



## Is Your Durable Power of Attorney Aging with You?

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A critical part of any estate plan that an individual adopts is a durable power of attorney that designates an agent to manage his/her financial affairs. The durable power of attorney is a backstop that enables others, acting as agent to manage an individual's (called the principal's) assets should they be unavailable to act, e.g. traveling out of the country, or if the individual later becomes incapacitated (when the power of attorney is *durable*, in that it will survive the principal's incapacity and acts taken will be binding on the principal or the principal's estate). In general, the durable power of attorney for financial affairs is intended to avoid the expense and publicity of having a probate court appoint a conservator to manage an unavailable or incapacitated individual's assets.

But a durable power of attorney for financial affairs is not a one-size-fits-all type of document. Especially as we age, the powers that we want our agent to possess under a durable power of attorney can be dramatically different than the durable powers of attorney that we may have adopted while in mid-life, or when we had the responsibility to raise minor children. The needs of an elder individual (or an individual with special needs) become far different as the aging process takes its toll and the implementation of an estate plan becomes critical. What is important to remember is that under Michigan's common law, and its statute, the powers that are delegated to an agent under a durable power of attorney are to be narrowly construed, so that if there is a debate over whether a power was actually given to the agent under the instrument, there is a good chance the power will be deemed to not have been given.

Most durable powers of attorney include broadly-phrased, sweeping powers to handle the principal's banking transactions,

access safe deposit boxes, create and fund trusts, manage with qualified plan accounts and IRAs, and change their beneficiary designations. Also commonplace is the ability to sign contracts and file income tax returns. But there are other, more discrete, express age-related powers that an individual should consider

giving to their agent under a durable power of attorney as time passes. In the absence of these express powers, a probate court conservator may still have to be appointed to handle transactions, along with the expense, publicity, and delays that the court appointment process often entails. Some express powers to consider adding to a conventional durable power of attorney to manage financial affairs of an aging principal might include the following powers.

### **Manage Governmental Benefits**

An agent must be able to deal with the principal's governmental benefits, including Social Security, Supplemental Security

Income, Medicaid, Veterans Benefits, Medicare, and the ability to identify and change the designated representative payee for such governmental benefits. If the receipt of Medicaid benefits is anticipated, the agent should also be expressly authorized to attend Medicaid fair hearings if a dispute arises over Medicaid eligibility or the amount of Medicaid benefits to be paid to the principal.

### **Enter Advance Funeral and Long-Term Care Contracts**

An agent should be able to purchase an advance funeral contract that uses the principal's assets. A prepaid funeral contract is normally treated as an exempt resource if Medicaid benefits are applied for, the ability to dedicate assets to that funeral contract is an important planning step. Similarly, it may be appropriate under some circumstances for the agent to expressly possess the power to purchase into a long-term care insurance

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policy in light of the unusually large premium obligation that is associated with that type of policy.

#### Declare an Intent to Return Home

The principal's home equity can be treated as an exempt asset when applying for Medicaid benefits. However, Medicaid rules will presume a permanent absence from that home after the applicant has resided for six months, or longer, in a nursing home facility. In order to avoid losing the exempt asset status for the recipient's home equity, the agent must possess the ability to formally acknowledge the principal's intent to return home in a Declaration, so as to preserve the home's equity exempt status. If the home equity is treated as a countable asset, then the principal's eligibility to continue to receive Medicaid benefits might be lost for an extended period of time.

#### Access Safe Deposit Boxes

The agent should have the ability to access all safe deposit boxes used by the principal. To prevent the bank that sponsors the box from denying the agent access, if possible the bank where the safe deposit box is located should be expressly identified in the durable power of attorney.

#### Sign Caregiver Agreements

Several strategies exist in order to assist an individual who anticipates at a later date applying for Medicaid benefits if they are forced to reside in an assisted living environment. Some of those strategies include 'spending down' the applicant's assets to become Medicaid eligible. If the elder principal has to pay for a caregiver while living in their own home, Medicaid authorities will treat the compensation that is paid to caregivers as a transfer of assets that will result in the imposition of a penalty period before Medicaid benefits become available, while other caregiver contracts will not be treated as an impermissible transfer of assets. The durable power of attorney should expressly empower the agent to enter into a 'qualified' caregiver agreement on behalf of the principal (including the agent themselves if they are to provide those in-home services, i.e. self-dealing is authorized) to avoid triggering those Medicaid disqualifying penalty periods. A provision under a standard durable power of attorney to 'enter into any contracts that I could enter into' is not sufficient for Medicaid authorities when

it comes to signing a Medicaid 'qualified' caregiver contract. Therefore, the express power given to the agent to enter into caregiver agreements is critical if accessing Medicaid benefits in the future is a concern.

