

## ***DURABLE POWERS OF ATTORNEY***

### *Notice to Members Concerning Durable Powers of Attorney that have been signed After October 1, 2011*

The Notice and any information contained herein do not constitute legal, estate planning, tax, accounting or other professional advice. Only through a personal, confidential consultation with qualified legal counsel or other professionals can anyone properly evaluate their own unique estate planning challenges and determine what, if any, appropriate legal strategies and tactics should be implemented to meet those challenges. The information contained in the Notice is provided for informational purposes only. No recipients of content from the Notice should act or refrain from acting on the basis of any content included in the Notice without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue from an attorney or other licensed professional in the recipient's state.

The information is provided as a public service by the City Pension Fund for Firefighters and Police Officers in the City of Tampa. While the information on the Notice is about legal issues, it is not legal advice or legal representation. Because of the rapidly changing nature of the law and our reliance upon outside sources, we make no warranty or guarantee of the accuracy or reliability of information contained therein. We assume no responsibility for any information or services provided by the Notice.

A Durable Power of Attorney Form is a document in which you delegate the authority to another person to take certain actions on your behalf. The Fire and Police Pension Fund regularly receives Powers of Attorney. When it does, we forward them to Board Counsel for review. This Notice contains information and requirements that Board Counsel has informed us they look at in advising us whether or not to honor a Durable Power of Attorney.

There are certain legal requirements for Powers of Attorney. If these requirements are not met, we cannot honor a Power of Attorney and your wishes may not be carried out. The Fire and Police Pension Fund is posting this Notice on its website to assist you or your lawyer in preparing Power of Attorney Forms. We are not attempting to deal with all problems that can arise in connection with Powers of Attorney. We recognize that other issues may arise; we are only seeking to deal with the most common issues.

The "Principal" is the person who is giving the authority to another person to take actions on his/her behalf. The person to whom the authority to act is given is called the "Attorney in Fact." This person can also be referred to as the "agent."

The Florida Statute governing Durable Powers of Attorney changed effective October 1, 2011. As of that date, the requirements for a Durable Power of Attorney are:

- The Durable Power of Attorney ("POA") *must* be in writing.
- The POA *must* be signed by the Principal.
- The Principal's signature *must* be witnessed by 2 adults and the Principal's signature must also be notarized. The notary public may serve as one of the witnesses.

- The POA *must* contain a clause that says, "This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in Chapter 709, Florida Statutes," or similar words that show the Principal's intent that the power given continues even though the Principal is subsequently incapacitated, except as otherwise provided by law. The Fire and Police Pension Fund has received some Power of Attorney forms that substitute disability for incapacity and say: "This durable power of attorney is not affected by subsequent *disability* of the principal except as provided in s. 709, Florida Statutes." The substitution of the word *disability* for *incapacity* is not proper.
- The Attorney in Fact must be a natural person who is 18 years or older or a financial institution that has trust powers, a place of business in Florida and is authorized to conduct trust business in Florida.
- The powers given to the Attorney in Fact should be specifically outlined. A Power of Attorney can enable the attorney in fact to do some things, and not others. An attorney in fact may not designate a beneficiary, change a beneficiary, or choose an optional form of benefit unless the Power of Attorney specifically gives him/her the power to do so. The law specifically forbids an attorney in fact from creating, amending, modifying or revoking any document or other disposition effective at the Principal's death unless expressly authorized by the Power of Attorney.
- ***For Durable Powers of Attorney created on or after October 1, 2011, general grants of powers will not be sufficient. Previously, Durable Powers of Attorney have said something to the effect that the Attorney in Fact has the authority to do whatever the Principal is able to do and that was legally sufficient to allow the Attorney in fact to take certain activities. Now, these documents must specifically state what authority the Attorney in Fact is given by the Principal. Additionally, specific to retirement plans, if the Principal wishes to give the Attorney in Fact the ability to "create or change a beneficiary designation" or to "waive the Principal's right to be a beneficiary of a Joint and Survivor annuity including survivor benefits under a retirement plan," the Principal must sign or initial next to each of these grants of authority.***

**Circular 230 Disclosure:** Nothing in this Notice is intended or written to be used, and cannot be used by any person for the purpose of avoiding tax penalties regarding any transactions or matters addressed herein. You should always seek advice from independent tax advisors regarding the same.

## ***DURABLE POWERS OF ATTORNEY***

### ***Notice to Members Concerning Durable Powers of Attorney that have been signed Prior to October 1, 2011***

The Notice and any information contained herein do not constitute legal, estate planning, tax, accounting or other professional advice. Only through a personal, confidential consultation with qualified legal counsel or other professionals can anyone properly evaluate their own unique estate planning challenges and determine what, if any, appropriate legal strategies and tactics should be implemented to meet those challenges. The information contained in the Notice is provided for informational purposes only. No recipients of content from the Notice should act or refrain from acting on the basis of any content included in the Notice without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue from an attorney or other licensed professional in the recipient's state.

