

Durable Financial Powers of Attorney

A Durable Financial Power of Attorney is an agency document whereby one person (i.e. the “principal”) appoints an “agent” to act on his or her behalf. The term “durable” means that it continues even if the person becomes disabled or incapacitated. The term “general” in this context means that the authorities conferred on the agent are extensive. Within the family setting, we typically prepare powers of attorney that are general providing expansive authority with limited exceptions. Maine law requires that the authority to make gifts out of the principal’s estate be specifically provided for in the document. This is an extremely important issue that often gets overlooked but will be discussed in your meeting with the attorney.

Powers of Attorney should be executed by most individuals provided they have an appropriate agent to name. There is always the possibility that one could become disabled or otherwise unable to manage his or her own affairs, and a Power of Attorney is a simple approach to addressing this concern. The alternative requires the court appointment of a conservatorship, which can be both expensive and time consuming. Moreover, conservatorships require the posting of a bond as well as ongoing court supervision; in a family context, such formalities are often unnecessary. A Power of Attorney can forgo the need for a conservatorship and save significant amounts of time and money.

Of course, Powers of Attorney have some significant risks associated with them. An agent can convert the principal’s property for his or her own use. Such behavior, although a breach of the agent’s fiduciary duty and criminal, is nonetheless a possibility. Therefore, it is essential that principals make sure that they have confidence and trust in the named agent. Agents should be warned of the potential criminal and civil liability associated with actions they take on behalf of the principal. Maine law mandates warning provisions to be written into the document that explicitly define these risks.

Maine recently passed a new law with respect to Powers of Attorney which provides a more user-friendly document for clients. The law also now includes language that clearly states a broad fiduciary duty. The agent has a duty to act in good faith; be loyal to the interests of the principal; avoid conflicts of interest; act with care, competence, and diligence; keep accurate records of all receipts and disbursements; cooperate with holders of healthcare authority; and endeavor to preserve the principal’s estate plan. 18-A M.R.S.A. § 5-914. These new broad powers are similar to those of trustees under the Maine Trust Code.

The user-friendly nature of the Power of Attorney now requires that third parties accept and act upon an agent’s Power of Attorney with prescribed time frames.

In addition to these general powers that one might expect, an agent can be granted the following powers if explicitly stated within the document: make gifts on behalf of the principal; create and change rights of survivorship as well as beneficiary designations; disclaim property; create, amend, or revoke a trust; and exercise fiduciary powers on behalf of the principal. One important issue that all too often gets overlooked is the timing of the Power of Attorney authority. A Power of Attorney is presumed to be effective upon signature and acknowledgement unless it is otherwise stated within the document. You can utilize a

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“springing” Power of Attorney whereby it will only become effective upon a doctor’s or other designated individual’s statement of disability. Alternatively, this office utilizes an escrow approach whereby the Power of Attorney is left with the attorney (or another agreed upon escrow agent) with instructions to deliver the document to the agent when the escrow agent determines that incapacity exists.

Finally, the new law provides that a Power of Attorney naming a spouse as the designated agent terminates upon the filing of an action for annulment, legal separation or divorce. Marriage or entry into a domestic partnership may also potentially terminate the authority of the agent.

Agents under Power of Attorney are entitled to reasonable compensation and reimbursement of expenses. Compensation is typically determined on an hourly basis similar to that of Personal Representatives (a.k.a. Executors). You will want to discuss this with the attorney. Family members often waive compensation, but the issue of compensation ought to be addressed ahead of time when naming non-family members as agents under Power of Attorney.