, in writing, the principal, the guardian and/or conservator (if any), any successor agent named in the document, and all reasonably ascertainable third parties who might be affected by the resignation. However, if the principal is incapacitated and there is no guardian, conservator, co-agent, or successor agent, the agent may resign by giving notice to the principal's caregiver, another person the agent reasonably believes has sufficient interest in the welfare of the principal, or to a government agency that has the authority to protect the principal.

When does a power of attorney terminate?

A power of attorney terminates when: (1) the principal dies (and the agent has knowledge of the death); (2) the principal becomes incapacitated, if the power of attorney is not durable; (3) the principal revokes the power of attorney; (4) the power of attorney provides that it terminates; (5) the express purpose of the power of attorney is accomplished; or (6) the principal revokes the agent's authority, or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

When does an agent's authority terminate?

An agent's authority terminates when: (1) the principal revokes the authority; (2) the agent dies, becomes incapacitated, or resigns; (3) an action is filed for the dissolution or annulment of the agent's marriage to the principal or for their legal separation, unless the power of attorney otherwise provides; or (4) the power of attorney terminates. Termination of an agent's authority is not effective until the agent has actual knowledge of the termination.

Is my power of attorney valid in other states?

A power of attorney is valid in any state, regardless of where the individual lived when the power of attorney was created. However, laws regarding powers of attorney vary from state to state.

What is a limited power of attorney?

A Limited Power of Attorney, also known as a Special Power of Attorney, grants an agent the legal authority, in writing, to perform a specific act or acts on behalf of the principal. For example, if you do not want to grant an agent full control over your financial matters, but would like an agent to cash your checks, you can limit the agent's powers by preparing a Limited Power of Attorney.

What is the difference between a medical and a financial power of attorney?

A Medical Power of Attorney generally gives an agent the authority to make medical and personal decisions. A Financial Power of Attorney gives an agent authority to manage the principal's finances and property and to transact business on behalf of the principal. The following sections describe these two types of powers of attorney in greater detail.

23-2. Financial Powers of Attorney

A Financial Power of Attorney, also known as a General Power of Attorney or General Power of Attorney for Property, is a very flexible and inexpensive method of giving another person the legal authority to manage some or all of your financial affairs. The agent can do whatever the principal may do — withdraw funds from bank accounts, trade stock, pay bills, cash checks — except as limited in the power of attorney. When transacting business on behalf of the principal, the agent must use the principal's finances as the principal would for the principal's own benefit.

When an agent manages the finances for a principal, the most important rule for the agent is to maintain separate accounts. An agent should never commingle the agent's own funds with those of the principal. The easiest way for an agent to keep track of the basic financial records is to establish a separate checking account because the checks will act as receipts and the checkbook register as a running account. Likewise, the agent should avoid cash transactions whenever possible because such transactions are more difficult to account for and may be more heavily scrutinized. A principal should ensure that the agent understands that the agent has a legal obligation to furnish the principal, or his or her designee, with information about the agent's activities.

When an agent acts for the principal's benefit under a Financial Power of Attorney, the law holds the agent to the "prudent man rule," which means that the agent must exercise "due care" and manage the principal's funds not as if they were the funds of the agent, but with the care needed for managing funds of another. The agent should avoid speculative investments even if the agent would be willing to take more risk with his or her personal funds.

For all Financial Powers of Attorney signed after January 1, 2010, the principal must state that the agent has certain powers, casually referred to as "hot powers." These "hot powers" include the power of an agent to create, amend, revoke, or terminate a trust; make a gift; create or change rights of survivorship; create or change a beneficiary designation; delegate authority granted under a power of attorney; waive the principal's right to be a

beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; exercise various powers held by the principal in a fiduciary capacity; and disclaim or release property or a power of appointment. If the power of attorney does not include these “hot powers,” then the agent lacks the authority to exercise any of these powers for the principal. The “hot powers” are listed as options in the statutory power of attorney form, Exhibit 23A.

As a word of caution, as previously mentioned, financial exploitation is not uncommon. The principal should be careful when empowering an agent through a Financial Power of Attorney. These documents are helpful tools and people should be encouraged to use them. However, a principal needs to carefully consider his or her choice of agent, monitor the agent, and consider other appropriate safeguards, such as including language in the document that allows successor agents or other family members to have some oversight of the agent currently serving.

23-3. Medical Powers of Attorney

A Medical Power of Attorney, also known as a Power of Attorney for Health Care, allows you to name an agent who will make health care decisions for you when you are not able to do so. In the document, you can give specific instructions to your agent about various issues like surgery, medical treatment, or the need for nursing home care. Unlike a living will, a Medical Power of Attorney’s use is not limited to terminal illness or persistent vegetative state situations. Instead, the agent under a Medical Power of Attorney is authorized to make any health care decisions that the principal could make, with certain limitations, if the principal had capacity to do so. Although an agent acting under a Medical Power of Attorney may direct medical treatment while the principal is still medically capable of making his or her own medical decisions, it is uncommon. Typically, medical providers will look to the principal to make decisions relative to medical courses of action so long as the principal is able to provide informed consent. Nevertheless, no agent may consent to or refuse any proposed medical treatment for a principal over the principal’s objection.

