

PLANNING AHEAD, DIFFICULT DECISIONS

Durable Power of Attorney



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Lifetime financial planning frequently poses the issue of how to ensure effective management of property and financial affairs after you become incapable of managing them on your own. Important events affecting a person's finances and property should not be put on hold simply because the person is unconscious or lacks the mental or physical capability of acting on his or her own. Durable Powers of Attorney provide a flexible and relatively low-cost option for planning for such situations.

Background

At its most basic, a power of attorney is a document that gives another person the authority to take some action on the signer's behalf.¹ Powers of attorney have long been used for a variety of purposes. For example, a woman who travels out of the country on business can appoint an agent to sign a real estate purchase contract on her behalf. The power of attorney gives the agent the right to bind the purchaser to the contract, as if the purchaser had signed it herself.

Traditionally, powers of attorney have not provided an effective means of planning for a person's incompetence (also known as "incapacity"). This is because traditional (or common law) powers of attorney become ineffective when the person who signs the document becomes incompetent.² A person is generally considered incompetent when he or she is unable, while unassisted, to properly manage and take care of his or her property as a result of a variety of factors, including physical and/or mental illness, advanced age, and disability.³ A common law power of attorney, therefore, provides few opportunities for disability planning. Consequently, many states, including Wyoming, have adopted some form of Durable Power of Attorney statute to fill the gap; this provides individuals of all backgrounds with a greater degree of flexibility in planning for financial affairs in the event that they become incompetent.⁴

What is it?

A Durable Power of Attorney, or DPOA, is a document that allows the principal (the person granting the power) to appoint an agent (the person receiving the power) to make decisions on his or her behalf. Unlike a common law power of attorney, a DPOA

does not terminate when the principal becomes incompetent,⁵ hence the addition of the word "durable." A DPOA may also be known as a Power of Attorney for Finances, a Letter of Attorney, or a Power of Attorney with Durable Provisions.

Why Do I Need One?

Without a DPOA, court appointment of a guardian or conservator for the incompetent person (known as the "ward") may be the only real option available to manage a person's property and financial affairs when the person becomes incompetent or disabled (see *Guardianships and Conservatorships* Bulletin 1250.9 for more information about guardianships and conservatorships). Obtaining appointment of a guardian or conservator can have several drawbacks when compared with a DPOA.

1. Appointment of a guardian or conservator can be costly due to legal fees and costs of complying with court procedure. A DPOA, on the other hand, is a one-time fee paid when an attorney creates the document.
2. Court appointment can be a slow and cumbersome process, especially when the court disagrees with the parties or requires them to do extra work. Court-appointed guardians and conservators must file regular reports with the court and remain subject to its jurisdiction.⁶ With a DPOA, the powers are active at or before the time of incapacity, so there is no wait time between incapacity and the ability of the agent to act (See Types of DPOA below).
3. A court-appointed guardian or conservator is given all powers that the court sees fit,⁷ while a principal can limit what powers are given to the agent through a DPOA.
4. Obtaining an appointment through the court can be embarrassing for the ward. A majority of court records are public,⁸ meaning that anyone can obtain copies of a petition or other documents associated with a guardianship or conservatorship action. When creating a DPOA, the only people who have access to the principal's personal information are the attorney creating the document and those whom the principal provides copies.

Overall, a DPOA allows the same financial and property powers conferred by a traditional guardianship or

conservatorship without the stress, hassle, or cost of going through the court system.

DPOAs vs. Revocable Trusts

Individuals of somewhat more substantial wealth often use revocable trusts (also known as “standby trusts”) for disability planning.⁹ In a typical standby trust arrangement, the trust’s creator (called the “settlor”) will cease to act as trustee once the settlor becomes incompetent. A successor trustee will then manage property held by the trust while the person is alive and incompetent according to directions provided by the document creating the trust.

Like a DPOA, a revocable trust can prevent the need for assets to be managed by a guardian or conservator. Unlike a DPOA, a trust continues to exist after the settlor dies, making it a possible tool for distributing the settlor’s property after death. Trust planning can be expensive, however, and may not be a feasible option for individuals with limited financial resources. In such situations, a DPOA can be a more cost-effective means of disability planning. Even individuals who have executed revocable trusts can benefit for DPOAs to provide for the management of property not yet transferred to their trusts. If a DPOA and trusteeship are both in effect, the principal and trustee will need to coordinate regarding management of the principal’s property.

Powers Granted Under a DPOA

The agent’s authority is generally determined by the terms of the DPOA.¹⁰ Generally, a principal can give an agent power to carry out any act that the principal would normally be able to do on his or her own. Since every person’s situation is different, the drafter of the DPOA should be very careful to include only the specific powers that the principal is willing to transfer to the agent. These powers can include almost any power that a person would normally have.

