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MATSUMURA LAW FIRM

Wills, Trusts, Probate
And Estate Planning

If you become incapacitated and you have not planned properly with a Durable Power of Attorney, your family will need to institute a conservatorship for you

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Durable Power of Attorney for Finances:

A Critical Document You Need To Avoid A Conservatorship

A Durable Power of Attorney for Asset Management is a very important document that you need to appoint someone to manage your finances if you become unable to do so yourself. If you become incapacitated and you haven't prepared a Durable Power of Attorney, your spouse, family or other relatives will have to go to court to ask for authority over your financial affairs. This court proceeding is called a conservatorship.

What is a Conservatorship?

Conservatorship proceedings can be expensive and invasive. Your family members must request the court to rule that you cannot take care of yourself. The courtroom is a public forum, and the court proceedings are a matter of public record. In some cases, notice of your conservatorship must be published in a local newspaper. If relatives fight over who is to be conservator, the proceedings can become contentious, and your estate can be eroded by the costs incurred by your family to fight for control of your estate. To avoid this potentially embarrassing and very expensive experience, you need to sign a Durable Power of Attorney for Finances to name your own agent for your financial matters. (If I have prepared your estate planning for you, this document is included automatically in my basic estate planning package.)

A Durable Power of Attorney Is Required Even Though You Are Married and All Your Property is Community Property.

Some people believe that if they are married, they do not need a Durable Power of Attorney for Finances. It is true that if you are married, your spouse can control property which you own together. However, your spouse has limited control over the sale of joint property. For example, your spouse cannot sell real property without your consent. If you are incapacitated, you cannot consent to the sale. In that event, your agent under your Durable Power of Attorney for Finances can sign on your behalf. If you do not have a Durable Power, then your spouse needs to start a conservatorship for you. And of course, if your spouse also becomes incapacitated, then your spouse has no legal capacity to help himself or herself, let alone you.

A Durable Power of Attorney Is Required Even Though You Have A Family Trust.

If you have Family Trust (aka revocable trust or living trust), you are well-ahead of the game, but not completely covered. A trust is helpful if you are incapacitated and an action is required in connection with an asset owned by your Family Trust. In that event, your successor trustee has authority to take over management of the trust property. However, your successor trustee has no authority

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Why You Need A Durable Power of Attorney For Finances

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over property not held in trust or for actions not directly related to a trust asset. For example, a trustee cannot file your income taxes for you and cannot make tax elections for you. Furthermore, if an asset is not owned by your trust, but needs to be in trust to avoid probate, then only your agent under your Durable Power of Attorney for Finances can make the trust transfer for you.

agent needs to make a gift to reduce your estate taxes and your “form” Durable Power does not specifically grant this power, your agent will need court involvement to make the gift.

Bank and Brokerage Forms. Some banks and brokerage companies have their own forms. If so, you should execute these companies’ forms *as well as* the general Power of Attorney prepared by your estate planning attorney.

Examples of Agent Authority Under A Durable Power:

- **Collect Social Security, Medicare or other governmental benefits**
- **File and Pay your Income Taxes**
- **Operate Your Small Business**
- **Claim Property You Inherit or To Which You Are Otherwise Entitled**
- **Transfer Property to a Trust**
- **Hire Someone to Represent You in Court**
- **Manage Your Retirement Accounts**
- **Handle Insurance and Benefits Paperwork**



When A Financial Power of Attorney Ends. Your Durable Power of Attorney automatically end if any of the following occurs:

1. *You pass away.* A Durable Power of Attorney is void at death.
2. *You revoke it.* As long as you are mentally competent, you can revoke the Durable Power at any time.
3. *A court invalidates it.* Although rare, a court may conclude that you were not mentally competent when you signed the document.
4. *No agent is available.* All of your named agents are unable or unwilling to act. (That’s why you should name many alternate agents!)

Why A “Fill-In-The-Blanks” Power of Attorney is Insufficient. You may have come across these form Durable Powers of Attorney in stationery stores or “self-help” centers. These forms are deficient with regard to agent authority as to matters that the California Probate Code requires specific language—such as the power to make gifts. If your

(next column above)

Conclusion. Don’t rely on the court to choose your agent for you. Prepare your Durable Power of Attorney! ★

About Me

I graduated cum laude from the University of the Pacific in Stockton, California with a Bachelor’s in Science (B.S.) degree in Business Administration. I received my law degree (J.D.) from King Hall School of Law at U.C. Davis, and was admitted to the California State Bar in 1993. I completed my Masters in Taxation (LL.M.) at Golden Gate University in San Francisco in 1998.

I have practiced exclusively in the area of estate planning, probate and trust administration for approximately nine years.

When I’m not working, I support University of California Athletics, the San Francisco Giants, the Sacto Kings (maybe next year), and play tennis!
GO BEARS!! ☺

Next Issue:

The Duties and Responsibilities of a Successor Trustee