

Durable Power of Attorney: a Good Idea?

By Robert Carowitz, Legal Hotline Attorney



One of the questions we frequently are asked at the Hotline is whether it is a good idea to have a Durable Power of Attorney. The answer is YES!

A “regular” power of attorney is a written document that allows one person (referred to as the Principal) to grant authority to another person (called the Agent) to do a variety of acts for the Principal. Regular power of attorney documents can be helpful to allow another person, e.g. a relative, to do something for you while you are absent, say on a trip or temporarily absent from your home.

By specific statute, Michigan law provides for a special power of attorney, the Durable Power of Attorney. Durable means that the authority of the Agent continues and “survives” even though the Principal becomes incapacitated. Thus the Durable Power of Attorney becomes a handy and helpful document for any adult who wants to have an Agent named and ready to handle financial and other types of matters should some type of mental or physical disability occur.

Who should have a Durable Power of Attorney? The answer is: anyone who wants to make sure there is someone waiting in the wings to step up and take care of his or her affairs, in the event of incapacity. Think of it like an insurance policy—you may not ever need it, but if you do, it’s there to protect you and you’re glad you have it.

What happens if you become incapacitated and you do not have a Durable Power of Attorney but yet your affairs have to be attended to—perhaps bills need to be paid or your home needs to be sold? If you don’t have a Power of Attorney, a Guardian or Conservator will need to be sought to ensure your affairs and well-being are addressed by a responsible person. These are formal, court interventions to handle your affairs; a Durable Power of Attorney is a private document between you and the agent you select. It is not subject to oversight by a court.

The court procedure called Guardianship allows a Probate Judge to appoint a person, called a Guardian, to handle your affairs, e.g. where you will live and other personal decisions. A Guardian can also handle your financial affairs if they are not involved and substantial. If you own real estate and have investments, the court is going to require the appointment of a Conservator, a person the judge appoints to handle your financial affairs. Both Guardians and Conservators are required to report to the court and are monitored and supervised by the court in what they can do. The cost and loss of control are drawbacks to having a Guardian or Conservator appointed. That is why a Power of Attorney is an important and useful tool for all adults to have in case something serious happens.

Selection of the Agent is probably the most important part of creating a Durable Power of Attorney. Because the Agent will handle all of your affairs, it is extremely important to name someone you completely trust. Lawyers sometimes refer to power of attorney documents as a license to steal. You want to make sure you have named someone who will act in your best interest and not abuse the power you've given them by making inappropriate decisions or financially exploiting you. Review that decision annually to be sure that your Agent is still up to the job as time goes by and life circumstances change.

There are some protections you can think about including in a Durable Power of Attorney. One is to limit the amount of "gifting" that your Agent can do. Requiring the Agent to provide other family members with statements and accountings can be a check and balance on the Agent's acts. Since acting outside the scope of the powers given and not in your best interest is a breach of trust, family members have a right of action against an Agent for wrongdoing. Including language about this in your Durable Power of Attorney, as well a warning to the Agent that it is a crime in Michigan to financially exploit a vulnerable adult, can be a way of making your Agent realize he or she must use due care, evenhandedness and ethical conduct in acting on your behalf.

As long as you are still mentally competent, you can easily revoke a Durable Power of Attorney and terminate your Agent's authority to act. This needs to be done in writing and delivered to the Agent and all third parties—like banks, agencies and government offices—that your Agent has been dealing with. Then you can make a new Durable Power of Attorney and choose another Agent if you

wish. If you are not competent, family members may need to seek a Guardian to supersede the Agent's authority.

While there are fill-in-the-blank forms available to create your own Durable Power of Attorney, it is probably best to have this important document drafted for you by a lawyer. Form documents are "one size fits all" and may not adjust to your circumstances. A Durable Power of Attorney drawn up for you by a lawyer is going to be reliable and tailored to your specific situation. And, you have someone to answer the inevitable questions that arise later. In some cases, banks or other financial institutions have forms that they want you to use. Investigate your situation to be sure your document will accomplish the objectives you seek.

Lawyers at the Legal Hotline can answer questions about a Durable Power of Attorney as well as other legal issues. Although the Hotline does not prepare documents, we may be able to refer you to a free legal services lawyer or affordable private attorney. You can call Monday through Thursday between 9 and 5 to set an appointment to talk with a lawyer. Reach the Hotline at (800) 347-5297. There is no charge for this assistance; donations are appreciated.