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# Durable Power of Attorney: Protecting Your Property against Incapacity

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# Durable Power of Attorney: Protecting Your Property against Incapacity

## What is a durable power of attorney?

A durable power of attorney (DPOA) is a tool that allows someone to carry on your financial affairs and protect your property in a period of incapacity, almost always with no need to seek formal judicial approval. A DPOA is a legal document that gives another person the legal authority to act for you. The person to whom authority is given is referred to as an attorney-in-fact, but need not be an attorney.

You may want to execute a DPOA because in today's modern age of medical miracles, your life expectancy has increased and so have your chances of becoming physically or mentally incapable of managing your own financial affairs. A devastating illness or serious accident can happen suddenly at any age. Old age can bring senility, Alzheimer's disease, or other ailments that affect your ability to make sound decisions. You may not be able to pay your bills, write checks, make deposits, sell assets, or otherwise conduct your business. This can undermine your financial, tax, and estate planning strategies, exhaust your savings, or create debt.

Unless you have authorized someone to carry on your financial affairs, a relative or friend will have to ask the court to appoint a guardian. This public procedure can be embarrassing, emotionally draining, time-consuming, and expensive. By executing a DPOA, you select the person you trust and almost always keep the court out of it.

There are two types of DPOAs. A standby DPOA becomes effective as soon as you sign it while a springing DPOA does not become effective until you become incapacitated.

## When can it be used?

***You are the age of majority, as defined by your state (generally, 18), and competent when you sign your durable power of attorney (DPOA)***

A minor cannot execute a DPOA. The age of majority in most states is 18.

Competency is a legal standard determined by state law. Competency generally means that you understand the meaning of your actions and have the capacity to enter into a contract.

***The person you choose to be your attorney-in-fact is the age of majority, as defined by your state (generally, 18), when it comes time to make your financial decisions for you***

***The DPOA is allowed in your state***

A springing DPOA is not permitted in some states. Check with an attorney to find out if a springing DPOA is allowed in your state.

## Strengths

***Can help avoid the need for guardianship***

A durable power of attorney (DPOA) is preferable to a court appointment of a guardian because the latter procedure is time-consuming and expensive; it opens to public view your incapacity and financial affairs; it can be emotionally traumatic for your family; and the powers of a court-appointed guardian can be more restricted than those available to an attorney-in-fact.

**Caution:** *However, your DPOA does not preclude the court from appointing a guardian. In Connecticut, your DPOA terminates automatically once a guardian has been appointed. In all other states, your DPOA continues in operation after the appointment of the guardian, but the guardian has the same rights that you have and can terminate your DPOA.*

**Tip:** *Some states allow you to name a guardian in advance through your DPOA.*

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## ***Provides a flexible way to continue the management of your affairs and protection of your assets***

Your attorney-in-fact steps in to make decisions for you as soon as you are unable to do so. It can prevent a lapse in the management of your financial affairs. Your attorney-in-fact has a legal duty to protect your best interest, keep accurate records, and keep your property separate from his or her own.

## ***Allows you to choose who will act for you***

You choose who you want and trust to manage your financial affairs while you are unable (e.g., your spouse, son, or daughter). If permitted in your state, you can name more than one person as your attorneys-in-fact, either as alternatives (Ken or Liz) or as partners (Ken and Liz). The latter may cause problems, however, if the attorneys-in-fact cannot agree on what is in your best interest.

**Caution:** *In some states, it may be necessary to name a state resident as your attorney-in-fact, or your attorney-in-fact may have to be a certain age. Check with an attorney regarding any restrictions your state may impose on who can be named.*

## ***Allows you to plan according to your goals and concerns***

You can make your attorney-in fact's powers as broad or as limited as you want, or terminate or change your DPOA as long as you have retained capacity, and even name the party or parties who determine whether you are incapacitated.

