

# Planning for the Future

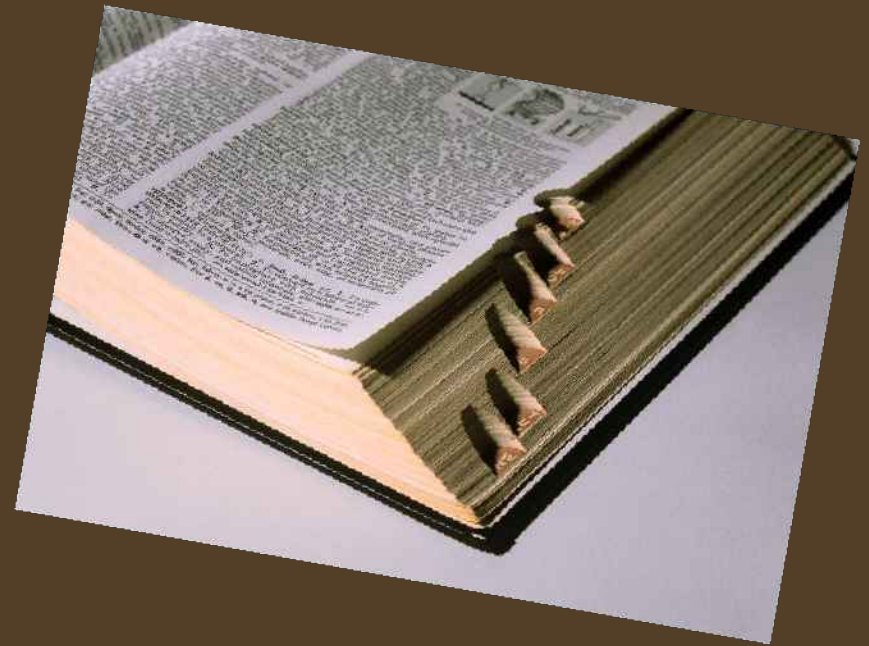
## Durable Power of Attorneys for Healthcare and Finance



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# What is a Power of Attorney?

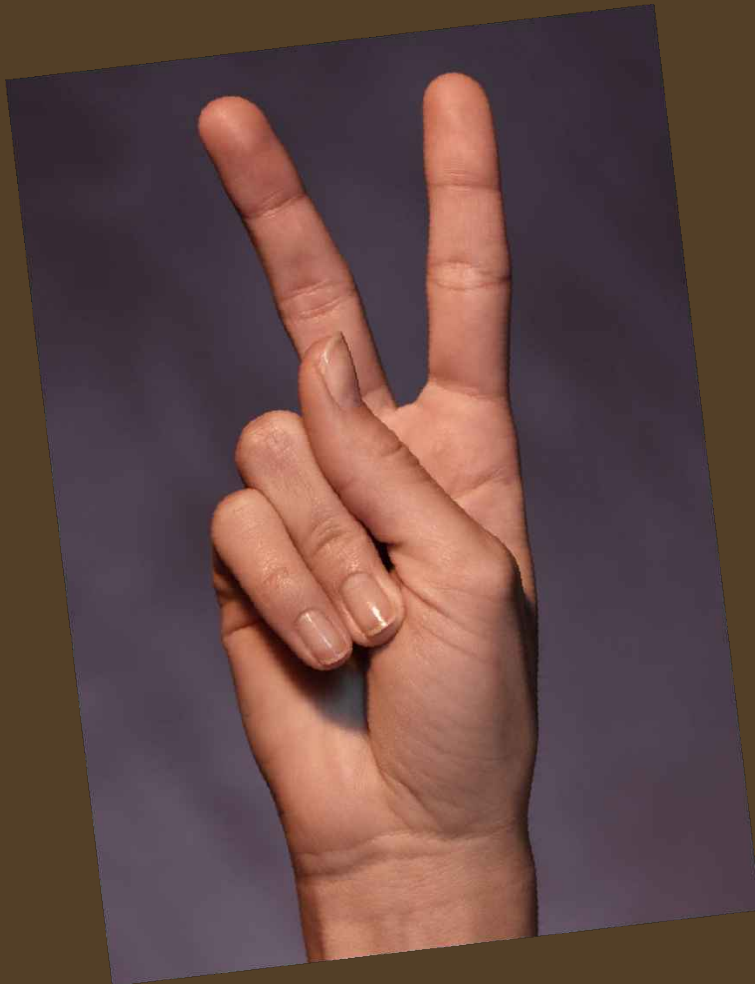
- Basic Terminology—
  - Power of Attorney (POA)—A “power of attorney” is a document used by a principal to appoint an attorney-in-fact to act as an agent on the principal’s behalf.
  - Principal—A “principal” is the person who appoints an attorney-in-fact to act on his behalf.
  - Attorney-in-Fact—An “attorney-in-fact” is the person the principal selects to act on his behalf.



