

# Powers of Attorney for Finances

# Fiduciary Positions in an Estate Plan

## Document

## Fiduciary Position

## Who?

Durable Power of Attorney

Agent or Attorney in Fact

?? (2 to 3 people)

Advance Health Care Directive

Agent

?? (2 to 4 people)

Will

Executor / Executrix /  
Administrator / Personal  
Representative

?? (2 to 3 people)

Living Trust

Successor Trustee

?? (3 people or trust co)

---

Conservatorship

---

Conservator

---

?? (nominate 1 in AHCD)

# Types of Financial Powers of Attorney

- Durable, General, and Limited
  - “Durable” POA means that the powers will remain through the incapacity of the principal
  - “General” POA means that the powers will NOT remain through the incapacity of the principal (unless it says it is durable)
  - “Limited” POA gives the attorney-in-fact a specific task that is limited in scope and/or duration

# Types of Financial Powers of Attorney

## ➤ Springing POA vs. Immediate POA

- Springing POA has a “springing” event that has to happen before the attorney-in-fact can act on behalf of the principal – ex. 2 letters from 2 doctors, family health council
- Immediate POA give the attorney-in-fact immediate authority as soon as the document is signed to act on behalf of the principal

# Myths

- The attorney-in-fact's powers continue after death of the principal
- The appointment of a conservator supersedes a POA
- The POA is not operative if someone becomes incapacitated
- The POA is only operative if someone becomes incapacitated

# California's POA Law

- California POA statutes are contained at Probate code 4000 *et seq*
- Applies to ALL POA's including California's statutory form POA
- California recognizes other POAs executed in other jurisdictions if valid in that jurisdiction

# Duties of the Attorney-in-Fact

- Act loyally in the principal's best interest
- Avoid conflict of interest
- Keep the principal's property separate, identified, and distinct from other property in a manner adequate to clearly identify the property belonging to the principal
- Act with care, competence, and diligence ordinarily exercised by attorney-in-facts in similar circumstances
- Maintain regular contact and communications with the principal
- Follow the principal's instructions unless a court authorizes the attorney-in-fact to do otherwise

# Duties of the Attorney-in-Fact

- Keep a record of all receipts, disbursements, and transactions made on behalf of the principal
- An attorney-in-fact must disclose their records of receipts, disbursements, and transactions made on behalf of the principal upon request by the principal, request by another fiduciary acting for the principal (ex – conservator, trustee), court order, or after the principal's death, upon request by the personal representative or successor-in-interest of the principal's estate



# Attorney-in-Fact's Powers

- Asset categories over which the Probate Code sets forth general powers
  - Real estate
  - Tangible personal property
  - Stocks and bonds
  - Commodities and options
  - Dealings with banks other financial institutions
  - Operation of an entity or business
  - Insurance and annuities
  - Estates, trusts, and other beneficial interests
  - Claims and litigation
  - Personal and family maintenance
  - Benefits from governmental programs or military service
  - Retirement plans
  - Taxes

\*\*The CA probate code provides scope of authority for each of the above unless restricted or expanded by the terms of the POA \*\*

# Attorney-in-Fact's Power

- These powers are only exercisable if specifically granted:
  - Create, amend, revoke, modify, or terminate a trust
  - Make or revoke a gift
  - Create or change rights of survivorship
  - Create or change a beneficiary designation
  - Loans to themselves

California law does not generally authorize the attorney-in-fact to access electronic communications, but California has enacted the CA Uniform Fiduciary Access to Digital Assets Act

# Conservatorships

- If a court appoints a conservator of the principal's estate, the attorney-in-fact becomes accountable to the conservator as well as the principal
- The conservator as legal representative may revoke an attorney-in-fact's authority under a POA with court authority
- The court can suspend or terminate the POA as part of the conservatorship proceedings

# Attorney-in-Fact's Compensation

- An attorney-in-fact is entitled to reasonable compensation unless the document provides otherwise
- An attorney-in-fact is entitled to reimbursement for expenses reasonably incurred on behalf of the principal

# Rights of the Principal

- May limit, expand, or alter the scope of virtually any power
- May identify the date or future contingency when the POA becomes operative or the date/contingency for its termination
- May identify a specific person (or persons) to determine whether the future contingency has occurred for when POA becomes operative or terminates

# Rights of the Principal

- Principal may NOT limit or alter the following:
  - Qualifications of witnesses
  - Qualifications of the attorney-in-fact
  - Protection of third parties from liability
  - Execution formalities
  - Warnings or notices required to be included in a POA

# Termination of POA

- Revocation by principal
  - Execution of new POA does NOT automatically revoke a prior one
  - If principal grants inconsistent authority to multiple attorneys-in-fact, the most recent grant controls
- Upon Principal's death
- Upon attorney-in-fact's death, incapacity, removal or resignation
- Dissolution or annulment of attorney-in-fact's marriage to principal
- The purposes of the POA have been fulfilled

# Third Parties

- Third parties may ask for POA regarding authority and scope of powers
  - If presented, third party must honor POA
  - In practice, third party may accept or reject authority under POA
  - If third party was required to honor POA and refuses, may be liable for fees and costs of attorney-in-fact incurred in connection with that matter
  
- Third Party may require the attorney-in-fact to provide any of the following information:
  - Identification
  - Examples of the principal's signature
  - Permanent residence address of the principal
  - Any other information reasonably necessary or appropriate to identify principal and attorney-in-fact and facilitate the actions of the third party in transacting with attorney-in-fact



# Liability of the Attorney-in-Fact

- Not liable for a predecessor's breach of fiduciary duty
- Attorney-in-fact is liable for the full amount of damages caused by any breach of fiduciary duty
- Damages include: loss or depreciation in value of the principal's property (with interest), profits made by the attorney-in-fact (with interest), and/or profit that would have accrued to the principal but for the breach.
- Probate Code allows for relief of liability when an attorney-in-fact has taken reasonable actions in good faith – at court's discretion
- Double damages can be imposed if the attorney-in-fact acted in bad faith. Attorney fees can be awarded against the attorney-in-fact as well.

# Selecting an Attorney-in-Fact

- Time
- Desire
- Proximity
- Organized
- Communicative
- Dedicated

# Drafting Tips

- Evaluate your estate plan to determine if any additional powers are desired or needed beyond the statutory powers
- Evaluate your estate plan to determine if any powers need to be restricted
- Be realistic about disputes among your children and how it will determine how effective your attorney-in-fact will be
- Bring these issues up with your drafting attorney