

# Powers of Attorney

## Concept

A power of attorney is a document that allows a person (known as the "Principal") to appoint another person or organization to handle his or her affairs while he or she is unavailable or unable to do so. The person or organization the individual appoints is referred to as an "Attorney-in-Fact" or "Agent."

## Description and Operation

### *General Power of Attorney*

A general power of attorney is broad and provides extensive powers to the person the principal appoints as his or her agent. These powers usually include:

- ◆ Handling banking transactions and transactions involving U.S. securities
- ◆ Entering safety deposit boxes
- ◆ Buying and selling property
- ◆ Purchasing life insurance
- ◆ Settling claims
- ◆ Entering into contracts
- ◆ Buying, managing, or selling real estate
- ◆ Filing tax returns
- ◆ Handling matters related to government benefits

Additional powers may be granted to the agent:

- ◆ Maintaining and operating business interests
- ◆ Making gifts
- ◆ Making transfers to revocable ("living") trusts

A general power of attorney is typically used to allow an agent to handle all of the principal's affairs during a period of time when the principal is unable to do so. For example, this could apply when the principal is traveling out of the state or country and is unable to handle his or her own affairs. A general power of attorney is frequently included as part of an estate plan to make certain someone can handle financial affairs if the estate owner is unable to do so.

### *Special Power of Attorney*

A special power of attorney gives only specific powers to the person he or she appoints as agent. For example, the principal could give an agent authorization to sell a car or a house on the principal's behalf.

### ***Health Care Power of Attorney***

A Health Care Power of Attorney allows the principal to designate an agent who will have the authority to make health care decisions on the principal's behalf in the event of unconsciousness, mental incompetence, or other inability to make such decisions.

In many states, people express their wishes regarding whether they want to receive "life-sustaining procedures" if they become permanently comatose or terminally ill in the Health Care Power of Attorney document. This helps the agent know the wishes of the principal as he or she makes decisions on the principal's behalf. Even when included in the document, the principal should still discuss the Health Care Power of Attorney with the agent, expressing his wishes, values, and preferences regarding health care. (A Health Care Power of Attorney is different from a Living Will, in that the Power of Attorney allows someone to make health care decisions, whereas a Living Will only expresses wishes concerning life-sustaining procedures.)

A HIPAA (Health Insurance Portability and Accountability Act) Authorization is also advisable. It allows medical providers to release a person's protected medical information to another person. The HIPAA language can be included in the Health Care Power of Attorney, or a freestanding document can be used.

With an executed Health Care Power of Attorney, the principal still has the right to give medical directions to physicians and other health care providers as long as he or she is able to do so. This document only becomes effective when the principal does not have the capacity to give, withdraw, or withhold informed consent regarding his or her health care.

### ***Durable & Springing Powers of Attorney***

A "durable" power of attorney is a general, special or health care power of attorney that contains special provisions allowing the document to stay in effect if a person becomes mentally incompetent.

A "springing" power of attorney document can be signed to prepare for the possibility of becoming mentally incompetent due to illness or an accident. In this case, the principal would specify that the power of attorney would not go into effect unless a doctor certifies that the principal is mentally incapacitated.

### ***Selection of Agent & Successor Agents***

It is important that the principal selects a trusted person. The relative, friend, or entity chosen to be the agent will be acting on the behalf of the principal in regard to financial and/or health care issues, so it is important to choose someone who will not abuse the powers granted to them and who will look out for the principal's best interests.

In general, an agent is only held responsible for misconduct that is intentional, not for unknowingly doing something wrong. This type of protection is included in most power of attorney documents to help encourage people and organizations to accept the responsibility of being an agent. Usually there is no financial incentive to serve as an agent and most serve without compensation.

It is important to also appoint a successor agent, because the person appointed as agent either will not be able to serve the principal or will refuse to serve. For example: An elderly husband names his elderly wife as his agent. After signing the power of attorney document, they are both diagnosed as having Alzheimer's disease. The wife becomes mentally incompetent and cannot serve as her husband's agent. The husband is also mentally incompetent and cannot sign a new power of attorney. If the husband had named a successor agent, he or she could have taken over as agent.

### ***Mental Competence***

For a power of attorney document to be valid, the principal must be mentally competent at the time the power of attorney is signed. The principal must understand the powers that he or she is granting to the agent and the implications of having someone else make decisions for him or her. If there is any question about the principal's mental competence, it is a good idea to have a physician do an evaluation and state in writing that he or she is competent.

How mental competence will be determined can be spelled out in the document. For example, the principal can name a physician to make the determination or can require that two licensed physicians agree on the principal's mental capacity. Even if the document does not set specific requirements, it is likely that the agent will need to get a doctor's written confirmation of the principal's incompetence. In some cases, a court may be required to decide the issue using generally accepted standards.

### ***Signing the Document***

A power of attorney must be signed by the principal. The signature on a power of attorney should be notarized. Notarization makes it harder for someone to challenge the validity of the signature. It also allows the document to be "recorded" for use with real estate transactions.