#### Create and Fund Trusts

While the ability to create and fund trusts with the principal's assets is a common power delegated to an agent under a conventional durable power of attorney, usually the power is limited to create a revocable trust to avoid probate on the principal's death or a probate conservatorship if the principal is disabled. However, there are a variety of other trusts that may become relevant to an older principal, or to implement their estate plan. Some of those unique trusts that are used both for

estate and Medicaid eligibility planning include: irrevocable trusts to receive lifetime gifts from the principal to take advantage of the temporary increase in the large federal transfer tax exemptions; qualified income trusts and self-funded Medicaid 'pay-back' irrevocable trusts to preserve the principal's eligibility to receive Medicaid benefits; pooled income supplemental needs trusts; and third-party special needs trusts that are established for the principal's disabled children or grandchildren.

#### Sign Disclaimers, Releases and Make Elections

Disclaimers are sometimes used to re-position an individual to qualify for Medicaid benefits. Or a power previously given to the principal, like a power of appointment over a trust given by a deceased spouse, may need to be released to avoid expensive federal transfer taxes. The same can be said with regard to a surviving spouse's probate court elections after the principal's spouse dies. The power given to the agent to make a disclaimer on behalf of the principal, to execute a release, to exercise a power of appointment over assets held by the principal, or to exercise the principal's elective rights against a deceased spouse's probate estate can add tremendous flexibility to the principal's Medicaid planning and help to avoid future taxes.

#### Elect a Personal Residence Exemption

The agent should be given the power to change the principal's ownership of real estate, including the right to change

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the principal's homestead property and make an election for a principal residence exemption (PRE) for Michigan real property tax classification purposes. A corollary power delegated to the agent might also be the power to challenge any real property assessments or change in property tax classification.

### Make Gifts

The agent should expressly hold the ability to make gifts of the principal's assets. Michigan's durable power of attorney statute is clear that a durable power of attorney must expressly delegate to the agent the authority to make gifts using the principal's assets; restated, the power to make gifts will not be presumed under a broadly phrased durable power of attorney instrument, e.g. 'anything I can do my agent can do.' This power to make gifts is critical, not only to fund a trust, but to also take advantage of the currently large federal transfer tax exemptions. Often the ability to make gifts is limited in a durable power of attorney to the federal gift tax annual exclusion amount, presently \$15,000 per donee. An agent's power to make gifts should be much broader than just the ability to make annual exclusion gifts on behalf of the principal. The ability to make gifts should be extended to make charitable gifts, to fund a charitable remainder trust to avoid incurring capital gains taxes on the sale of the principal's appreciated assets in order to improve the principal's cash-flow, or to engage in more sophisticated tax planning strategies like funding a grantor retained annuity trust (GRAT), a qualified personal residence trust (QPRTs), or a spousal lifetime access trust (SLATs), all of which are designed to shift wealth over time to others through lifetime gifts without incurring substantial federal transfer taxes.

### Manage IRAs

Since so much wealth is held in IRAs these days, the agent needs to be given clear, broad powers to manage those unique, pre-tax assets. Delegated powers to the agent might include: make IRA rollovers; change the investments held in an IRA;

modify IRA beneficiary designations, e.g. to fulfill a charitable bequest on the principal's death; take the principal's required minimum distributions from an IRA (traditional and inherited); or make a qualified charitable distribution to satisfy the principal's required minimum distribution (RMD) for the calendar year, effectively a 100% charitable income tax deduction. The agent should also be given the authority to engage in a conversion of the principal's traditional IRA to a Roth IRA if the long-term planning goal is to reduce the principal's taxable income, or to provide tax-free income to the principal's beneficiaries after the principal's death.

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### Authorize Self-Dealing

Usually a principal will name a spouse or adult child as their agent under their durable power of attorney. If the agent exercises a power that benefits himself or herself, most power of attorney statutes will either prohibit the exercise of that power or make the transactions using the durable power of attorney voidable if others protest that self-dealing. In order to achieve maximum flexibility by the agent, the durable power of attorney instrument should expressly recognize and authorize self-dealing by the agent, so long as the agent also timely accounts to others for the self-dealing actions taken under the durable power of attorney that would otherwise be treated as prohibited self-dealing.

In conclusion, spend some time to review your existing durable power of attorney for the management of your financial affairs. Do the powers delegated to your agent make sense? Do they reflect your existing assets, like a power of appointment that you might hold? Does your agent possess enough clearly delegated powers that will allow your agent to implement your existing estate plan? If not, visit your estate planning attorney to modify and expand your durable power of attorney to make sure that it ages along with you. ☑