

# Answering your legal questions about durable powers of attorney for finances and other property

## Part I

### What is a Durable Power of Attorney for Finances and Other Property?

The Durable Power of Attorney is a signed and notarized document by which one person, the *principal*, gives another person, an *agent*, authority to act on the principal's behalf. The authority may be general, giving the agent broad power to make decisions, or limited, giving the agent the power to do one or more specific things. Most general powers of attorney prepared today are durable, which means the authority continues even if the principal becomes disabled or incapacitated and cannot act for himself or herself. A principal can make the power of attorney effective immediately or at some later date or event, such as when the principal becomes incapacitated. Under most circumstances, a properly executed general durable power of attorney avoids the need for a court-appointed guardian or conservator.

**NOTE:** This brochure does *not* address powers of attorney for health care decision-making, which are governed by different laws and involve different considerations. Individuals are encouraged to complete powers of attorney for health care to appoint an individual, called a "health care agent," to make health care decisions for them.

### Considerations in using a Durable Power of Attorney

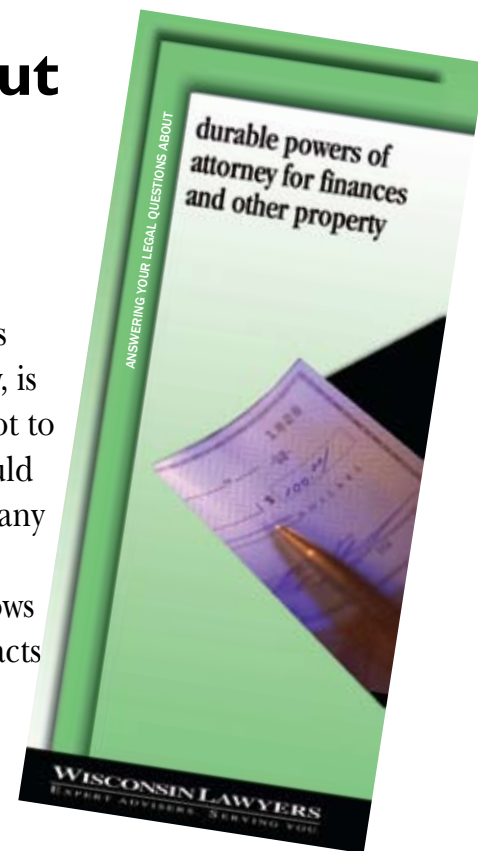
#### Why should I consider a Durable Power of Attorney?

Insurance statistics reveal that one out of two Americans will suffer a period of prolonged disability in his or her lifetime. If you cannot manage your own affairs someone else must. A *Durable Power of Attorney* allows your agent to act even if you become incompetent.

If you do not have a Durable Power of Attorney and you become incompetent, it may be necessary for your family to ask the court to appoint a guardian for you. Appointing a guardian takes time and can be cumbersome, public, and expensive. The family must hire a lawyer who will arrange for a court hearing. A physician must provide evidence that you cannot handle your own affairs. If you are physically able, you must go to the courthouse to hear the testimony that you are incompetent.

Many people think that it's not necessary to have a durable power of attorney if they don't have much money or if they hold all property jointly with a spouse or partner. However, there are many actions an agent would need specific legal authority to do – regardless of how much (or little) money you have or whether you hold most of your assets jointly with another person. Some examples include: applying for work-related disability or income continuation benefits, and public benefits such as Social Security disability; accessing or changing retirement plans; filing insurance claims or appealing denials; signing

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tax forms; selling a home to move somewhere more accessible; contracting for health care services; and hiring accountants or lawyers.

#### What may I authorize the agent to do for me?

An agent may perform a variety of tasks for you, including handling bank accounts, paying bills, buying and selling real estate, handling a business, applying for public benefits, making changes to life insurance or retirement plans, filing taxes, hiring workers for personal assistance, hiring lawyers and accountants, securing investment advice, making gifts, creating or transferring assets to a trust, compensating an agent, reimbursing an agent, and more. For each of these tasks you may authorize your agent to do almost anything the law permits you to do yourself. Your lawyer can discuss your specific concerns with you.