You can also give your attorney-in-fact the power to make gifts. This may be important because it allows your attorney-in-fact to continue your estate and tax planning (e.g., by taking advantage of the annual gift tax exclusion or Medicaid planning ).

**Caution:** *The potential for abuse of the gift-giving power is great. Be sure to grant it wisely.*

## ***Should be fairly simple and inexpensive to implement***

A DPOA is usually only a two- or three-page document. You may be able to buy a fill-in-the-blank form at a stationery store. If not, your state may publish a form in its statute books that you can copy. An attorney's fee for drawing up a DPOA should be relatively inexpensive.

## **Tradeoffs**

### ***A standby durable power of attorney (DPOA) may be troublesome if you are unwilling to immediately share some degree of control over your financial affairs***

A standby DPOA becomes effective as soon as you sign it. However, this type of DPOA means that your attorney-in-fact has immediate power over your affairs. You must be willing to take some risk if you choose to execute a standby DPOA.

**Example(s):** *Hal is worried that one day he'll get in an accident and end up in a coma. He executes a standby DPOA so that his wife, Jane, can pay the mortgage and buy the groceries in case his fears come true. Unfortunately, Jane is unhappy, and before Hal knows it, she has cleaned out his bank account and has moved to England.*

**Tip:** *A standby DPOA is good if you are facing a serious operation. You may become incapacitated for a time while you recuperate. Once you have recovered sufficiently, you can terminate the DPOA.*

### ***Determining whether incapacity has occurred, causing a springing DPOA to become effective, can be difficult***

A springing DPOA does not become effective until you have become incapacitated. This type of DPOA allows you to maintain control of your financial affairs for as long as possible. However, determining when you have become incapacitated is easier said than done. You can state in your DPOA that one or more physicians must certify that you are incapacitated. However, this arrangement may fail if your physician is hesitant to declare your incapacity, or if there is a dispute within your family. Your family may then become involved in the very court process you seek to avoid.

### ***Third parties may challenge your attorney-in-fact's authority***

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Third parties who deal with your attorney-in-fact may be reluctant to honor your DPOA. They may be worried that your DPOA does not authorize your attorney-in-fact to perform certain acts, that you were incompetent at the time you executed your DPOA, or that you have terminated your DPOA. To help overcome these difficulties, you can do the following:

- Execute more than one original DPOA so that your attorney-in-fact can provide the third party with an original
- Provide the third party with a customized DPOA form
- Provide the third party with an updated copy of your DPOA if the third party establishes an arbitrary cutoff (some banks will not accept your DPOA six months or one year from the date of execution)
- Include a termination date in your DPOA and re-execute it when necessary
- Notify the third party that you have executed a DPOA

## **Other states may not recognize your attorney-in-fact's powers**

Your attorney-in-fact may not be able to do business in a state other than the state in which your DPOA was executed.

**Example(s):** Jane creates and executes a DPOA in Maine, where she currently lives and writes novels. She wants her attorney-in-fact to sell her condo in New York because she has had a falling out with her publisher and has decided to try acting in California. Whether her attorney-in-fact will be allowed to sell her condo depends on New York's recognition of Jane's DPOA.

**Tip:** You may want to execute a DPOA in each state where you own real estate or do business.

## **How to do it**

### **Choose an attorney-in-fact**

You may be granting your attorney-in-fact significant power, so the person you choose should be someone trustworthy and capable. If permitted in your state, you can name more than one person as your attorneys-in-fact, either as alternatives (Ken or Liz) or as partners (Ken and Liz). Be sure to inform the person you choose that he or she will be under a legal duty to act in your best interest.

**Caution:** Using multiple attorneys-in-fact is not without problems. They may disagree about the proper course of action and fights may ensue.

**Tip:** Choosing an alternate attorney-in-fact may be advisable in case your first choice cannot act.

### **Set your goals**

To create a durable power of attorney (DPOA) that is going to fit your goals, you need to think about and decide on your options, such as:

- Do you want your DPOA to become effective immediately (standby), or only if you become incapacitated (springing)?
- What powers will you want your attorney-in-fact to have?
- What powers will you want to keep from your attorney-in-fact?
- Do you want to specify who can declare your incapacity?

