

# Powers of Attorney: Uses, Abuses, and Limitations

MARTIN A. RECHNITZER, ATTORNEY

388 SW JOHNSON AVE., BURLESON, TX 76028

(O) 817-551-1752 (F) 817-764-6214

E-MAIL: MRECHNITZER@GMAIL.COM

MAY 6, 2015

# Power of Attorney - *What is It?*

- ▶ A written document in which one person (the principal) appoints another person to act as an agent on his or her behalf, thus conferring authority on the agent to perform certain acts or functions on behalf of the principal.
- ▶ Powers of attorney can be written to be either general (full) or limited to special circumstances. A power of attorney generally is terminated when the principal dies or becomes incompetent, but the principal can revoke the power of attorney at any time.

# Power of Attorney - *What is It? (continued)*

*“Agent's Duties -- When you accept the authority granted under this power of attorney, you establish a “fiduciary” relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated or revoked by the principal or by operation of law.”*

# Why have a Power of Attorney?

- ❖ A **Medical Power of Attorney** gives the person you name as your agent the authority to make any and all health care decisions for you in accordance with your wishes.
- ❖ When accidents, sudden illness, planned or unexpected absences occur, or when you just can't cope, you may need someone to manage your financial affairs – a **Durable Power of Attorney** will help. It can be done in anticipation of a future need, for a special purpose or for a limited time. The agent will (by your instructions) safeguard and manage your assets and financial affairs if you are unable to manage them for yourself or if you lose legal capacity.

# Uses:

- ▶ A ***Durable Power of Attorney*** is a legal document which gives the person you choose (the agent) the power to manage your assets and financial affairs while you are alive. The document must be signed by you (the principal) while you have the required legal capacity to give your agent clear and concise instructions. The appointment may be for a fixed period and can be revoked by you at any time providing you still have the legal capacity to do so. A power of attorney ceases when you die. The executor named in your will then takes over the responsibilities of your estate.

# Uses:

- ▶ A ***Medical Power of Attorney*** gives the person you name as your agent the authority to make any and all health care decisions for you in accordance with your wishes, including your religious and moral beliefs, when you are no longer capable of making them yourself. Because "health care" means any treatment, service, or procedure to maintain, diagnose, or treat your physical or mental condition, your agent has the power to make a broad range of health care decisions for you. Your agent may consent, refuse to consent, or withdraw consent to medical treatment and may make decisions about withdrawing or withholding life-sustaining treatment.

# Uses:

## *Medical Power of Attorney* (continued)

- ▶ Your agent is obligated to follow your instructions when making decisions on your behalf. Unless you state otherwise, your agent has the same authority to make decisions about your health care as you would have had.
- ▶ A physician must comply with your agent's instructions or allow you to be transferred to another physician. Your agent's authority begins when your doctor certifies that you lack the competence to make health care decisions.

# What is a Limited Power of Attorney?

- ▶ A limited power of attorney allows the principal to give only specific powers to the agent. The limited power of attorney is used to allow the agent to handle specific matters when the principal is unavailable or unable to do so.



# What is a Statutory Power of Attorney?

- ▶ A statutory power of attorney is a power of attorney that copies the language in a state statute which includes an example of a form that may be used. For example, a durable power of attorney may also be a statutory power of attorney if it copies the language in the state durable power of attorney statute. State laws vary, but the states that have adopted a statutory form of power of attorney typically allow for other language to be used as long as it complies with the state law.

# Limitations –

## *Medical Power of Attorney*

- ▶ A power of attorney is a voluntary agreement between the Principal and the Agent. As a voluntary agreement, it can be revoked by the Principal at any time, for any reason—even if the Principal is incapacitated.
- ▶ As long as the resident is capable of communicating his/her desires, he or she has the right to decide whether to stay in the nursing facility or pursue relocation, unless he or she is subject to parole restrictions or has been declared incapacitated by a court and appointed a guardian of the person.

# Limitations - Medical Power of Attorney continued

- ▶ Your agent may not consent to voluntary inpatient mental health services, convulsive treatment, psychosurgery, or abortion.

# Limitations -

## *Durable Power of Attorney*

- ▶ Limitations, if any, are usually contained in the DPOA itself and (should be) clearly defined.

