

Power of Attorney

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The tool I recommend for disability planning is called a “Durable Power of Attorney.” As the “principal” who signs the power of attorney, you designate one or more persons to act on your behalf, that is, to be your “agent,” for financial and health care matters. The word “durable” means that the power of attorney continues even if you become disabled.

We use the durable power of attorney to avoid the cumbersome and expensive procedure of having a court-appointed and court-supervised guardianship and conservatorship. The guardianship and conservatorship process requires much time and effort to establish authority to care for the legally disabled person and manage his or her property.

The durable power of attorney that I prepare is effective immediately. Delivery of the original or a copy to your designated agent gives your agent the power to exercise the powers granted in this instrument. As the principal, however, you have the reserved authority to instruct your agent not to exercise any powers on your behalf unless and until the time comes when you are incapable of doing so by yourself. You also have the reserved power to revoke this instrument at any time. Furthermore, your designated agent has a legal “fiduciary duty” to exercise the agent’s powers *only for your benefit*. (A durable power of attorney may be written so that it does not become effective until the principal actually becomes incompetent and that fact is established by an external process. A triggering mechanism may involve a committee of two or three persons or your physician, who must unanimously certify to your inability to manage your property interests. I do not typically include a triggering mechanism because of practical problems associated with it and the fact that it is akin to the judicial determination of incompetence which the durable power of attorney is designed to avoid.)

Implicit in the use of the durable power of attorney is the fact that you have complete faith and trust in the person or persons named as your agent. Where that fact exists, both the principal and the agent usually have no problem recognizing, when the time comes, that there is an actual need for the agent to assume responsibility for the management of the principal’s property.

I include in the durable power of attorney declarations of your intent concerning the use of artificial life sustaining medical procedures for nutrition, hydration and respiration. I include these in the durable power of attorney (rather than a separate “living will” or “advance directive”) because it appoints someone with authority to carry out your stated intent. You need to decide whether these provisions accurately state your intent.

Even with a Durable Power of Attorney in place, there is still a potential for a family member who is not the designated agent to ask a court to establish a conservatorship and to appoint some other family member as conservator to take over the management of your business affairs. Since that possibility could be used to defeat your intent, I provide in the Durable Power of Attorney that your designated agent shall have the first right to nominate a court appointed conservator and that the nominee may be your agent.

The durable power of attorney provides an effective remedy for many of the legal problems that arise when a person suffers a disabling condition that renders the person legally incompetent to make decisions concerning personal care and property management. I recommend the use of this personal planning tool to all persons of legal age.



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