



# A Matter of Choice: Durable Power of Attorney

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Have you ever considered what would happen if or when you could no longer make personal financial decisions? What would happen if you were traveling abroad and in your home town an important document needed your signature? A durable power of attorney can handle these situations. Planning ahead is more than just being practical. It is an act of concern for your family. You can help your family avoid disagreements over your finances by making your preferences known in advance.

We all treasure the right to make our own personal financial choices. However, we need to consider the possibility of dependency and not being competent enough to make decisions on our own at some time in the future. One way to increase control over what happens when one experiences incapacity is to write instructions in advance. Incapacity does not just happen to the elderly. Younger people may suddenly experience disability or incapacity because of an accident.

## What Is Power of Attorney?

A **power of attorney** is a legal document in which one person (**the principal**) gives another person (**the agent**) the power to handle certain or all affairs or property on his or her behalf. These affairs include paying bills, real estate transactions (leasing, buying and selling), contract agreements, depositing or withdrawing money from checking and savings accounts, securities transactions, complete tax returns and pay taxes. Other powers can include insurance transactions, settling claims and litigations, employing financial advisors and handling operations of a business. Declaring that the agent has general powers will include all of the powers mentioned previously. However, you may decide to be specific about the



powers given to the agent. In this case, you will need to list the specific powers in the document. The person selected to have power of attorney should be someone who is trusted and has knowledge about financial management.

## Legal Terms in Power of Attorney Document

**Principal:** The *principal* is you. You make the legal document giving the power to the agent.

**Agent:** The *agent* is the person(s) or the institution to whom you, the *principal* gives powers. Another legal term for the agent is attorney-in-fact.

**Incapacity:** A person is mentally incompetent or physically unable to make decisions on his/her own behalf.

## What is Incapacity?

**The following definition of an incapacitated person is defined in Oklahoma Statutes, Uniform Probate Code, 5-101.**

*“Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the person.”*

If a principal becomes mentally disabled, he or she loses many legal rights. The law removes these rights to protect the principal from persons taking advantage of him/her.

A principal may resist being declared mentally incompetent. The agent may need to legally declare the principal is incapacitated or incompetent for the legal action of power of attorney to take effect. Such situations can cause conflict and anguish for the agent, the principal and family members.

## Ordinary and Durable Power of Attorney

Powers of attorney are either ordinary (attorney-in-fact) or durable. An **ordinary** power of attorney (attorney-in-fact) lets you name a person to act as your agent. The agent will handle your business or financial matters when you are away. It ceases to exist (becomes void) when the principal suffers incapacity. Therefore, it is useless when it is needed the most.

In contrast, **durable** power of attorney provides that the person named under the power can act legally when the principal becomes incapacitated. It remains in effect while the principal is alive, unless the document is revoked by the principal.

**In Oklahoma, the power of attorney document should contain the words, “This power of attorney shall become effective upon the disability or incapacity of the principal,” (Oklahoma Statutes, 58-1072).** These words show the intent of the principal. This statement gives authority if the principal becomes disabled or incapacitated.

Naming a durable power of attorney assures privacy, saves money and avoids publicity. However, it places powerful rights into the hands of the agent. There is a risk the agent could have the principal declared incapacitated and wipe him/her out financially. Some legal advisors feel that a

safeguard to a potential problem is to name two agents who will act together on the principal's behalf. This will reduce the risk, but also requires two signatures on every transaction. If the agents live in different towns, this can cause inconvenience and delay.

## Creating Power of Attorney

**If you established a durable power of attorney document and durable power of attorney for health care prior to the recent Oklahoma legislation for advance directive of health care (effective September 1, 1992), you will need to establish new documents. You are required to prepare a separate document for durable power of attorney and complete the advance directive of health care form.**

A power of attorney document is easy to create and involves an inexpensive procedure. It can reduce a lot of unnecessary worry and regret. In fact, a power of attorney document is an essential element of a person's estate planning process.

Work with an attorney to make the document precise but as flexible as you need. You do not give up your decision-making power when you sign a power of attorney document. Remember, the power can grant complete authority or it can restrict responsibilities. When giving the power to manage your affairs, choose an individual who knows your wishes. Those most often named as an agent are relatives, friends, banker, or a lawyer. Make sure



to inform the person you wish to appoint.

