

SENIOR INFORMATION & ASSISTANCE

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Durable Power Of Attorney: General Information

What is a Power of Attorney?

A Power of Attorney is a grant from one legally competent person, called the "**principal**" to another individual, called the "**attorney-in-fact**" to act on behalf of the principal.

The power may be limited or special, that is, designed for a specific purpose. For example, a married person, who will be out of state when a real estate sale closes may give his or her spouse a **limited** Power of Attorney to sign all closing documents for both of them.

The power may also be **general**, granting the attorney-in-fact all of the powers that the principal has. However, certain powers are **not included** in general Powers of Attorney unless you specifically mention them. Such as:

- the power to make gifts of the principal's property,
- to designate beneficiaries of the principal's life insurance policies, or
- to change the principal's will or community property agreement.

What is a Durable Power of Attorney?

All Powers of Attorney terminate upon the death of the principal. An ordinary Power of Attorney terminates at the time the principal is determined mentally incompetent. However, a Durable Power of Attorney is different. The principal may specify that the power shall not be affected by the disability or incompetence of the principal. This makes the power "durable".

A Durable Power of Attorney can be limited or general, as noted above.

But I am doing fine...Why would I want a Durable Power of Attorney?

You can create a Durable Power of Attorney to become effective only when you need assistance. In fact, a physically healthy, mentally alert person usually executes a Durable Power of Attorney effective upon the onset of a disability. It becomes effective only when he or she is determined to be disabled or mentally incompetent. Married couples, who would ordinarily rely on each other, may wish to plan for emergencies where both spouses become incapacitated.

The other option is a Durable Power of Attorney effective immediately. This is appropriate for a person who, while mentally competent, is physically disabled or has a progressively disabling disease and wants the assistance of another trusted person in managing their financial and legal affairs. ***Once a person becomes incompetent, it is too late to execute a Power of Attorney. At that point, a court-appointed guardian may be necessary.***

What if I already have a Power of Attorney?

You may have already executed some form of Power of Attorney, perhaps in another state, or sometime in the past. Such a power may still be valid; however, if it does not have the durable language, it would terminate if you become legally incompetent. Documents made out of state may be ineffective in Washington. Furthermore, the older the documents are, the less likely they are to be honored by others. It is recommended you review old documents with an attorney to be sure they will accomplish your goals.

Is there any limitation to my right to choose my Attorney-in-Fact?

Washington law has some limitations for your protection. The attorney-in-fact may not be a health care provider (e.g., doctor, nurse, hospital or care facility operator of a place where you reside, or employees of such facilities), unless the health care provider also happens to be your spouse, adult brother or sister, or adult child. Otherwise, you are free to select any competent adult person.

What guarantee do I have that my Attorney-in-Fact will do the right thing?

You have no such guarantee. An attorney-in-fact is not bonded in the same way a court-appointed guardian would be. A principal generally has no insurance to cover the mistakes of the attorney-in-fact. For this reason, a Durable Power of Attorney should never be granted to another person without serious consideration. While the attorney-in-fact is your agent, and as such, acts for you as a fiduciary, he incurs no liability so long as such acts are performed without negligence and in good faith.

Why execute a Durable Power of Attorney document?

A Durable Power of Attorney provides a legal basis on which someone else can rely. If a business, hospital, care facility, or a bank, is agreeable to do business, then the existence of a Durable Power of Attorney provides the legal basis. On the other hand, if the other party won't cooperate without a court order, the only alternative may be to establish a guardianship.

If you execute a Durable Power of Attorney, you should pave the way for its eventual use. While you are well, share it with important third parties such as bank managers, doctors, financial planners and accountants. Determine if they will honor it.

Can I change my mind?

Yes. You may revoke your Durable Power of Attorney at any time by communicating your intent to the attorney-in-fact, so long as you are still legally competent. In addition, it terminates automatically if a guardian is appointed for you. If a Power of Attorney has been recorded with the county auditor where you reside or have owned property, you must record the Document of Revocation there as well.

Is a Power of Attorney a way to avoid probate?

No. As mentioned earlier, Powers of Attorney terminate upon the death of the principal. You must make provision for your wishes following your death through a will.

When should I record a Power of Attorney?

You must record this document whenever you intend your attorney-in-fact to have the power to undertake any real estate transaction on your behalf. Remember, if you record a power and later decide to revoke it, you must also record that revocation. Recording is done with the auditor of the county where you reside.

Do I need to go to a lawyer for a Power of Attorney?

A lawyer is not required in order to prepare or execute a Power of Attorney document, however, it is wise to obtain individualized legal advice. You should make sure the document grants only those powers you want it to, and that it takes effect only under the conditions you desire. To get advice about which Power of Attorney document is appropriate for your circumstances, see an attorney. For more information about Power of Attorney documents and to download a form for a Durable Power of Attorney, go to www.washingtonlawhelp.org.