

What Is A Power of Attorney

An important part of lifetime planning is the Power of Attorney (POA). A POA is accepted in all states, but the rules and requirements differ from state to state. A POA gives one or more persons the power to act on your behalf as your agent. The power may be limited to a particular activity, such as closing the sale of your home, or be general in its application. The power may give temporary or permanent authority to act on your behalf. The power may take effect immediately, or only upon the occurrence of a future event, usually a determination that you are unable to act for yourself due to mental or physical disability. The latter is called a "springing" POA. A POA may be revoked, but most states require written notice of revocation to the person named to act for you. The person named in a POA to act on your behalf is commonly referred to as your agent or attorney-in-fact.

With a valid POA, your agent can take any action permitted in the document. Often your agent must present the actual document to invoke the power. For example, if another person is acting on your behalf to sell an automobile, the motor vehicles department generally will require that the POA be presented before your agent's authority to sign the title will be honored. Similarly, an agent who signs documents to buy or sell real property on your behalf must present the POA to the title company. Similarly, the agent has to present the POA to a broker or banker to effect the sale of securities or opening and closing bank accounts. However, your agent generally should not need to present the POA when signing checks for you. Why would anyone give such sweeping authority to another person? One answer is convenience. If you are buying or selling assets and do not wish to appear in person to close the transaction, you may take advantage of a POA. Another important reason to use POA is to prepare for situations when you may not be able to act on your own behalf due to absence or incapacity. Such a disability may be temporary, for example, due to travel, accident, or illness, or it may be permanent.

If you do not have a POA and become unable to manage your personal or business affairs, it may become necessary for a court to appoint one or more people to act for you. People appointed in this manner are referred to as guardians, conservators, or committees, depending upon your local state law. If a court proceeding, sometimes known as intervention, is needed, you may not have the ability to choose the person who will act for you. Few people want to be subject to a public proceeding in this manner so being proactive to create the appropriate document to avoid this is important. A POA allows you to choose who will act for you and defines his or her authority and its limits, if any. In some instances, greater security against having a guardianship imposed on you may be achieved by you also creating a revocable living trust.

Who Should Be Your Agent?

You may wish to choose a family member to act on your behalf. Many people name their spouses or one or more children. In naming more than one person to act as agent at the same time, be alert to the possibility that all may not be available to act when needed, or they may not agree. The designation of co-agents should indicate whether you wish to have the majority act in the absence of full availability and agreement. Regardless of whether you name co-agents, you should always name one or more successor agents to address the possibility that the person you name as agent may be unavailable or unable to act when the time comes. There are no special qualifications necessary for someone to act as an agent except that the person must not be a minor or otherwise incapacitated. The best choice is someone you trust. Integrity, not financial acumen, is often the most important trait of a potential agent.

How The Agent Should Sign?

Assume Michael Douglas appoints his wife, Catherine Zeta-Jones, as his agent in a written POA. Catherine, as agent, must sign as follows: Michael Douglas, by Catherine Zeta-Jones under POA or Catherine Zeta-Jones, agent for Michael Douglas. If you are ever called upon to take action as someone's agent, you should consult an attorney about actions you can and cannot take and whether there are any precautionary steps you should take to minimize the likelihood of someone challenging your actions. This is especially important if you take actions that directly or indirectly benefit you personally.

What If I Move?

Generally, a valid POA when signed will remain valid even if you move. Although it should not be necessary to sign a new POA merely because you have moved to a new state, it is a good idea to take the opportunity to update your POA. The update ideally should be part of a review and update of your overall estate plan to be sure that nuances of the new state law (and any other changes in circumstances that have occurred since your existing documents were signed) are addressed.

What Kinds of Powers Should I Give My Agent?

In addition to managing your day-to-day financial affairs, your agent can take steps to implement your estate plan. Although an agent cannot revise your will on your behalf, some jurisdictions permit an agent to create or amend trusts for you during your lifetime, or to transfer your assets to trusts you created. Even without amending your will or creating trusts, an agent can affect the outcome of how your assets are distributed by changing the ownership (title) to assets. It is prudent to include in the POA a clear statement of whether you wish your agent to have these powers.

Gifts are an important tool for many estate plans, and your agent can make gifts on your behalf, subject to guidelines that you set forth in your POA. For example, you may wish to permit your agent to make "annual exclusion" gifts (up to \$14K in value per recipient per year in 2016) on your behalf to your children and grandchildren. It is important that the lawyer who prepares your POA draft the document in a way that does not expose your agent to unintended estate tax consequences. While some states permit agents to make gifts as a matter of statute, others require explicit authorization in the POA. If you have older documents you should review them with your attorney. Because of the high estate tax exemption (\$5M inflation adjusted) many people who had given agents the right to make gifts may no longer wish to include this power.

Others, however, in order to empower their agent to minimize state estate tax might continue or add such a power. Finally, there may be reasons not to limit the gifts your agent may make to annual exclusion gifts in order to facilitate MediCal planning or to minimize or avoid state estate tax beyond what annual exclusion gifts alone might permit. In addition to the power of your agent to make gifts on your behalf, many powers of your agent are governed by state law. Generally, the law of the state in which you reside at the time you sign a POA will govern the powers and actions of your agent under that document. If you own real estate, such as a vacation home, or valuable personal property, such as collectibles, in a second state, you should check with an attorney to make sure that your POA properly covers such property.

Will My POA Expire?

Some states used to require the renewal of a POA for continuing validity. Today, most states permit a "durable" POA that remains valid once signed until you die or revoke the document. You should periodically meet with your lawyer, however, to revisit your POA and consider whether your choice of agent still meets your needs and learn whether developments in state law affect your POA. Some powers of attorney expressly include termination dates to minimize the risk of former friends or spouses continuing to serve as agents. It is vital that you review the continued effectiveness of your documents periodically.