

# **PLEASE READ THIS DISCLAIMER** **BEFORE UTILIZING ANY PROVIDED** **FORMS**

## **DISCLAIMER**

We provide certain forms as a courtesy and service to our clients and we believe most people know what they are doing and accept responsibility for the consequences if someone misuses a power they grant. However, the lawsuit-happy age in which we live forces us to make the following statement. Technically, granting someone signature power on assets should entail thorough discussion and analysis of the implications with a qualified attorney (we do not counsel on this), involving careful tailoring and drafting to suit the situation while providing as much protection as possible. **YOU HAVE NOT ENGAGED THIS LAW OFFICE TO COUNSEL OR ADVISE YOU IN GRANTING SIGNATURE POWER TO ANYONE.** Whichever form you use – whether it be an appointment of co-trustee form, or the more dangerous power of attorney form – any such decisions are yours and yours alone and not at the advice or urging of our law office. We simply make the forms available as a courtesy. At the same time we must advise you to seek competent legal advice before using such forms. Use of any form is at your own risk. We will not counsel you as to the scope, potential variations, dangers, limitations, or wisdom of utilizing such forms. Whether you appoint someone as co-trustee or grant someone a power of attorney it is not at the urging or counsel of this law office nor have you engaged us in any way to counsel you on this issue. Any such action is taken entirely on your own and at your own risk.

### **Make a Copy of the Form.**

Do not write on the original form that we provide to you. Instead, make a copy of the form before utilizing it and fill out the copy. That way if you make a mistake you can start over again.

# Granting Signature Power on Assets

The general idea behind a living trust is to provide for uninterrupted proper management of your assets. If you become incapacitated that means management of the trust assets (paying bills, etc.) for your benefit during your incapacity. If you die, this means winding up your affairs and transitioning your assets to your named beneficiaries.

## Signature Power through Trusteeship Is Accompanied by High Fiduciary Duty

In essence you are granting signature power to your named successor trustee – a power that is generally triggered only by your death or incapacity. When someone gains signature power on assets through being a trustee, that person is automatically bound by law to the highest fiduciary duty requiring them to properly manage and use the assets. The trustee therefore owes you and your future beneficiaries the highest degree of honesty and fair dealing. Thus, the trustee is accountable to the beneficiaries and would be held liable by any court for misuse, mismanagement, or misappropriation of any assets. Therefore, **a high degree of legal protection accompanies granting signature power through trusteeship**. That said, if a wrong acting trustee has fled to Brazil or spent all the money, there may be a certain difficulty in collecting – which is why you should still choose your trustees and successor trustees carefully. Point is, there is always some degree of risk associated with granting anyone signature power. The idea is to minimize it.

## A Reminder: Management of your trust assets is already addressed should you become incapacitated.

One of the advantages of a trust is that it provides for management of your trust assets in the event that you become incapacitated. That is, with a note from two licensed physicians (stating your incapacity) your designated successor trustee (owing you the highest fiduciary duty) will be able to step in, be given signature power, and manage the trust assets during your incapacity. This avoids the need for seeking a conservatorship for managing those assets (a costly, time consuming, bureaucratic process). For many clients, knowing that their successor trustees will be given signature power on assets if they become incapacitated eliminates any perceived need to risk granting present signature status on trust assets to anyone else.

## Granting Present Signature Power on Some or All Assets

Nonetheless some clients wish to grant another individual (typically a child) **present** signature power either on some selected assets (accounts) or maybe even on all assets. This is often true for clients who find themselves in a declining state of health or ability -- and who need the help of others in maintaining their financial affairs and paying bills. Still other clients just wish to grant someone the present ability to sign (typically to a child) just because they want to (as an emergency measure or what not). The reasons are without end but the end goal is the same: to elevate someone to sign on assets right here and now even while you are alive and technically able to do it yourself.