A Medical Power of Attorney can be as simple or as sophisticated as the principal and the principal’s attorney wish to make it. In addition to the authority to make health care decisions, the principal can consider adding language that permits the agent to complete the documentation necessary for insurance, Medicare, Medicaid, and medical facility admissions. The document should also include language sufficient to satisfy the requirement of the Health Insurance Portability and Accountability Act of 1996, commonly known as “HIPAA.” HIPAA is intended to ensure the privacy of medical information. Although an agent legally is entitled to access the medical records of the principal, by including specific HIPAA language that authorizes an agent to be considered a “personal representative” (the HIPAA term for an agent), the principal will ensure that the agent can discuss medical issues and access medical records so he or she can make informed decisions when the principal is unable to do so.

It is recommended that the principal discuss all medical issues and beliefs concerning medical treatment with his or her doctor and the agent under a Medical Power of Attorney, since the agent is required to follow the principal's wishes and intent as to medical care and treatment. If the principal's specific wishes are not known to the agent, the agent must act in accordance with the best interests of the principal as determined by the agent.

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Exhibit 23A.
Sample Colorado Statutory Form
Power of Attorney for Property

STATE OF COLORADO
STATUTORY FORM POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the special instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a coagent in the special instructions. Coagents are not required to act together unless you include that requirement in the special instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the special instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I _____ (name of principal) name the following person as my agent:

Name of agent: _____

Agent's address: _____

Agent's telephone number: _____

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of successor agent: _____

Successor agent's address: _____

Successor agent's telephone number: _____

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of second successor agent: _____

Second successor agent's address: _____

Second successor agent's telephone number: _____

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All preceding subjects" instead of initialing each subject.)

- Real property
- Tangible personal property
- Stocks and bonds
- Commodities and options
- Banks and other financial institutions
- Operation of entity or business
- Insurance and annuities

- Estates, trusts, and other beneficial interests
- Claims and litigation
- Personal and family maintenance
- Benefits from governmental programs or civil or military service
- Retirement plans
- Taxes

- All preceding subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

- Create, amend, revoke, or terminate an inter vivos trust
- Make a gift, subject to the limitations of the "Uniform Power of Attorney Act" set forth in section 15-14-740, Colorado Revised Statutes, and any special instructions in this power of attorney
- Create or change rights of survivorship
- Create or change a beneficiary designation
- Authorize another person to exercise the authority granted under this power of attorney
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- Exercise fiduciary powers that the principal has authority to delegate, including powers to participate in the designation or changing of a fiduciary and powers to participate in the direction of a fiduciary in the exercise of the fiduciary's powers
- Disclaim, refuse, or release an interest in property or a power of appointment
- Exercise a power of appointment other than: (1) The exercise of a general power of appointment for the benefit of the principal which may, if the subject of estates, trusts, and other beneficial interests is authorized above, be exercised as provided under the subject of estates, trusts, and other beneficial interests; or (2) the exercise of a general power of appointment for the benefit of persons other than the principal which may, if the making of a gift is specifically authorized above, be exercised under the specific authorization to make gifts

- () Exercise powers, rights, or authority as a partner, member, or manager of a partnership, limited liability company, or other entity that the principal may exercise on behalf of the entity and has authority to delegate excluding the exercise of such powers, rights, and authority with respect to an entity owned solely by the principal which may, if operation of entity or business is authorized above, be exercised as provided under the subject of operation of the entity or business

LIMITATION ON AGENT’S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the special instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the special instructions.

This document was acknowledged before me on _____, (Date) by _____ (Name of principal)

(Seal, if any)

Signature of notary

My commission expires: _____

This document was prepared by:

IMPORTANT INFORMATION FOR AGENT

Agent's duties

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

- (1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) Act in good faith;
- (3) Do nothing beyond the authority granted in this power of attorney; and
- (4) 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 signature) as agent

Unless the special instructions in this power of attorney state otherwise, you must also:

- (1) Act loyally for the principal's benefit;
- (2) Avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) Act with care, competence, and diligence;

- (4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
- (6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

Termination of agent's authority

You must stop 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. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- (1) Death of the principal;
- (2) The principal's revocation of the power of attorney or your authority;
- (3) The occurrence of a termination event stated in the power of attorney;
- (4) The purpose of the power of attorney is fully accomplished; or
- (5) If you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the special instructions in this power of attorney state that such an action will not terminate your authority.

Liability of Agent

The meaning of the authority granted to you is defined in the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes. If you violate the "Uniform Power of Attorney Act", part 7 of article 14 of title 15, Colorado Revised Statutes, or act outside the authority granted, you may be liable for any damages caused by your violation.

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