For example, the principal may consider giving the following powers to an agent:

- Property collection,
- Real and personal property management,
- Contracts,
- Banking,
- Tax returns,

- Safe deposit box access,
- Employment, such as hiring and dismissal of accountants, attorneys, financial advisers, etc.,
- Motor vehicle title and transfer powers,
- Settle debts, claims, and disputes,
- Commence, enforce, answer, and settle lawsuits and other judicial or administrative proceedings,
- Stock and other interests in business entities,
- Insurance,
- Governmental benefits,
- Borrowing, lending, debt, and expenses,
- Investments,
- Gifting,
- Annuity and retirement accounts, and
- Disclaimers.

Many principals also desire to expressly indicate certain powers that their agent does not possess under the DPOA. For example, the document may specify that the agent cannot execute or amend wills or trusts on the agent’s behalf, divert the principal’s property for the agent’s benefit, or exercise the powers of appointment held by the principal.

Principals are free to grant as much or as little power as they see fit, and a court will generally recognize any limitation a principal puts on the DPOA. However, because of the vast amount of control a DPOA can give the agent, it is important to choose someone in whom the principal has complete confidence and trust. The principal might consider his or her personal and business affairs when granting powers to an agent. For instance, the person may have closely held business interests requiring ongoing management during his or her incompetence. It may be prudent in such situations, for example, to give the agent power to receive dividends, vote at shareholder meetings, and transfer shares of stock.

In addition, there are certain powers that a principal may not grant an agent in a DPOA because most courts consider them too personal to be assignable. These powers include, but are not limited to, making a will for the principal, voting in a government election, entering into a marriage or obtaining a divorce, and making health-care decisions unless specifically authorized (see *Advance Health Care Directives* Bulletin 1250.10 for information about Advance Directives and Health Care Powers of Attorney).

Certain DPOA powers may raise federal transfer tax consequences, such as the agent's power to make gifts. Individuals with large estates that may be subject to the federal estate tax will often seek to utilize lifetime and annual gift exemptions to pass as much property as possible free of federal transfer taxes. This strategy can be interrupted if a person becomes incompetent and has not executed a DPOA. The IRS has advised in a non-binding, private-letter ruling that powers of attorney should expressly authorize the ability of the agent to make gifts.¹¹ Tax considerations in drafting a DPOA can be complex and should be discussed with a licensed tax attorney.

Things to Consider When Choosing an Agent

When choosing an agent, the principal should consider many factors that will affect the nature and effectiveness of the principal-agent relationship. Paramount concerns involve the agent's skill, time, willingness, and ability to carry out tasks and powers assigned by the DPOA. Other relevant factors include a) potential friction within the family that may result if certain members are appointed, b) whether different powers should be split and assigned to different agents, c) how appointing one's spouse may be affected by potential divorce or separation, d) whether to have one agent with sole discretion or multiple agents that must act in unison, e) who will become successor agent should the original agent be unable to fulfill the role, and f) whether a commercial agent (i.e., a bank or corporation) or an individual person would better serve you.

Considerations for Drafting a DPOA

At a minimum, the DPOA document must be in writing and signed by the principal. The document must provide language demonstrating that the principal intended for the agent's power to exist while the principal is incompetent:

- i. "This power of attorney shall not become ineffective by my disability"; or
- ii. "This power of attorney shall become effective upon my disability"; or

- iii. Words showing the intent of the principal that the authority conferred by his/her power of attorney instrument shall be exercised notwithstanding his/her disability.¹²

Often, banks and other financial institutions will not accept a DPOA unless the agent provides a written copy. In addition, having the document signed by witnesses and notarized by a notary public can increase the chances of having the DPOA recognized and decrease the likelihood that a third party will be able to challenge what the document says. Notarization may also be necessary if the DPOA ever needs to be recorded, such as to provide notice that the agent had authority to convey real property on the principal's behalf.¹³ The document should be simple and concise, and it should state the principal's intentions plainly and clearly. The instrument should clearly describe all of the powers given to the agent, conditions under which the agent can exercise those powers, and powers reserved by the principal. To the extent that any portion of the document does not comply with local law, a court may hold the offending portion or the entire document as void.

Wyoming is one of the few states that has not adopted the Uniform Durable Power of Attorney Act.¹⁴ Consequently, it may be necessary for a DPOA to specify a number of powers and requirements that would be considered to exist by default in other states. Issues not currently addressed by Wyoming law, which you may consider discussing with your attorney, include:

- Whether an affidavit is necessary to trigger a "Springing" DPOA (see Types of DPOA below);
- Whether the agent has gift-giving authority;
- Whether the agent must provide notice of his or her resignation;
- Protection of third parties for reliance on the DPOA; and
- The effect of divorce on the authority of an agent who is a spouse.

