

Durable Power of Attorney for Finances – Question & Answers
State Bar of Michigan

What is a power of attorney?

You may, by written document, voluntarily choose another person to handle some or all your property and financial affairs.

The person to whom you give this power is known as your "attorney-in-fact" or "agent." You are known as the "principal."

Why might someone sign a power of attorney?

A power of attorney is often used for convenience. For example, if you were selling your house, but planned to be out-of-state on the day of closing, you could designate someone to attend the closing and sign documents for you.

Who is eligible to sign a power of attorney or durable power of attorney?

You must be at least 18 years old and have the capacity to enter into a contract. Basically, you must understand you are voluntarily giving another person the power to make financial decisions for you, and be aware of that person you are naming as agent.

What is a *durable* power of attorney?

An ordinary power of attorney ends when you become mentally incapable because of sickness or injury to handle your affairs. A durable power of attorney does not end in these circumstances.

To have a durable power of attorney, you must show in the document your intention the powers not end upon your incapacity.

Under a durable power of attorney, when do the powers of the agent begin?

You have a choice. You can sign a document under which the agent has powers immediately. The document would include a statement similar to, "This power of attorney shall not be affected by disability of the principal."

If I give my agent immediate powers, do I forfeit all rights to make financial decisions?

No. You could continue to make decisions as long as you were capable, but have the assistance of your agent in carrying them out. If your agent attempted to

exercise powers without your consent, and you disagreed with the decision, you could revoke the power of attorney.

Can I have a durable power of attorney that becomes effective only in the future?

Yes. For instance, you might want the powers to begin only if and when you become incapable of handling your financial affairs. The document would have words to the effect, "This power of attorney shall become effective upon the disability of the principal." You would still sign the document now.

If I choose this type of document, how would my incapacity be determined?

In the document, you could define "disability" and also provide who would determine in the future whether you meet the definition. You might, for instance, choose your personal doctor.

If you recover from disability after the powers take effect, you could regain control over your financial affairs.

What powers can I give through a durable power of attorney?

You can give an agent power over all property and financial affairs signing checks and making deposits, paying bills, filing tax returns, selling property, investing money.

Are there any powers over my property I cannot give?

Yes. You cannot authorize your agent to write a will for you, or to change the provisions of an existing will.

Can I give my agent power to make health care decisions for me?

You can give your agent powers to make health care and personal decisions for you, but those powers are only applicable if you become unable to participate in decisions yourself.

It is probably better to have separate documents, one for financial decisions and one for health care decisions.

Is there information available about health care decision-making?

Yes. Advance Directives: Planning for Medical Care in the Event of Loss of Decision-Making Ability has information and forms for a durable power of attorney for health care, a do-not-resuscitate declaration and a living will.

Are there other uses of a power of attorney?

Yes. Through a power of attorney you can delegate parental responsibility for up to six months; or appoint a guardian for your minor children, in the event both parents are incapacitated or die.

If you are serving as guardian for an adult, you can delegate your powers for up to six months; or appoint a successor guardian, effective upon your death or incapacity.

Must I give my agent full power over all my property?

No. A durable power of attorney can be as broad or narrow as you choose. You can specify in the document certain property you want your agent to handle. And you can express how you wish your property managed or invested. For instance, you could give your agent authority to pay all utility bills and upkeep on your home, but not to sell the house.

If my spouse and I own everything "jointly," might a durable power of attorney still be useful?

Yes. If you become incapacitated, your spouse can still sign checks and make withdrawals on joint bank accounts. However, your spouse cannot sell jointly owned stocks or your jointly owned home without legal authority to sign for you.

Can I add my daughter's or son's name to my bank account instead of having a durable power of attorney?

You can create a joint account with a child or other relative, which would give her or him power to make withdrawals and write checks on the account.

However, you should carefully consider the real possibility of future problems. Joint tenants have been known to withdraw large sums from accounts for their own use, not the principal's benefit. The joint account is subject to attachment by creditors of the joint tenant, and may affect your eligibility for Medicaid.

You may run into resistance from the joint tenant if you want the account back into your name, alone. If you should die, money in the account would belong to the joint tenant, which may not be what you intend.

Whom can I appoint as my agent?

You can choose any person age 18 or over — spouse, relative, friend. You are giving the person great responsibility; it is important to appoint someone you trust, who can handle the tasks, and who is willing, to serve.

Must the individual I appoint live in Michigan?

No. But you should consider the practical problems if your agent lives far away from you.

Can I name more than one person as agent?

Yes. You can name two people to act jointly, or name different people to handle different financial affairs, although this can create practical problems.