# Durable v. Non-durable

- A POA can be either durable or non-durable.
  - Non-Durable POA—A POA that is non-durable is a POA in which the authority given to the attorney-in-fact terminates if the principal becomes disabled or incapacitated.
  - Durable POA—A POA that is durable is a POA in which the authority given to the attorney-in-fact continues after the principal becomes disabled or incapacitated.
- A POA *must be durable* if it is the principal's intent to give the attorney-in-fact the authority to act for the principal in the event of the principal's disability or incapacity. Otherwise, the POA would become ineffective upon either event.

# Two Common Uses for Durable Powers of Attorney (DPOA)



- Healthcare DPOA—A DPOA is commonly used to appoint an agent to make your healthcare decisions in the event that you become incapacitated. This type of DPOA is known as a Durable Power of Attorney for Healthcare.
- Financial DPOA—A DPOA is also commonly used to appoint an agent to manage your finances. This type of DPOA is known as a Durable Power of Attorney for Finances.

# Healthcare DPOA—What is a healthcare DPOA?



- Healthcare DPOA—A healthcare DPOA is a document that appoints an agent (attorney-in-fact) to make your healthcare decisions in the event that you become incapacitated.
- “Springing” Authority—An agent’s authority under a healthcare DPOA is a “springing” authority. This means that the agent’s authority only becomes effective in the event that the principal becomes incapacitated.

# Healthcare DPOA—What does it mean to be “incapacitated”?

- Incapacitated—A person is “incapacitated” when they are unable because of a physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that they lack capacity to meet essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness or disease is likely to occur.
- Determination of Incapacity—The law requires that incapacity be determined by two licensed physicians unless you expressly authorize otherwise in the healthcare DPOA.
- Effect of Healthcare DPOA Before Incapacity—After creating a healthcare DPOA you are still in control. Your attorney-in-fact will not be entitled to make any healthcare decisions unless you become incapacitated

# Healthcare DPOA—What happens if I don't create a healthcare DPOA?

- Guardianship—If you become incapacitated without first creating a healthcare DPOA a judge will appoint a guardian to make your healthcare decisions for you.
- Characteristics of Guardianship—
  - The court will decide who will be making your healthcare decisions and the choice will not be your own as with a healthcare DPOA.
  - To appoint a guardian a petition will have to be filed with the court. A guardian's authority does not spring into action like an agent's authority under a healthcare DPOA.
  - The appointment of a guardian can be more costly than creating a healthcare DPOA. Those costs can be charged to your estate.



# Healthcare DPOA—How do I create a healthcare DPOA?



- No Lawyer Needed—You do not need a lawyer to create a healthcare DPOA. However, healthcare DPOAs are legal documents and must satisfy all of the statutory requirements to be effective.
- Three Statutory Requirements for a Healthcare DPOA—
  - The DPOA must be denominated as a “Durable Power of Attorney.”
  - The DPOA must include a provision that states in substance that: “This is a durable power of attorney and the authority of my attorney-in-fact, when effective, shall not terminate or be void or voidable if I am or become disabled or incapacitated or in the event of later uncertainty as to whether I am dead or alive”; and,
  - The DPOA must be subscribed by the principal, dated, and notarized.

# Healthcare DPOA—Selecting an Attorney-in-Fact

- Who should I appoint as an attorney-in-fact?
  - This is an important decision.
  - This person should be someone you trust.
  - This person should understand your values and desires.
  - This person should be willing to speak for you when you are unable to speak for yourself.
  - This person should be able to make the tough decisions.
  - This person must be willing to assume the responsibility of being your attorney-in-fact.
- Possible attorneys-in-fact include your:
  - Spouse,
  - Children,
  - Grandchildren,
  - Other relatives, and
  - Friends



# Healthcare DPOA—Selecting an Attorney-in-Fact

- Who cannot be appointed as an attorney in fact?
  - No person connected with a facility licensed by the Missouri Department of Mental Health or the Missouri Department of Social Services in which you reside, unless the person is closely related to you.
  - No full time judge or clerk of the court, unless the person is closely related to you.
  - No person under the age of 18 or person who has been judicially determined to be incapacitated or disabled.
  - No habitual drunkard.
  - No attending physician or an employee of an attending physician, unless the person is closely related to you.
  - No owner, operator or employee of a healthcare facility in which you are a resident, unless the person is closely related to you.



# Healthcare DPOA—Attorney-in-Fact's Authority

- Can I limit the decisions my attorney-in-fact is able to make?
  - Express Authority—
    - The attorney-in-fact may be limited by excluding certain authority from the language of the healthcare DPOA.
    - Example—An attorney-in-fact must have express authority in the healthcare DPOA in order to have the power to remove artificial nutrition and hydration.

