

DURABLE POWERS OF ATTORNEY

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Agent and Principal

A power of attorney is a document whereby one person, the “principal,” gives another person the power to make decisions or take action on behalf of the principal. The person who is given the power to act on behalf of the principal is called the “agent,” or sometimes the “attorney-in-fact.”

Durable Powers

A power of attorney may be either (1) a durable power of attorney or, (2) a power of attorney which terminates upon the incapacity of the principal. The second type of power, sometimes called a “non-durable power of attorney,” is useful when the principal wants to supervise the agent, perhaps from afar. For example, if one is buying a home and is called out of town in the middle of the escrow, one might give a trusted friend a non-durable power of attorney. Such a power would allow the agent to complete the purchase on the principal’s behalf, but if the principal became incapacitated and could no longer supervise the agent, the agent would lose his or her power to act on the principal’s behalf. Non-durable powers are seldom, if ever, used in estate planning because, in estate planning, powers of attorney are used to protect the principal in the event of incapacity. Only with a *durable* power of attorney may an agent act on behalf of an incapacitated principal.

Powers of attorney are durable only if they contain a statement that “the power of attorney shall not be affected by subsequent incapacity of the principal” or words of similar effect.

Springing Powers

A durable power of attorney may be a presently effective power which remains in effect after the principal becomes incapacitated. Or, a durable power of attorney may only become effective when the principal becomes incapacitated. This second type of durable power of attorney is called a “springing durable power of attorney” because it springs into effect when the principal becomes incapacitated. A springing durable power of attorney typically contains a statement such as “this power shall become effective upon the incapacity of the principal.”

Scope of Power

The principal may use a power of attorney to empower his or her agent to act on the principal's behalf with respect to any lawful purpose. Typically, powers of attorney are one of three types: (1) financial, in which case the power of attorney is called a "(durable) power of attorney for financial management," (2) health care, in which case the power of attorney will be contained in an "advance health care directive" or "durable power of attorney for health care," or (3) personal care, in which case the power of attorney is called a "durable power of attorney for personal care."

Financial Powers of Attorney

A power of attorney for financial management, or "financial power," may be durable or non-durable, depending upon the principal's needs. When powers of attorney are used as a tool for planning for incapacity, a durable power is necessary. Without a durable power, an agent cannot act on behalf of an incapacitated principal.

Financial powers may be very broad or very narrow, but a broad power is usually appropriate when the power of attorney is used as a tool for planning for incapacity. Even if one's estate plan is built around a revocable living trust, the trustee of the trust is limited to administering trust assets. Trustees are powerless to deal with problems arising outside the trust administration. For example, a trustee does not have the power to negotiate with the Social Security Administration, nor with the administrator of an Individual Retirement Plan or 401(k). A good estate plan will therefore contain a broad financial durable power of attorney, a document that grants the agent all the powers he or she may need to address the problems that often arise when a principal becomes incapacitated.

Health Care Powers

A durable power of attorney for health care authorizes the agent to make health care decisions on behalf of the principal should the principal become unable to make these decisions on his own or her own behalf. An agent under a durable power of attorney for health care may grant, refuse, and withdraw consent for medical procedures and may make decisions to begin, continue, increase, limit or discontinue medical care. The scope of the agent's power is determined by the language in the power of attorney form. An agent under a durable power of attorney for health care may not, however, make medical decisions for the principal if the principal is capable of making those decisions himself.

At the Law Offices of Margaret M. Hand, we recommend our clients use the durable power of attorney that is part of the Advance Health Care Directive published by the California Medical Association ("CMA"). This form allows the principal to designate an agent, to express personal health care preferences, and to indicate whether the principal wants to be an organ donor. The form is readily recognized by all health care providers in California and by many in neighboring states. Because it is easily recognized, agents may avoid unnecessary delay in an emergency situation.

Personal Care

A durable power of attorney for personal care allows the agent to make decisions about, among other things, where the principal will live, whether to hire household help, and how to provide meals, transportation and recreation for the principal. The powers for personal care may be set forth in a financial power or may be set forth in a separate document. Also, the agent for financial management may be different from the agent for personal care and/or the agent for health care. The powers for personal care are not part of the CMA form Advance Health Care Directive, however.

Be Careful!

Great care should be exercised in granting a power of attorney. Whether the power is a financial power, a power to make personal care decisions or a health care power, the decisions made by one's agent may profoundly affect one's life. An agent should be someone who is not only completely trustworthy, but one who will not impose his or her own desires upon the principal. For example, one's agent under a durable power of attorney for health care must be someone who may be trusted to do what the principal would want done if the principal were capable of acting himself.

Be careful when accepting a power of attorney, too! Especially a financial power. An agent under a durable power of attorney for financial management owes the principal a fiduciary duty, that is, a duty to manage the principal's affairs as would a prudent person. Fulfilling this duty often requires taking actions and precautions that are unnecessary when one is managing one's own affairs. An agent who breaches his or her fiduciary duty to the principal may be liable to the principal, or to the administrator of the principal's estate, for that breach. Anyone who agrees to serve as an agent under a durable power of attorney should seek legal advice about their duties to the principal.

Be particularly cautious in situations where there is a disagreement between the members of the principal's family regarding management of the principal's affairs. In such situations, an agent under a durable power of attorney may face allegations of breach of duty from unhappy family members. Even if the allegations are unfounded, an agent accused of breach of duty will nevertheless be forced to defend his or her actions, perhaps in court. A thorough understanding of one's duties as agent and a careful performance of those duties should diminish the need to mount such a defense.