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## Power of Attorney

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## POWER OF ATTORNEY

ADAPTED FOR SOUTH DAKOTA AUDIENCES BY DAVID REZAC, SCHOOL OF LAW GRADUATE STUDENT, UNIVERSITY OF SOUTH DAKOTA, ANNE MARIE FEIOCK, J.D., YOUNG LAWYERS SECTION PRESIDENT, SOUTH DAKOTA BAR ASSOCIATION, AND ELIZABETH E. GORHAM, PHD, AFC, ASSOCIATE PROFESSOR AND EXTENSION FAMILY RESOURCE MANAGEMENT SPECIALIST, SOUTH DAKOTA STATE UNIVERSITY, WITH PERMISSION OF MONTANA STATE UNIVERSITY, AUTHOR MARSHA A. GOETTING, PHD, CFP®, CFCS, PROFESSOR AND EXTENSION FAMILY ECONOMICS SPECIALIST, MONTANA STATE UNIVERSITY.

- An elderly woman is worried about who will withdraw cash and pay her bills for her if she isn't able to make her weekly trips to the bank.
- A young couple is concerned about who would manage the family finances should either of them become physically or mentally disabled.
- A South Dakota National Guardsman wants to be sure his finances will be looked after at home while he is on an overseas assignment.

All these people may be able to find the assistance and peace of mind they're looking for by giving someone else legal authority to act in their place. A legal instrument designed to achieve this goal is called a power of attorney. This fact sheet will answer questions about powers of attorney.

### WHAT IS POWER OF ATTORNEY?

A power of attorney is a written, notarized document in which one person gives another the power to conduct certain acts on his or her behalf. These actions could include selling

property, depositing or withdrawing funds from checking or savings accounts, and paying bills. It differs from a guardianship or conservatorship, which are legal relationships ordered by a circuit court for the protection of a minor or incapacitated person.

South Dakota law defines a guardian as a person appointed by a court to be responsible for the personal affairs of a minor or protected person, but excludes one who is merely a guardian ad litem (a guardian appointed by the court to look out for the best interests of a child during the course of legal proceedings). A conservator is defined as one appointed by the court to be responsible for managing the estate and financial affairs of a minor or protected person.

The person giving the power of attorney is called the principal. The person to whom the power is given is called attorney in fact or an agent. Obviously, the person selected to receive the power of attorney must be one who can be trusted and who is somewhat knowledgeable about finances because of the financial nature of his or her duties.



### HOW DO I GRANT SOMEONE POWER OF ATTORNEY?

Although it is not essential that you have an attorney draft a power of attorney document, you may wish to do so. Such legal assistance can assure that you grant only as much power to someone else to act on your behalf as necessary and only under specific conditions. An attorney could also provide advice about the risks involved in granting powers for someone to act on your behalf.

### WHAT KINDS OF POWER OF ATTORNEY ARE THERE?

There are two kinds of power of attorney: general and special. A general power of attorney grants the agent authority to do anything for the principal.

For example, a homebound elderly mother may want her daughter to have the authority to write checks and pay for groceries, medicine and other personal items. The mother may grant a general power of attorney to her daughter to perform these types of financial tasks.

A special (or limited) power of attorney restricts the agent's authority to specific actions, such as buying a particular piece of property or paying bills while the person who granted the power (principal) is out of the country.

For example, a South Dakota National Guardsman assigned to Iraq for six weeks may wish to write a special power of attorney authorizing his wife to sell their home. He could also indicate that he is granting permission for her to cash a Certificate of Deposit titled in his name only that will reach maturity while he is out of the country.

Persons confined to a nursing home may wish to write a power of attorney authorizing relatives or trusted friends to make deposits to, but not withdrawals from, their savings accounts.

### HOW LONG DOES THE POWER OF ATTORNEY LAST?

A person may specify that the power of attorney last indefinitely or for a certain period of time. However, the power ends at the death of the person granting the power of attorney.

### HOW DO I CANCEL A POWER OF ATTORNEY?

A principal may cancel (revoke) his or her power of attorney at any time by signing a document that contains much the same information as the document granting the power. This document should clearly identify the power of attorney and state that it is revoked. If the agent has conducted business with financial institutions or any other person, a copy of the revocation should be sent by certified mail to them. This action clarifies that the person who had power of attorney no longer has its capacity. Until the financial institutions or persons receive evidence of revocation of the power of attorney, the principal may still be legally bound by any financial actions taken by the agent.

### WHAT IS A DURABLE POWER OF ATTORNEY?

Generally, a power of attorney ceases if the principal becomes incapacitated. But, through what's known as a durable power of attorney, a person can plan ahead to have the power of attorney survive any disability he or she could suffer. To provide a durable power of attorney, the person must include in his or her written document a statement of this intention.

Without such a statement, the principal may not have authorized someone to act on his or her behalf at a time when he or she would most need one. To make a power of attorney durable, the following or similar language could be used: "This power of attorney shall not be affected by subsequent disability or incapacity of the principal."

### WHAT IS SPRINGING POWER OF ATTORNEY?

A springing durable power of attorney can be used when the principal does not want the agent to take any authority until the principal is determined to be incapacitated and unable to direct his or her own affairs. The durable power of attorney is said to spring into existence upon the disability of the person granting the power. The term “disability” should be defined in the document, such as the principal being in a coma or diagnosed with Alzheimer’s or another debilitating disease.

The power of attorney could also be conditioned upon the agent presenting a written statement signed by a physician licensed to practice in any state. As a practical matter, the agent would therefore need to present such a statement as well as the power of attorney document itself, when dealing with parties. A cautious third party may wish to verify with the appropriate licensing board that the physician is, in fact, licensed to practice, and may not accept any written statement that is dated well before the agent’s attempted use of the power.

There are other potential problems, and these practical considerations lead many attorneys to recommend durable powers that are effective immediately upon execution of the document.

By planning ahead and preparing a springing durable power of attorney, a person can reduce the expense and time by relatives and friends of petitioning a circuit court for a guardianship and/or conservatorship.

### WHAT FORM OF POWER OF ATTORNEY SHOULD BE USED?

The best form depends on the needs and concerns of the parties involved. It may be best to consult an attorney as to what the appropriate form for your circumstances may be. South Dakota does not have a statutory power of attorney.

### ARE THERE PROBLEMS WITH POWERS OF ATTORNEY?

Two common problems with the power of attorney are that sometimes the principal tends to grant it in too broad a manner, or that the power is granted to someone who turns out to be untrustworthy.

As an example, an elderly woman may grant power of attorney to a niece, because she is having trouble handling her daily finances. The niece may then cash all of her aunt’s Certificates of Deposit and move to another state leaving the aunt with meager funds for support.

A power of attorney can be a very useful instrument if used properly, but it may unfortunately be abused. When you give a person this power, there should be no doubt about his or her integrity and his or her ability to perform the duties.

### SUMMARY

Anyone considering granting powers of attorney should be as specific as possible about what powers are being given and for how long.

Legal assistance is recommended to help develop a document that conveys your intentions with a power of attorney.

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This publication is not intended to be a substitute for legal advice. Rather, it is designed to create an awareness of the need for estate planning, and to help families become better acquainted with some of the devices used in such planning. Future changes in laws cannot be predicted, and statements in this guide are based solely upon those laws in force on the date of publication.

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This publication is suggested for the reading of all South Dakotans. It has been reviewed and approved by the South Dakota Bar Association and South Dakota State University faculty in the Human Development, Consumer and Family Sciences Department, College of Family and Consumer Sciences, March 2005.

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