#### What should I consider before including a gifting power?

First, you need to recognize how dangerous a power to make gifts can be if your agent turns out not to be honest. You may decide, therefore, not to give your agent the power to make gifts. If you don't want to include a gifting power, it is best to include a statement prohibiting gifting.

Under Wisconsin law, unless there is a specific provision authorizing gifts in the Power of Attorney, gifts are not permitted. Without such a specific provision, third parties, such as Medicaid, the IRS, and title companies, are not permitted to recognize the gift.

If you decide to give your agent the power to make gifts, you have to decide and specify how extensive the gifting power should be. Should it be limited to a certain class of persons (your spouse, children, etc.) or charitable organizations? Should it be limited to specific circumstances such as at holidays or birthdays, or for tax or Medicaid planning? Should there be a monetary limit on gifts? Should the agent be permitted to make gifts to himself or herself?

In sum, the advantages and disadvantages of a gifting power should be considered carefully when completing a document. Seek the advice of a competent attorney.

### **What characteristics should I consider in selecting my agent?**

Select someone in whom you have total faith and trust, someone who is honest and loyal to you. Consider whether the person you have in mind is available and willing to serve. While it's always handy for the person to be geographically close, it is certainly possible for a conscientious agent to handle your financial matters from a distance. Trustworthiness is the most important factor. Find out if the person has the knowledge and experience required to manage your business or investments.

Plan ahead; what if this person, although willing to serve now, is unable to serve later? If possible, provide for one or more other persons to succeed your initial agent. The Durable Power of Attorney may also allow your agent to appoint his or her own successor if you delegate this power.

If you have concerns about financial management, or extensive security holdings, your document may authorize your agent to transfer financial assets to a standby trust with a corporate trustee. Your agent will continue to handle your financial affairs but will not have the day-to-day worry about investment decisions. The easier you make it for your agent, the more likely he or she will be willing to act as agent.

While corporate trustees can act as agents, some are reluctant to do so even in the financial area. The standard Durable Power of Attorney gives more decision-making powers to agents than some corporate trustees are comfortable with. A corporate trustee, however, may accept the appointment if its role is limited to transferring your stocks and bonds to a previously established standby trust of which it has been named trustee.

A person you would like to select as your agent may have a legal conflict of interest with your own interests. This is fine if you know the person can be trusted to protect your interests and you are willing to accept the conflict. It is unwise to appoint someone who is not financially stable or who has personal problems.

While it's natural to consider family members for this kind of responsibility, it's important to be honest and objective when selecting an agent. Fully consider whether family members have the time, skills, and commitment to be conscientious in performing this important fiduciary responsibility for you. Consult with the individual or corporate trustee you have in mind as agent before completing your document. Remember, your agent may be exercising the power when neither you nor anyone else may be able to monitor the agent's actions.

### **How can I protect myself against abuse by my agent?**

The best protection is to pick an individual in whom you have total trust. Other methods of protecting yourself are: including a statement of the agent's fiduciary duty in the actual document; requiring your agent to sign the document and thereby acknowledge his or her acceptance of the fiduciary duty; requiring that the agent be bonded; prohibiting gifts (or limiting gifts as to amount or recipients); requiring the agent to send regular accountings to another person or persons. You also can ask the agent to meet with your lawyer to better understand the powers being delegated, your expectations, and the agent's fiduciary duty to you.

The agent usually serves without any supervision and without a surety bond to protect you or your estate if the agent misuses

your assets. That is why you need someone in whom you have great faith and trust. If you can't find someone who meets those requirements, do not use a Durable Power of Attorney. Instead, discuss your concerns with your lawyer, who can suggest other ways to meet your needs and objectives.

### **What can I do if I believe my agent stole from me?**

First, seek the advice of a competent lawyer. Second, and very critical, immediately revoke (cancel) your Durable Power of Attorney so that the agent cannot do any more damage. This is best accomplished by signing a dated statement indicating that you are revoking the document. Include the date you signed the original document and the agent's name and clearly state that you are revoking all of the agent's power. It is wise to sign the revocation document in the presence of a notary public. Mail or deliver the original revocation to your agent. Make copies of the revocation document and immediately send them to all individuals and institutions (for example, banks) that you believe have a copy of the Power of Attorney document.