## Potential Dangers of Granting Someone Present Signature Power

Before laying out the means to this end it is important to discuss the potential dangers of giving someone signature power. Many people are trustworthy but unfortunately some are not. We have all heard a story of someone being wiped out or stolen from by a child (or someone else) they granted signature power to. It happens all the time. Be very aware of this danger – it could happen to you. When you grant someone signature power, no matter how much legal protection you have, you are still handing them the “keys to the safe”. Fiduciary duty or not, if they misappropriate the money, it still has to be recovered.

### **Signature Power through Present Co-Trusteeship vs. Power of Attorney**

Two general (but not exhaustive) methods for granting signature power to someone will be discussed. One method is through appointing someone as a present acting co-trustee, the other method is through granting someone a power of attorney. **Appointing someone as co-trustee is the only proper way to give signature power to someone for assets titled in the name of your trust.** Thus it is important to remember that **a power of attorney will not work to grant signature power for assets titled in your trust.** A power of attorney will only function on assets outside of the trust (and generally you don't want assets to exist outside your trust except qualified retirement plans). At present your paperwork **reflects only you as the trustee of your trust** – and because of that, **no institution is going to properly allow anyone else to sign** -- unless you elevate that person to the status of a present acting trustee. Repeated: **If you have a child or other person on an account as a present signer they will not be allowed to stay on the account when you title it in your trust unless you appoint them as a present acting co-trustee.**

### **Appointing Someone As a Co-Trustee:**

Your choices in giving someone signature power by appointing them as a present acting co-trustee is to 1) elevate them to the level of a present acting co-trustee **on selected accounts only (appointment of limited co-trustee)** or 2) elevate them to the level of present acting co-trustee **on all accounts and trust assets (appointment of full co-trustee)**. Remember, if you presently have a child who can sign on an account, **in order to allow them to stay on as a signature you will need to appoint them as a present acting co-trustee (limited or full).** **For your convenience we supply several forms which you can utilize towards these ends.** Because the law automatically binds any trustee with the highest fiduciary duty, granting present signature power through appointment of co-trustee provides more protection than a power of attorney. Yet it is important to emphasize that even with appointment of a co-trustee, you should still be prudent and cautious whom you grant signature power to – in that you are still handing them the “keys to the safe.”

### **Appointment of Limited Co-Trustee Form:**

Appointing someone only on selected accounts is sometimes perceived as a middle ground approach because you limit the “signature power risk” to one or a few selected accounts only (vs. granting power on all trust assets). If you wish to grant someone signature power **on only limited trust assets or selected accounts** you may utilize the form entitled “**Appointment of Limited Co-Trustee**” (wherein you detail and list the person and the accounts/assets that you are authorizing their signature on).

### **Appointment of Full Co-Trustee Form**

If you wish to grant someone signature power **on all trust assets or accounts** utilize the form entitled “**Appointment of Full Co-Trustee**” (wherein you detail the person authorized to sign on any trust asset).

### **Signature Power through Power of Attorney**

As an alternative, some folks turn to utilizing financial durable powers of attorney to address potential incapacity and management of assets on your behalf. A financial durable power of attorney generally grants someone broad power to act on your behalf as an individual (file tax returns, buy and sell assets, sign on accounts and other assets, etc.). The danger with powers of attorney are that the person you grant the financial durable power of attorney **owes little or no fiduciary duty to you or others.** You are simply granting them the power to act in your stead. If there is misuse, misrepresentation or misappropriation of the assets there is little recourse available in that it is just as if you did the act yourself. **It is for this reason that we do not automatically draw up financial powers of attorney during your trust process.** (We do however provide a form, broad based power of attorney, if you wish to utilize it – discussed below).

### **Why Would You Need a Power of Attorney if You Have A Trust?**

Again it is important to emphasize that a power of attorney grants signature power only on assets that you own as an individual. A financial durable power of attorney **does not and will not** grant the power for someone to sign or act on assets titled in your trust (or allow them to modify your trust in any way). Given the fact that your goal is to title most all of your assets in the name of your trust you might ask if there is any need for a power of attorney. The first answer to this question can be found in the fact that there are certain assets that cannot be titled in your trust – mainly Qualified Retirement Plans such as IRA's, 401k's, PERS, etc. If you have large amounts tied up in such plans (or other assets you may leave outside the trust) you may want to consider a contingency plan for getting at those assets in case you become incapacitated. (We have seen situations wherein a well spouse is unable to access the incapacitated spouse's retirement accounts.) There is also the possibility you may wish to allow other actions on your behalf such as filing tax returns, etc.

