

Durable Power of Attorney:

Do You Need One?

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Durable Power of Attorney: Do You Need One?

There are almost daily horror stories of elder abuse in the newspapers—children squandering an entire estate and leaving their parents in the poor house, unethical attorneys using their clients' money as their own, people swindled by financial scams or telemarketing fraud. How can you make sure that something like this doesn't happen to you when you get older? If you have aging parents, how can you protect them from being cheated?

Consider creating a durable power of attorney. It allows you to appoint someone you trust to handle financial affairs and health-care decisions if you become unable to do so. Completing a few simple forms can protect your assets and ensure that your wishes about health-care matters are upheld.

What Is a Durable Power of Attorney?

A power of attorney is a legal document in which you authorize another person to have specified legal authority to act on your behalf. This person, called either an "attorney in fact" or an "agent" (although the person need not be a lawyer), manages your financial affairs or makes health-care decisions as you have directed. You can grant someone power of attorney to take care of your finances, health-care decisions, or both. Normally, you create separate documents for finances and health care, but there may be special situations where they can be combined.

You can also create several powers of attorney that give different agents authority for different types of transactions. For example, you may grant your daughter power of attorney to deal with your real estate because she lives nearby and your son power of attorney over your retirement assets because he is an accountant. One of the benefits of this type of legal document is that it is flexible—you can adapt it to your needs.

A power of attorney ends normally when you become incapacitated. Then the agent must go through a court proceeding called a "conservatorship" or "guardianship" to gain the authority to handle decision-making on your behalf. The downside of the traditional power of attorney is that court proceedings can drag on, cost a lot of money and cause family fights.

Fortunately, all 50 states and the District of Columbia now allow their citizens to create a *durable* power of attorney—one which remains in effect even after the person granting it becomes incapacitated. In a durable power of attorney, you determine who has control over your financial or health-care affairs and under what re-

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strictions that person can act for you. Unless revoked, a durable power of attorney remains in effect until you die.

The great advantage of a durable power of attorney is its flexibility. You decide whether it takes effect upon signing (which is useful if you are undergoing some sort of major surgery or are in failing health) or only when you become incapacitated. Another option is called a "springing" durable power of attorney; it springs into action only when you become incapacitated.

Who Should Create a Durable Power of Attorney?

A durable power of attorney is especially important for people who may soon be unable to handle their affairs.

You may not think you need a durable power of attorney if you are married and all of your assets are owned jointly with your spouse. However, a durable power of attorney can make life much easier for your family if you ever become incapacitated. For example, if you are married to someone who is incapacitated but does not have a durable power of attorney, you can still withdraw money from joint accounts. However, most states require both spouses to agree to sell real estate or cars. If the incapacitated spouse cannot consent, then the other spouse cannot sell. This can be a real problem if the spouse has high medical bills that need to be paid.

What Are Durable Powers of Attorney for Finances and Health Care?

Durable Power of Attorney for Finances

A durable power of attorney for finances is a powerful tool that can allow your agent to take care

of your financial obligations in the event of your incapacitation. You must be careful to pick someone you absolutely trust; they will have control over your assets to the extent that you authorize them. Here is a partial list of activities typically handled by agents:

- using your assets to pay for your everyday expenses;
- buying, selling, paying taxes on real estate and property;
- collecting government benefits (Social Security, Medicare, etc.);
- investing your money;
- buying and selling insurance policies and annuities;
- filing and paying your taxes;
- operating your small business; and
- managing your retirement accounts.

You are free to give your agent as much or as little power over your finances as you deem necessary. Keep in mind, however, that if you haven't adequately addressed all your financial needs in your durable power of attorney, your family will be forced to go to court to get the authority to take care of anything you have not authorized if you become incapacitated. If you would like your agent to have complete control over all your affairs, make that clear. You can include a clause that states that you authorize your agent to have the authority to do each and every act that you could personally do.

You are free to revoke (take back) your power of attorney at any time. If you think your agent is making poor decisions or not following directions, you can revoke his or her powers. You do this in writing and by sending copies of the revocation letter to interested parties, such as your bank and other financial institutions.