# Must a Power of Attorney be recorded?

- ▶ Usually, most Power of Attorney forms do not need to be recorded. However, Power of Attorneys dealing with the sale and purchase of real estate must be recorded (e.g. Durable Power of Attorney).

# Revoking a Medical Power of Attorney

In Texas, a Medical Power of Attorney can be revoked in the following ways:

- ▶ You can revoke a Medical Power of Attorney by notifying either the agent or your health care provider orally or in writing of your intent to revoke. Your ability to revoke is not contingent on your capacity to make health care decisions or your mental state.

# Revoking a Medical Power of Attorney (continued)

- ▶ You can also revoke a Medical Power of Attorney by executing another one. If you execute a new Medical Power of Attorney, then all prior ones are revoked.
- ▶ Additionally, if you have designated your spouse to be the agent, then a later death or divorce revokes the Medical Power of Attorney.

# Revoking a Medical Power of Attorney (continued)

- ▶ Once your physician is informed of your decision to revoke or is provided with your revocation, he/she should immediately record the revocation in your medical records and give notice of the revocation to the agent and any other health or residential care providers responsible for your care.



# Revoking a Durable Power of Attorney

- ▶ §751.058 of the Texas Estates Code indicates that a durable power of attorney can be revoked; however, it does not provide specific instructions for accomplishing this. The statute provides:
- ▶ *“Unless otherwise provided by the durable power of attorney, a revocation of a durable power of attorney is not effective as to a third party relying on the power of attorney until the third party receives actual notice of the revocation.”*

# Revoking a Durable Power of Attorney (continued)

- ▶ If a power of attorney has remained unused in a safe place and you have not recorded it in the court records, then destroying the power of attorney and creating a new one will serve as a revocation. However, if the power of attorney has been used or recorded in court records, then the revocation will not be effective as to third parties unless they have actual knowledge of the revocation.

# Revoking a Durable Power of Attorney (continued)

- ▶ This may require you to ask the agent to return the original power of attorney, contact every establishment in which the agent has used the power of attorney and file a revocation in the court records. To preserve your ability to revoke a power of attorney, you should keep it in a safe place until you become incapacitated. Be sure that whoever is named as agent knows where it is located.

# Abuses of Powers of Attorney

- ▶ Remember the “principal/agent” concept
- ▶ What does the POA say? If it’s not in it, it is not a “power” or a “right”.
- ▶ What does the POA NOT say?

# Abuses of Powers of Attorney (continued)

- ▶ Some agents under a POA for an adult confuse their powers with those of parents and/or those ordered by a Court, and/or try to make their powers something they are not. Guardian powers per the Texas Estates Code & rights of parents under the Texas Family Code

# Abuses of Powers of Attorney (continued)

- ▶ Some family members/"friends" ask people with diminished capacity to sign POA's, not fully understanding what they're signing or why, then proceeding to make decisions that aren't in the principal's best interests.

# Abuses of Powers of Attorney (continued)

- ▶ What to do if you think someone is misusing a POA:
  - ❖ Follow your company's policy/guidelines – if you are not sure ask your supervisor.
  - ❖ Contact your employer's attorney to ask for guidance – don't take the word of the agent under the POA or not be sure yourself
  - ❖ Report to Court – Statutory Probate Court large counties; County Court at Law or County Court other counties (*"Suggestion of Need"*)
  - ❖ If there is potential for abuse and/or financial exploitation, and Ward is adult, APS; minor – CPS
  - ❖ If breach of peace occurring, call police

# Powers of Attorney: Uses, Abuses, and Limitations – May 6, 2015

## DISCLAIMER

The information in this presentation is a public service for general information only. Material contained herein may not reflect the most current legal developments. This material does not constitute legal advice, no attorney-client relationship is established, and no person should act or refrain from acting on the basis of any information provided herein without seeking appropriate legal or other professional advice on that person's particular circumstances. Neither Martin Rechnitzer nor Martin A. Rechnitzer, PC, makes any representations or warranties, express or implied, including but not limited to no warranty of fitness for a particular purpose. The handouts provided require specific legal knowledge to use correctly, and use by members of the public may result in unintended adverse consequences.