Fact is, there are an unending variety of powers of attorney (i.e. "springing" which only become effective on incapacity, "limited" to specific acts., etc.). Whole books are devoted to the subject – which is why hours and hours could be spent on the topic alone. If you want to properly address this subject you should seek competent legal advise from a qualified attorney who can help you carefully tailor a document to your specific needs, objectives, and situation (we do not counsel on this subject).

For your convenience however, we provide you with two types of financial power of attorney 1) a broad based power of attorney and 2) a more limited power of attorney.

### **Broad Based Financial Durable Power of Attorney Form**

This broad based power of attorney pretty much grants whomever you appoint the power to sign and act in your stead on anything and everything – no restrictions (although they cannot modify your trust or act on trust assets). Some clients are perfectly comfortable granting such broad powers to certain individuals (spouses, children, confidants, etc.). Having this completed form would certainly allow for access to your non-trust assets (incapacitated or not) and does amount to a strategy for dealing with such assets as IRA's, 401k's etc.. If correctly filled out, the provided broad based power of attorney form should work at allowing access by your appointed individuals to these accounts as well as allowing them to act in your stead on any matter. A strategy some clients use is to just complete and execute the form and leave it with their important papers where it can be found and used if needed (instead of handing it to the person right now). Give careful consideration before granting anyone such sweeping powers.

### **Limited Power of Attorney Form**

If properly completed, this form allows the appointed person to make a transfer of assets you own as an individual to your living trust. This should, for example, allow a withdrawal from a Qualified Retirement Plan account (IRA, PERS, 401k, 403b, etc.) as long as it is to be put in an account in the living trust. This helps solve the problem of access to the one major asset (for many) that can't be put in the trust. Since the money goes directly to the trust your trustee is legally bound by the fiduciary duty to only use the assets for your benefit.

**Warning: This document grants unilateral signature power on the listed assets. Be careful who you grant this power to. Even though the appointed trustee owes you a high fiduciary duty to only use the asset(s) according to the trust, if they misuse this power you may find yourself in a situation of trying to recover misappropriated or misused assets.**

**APPOINTMENT OF LIMITED CO-TRUSTEE**

\_\_\_\_\_ being the settlor, trustor,  
(Fill in name your name on above line):

and trustee of the \_\_\_\_\_  
[Fill in name & date of trust on the above line (i.e The Smith Trust created January 1, 1999)]

hereby appoint and authorize **the below named person to act as a co-trustee on the below described account(s) and/or described functions. This appointment of co-trustee is specifically limited to acting on the below described account(s) and/ or functions only.** For purposes of the below described account(s) **any co-trustee** is authorized to act unilaterally, without limitation, monetarily or otherwise, in regards to any transaction involving the below described account(s), **with any one signature being sufficient.** This authorization overrides any present article in the trust which may seem to impose any limitation to act unilaterally. This appointment and authorization is in full accordance with the terms of the above mentioned trust.

**Name of Appointed Co-Trustee:**

<u>Financial Institution</u>	<u>Account No.</u>	<u>&amp;/or</u>	<u>Description of Function</u>

Date: \_\_\_\_\_  
Signed \_\_\_\_\_

State of \_\_\_\_\_

County of \_\_\_\_\_

On \_\_\_\_\_ before me, \_\_\_\_\_ (notary public), personally appeared

\_\_\_\_\_ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument. I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

Witness my hand and official seal.

\_\_\_\_\_  
Signature of Notary

## Warning:

This document grants full access and unilateral signature power on any and all trust assets. Be careful who you grant this power to. Even though the appointed trustee owes you a high fiduciary duty to only use the assets according to the trust, if they misuse this power you may find yourself in a situation of trying to recover misappropriated or misused assets.

