

Durable Power of Attorney

This article describes how a Power of Attorney (POA) works, powers that can be granted to an attorney-in-fact, when the power can be effective, and the advantages of establishing this document.

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A Power of Attorney (POA) is a legal document by which a client (the “Principal”) entrusts the management of his or her financial matters to another person (the “attorney-in-fact” or “agent”).

DURABLE POWER OF ATTORNEY (DPOA)

If the POA is made “durable,” it remains in effect even if/when the principal later loses the capacity to handle his or her own affairs. To be durable, the document creating the power must contain the words “this power of attorney shall not be affected by subsequent disability or incapacity of the principal,” or, “this power of attorney shall become effective upon the disability or incapacity of the principal,” or similar words showing the same intent. A DPOA, therefore, provides a client with the means for “surrogate” management of his or her financial matters during lifetime, regardless of capacity. (If a client becomes incapacitated without a DPOA, a conservator or guardian may need to be appointed and supervised by a court – a sometimes costly and cumbersome process.)

WHEN IS A DPOA EFFECTIVE?

A DPOA may be designed to be effective immediately upon its execution (an immediate power), or only when the principal becomes incapacitated (a springing power). In all cases, the authority of the attorney-in-fact to act under the agreement ends when the principal has died.

WHAT ARE THE ADVANTAGES OF A DPOA?

The advantages of a DPOA as an incapacity planning device include:

- A DPOA is simple to implement
- No transfer of title to assets is required
- Court supervision is unnecessary
- Administration requirements are minimal

WHAT POWERS MAY BE GRANTED TO THE DPOA TO ACT ON BEHALF OF THE PRINCIPAL

An attorney-in-fact may be authorized to do virtually anything the principal can do, except the following:

- Exercise the principal's fiduciary obligations (as a trustee or executor)
- Sign a Last Will and Testament for the principal
- Vote or perform other acts requiring the principal's personal attention

A list of general powers that the document might confer an attorney-in-fact include:

- To lease or to sell
- To open accounts
- To vote shares
- To carry insurance
- To continue a business
- To buy securities
- To apply for government benefits
- To sign checks
- To file tax returns
- To prosecute/defend legal action
- To access safe deposit boxes
- To renounce a fiduciary position

The document may enumerate the powers or refer to the powers granted to an attorney-in-fact under state law. Either way, it is the document that will prescribe what the attorney-in-fact can do on the principal's behalf.

CAN AN ATTORNEY-IN-FACT MAKE ESTATE PLANNING DECISIONS?

Generally, an attorney-in-fact acting under a DPOA cannot make estate planning decision on behalf of the principal, unless the document specifically provides that such authority has been granted.

CAN AN ATTORNEY-IN-FACT MAKE GIFTS ON BEHALF OF THE PRINCIPAL?

Similarly, an attorney-in-fact acting under a DPOA typically may not make gifts on behalf of the principal, unless the document specifically authorizes the attorney-in-fact to do so.