Here is a sample durable power of attorney for finances with each clause explained in italics. The legal requirements for creating a valid durable power of attorney are straightforward but may vary from state to state. Make sure you are familiar with your state's requirements before drafting.

Sample Durable Power of Attorney for Finances*

1. I, _____ (Principal's Name)
_____, (Principal's Address),
being of sound mind and legal capacity, do hereby appoint
_____, (Agent's Name)
_____, (Agent's Address),
as my true and lawful attorney in fact, to act for me in my name, place and stead, and on my behalf to do
and perform the following:

(This section allows you to declare the extent to which your agent will be able to act for you. You can list specific tasks, or you can give broad authority over all your affairs.)

2. The following property, interests or rights shall be subject to this Power of Attorney:

(In this section, detail the assets that the agent shall have power over. Be sure to clearly describe the nature, ownership and location of any assets, including real estate, securities, personal property, etc.)

3. This Power of Attorney shall be effective on the date of:

(Include this section only if you want your durable power of attorney to take effect on a certain date or immediately. See below for a "springing" document.)

4. This Power of Attorney shall remain in effect in the event that I should become or be declared disabled, incapacitated or incompetent.

(This is the clause that makes this document 'durable.' If you delete this section, your power of attorney will end if you become incapacitated. To create a "springing" durable power of attorney, change "shall remain in effect" to "shall take effect.")

5. This Power of Attorney shall terminate on _____ (Date) _____, unless I have revoked it sooner. I may revoke this Power of Attorney at any time and in any manner.

(It is important to create a way in which you can revoke this document should you recover your mental capacity.)

6. My agent shall be paid compensation for services pursuant to this Power of Attorney as follows:

(You can allow for your agent to be paid, or you can decide not to pay your agent. It is up to you. If no payment is to be given, change the words to "My agent shall not be paid compensation for services pursuant to this Power of Attorney.")

7. This Power of Attorney shall be governed by the laws of _____ (State) _____.

In Witness Whereof, I have signed this Power of Attorney of my own free will.

_____, (Principal's Signature) _____ (Date) _____

Agreed to and Accepted by:

_____, (Agent's Signature) _____ (Date) _____

Subscribed and sworn to before me on this _____ (Date) _____.

_____, (Signature) _____

Notary

*For illustration purposes only.

Durable Power of Attorney for Health Care

A durable power of attorney for health care, sometimes called a health-care proxy, gives another person authority to make medical decisions for you if you are unable to make them for yourself. A durable power of attorney for health care is important because it can ensure that you receive only the medical care you want if you become incapacitated.

One of the most important areas that people want to cover in this document is the use of life-support systems. If no advance planning has been done, a person may be kept alive by medical technology indefinitely because no one has the authority to disconnect or withhold life-support equipment. If you would like to prevent this, you can leave written instructions that no lifesaving technology be used if your situation is hopeless and you have no reasonable chance of recovery to a life you consider meaningful. Or, you may decide to leave this decision up to your agent.

A durable power of attorney for health care ensures that you receive only the medical care you want if you become incapacitated.

The choice of using life-support technology is only one of many situations you can deal with in your durable power of attorney for health care. You can also name the doctor you want to determine if you become incapacitated, the hospital you want to be treated at and specific treatment(s) you do or don't want to receive. A durable power of attorney for health care may sound a lot like a living will, but there are some important distinctions.

A living will (another type of health-care directive) allows you to state ahead of time and in writing whether you want your life prolonged if there is no hope of recovery. It is not a substitute for a "last will and testament," which explains how you want your

assets distributed after your death. As a general rule, living wills only go into effect if you are no longer able to make your own health-care decisions. For example, if you suffer serious brain damage in a skiing accident or suffer an incapacitating stroke, you may be permanently unconscious and unable to communicate with your doctor. In this case, a living will lets your physician know your wishes concerning certain medical procedures.

Ideally, a durable power of attorney for health care and a living will work together. For example, you could create two separate documents, a living will explaining the treatment you wish to receive and a durable power of attorney appointing someone to oversee your directive.

