

# POWERS OF ATTORNEY

WHAT YOU NEED TO KNOW

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Need To Know"* Webinar.

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A Guide To Understanding Its  
Use And Purpose

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# INTRODUCTION

We are in an interesting world right now with everything that we're facing with stay-at-home orders, stock market going rollercoaster up and down, people really questioning do they have the right estate plan in order. We have been fielding a lot of questions about estate planning and it reminds me of when I was renovating my house.

I have an old home built in 1878. It's over 140 years old. We were doing renovations, I thought I had a great plan until it really got challenged unexpectedly. We started some demolition, and when you start to peel back the layers to the onion, you don't know how far it goes.

As I revealed more and more of the home, I moved from confidence in my plan to uncertainty. Thankfully, I was working with a great architect and engineer. Each was a professional who understood my goals of creating a "forever" home where I could also welcome an aging parent...or two.

*Because I worked with professionals who could guide me on my paths - I was able to move from uncertainty to **complete confidence.***

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And...if you're wondering...the house turned out fantastic. Even the aging parents like staying...maybe a little too much..

In this guide, I am going to focus on one element of a great estate plan.: power of attorney. If by the end of this, you are confident you have the right power of attorney - GREAT! If you're not sure or you want more information, schedule a free 15 minute consultation with us.

# WHAT IS A POWER OF ATTORNEY?

## What Is a Power of Attorney?

In the strictest definition, a power of attorney is a legal document that gives someone the ability to make decisions for another person. So essentially, what you're doing is you're basically appointing somebody, is this legal document, appointing somebody to make decisions for you and based on what ever rules you put in there. It results in appointing a fiduciary as an agent. What that means is that person has to put their best interests ahead of your own. And it is the alternative to a guardianship or a conservatorship. So the idea here is that if you have a power of attorney, you avoid a guardianship.

A yellow speech bubble with a black outline, containing the word "Why?" in a bold, black, sans-serif font.

## What Are Guardianships & Why Are They Needed?

A guardianship is a legal proceeding that you go through when your power of attorney that fails, or you don't have a power of attorney. You need to go through a mini lawsuit to appoint somebody to make decisions for you.

*If you have a great estate plan, one that works when you need it,  
you can avoid a guardianship.*

## How Does A Guardianship Work?

During this mini-lawsuit, your spouse or children hire a lawyer to help convince a court that you have lost capacity to make your own decisions, and that your legal right should be stripped away, and given to that spouse or child. The court appoints a lawyer to you who charges your estate hourly to represent you. Their job is to review your finances, review your medical records, interview you (to see if you really have lost your decision-making ability), and finally interview your proposed guardian. Meanwhile two doctors have to **file affidavits** about your mental capacity, for which they are typically paid.

In all, the process can cost more than \$10,000 and take 3 to 4 months. In the end, the judge - not you - makes the final decisions about who is in charge and that person has to post a bond equal to 1% of your estate every year as long as you need a guardian. Using a power of attorney is one of the ways we can avoid all this,

# CAPACITY

## Which Document Requires The Highest Level of Ability To Make Your Own Decisions?

There are different levels of capacity for different kinds of estate planning documents. So if we start to break down each one of these things, we've got a financial power of attorney, a healthcare power of attorney, a last will and testament.

Last Will & Testament

Healthcare Power of Attorney

Financial Power of Attorney

Lower



Higher

Level of Capacity

The financial power of attorney requires the most capacity. And the reason for that is that it is the highest level of fiduciary relationship. With the financial power of attorney, you're basically telling someone, stand in my shoes and do the things that I can do. With the healthcare power of attorney, you really just have to know what kind of healthcare decisions you want, you don't need to know much more than that. Finally with the last will and testament the only thing you need to know there is what do you own and who you want to give it to. So you don't need to know what year it is, you don't need to know all that kind of stuff. But just remember that the financial power of attorney requires the highest capacity.

# WHAT MAKES A GREAT POWER OF ATTORNEY

## Broad Provisions

**MISCONCEPTION  
BUST!**

In my office I often see people come in with a one or two page general, basic, power of attorney that just says, "I confer all authority." This is ***not an effective*** power of attorney. What we need, is specific provisions for all the powers we want the agent to have.

You want to include banking provisions, real estate, creating trusts, applying for government benefits, life insurance; basically everything that you think you may want to do. For that reason, the power of attorney we give clients is a lot longer than the ones that you might download from the Internet. The reason we make them so over inclusive is because if you later become incapacitated, you can't sign a new power of attorney. So, if we are missing one of those important provisions, it's too late to sign a longer power of attorney.

## Proper Execution

Powers of attorney need to be signed a certain way to be valid in New Jersey. There are all kinds of rules about the number of witnesses, and whether you need a notary. During the COVID-19 crisis, there were even special rules for signing with a remote notary.

***But what if we want to use the power of attorney outside of New Jersey?*** There are formalities that exist pretty much everywhere so it's important to sign them in a way where they will be honored no matter where you use it. The best practice is to sign with two witnesses and a notary. It's sort of like a belt, and suspenders, *and* a rope. This helps us make sure that no matter where you go to use the power of attorney, it meets the execution standards that are generally required just about anywhere.

# POWER OF ATTORNEY NUTS + BOLTS

## How Does a Power of Attorney Work?

To use a power of attorney, you present it to the person or the institution that's holding assets or where you want to conduct your activity. If you want to hire a lawyer to help you and you were incapacitated, your agent, could use a power of attorney to do that. If you needed to manage money, move money around, pay bills, or do some asset protection, (if you became incapacitated and you were facing sort of an assisted living facility or a nursing home), then you would need to give the power of attorney to every entity involved with that kind of planning.

It's at the time you present it that you learn whether it is effective or not. That would be a tough time to find out that you have a power of attorney that doesn't work. There are no laws or regulation that standardizes whether a private institution or person needs to honor your power of attorney. New Jersey, for instance, doesn't publish a form and say, "*If you follow this form, then it will be effective.*" That's why sometimes you get a power of attorney that is 26 pages, sometimes you get ones that are three pages.

## What's The Difference Between an Immediate & Springing Power of Attorney?

An immediate power of attorney is one that is immediately effective when you sign it. That means that that person you assign to be your agent can do so the moment you sign the document. A springing power of attorney, though, is the opposite. It does not become not effective until you are incapacitated.

You have to weigh which one would be better for your situation. An immediate power of attorney reduces the chances that the document is rejected because you do not meet the test of incapacity. However, a springing power of attorney makes it so someone isn't running around with a blank check to your life. There's no one size fits all.

**A Springing  
Power of Attorney  
is effective only  
when you become  
incapacitated**