

California Powers of Attorney

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This brief synopsis is to provide a basic understanding of California Power of Attorney law. It is not an exhaustive treatment of the subject. For more detailed information, obtain the counsel and assistance of an attorney by calling for an appointment.

A Power of Attorney is a legal document through which one person authorizes another person to make decisions for him or her. Generally, no person has any authority to make decisions for another adult. Not even spouses have such authority over each other. Accordingly, Powers of Attorney are important, especially if an adult loses capacity to make decisions.¹

Parties to a Power of Attorney

There are two primary parties to a Power of Attorney, the Principal and the Agent. The Principal is the person whom creates the Power of Attorney. The Agent (also sometimes known as the Attorney-in-Fact) is the person designated through the Power of Attorney to act on behalf of the Principal.

¹ If an adult loses capacity to make decisions and has no Trust or Durable Powers of Attorney in place, then a Conservatorship likely is the only mechanism through which a concerned person may gain authority to make decisions to provide care.

Purposes of Powers of Attorney

The purpose of a Power of Attorney is to confer on a person the authority to make decisions for the person that created the Power of Attorney. Powers of Attorney are important because they can facilitate financial and health care decision making for a person unable to do so due to lack of capacity.

Types of Powers of Attorney Based on When Authority Becomes Effective

There are two types of Powers of Attorney based on when the Agent's authority becomes effective:

1. Immediate Authority; and
2. Deferred Authority.

Immediate Authority: A Power of Attorney can confer authority on the Agent immediately upon execution. After execution of such a Power of Attorney the named Agent will have immediate authority to make decisions for the Principal.

Deferred Authority: Most people desire to maintain exclusive control over their affairs. Accordingly, most Principals prefer to execute a Power of Attorney that does not confer authority on the Agent until the Principal's lack of capacity. This type of Power of Attorney is often called a "springing" Power of Attorney because the Agent's authority "springs" into existence automatically when the Principal becomes incapacitated, but not before then.

Types of Powers of Attorney Based on Nature of Powers Conferred:

Powers of Attorney for Financial Management and Health Care

There are two types of Powers of Attorney based on the nature of the powers conferred on the Agent:

1. Power of Attorney for Financial Management; and
2. Power of Attorney for Health Care.

A Power of Attorney for Financial Management authorizes the designated Agent (or Attorney-in-Fact) to make financial management and asset management decisions for the Principal. Through a Power of Attorney for Financial Management, the Principal may authorize the Agent to perform, among other things, the following tasks:

1. Management of real property;
2. Management of personal property;
3. Operation of a business;
4. Management of investments; and
5. Payment of bills and debts.

A Power of Attorney for Health Care authorizes the designated Agent to make health care decisions for the Principal. Significantly, a Power of Attorney for Health Care can contain specific directions to the designated Agent regarding particular treatments that the Principal desires or does not desire. Such specific directions may pertain to, among other things, life support, coma, resuscitation, severe burns, and dementia. Through a Power of Attorney for Health Care, the designated Agent will have both the authority to make health care decisions for the Principal and clear directions regarding particular treatments that the Principal desires and does not desire. Thus, a Power of Attorney for Health Care will provide peace of mind both to the Principal and to the Agent that the Agent will carry out the desires of the Principal.

Expiration and Termination of Powers of Attorney

All Powers of Attorney expire when the Principal dies.

California law provides that all Powers of Attorney for Health Care executed between January 1, 1984, and January 1, 1992, automatically terminated seven years after the date of execution. Accordingly, anybody who executed a Power of Attorney for Health Care prior to January 1, 1992, needs to have a new replacement Power of Attorney for Health Care prepared.

Selection of Agent

The Agent possesses much authority and control over the affairs of the Principal. Accordingly, the Agent owes a fiduciary duty to the Principal, which means that the Agent owes the Principal the duty to provide the highest standard of care. An Agent owes the Principal duties to exercise care and skill in all decisions, to maintain loyalty to the Principal, to follow instructions, and to maintain the Principal's property separate from the Agent's property. Good Agents are trustworthy, possess common sense, and are willing and able to act consistent with the best interests of the Principal. Further, Agents of Powers of Attorney for Health Care must have the intellectual and emotional fortitude to carry out the Principal's desires regarding health care treatments, and they should reside geographically proximate to the Principal to ensure prompt response in case of medical emergency.

Attorney Assistance Recommended

Because of the importance of Powers of Attorney and the potential harm if not drafted appropriately with specific language, the Principal should obtain the counsel and assistance of an attorney to draft the Powers of Attorney. Similarly, the Agent should obtain the counsel and assistance of an attorney for guidance regarding carrying out the terms of the Powers of Attorney. Please call for a consultation.

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