You have two options to try to recover the stolen assets. You may consult with a private attorney about various civil actions you could bring against your agent to recover the funds you believe your agent stole. These civil lawsuits might include actions for conversion (injury to personal property), an accounting, breach of an agent's duty to the principal, constructive trust, and others. An attorney can fully explain these actions to you. Keep in mind, however, that if you believe your agent has already spent the funds and has no other funds to repay you, even a successful lawsuit may not result in recovering your funds.

You may also report the theft to the police and district attorney. If they believe that a crime has been committed (for example, theft or abuse of a vulnerable adult) the district attorney may criminally prosecute your agent. A criminal prosecution may result in your agent paying a fine or serving time in jail or prison; it does not automatically guarantee that the agent will repay you the stolen funds. However, a judge may be able to order your agent to "make restitution" to you.

## **Part 2**

### **What if I am appointed as the agent under someone's power of attorney?**

#### **What are my responsibilities as agent?**

When you agree to act under a Durable Power of Attorney you become the agent of the principal (the person who appointed you). As agent you are what the law calls a "fiduciary." This means you have a duty to act in the highest good faith for the principal's benefit.

#### **What should I do when I become an agent?**

Read the entire Power of Attorney document, taking note of the powers the principal has given you. You can do only the things the principal has empowered you to do. If you have any question as to whether you have been authorized to make a certain decision, you should ask the principal for clarification or instructions, if possible, or obtain advice from a lawyer. If you are managing all of the principal's property, it may be advisable to consult with a lawyer for specific advice about what is necessary to carry out your duties and protect the principal's property. For example, you will need to make or get a complete inventory of the principal's assets. This is necessary so that you know what you are responsible for and can keep property such as real estate and motor vehicles properly insured. If you have many

assets to manage, either a corporate trustee custodial account (set up through the principal's bank) or a corporate trustee may help you manage and keep track of the assets.

Some agents deposit securities in the safekeeping of a brokerage firm, which may be convenient for an active investment account. However, as agent, you are still responsible for keeping the assets safe. You could be personally liable if you are negligent by selecting a failing brokerage house, resulting in a loss of assets to the principal.

If you are going to be responsible for any bill paying for the principal, you should take a copy of the Durable Power of Attorney to the principal's bank and get your signature recognized by the bank. You should consider setting up a checking account in the principal's name and order checks containing both the principal's name and your name as power of attorney. After the checks are printed, you may then write out the principal's checks, signing your name and writing "P.O.A." next to it.

### **What do I do with the Power of Attorney document?**

First, sign the document as the agent, if a signature line is part of the document. Then, keep the original in a safe place such as in your safe deposit box or with the lawyer who prepared it. Most Power of Attorney documents provide that a copy has the same authority as the original, so keep the original document and make copies to give on request. If you are selling real estate as the principal's agent under the document, you must record the original in the office of the register of deeds in the county in which the real estate is located. Make sure that the original is returned to you after recording.

### **What records should I keep?**

Keep the usual checking and savings account records. In addition, because you are acting for someone else, you must keep careful records of what you do with the principal's property. (For a sample Record of Daily Activity, refer to Appendix C at [www.legalexplorer.com/POA](http://www.legalexplorer.com/POA)). That record should show all of the following:

- the principal's income – the money you receive for the principal. You should deposit these funds in an account for the principal. *Never put the principal's money and yours in the same account;*
- the principal's expenses – the money you pay for the principal's needs. If you write a check, do so from the principal's account, not from your own funds; and
- other transactions, such as purchases and sales of assets.

### **When does my authority to act as agent begin?**

The Power of Attorney should state when your power to act begins and ends. For example, most powers of attorney provide for "immediate authority" – that is, they allow you to begin acting as soon as the principal signs the Durable Power of Attorney document. In some cases, the principal may provide for "springing power" – that is, that you have power to act only if the principal has been determined to be incapable of acting. A document that provides for a springing power usually will say how incapacity will be decided (for example, after a doctor's examination and certification).

### **When does my authority to act as agent end?**

Your authority ends when the principal dies, but may end sooner if the document so provides.

