

Durable Power of Attorney

One of the primary tools used in estate planning, Durable Power of Attorney is a document by which you give one or more people the authority to handle financial transactions on your behalf, even if you later become incompetent. This important document for financial issues, along with a Health Care Power of Attorney for medical issues, is one that all adults should have in place. Spouses, adult children, siblings and professionals, such as a personal attorney or accountant, are the most frequent choices as agents of a Durable Power of Attorney.

There are several variations on this document. The Durable Power of Attorney can be very broad or very limited in its scope. It can contain special gift giving and estate planning authority which can be used in extraordinary circumstances. It can be written to take effect immediately, or to take effect only if you become incapacitated. It can also be placed in safekeeping, such as in your lawyer's file - called "escrow" - to be delivered only when there is a need for the appointed person to make business transactions on your behalf.

In most states, any person who is over 18 and is competent can give this power to another to act on their behalf. You should note that it is not possible to be given power of attorney over someone who has become incapacitated. Once a person has become mentally incapacitated, if no Durable Power of Attorney exists, the agent will need to petition the court to be appointed Guardian to take care of that person's financial affairs.

Responsibilities of an Attorney-in-Fact

An agent under a Power of Attorney is governed by fiduciary principles. That means that when the agent steps into your shoes, he or she is required to carry out your instructions and act in your best interests. The agent must exercise care in handling your business and be able to account for the use of your assets.

Trustworthiness, good judgment, and availability are the key factors in selecting someone to act as your agent under a Durable Power of Attorney. A Durable Power of Attorney is like a blank check since it gives the agent authority to sign for you in nearly any circumstance on any kind of transaction, without limitations or approval. For this reason, the person chosen as Attorney-in-Fact must be someone whom you can trust to act in your best interest at all times. The agent should not be someone prone to impulsive action and must recognize the limits of his or her knowledge or skill and seek expert advice when needed.

Choosing your Attorney-in-Fact

There are many reasons why most people should give a Durable Power of Attorney to a close family member, friend, or trusted associate. It can be given for reasons of convenience, but perhaps more importantly, should be given to one or more members of your Response Team - the group of people you have designated to take care of your affairs if you are not able to do so - so they have the ability to act in the event that something happens which prevents you from handling your own affairs. Bills need to be paid. Money may have to be reinvested. Taxes must be filed, and business decisions made. The Durable Power of Attorney allows an individual to pre-select the right person(s) to "carry on" in the event of incapacity.

For those who have a legal spouse, he or she can automatically act on your behalf in some of these areas. But if you have any accounts, such as IRAs or 401(k)s, in your name only, your spouse is not authorized to act on those accounts without a Durable Power of Attorney or Guardianship. Giving your spouse a Durable Power of Attorney guarantees that he or she will have complete access to your finances in the event of an emergency, and an expensive Guardianship proceeding, where your spouse would be forced to have you declared incompetent in court, could be avoided.

It is possible to name multiple agents, acting together, under your Power of Attorney, but care must be exercised in such arrangements. If two agents' signatures are essential for each transaction, routine transactions may become cumbersome and important transactions may be stymied if one agent is unavailable. Some people may want to give the same power to more than one agent, each acting independently. This arrangement also requires care. There is a great danger of the "left hand not knowing what the right hand is doing." Coordination of authority and responsibility is essential. One solution is to designate one member of your Response Team to act under the Power of Attorney, but give that person clear instructions to consult with another trusted adviser before carrying out non-routine transactions. Also, we recommend designating a second, and often a third "back-up" Power of Attorney, in case your first choice is unable or unwilling to serve in this role.

Example: A couple creates Durable Powers of Attorney designating each other as agents with back-up powers to their oldest daughter. Months later an auto accident injures the wife and a head injury incapacitates the husband, who has to be placed in a health care facility. The daughter assumes control and the parents' attorney releases the Powers of Attorney, which had been held in

escrow, to her. The daughter begins paying routine bills, files insurance papers, and under the parents' attorney's guidance, begins restructuring the couple's assets to permit the husband to qualify for Medicaid to help with his nursing home bill. The daughter has a duty to keep records of all transactions she makes on her parents' behalf. She cannot use her parents' assets for her own benefit. Gradually the wife recovers and assumes responsibility for routine transactions, and the daughter's role as Attorney-in-Fact is revoked, until such time as it might be needed in the future.

Limitations of a Durable Power of Attorney

While they are powerful instruments, Durable Powers of Attorney are not without their limitations. Banks, stock transfer agents, insurance companies, and real estate title companies often must approve the Power of Attorney before accepting the agent's authority to act on your behalf. A power created five years ago is less likely to be accepted than one created within the past six months.

A document which often accompanies the Durable Power Attorney is an *Addendum to the Power of Attorney*, which gives your agents very broad authority in conducting estate planning and asset preservation strategies in the event you require long-term care. This very powerful document can provide extended authority to your agent, who can allow your assets to be transferred, allowing you to qualify for Medicaid and VA benefits, should you need them. At Severns Associates, we almost always hold an Addendum in escrow, even if Powers of Attorney are released at the time of signing.

If your Power of Attorney has been released and you regain the capacity to manage your affairs, it is possible for you to revoke the Power of Attorney, or to change the person named as your Power of Attorney. A written revocation should be filed with the recorder of public records in your county, and then delivered to the person holding the power. At your death, your agent's authority to act on your behalf under the Durable Power of Attorney ends.

As you can see, Durable Power of Attorney is an important tool to have in place to safeguard your financial affairs in the event you cannot do so yourself. Please contact our office for more information on putting this document in place, or to update your current documents.