# APPOINTMENT OF FULL CO-TRUSTEE

\_\_\_\_\_ being  
(Fill in your name on above line)

the settlor, trustor, and trustee of:

the \_\_\_\_\_  
(Fill in name & date of trust on the above line (i.e The Smith Trust created January 1, 1999))

hereby appoint and authorize **the below named person to act as a co-trustee. Further, any co-trustee** is authorized to act unilaterally, without limitation, monetarily or otherwise, in regards to any transaction **with any one signature being sufficient.** This authorization overrides any present article in the trust which may seem to impose any limitation to act unilaterally. This appointment and authorization is in full accordance with the terms of the above mentioned trust.

**Name of Appointed Co-Trustee:**

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Date: \_\_\_\_\_

Signed

State of \_\_\_\_\_

County of \_\_\_\_\_

On \_\_\_\_\_ before me, \_\_\_\_\_ **(notary public)**, personally appeared

\_\_\_\_\_ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument. I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

Witness my hand and official seal.

\_\_\_\_\_  
Signature of Notary

# **GENERAL DURABLE POWER OF ATTORNEY**

## **NOTICE TO THE PERSON EXECUTING THIS DOCUMENT AND THE PERSON ACCEPTING THE APPOINTMENT AS ATTORNEY IN FACT:**

**THIS IS AN IMPORTANT LEGAL DOCUMENT. IT CREATES A DURABLE POWER OF ATTORNEY. BOTH THE PRINCIPAL (GRANTOR OF THE POWER OF ATTORNEY) AND THE AGENT (APPOINTED ATTORNEY IN FACT) SHOULD READ THE NOTICES CONTAINED IN THIS DOCUMENT.**

### **Notice to Person Executing Durable Power of Attorney**

A durable power of attorney is an important legal document. By signing the durable power of attorney, you are authorizing another person to act for you, the principal. Before you sign this durable power of attorney, you should know these important facts:

Your agent (attorney-in-fact) has no duty to act unless you and your agent agree otherwise in writing.

This document gives your agent the powers to manage, dispose of, sell, and convey your real and personal property, and to use your property as security if your agent borrows money on your behalf. This document does not give your agent the power to accept or receive any of your property, in trust or otherwise, as a gift, unless you specifically authorize the agent to accept or receive a gift.

Your agent will have the right to receive reasonable payment for services provided under this durable power of attorney unless you provide otherwise in this power of attorney.

The powers you give your agent will continue to exist for your entire lifetime, unless you state that the durable power of attorney will last for a shorter period of time or unless you otherwise terminate the durable power of attorney. The powers you give your agent in this durable power of attorney will continue to exist even if you can no longer make your own decisions respecting the management of your property.

You can amend or change this durable power of attorney only by executing a new durable power of attorney or by executing an amendment through the same formalities as an original. You have the right to revoke or terminate this durable power of attorney at any time, so long as you are competent.

This durable power of attorney must be dated and must be acknowledged before a notary public or signed by two witnesses. If it is signed by two witnesses, they must witness either (1) the signing of the power of attorney or (2) the principal's signing or acknowledgment of his or her signature. A durable power of attorney that may affect

real property should be acknowledged before a notary public so that it may easily be recorded.

You should read this durable power of attorney carefully. When effective, this durable power of attorney will give your agent the right to deal with property that you now have or might acquire in the future. The durable power of attorney is important to you. If you do not understand the durable power of attorney, or any provision of it, then you should obtain the assistance of an attorney or other qualified person.

**Notice to Person Accepting the Appointment as Attorney-in-Fact**

By acting or agreeing to act as the agent (attorney-in-fact) under this power of attorney you assume the fiduciary and other legal responsibilities of an agent. These responsibilities include:

- 1. The legal duty to act solely in the interest of the principal and to avoid conflicts of interest.
- 2. The legal duty to keep the principal's property separate and distinct from any other property owned or controlled by you.

