



*Helping Older Persons With  
Legal & Long-Term Care  
Problems*

# ***PREPARING A DURABLE FINANCIAL POWER OF ATTORNEY***

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## ***1. What is a financial power of attorney?***

A financial power of attorney (FPOA) is a written document through which a competent adult, known as the principal, appoints and authorizes another competent adult, known as the attorney-in-fact (A-I-F), to act on the principal's behalf. Financial powers of attorney usually cover financial, business, personal and real estate matters.

## ***2. What is a durable financial power of attorney?***

A durable financial power of attorney (DFPOA) authorizes the attorney-in-fact to act on behalf of you, the principal, even after you become incapacitated or incompetent. For a FPOA to be durable, it must include the words, "This power of attorney shall not be affected by the disability of the principal or lapse of time." If a FPOA does not include these or similar words, then the FPOA is not durable. Non-durable FPOAs are very rare because they terminate when the principal becomes incapacitated or incompetent.

## ***3. What powers are generally given in a DFPOA?***

Since a FPOA authorizes the A-I-F to act on your behalf, the powers you give your A-I-F can be specific or general, depending on what you need or want. Specific powers over certain affairs, such as the sale of a car, may be appropriate in certain situations. Generally, however, most individuals want to have their A-I-F exercise broad general powers over all their financial affairs, including receiving and depositing checks, signing their name to checks, paying all bills, handling all bank accounts, CDs, stocks and bonds, and taking possession of any real estate or personal property, including the power to sell any real estate or personal property. In other words, most principals want to give their A-I-F the power to perform any legal act which the principal could do for himself.

When signing a document on behalf of a principal, the A-I-F must indicate that he/she is acting in that capacity by adding "POA" after his/her signature. Otherwise, the A-I-F may be held personally liable on the obligation.

#### *4. Are there any limitations to the A-I-F's powers?*

Yes. Because you can delegate either broad or narrow powers to the A-I-F, the document itself limits what your A-I-F can do. No FPOA can give the A-I-F the right to agree to acts the FPOA opposes. A-I-Fs are fiduciaries, which means they must act in good faith and deal honestly with you and others on your behalf. In addition, a FPOA does not prevent the principal from continuing to act on his/her own behalf and to perform any of the powers delegated through the FPOA document.

Note that the A-I-F generally is not personally responsible for the contracts or debts of the principal. However the A-I-F may be liable for a debt of the principal if the debt arose due to the A-I-F's negligence or the A-I-F went beyond the authority granted in the DFPOA to create the debt.

#### *5. How can abuse of the FPOA be prevented?*

Selecting a trustworthy A-I-F is your best safeguard against abuse of the FPOA. An inept, dishonest or negligent A-I-F can result in the FPOA doing more harm than good. To protect you even more, the FPOA may require the A-I-F to file an annual accounting with a third party that you choose. You can also require the co-signature of this designated third person for transactions involving real estate or more than a certain amount of money. The A-I-F can also be required to post a bond. Because FPOAs are effective as soon as they are created, you may want to have the FPOA become effective only after the happening of a specific event. You can do this by creating a springing durable financial power of attorney.

#### *6. What is a springing DFPOA?*

A springing DFPOA is one which becomes effective upon a later date or event. You would be most likely to use it if you wanted the power to go into effect if you become incapacitated in the future. Because a springing DFPOA only goes into effect if you are incapacitated, this ensures that it can not be used until that time. As a practical matter, however, a springing DFPOA carries with it certain risks. Questions may arise as to when the incapacity occurred. Third parties may be reluctant to accept a springing FPOA without specific proof of your incapacity. Thus, when you create a springing DFPOA, the document should be very clear in describing what exactly determines incapacity. For example, if a doctor's written statement specifying your incapacity is required, it should be clearly stated in the document.

#### *7. How do you create a durable financial power of attorney?*

To create a DFPOA, you must be competent. DFPOAs should be drafted so that third parties, such as banks and insurance companies, will recognize their validity. These documents should be written clearly and specifically and should allow photocopies to be used. If the DFPOA is for a specific purpose, any institution involved with that purpose should be consulted as to its own DFPOA policies. The DFPOA should be prepared by an attorney, signed by the

principal and notarized. If the DFPOA authorizes any real estate transactions, it must also be recorded in the county where the real estate is located prior to any real estate transfer.

### *8. What additional powers can be delegated in a DFPOA?*

You can delegate to an A-I-F any legal act, including:

- (a) nominating someone to be your guardian, the guardian of your estate or your children;
- (b) nominating a successor guardian and waiving bond;
- (c) funding a revocable trust;
- (d) allowing access to a safe deposit box;
- (e) making gifts or charitable contributions;
- (f) paying taxes;
- (g) conferring the right to prosecute any action, lawsuit, or be involved in any legal proceeding; and
- (h) appointing a successor A-I-F.

### *9. Can a DFPOA be terminated?*

Yes. A DFPOA can be ended if you state in writing that you are revoking it, if the DFPOA itself states that it ends at a certain time or event or if you die. A DFPOA is not affected by your incapacity or incompetence nor by the passing of time. An A-I-F may continue to act past the revocation or your death until the A-I-F has actual knowledge of your death or the revocation.

A springing DFPOA which becomes effective when you become incapacitated, terminates when you die or when your incapacity ends. If another event or a particular date springs into effect a springing DFPOA while you are still competent, it can be terminated by your written revocation or by your death. The revocation should be signed, dated and notarized.

A recorded DFPOA which gives the A-I-F the power to buy and sell registered land cannot be revoked unless the revocation or death of the principal is recorded in the same office where the DFPOA was originally recorded. In addition, to be effective, any revocation of a DFPOA must be given to the original A-I-F. The A-I-F must also be notified of the death of the principal. Any act the A-I-F does in good faith without knowing the principal has died or that the DFPOA has been revoked is valid and enforceable against the heirs and personal representatives of the deceased principal.

### *10. What is a durable power of attorney for health care?*

A durable power of attorney for health care (DPOAHC) allows you to give an A-I-F the power to make all of your health care decisions. The DPOAHC takes effect only when your doctor determines that you have lost your capacity to make informed health care decisions. Even after signing a DPOAHC, you still have the right to make health care decisions as long as you

are able to give informed consent. It is generally recommended that you have both documents, a DFPOA and a DPOAHC, to cover all aspects of your estate (financial) and your person (health).

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In southwest Ohio, Pro Seniors' staff attorneys and long-term care ombudsmen handle matters that private attorneys do not, such as nursing facility, adult care facility, home care, Medicare, Medicaid, Social Security, protective services, insurance and landlord/tenant problems.

This pamphlet provides general information and not legal advice. The law is complex and changes frequently. Before you apply this information to a particular situation, call Pro Seniors' free Legal Hotline or consult an attorney in elder law.

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