

## **Section 42 - Durable Power of Attorney**

### **42.10 In General**

This section will focus its comments on the Durable Power of Attorney statutes that are directly related to actions by the Probate Division. The General Durable Power of Attorney law is found in §§ 404.700 to 404.737. The Healthcare Durable Power of Attorney law is found in §§ 404.800 to 404.872.

Actions involving a durable power of attorney are adversary civil actions to which the Civil Rules and Civil Code are fully applicable. However, § 472.300 applies to judicial proceedings involving powers of attorney to the extent that they apply to judicial proceedings involving trusts and are not inconsistent with provisions of the durable power of attorney law.

### **42.20 Jurisdiction of Probate Division**

The Probate Division has concurrent jurisdiction with regular divisions of the Circuit Court to hear all matters related to durable powers of attorney, except that certain provisions of the durable power of attorney law relating to accounting and declaration of disability and incapacity require filing and hearing in the Probate Division.

Reference: § 404.731

### **42.30 Court Appointment of Guardian/Conservator for Principal**

If the Court appoints a legal representative (guardian or conservator) for a principal who has executed a durable power of attorney, the attorney-in-fact thereunder shall follow the instructions of the Court or legal representative and shall communicate with and be accountable to the principal's guardian on matters affecting the principal's personal welfare and to the principal's conservator on matters affecting the principal's property and business interests, to the extent that the responsibilities of the guardian or conservator and the authority of the attorney-in-fact involve the same subject matter. See Section 42.60.30.

Reference: § 404.714.5

### **42.40 Court Appointment of Personal Representative for Principal**

On the death of the principal, an attorney-in-fact shall follow the instructions of the Court having jurisdiction over the principal's estate and shall be accountable to the principal's personal representative or, if none, the principal's successors. The principal's property, including records held by the attorney-in-fact shall be turned over to the personal representative.

Reference: § 404.714.9

### **45.50 Accounting**

#### **42.50.1 Who May Petition**

The principal may petition the Court for an accounting by the principal's attorney-in-fact or the attorney-in-fact's legal representative. If the principal is disabled, incapacitated or deceased, a petition for accounting may be filed by the principal's legal representative, an adult member of the principal's family or any person interested in the welfare of the principal.

Reference: § 404.727.1

#### 42.50.2 Waiver or Ex Parte Approval

Any requirement for an accounting may be waived or approved by the Court without hearing, if the accounting is waived in writing or approved by a principal who is not disabled, or by a principal who has been restored, or by all creditors and distributees of a deceased principal's estate whose claims or distributions remain unsatisfied.

Reference: § 404.727.2

#### 42.60 Declaration of Incapacity or Disability

##### 42.60.1 Petition for Court Action

If the principal is found to be incapacitated or disabled, on petition of the principal's legal representative, an adult member of his family, or any person interested in the principal's welfare, the Court may terminate, suspend, modify or confirm authority granted under a durable power of attorney, generally or as to particulars, as specifically set out in § 404.727.5.

##### 42.60.2 Accounting to Successor

If the Court suspends or terminates the authority of the attorney-in-fact as specified in Section 42.60.1, the Court may require an accounting and order delivery of the principal's property to a successor attorney-in-fact or the principal's legal representative.

Reference: § 404.727.7.

##### 42.60.3 Duties and Powers Specified by Court Order

If a principal is declared incapacitated or disabled, and a guardian/conservator is appointed, the Court may enter an order, after notice and hearing, specifying the respective duties and powers of the guardian/conservator and the attorney-in-fact as to the principal/protectee's affairs. See Section 42.30, *supra*.

Reference: § 404.731.3

#### 42.70 Appointment of Guardian Ad Litem or Conservator Ad Litem

The Court may, upon petition, appoint a guardian ad litem or conservator ad litem to act for the

principal if it appears a conflict of interest may exist between the principal and the attorney-in-fact. Compensation for the guardian/conservator ad litem may be paid out of the principal's estate or may be charged as costs against any party whose conduct may have given rise to the appointment of the guardian ad litem/conservator ad litem.

Reference: § 404.731.5 [END OF SECTION]