

To receive a printable version of this PDF, please contact our firm.

Durable Powers of Attorney

What is a Durable Power of Attorney (DPA)?

It is expected that during the course of our lives we may become incapacitated and unable to act either because of a physical infirmity or mental incapacity. When that happens, it is important to have a Durable Power of Attorney (DPA) in place to deal with the day-to-day issues of our lives when incapacitated.

A DPA is a document that allows a person or entity, referred to as the attorney in fact, to act on behalf of the person giving the Power.

A Durable Power of Attorney is needed to allow the designated agent to handle financial transactions, such as writing checks, voting stock rights, and, generally, to act in all matters of a financial and/or legal nature for the principal who generally is not in a position to act for themselves.

When most people hear the words “ Power of Attorney” they are on guard that they might be giving away some power that will become abused and cause the person authorizing the Power harm. In reality, a *DURABLE POWER OF ATTORNEY* is actually something that could save you or your estate money and time.

Why would such a document save you time and money?

Let’s take an example where we assume you are in good health and still gainfully employed and then suffer an accident resulting in a total mental or physical incapacity. If you do not have a Durable Power naming your spouse (a trusted relative) to act in business matters for such things as paying bills, operating his or her checkbook, paying taxes, and signing business papers from bills of sale to contracts for services or products, then your family will have to generally go to court and ask the court to determine that you are incapable of acting on your own and that someone else should act for you and be given these powers that could have otherwise been included in the Durable Power document. The court will typically require notice to others, and a hearing and testimony, including possibly some independent expert testimony concerning the extent of the disability to allow the spouse (or other elected person) to act for the incapacitated person.

The hearing procedure generally referred to in most states as a conservatorship or guardianship is time consuming and expensive and, generally, will require the services of one or more attorneys

To receive a printable version of this PDF, please contact our firm.

Had you simply implemented a Durable Power of Attorney signed in advance of the hardship or incapacity, you would be able to use that document in lieu of the court hearing and the court orders that would otherwise be necessary to act upon the assets and/or businesses held in the name of the incapacitated person.

What kind of Durable Powers are there and what should you inquire about when you have to have one drafted?

In the above example, if you had a retirement account, pension accounts, Profit Sharing, stock bonus plan, and Keogh or other retirement plans, a Durable Power can have language which will allow the appointed person to act for you in connection with those accounts. This is an important issue for a client's spouse when the couple is retired and is primarily living off the income from the client's IRA. Depending on the circumstances, without a DPA, the spouse might not be able to access the money from the IRA without going to court to have someone appointed to act on behalf of the incapacitated spouse.

Some DPAs have “**springing powers**” which are only effective upon disability and will, generally, terminate upon the disabled client becoming capable or no longer disabled. Usually these springing Powers of Attorney are activated by one or two physicians stating the nature and extent of the disability to verify that the DPA should be used; and when the period of disability ends, the physicians will determine that such incapacity ended and the need for the use of the Durable Power ends, thus putting the client back in charge of his/her affairs.

Other powers are effective forthwith upon signing and allow the designated attorney in fact to act for the incapacitated person immediately. One should always check their resident state laws to determine what flexibility is allowed under that state in developing a Durable Power of Attorney.

Powers of Attorney can even provide for the delegation of an agent's power to deal with a Section 529 college education savings plan account(s). All Durable Powers of Attorney or springing Durable Powers should include specific language that allows the attorney in fact to create, open, or invest the owner's assets in a Section 529 account, to maintain that account, and make decisions with regard to handling account disbursements and the change of designated beneficiary of a Section 529 account.

Durable Powers can provide for another person to make gifts for the principal, appoint a separate agent to vote the stock, make business decisions, and the like.

To receive a printable version of this PDF, please contact our firm.

Delegating medical treatment options and/or directives

In some states, like Michigan, a Durable Power of Attorney can also appoint an individual called a Patient Advocate (PA) to make medical treatment decisions if the individual is at least 18 years of age and of sound mind when the power was signed. Usually this kind of patient advocate form would include language typical of the “living will” in which the quality of life and opinion of the grantor is stated. In most cases, the Durable Power might now include the patient advocacy matter and a separate document called a “Patient Advocate” form would be used to cover the issue of the treatment, or lack thereof, of a person desiring to appoint another to determine the future of the incapacitated person’s medical treatment.

The Living Will used in some states would be similar to the Patient Advocate form, which attempts to accomplish the same objective of appointing someone close to the nominee to make decisions concerning medical treatment or the lack thereof.

Why is a Patient Advocate Designation or Living Will important and why you should have one?

Many Americans die in a hospital or other care facilities. Physicians and health care workers who work in these facilities are generally charged with preserving a patient's life. You may or may not want a physician or hospital making decisions about your care when incapacitated. Health Care Directives give you the opportunity to write out your wishes in advance and ensure some legal respect for them if you are ever unable to speak for yourself.

What is a Living Will?

A Living Will, known in some states as a Health Care Directive, sets out a person's wishes about what medical treatment should be withheld or provided if a person becomes unable to communicate those wishes. The directive creates a contract with the attending physician. Once the physician receives a properly signed and witnessed directive, he or she is under a duty either to honor its instructions or to make sure the patient is transferred to the care of another physician who will honor them.

Health Care Directives are not used just to instruct physicians to withhold life-prolonging treatments. Some people want to reinforce that they would like to receive all medical treatment that is available, and the Patient Advocate Form or Health Care Directive is the proper place to specify that.

In most states, you must be 18 years old to sign a directive of this nature; and every state law requires that the person making a Health Care Directive must be able to understand what the document means, what it contains, and how it works.

To receive a printable version of this PDF, please contact our firm.

If you are physically disabled, you may make a valid health care document by simply directing another person to sign the document for you if you are unable to sign it yourself.

If you do not have a Medical Directive, a Living Will, Patient Advocate Form or Durable Power with medical directives signed, then the physicians who attend you will use their own discretion in deciding what kind of medical care you will receive.

Problems also can develop when your family members are not in agreement as to what type and extent of medical treatment you and/or your spouse should receive or not receive. In worse cases, the court will decide these cases even though the judge has little medical knowledge and no familiarity with you. These legal court wars are usually expensive and begin to use up the financial resources of the person incapacitated who would have otherwise, given the choice, not wanted the heirs battling over the extent of medical treatment and expensive legal fees and costs.

The execution of a Living Will, Patient Advocate Form, Medical Directive, and/or other appropriate Durable Power would save time and the expense of a court trial.

Your Health Care Directive can take effect when you are diagnosed to be close to death from a terminal condition or to be permanently comatose, and you are unable to communicate your own wishes for your medical care. Under these circumstances, your Medical Directive can be given to the medical personnel taking care of you; and that Medical Directive with specific instructions should then be followed.

The directive should be a part of your medical record when you are admitted to a hospital or other care facility. If your need for care arises unexpectedly or while you are out of your home state or country, it is best to give copies of your completed documents to your family and your personal physician.

Conclusion

Durable Powers and Patient Advocate Forms should be incorporated into every estate plan so as to avoid delay in medical treatment or the payment of household bills. Because of the litigation that can be required in order to have a court determine who will have the authority to pay bills and make determinations about your medical care (life and death decisions), we can state with confidence that not having Durable Powers and Patient Advocate forms in your estate plan would be a tremendous mistake.

We advocate that you purchase a will at your earliest convenience.

To purchase a will by a pre-certified attorney, please contact us and we will help facilitate the process.