# Healthcare DPOA—Attorney-in-Fact's Authority—Cont'd

- Can I limit the decisions my attorney-in-fact is able to make?
  - Healthcare Directive (Living Will)—
    - Healthcare Directive (Living Will)—A healthcare directive, commonly known as a living will, is a document that lays out the circumstances under which life sustaining treatment may or may not be used.
    - Problems with Limiting Authority—The various circumstances that an attorney-in-fact could be confronted with are infinite, so a healthcare directive may not be applicable to all situations.
    - Consider Seriously—If there is life sustaining treatment that you would not like to receive, or that you are morally opposed to receiving, you may want to consider limiting the attorney-in-fact's authority in a healthcare directive.

# Healthcare DPOA— Revoking/Terminating Your DPOA

- Can I revoke/terminate my healthcare DPOA?
  - Five ways to revoke your healthcare DPOA:
    - Revocation by Communication—You can revoke your healthcare DPOA at any time by communicating your intent to revoke to the attorney-in-fact or to the attending physician or healthcare provider.
    - Revocation by Execution—You can revoke your healthcare DPOA at any time by executing a new healthcare DPOA.
    - Revocation by Filing with Recorder of Deeds—You can revoke your healthcare DPOA at any time by filing a written notice of termination of the healthcare DPOA with the recorder of deeds in the city or county of your residence.
    - Termination by Death—Your healthcare DPOA will terminate automatically upon your death.
    - Termination by Divorce—Your healthcare DPOA will terminate automatically upon a filing of divorce if your attorney-in-fact is your spouse, unless the healthcare DPOA provides otherwise.

# Healthcare DPOA—What should I do with my healthcare DPOA?

- Spread it Around—Give a copy of your healthcare DPOA to your attorney-in-fact, family, close friends, doctor, lawyer, minister or anyone that may be asked to make decisions concerning your healthcare if you are unable to do so.
- Make it Part of Your Medical Records—Give a copy of your Healthcare DPOA to your healthcare providers. They are required to make it part of your medical records.
- Do Not—Do not place your healthcare DPOA in your safe deposit box, or other similar location. Do not keep it a secret. Your healthcare DPOA will not be usable unless your attorney-in-fact has access to it.



# Financial DPOA—What is a Financial DPOA?



- Financial DPOA—A financial DPOA is a document that appoints an agent (attorney-in-fact) to manage your finances.
- “Springing” or “Continuing” Authority
  - Springing Authority—An agent’s authority under a “springing” financial DPOA becomes effective upon the occurrence of a future event specified in the DPOA. The future event is usually the principal’s incapacity.
  - Continuing Authority—An agent’s authority under a “continuing” financial DPOA becomes effective when the financial DPOA is created. This is the more common type of financial DPOA.

# Financial DPOA—What decisions can an attorney-in-fact make under a financial DPOA?

- General Powers—A financial DPOA can grant an attorney-in-fact with a general grant of authority. A general grant of authority gives the attorney-in-fact the power to do all that a competent principal could do through an agent.
- Express Powers—A financial DPOA can grant an attorney-in-fact with authority that is expressly less in scope than a general grant of authority. A financial DPOA can also grant an attorney-in-fact with express authority that allows the attorney-in-fact to operate with more authority than is provided in the general grant of authority.

# Financial DPOA—What decisions can an attorney-in-fact make under a financial DPOA?

- Powers Included in a General Grant of Authority—
  - To execute and deliver or accept any deed, bill of sale, bill of lading, assignment, contract, note, security instrument, consent, receipt, release, proof of claim, petition or other pleading, tax document, notice, application, acknowledgement or other document necessary or convenient to implement or confirm any act, transaction or decision.
  - To employ and compensate real estate agents, brokers, attorneys, accountants, and subagents of all types to represent and act for the principal in any an all matters, including tax matters involving the United States government or any other government taxing entity, including but not limited to, the execution of supplemental or additional powers of attorney in the name of the principal in form and may be required or preferred by any such taxing entity or other third person and to deal with any or all third person in the name of the principal without limitation.

# Financial DPOA—What decisions can an attorney-in-fact make under a financial DPOA?

- Powers that must be expressly granted in a financial DPOA—
  - To execute, amend, or revoke any trust agreement.
  - To fund with the principal's assets any trust not created by the principal.
  - To make or revoke a gift of the principal's property in trust or otherwise.
  - To disclaim a gift or devise of property to or for the benefit of the principal.
  - To create or change survivorship interests in the principal's property or in property in which the principal may have an interest.
  - To designate or change the designation of beneficiaries to receive any property, benefit or contract right on the principal's death.
  - To give or withhold consent to an autopsy or postmortem examination.
  - To make a gift or, decline to make a gift of, the principal's body parts under the Uniform Anatomical Gift Act.
  - To nominate a guardian or conservator for the principal, and if so stated in the DPOA the attorney-in-fact may nominate himself as such.
  - To designate one or more substitute or successor or additional attorneys-in-fact.
- Powers that cannot be granted in a financial DPOA-
  - To make, publish, declare, amend or revoke a will for the principal.
  - To make, execute, modify or revoke a living will declaration for the principal.
  - To require the principal, against his or her will, to take any action or to refrain from taking any action.
  - To carry out any actions specifically forbidden by the principal while not under any disability or incapacity.

