Durable Power of Attorney
For Finances

Choosing Someone to Handle Your Property
And Finances in Case of Disability

Washtenaw County Probate Court

FOREWORD

We all value the right to make decisions for ourselves. Whether we term this autonomy, liberty or independence, it is central to our concept of dignity.

One important area in which we exercise independence is controlling our money – deciding what to buy, how much to save and where to invest. Few would deny a competent adult has the right to make such decisions.

Unfortunately, due to illness or injury, it may become inconvenient or impossible for an individual to effectively manage her or his financial affairs. Such disability may be temporary or permanent.

No one likes to consider the possibility of becoming unable to make decisions. It is easy to put off thinking about that occurring, and how we would like things handled should it take place. As difficult as it is to confront these issues, by doing so, we can help ensure our wishes are honored in the future.

.

There are a number of legal mechanisms that can be used to plan. This pamphlet focuses on one, a durable power of attorney for finances. This mechanism can be relatively simple to use, and inexpensive or free. However, it is a big step, and you should only take it if you thoroughly understand the choices you have, and the consequences of signing the document.

This pamphlet has questions and answers to inform you about durable powers of attorney for finances. The fill-in-the-blanks form at the end of the pamphlet is but one option should you choose to proceed. A separate pamphlet discusses planning for health care decision-making in the event of disability.

Thanks are due to members of the Elder Law and Advocacy Section of the State Bar of Michigan for their timely and constructive suggestions to improve this pamphlet.

QUESTIONS AND ANSWERS ABOUT DURABLE POWERS OF ATTORNEY

What is a power of attorney?

You may, by written document, voluntarily choose another person to handle some or all of 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 the 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 whom 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 that 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. 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. However, 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 some 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 be 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 you 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 to 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.

DURABLE POWER OF ATTORNEY FOR FINANCES

NOTICE

1. This is an important legal document. By signing it, you are voluntarily giving another individual broad powers to handle your property and finances.

2. Warning! Do not sign this document unless you fully understand the consequences of having a durable power of attorney for finances.

3. There is no standard form for a durable power of attorney. If this form does not reflect your wishes or suit your needs in any way, seek advice from a lawyer.

4. In using this document, you must choose whether you want your agent to have powers now, or only if you become unable to handle your finances.

5. This document does not give your agent power to make medical decisions.

6. You can revoke this power of attorney by notifying your agent in writing.

INSTRUCTIONS

1. Read over the following document carefully. If there is anything you do not understand, you should ask a lawyer to explain it to you.

2. If the document suits your needs, complete the blanks on the form or direct someone else to do it for you. Make sure to initial one choice under “Effective Date.”

3. Sign the document or direct someone else to sign your name in your presence, and have two witnesses sign the form.

4. If your agent will have power to deal with real estate, make sure a notary public signs the document.

5. Keep the original document in a safe place, accessible to you and your agent. You can make and use photostatic copies of the original.

DURABLE POWER OF ATTORNEY FOR FINANCES

I, ____, am of sound mind, and I
(Print or type your full name)
voluntarily make this designation. I revoke any financial powers of attorney I have signed in the past.

APPOINTMENT OF AGENT

I designate ______________________________________, my ____________________,
(Insert name of agent) (Spouse, child, friend ....)
living at ____,
(Address, City, State, ZipCode)
to act for me as my agent, with the powers set forth in this document. If my first choice cannot serve or cannot continue to serve, I designate ____,
(Name of successor agent)
my ____________________, living at ____,
(Spouse, child, friend ....) (Address, City, State, ZipCode)
to act for me as my agent. I have discussed this appointment with the individual or individuals I have designated.

EFFECTIVE DATE

(You **must** choose one paragraph by writing your initials on the line)

____________ My agent has the powers set forth in this document immediately upon my signing it. These powers shall not be affected by any mental or physical disability I may have in the future.

OR

____________ My agent shall only have the powers set forth in this document when it is determined I am unable to manage my property and financial affairs effectively. That determination shall be made by my attending physician, who shall put it in writing.

POWERS

My agent shall exercise powers in my best interests and for my welfare, as a fiduciary. My agent shall have the following powers:

1. **BANKING –** To receive funds, deposit funds in any financial institution, and make withdrawals by check or otherwise to pay for goods, services, and any other personal and business expenses for my benefit. To effect her or his powers, my agent has power to sign a power of attorney drafted by the institution, and shall have access to my safe deposit box.

2. **GOVERNMENT BENEFITS –** To apply for and receive any government benefits for which I may be eligible or become eligible, including but not limited to, Social Security, Medicare and Medicaid.

3. **INVESTMENTS –** To invest and reinvest my funds, and to withdraw funds to the extent needed to pay for my needs.

4. **RETIREMENT PLAN –** To contribute to, select payment option of, roll-over, and receive benefits of any retirement plan or IRA, except my agent shall not have power to change the beneficiary of any plan or IRA.

5. **TAXES –** To complete and sign any local, state and federal tax returns, pay any taxes and assessments due and receive credits and refunds, to sign any IRS documents necessary to effectuate these powers.

6. **INSURANCE –** To purchase, pay premiums and make claims on life, health, automobile and homeowners' insurance, except my agent shall not have the power to cash in or change the beneficiary of any life insurance policy.

7. **REAL ESTATE –** To purchase, sell, lease, repair, improve, mortgage, and make mortgage and utility payments upon real property. A legal description is attached.

8. **PERSONAL PROPERTY –** To hold personal property for safekeeping, and to buy and sell personal property, including motor vehicles.

9. **LEGAL ADVICE AND PROCEEDINGS –** To obtain and pay for legal advice, to initiate or defend legal and administrative proceedings on my behalf, including actions against third parties who refuse without cause to honor this document.

10. **ESTATE PLAN –** My agent has no authority to make or amend a will on my behalf, and has no power to make gifts on my behalf except to my spouse. My agent has access to my will; in exercising powers, my agent shall take into account my estate plan as known to the agent.

SPECIAL INSTRUCTIONS

On the following lines are any special instructions limiting or extending the powers I give to my agent. ____

____

____

____

____

____

OTHER PROVISIONS

No person in Michigan or in any other state who relies upon representations of my agent under this durable power of attorney shall be liable to me or my estate without actual knowledge my agent did not have power to act.

My agent shall not incur any liability to me under this power except for a breach of fiduciary duty.

My agent is entitled to reimbursement for reasonable expenses incurred in exercising powers, and to reasonable compensation for services as agent.

I can amend or revoke this power of attorney through a writing delivered to my agent. Revocation is not effective as to a third party until the third party learns of it.

Photocopies of this document can be relied upon as though they were originals.

SIGNATURE OF PRINCIPAL

I sign this document voluntarily, and I understand its purpose.

DATED: ___________________ SIGNED: ____
(Your signature)
ADDRESS: ____

____

STATEMENT AND SIGNATURE OF WITNESSES

We sign below as witnesses. This declaration was signed in our presence. The declarant appears to be of sound mind, and to be making this designation voluntarily, without duress, fraud, or undue influence. Neither of us is an agent named in this document.

WITNESS: ____
(Signature of witness)
PRINT NAME: ____

ADDRESS: ____

____

WITNESS: ____
(Signature of witness)
PRINT NAME: ____

ADDRESS: ____

____

SIGNATURE OF NOTARY

Sworn to and signed by ____
(Name of Principal)
this _____________________ month _______day of 20____.

____
(Signature of notary public)

County_____________________________________

My commission expires ______________________