You should certainly consider naming a second person to serve if the first person becomes unable to serve through disability, death or other reason.

Should I talk with the person I intend to appoint before completing the durable power of attorney?

Absolutely. It is important this person is willing to serve.

Will my agent charge for services rendered?

You should include in the durable power of attorney document the terms of payment, if any. A family member may gladly serve without charge.

What is the legal responsibility of an agent?

Your agent has a *fiduciary duty*. The agent is obligated to follow your instructions set forth in the durable power of attorney. To the extent the agent has discretion, he or she must act in your best interest. An agent should keep accurate records of all financial transactions, including money received and spent.

Your agent cannot make decisions for his or her own interest. If your agent breaches duties owed to you, you can revoke (cancel) the power of attorney and sue for damages.

Does an agent have any responsibility to use his or her own money to support me?

No.

Can I require my agent to provide me a monthly or annual account?

Yes. You can state in the document your agent must provide a monthly or annual account of income and expenses to you, and to others you name.

What are the formal requirements of a durable power of attorney?

There is no set form. The durable power of attorney must be in writing and signed by you. It is best to have two witnesses sign the document, neither of whom is going to be your agent.

If the durable power of attorney includes the power to buy, sell, or mortgage real property, the document must also be notarized, and might best have a legal description of the property attached.

How would I go about getting a durable power of attorney?

Before you decide on how to proceed, pick the person you want to serve as your agent. Consider whether you want his or her powers to be effective immediately, or only upon your disability. Think about what instructions you wish to include to reflect your wishes.

You then have a number of choices. This booklet has one form you can use. There are other forms available. You can also see a lawyer to have a durable power of attorney drafted. Feel comfortable in discussing fees with an attorney before you go forward.

What should I do once the durable power of attorney is signed?

Let family members know you have signed a durable power of attorney.

Must the probate court approve of the document?

No. A power of attorney or durable power of attorney is essentially a private arrangement. Both you and your agent should have access to the original document. You cannot file an original or a copy with the probate court; the only time a court might be involved is if there were disputes in the future.

Should I notify my bank about the durable power of attorney?

Yes. Soon after you sign the document, you should send a copy of the power of attorney to the bank and other businesses with whom you deal. Ask whether they will honor the document. Some banks, insurance companies, pension plans and tax authorities want a durable power of attorney to be on their own form. It is best to find that out now, so you may sign their form.

Once I have signed a durable power of attorney, can I change my mind?

Yes. You could change the terms by signing a new durable power of attorney, assuming you still had capacity to contract.

You can also revoke the durable power of attorney entirely, unless you provide otherwise in the document.

What should I do if I revoke the durable power of attorney?

You should give written notice of revocation to the agent and send a copy to all persons and institutions the agent was dealing with in your behalf, such as your bank. If the power of attorney has been recorded at the Register of Deeds, also record the revocation.

Can anyone else revoke a power of attorney I have granted?

Yes. If a *conservator* is appointed for you by the probate court, the conservator usually has the right to revoke the durable power of attorney.

What is a conservator?

A conservator is a person appointed by the probate court, after petition and a hearing, to handle your finances and property. If you are not the petitioner, the court must find you are not able to handle your finances effectively. A conservator's powers can be quite similar to those of an agent.

Will having a durable power of attorney prevent the need for a conservatorship?

In most cases, yes. Should conservatorship become necessary, your agent might well be the person appointed.

Are there advantages to a power of attorney over a conservatorship?

Yes. The procedure is voluntary and you have absolute control as to whom to designate as agent. You can grant limited powers or provide specific instructions. You can plan for the possibility of future incompetence. Finally, a durable power of attorney can spare the time, cost and discomfort of conservatorship proceedings.

Are there disadvantages?

Possibly. A power of attorney is a private arrangement and is not overseen by any court. You cannot force an agent to provide an inventory or account without bringing an action in court. In addition, some institutions or agencies are hesitant to honor a durable power of attorney.

Does my death affect a power of attorney?

Yes. All powers of attorney, ordinary or durable, cease when the person granting the power dies and the agent receives notice of the death.

Is there a method to effect the same ends as a durable power of attorney, but have the power survive death?

Yes. You can sign a document known as an *inter vivos* or living trust. A living trust is sometimes used in conjunction with a durable power of attorney. For instance, the agent could be given authority to add assets to the trust should the principal become incapacitated.

If you wish to consider a living trust, you should contact a lawyer to draft a trust to meet your needs and wishes. It is not a good idea to use a "trust kit" available through the mail or at an office supply store.