

Durable Power of Attorney

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A power of attorney is a written document that authorizes an individual (an “agent” or “attorney-in-fact”) to act on behalf of another individual (the “principal”) in a fiduciary capacity related to matters specified within the power of attorney document. The agent does not have to be a licensed attorney in order to assume the role as agent, but must act with care and in good faith when dealing with the principal’s affairs. An agent’s power can be limited to a specific transaction, such as purchasing a specified piece of real estate, or the agent can be authorized to complete various tasks (“general powers”) such as entering into contracts, signing tax returns, or managing bank accounts. However, certain acts are prohibited by statute from being delegated to an agent, such as making or revoking a will. Statutes in some states require that certain acts of an agent be specifically stated—for example, changing beneficiary designations or consenting to an autopsy. Further, the agent is limited to acting only within the scope designated in the document. In addition, the agent’s power ends when the acts specified in the document have been fulfilled. For example, if the power of attorney document identifies the sale of a piece of real estate as the act the agent is authorized to conduct, once that occurs, the power granted to the agent terminates. The power granted to the agent can be revoked by the principal at any time. Further, even when an agent is assigned, the principal is still able to transact business on his or her own behalf.

Under a conventional (non-durable) power of attorney, all powers granted to the agent terminate at the principal's incapacity or death. The theory behind the conventional power of attorney is that the agent can only do what the principal can do – if the principal cannot act because of death or incapacity, then the agent can no longer act.

However, a durable power of attorney is a legal document that operates like a regular power of attorney, but the agent's authority does not terminate if the principal becomes incapacitated. Rather, the relationship (and the agent's power to act under the scope of the document) remains in effect even if the principal is incapacitated. Therefore, unlike the conventional power of attorney, under a durable power of attorney, the agent is able to act even if the principal cannot.

Because the agent's authority remains effective even if the principal is incapacitated, a durable power of attorney is an important estate planning tool. If this relationship exists and a principal becomes incapacitated, there may be no need for court involvement to determine how the principal's affairs will be handled during incapacitation if the durable power of attorney provides sufficient authority over the principal's affairs. However, just like a conventional power of attorney, a durable power of attorney ends at the death of the principal and can also be revoked by the principal at any time.

There are two types of durable power of attorney: immediate and springing. An immediate durable power of attorney is effective at the document's execution and, unless revoked, remains in effect until the purpose of the granted authority is achieved, the authority expires at the time set-forth in the document, or the principal dies. In contrast, a springing durable power of attorney is not immediately effective. Rather, it becomes effective on a date

specified (such as a birthday) or upon the occurrence of an event (such as at the time the principal begins receiving hospice care or enters a nursing home facility). In this case, the power of attorney “springs” into effect at the designated time/event. This type of document must be carefully drafted so there is no ambiguity regarding the event that “springs” the power of attorney into effect. Further, proof of the springing event (a doctor’s certification of the principal’s incapacity, for example) may be required before the agent can act on behalf of the principal.

All fifty states recognize the concept of durable power of attorney. To create more uniform requirements among the states, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Power of Attorney Act (UPOAA). The UPOAA provides a model law that states can adopt. Despite the creation of the UPOAA, states vary in their requirements for a legal power of attorney. For example, some states treat all powers of attorney as durable unless the document expressly provides it is not durable. Therefore, it is essential that the laws of the applicable state be reviewed prior to the execution of a power of attorney document.

Further Reading

Uniform Law Commission: Power of Attorney:

<http://www.uniformlaws.org/Act.aspx?title=Power%20of%20Attorney>

American Bar Association: Power of Attorney:

http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/power_of_attorney.html

Durable Power of Attorney Abuse: A National Center on Elder Abuse Fact Sheet for Consumers:

http://www.americanbar.org/content/dam/aba/administrative/law_aging/durable_poa_abuse_fact_sheet_consumers.authcheckdam.pdf

Giving Someone Power of Attorney for Your Health Care: A Guide with an Easy-to-Use, Multi-State Form for All Adults:

[http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_hcd
ec_univhcpaform.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_hcd
ec_univhcpaform.authcheckdam.pdf)