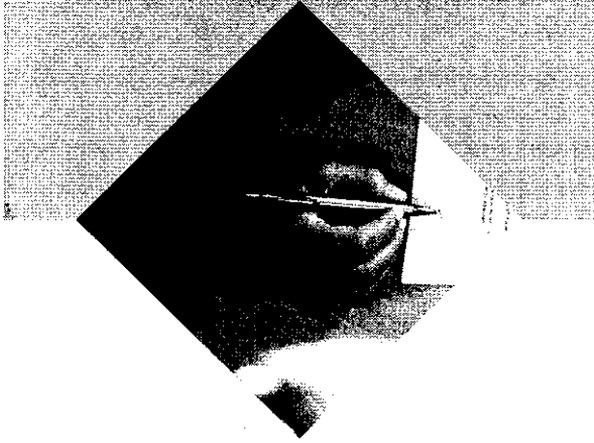


STATE BAR OF MICHIGAN

PROBATE AND ESTATE PLANNING SECTION



THE DURABLE
POWER OF ATTORNEY

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The Durable Power of Attorney

The Problem

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. You should be concerned about the possibility of your disability, that is, your inability to legally handle your affairs (business, financial, and personal). Disability can arise from a number of different causes, for example, illness (such as a stroke), injury, an accident, old age, or the inability to locate or contact you. If you are unable to handle your affairs, who can and will do so?

In such cases, Michigan law provides for a probate court proceeding to have an individual or a bank appointed to act for you. Guardianship and conservatorship proceedings involve time, expense and perhaps even the embarrassment of trying to prove that you are mentally incompetent. Furthermore, you have no assurance as to whom the court will appoint.

A document giving a relative, friend, or a bank the power to act for you—an ordinary power of attorney—is automatically suspended or revoked (it is no longer valid) if you become incompetent—just when your family would most need it. The Michigan legislature responded to the problem by creating the “Durable Power of Attorney” which is a power of attorney that remains in effect even if you become disabled.

You should consider having a Durable Power of Attorney. It can save you and your family time, expense, and the inconvenience of a probate court proceeding.

Questions and Answers

Here are some questions and answers that you should consider:

1. What is a power of attorney?

You, as “principal,” name another individual or a bank as your “agent” or “attorney-in-fact,” to act for you in handling your affairs; for example, to sign checks and make deposits, pay bills, contract for medical or other professional services, sell property, obtain insurance, and do all the things you do in managing your day to day affairs. The authority that you give to your agent can be as broad (for example, to do anything you could do) or as narrow (for example, to sell a particular piece of real estate) as you choose to make it. A power of attorney should be in writing and signed by you so that your agent has something to show as to his or her authority to act for you. Oftentimes, a power of attorney is signed with all of the formalities required when a deed is executed. This allows, for example, the power of attorney to be recorded with a local register of deeds office in the event your agent needs to use the power of attorney in connection with a real estate transaction.

2. What is a Durable Power of Attorney?

A Durable Power of Attorney is a written power of attorney which contains the words “This power of attorney shall not be affected by my disability,” or “This power of attorney shall become effective upon my disability,” or similar words. In order to be valid it must be signed by you before you become disabled.

3. Do I need a Durable Power of Attorney even if my spouse and I own everything “jointly”?

Yes. If you are disabled, your spouse can still sign checks and make withdrawals on joint bank accounts, but your spouse cannot sell jointly owned stocks or a jointly owned home or cottage without your signature. Your spouse cannot name or change a beneficiary on your life insurance or your retirement benefits. Even if you own everything jointly, you both should consider having Durable Powers of Attorney.

4. Can I make a Durable Power of Attorney that is effective even while I am still able to handle my own affairs? Isn't that dangerous?

Yes, you can make a Durable Power of Attorney that is presently effective. Your agent may be given a lot of authority, and that authority can be abused even though he or she is obligated to act in your best interest and follow your instructions. It should be given to someone you trust.

5. Can I make a Durable Power of Attorney that becomes effective only if I become disabled?

Yes, you could say, “This power of attorney shall become effective upon my disability.” You need to indicate how you will be determined to be disabled so that when your agent goes to use the power of attorney (say at a bank), your agent will be able to convince the third party (for example, a bank teller) that you are disabled. It's up to you to decide if you want a Durable Power of Attorney that is presently effective or one that is effective only if you become disabled.

