



## Capacity Planning: Is Your Agent Up to the Task?

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A critical part of any estate plan is having a financial durable power of attorney. This document names an individual (agent) to handle the financial and property affairs for another individual (principal). A durable power of attorney for financial affairs is important since it enables another to timely handle and manage a person's financial affairs when they are unable to do so on their own due to unavailability or incapacity.

A durable power of attorney can be immediately effective, such that the agent could be empowered to make financial decisions for their principal when they are inaccessible but still competent, e.g., the principal is on an extended fishing trip in the wilds of Canada and cannot be located. On the other hand, the durable

power of attorney can be a springing, which comes into effect upon the occurrence of a future event, such as only when the principal becomes incapacitated. Often the challenge with using a springing durable power of attorney is the determination of if, and when, the principal becomes incapacitated. Surprisingly, many physicians are reluctant to sign a certificate that their patient is incompetent or incapacitated, so that there can be a lingering question, or delay, if the precondition has been met, thus activating the agent's authority to act on the incapacitated principal's behalf.

Early on, a durable power of attorney was a relatively short legal document that pretty much said 'whatever I can do with my property or financial interests, my agent can do the same under this durable power of attorney.' As time has progressed, the approach evolved to itemize each of the powers that the principal grants to his/her agent, thus leading to a long laundry-list type of legal document. [Aside: I used to prepare these 'long form' durable powers of attorney. They inevitably provoked my client's observation

that 'you must be billing by the word.'] What is important, however, is that discrete powers and responsibilities can be conferred on the agent, with other powers and authority withheld from the agent, for a variety of reasons. However, one downside to the use of the 'long form' durable power of attorney is if the agent wants to perform an act that is not clearly identified in the 'long form' document. There

is a good chance that a third party, like a bank, might refuse to acknowledge the agent's authority, which means that it is less likely the missing power will be imputed to the agent.

Most durable powers of attorney for financial affairs do not have an expiration date. This means that a durable power of attorney created 10 to 15 years ago might

still be valid. However, banks and insurance companies are often reluctant to rely upon an agent's assertion of authority under an old durable power of attorney. There is no legal basis to reject the agent's exercise of authority under a durable power of attorney just because it is old, but banks and insurance companies often cite company policy as their reason to reject the agent's exercise of authority acting on the principal's behalf. While there is no legal basis to reject the agent's authority because its age is stale, that often leads to the suggestion that a durable power of attorney for financial affairs should be refreshed every four or five years, simply to remove this impediment from the agent's ability to handle their principal's financial affairs.

Perhaps the most difficult aspect of a durable power of attorney for financial affairs is to identify who should act as the principal's agent. Just like the selection of a trustee is an extremely important decision, so too is the selection of the correct person to act as agent who will handle the principal's assets and financial affairs 'outside' of the trust.

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Most individuals name their spouse, and their adult children in the absence of their spouse. However, are those individuals, despite their relationship with the principal, the best to handle the principal's financial affairs when the principal is unable to act on their own behalf? The following are some characteristics to consider when a person is named as an agent to serve under a durable power of attorney:

- Does the candidate lack common sense and judgement?
- Does the candidate have a history of procrastination?
- Does the candidate closely read, listen to, and follow directions, e.g. does he/she refuse to follow the directions of an attorney?
- Does the candidate communicate well with others?
- Is the candidate disorganized, often losing items or misplacing important papers?
- Is the candidate entirely trustworthy?
- Is the candidate susceptible to the influence of others, like a spouse or an adult child?
- Is the candidate an arrogant 'know it all?'

Tough questions must be answered when an agent is identified to hold an individual's durable power of attorney with regard to assets and the management of their financial affairs. While an adult child might be the likely candidate to hold their parent's durable power of attorney for financial affairs, that child might still not be the best candidate to serve in that role due to their own personal circumstances. That child may become distracted while dealing with his or

her own family matters. That child may have developed an addiction to online gambling or sports betting. Or the most recent sad phenomena in our society, that child may be one of the silent victims of the opioid epidemic. While 'back-up' agents can always be named in the document to serve if the first agent selected is unable to serve, there is no guarantee that the initially designated agent will quietly resign their role, especially if addictions govern their life.

The point to all of this is that it is a good idea to review your durable power of attorney for financial affairs every couple of years to confirm that it still makes sense. Assets

change over time. Additional assets may become subject to beneficiary designations that can be modified by the agent who acts under the durable power of attorney. New tax and financial planning opportunities exist that may not have existed in the past and are not identified in the durable power instrument, e.g., the agent's ability to save income taxes by making direct qualified charitable distributions from the principal's IRA.

A change in the principal's assets, or new tax planning strategies, may also warrant a modification and update to a durable power of attorney to enhance the agent's flexibility to respond to change in the laws. Finally, it is always important to assess if the designated agent is still capable of making sound decisions under the durable power of attorney in the principal's best interests and timely account to others when significant financial decisions are made in reliance upon the principal's durable power of attorney. ☑

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