

New Jersey Department of the Public Advocate
Durable Power of Attorney
Questions and Answers

Who will handle my affairs if I can't?

Most people know they should have a will so their estate can be administered and distributed to beneficiaries promptly and efficiently upon their death.

Unfortunately, many people fail to plan adequately for lifetime disability that leaves them unable to legally handle their business, financial and personal affairs.

The durable power of attorney allows you to choose who will be in control of your affairs, should you be unable to act on your own behalf, eliminating the need for the courts to appoint a guardian.

Disability can arise from a number of different causes, such as illness, injury, an accident or old age. If this happens – and you have not executed a durable power of attorney – then the court may decide who will act on your behalf.

Known as guardianship and conservatorship proceedings, these court actions can consume time and money and leave the decision of who will handle your affairs in the hands of a judge.

Even an ordinary power of attorney, which gives a relative, friend or bank the power to act on your behalf, becomes invalid if you become incompetent.

The New Jersey Legislature responded to this problem by creating the “Durable Power of Attorney,” which remains in effect even if you become mentally incapacitated. Having a Durable Power of Attorney can save time, expense and the inconvenience of a court proceeding.

What are some advantages of a Durable Power of Attorney?

- You – not a judge – 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.

What is a power of attorney?

You, as “principal,” name another individual or an institution (such as a bank) as your “agent” or “attorney-in-fact” to act for you in handling your affairs. The appointment gives them the power, 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 daily affairs.

The authority you give to your agent can be as broad (to do anything you could do) or as narrow (to sell a particular piece of real estate) as you choose to make it. A power of attorney should be in writing, signed by you in the presence of a notary public who witnesses your signature. This way, your agent can prove he or she has the authority to act for you.

If you are giving your agent authority to make decisions about real estate you own, then the power of attorney is typically recorded, along with the deed, in the county clerk's office.

Is a durable power of attorney different?

Yes. Unlike a simple power of attorney, a durable power of attorney survives even if you become incapacitated and cannot act on your own behalf. It typically contains words like: "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or a lapse of time," or "This power of attorney shall become effective upon the disability or incapacity of the principal." In order to be valid, it must be signed by you before you become disabled.

Do I need a Durable Power of Attorney even if my spouse and I own everything "jointly?"

Yes. If you are incapacitated, your spouse can still sign checks and make withdrawals on joint bank accounts, but your spouse cannot sell jointly owned stocks or your jointly owned home 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.

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 create a Durable Power of Attorney that is effective while you are still able to take care of your own affairs. The advantage here is that, should you become incapacitated, your agent does not have to produce medical evidence that you are unable to handle your own affairs.

On the other hand, you are giving your agent a lot of authority and that authority can be abused, even though your agent is obligated to act solely in your best interest. **So it is very important that you give this power only to someone you trust completely.**

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

Yes, you or your lawyer could include a phrase that says something like: "This power of attorney shall become effective upon my disability." You need to indicate how it will be determined that you are disabled so that when your agent tries to use the power of attorney (say at a bank), your agent will be able to produce evidence that proves your disability.

It's up to you to decide if you want a Durable Power of Attorney that is presently effective or one that becomes effective only if you become disabled or incapacitated. A knowledgeable attorney can assist you in deciding what type of power of attorney best meets your needs.

Can I revoke a Durable Power of Attorney?

As long as you have capacity, you can revoke your Durable Power of Attorney. The revocation should be in writing and it should be delivered to the agent and third parties with whom the agent is dealing. While a guardian appointed by the probate court cannot revoke a Durable Power of Attorney, a court may void the Power of Attorney as part of a guardianship order.

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. Until a third party has received actual notice of the principal's death, the third party is not held liable for continuing to rely on the Durable Power of Attorney.

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 durable 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
- Buy, sell or manage 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
- Do Medicaid planning
- 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 health-care proxy.

Whom should I name as my agent?

You may name any adult (for example, a spouse, child, other relative or a friend), or you may name a private pay guardian (such as a bank or accountant). It is very important that

you choose an agent you trust and who is willing to act solely on your behalf. Remember, your agent may be making important financial and personal decisions for you.

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.

What are the agent's obligations to me?

Your agent is obligated to follow your instructions (oral and written) 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.

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 guardian to handle your affairs.

The guardian can require the agent to account and report, and if warranted, petition the court to amend, suspend or revoke the Durable Power of Attorney. In addition, you (or your guardian) can sue your agent for damages caused by the agent's abuse of authority.

What are some problems with a Durable Power of Attorney?

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.

Another problem occurs if you have an individual as your agent and he or she "quits" or "dies" or becomes disabled. In such an event, if you are mentally incapacitated and have not named an alternate agent, there will be no one to act on your behalf.

One of the biggest problems with any power of attorney is 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.

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

Because of the complexities involved, 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 long-term-care planning.