

# **Your Guide to the Durable Power of Attorney in California**

## ***What it is and Why You Need One***



### **What is the main purpose of the Power of Attorney document?**

The primary reason to draft a Durable Power of Attorney (for finances) in California is to appoint an **agent**, called an **attorney in fact**, to act on for you (as the grantor or principal) in the event of mental incapacitation. A Durable Power of Attorney can also be used when mental incapacitation is not present, should you wish for someone else to manage financial affairs on your behalf.

### **When does a Durable Power of Attorney become effective?**

While a Power of Attorney can, in theory, become effective at any time, it is typically effective either:

**Upon incapacity** When executing a Power of Attorney earlier in life, this would be the option to choose, while your mental capacity is intact.

**or**

**Immediately** If you require someone to act immediately on your behalf (in instances of travelling abroad for long periods of time or due to illness), then this is the right option you.

**Powers Granted to an Agent or Attorney in Fact  
by a Durable Power of Attorney**

**1. Can attorneys in fact be given the power to create and revoke trusts on behalf of the grantor?**

Yes. An agent, or attorney or fact can be given the power to create or revoke trusts on behalf of the grantor, although it is generally not advisable to do so.

**2. Can an attorney in fact be granted the power to oversee all business operations?**

Yes. A Durable Power of Attorney will typically allow one to manage business operations or farm/ranch properties.

**3. Can an attorney in fact manage all investments of the grantor?**

Yes. The Principal (or grantor) can grant power to his or her attorney in fact (agent) to manage all investments.

**4. Can an attorney in fact manage and sign for all government benefits of the grantor?**

Yes. An attorney in fact may manage all government benefits for the principal, including signing documents on their behalf. This applies to social security benefits, Medi-Cal and other government programs.

**5. Can an attorney in fact manage retirement accounts for the grantor?**

Yes. The agent, or attorney in fact appointed by a Power of Attorney can manage retirement accounts for the grantor (principal).

## **6. Can an attorney in fact manage 529 (College fund accounts)?**

Yes. An attorney in fact can manage college accounts for children on behalf of the grantor.

## **7. Can an attorney in fact manage all beneficiary transactions related to an estate, trust, or other?**

Yes. An attorney in fact is generally given the power to manage duties related to an estate or trust on behalf of the principal. However, an attorney in fact is not given the ability to make changes to the principal's trust or estate plan, or revoke any part of a will or trust.

## **8. Is the attorney in fact typically given the power to manage all personal and family maintenance costs of the principal?**

Yes. Most Durable Power of Attorney documents contain a provision that generally gives the attorney in fact authority to perform all acts necessary to maintain the customary standard of living of the principal, the principal's spouse and children, and other dependents, including providing for their medical care.

## **9. Is maintaining the principal's pets one of the authorities that can be conveyed upon the agent or attorney-in-fact?**

Yes. A Power of Attorney can be used to appoint someone to manage aspects of family life, such as providing appropriate funds for children or pets.

## **10. Can an attorney in fact give financial gifts to themselves if authorized by the document?**

Yes. An attorney in fact can be paid for their services and/or give themselves financial gifts. In most cases, if the principal wishes this to occur, he or she should

set out the guidelines in a very specific manner in order that the attorney in fact is not held liable for mismanaging funds later.

### **11. What are financial gifts to an attorney in fact subject to, if not spelled out specifically?**

California probate law limits gifts to the attorney in fact to “an ascertainable standard.” This is not extremely specific, and therefore attorneys-in-fact should act with utmost caution when proceeding with gifts to themselves.

### **12. What years are the tax powers typically in place for an attorney in fact?**

They are in place any tax year for which the statute of limitations has not run and for the tax year in which the durable power of attorney was executed, *and* all subsequent tax years.

## **Liability of an Attorney in Fact**

### **1. Can an attorney in fact be held responsible for actions taken and not taken in good faith?**

No. Generally, if an agent takes an action or refrains from taking an action *in good faith*, he or she cannot be held liable by a Court of Law. However, agents should be careful with regards to their conduct, as any action or inaction that is perceived to be in bad faith by another party may result in a lawsuit.

**California Probate Code** does say that an attorney in fact who demonstrates “*Gross Negligence*” or “*Willful Misconduct*” can be held responsible in a court of law.

### **2. Under California Probate Code, is an attorney in fact eligible for compensation?**

Yes. When the grantor draws up the Power of Attorney document, he or she can select whether or not to pay their agent, and how much. In most cases, the grantor will either waive compensation or select that payment be “reasonable.” However, when choosing to appoint a professional fiduciary as agent, they may also select to pay that person at the going hourly rate.

### **3. Can a Power of Attorney specifically bar someone from petitioning the court with regards to the power of attorney?**

Yes. For example, if there is an individual that the principal believes is untrustworthy or dishonest, the principal might choose to explicitly state that that person is barred from petitioning the court with regards to their power of attorney. Unfortunately, when a lawsuit does arise regarding a Power of Attorney, there usually was no way the principal could have foreseen it.

### **4. Is it possible to create a DPOA (durable power of attorney) that applies only to the management of specific property?**

Yes. A Durable Power of Attorney can be executed for the management of specific property, including real estate, investment accounts, bank accounts or other forms of property. This is generally called a “Specific Property form.”

### **5. What happens if an agent has difficulty using the Power of Attorney?**

An agent can file a petition with the Probate Court (located in Martinez for Contra Costa County, and Berkeley for Alameda County) asking for confirmation of the Power of Attorney. The probate court can also order institutions like Banks to honor the authority of the agents.

#### **Is it ever too late to execute a Power of Attorney?**

**YES.** It is safest to execute a Durable Power of Attorney before you turn 65. Under California law, individuals 65 years and older are considered

vulnerable to elder abuse. “Financial Elder Abuse” is strikingly common, and cases frequently involve a Power of Attorney that was drawn up late in life.

If there is any question about a person’s mental capacity (memory loss, early stage dementia), they **cannot sign** a Power of Attorney. At this point, it is necessary to obtain a [Conservatorship](#). A Conservatorship essentially mirrors the Power of Attorney, but it is overseen by the Court. While an experienced Elder Law attorney can make the process of obtaining a Conservatorship relatively smooth, it is considerably more expensive and time consuming than a Power of Attorney. Thus, nearly everyone will benefit from executing a Power of Attorney during adulthood.

If you have further questions about the Durable Power of Attorney in California, visit [What is a Power of Attorney?](#) Or call my [SF East Bay Estate Planning Law Office](#) at 925-322-1795 to set up a complimentary consultation.