### **Create your DPOA**

Although many states have their own fill-in-the-blank forms, a DPOA is a legal document. Careful drafting and a thorough understanding of your state's laws are needed to create a DPOA that will be effective. It may be advisable to consult an attorney when drawing up your DPOA. Remember, when it comes to a DPOA, there is no such thing as one size fits all.

Among other things, you should:

- Specifically provide in your DPOA that your attorney-in-fact's powers continue after you become incapacitated
- Specifically state gift-giving powers to satisfy the IRS
- Specifically enumerate each power, or certain powers, that you give your attorney-in-fact, if required by your state

### **Properly execute your DPOA**

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Requirements vary from state to state, which is another good reason to seek out the help of an attorney, but generally, you must sign your DPOA in front of a notary public. In some states, witnesses must be present to sign as well.

### ***Prepare any DPOA forms required by third parties***

Some banks and other financial institutions will not recognize your DPOA and will require you to execute their own forms. Be sure to contact any bank, insurance agent, or other broker with whom you do business and ask what you need to do.

### ***Put a copy on file at the local land records office, if required***

If you give your attorney-in-fact authority to deal in real estate, most states will require you to record your DPOA at the local land records office. This is an easy procedure for your attorney, or you can do it yourself. Simply give a copy to the clerk along with the filing fee (generally, a nominal amount).

**Caution:** *Once recorded, this information will no longer be private. Local land records are public records and available to anyone.*

### ***Get court approval if it is required in your state***

Most states do not, but some minority of states may require that your DPOA be approved by the court. You may need an attorney if this court process is required.

## **Tax considerations**

### **Income Tax**

If properly drafted, your durable power of attorney (DPOA) gives your attorney-in-fact the right to sign all your income tax returns.

### **Gift and Estate Tax**

If properly drafted, your DPOA gives your attorney-in-fact the right to sign all your annual gift tax returns.

### ***If properly drafted, your DPOA can give your attorney-in fact the power to make gifts on your behalf***

Your attorney-in-fact's ability to give away your wealth (by taking advantage of the annual gift tax exclusion) before you die may help reduce any federal gift and estate tax that may be imposed on your estate.

**Tip:** *Include specific authorization to make gifts in your DPOA in order to ensure that any gifts made by your attorney-in-fact are valid.*

### ***Gives your attorney-in-fact the right to elect to treat gifts made by your spouse as gifts made by you and your spouse***

Your attorney-in-fact's ability to elect to split gifts between you and your spouse can produce estate and gift tax savings.

## **Questions& Answers**

### ***What does being competent to execute a durable power of attorney (DPOA) mean?***

Competency is a standard determined by state law. Generally, it means that you understand what you are doing. This disqualifies those under guardianship, those whom the court has determined to be mentally incompetent or spendthrifts, and inebriated persons.

### ***Once empowered, what can an attorney-in-fact do?***

Your attorney-in-fact can do just about anything you could do. Your attorney-in-fact "stands in your shoes." Of course, you can limit this power by specifically stating what he or she can and can't do. And remember, some states require that particular powers be specifically enumerated. Some of the powers you can authorize are:

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- Sign checks and tax returns
  - Enter into contracts
  - Deposit or withdraw funds
  - Buy or sell securities
  - Run your business
  - Apply for and collect public benefits
  - Use your assets to pay your everyday expenses
  - Buy, sell, maintain, pay taxes on, and mortgage real estate
  - Buy and sell insurance policies and annuities
  - Invest your money in stocks, bonds, and mutual funds
  - Represent you in court
  - Manage your retirement accounts
  - Make gifts

### ***What happens to a DPOA when you die?***

Your DPOA ends. You can't give your attorney-in-fact authority to handle your affairs after your death.

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