

Powers of Attorney

There are several forms of Power of Attorney of which you should be aware during the estate planning process. Generally, a Power of Attorney is a document with which you will provide someone else the ability to make a decision for you and to take some act on your behalf. There are two general species of Power of Attorney: (1) Business Power of Attorneys, which allow someone to do a business transaction, such as banking, making a claim, taking out a loan, or selling real-estate held in your name and (2) Healthcare Power of Attorney, which allows someone else to make healthcare decisions for you when you are unable to do so.

The Business Power of Attorney:

This document will permit somebody else to take care of one or more business transactions for you. It can be a document that is specific to a particular item of business (“Special Power of Attorney”) or it can generally allow someone to do any business in your name (“General Power of Attorney”). A power of attorney can have a specific term of existence, with inclusive dates, or it can be for an indefinite period. Most Power of Attorney forms in California are made “durable”, which means they continue to be effective during any period during which you are not legally competent to conduct business, which is really the main reason you would want to have one.

Additionally, a Power of Attorney can be structured so it is either a “Springing” Power of Attorney or what we term a “Live” Power of Attorney. A “Springing” Power of Attorney only becomes effective when you are unable to transact business in your own name and one or two physicians have written letters attesting to your inability to do business in your own name. The physician letter requirement is somewhat cumbersome and may make this Power of Attorney rather awkward to use. On the other hand, the “Springing” Power of Attorney is far less subject to abuse, a problem which has arisen in many cases with a “Live” Power of Attorney, i.e. drug user or gambler child place second mortgage on parent’s home.

A “Live” Power of Attorney is a bit like having a loaded pistol in your bedside table – perhaps a good thing if there is a home invasion, perhaps not so good if your grandchildren decide to play cops and robbers. If the person to whom you give a “Live” Power of Attorney is trustworthy, there should not be a problem. Alternatively, there are mechanisms that would allow for the “Live” Power of Attorney to be released to the person who becomes empowered only when serious questions have arisen about your competence. For instance, you could leave a “Live” Power of Attorney with your trusted accountant, attorney or friend and instruct that it only be released if there is clear evidence that you are not legally able to proceed. The trusted individual holding the original Power of Attorney form would then need to oversee the process of releasing it to the Attorney-in-Fact, which could be a good “check and balance” approach.

Because of the risk of fraud being perpetrated with a Business Power of Attorney, many financial institutions are relatively reluctant to honor a Business Power of Attorney. We have found that a Business Power of Attorney which is more than three years old is viewed with greater suspicion than one that is more current. For this reason, we recommend that you regularly “update” your Power of Attorney by signing anew with appropriate notarization. It is probably not necessary that the form change, except for the dating, just that the dating and signatures be current. This should be done at least once every five years, preferably earlier, and particularly as an elder person becomes more “at risk” of circumstances which might require a financial Power of Attorney (dementia, extend hospitalization).

Another technique banks use to avoid fraud and facilitate their own internal recognition of a Power of Attorney is to create Power of Attorney forms to use with their own account. Major banks, such as Bank of America, Wells Fargo, and Chase, all have their own Power of Attorney form for accounts; such forms generally resemble a signature card. It is recommended that you obtain and complete the bank’s form for any significant accounts which you would want your Attorney-in-Fact to access. This does not mean you should not have an attorney-prepared Power of Attorney form to cover more general transactions, such as filing your taxes, making insurance claims, etc.

If you do not have a bank-created Power of Attorney form for a bank account, we are generally able to cause a bank to honor an attorney-prepared Power of Attorney form, but this may require contacting the bank’s legal counsel and corresponding persuasively, a process that could cost a few hundred dollars and delay matters for several days. Specifying the accounts, including the last four or five digits of an account number, can be a helpful indicia of validity, for which reason we request you provide such information for us to draft a financial Power of Attorney, i.e. Bank of America Savings Account # *****1245.

While, legally, a Power of Attorney simply authorizes another to transact business for you, it also confers fiduciary status. The attorney-in-fact is viewed as the individual you trusted and will receive attendant deference. At the same time, as a fiduciary, an attorney-in-fact can be called upon to account for his or her acts, for which reason the attorney-in-fact should be careful to keep your affairs entirely separate from his/her affairs and seek legal counsel if any possibility of self-dealing a conflict of interest arises. An attorney-in-fact can be required to provide a full accounting of the transactions s/he has performed for the principal.

