

What is a durable power of attorney?

A durable power of attorney is an important legal document that authorizes another person (typically a family member) to act on your behalf in making financial and legal decisions. The person who is authorized to act on your behalf is called an agent or “Attorney-in-Fact”.

Depending on how the power of attorney is drafted, the person you designate as your attorney-in-fact may, acting on your behalf, withdraw money from your bank account, sell real estate and enter into contracts.

A power of attorney is called “durable” because it remains effective even if you become incapacitated either for medical or other reasons.

Typically, married couples will give their power of attorney to their spouse or adult children although there are no restrictions on who you can give the power of attorney to (provided the person is an adult). The best practice is to designate a primary person to act as your power of attorney and then one or two others if the first is unable to act.

Why is a durable power of attorney important?

A common misperception among married couples is that they can act on each other’s behalf. This is not true. If your spouse becomes incapacitated, you can not access his or her bank accounts unless your name is also on the account. If you hold your house or other real estate jointly (as most couples do) and one person becomes incapacitated, the other can not sell or transfer the real estate without court authorization. The same is true for single people. That is, if they are incapacitated, no one else can access a single person’s accounts, pay their bills or manage their affairs in their absence.

If you do not have a durable power of attorney, the only recourse is to apply through the probate court for guardianship or authority to act. This can be a time consuming and expensive process. This process can also become adversarial, if family members disagree among themselves as to what should be done or who should serve as guardian.

By designating a trusted relative or friend to act on your behalf, you decide who will manage your affairs if you are unable.

What types or Power can be granted in a power of attorney?

The powers granted in your power of attorney can be as broad or limited as you decide. That said, for estate planning purposes, the practice of our office (and most attorneys) is to draft these documents broadly because it can be difficult to predict what action future circumstances may require. The one set of powers that are not included in a power of attorney are for matters related to your health care. Health care powers are covered in a separate document called a Health Care Proxy.

Here is a listing of some of the powers that we typically include in our power of attorney:

Write checks	Prepare and file tax returns
Withdraw funds from bank accounts	Collect debts
Access safe deposit boxes	Manage IRAs and other retirement accounts
Buy and sell stocks and mutual funds	Pay compensation for advisers
Manage investment accounts	Form trusts and prepare estate documents
Vote shares of stock in a business	Apply for Social Security and other public benefits
Manage family businesses	Transfer title to automobiles
Make gifts	Initiate and/or defend law suits
Manage and sell real estate	Borrow money
Enter into contracts	

When does a durable power of attorney become effective?

A durable power of attorney can be drafted in two basic forms:

- Immediate – this is effective when it is signed
- Springing – this is effective only if you become incapacitated

As a policy, our office does not draft springing powers of attorney because they create a level of uncertainty about if and when a person becomes incapacitated. Because the power granted in a durable power of attorney is significant, third parties such as banks are less likely to approve a springing durable power of attorney that is effective upon incapacity.

Example: Consider what would happen if someone comes into a bank and presents to the manager a durable power of attorney that authorizes that person to withdraw all of the funds in a bank customer's account. If the power of attorney says that it is effective upon incapacity, the bank manager will be cautious to act without verifying the customer's medical condition. Even if the manager is presented with a doctor's letter stating that the customer is incapacitated, there are still questions as to whether the letter is authentic and whether the doctor applied the correct standards. Because these facts are difficult and time consuming to verify, banks and other institutions may refuse to honor a springing power of attorney.

When does a power of attorney expire or terminate?

A power of attorney is typically drafted so that it remains effective until revoked by the person making it. Revocation of the power of attorney should be done by (a) destroying all copies of the document; (b) giving written notice to the individual(s) named as your power of attorney that you are revoking it effective immediately; and (c) sending written notice to any individuals or institutions that may rely on the power of attorney (such as banks, insurance companies, brokerage companies) and potentially recording a copy of the revocation with the registry of deeds.

The concern, however, is that once the power of attorney is out there it can be difficult to withdraw. Given this concern, we advise clients to hold on to the power of attorney in a safe place until it is needed. Our office can also hold the document along with a letter of instruction from you on how and when to distribute it.

If you have any concerns that a person is acting improperly or abusing the authority granted under a power of attorney, you should seek the advice of an attorney to determine the best course of action.

Finally, although powers of attorney are typically drafted so that they do not expire with the lapse of time, some banks and other institutions have refused to honor powers of attorney that are several years old. Therefore, out of an abundance of caution, you may consider re-executing a new power of attorney every four or five years.

What risks are associated with a power of attorney? Can they be abused?

The primary risk that we worry about in executing a power of attorney is that the power may be abused by the individual who is authorized to act on your behalf. Although such an individual remains liable for not acting in your interests, pursuing legal action to collect damages is a time consuming, stressful and expensive process and may not be successful.

If there are concerns about misuse or abuse of a power of attorney, we advise clients to think carefully about who they designated as their power of attorney and to keep the durable power of attorney in a safe and secure place until it is needed. It is also possible to draft the power of attorney so that it is narrowly focused and does not grant broad discretion.

What decisions do I need to make when I complete a durable power of attorney?

There are really only two decisions that you need to make to put in place a power of attorney:

- The person who will act as your agent or attorney-in-fact and, ideally, one or two individuals who will act as back-up powers of attorney in the event that the first person named is unable; and
- Any restrictions on the powers granted in a power of attorney.

What services do you provide in this area?

Drafting of a durable power of attorney is included as part of our standard estate planning package. Typically, for estate planning work we schedule an initial consultation which can last one to two hours. This first meeting allows us to get to know each other and to review your needs, concerns and objectives. There is no cost

for this first meeting and no obligation to retain us as your attorney. We will then make our initial recommendation on what type of plan makes sense for you. We will also be able to give you a quote on what it will cost us to prepare and implement your particular plan.

If you are only in need of a durable power of attorney, please contact our office for a quote on the cost and to arrange a time to meet.

Please contact us if you have any further questions at (617) 965-9100.

Stephen A. Evans, Esq.
sevans@evanslegal.com

Newton office:
797 Washington Street, Suite 1
Newton, MA 02460

Belmont office:
100 Van Ness Road
Belmont, MA 02478

DISCLAIMER: The information presented here is provided with the understanding that it does not constitute legal advice or professional assistance in any matter and should not serve as a substitute for consultation with a professional attorney, but rather is provided for informational purposes only. I strongly encourage anyone who is impacted or dealing with the issues discussed above to seek professional legal advice. Stephen A. Evans, Esq. is authorized to practice law in the Commonwealth of Massachusetts, USA and no other state. © Stephen A. Evans, Esq. 2007. All rights reserved. *Under the rules of the Supreme Judicial Court of Massachusetts, this material may be considered advertising.*