The information is provided as a public service by the City Pension Fund for Firefighters and Police Officers in the City of Tampa. While the information on the Notice is about legal issues, it is not legal advice or legal representation. Because of the rapidly changing nature of the law and our reliance upon outside sources, we make no warranty or guarantee of the accuracy or reliability of information contained therein. We assume no responsibility for any information or services provided by the Notice.

A Durable Power of Attorney Form is a document in which you delegate the authority to another person to take certain actions on your behalf. The Fire and Police Pension Fund regularly receives Powers of Attorney. When it does, we forward them to Board Counsel for review. This Notice contains information and requirements that Board Counsel has informed us they look at in advising us whether or not to honor a Durable Power of Attorney.

There are certain legal requirements for Powers of Attorney. If these requirements are not met, we cannot honor a Power of Attorney and your wishes may not be carried out. The Fire and Police Pension Fund is posting this Notice on its website to assist you or your lawyer in preparing Power of Attorney Forms. We are not attempting to deal with all problems that can arise in connection with Powers of Attorney. We recognize that other issues may arise; we are only seeking to deal with the most common issues.

The "Principal" is the person giving the right to another person to take actions on his/her behalf, and the person to whom the Power to act is given is the "attorney in fact." This person can also be referred to as the "agent."

- The Power of Attorney ("POA") *must* be in writing.
- The POA *must* be signed by the Principal.
- The Principal's signature *must* be witnessed by 2 adults.
- The Principal's signature should be notarized. If it is not, the POA can still be valid, but the Fire and Police Pension Fund may require that the person who you are authorizing to take action on your behalf file a particular Affidavit.

- The POA *must* contain a clause that says, "This durable power of attorney is not affected by subsequent incapacity of the principal except as provided in s. 709.08, Florida Statutes," or similar words that show the principal's intent that the power given continues even though the principal is subsequently incapacitated, except as otherwise provided by law. The Fire and Police Pension Fund has received some Power of Attorney Forms that substitute disability for incapacity and say: "This durable power of attorney is not affected by subsequent *disability* of the principal except as provided in s. 709.08, Florida Statutes." The substitution of the word *disability* for *incapacity* is not proper.
- The Attorney in Fact must be a natural person who is 18 years or older or a financial institution that has trust powers, a place of business in Florida and is authorized to conduct trust business in Florida.
- The powers given to the Attorney in Fact should be specifically outlined. A Power of Attorney can enable the attorney in fact to do some things, and not others. An attorney in fact may not designate a beneficiary, change a beneficiary, or choose an optional form of benefit unless the Power of Attorney specifically gives him/her the power to do so. The law specifically forbids an attorney in fact from creating, amending, modifying or revoking any document or other disposition effective at the Principal's death unless expressly authorized by the Power of Attorney.
- If the Durable Power of Attorney says that it is not effective until the Principal lacks capacity, the Pension Fund must receive two affidavits, one from the attorney in fact and one from the Principal's primary physician. The affidavit executed by the physician must state that the physician is licensed to practice medicine or osteopathic medicine pursuant to chapter 458 or chapter 459, that the physician is the primary physician who has responsibility for the treatment and care of the principal, and that the physician believes that the principal lacks the capacity to manage property.
- The Attorney in Fact affidavit may, but need not, be in the following form. This form is reproduced directly from Florida Statutes. The Form of the Approved Affidavit for the Attorney in Fact is as follows:

**Sample affidavit of Attorney in Fact:**

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

Before me, the undersigned authority, personally appeared (attorney in fact) ("Affiant"), who swore or affirmed that:

1. Affiant is the attorney in fact named in the Durable Power of Attorney executed by (principal) ("Principal") on \_\_\_\_\_ (date).
2. This Durable Power of Attorney is currently exercisable by Affiant. The Principal is domiciled in (insert name of state, territory, or foreign country).
3. To the best of Affiant's knowledge after diligent search and inquiry:
  - a. The Principal is not deceased; and
  - b. There has been no revocation, partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the Durable Power of Attorney, or suspension by initiation of proceedings to determine incapacity or to appoint a guardian.
4. Affiant agrees not to exercise any powers granted by the Durable Power of Attorney if Affiant attains knowledge that it has been revoked, partially or completely terminated, suspended, or is no longer valid because of the death or adjudication of incapacity of the Principal.

\_\_\_\_\_  
(Affiant)

Sworn to (or affirmed) and subscribed before me this this (day of) (month), (year), by (name of person making statement)

\_\_\_\_\_  
(SIGNATURE OF NOTARY)

\_\_\_\_\_  
(PRINT NAME OF NOTARY)

Personally Known \_\_\_\_\_ or Produced Identification \_\_\_\_\_

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