

PURPOSE AND SCOPE OF A FINANCIAL POWER OF ATTORNEY

A financial power of attorney serves several key functions. The first is to designate an attorney-in-fact who can handle financial and legal matters for you. The power of attorney can be durable, which takes effect immediately and survives your disability or the power of attorney can spring into existence upon your incapacity. A springing power of attorney always raises the issue of how to define incapacity and whether your situation satisfies the definition.

Many states have adopted some form of the Uniform Power of Attorney Act.

The Uniform Act provides a statutory form of a power of attorney. Such form can be useful in a pinch, but we often see the forms get used in a way that reflect a lack of understanding of some provisions. As a result, we recommend working with an attorney to create your power of attorney. Vandennack Weaver seeks to make this cost effective for clients by providing the ability to engage in the process online.

Financial powers of attorney can be valuable tools in a variety of ways. If you become incapacitated, an expensive, public and possibly contested conservatorship can be avoided. You will have someone that you chose designated to handle financial and legal matters if you cannot.

If your estate plan is in flux or you want someone to be able to make a change, an attorney-in-fact can be provided powers that will allow the attorney-in-fact to implement your testamentary plan if you become incapacitated. An attorney-in-fact can be provided the authority to create a trust for the principal, to transfer assets to the trust and to change beneficiary designations, to terminate joint tenancies and to disclaim inheritances.

If your financial power of attorney is more than five years old, the document should be updated. If you have no financial power of attorney, one should be put in place. This is less urgent if you have a fully funded revocable trust that has a successor trustee.

Consider the following:

- Is your power of attorney current?
- Are you comfortable with your attorney-in-fact?
- Should you add or change a successor?

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- Should there be co attorneys-in-fact? (I used to prefer the simplicity of one attorney-in-fact until I had to tell a 91-year old woman that her son, as attorney-in-fact, had spent all of her funds and she was going to be evicted from her assisted living facility. I now prefer co-attorneys-in-fact with the ability to delegate to the other or a professional with integrity, insurance, and a high level of awareness and concern about fiduciary liability).
- What powers should the attorney-in-fact have? If you are concerned about an attorney-in-fact having too much power, you can have more than one power of attorney and provide different authority to different attorneys-in-fact. While I used to favor limiting authority in powers of attorney, I have concluded that it is likely you may want to have someone who can take actions to implement testamentary intentions or consider law changes. This can be done effectively and protectively by using more than one attorney-in-fact or additional powers of attorney that have more limits on certain broad powers.
- Will the attorney-in-fact be allowed to make gifts? Consider the specifics of who gifts can be made to and whether they should be equal among classes of gift recipients. If the attorney-in-fact is also a gift recipient, designate someone else to authorize any gifts to the attorney-in-fact.

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