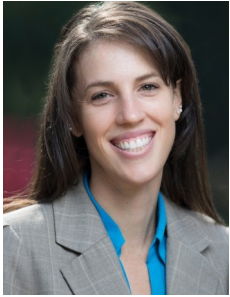


# The Power of Attorney

By: Mia Bowler

January 23, 2018



A durable power of attorney is a common part of an estate plan. However, the purpose of the power of attorney is often misunderstood.

The power of attorney names an agent to handle financial affairs for the principal. The Uniform Statutory Form comes with a number of options that the principal can check conferring authority on the agent, for example for real property transactions, banking and financial institution transactions, tax matters, and several other categories. The Uniform Statutory Form does not need to be used, and custom power of attorneys can be drafted; however, use of the Uniform Statutory Form is helpful as it provides options for the most common issues.

Naming an agent under power of attorney is a tool that can prevent a conservatorship if the principal is unable to manage her affairs.

Where an individual has a living trust in place, the power of attorney may be unnecessary if all of the assets are properly titled. But it is generally recommended to include a power of attorney in a living trust package as it is common for individuals to fail to transfer all of their assets into the trust and the agent under power of attorney can transfer assets inadvertently held outside of the trust to the trust in the event of the principal's incapacity.

A power of attorney is only effective during the life of the principal. If a power of attorney is "durable" it continues even in the event of the incapacity of a principal. An agent's authority can be effective immediately or at a later date, usually upon the incapacity of the principal. If the power of attorney is effective upon incapacity, the power of attorney must set forth the standard for determining incapacity. A default standard is not provided in the California Probate Code.

There is no affirmative duty for an agent under power of attorney to act on behalf of the principal. Thus, simply naming an agent does not mean that the agent will act and the agent has no liability for refusing to act. An agent assumes fiduciary duties to the principal only in limited circumstances. An agent is under a duty to act if he agrees in writing to act. Thus, principals should consider having their named agent agree to act in writing. An agent also is under a duty to act when the agent undertakes a transaction on behalf of the principal such that the agent is obligated to complete that transaction. Choosing an agent carefully, and naming a successor agent, is critically important. If the agent refuses to act, then the power of attorney may be of no use.

An agent who does act must do so at his own risk. Acting agents are fiduciaries and subject to scrutiny of their actions. The agent must act in the best interests of the principal and manage the assets in a manner consistent with the standard of care that would be observed by a prudent person. The agent must keep accurate records of transactions. Under certain circumstances, the agent may be required to account to the principal or others. An agent who breaches his fiduciary duties could face troubling penalties including double damages and payment of the other party's attorney fees.