

A power of attorney is a written instrument in which one person gives another person the ability to do legal acts in his name, such as the power to sign his name to legal documents. The person who is giving the power is called the principal and the person authorized to do acts on the principal's behalf is called the agent or the attorney in fact.

Durable Powers of Attorney

It used to be the law that if the principal became mentally incapacitated, the power of attorney was no longer effective. The theory was that an agent could not do anything the principal was unable to do. If the principal could not make contracts, etc. because he was incompetent, then neither could the agent.

In other words, when one became incompetent, just when it would be the most useful to have someone be able to make decisions and take action on one's behalf, the power of attorney became ineffective.

The California Legislature changed that rule, so that now one may make a power that is durable, i.e., remains effective even if the principal is incompetent.

The Legislature even provided that one may make a power of attorney which is *only* valid when one becomes incompetent. Usually such powers provide that they become effective when someone, for example, two physicians, state that the principal is unable to handle his financial affairs.

As with any other legal document, a power of attorney is only valid if the principal was competent at the time it is signed. It is not possible to create a valid power of attorney after the principal becomes incompetent.

Asset Management Powers

The type of document we usually think of as a power of attorney gives the agent powers relating to the principal's financial affairs. For instance, it might give authority to execute documents relating to the sale of real property, such as deeds, contracts, escrow instructions, etc.

Powers relating to the management of assets may be general or special. A general power of attorney allows the agent to do virtually any act of legal significance on the principal's behalf. A special power of attorney is any power which is not general, i.e., is limited, usually to one transaction or type of transaction.

A power of attorney may also be limited in duration, so that it is invalid after a certain date.

The Legislature has prescribed a form general power of attorney called a Uniform Statutory Form Power of Attorney, although other forms may also be used.

There are some things that the principal under a general power of attorney may not do unless the power specifically says that he can. Those things include making gifts (especially to himself), making or changing beneficiary designations on things like insurance, bank accounts or IRAs, or setting up trusts.

Duties of Agent

The agent acting under an asset management power of attorney is obligated to act in the interests of the principal. Although, under a general power of attorney, he could sell all of the principal's assets and abscond with the proceeds, he has a duty not to do so, and the principal could successfully sue the agent if he

did. The agent also has the duty to give an accounting of transactions he has performed if the principal so requests.

On the other hand, once the agent has absconded, or spent or hidden the money, the ability to sue successfully may be of little value. One should not, therefore, give a general power of attorney to anyone who is not absolutely trustworthy.

Advance Health Care Directives

The California Legislature has authorized people to execute documents called Advance Health Care Directives. Similar to living wills, advance health care directives may be used to specify the type of health care one wants if he becomes incapacitated. For example, many people wish to instruct that heroic measures not be taken to prolong artificially their lives if they are in an irreversible coma or have an incurable condition.

An advance health care directive may also designate an agent who can make decisions relating to medical care. The agent would be obligated to follow the instructions set forth in the directive. A health care directive may not be combined with any other power of attorney. If no instructions are given on a particular health care decision, the agent has the power to use his own best judgment.

Health care directives may also contain instructions relating to the donation of organs and body parts and the disposition of ones remains. If no directions are given, the agent has the discretion to make those decisions on the principal's behalf.

Avoiding Conservatorships

A conservatorship is a court-supervised procedure for handling financial affairs of and making personal decisions for incompetent persons, who is called the conservatee. In a conservatorship, the court appoints someone to be the conservatee's conservator. The conservator is given powers to act in the conservatee's place, and is generally required to report what he has done to the court.

Because of the court involvement, conservatorship proceedings can be intrusive and expensive. An agent acting under a durable power of attorney or advance health care directive could make many if not most of the decisions that a conservator makes. The decisions and acts of agents under those instruments are not subject to review by a court unless someone challenges them.

Absence of court supervision is both the greatest strength and greatest danger of these instruments. If the agent is trustworthy and competent, a great deal of expense, trouble and personal invasion may be avoided, but if he is not, much can be lost. Selection of the proper agent is vital, and it is far better to have no agent at all than to have a dishonest or incapable one.

ABOUT ESTES & ESTES

Estes & Estes represents clients in estate planning and administration matters, as well as litigation relating to those areas. The firm's attorneys have collectively more than 50 years of service to families in South Orange County.

We strive to deliver legal services at the highest level and at the same time, fully understand the unique needs of each of our clients.

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