

How To Delegate Statutory Property Powers

Durable powers of attorney for property (property powers) let you (the principal) delegate authority over your affairs to another person (the agent). Statutory forms of property powers are the state's best estimate of what the typical person would choose to do under normal circumstances. But just as most people would not think of relying on the state's intestacy laws to distribute their property after their death, you shouldn't blindly rely on statutory property powers to decide how the agent will control your property if you become incapacitated. When preparing property powers, you must consider whether powers should be added or deleted from the boilerplate language provided by the state legislatures. Every state (and the District of Columbia) has statutes that recognize property powers. The powers typically address the average person's needs to provide for the administration of his or her assets if he or she becomes incapacitated. These powers can be limited.

In certain situations, you may not want an agent to have all of the available statutory powers -- which are typically similar to those usually given to a trustee under a revocable living trust, including the power to buy and sell assets, conduct business and borrow money. Here's how you can ensure the statutory property powers will delegate authority appropriately.

Limiting Power

Certain powers may be so broad that they are subject to abuse, such as the power to make gifts on your behalf or the power to change life insurance beneficiaries and the dispositive provisions of trusts. In complex or atypical situations, the inclusion of these powers should be carefully considered. You need to plan ahead to ensure these powers will not either be used against you should you become incapacitated, or distort your estate plan.

Start by clearly stating the scope of the power to make gifts. You can place restrictions limiting gifts to a certain group or amount, or requiring equal distributions to all recipients. Another option is to allow the agent to only continue an existing program of annual gift tax exclusion gifts to the family.

Giving the Power To Plan

If you have an estate plan or are in need of one, consider giving the agent the power to handle trusts and estates. If you have established a revocable living trust for tax planning purposes or to avoid probate, you may wish to provide the agent with the authority to add assets to that trust. In fact, this might be the sole power you give your agent. You will need to coordinate your will and trust if you don't want the agent to have power to determine the disposition of your assets.

If you have rights or powers as a beneficiary under a trust, consider whether your agent should have the power to exercise your rights and powers under the trust. You may want to delegate the right to revoke or amend a revocable living trust to an agent in unique situations. If you delegate this right, the delegation should be included in both the property power and the trust agreement.

Putting the Powers in Place

After you have decided which powers to grant your agent when completing a statutory property power, you must consider several other issues. For instance, you need to determine when the agent's powers begin and end. Powers typically begin when the instrument is signed and end on your death. Some people have the agent's powers begin on a determination of incapacity. This standard should be defined in the document.

Regardless of what powers you grant to an agent, make sure the delegation of authority meets your needs. If you would like assistance in determining this, or if you have questions about selecting an agent, please give us a call. We would be glad to help you achieve your goals regarding management of your assets should you become incapacitated.

OBSERVE THE RULES

When executing the statutory powers document, be sure to follow all required formalities. Some forms require witnesses to sign the document, others may require signatures to be notarized. In addition, since the property power may be used to transfer real estate, the document may need to meet the recording requirements of the particular state.

SETTING UP PROPERTY POWERS

By setting up property powers, you can:

- Allow gifts to be made between spouses to ensure that both spouses can take full advantage of the gift and estate tax applicable exemption amount and so assets between the spouses are balanced. This helps ensure that marginal estate tax brackets are more equal.
- Allow the agent to make gifts to charities to facilitate estate planning. You may want to limit such power to a specified standard or amount.
- Authorize the agent to consent to gift splitting with a spouse to continue maximum use of annual exclusions.