

## Supplementary Material on Durable Power of Attorney

Taken from website of Senior Law Resource Center

<http://www.senior-law.org/Home/resource/incapacity-planning/durable-power-of-attorney>

### Planning for Incapacity - Durable Power of Attorney

A durable power of attorney is a legal document in which one person gives another person the power to act on his or her behalf. The person who executes a durable power of attorney is called the “principal.” The person who is given the power to act on behalf of the principal is called the “attorney-in-fact” or “agent.”

Durable Powers of Attorney are powerful tools. They can be a good way to give your loved ones the ability to take care of you without the need to get a guardianship. However, they can also be abused and cause significant financial and personal hardship.

#### *Considerations*

Before signing a durable power of attorney, consider the following:

- How trustworthy and responsible is my chosen attorney-in-fact?
- Do I want to give this person the power to make decisions about my property? My medical and personal care? Both?
- Do I want to put any safeguards in place for certain decisions?
- What standard do I want to use to determine if I am incapacitated and who should decide?
- Will my bank and other companies honor my durable power of attorney?

Some durable powers of attorney only deal with property and financial matters. Others include personal and medical care. It is up to the principal to decide what powers he or she wishes to grant the attorney-in-fact. Talk to an attorney about drafting a durable power of attorney that fits your specific needs.

#### *When Will the Durable Power of Attorney Take Effect?*

Durable powers of attorney can be written either to take effect immediately or only after the principal becomes incapacitated. If the durable power of attorney takes effect when the principal is incapacitated, it should clearly state how and by whom a determination of incapacity will be made. Often this type of durable power of attorney will require written certification by two licensed physicians that the principal is

incapacitated.

Another option is to execute a durable power of attorney that takes effect immediately, but not give a copy to your attorney-in-fact until you are ready to have it take effect. You may want to ask your attorney to hold it for safe keeping. Make sure your attorney-in-fact knows where a copy is located.

### **Choosing Your Attorney-In-Fact**

Choose your attorney-in-fact carefully and make sure it is someone you trust. Depending on how broad the powers granted, your attorney-in-fact could have the power to sell your home, place you in a nursing home or make other significant decisions for you.

When choosing your attorney-in-fact, consider the following:

- ***Can this person legally act as my attorney-in-fact?*** – Under Oklahoma law, an attorney-in-fact must be at least 18 years old and not incapacitated.
- ***Is the person willing to serve?*** – Ask permission to name someone as your attorney-in-fact.
- ***Will the person be available?*** – Does the person live close by or does he or she come to town often enough? Does the person have other responsibilities that would prevent him or her from being available?
- ***Does this person have the necessary skills?*** – This will depend on the complexity of your financial or personal affairs.
- ***Will the person act for my benefit?*** – Can this person be trusted to act only on your behalf and not in his or her own interest?
- ***Can I talk to this person about my medical conditions?*** – If you are giving this person power over medical decisions, make sure you feel comfortable sharing your medical information with him or her.
- ***Will this person be able to handle conflict?*** – There may be some who disagree about the best course of action or who pressure your attorney-in-fact to take actions that are not in your best interest. Make sure your attorney-in-fact can handle these potential conflicts.

Safeguards, such as requiring a second person to agree to major transactions or requiring an attorney-in-fact to report to another person annually, can be included.

### **Duties Owed by the Attorney-In-Fact**

The purpose of a durable power of attorney is to help the principal with financial, personal and/or health matters. It does not give the attorney-in-fact the power to go

against the wishes of the principal or take actions that are detrimental to the principal's interests.

An attorney-in-fact owes fiduciary duties to the principal. These include a duty of care and a duty of loyalty.

When acting on behalf of the principal, an attorney-in-fact cannot profit to the detriment of the principal. A transfer of property or other transaction between the principal and the attorney-in-fact is presumed to be a result of undue influence, and the attorney-in-fact may have the burden to show that the transaction was fair and free of coercion. If such a transaction is contemplated, the principal should receive independent legal advice or the fiduciary relationship should be terminated beforehand.

### ***Changing or Revoking a Durable Power of Attorney***

As long as the principal is not incapacitated, he or she can revoke the durable power of attorney at any time. The principal must inform the attorney-in-fact that the durable power of attorney has been revoked, preferably in writing. It is also a good idea to inform anyone with whom the attorney-in-fact has done business on the principal's behalf, such as a bank.

### ***Other Considerations***

Check with your bank and other institutions with which you do business to make sure your durable power of attorney meets their requirements and will be honored. If you have property in more than one state, or if you spend significant amounts of time in more than one state, make sure your durable power of attorney meets the requirements of those states or execute separate durable powers of attorney for each state.

## **Drafting and Executing a Durable Power of Attorney**

Some durable powers of attorney only deal with property and financial matters. Others include personal and medical care. It is up to the principal to decide what powers he or she wishes to grant the attorney-in-fact. Talk to an attorney about drafting a durable power of attorney that fits your needs.

### ***What a Durable Power of Attorney Can Include***

Common powers to include in a durable power of attorney include:

- banking
- managing and conveying real property
- handling tax matters
- To waive bond so that your personal representative does not have to purchase a bond during the probate procedure
- applying for government entitlements and benefits
- dealing with insurance
- handling investments
- creating trusts and transferring property to trusts
- making health care decisions
- hiring and firing professional care givers

Durable powers of attorney tend to be interpreted narrowly. That means the power must be explicitly granted in the document. Courts generally will not imply powers that are not specified. For example, unless the durable power of attorney specifically grants the attorney-in-fact the power to make gifts, courts will usually not imply such a power.

### ***What a Durable Power of Attorney Cannot Include***

Certain powers cannot be granted in a durable power of attorney, including:

- the right to vote
- the authority to execute a will
- the power to get married or seek a divorce
- the power to execute a durable power of attorney or Advance Directive for Health Care

- the power to make decisions regarding life-sustaining medical treatment (unless the durable power of attorney complies with Oklahoma's Advance Directive for Healthcare Act)

### ***Different Types of Durable Powers of Attorney***

Oklahoma has two main durable power of attorney statutes. The [Uniform Durable Power of Attorney Act \(58 O.S. §§ 1071-1077\)](#) authorizes durable powers of attorney that grant powers over health and medical decisions as well as property and finances.

A durable power of attorney executed under the Uniform Durable Power of Attorney Act should be signed by the principal, witnessed by two people who are at least 18 years old and not related to the principal or to the attorney-in-fact by blood or marriage, and notarized. The attorney-in-fact or alternate attorney-in-fact cannot be a witness.

Oklahoma's second durable power of attorney statute is the [Uniform Statutory Form Power of Attorney Act \(15 O.S. §§ 1001-1020\)](#). This Act provides a standardized form to grant powers over property only. This statutory form lists 13 powers over financial matters and property. The principal can initial each power he or she wishes to grant the attorney-in-fact, or may initial one line granting all the powers. Each power is defined in more detail in the Act. There is space for the principal to add to or explain the powers granted. However, this space cannot be used to grant any power to make medical or health-related decisions.

Unlike the Uniform Durable Power of Attorney, this form does not need to be witnessed, but it does need to be signed by the principal and notarized.