6. Can I revoke a Durable Power of Attorney? If so, how?

As long as you are competent you can revoke your Durable Power of Attorney. The revocation should be in writing, and it should be delivered to the agent and to third parties with whom the agent is dealing (for example, your bank). A conservator appointed by the probate court can revoke the Durable Power of Attorney. Finally, the Durable Power of Attorney terminates at the time of your death, unless there is uncertainty as to whether you are dead or alive. Please understand, however, that a third party is entitled to rely on a power of attorney that has been terminated or revoked until the third party has actual notice of the termination.

7. What are some specific authorities that might be given in a Durable Power of Attorney?

Ordinarily, you want your agent to be able to do anything you could do, and so most Durable Powers of Attorney are very broad. Specifically, a power of attorney might authorize your agent to do any or all of the following on your behalf:

- pay for support and care
- borrow
- conduct banking transactions
- deal with property
- handle legal claims
- gain entry to safety deposit boxes
- deal with insurance and retirement benefits
- prepare and file tax returns
- exercise stockholder rights
- contract for services
- make gifts
- collect Social Security and other benefits
- exercise rights of the settlor or grantor of a trust

A Durable Power of Attorney may be limited to authority over property and financial matters. If you want to authorize someone to make medical decisions for you when you are no longer able to do so, you should designate someone to act as your patient advocate. You may, if you desire to do so, indicate to your patient advocate that you want life support systems withheld or withdrawn in the face of a terminal illness or imminent death.

8. Whom should I name as my agent?

You may name any adult (for example, a spouse, child, or other relative, or a friend) or you may name a bank; but you should select an agent who is willing to act and in whom you have confidence and trust. Remember, your agent may be making important financial and personal decisions for you.

9. Can I name more than one agent?

Yes, you can name two or more agents. If you do name more than one agent, you should specify whether your agents can act independently or whether they must act jointly. If you name two agents to act jointly, however, a deadlock may develop if they cannot agree. Rather than naming two persons to act jointly, you could name one agent with an alternate to act if the first agent cannot or will not act. However, be mindful that it may be difficult for an alternate agent to convince third parties (for example, the bank teller) that the first agent cannot or will not act.

10. What are the agent's obligations to me?

Your agent is obligated to follow your instructions and act in your best interest. The agent should keep accurate records and accounts and act prudently. If your agent improperly handles your affairs, he or she is legally responsible for damages to you.

11. What if my agent abuses the authority?

You can revoke the Durable Power of Attorney or, if because of your disability you are unable to revoke it, anyone interested in your welfare can ask the probate court to intervene and appoint a conservator to handle your affairs. The conservator can require the agent to account and report, and can even suspend or revoke the Durable Power of Attorney. In addition, you (or your conservator) can sue your agent for damages caused by the agent's abuse of authority.

12. What are some problems with a Durable Power of Attorney?

The biggest problem with any power of attorney is that there is no guarantee that it will be accepted or recognized by third parties. For example, if the purpose of the Durable Power of Attorney is to deal with governmental agencies, such as the Social Security Administration, the Veterans Administration, or the Internal Revenue Service, one must either use the agency's special Power of Attorney form, or make sure that the Durable Power of Attorney presented to the agency contains the special wording required by each agency's particular form.

Another problem occurs if you have an individual as your agent and he or she “quits” or dies or becomes disabled. In such event, if you haven’t named an alternate agent, there will be no one to act on your behalf.

In order for a Durable Power of Attorney to be workable, you have to give the agent a great deal of power and authority. Thus, you should be sure to choose someone you trust and have confidence in to handle your affairs.

13. What are some of the advantages of a Durable Power of Attorney?

You (not a court) select your agent.

It can give you and your family some peace of mind knowing that you have named someone to handle your affairs.

It can save time and the expense of a court proceeding.

14. How do I go about getting a Durable Power of Attorney?

It is recommended that you consult with a knowledgeable lawyer who can prepare a Durable Power of Attorney to suit your needs and to advise you on its use.

Everyone should consider the advantages of having a Durable Power of Attorney. It’s an important part of estate planning.