You may not transfer the principal's property to yourself without full and adequate consideration or accept a gift of the principal's property unless this power of attorney specifically authorizes you to transfer property to yourself or accept a gift of the principal's property. If you transfer the principal's property to yourself without specific authorization in the power of attorney, you may be prosecuted for fraud and/or embezzlement. If the principal is 65 years of age or older at the time that the property is transferred to you without authority, you may also be prosecuted for elder abuse under Penal Code Section 368. In addition to criminal prosecution, you may also be sued in civil court.

I have read the foregoing notice and I understand the legal and fiduciary duties that I assume by acting or agreeing to act as the agent (attorney-in-fact) under the terms of this power of attorney.

Signature of Agent: \_\_\_\_\_ Date: \_\_\_\_\_

(Above area for the signature of the agent need not be completed until such time the agent utilizes this power of attorney).

**GRANTING OF POWER OF ATTORNEY**

**TO WHOM IT MAY CONCERN:**

I, \_\_\_\_\_ (the principal) presently a

resident of the County of \_\_\_\_\_ State of \_\_\_\_\_

do hereby appoint \_\_\_\_\_ (the agent), as my true and lawful attorney-in-fact for the principal and in the principal's name, place, and stead:

1. To manage, control, lease, sublease, and otherwise act concerning any real property which the principal may own, collect and receive rents or income therefrom; pay taxes, charges, and assessments on the same; repair, maintain, protect, preserve, alter, and improve the same; and do all things necessary or expedient to be done in the agent's judgment in connection with the property.

2. To manage and control all partnership interests owned by the principal and to make all decisions the principal could make as a general partner, limited partner, or both, and to execute all documents required of the principal as such partner, all to the extent that the agent's designation for such purposes is allowed by law and is not in contravention of any partnership or other agreement.

3. To purchase, sell, invest, reinvest, and generally deal with all stocks, bonds, debentures, warrants, partnership interests, rights, and securities owned by the principal.
4. To collect and deposit for the benefit of the principal all debts, interest dividends or other assets that may be due or belong to the principal, and to execute and deliver receipts and other discharges therefor; to demand, arbitrate, and pursue litigation on the principal's behalf concerning all rights and benefits to which the principal may be entitled; and to compromise, settle, and discharge all such matters as the agent considers appropriate under the circumstances.
5. To pay any sums of money which may at any time be or become owing from the principal, to sell, and to adjust and compromise any claims which may be made against the principal as the agent considers appropriate under the circumstances.
6. To grant, sell, transfer, mortgage, deed in trust, pledge and otherwise deal in all property, real and personal, which the principal may own; including but not limited to any real property described on any exhibit attached to this instrument including property acquired after execution of this instrument; to attach exhibits to this instrument which provide legal descriptions of all such property; and to execute such instruments as the agent deems proper in conjunction with all matters covered in this paragraph 6.
7. To prepare and file all income and other federal and state tax returns which the principal is required to file; to sign the principal's name; hire preparers and advisors and pay for their services; and to do whatever is necessary to protect the principal's assets from assessments for income taxes and other taxes for ALL years. The agent is specifically authorized to receive confidential information; to receive checks in payment of any refund of taxes, penalties, or interest; to execute waivers (including offers of waivers) of restrictions on assessment or collection of tax deficiencies and waivers of notice of disallowance of claims for credit or refund; to execute consents extending the statutory period for assessment or collection of taxes; to execute closing agreements under Internal Revenue Code section 7121, or any successor statute; and to delegate authority or substitute another representative with respect to all above matters.
8. To deposit in and draw on any checking, savings, agency, or other accounts which the principal may have in any banks, savings and loan associations, and any accounts with securities brokers or other commercial institutions, and to establish and terminate all such accounts – this power includes and applies (but is not limited to) any Individual retirement accounts (IRA's) or any other Qualified & Non-Qualified Retirement Plans or accounts.
9. To invest and reinvest the principal's funds in every kind of property, real, personal, or mixed, and every kind of investment, specifically including, but not limited to, corporate obligations of every kind; preferred or common stocks; shares of investment trusts, investment companies, and mutual funds; mortgage participation's; that, under the circumstances then prevailing (specifically including but not limited to the general economic conditions and the principal's anticipated needs) persons of skill, prudence, and diligence acting in a similar capacity and familiar with those matters would use in the conduct of an enterprise of a similar character and with similar aims, to attain the principal's goals; and to consider individual investments as part of an overall plan.
10. To have access to all safe deposit boxes in the principal's name or to which the principal is an authorized signatory; to contract with financial institutions for the maintenance and continuation of safe deposit boxes in the principal's name; to add to and remove the contents of all such safe deposit boxes; and to terminate contracts for all such safe deposit boxes.
11. To make additions and transfer assets to any and all living revocable trusts of which the principal is a settlor.
12. To make direct payments to the provider for tuition and medical care for the principal's issue under Internal Revenue Code section 2503(e) or any successor statute, which excludes such payments from gift tax liability.
13. To use any credit cards in the principal's name to make purchases and to sign charge slips on behalf of the principal as may be required to use such credit cards; and to close the principal's charge accounts and terminate the principal's credit cards under circumstances where the agent considers such acts to be in the principal's best interest.
14. Generally to do, execute, and perform any other act, deed, matter, or thing, that in the opinion of the agent ought to be done, executed, or performed in conjunction with this power of attorney, of every kind and nature, as fully and effectively as the principal could do if personally present. The enumeration of specific items, acts, rights, or powers in this instrument does not limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers granted to the agent except where powers are expressly restricted.
15. The agent is authorized and directed to commence enforcement proceedings, at the principal's expense, against any third party who fails to honor this durable power of attorney.