Depending on the specific language in the Power of Attorney document, your authority to act may end:

- on the date provided in the Power of Attorney, if there is one;
- on the occurrence of a specific event, for example, when two physicians have decided that the principal has regained the ability to act for himself or herself;
- when the principal becomes incapacitated, *if* the power does not state that it is durable (continues into incapacity);
- when the principal revokes the power by signing and dating a statement saying that the power is revoked;
- if a court says that you no longer have the power to act; or
- when you resign, which you may do at any time. Many Power of Attorney documents name an "alternate agent" or "successor agent" to act in case you cease to act for any reason. If you do resign, you should notify the principal and, if there is one, the successor agent. If there is no successor agent, and if the principal is unable to create a new Power of Attorney, you should continue as agent at least until another arrangement can be made. Seek the advice of a lawyer if you are uncertain what to do.

### **May the principal still act after giving me a Power of Attorney?**

Yes, if the principal is competent. The fact that the principal has given you authority to act does not limit in any way the principal's ability to act for herself or himself. While the principal is competent, she or he can take any action, including undoing something that you have done as agent. To avoid confusion or other problems, talk with the principal to make sure you are not working at cross purposes.

### **How must I act?**

You must act in the highest good faith toward the principal. "Good faith" means not taking advantage of another, even through technicalities of law. You must follow the instructions of the Power of Attorney and must use ordinary care and diligence even if you are not taking any pay for your work as agent.

### **Are there things I must not do?**

Yes. You must be careful not to do anything that does not benefit the principal. (Exception: If the document permits gifting, you may do so on behalf of the principal, but only according to the terms the principal has specified in the document.) Some things may benefit both the principal and another person, such as using the principal's car and gas to take the principal on a trip. In such cases you should be careful that you are acting primarily for the principal's benefit. It is wise to get advice from a lawyer before you use the principal's money or property in a way that benefits someone in addition to the principal. Always keep your money and property separate from the principal's.

### **May I hire people to assist me?**

Yes. You should get the help you need to carry out your duties as agent. For instance, if you are managing many assets, you should get investment advice or even make arrangements with a trust company to manage the investments through a custodial account. The reasonable costs of these services are expenses that should be paid from the principal's assets.

### **May I use property for myself?**

No, unless the Power of Attorney specifically allows you to use any of the property for your own benefit. For example, unless the document

specifically says so, you may not borrow money from the principal even if you are paying it back at the same or a higher interest rate you would pay a bank. Also, you should not sell any of the principal's property to yourself, your friends, or your relatives even at a fair price unless the Power of Attorney makes it clear that you can.

### May I make donations or gifts?

No, unless the Power of Attorney specifically says that you can make donations or gifts. You are to use the money for the principal's benefit, and such donations and gifts are not considered to be for the principal's benefit. If, however, the document authorizes gifting or donating, you may make gifts or donations of the principal's property, but only as specified in the document. For example, the document may list certain family members or charities. It may permit gifting or donations only in amounts consistent with past giving, or only if the gifts or donations don't cause tax consequences or jeopardize eligibility for public benefits. Again, read the document carefully. Even with such a provision, however, you must still be mindful of your fiduciary responsibility. The principal's needs come first. Obtain a lawyer's advice if you have questions about a gifting power or its provisions.

### May I reimburse myself for out-of-pocket expenses and may I pay myself fees for my services?

Generally, you may use the principal's money to reimburse yourself for reasonable and necessary out-of-pocket expenses that you have incurred in acting as agent for the principal's benefit.

As to paying yourself for your services, you may not pay yourself compensation unless the document provides that you may. If the document is not specific about the amount you pay yourself for your time, you are entitled only to *reasonable* fees. However, if the Power of Attorney establishes fee amounts or rates for you as agent, you are bound by the document's provisions. If the principal is competent, the two of you should agree on what would be a reasonable fee. In deciding what is reasonable, you should consider the following factors:

- the customary fees for the services you are performing as agent;
- any unusual skill or experience you have that you are using as agent for the principal's benefit;

- the amount of risk and responsibilities you have assumed as agent;
- the time you spend in carrying out your duties as agent; and
- any fee estimate you gave in advance.

Your fees as agent are reportable on your income tax returns as income.

While many agents receive fees, it is not required for you to accept any fees as agent. You can agree to serve without charging a fee.

If there is a dispute about your fees, a court may decide what is fair compensation and can reduce or deny fees to you if you have not carried out your responsibilities according to law and the terms of the Power of Attorney. ◀

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