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A program of Elder Law of Michigan, Inc.*

DURABLE POWER OF ATTORNEY FOR FINANCES

What is a power of attorney and why would I need one?

A power of attorney is a written document in which you appoint a person or business to handle some or all of your legal and financial affairs. The person or business you appoint is called your "attorney in fact" or "agent." You are called the "principal." For a valid power of attorney, the principal must be at least 18 years of age and mentally competent when the document is signed.

Your agent can use the power of attorney to act for you when you are unable to do so yourself. For example, you might be too ill to understand or sign documents or you might need someone to handle matters in Michigan while you spend the winter in Florida. While the probate court can appoint a conservator to handle the finances of a disabled individual, it requires a time-consuming and expensive procedure. If you have appointed someone to act under a durable financial power of attorney, no court involvement is required. Using a power of attorney is faster and less complicated and lets you choose who will handle your financial affairs.

What is a durable power of attorney?

Under Michigan law, a power of attorney ends when the principal becomes mentally incompetent, unless the document has specific language making it "durable." This means that the power of attorney is not affected by the later disability of the principal. Most people want this language so that their agent can continue to act on their behalf.

Is a power of attorney needed when I own everything joint with my spouse or children?

Yes, for certain joint property. Joint owners can handle your interest in certain joint assets such as bank accounts. However, for other joint assets such as real estate or stock, a joint owner cannot sign for you without legal authority from a power of attorney or court order.

Is a power of attorney needed when I have a will?

Yes. A will is only effective after your death. The person named as personal representative in your will cannot handle your estate until after court appointment. A power of attorney is necessary to authorize someone to act for you during your lifetime. It ends at your death.

When can an agent under a power of attorney start acting for me?

You can choose to have your power of attorney be effective only after you are mentally incompetent. This ensures that your agent can't act while you are still able to handle your own affairs. However, such language may make it harder for the agent to use the power of attorney once it is needed. For example, a bank would probably require documentation of your incompetence before letting the agent use the power of attorney to access your accounts. You can have language in the power of attorney about how incompetence is to be determined, for example by a statement from your doctor. As an alternative, you can authorize your agent to start acting as soon as the document is signed. This makes it easier for the agent to deal with third parties such as banks. However, this also makes it possible for your agent to act at a time when you may still wish to handle your affairs without assistance. You need to be sure the agent you appoint is someone very trustworthy who will use the power of attorney consistent with your wishes.

What type of actions can my agent take on my behalf?

It is up to you what authority you give your agent. The power of attorney can give limited authority only, such as to sell a specific asset. However, most people want to give broad authority so that the agent can handle all financial

and legal matters. Examples of authority typically given in a broad power of attorney include: making investment decisions, buying and selling assets, and handling all legal claims. If the power of attorney is to be used to sell real estate it must be in the proper form for recording with the Register of Deeds and must refer to a legal description of the property. Some government agencies such as the IRS will only honor powers of attorneys that contain specially required wording.

Who should I name as my agent?

You may name any adult or financial institution willing to serve. If you name an individual it should be someone trustworthy. An agent under a power of attorney has the opportunity to misuse or misappropriate your assets and income.

Can I name more than one person as agent?

Yes, but this is probably not a good idea because of the possibility of disagreement between agents. It also may be harder to deal with third parties such as banks when two signatures are required for every transaction. It is a good idea to appoint a successor agent to act if the first person named is unable or unwilling to do so.

Does my agent have to be a Michigan resident?

No, but for practical reasons it may be difficult for someone living far away to handle your affairs promptly and efficiently.

What are the obligations of an agent?

An agent under a power of attorney is a fiduciary. This means he/she must act in your best interest and not use your income/assets for the agent's benefit. An agent is supposed to follow your instructions set out in the power of attorney. Accurate records should be kept and the agent should keep you advised of the status of your financial affairs. If you wish, the power of attorney can specify what type of accounting your agent must

make to you. There is no court overview of the agent's decisions as they are made. You can sue an agent who breaches his/her fiduciary obligation or refuses to account to you. However, if money is poorly invested or spent on the agent's personal debts it may be very hard to collect in a later lawsuit. An agent is not personally responsible for your debts unless he/she signs a contract to be liable.

Can my agent charge for his/her services and time?

Yes. If you want to provide for that, your power of attorney should include language to authorize payment and indicate how it is to be determined and documented.

Can I revoke a power of attorney?

Unless the power of attorney provides otherwise, you can revoke it at any time as long as you are still legally competent to do so. This should be done in writing and signed and dated by you. The revocation will be effective once your agent and any third parties dealing with the agent have been given notice. If the power of attorney has been recorded with the Register of Deed then the revocation must in recordable form and recorded.

What are the pros and cons of using a power of attorney?

The biggest advantage of a power of attorney is that it can save the expense and time of a court proceeding to appoint a conservator to handle your financial and legal affairs. You are able to choose your agent rather than having this decision made by the court.

One potential problem of a power of attorney has been mentioned above - the risk of abuse by the agent since there is no court oversight of his/her actions. Another potential problem is that a third party such as a bank might refuse to honor the power of attorney. Michigan law does not require that businesses deal with your agent under a power of attorney. Some companies may be concerned about liability to you or they may have their own requirements about what language should be in a power of attorney.

Is a photocopy of the original power of attorney valid?

The power of attorney should have language allowing the use of photocopies or some third parties may require the original.

*If you are a senior, you can get specific questions answered at the Legal Hotline for Michigan Seniors.
Call **1-800-347-5297***

*The Legal Hotline is a program of Elder Law of Michigan, Inc., a non-profit organization.
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