



General Information and FAQs on Power of Attorney, Financial - Learn the Who, What, When, Where, and Why!

General Information

The same individual fulfills three roles.

Power of Attorney, Executor, and Trustee. Let's look at why this is standard practice and is automated within Encore's software and some considerations for those requesting an alternative.

Why would the same individual fulfill so many roles?

A Successor Trustee/Executor/Power of Attorney is the person who would control your finances and the administration of your estate if you cannot due to your death, mental incapacity, or voluntary resignation. Generally, you will use the same individual to maintain consistency and avoid unnecessary complications.

Referring to a Trust-Based Estate Plan

Who

- Trustor- the creator of the trust.
- Trustee- the individual managing the trust's assets.
- Successor- next in line to fulfill a specific role within your estate plan.

What and When

- The Trustee is in charge of the trust's assets during your lifetime and after your passing.
- The Executor is in charge of any non-trust assets (personal assets) after your death (covered in your pour-over will), and
- The Power of Attorney is in charge of your personal assets during your lifetime if you are unable to do so yourself/incapacitated. Their authority ends when you pass. Some states differ, and this power is immediate vs springing.

Referring to a Will-Based Estate Plan

Who

Grantor- the creator of the will.

Executor- the individual managing your personal assets.

Successor- next in line to fulfill a specific role within your estate plan.

What and When

- The Grantor is in charge of their personal assets during their lifetime.
- The Executor is in charge of any personal assets after your death.
- The Power of Attorney is in charge of your personal assets during your lifetime. Their authority ends when you pass. Some states differ, and this power is immediate vs springing.

Asking multiple people to fulfill these roles can be a nightmare.

Imagine this- You have a trust-based estate plan, your brother is your power of attorney - financial, your sister is your successor trustee, and your cousin is the executor. Unfortunately, you were in an accident last month and are currently incapacitated. Your brother is currently serving as your financial power of attorney and just finished deciphering and organizing what bills and policies need to be paid. He also just finished providing the documentation these companies required for him to access your accounts. Sadly, you passed away today. Now, your sister steps in to act as the trustee. She will now need to repeat the process your brother just completed. Uh-oh, she and your brother also have different investment philosophies. She is unhappy with some of his decisions... Your cousin also has some ideas of his own!

The list of possible complications compounds further as you involve more and more people. Unless you have specific circumstances warranting the need for multiple individuals to fulfill these roles, it is generally best for the same person to fill them.

Potential Complications for Married Couples

What if you're married/in a domestic partnership, and you want different people fulfilling the roles within your estate plan?

There are several common complications that arise with this decision. We're not saying this isn't the best choice for you and your spouse. We're simply saying is usually NOT the best option FOR MOST married couples.

Imagine this: your spouse is incapacitated, and their sibling is acting as their financial power of attorney while you are living. If you were not selected as their initial Power of Attorney, what assets are they supposed to manage? What bills are they supposed to pay? Why go through the hassle when someone familiar with the family finances is still capable of doing so?

Now, the inevitable curve ball. You and your spouse have both passed away. You now have two separate executors trying to manage assets. Which, if there are minor children, may require them to work together for a long period of time. Possibly several decades. Will beneficiaries need to visit two trustees with requests, questions, and concerns? Will they use separate financial advisors?

The list of possible complications compounds further as you involve more and more people. Unless you have specific circumstances warranting the need for individual trusts and differing individuals to fulfill these roles, it is generally best for the same person to fill the roles within a couple's estate plan.

Some examples that might warrant a need for differing individuals.

- You will or have received a significant inheritance.
- Your spouse has addiction or spendthrift issues.
- You have individual assets of moderate to significant value and have children from a previous marriage.
- You have a real need for individual trusts and different individuals to fulfill these roles.

Who would be a good trustee/executor/power of attorney?

Most people ask someone who is financially responsible, would handle finances similarly to them, and is generally a good decision-maker. If you do not have a family member or friend with these qualities/characteristics, there are professional or corporate trustees who may be a better fit.

Power of Attorney

What is a power of attorney?

