



## **The Durable Power of Attorney**

The Legal Hotline for Michigan Seniors receives frequent calls from people with questions about a legal document called a power of attorney. Most callers want to know exactly how they work, if it is a good idea to have one, and how to obtain one. In most situations we tell seniors that it is a good idea to have a Durable Power of Attorney. Whether to have one is somewhat like deciding on whether to buy insurance. If you buy it and never have a loss, you could ask why did I buy it? But you're glad you had it if you have a loss. If you have a Durable Power of Attorney, but you never become incapacitated, then you didn't need it. But if you have it in place and the time comes when you are unable to make your own decisions, then signing one was a smart idea and could save you the time, trouble and expense of a Court proceeding for Guardianship and/or Conservatorship. Some questions and answers about a Durable Power of Attorney follow and these will help you to understand how this legal document works and guide you in deciding if you want to have one.

### **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 Power of Attorney, with authority to handle financial affairs, 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. As they get older, it is advisable for people to have this language in their power of attorney so that their agent can continue to act for them, if they become incapacitated. Stating in the document that it is “durable” and you intend the authority to your agent to continue even if you become disabled, makes the document a Durable Power of Attorney.

### **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 can not 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 and that they understand they will only step in to act for you when you are no longer able to do so.

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

It is up to you what authority you give your agent. A power of attorney may 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: handling day-to-day financial affairs, making investment decisions, buying and selling assets, dealing with tax matters, contracting for services, paying for support and care 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.

A Durable Power of Attorney may be limited to authority over property and financial matters. If you also want to authorize someone to make medical decisions for you when you are not able to make choices for yourself, you should sign a Health Care Power of Attorney and designate a patient advocate to make health care decisions in the event you are unable to make them yourself. Michigan law permits you to appoint someone to act for you in deciding upon your care, custody, and medical treatment. You may specify, if you desire to do so, that you want life support systems

withheld or withdrawn in the face of a terminal illness or imminent death. A form for a Health Care Power of Attorney is available free of charge from most hospitals. You can contact the Legal Hotline and one can be sent to you at no charge with a pamphlet that contains helpful questions and answers.

### **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 extremely trustworthy. An agent under a power of attorney has the opportunity to misuse or misappropriate your assets and income but this is unlikely to happen if you use care in choosing the right person. Since your agent will be acting for you when you are incapacitated and unable to oversee what is occurring, choosing your agent with great care is extremely important.

### **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 is in a position of trust and 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 oversight of the agent's decisions as they are made; remember, this is a private arrangement between you and your agent. 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 personally liable.

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

Yes. If you want to provide for compensation to the agent, 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. A revocation should be 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 by receipt of a copy. 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 pro's and con's 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. A power of attorney is substantially less expensive than a court proceeding to appoint a Conservator or Guardian.

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.

Governmental agencies, such as the Social Security Administration, the Veteran's Administration or the Internal Revenue Service require their own special power wording in a power of attorney so you either need to incorporate their wording into your document, or use their form.

### **Is a photocopy of the original power of attorney valid?**

Yes. The power of attorney should have language allowing the use of photocopies otherwise some third parties may require the original for their records, leaving you and your agent without one.

### **What can be done to force someone to accept an agent's authority under a Durable Power of Attorney?**

Unfortunately, under Michigan law, there is no way to force a third party, such as a bank or nursing home, to honor a Durable Power of Attorney. However, most businesses are familiar with the Durable Power of Attorney and will allow the agent to act for the principal.

### **Is the Durable Power of Attorney still valid after my death?**

No. The authority of an agent to handle the principal's affairs ceases at the death of the principal. A third party, not knowing of the principal's death, might still continue to allow the agent to act.

### **Can a Durable Power of Attorney be used to sell real estate?**

Yes. However in order for the agent to sell realty, the Durable Power of Attorney must be in recordable form, that is it needs two witnesses and must be notarized so that it can be recorded at the Register of Deeds. If the Durable Power of Attorney has been recorded, and then is subsequently revoked by the principal, then by Michigan law the revocation must also be recorded.

## **How do I go about getting a Durable Power of Attorney?**

While there are forms available at office supply stores and on the internet, having a lawyer prepare a Durable Power of Attorney for you is probably the best option. You will get a reliable document that is custom fit to your needs. You will be able to obtain advice about its use and have someone to call if you have questions or problems. A Durable Power of Attorney prepared for you by an attorney is less likely to be questioned by third parties your agent may deal with.

## **Consider a Durable Power of Attorney**

Most people are aware of the fact that they should have a will and an estate plan so that upon death their estates can be administered and distributed to their beneficiaries promptly and efficiently. However, many people fail to plan adequately for lifetime disability. Since disability may arise from any number of different causes, for example, illness (such as a stroke), injury, an accident, or old age, you should be concerned about the possibility of how it might prevent you from handling your own affairs. You should consider having a Durable Power of Attorney. It can save you and your family time, expense and the inconvenience of a court proceeding.

If you have additional questions about a Durable Power of Attorney, please don't hesitate to call the Legal Hotline for Michigan Seniors and talk to one of our lawyers. (800) 347-5297.