
THE TRUTH ABOUT POWERS OF ATTORNEY

by Germaine Curtin

What exactly is a power of attorney? Does it give me the same power as if I was a lawyer? Do I become an attorney? What exactly does it allow me to do?

Most people believe they understand powers of attorney, but many people are wrong.

A power of attorney is simply a signed document that gives another person (the “agent” or “attorney in fact”) the power to act for the person giving the power (“principal”). The agent’s power is limited to the power actually given in the written instrument. The power may say, “Joe has the right to sell my truck for whatever amount he believes to be fair market value.” In this case, Joe can sell the truck for \$500, **IF** he believes \$500 to be the fair market value. The concept is very simple, but the law around powers of attorney has grown complicated.

The first concept that one should understand is that a power of attorney, generally, only allows the agent to act **IF** the principal was able to act at that time. Consequently, the power of the attorney in fact ceases when the principal no longer has the capacity to act herself.

But what good does that do? Don’t I want to act for someone only if they are unable to? My mother doesn’t want to give me power of attorney if she thinks I’ll act for her when she is able to act for herself.

While the general rules for powers of attorney provide that the power terminates when the principal loses capacity, the legal system recognized the problem, and has passed laws that allow a power of attorney to act after the principal loses capacity under a document that

is called a “durable” power of attorney. This document must clearly state that the power survives even if the principal loses capacity. Georgia has created a law that includes the text of a document called a “Georgia General Durable Power of Attorney.” The form includes answers to frequently asked questions. You can find it easily by “googleing” it. The Georgia form is not the exclusive power of attorney form, but it is a practical way to create a document that you know is legal and covers all necessary items.

The **Georgia General Durable Power of Attorney** is considered a “financial” power of attorney because the twelve separate powers granted in the document relate to financial matters, such as the ability to sell real estate, resolve legal disputes, engage in monetary transactions with the principal’s bank accounts, and others. The principal can choose which powers she wants to grant to the agent by initialing next to the appropriate numbered power on the Georgia form.

Health Care Power of Attorney: In 1990, Georgia passed a law (which was amended in 2007) to allow a principal to grant durable powers for the purpose of authorizing the agent to make health care decisions for the principal when the principal is incapacitated. This is distinct from a durable power of attorney for financial purposes, which may be exercised not only when the person is incapacitated, but also when the principal has all of her capabilities intact. A health care power of attorney can be exercised **ONLY** when the principal can’t act on her own behalf.

By signing an Advance Directive for Health Care the principal can ensure that she is taken off life support (if that’s what she desires) rather than requiring the medical staff to continue to try to keep her alive, as the medical staff is otherwise required to do.

So, if You Think the Durable Financial Power of Attorney for Health Care Covers Everything, You Would be Wrong.

What other powers can be granted if I covered my health and my finances including all real property and personal property? What else is there? That's a good question; the answer lies with bureaucracy.

1. **Taxing authorities.** If you ever desire (probably too strong of a word) to deal with any state or federal taxing authority, you will need to submit for that tax authority a power of attorney signed by the tax payer, and you also need to specify what type of tax (income, sales, etc.) and for what years. Each taxing authority has its own form, and you need to provide a separate power of attorney to each taxing authority you are dealing with.

I recently submitted a power of attorney to the GA Department of Revenue for a tax payer to discuss what I thought were income tax issues. It turned out that the taxpayer was personally responsible for unpaid sales taxes of his company, and the matter I was dealing with was a sales tax, not an income tax, matter. I learned it was a sales tax issue by speaking with the income tax revenue agent, after I had provided my power of attorney to her. As soon as the revenue agent learned it was a sales tax issue, she transferred my call to the sales tax area. She promptly told me she couldn't speak with me because it was a sale tax issue and my power of attorney only covered income taxes. Unfortunately, my client was out of town so I wasted several days. Now when I submit a power of attorney to any taxing authority, I make sure it covers ALL taxes for at least ten years.

2. **Power of Attorney for Care of a Minor Child.** Georgia passed a law and created a power of attorney form for a parent to give to a grandparent or great-grandparent permission to care for their minor grandchild. I was amazed when I found that form power of attorney; I always thought that grandparents had an automatic right to care for their grandchildren. I'm sure some lawyer thought it was necessary. Other states have a similar

form, but the principal can grant the power to any person, not just a grandparent or great-grandparent.

So, you have been named an Attorney in Fact. What can you do now? According to most Banks: NOTHING!!

By 2006 I had been practicing laws for over twenty years and, over the years, advised my clients to protect themselves by granting a power of attorney to another trusted person so the agent can pay bills and otherwise take care of things if the principal is hospitalized. Many estate planning attorneys will have their client sign a power of attorney to take care of things in a client's older years.

I was named as the Attorney in Fact for my mother. We set up a trust for her so we could avoid probate. In 2006, just two days before she died, I discovered that she had too much cash in her name to qualify for the \$20,000 small estate exemption from probate. She was getting feeble and simply forgot. Using my power of attorney, I wrote a check from her personal checking account and into her trust, to remove the money from her estate. I went to the bank, feeling lucky that I had discovered the mistake before she died. Much to my surprise, the Bank **WOULD NOT RECOGNISE** my power of attorney. I tried everything to convince them, to no avail. My mother's attorney contacted the bank and confirmed that he the drafted the power of attorney, named me as the attorney in fact, watched my mother sign it and stated that she was in sound mind at the time. The Bank **STILL** would not honor it.

It appears that banks have much more power than we thought. After many calls to my contacts in the banking world, it seems there is an unwritten rule that banks **DO NOT RECOGNIZE** a power of attorney **UNLESS** it is on their form **AND** on file at the bank. I have checked with many banks since that time and have found the policy consistent throughout the industry.

WARNING: if you are the attorney in fact under a financial power of

attorney, I strongly advise you to file it with your principal's bank and make sure the bank finds it acceptable. Otherwise, you will not be able to exercise your powers with the bank.

Germaine Curtin, JD, LLM is a business, tax and transactional attorney.
[404-869-0122](tel:404-869-0122)