A power of attorney is a legal document delegating authority from one person to another. In the document, the maker of the power of attorney (the “principal”) grants the right to act on the maker’s behalf as that person’s agent. What authority is granted depends on the specific language of the power of attorney. A person giving a power of attorney may make it very broad or limit it to certain specific acts.

What are some uses of a power of attorney?

A power of attorney may be used to give another the right to sell a car, home or other property. A power of attorney might be used to allow another to access bank accounts, sign a contract, make health care decisions, handle financial transactions or sign legal documents for the principal. A power of attorney may give others the right to do almost any legal act that the maker of the power of attorney could do, including the ability to create trusts and make gifts.

Where may a person obtain a power of attorney?

You may obtain a power of attorney from Encore. It is included in our trust-based estate plans and will-based estate plans. You may also purchase a powers-only plan that will include a power of attorney - financial, power of attorney - health care, and a HIPAA release with an optional statement of wishes.

What is a “principal”?

The “principal” is the maker of the power of attorney – the person who is delegating authority to another. This is the person who is allowing someone else to act on his or her behalf.

What is an “agent”?

The “agent” is the recipient of the power of attorney – the party who is given the power to act on behalf of the principal. The agent is sometimes referred to as an “attorney-in-fact.” The term “attorney-in-fact” does not mean the person is a lawyer.

Who may serve as an agent?

Any competent person 18 or 21 years of age (depending upon state age of majority) or older may serve as an agent. Agents should be chosen for reliability and trustworthiness. Certain financial institutions with trust powers also may serve as agents.

What happens if the power of attorney is created under the laws of another state?

If the power of attorney was properly executed under the other state's laws, it may be used in that state. However, state-specific documents vary widely. If you move to another state, it would be wise to review your estate plan and consider updating any state-specific documents.

Power and Duties of Agent

What activities are permitted by an agent?

An agent may perform only those acts specified in the power of attorney and any acts reasonably necessary to give effect to the specified acts. If an agent is unsure about authorization to do a particular act, the agent should consult legal counsel.

May an agent sell the principal's home?

Possibly, if ownership of the home has not been transferred to the trust, however, if the principal is married, the agent would need the surviving spouse's authorization to do so.

What may an agent not do on behalf of a principal?

There are a few actions that an agent is prohibited from doing, even if the power of attorney states that the action is authorized. A non-attorney agent may not practice law. An agent may not sign a document stating that the principal has knowledge of certain facts. An agent may not vote in a public election on behalf of the principal. An agent may not create or revoke a trust, will or codicil for the principal. If the principal was under contract to perform a personal service (i.e., to paint a portrait or provide care services), the agent is not authorized to do these things in the place of the principal. Likewise, if someone had appointed the principal to be trustee of a trust or if the court appointed the principal to be a guardian or conservator, the agent may not take over these responsibilities based solely on the authority of a power of attorney.

What are the responsibilities of an agent?

While the power of attorney gives the agent authority to act on behalf of the principal, an agent is not required to serve. An agent may have a moral or other obligation to take on the responsibilities associated with the power of attorney, but the power of attorney does not create an obligation to assume the duties. However, once an agent takes on a responsibility, there is a duty to act prudently.

Is there a certain code of conduct for agents?

Yes. Agents must meet certain standards of care when performing their duties. An agent is looked upon as a “fiduciary” under the law. A fiduciary relationship is one of trust. If the agent violates this trust, the law may punish the agent both civilly (by ordering the payment of restitution and punishment money) and criminally (probation or jail).

Using the Power of Attorney

When is a power of attorney effective? This depends.

A durable power of attorney that is contingent on the incapacity of the principal (called a “springing” power) remains valid but is not effective until the principal’s incapacity has been certified by a physician. However, most spouses/partners opt for this to take place immediately. Some states, like Florida, require this to take effect immediately.

Must the principal deliver the power of attorney to the agent right after signing or may the principal wait until such time as the agent's services are needed?

No. But, delaying delivery, might result in less-than-ideal circumstances during critical moments.

How should the agent sign when acting as an agent?

John Smith, as agent for Tom Jones. (In this example, John Smith is the agent, and Tom Jones is the principal.)

What if the third party will not accept the power of attorney?

