

## **Why Have a Power of Attorney?**

### What Is a Power of Attorney?

A power of attorney is an important part of your estate plan. A power of attorney allows you to appoint a person or persons to handle your financial affairs for you. Although some powers of attorney are used for short-term purposes, such as allowing someone else to handle a real estate closing for you when you are unable to attend, most modern powers of attorney are “durable” powers of attorney, which provide that the document will stay in effect indefinitely, even if you become incapacitated. In fact, many powers of attorney go one step beyond that and provide that the document will not be in effect unless you are incapacitated. Those documents are commonly referred to as “springing powers of attorney” since they “spring” into effect at some later date.

### What Happens if I Don't Have a Power of Attorney?

Powers of attorney are important because they set up a mechanism for handling your affairs if you are unable to do it yourself. If you become incapacitated and do not have a power of attorney, your family must apply to a probate court to have you conserved in order to pay your bills, manage your investments, sign your tax returns and so forth. Although the conservatorship procedure has the advantage of court oversight, there are also disadvantages to that approach. A proceeding to have someone conserved generally involves an attorney for the applicant and another attorney for the proposed conserved person with a full formal evidentiary hearing (a sort of mini-trial) in the presence of the person who is to be conserved. This procedure is necessary to protect people from losing their rights with unnecessary conservatorships, but it also is expensive, time-consuming and upsetting to everyone involved. If a conservatorship is granted, the conservator remains under court supervision, and the conservator must go back to the court to get permission to exercise certain powers such as the sale of real estate and relocating the conserved person to a new address or care situation. A conservator cannot make gifts to protect assets from the cost of nursing homes. The conservator also is required to file periodic reports and accountings. Consequently, a conservatorship is inflexible and the ongoing cost of a conservatorship can be high.

### Why Is a Power of Attorney Better Than a Conservatorship?

In contrast to a conservatorship, a power of attorney is inexpensive and can either take effect immediately or when an affidavit is later signed to the effect that a person is no longer capable of handling his or her affairs, without court intervention. A power of attorney also is more flexible since you can give your attorney-in-fact whatever powers you desire, including the power to make gifts. However, sometimes such powers are misused, so it is important to name someone that you trust. It is also good to know that it is possible to involve a

probate court where appropriate by requesting that the attorney-in-fact file an accounting with the court.

### Is a Form Power Good Enough?

Although statutory powers of attorney are better than nothing, the statutory form does not include the power to make gifts and may not include other useful powers. Therefore, we recommend that a more complex power be utilized.

### Is My Old Power OK?

Although powers of attorney do not expire unless the document includes a specific expiration date, the older a power of attorney is, the more likely it is that a financial institution will refuse to accept the power. Unfortunately, there is no law that requires anyone to accept a power of attorney. Banks, brokerage houses and other financial institutions often raise objections to powers of attorney on the basis that they are "stale". Some institutions demand that they be dated within the last 60 days. Usually these objections can be overcome by submitting affidavits from family and the attorney who drafted the document to the effect that the power has not been revoked and is still in effect. However, the older the power is, the more difficult it is to get the power accepted. Therefore, it is good practice to redo the powers every few years and to file "fresh" powers with each of your financial institutions.