

POWERS OF ATTORNEY ARE THE IMPLEMENTATION OF YOUR PLAN

What is a Power of Attorney?

A Power of Attorney is a document that confers important powers from one person (the “Principal”) to another person (the “Agent”).

It can be effective right away (“immediate”) or at a future date (“springing”), and it can expire at some future date or be effective as long as the principal is living (“durable”).

A Power of Attorney permits the agent to perform a wide range of actions on behalf of the principal. Often, the intent is to confer the maximum authority allowable. The agent is authorized to do nearly everything that the principal could personally do for himself. In some cases, an agent might prefer a limited set of options.

For example, consider this:

DeShalle wanted to sell her house in Michigan now that she had moved down to North Carolina with her family. But, she wasn't able to travel well when her arthritis acted up. She needed a way to let her cousin in Farmington sell the house without her being present.

DeShalle asked an attorney to draw up a limited Power of Attorney that gave her cousin the right to act as her “agent” and sell the house for her. The cousin could only sell the house and transfer the funds to her bank account. The power he had as her Agent expired once the sale was completed.

She also had her daughter listed as her agent under a durable general power of attorney in North Carolina. Her daughter could not act until DeShalle lost capacity to act for herself, but once that happened, DeShalle would receive the financial help she needed to manage her affairs.

In this case, DeShalle had two different powers of attorney in operation at the same time but with different powers, limits, and durations.

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from one person to another person.

Are There Different Kinds of Powers of Attorney?

Attorneys usually work with two kinds of powers of attorney: financial, and health-care. Financial powers of attorney deal with banking and money issues. Medical or health-care powers deal with care issues, medications, admissions and so on.

The following are some key characteristics of all powers of attorney.

- A Power of Attorney (Power of Attorney) can be general, granting “all” powers defined in North Carolina statutes, whether for health care or financial concerns.
- A Power of Attorney can also be a specific power that authorizes the agent to act for a specific purpose. Some Power of Attorney documents have time limits.
- A “durable” power means it continues to allow the agent to act even if the principal cannot make decisions for himself.
- “Immediate” powers means the powers take effect immediately when signed; “Springing” power means they take effect when the principal loses capacity.

A third kind of Power of Attorney is the “Living Will” or as it is more correctly named, the “Advance Directive.”

The Advance Directive document also gives instructions in advance to medical professionals as to how you wish to be treated at the end of your life.

Related to this is the “DNR,” or Do Not Resuscitate order, which will instruct doctors and EMTs to limit their efforts to revive you if your heart or breathing stop. Lawyers cannot provide this form because it must be prepared with your primary care physician and reviewed by your medical people.

In Elder Law, the most common forms of Powers of Attorney are financial and health-care.

Is there much difference between Financial and Medical Powers?

Yes, they are very different documents with different powers.

A **financial** Power of Attorney grants financial powers. These usually include typical transactions such as banking and investments, buying and selling of property, or gifting to others. Some additional powers are often important for our clients, such as the ability to create and fund trusts.

A **medical** (or “health care”) Power of Attorney grants decision-making powers related to medical care. It is a document that allows a designated person (a “health care agent”) to make medical decisions for an individual if he or she is unable to make such decisions for him/herself.

Carole had a family history of early onset dementia. She wanted her husband to make financial decisions for her if she ever had capacity problems. She had an attorney complete a durable financial power of attorney and record it in the county in which they lived.

When Carole had an unexpected stroke, her husband was able to take care of her IRA, make reasonable stock trades, and keep her small business bank accounts and credit cards in order.

At the same time, Carole knew that her husband would be unable to make the kinds of medical decisions she wanted. He was too emotional to think straight when his wife was ill ... that was obvious when the babies were born. So, she asked her sister to be her agent under a Medical power of attorney. She knew she could trust her sister to make the difficult decisions Carole would need made for hospitalization and at her end of life.

Carole and her husband planned for one event, and were surprised by a different one. But, because their plan was in place, it was easy to adapt.

Some people ask how extensive these powers are in practice. The agent cannot actually perform medical *procedures*, but are able only to help the principal make decisions for themselves.

In addition to making medical decisions, a Power of Attorney also permits the agent to decide where the principal will live or recuperate if needed.

*A **financial** power of attorney grants financial powers, such as banking or selling property.*

Do I lose the right to make decisions once I sign a Power of Attorney or once the agent has been activated?

Yes and no. Under an “Immediate” Power of Attorney, the principal retains all decision-making power. But, even after a Power of Attorney is operative due to incapacity, the principal sometimes can still act for himself or herself. This could depend on what powers have been granted and what decisions the principal wants to make.

The Principal and the Agent have “concurrent authority” to act on behalf of the principal. So, as long as the principal CAN make decisions, they are allowed to. This can be to make independent decisions, or it can be with the help of the Agent.

Under a “springing” power of attorney, the agent does not have any power to act UNTIL the principal is deemed to lack capacity. That usually means that a doctor or a court decides that the principal lacks capacity to act on her own behalf, which allows the agent to take over responsibilities.

Generally, the Principal and the Agent have “concurrent authority” to act on behalf of the principal.

However, the principal DOES lose the right to make decisions if a **guardianship** of the estate is imposed and supervised by the court. In that case, the “ward” (the principal

who is now under the guardianship) will no longer be able to act for themselves.

LuAnn had increasing trouble with remembering facts, and that kept her from working, so she quit her six-figure consulting job. Eventually, she developed aphasia (inability to select the right words to say), and was diagnosed with semantic dementia. She was only 40. Her husband, Robert, never had a power to act for her because it just seemed too soon to worry about planning.

Robert had to pursue a guardianship, at a cost of almost \$5,000 to gain control over his wife's IRA and bank accounts so they could sell enough to cover the medical bills. They could have avoided this by a simple Financial Power of Attorney.

And, if the principal is making bad decisions (or none) and has been deemed to lack capacity, then the principal will not be able to make decisions on his or her own **until** he or she regains capacity.

Susie denied that she had any trouble with her memory, but her daughter could tell. When she stopped caring for her own basic hygiene, Susie needed real help. She moved to an assisted living facility in North Carolina, but was an elopement risk (she didn't stay at the facility, choosing to go "places" without knowing how to go or return). When she called for an Uber driver to take her "home" to Florida, her daughter invoked the agency granted under the properly recorded power of attorney, and had Susie moved to memory care to control her elopement risk.

Susie was safe and secure, and was properly cared for by her daughter and the staff. Although she didn't like it, it was exactly what she planned for when she gave her daughter the right to make medical and financial decisions for her after she lost capacity.

Regaining capacity may be as simple as recovering from the stroke, or being cleared by a doctor to have capacity to make decisions.

Carl had set up a power of attorney with his brother acting as agent. Carl had a stroke, and was unable to make decisions. His brother acted for him for six months, and when Carl had recovered enough, he was able to retake control over his finances.

I have Alzheimer's dementia. Can I still sign a Power of Attorney?

It depends. An early diagnosis is not a limitation on your capacity. Many of our elder clients have Alzheimer's, and are perfectly capable of making decisions. But, it is a progressive disease, and sadly, your capacity for making decisions will decline.

If you are asking that question, you are probably sufficiently capable of making most decisions. But, if you are asking that as the caregiver for a person with Alzheimer's ... well, that is when we have to rely on our assessment, or on a finding of capacity (or not) by a doctor.

Life and planning for eventualities is a process; whatever diagnosis or illness you have, planning is essential. And, capacity varies from day-to-day, so, it is always a good idea to plan.

You never really know exactly when you will need the plan.

Planning is a process.