If the power of attorney was lawfully executed and it has not been revoked, suspended or terminated, third parties may be forced to honor the document. The third party is required to give the agent a written explanation of the refusal to accept the power of attorney within a reasonable time after it is presented to the third party.

Under some circumstances, if the third party’s refusal to honor the power of attorney causes damage, the third party may be liable for those damages and even attorney’s fees and court costs. Even a mere delay may cause damage, and this, too, may be actionable. It is reasonable, however, for the third party to have the time to consult with a lawyer or an internal legal department about the power of attorney. Delay for more than a short period may be unreasonable. Upon refusal or unreasonable delay, consult an attorney.

Why do third parties sometimes refuse powers of attorney?

Third parties are often concerned whether the document is valid. They do not know if it was executed properly or forged. They do not know if it has been revoked. They do not know if the principal was competent at the time the power of attorney was signed. They

do not know whether the principal has died. Third parties do not want liability for the improper use of the document. Some third parties refuse to honor powers of attorney because they believe they are protecting the principal from possible unscrupulous conduct. If your power of attorney is refused, talk to your attorney.

May the agent employ others for assistance?

Yes. The agent may hire accountants, lawyers, brokers, or other professionals to help with the agent's duties but generally may not delegate the entirety of their responsibilities as an agent. The power of attorney was given by the principal to the agent, and the agent does not have the right to transfer that power to anyone else. The agent must keep in mind the fiduciary duties when hiring professionals to help. The agent may be allowed to delegate investment responsibility unless the power of attorney prohibits such a delegation.

Relationship of Power of Attorney to Other Legal Instruments

What is the difference between an agent and an executor (aka personal representative)?

An executor, sometimes referred to as a "personal representative" in certain states, is the person who takes care of another's probate estate after that person dies. An agent may take care of the principal's affairs only while the principal is alive. An executor may be named in a person's will and is appointed by the court to administer the estate.

What is the difference between a "trustee" and an "agent"?

Like an executor, a trust may authorize an individual (the "trustee") to act for the maker of the trust (trustor) after that person dies. Like an agent, the trustee may manage the financial affairs of the trustor's estate. A trustee only has power over an asset that is owned by the trust. In contrast, an agent may have authority over all of the principal's non-trust assets. Another important distinction is that a trustee makes decisions after the trustor dies. In contrast, the power of attorney expires upon the principal's death.

Termination of the Power of Attorney

When does a power of attorney terminate?

Below are two of the most common ways the authority of any agent under a power of attorney automatically end:

- The principal dies.
- The principal revokes the power of attorney.

When does a particular agent's authority terminate? (For principals with contingent agents.)

The authority of an agent under a power of attorney automatically ends when one of the following things happens:

- The agent dies.
- The agent resigns or is removed by a court.
- The agent becomes incapacitated.
- There is a filing of a petition for dissolution of marriage if the agent is the principal's spouse, unless the power of attorney provides otherwise.

Financial Management and the Liability of An Agent

What is “fiduciary responsibility”?

An agent is a fiduciary and as such has multiple duties when acting for the principal. These include an overriding duty to do only those acts authorized by the power of attorney, and when performing those acts to act in accordance with the principal's reasonable expectations, to act in the principal's best interest and to attempt to preserve the principal's estate plan. The preservation of the estate plan is dependent on a number of factors, including the agent's knowledge of the plan and the needs and desires of the principal. If the agent assumes responsibility for the principal's investments, the agent has a duty to invest and manage the assets of the principal as a prudent investor. This standard requires the agent to exercise reasonable care and caution in managing the assets of the principal. The agent must apply this standard to the overall investments and not to one specific asset. An agent possessing special financial skills or expertise has an obligation to use those skills. The agent is required to keep careful records and may be required to provide an accounting. Everything the agent does for the principal should be written down, and the agent should keep all receipts and copies of all correspondence and consider logging phone calls so if the agent is questioned, records are available. Agents should consult with a lawyer if they have questions regarding the duties applicable to them.

Information was obtained from:

- [Cornell Law's Legal Information Institute](#)
- [WEX Free Legal Dictionary and Encyclopedia](#)
- [Florida Bar Consumer Pamphlets](#)
- [American Bar Association](#)