Each state has enacted different regulations that govern durable powers of attorney for health care. In some states, you must prepare two separate documents; one that details the medical care you want to receive or deny (living will) and one appointing an agent to act on your behalf. In other states, the two can be combined into one document, called an "advanced directive." Visit HALT's Web site for links to resources that offer free health-care directive forms or some guidance on what you need to do to create your own.

Below is a sample durable power of attorney for health care. Due to differing regulations among states, this document will not be valid for every state. Go to your local library or consult a local attorney to see how your state requirements may differ from our example.

A living will allows you to state ahead of time and in writing whether you want your life prolonged if they are only prolonging the dying process or if there is no hope of recovery.

Sample Durable Power of Attorney For Health Care*

1. The GRANTOR of this Durable Power of Attorney for Health Care is:

(Name)

(Address)

(City, State, Zip)

2. The ATTORNEY IN FACT is:

(Name)

(Address)

(City, State, Zip)

3. Creation of this Durable Power of Attorney for Health Care.

To my family, relatives, friends and my physicians, health-care providers, community care facilities and any other person who may have an interest or duty in my medical care or treatment:

I, _____ (Name) _____, being of sound mind, willfully and voluntarily intend to create by this document a durable power of attorney for my health care by appointing the person designated as my attorney in fact to make health-care decisions for me in the event I become incapacitated and am unable to make health-care decisions for myself. This power of attorney shall not be affected by my subsequent incapacity.

4. Designation of Attorney in Fact.

The person designated to be my attorney in fact for health care in the event I become incapacitated is _____ (Name) _____, whose address is above. If _____ (Name) _____ for any reason shall fail to serve or ceases to serve as my attorney in fact for health care, _____ (Name) _____ of _____ (Address) _____ shall be my attorney in fact for health care.

5. Effective on Incapacity.

This durable power of attorney for health care shall become effective in the event I become incapacitated and am unable to make health-care decisions for myself, in which case it shall become effective as of the date of the written statement by a physician, as provided in paragraph 6.

6. Determination of Incapacity.

The determination that I have become incapacitated and am unable to make health-care decisions shall be made in writing by a licensed physician. If possible, the determination shall be made by _____ (Name) _____ of _____ (Address) _____.

In the event that a licensed physician has made a written determination that I have become incapacitated and am not able to make health-care decisions for myself, that written statement shall be attached to the original document of this durable power of attorney for health care.

7. Authority of My Attorney in Fact.

My attorney in fact shall have all lawful authority permissible to make health-care decisions for me, including the authority to consent, withdraw consent or refuse consent to any care, treatment, service or procedure to maintain, diagnose or treat my physical or mental conditions, EXCEPT for the following:

8. Inspection and Disclosure of Information Relating to My Physical or Mental Health.

Subject to any limitations in this durable power of attorney for health care, my attorney in fact has the power and authority to do all of the following:

- a. Request, review and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records.
- b. Execute on my behalf any releases or other documents that may be required in order to obtain this information.
- c. Consent to the disclosure of this information.

9. Signing Documents, Waivers and Releases.

Where necessary to implement the health-care decisions that my attorney in fact is authorized by this document to make, my attorney in fact has the power and authority to execute on my behalf all of the following:

- a. Documents titled or purporting to be a “Refusal to Permit Treatment” and “Leaving Hospital Against Medical Advice.”
- b. Any necessary waiver or release from liability required by a hospital or physician.

10. Duration.

I intend that this Durable Power of Attorney for Health Care remain effective until my death, or until revoked by me in writing.

Executed _____ (Date) _____

In Witness Whereof, I have signed this Power of Attorney of my own free will.

(Principal's Signature) _____ (Date) _____

Agreed to and Accepted by:

(Agent's Signature) _____ (Date) _____

Subscribed and sworn to before me on this _____ (Date) _____

(Signature) _____

Notary

*For illustration purposes only.

How Can You Be Sure Your Form Is Official?