16. Notwithstanding any other possible language to the contrary in this instrument, the agent is specifically **NOT granted the following powers:** (a) To use the principal's assets for the agent's own legal obligations, including but not limited to support of the agent's dependents; (b) To exercise any trustee powers under an irrevocable trust of which the agent is a settlor and the principal is a trustee; and (c) To exercise incidents of ownership over any life insurance policies which the principal owns on the agent's life.

17. Any third party from whom the agent may request information, records, or other documents regarding the principal's personal affairs may release and deliver all such information, records, or documents to the agent. The principal hereby waives any privilege that may apply to release of such information, records, or other documents.

18. The agent's signature under the authority granted in this power of attorney may be accepted by any third party or organization with the same force and effect as if the principal were personally present and acting on the principal's own behalf. No person or organization who relies on the agent's authority under this instrument shall incur any liability to the principal, the principal's estate, heirs, successors, or assigns, because of reliance on this instrument.

19. The principal's estate, heirs, successors, and assigns shall be bound by the agent's acts under this power of attorney.

20. This power of attorney shall not be affected by the principal's subsequent disability or incapacity.

21. The principal hereby ratifies and confirms all that the agent shall do, or cause to be done, by virtue of this power of attorney.

22. The principal declares that the principal understands the importance of this durable power of attorney, recognizes that the agent is granted broad power to hold, administer, and control the principal's assets, and recognizes that this durable power of attorney will become effective immediately on execution and will continue indefinitely until specifically revoked or terminated by death, even if the principal later becomes incapacitated.

23. On the appointment of a conservator of the principal's estate, this power of attorney shall terminate and the agent shall deliver the assets of the principal under the agent's control as directed by the conservator of the principal's estate.

**I have read the warnings on page 1 of this document and as Principal I hereby place my signature on this Power of Attorney:**

**Date:** \_\_\_\_\_

**Signed by Principal**

State of \_\_\_\_\_

County of \_\_\_\_\_

On \_\_\_\_\_ before me, \_\_\_\_\_ **(notary public)**, personally appeared

\_\_\_\_\_ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument. I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

Witness my hand and official seal.

\_\_\_\_\_  
Signature of Notary