It is wise to name one or more successor agents in case the first-named person dies or is unable or unwilling to act in your behalf. For example, if a spouse is the primary agent, and both husband and wife suffer serious injuries in an accident, both may be unable to make financial decisions. Then someone else will have to decide on their behalf. Individuals usually appoint first a spouse, then either an adult child, a brother or a sister. One could also name a close friend or financial advisor.

## **Recognition of the Document**

Power of attorney law varies among states. There is a chance the document will need to be used in a state different from Oklahoma. Experts suggest that the document contain names of witnesses and a notary. These procedures will cover all eventualities. In Oklahoma, a power of attorney document is filed in the office of the clerk of the court whose judge approves the power. A certified copy is put on file in the county clerk's office of the county where the principal lives. It is wise to file a certified document in each county where the principal owns real estate.

A power of attorney is useful only when the agent can carry out financial transactions with other people. Sometimes an institution refuses to recognize that an agent has a power of attorney. A power of attorney document is more likely to be accepted if it includes both a statement of the general powers that the agent may exercise and a list of the specific powers.

You must check with banks, brokerage houses, and other financial institutions to see whether they will recognize a power of attorney for transactions. Some financial institutions will not recognize a power of attorney document unless it uses the institution's own form. Also, some institutions may not recognize a document after six months to one year. Therefore, it is important to annually renew the power-of-attorney document.

## **Termination of Power of Attorney**

A power of attorney terminates on (1) written repeal by the principal, (2) death of principal, (3) expiration as specified in the document or (4) appointment of a guardian of principal.

The principal has the right to revoke a power of attorney at any time, if he/she is mentally competent at the time of repeal. The principal should give a written notice to the agent that the power of attorney ends. The principal should thereafter file the notice promptly in the office of the clerk of the court whose judge approved the power. The prin-

cipal should also give a copy of the notice to any person or institution affected by the power of attorney.

## **Advantages of a Power of Attorney**

The power of attorney document has the following advantages:

- The principal decides who should make decisions on his/her behalf, rather than the court appointing an agent.
- The principal can choose to give either general or specific powers to the agent.
- The power of attorney document can require the agent to become bonded. Also, it can require an accounting of transactions.
- A durable power of attorney is flexible.
- Establishing a power of attorney is inexpensive.

## **Disadvantages of Power of Attorney**

The power of attorney may have these disadvantages:

- Sometimes the person giving the power grants powers that are too general to the agent.
- The agent could be someone who turns out to be untrustworthy.
- Questions sometimes arise about the mental competence of the principal at the time of writing the power of attorney. For people suffering early symptoms of mentally impairing illness, as in early Alzheimer's disease, medical documentation must state that the person was lucid at the time of signing the document.
- Some financial institutions may refuse to recognize a power of attorney that is not written on their forms. Be sure to check with all financial institutions where you conduct business transactions.
- Some institutions may refuse to recognize a document after six months to one year. Check annually if the power of attorney document needs to be updated for it to be legal.
- Power of attorney is open to possible abuse by the agent.

Anyone considering granting a power of attorney should be as specific as possible about what powers are being given and for how long. Remember, the power of attorney document is not a substitute for a living trust or will. It immediately becomes invalid once the principal dies.

A person should obtain legal assistance to develop a document that conveys his/her power of attorney intent. Mental incapacity and physical disability are possibilities that all of us must face.

No one likes to think of these events and often will postpone writing a power of attorney document. If you want to control your financial affairs, it is important to give serious thought to how you want them controlled. Then, follow through with the necessary documents.

There are no magic solutions to the events and problems that face us, but there are three steps you can take to avoid financial crises in the future:

- Step 1:** Decide now how your financial affairs will be handled if you ever face incapacity or are traveling abroad.
- Step 2:** Begin immediately to take the legal steps necessary to assure that your choices will be carried out.
- Step 3:** Share your planning process and decisions with family, friends, legal advisors and financial institutions where you do business.

Each of us has unique life experiences and values. No matter what age or situation — whether you are single, married, divorced or widowed, planning for the unexpected is important.

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