

LawFacts

What you should know about.....



Financial Powers of Attorney

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A financial power of attorney is a legal document that many people use to allow a third party to help handle their financial affairs when they are unable to do so. Because such documents give significant, far-reaching powers to another, financial powers of attorney should be made only after careful consideration. Ohio Revised Code Section 1337.18 provides a form that may be used to create a power of attorney. While Ohio law does not require the use of this form, it is important to use language that reflects current law when creating such a document. When drafting a financial power of attorney document, an attorney's assistance is recommended.

What is a financial power of attorney?

In general, a power of attorney is created to allow one person (the *principal*), to authorize another person (the *attorney-in-fact* or the *agent*), to act or make decisions for the principal. A financial power of attorney (in contrast with a health care power of attorney) allows the principal to authorize an attorney-in-fact or agent to make financial decisions.

While such powers are designed and intended to last for as long as the principal is living, people sometimes need financial powers of attorney for limited purposes and limited time. For example, a person who is planning an extended trip or who is recuperating from an illness may grant such powers to a spouse or a child for a limited period of time. Financial powers of attorney documents can be fashioned to fit the principal's particular needs.

In essence, the principal gives authority and power to the agent, and the agent acts for the principal. The agent should always act according to the principal's instructions or reasonable expectations, if the agent knows them; otherwise, the agent must act according to what he or she believes is the principal's best interest. The agent should always be loyal to the principal, act in good faith and do nothing beyond the authority granted in the document.

What are the main components of a financial power of attorney?

In general, a financial power of attorney will address, at a minimum, the following matters:

- It will name the agent.
- It will name successor agents, if any.

- It will define the authority and powers given to the agent as well as any limitations on such authority or powers.
- It will state when the authority and powers begin and end.
- It will state whether the agent can act when the principal is incompetent or disabled.

What authority or powers will the agent have?

The agent will have only the authority and powers that the principal gives. This means that the principal can give the agent very broad, or very limited, powers. The form provided in the statute (written law) lists 22 classes of powers, such as real property transactions, banking transactions and tax matters. Such a list makes it easy for the principal to grant authority in some or all of these areas. An all-inclusive (general) grant of authority to an agent may not be honored, especially if the statute requires the principal to specifically allow a certain act to be authorized.

Why do some actions require a specific grant of authority in a financial power of attorney document?

Most individuals who execute financial powers of attorney expect the agent to assist with routine matters, but there are other matters that many individuals would rather an agent not handle. Therefore, the law lists ten powers that an agent cannot exercise unless the principal provides specific authorization. Most of these powers have to do with making changes to the principal's estate plan. When using the statutory form, a principal can, however, grant such powers through the section entitled "Special Instructions."

How specific must the authority or power be? Can I simply say I want my brother to handle my finances?

The authority or power given to an agent should be stated clearly so that the agent and third parties know what the agent can and cannot do. Ohio law now allows many powers to be given in a "short-form" manner by using the statutory form. For example, you can simply state that your brother, the agent, will have the power to handle "banking and other financial institution transactions." The statute sets forth the details of such powers. An attorney can help you determine the authority and powers you may want to give to an agent. An agent who is appointed primarily to assist with the principal's finances should not be named as a joint owner on the principal's bank accounts. The agent should, instead, be added to the principal's existing account as an authorized signer.

Must everyone honor a financial power of attorney?

No. Ohio law does not require third parties to accept powers of attorney documents. Many financial institutions have developed their own powers of attorney forms for their customers to use, and some institutions will not accept powers of attorney that are very old. When possible, it is wise to check with banks, brokerage firms, and insurance companies to ensure the financial power of attorney granted to an agent will meet an institution's specific requirements.

Can the principal change a financial power of attorney?

Yes. The principal can always change or revoke (cancel) a financial power of attorney.

Can an agent act when the principal is incompetent or disabled?

Yes. The law now allows an agent to act when the principal is incompetent, as long as the principal has specifically stated in the power of attorney document that the agent will have authority even if the principal becomes incompetent or disabled.

Can an agent make gifts of the principal's property?

An agent cannot make gifts of the principal's money or property unless the principal has specifically given the agent this significant authority. Even if a principal gives very general or broad authority to an agent (for example, authority to do anything the principal can do), the agent still does not have the authority to make gifts of the principal's money or property. A principal may, however, give an agent the specific authority to make limited gifts, which may include the authority to change the beneficiaries under life insurance policies or retirement benefit plans, consistent with the principal's goals and directions.

If the principal wants to give the agent authority to make gifts larger than the federal gift tax annual exclusion, or if the agent is one of the gift recipients, the document should specifically give those powers.

Are there powers that cannot be given to an agent?

Yes. There are some matters that one cannot authorize another to do because they are considered too personal in nature. For example, a principal cannot authorize an agent to vote in his or her place.

When does the agent's authority begin?

The agent's authority begins when the power of attorney states that it will begin. Many powers of attorney documents state that the agent's authority begins as soon as the power of attorney document is signed. Some powers of attorney documents state that the agent's authority will "spring" into effect at a future date or upon a particular event. For example, a power of attorney document can provide that the agent's authority will begin if and when the principal is no longer competent as determined by two physicians who have examined the principal. If an agent's authority is to "spring" into effect in the future upon the occasion of a particular event, it is important to consider how easy or difficult it may be for the agent and others to determine whether such event has occurred.

When do the powers of the agent end?

The agent's authority ends when the power of attorney states that it will end or when the principal revokes (cancels) the power of attorney. Many powers of attorney documents will not specifically state when the agent's authority ends. If the document does not spell out a specific end to the agent's authority, then the agent's authority will end when the principal dies or revokes the power of attorney. An agent can never act after the agent knows the principal has died.

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