

## Disputes Arising Over a Power of Attorney

One essential document in any estate plan is a properly drafted power of attorney. However, while creating a power of attorney for someone to act on your behalf is generally a good idea, it can lead to complications if you become incapacitated and the designated person abuses the power. This can result in disputes both during your lifetime -- and after your death.

### What is a Financial Power of Attorney?

A financial power of attorney is a document in which an individual appoints a person (or persons) to act on his or her behalf during the individual's lifetime. The person who has the power to act is called an "attorney-in-fact" or an "agent." This person is permitted to make financial decisions on the individual's behalf, as outlined in the power of attorney document.

In order to be valid, the power of attorney must be properly signed and notarized. It may be a good idea to also have two witnesses. The individual signing a power of attorney must have the *capacity* to execute the power of attorney. In other words, the person must have the ability to understand the document and to understand the implications of signing a power of attorney.

The powers granted in the power of attorney can be narrow or broad. For instance, a power of attorney may allow the agent to make all financial decisions or the power of attorney can be limited to a sole real estate transaction.

A power of attorney may be effective as soon as it is signed. Another type of power of attorney, called a "springing" power of attorney, only takes effect when a person becomes incapacitated. It is important to discuss your individual circumstances to determine if an immediate or springing power of attorney best fits your circumstances.

### When Can Problems Arise?

Disputes often occur if the agent acts outside the parameters of what is permitted in the power of attorney. This invariably happens when the agent is accused of "self-dealing" (in other words, using the individual's money for the agent's own purposes rather than for the benefit of the individual). Other disputes may arise when there is a claim that the individual lacks capacity to execute the power of attorney.

### Who Might Claim that Power Was Abused?

In some cases, family members claim that an agent has abused power when they believe that the individual who provided the power of attorney was incapacitated at the time of signing and did not know what was occurring.

During the lifetime of an individual who executes a power of attorney, the individual can revoke the power. He or she can also make a claim against the agent if there is an alleged abuse of power. Unfortunately, what often happens is the individual becomes incapacitated and cannot make the claim.

Family members may want to make the claim on the individual's behalf. In Ohio family members may ask the probate court to review an agent's action.

If the individual who executed the power of attorney is deceased and family members believe there was an abuse of power, the personal representative of the estate can make a claim against the former agent. If the agent and the personal representative of the estate are the same person, an interested family member may be able to remove the personal representative because of a conflict of interest and have the court appoint a successor representative to make a claim should the facts support one.

## **What Should You Do?**

- If you want to create a power of attorney, it is best to have an attorney draft one for you. It should be carefully structured to meet your objectives. Be sure to pick a trusted person to act as your agent.
- If you are an agent yourself, keep proper records of all activities and act only within the terms of the power of attorney document. Be prepared to provide an accounting of all your actions to any interested party. The more information shared, the less suspicion there will be by other family members.

Finally, if you are a family member who wants to dispute the use of the power of attorney because of an alleged abuse, seek guidance on the proper procedures.