

Durable Power of Attorney (DPOA)

What is a durable power of attorney?

A durable power of attorney is a written instrument where you (as the “principal”) appoint one or more persons (as “agents”) to act on your behalf. An agent, for example, might be able to sign a check on your checking account, to sign a tax return for you, or buy and sell property in your name. An agent can even be provided with the legal authority to make gifts of your assets (but only if this is specifically outlined in the instrument).

Often, a separate document is utilized for healthcare decisions. A durable power of attorney for healthcare is a document where you appoint another person to make healthcare decisions for you should you become incapable of making them yourself. Occasionally, one instrument will be used to appoint an agent with powers and authority over both healthcare and financial decisions. Alternatively, one instrument will act as a power of attorney for healthcare and a second instrument will act as a durable power of attorney for financial and property matters.

What does “durable” mean when it comes to a power of attorney?

The word “durable” means that the appointment of an agent is effective even if you become disabled or incapacitated – meaning you no longer have the ability, due to illness or injury, to make decisions for yourself. In this sense, a power of attorney is durable. While you are incapacitated, your agents can be taking care of your affairs for you. In fact, this is the goal of most durable powers of attorney – to give legal authority to someone you trust in the event you are no longer able to make those decisions.

A power of attorney gives the person you assign as your agent permission to manage your property or financial affairs and can be drafted so that it becomes effective only upon your incapacity. Alternatively, a financial or property power of attorney can be drafted so that it is effective immediately. The benefit to the

“effective immediately” durable power of attorney is that there is no need for your agents to document the existence of an incapacity – such as, with a note from your doctor. The downside to an “effective immediately” durable power of attorney is that you may not want to give your agents authority over your affairs at the present time.

A power of attorney for healthcare, by contrast, is never effective immediately. A power of attorney for healthcare can only “spring” into effectiveness upon your incapacity. Sometimes, this kind of power of attorney is called a “springing” durable power of attorney.

How do I create a durable power of attorney?

A durable power of attorney may be created at any time by a competent adult. It must properly state your intent to give authority to your agent to make health care decisions should you become incapacitated. It must also be signed by you and two witnesses or a notary public. Alternatively, you may direct another person to sign for you in the presence of witnesses. A durable power of attorney is a complex and powerful document which gives broad authority to your agent to make important decisions for you if you should ever become incapacitated.

Is there an approved form for a durable power of attorney for finances and property?

No. There is no statutory form for a durable power of attorney for finances and property. The best way to get a valid form is to consult with a South Dakota attorney.

Who should I name as my agent?

Selecting an agent should not be taken lightly. You must think carefully about who will best be able to speak for you if you become incapacitated. For some, this might be a spouse or an adult child, but you may name anyone, including a trusted friend. You may consider appointing multiple agents, successor agents, or co-agents. Your agent will be a fiduciary. There are many responsibilities and expectations of fiduciaries because of the power that they hold. You should also consider whether

the agent will be paid for their work as your agent and what the payment will be.

What are the advantages and disadvantages to a durable power of attorney?

The primary advantages to a durable power of attorney are their relatively inexpensive cost and the ability to select the individual or individuals that you want making decisions on your behalf during a period of incapacity. With proper planning a guardianship or conservatorship can be avoided because agents can be vested with essentially the same powers. This avoids the cost and delay of a court proceeding.

The primary disadvantage to a durable power of attorney is the lack of supervision and oversight of agents. Remember – you will not be able to adequately supervise your agents because they will be acting when you are incapacitated.

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