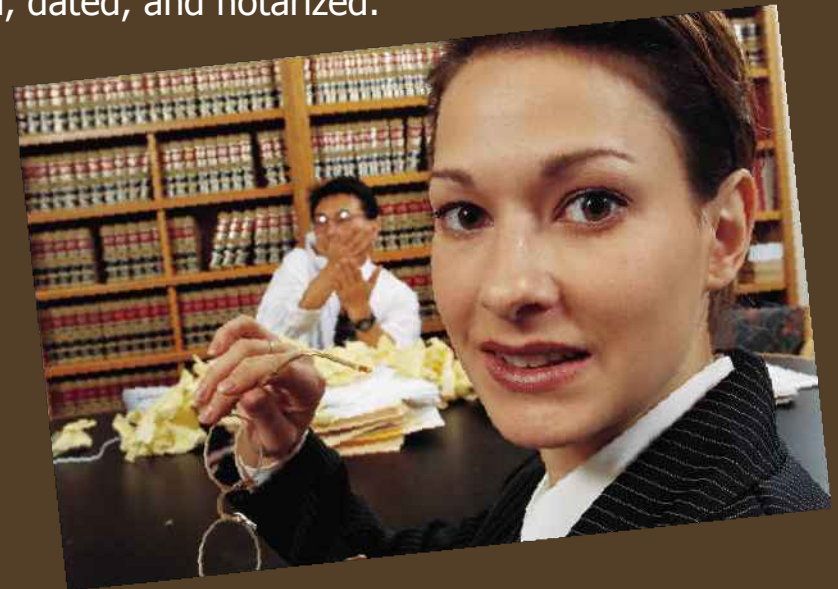
# Financial DPOA—What happens if I don't create a Financial DPOA?

- Conservatorship—If you become incapacitated without first creating a financial DPOA a judge will appoint a conservator to make your financial decisions for you.
- Characteristics of Conservatorship—
  - The court will decide who will be making your financial decisions and the choice will not be your own as with a financial DPOA.
  - To appoint a conservator a petition will have to be filed with the court.
  - The appointment of a conservator can be more costly than creating a financial DPOA. Those costs can be charged to your estate.



# Financial DPOA—How do I create a Financial DPOA?

- No Lawyer Needed—You do not need a lawyer to create a financial DPOA. However, financial DPOAs are legal documents and must satisfy all of the statutory requirements to be effective.
- Three Statutory Requirements for a Financial DPOA—
  - The DPOA must be denominated as a “Durable Power of Attorney.”
  - The DPOA must include a provision that states in substance either of the following:
    - Springing Authority—“This is a durable power of attorney and the authority of my attorney-in-fact, when effective, shall not terminate or be void or voidable if I am or become disabled or incapacitated or in the event of later uncertainty as to whether I am dead or alive,” or,
    - Continuing Authority—“This is a durable power of attorney and the authority of my attorney-in-fact shall not terminate if I become disabled or incapacitated or in the event of later uncertainty as to whether I am dead or alive”; and
  - The DPOA must be subscribed by the principal, dated, and notarized.



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- Possible attorneys-in-fact include your:
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  - Children,
  - Grandchildren,
  - Other relatives, and
  - Friends



# Financial DPOA— Revoking/Terminating Your DPOA

- Can I revoke/terminate my financial DPOA?
  - Four ways to revoke your financial DPOA:
    - Revocation by Communication—You can revoke your financial DPOA at any time by communicating to the attorney-in-fact, orally or in writing, your intent to terminate the financial DPOA.
    - Revocation by Filing with Recorder of Deeds—You can revoke your financial DPOA at any time by filing a written notice of termination of the financial DPOA with the recorder of deeds in the city or county of your residence.
    - Termination by Death—Your financial DPOA will terminate automatically upon your death.
    - Termination by Divorce—Your financial DPOA will terminate automatically upon a filing of divorce if your attorney-in-fact is your spouse, unless the financial DPOA provides otherwise.



# Financial DPOA—What should I do with my financial DPOA?

- Attorney-in-Fact—Give a copy of your financial DPOA to your attorney-in-fact. Or keep the financial DPOA in a place that is mutually accessible to you and your attorney-in-fact.
- Be Cautious—Financial decisions can create a lot of controversy. Be careful about spreading your financial DPOA around. Think carefully when deciding who to provide a copy of your financial DPOA.



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