Healthcare Power of Attorney:

The Durable Healthcare Power of Attorney or Advanced Health Care Directive (“AHCD”) as it is commonly known, is a form commonly used for individuals with serious health complications and who may not be competent to make their own decisions because of medication, fatigue, or dementia. The form

should be prepared while the client is healthy and competent. Our office keeps a supply of the DHCPOA forms promulgated by the California Medical Association (CMA), which we generally recommend you use since physicians are familiar with the form. Kaiser Permanente has its own form, which should be used by persons within the Kaiser health care system. Some of the other health maintenance organizations may eventually have their own forms, though we are not aware of any others at this time.

The main purpose of the DHCPOA is to empower another individual to make healthcare decisions for you. The forms generally do have choices on a few significant healthcare-related issues, including a choice between hospice care when a terminal patient might want to die gently or “life support” measures when the individual might want to try to beat the odds with by accessing medical technology or procedures such as ventilators, feeding tubes, novel medications or treatments, or high-risk surgeries. There are also choices about organ donation and donating the body to science, as well as options for you to write in other specific items to clarify your wishes as to how your Healthcare Agent might act.

Two additional forms related to healthcare are in common use in California. A Physician’s Order for Life Sustaining Treatment (“POLST”) is a form completed with your physician once a serious medical condition arises and there exist treatment options. This is not a document completed with an attorney. In fact, a physician’s signature is required for the effectiveness of the document. One can download the form from the internet, but it usually is presented and completed within the context of healthcare consultations about a serious health condition conducted by a physician. The other document is a “Do Not Resuscitate” (“DNR”), which is generally only put into effect at the time one has a quickly deteriorating illness and prefers not to be resuscitated should breathing cease. Again, this is a document typically prepared with a physician in the context of a serious health situation, not with an attorney. POLST forms themselves include a DNR, even though a DNR can be “free-standing”.

Choosing Your Attorney-in-Fact:

The choice of an Attorney-in-Fact is a very important decision. The Attorney-in-Fact/Healthcare Agent must be trustworthy and competent with respect to the business or healthcare decision that would need to be made. Generally, it is good to have somebody who is fairly local to the vicinity for a Healthcare Power of Attorney. Most married individuals choose their spouse as the first in line and a trusted child would be the number two choice, but those choices are not always available to people. Professional fiduciaries are available to manage business affairs. As for the Healthcare Power of Attorney, it is important to have somebody with whom you have a good relationship and can trust with your directions about life and death matters. A professional health care manager might be retained by a single individual who has no appropriate friend or family member available and is willing to bear the cost and undertake the process of retaining a care manager.

Some clients value the concept of a family-meeting consensus on major health care decisions, including those involving moving a person from his/her home to institutional care (Assisted Living or Nursing Home care) or life and death decisions. There is a page provided in the CMA Advanced Health Care Directive for specifying such directions or other directions, such as “no feeding tube” or “no respirator” in the event of a terminal illness.

Keeping of Documents:

How and where to keep Power of Attorney forms is a matter worthy of consideration. For your attorney to keep a fully completed and signed form on file is helpful in case someone contacts the attorney and needs to have the information. It is then in the attorney’s discretion whether the information may be released. Our office has only released the information on a few occasions, when a DHCPOA form has been sent to an emergency room so a Healthcare Agent is able to make life and death decisions at a critical moment. Beyond your attorney’s file, POA and DHCPOA forms are generally safeguarded in a locked file cabinet, home safe or even a safe deposit box, but such arrangements beg the question as to how your Attorney-in-Fact will access the document. Alternatively, a POA or AHCD might be scanned and stored “in the cloud”. As an Attorney-in-Fact should be a trusted individual, perhaps you should simply give her/him the original form or, alternatively, provide that person with a copy and information as to how to locate the original. A copy of your DHCPOA form should be given to your primary care physician and made part of your electronic medical records wherever they are maintained.

Letter of Explanation:

The legal forms discussed above provide authority and power, but may not contain a great deal of guidance as to how you would want your decision made. Generally, it is a good idea to trust somebody who you believe would be able to infer your wishes, but these are not matters for which guesswork is the best policy. Discussing your wishes, interests, how you would handle things, etc. may be a prudent thing to do. Alternatively, or in addition, you may want to prepare a note expressing some general thoughts, desires, and directions to the person who would be making the decisions, perhaps a document to be kept with the original Power of Attorney form so the person would read it at the time the original document becomes available for use.

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