Types of DPOA

A principal can execute two types of DPOA.

The first is an Immediate DPOA, which becomes effective the moment the principal signs the document. People often use this type of DPOA when

they already have difficulty managing their affairs, or for couples who own all of their assets jointly. Additionally, some people may use this type of DPOA to grant an agent temporary power to act for them, such as when they leave the country for a period.

The second type is a Springing DPOA. A Springing DPOA only comes into effect once a specific condition is met, such as on a certain date or when the principal has been declared legally incompetent to manage his or her own affairs. In other words, the agent may not act on behalf of the principal until the condition has been satisfied. A person cannot sign a DPOA once he/she has been declared incompetent. It is, therefore, important to create one before such a situation arises.

Implementing a DPOA

As discussed above, a DPOA becomes effective either immediately or upon the occurrence of conditions rendering the principal incompetent. Often, the document will require a certification by one or more physicians that the principal has lost capacity. Those requirements should be closely followed to ensure that the agent has the required authority to act.

The document should be accessible to the people who need it, including the agent and his or her attorneys. Many institutions will accept photocopies as evidence of the agent's powers under the instrument. The agent may be expected to show the document to the principal's banks, investment companies, stock transfer agents, insurance companies, accountants, etc. It may also be necessary to record the document with the county clerk to demonstrate the agent's authority to buy and sell real estate.

Depending on the terms of the document, there may be provisions for the replacement, removal, or resignation of the agent.

Revocation and Revision of a DPOA

There are at least three ways that a DPOA can become ineffective. First, a DPOA becomes ineffective when the principal revokes the power or creates a new DPOA that supersedes the old one.¹⁵ Keep in mind that principals may only create or revoke a DPOA if they have capacity. This, however, assumes that a condition precedent has not activated the DPOA. If an agent is currently acting under the authority of a DPOA, the principal may need to communicate to all third parties that the old DPOA is no longer effective before a revocation or revision will be considered valid. Second, like any agency agreement, a DPOA terminates upon the death of the principal.¹⁶ Note, however, that acts undertaken by the agent without knowing whether the principal is alive or dead may be effective.¹⁷ Third, Wyoming law permits a principal to revoke a DPOA by recording a revocation document, attached to the original DPOA, with the county clerk of the county in which he or she resides.¹⁸

If the court appoints a guardian or conservator, one of two results can occur. In some states, the appointment of a guardian or conservator immediately terminates the DPOA. In others, including Wyoming, the DPOA remains in effect, but the agent must report to the guardian or conservator. Wyoming law gives a conservator the same power to revoke or terminate any power under a DPOA that the principal would have had while competent.¹⁹

Do I Need an Attorney?

A variety of resources exist for drafting and executing a DPOA for yourself; however, DPOAs are legal documents with substantial effects on your rights. A generic DPOA form may be inappropriate if the principal has specific issues not addressed by the form. It is, therefore, advisable to consult a licensed attorney before drafting and executing a DPOA.

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- ¹ Corpus Juris Secundum: Agency § 37 (2013).
- ² Restatement (Second) of Agency § 122 (1958).
- ³ Wyo. Stat. Ann. § 3-1-101(a)(ix), (xii).
- ⁴ Wyo. Stat. Ann. §§ 3-5-101 et seq.; Uniform Durable Power of Attorney Act, (1979), <http://www.uniformlaws.org/Shared/Docs/Durable%20Power%20of%20Attorney/UDPAA%201979%20with%201987%20Amendments.pdf>.
- ⁵ Wyo. Stat. § 3-5-101.
- ⁶ Wyo. Stat. Ann. §§ 3-1-102, 3-2-109, 3-3-901 to -902.
- ⁷ Wyo. Stat. Ann. §§ 3-2-201, 3-3-606.
- ⁸ See Wyoming Rules Governing Access to Court Records, https://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=AccessCourtRecords.xml.
- ⁹ Sidney Kess and Bertil Westlin, 1989, CCH Estate Planning Guide.
- ¹⁰ Wyo. Stat. Ann. § 3-5-101(b).
- ¹¹ See IRS Private Letter Ruling 199944005.
- ¹² Wyo. Stat. Ann. § 3-5-101(a).
- ¹³ Wyo. Stat. Ann. § 34-1-104.
- ¹⁴ In re Guardianship and Conservatorship of Parkhurst, 2010 WY 155, ¶ 24.
- ¹⁵ Restatement (Third) of Agency § 3.10 (2010).
- ¹⁶ Restatement (Third) of Agency § 3.07.
- ¹⁷ Wyo. Stat. Ann. § 3-5-101(c).
- ¹⁸ Wyo. Stat. Ann. § 3-5-103.
- ¹⁹ Wyo. Stat. Ann. § 3-5-101(c).

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