You have to be 18 or older to create a durable power of attorney. To make it legally binding, you have to sign it in front of a notary public. Some states may also require that you sign it in front of at least one witness, excluding the notary public. If you have specified that your agent will deal with real estate matters, then you also need to put a copy of your durable power of attorney on record with the local land records office. In two states, North Carolina and South Carolina, all durable powers of attorney must be recorded at the land records office.

Do I Need to Hire a Lawyer, or Can I Create a Durable Power of Attorney Myself?

You can write your own durable power of attorney with the help of do-it-yourself legal products. However, some products are better than others. Consult HALT's *Citizens Legal Manual, Do-It-Yourself Law: HALT's Guide to Self-Help Books, Kits & Software* for our recommendations on which ones to use. Also, be sure that anything you purchase will comply with your state's laws. Specific book recommendations are at the end of this guide.

If your situation is too complex for do-it-yourself products, you can have a lawyer create a durable power of attorney for you. Hiring a lawyer to write a durable power of attorney can be relatively inexpensive. Generally, the service will cost between \$50 to \$200, depending on the complexity of the document and the hourly rate of the lawyer. Shop around to make sure you get the best rate and quality possible. Finally, if you participate in a prepaid legal service plan, contact them to see whether a durable power of attorney is part of the plan's benefits and if not, how much it would cost to get one drafted.

Resources: Organizations

Compassion in Dying Federation

6312 S.W. Capitol Hwy., Ste. 415
Portland, OR 97201
Tel: 503-221-9556
Fax: 503-228-9160
E-Mail: cid@compassionindying.org
Web site: www.compassionindying.org

Partnership for Caring

1620 Eye St., NW, Ste. 202
Washington, DC 20006
Tel: 202-296-8071
Fax: 202-296-8352
Toll-free: 1-800-989-9455
E-mail: pfc@partnershipforcaring.org
Web site: www.partnershipforcaring.org

Do-It-Yourself Products

Nolo's Quicken WillMaker Plus 2004 (\$49.95)

Contact: Nolo
950 Parker St.
Berkeley, CA 94710
Toll-free: 1-800-992-6656
Web site: www.nolo.com
A HALT Do-It-Yourself Best Buy, this computer program has over 40,000 different document possibilities dealing with wills, durable powers of attorney, health-care directives and much more.

How to Write Your Own Living Will (\$16.95)

by Edward A. Haman, 1997, 192 pp.
Sourcebooks, Inc.
Sphinx Sales
1935 Brookdale Rd.
Naperville, IL 60563
Tel: 630-961-3900
Web site: www.SphinxLegal.com
This resource compares living wills and health care powers of attorney. It also details regulations in all 50 states and the District of Columbia and contains state-specific forms. This book does not have information on durable powers of attorney for finances.

Living Wills Simplified (\$28.95)

by Dan Sitarz, 2002, 295 pp.

Contact: Nova Publishing Company

1103 West College St.

Carbondale, IL 62901

Web site (for purchase): www.amazon.com

This book includes information on creating a valid durable power of attorney for finances and health care for all 50 states and the District of Columbia. It also comes with a CD-ROM, which has printable copies of all the available forms.

Estate Planning: Step-By-Step (Barron's Legal-Ease Series) (\$14.95)

by Martin Shenkman, 1997, 244 pp.

Contact: Barron's Educational Series

250 Wireless Blvd.

Hauppauge, NY 11788

Toll-free: 1-800-645-3476

Web site: www.barronseduc.com

This book takes you through creating durable powers of attorney for finances and health care step-by-step. Includes clause by clause explanations of sample durable powers of attorney. The book does not include a CD-ROM; users must tear out and photocopy documents.

Nolo's Medical Directives & Powers of Attorney for California (\$16.99)

by Shae Irving, J.D., 2003, 144 pp.

Contact: Nolo (See above.)

Offered by Nolo, this resource has in-depth information on creating a durable power of attorney for finances and health care in the state of California. The book also includes sample forms that you can tear out or download from a CD-ROM.

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Since 1978, HALT has provided a powerful voice—working on your behalf in Washington and across the nation—to help Americans navigate the legal system with or without a lawyer. And we need your help. Join HALT to help us allow more people to settle their legal affairs simply and affordably.



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