



Insider Tips on Durable Powers of Attorney

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1. Why do I need a Durable Power of Attorney?

If you don't have one, and someone helping you needs to do something on your behalf-like pay your bills, or sell your house, or sign an admission agreement to have you placed in care, or apply for public benefits, their only option will be to go to court and seek a conservatorship over you. The conservatorship process involves lots of time, money and effort. A valid Durable Power of Attorney can avoid all that. And recent changes to the law provide that a valid Durable Power of Attorney cannot become stale and cannot be unreasonably refused.

2. Why does a power of attorney have to be “Durable”?

A power of attorney that does not contain the magic words, “*This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time,* or, “*This power of attorney shall become effective upon the disability or incapacity of the principal*”, is not a “durable” power of attorney. This means that in the event the principal (the person that is appointing someone else to assist them if needed), becomes disabled or incapacitated; the power of attorney becomes null and void and can't be used.

3. Can a copy of a power of attorney be used?

Only if the person or institution you are giving it to is willing to take it. If you are trying to do something with land (for instance sell it, mortgage it or change ownership), a *notarized original* must be recorded with the deed or mortgage, a copy won't work. Find and keep that original safe! I typically have my clients sign three (3) originals so if one gets lost or used there are others available.



4. Can I name two (2) people on my power of attorney?

A person acting under a power of attorney is called an “attorney-in-fact”. While there is nothing in the law that prevents multiple people from being appointed attorneys-in-fact, some financial institutions won’t recognize the power unless they only have to listen to one attorney-in-fact at a time. Save your family some trouble and only name one person at a time-but be sure to include 1 or two alternates in case the person you choose first can’t help for some reason.

5. Do I have to have witnesses to my Durable Power of Attorney?

Not to have it be legal in Massachusetts. But if you may travel out of state, or have concerns that someone may challenge the document, it’s a good idea. A durable power of attorney should always be notarized, but just like with witnesses it would be legal without it, although it might be hard to use, and won’t help with real estate.

6. What if I don’t altogether trust the only person I know that I can name as my attorney-in-fact under my Durable Power of Attorney?

A durable power of attorney can be either “present” or “springing”. Present means the person has the power to deal with your finances at the present, but doesn’t have to unless you and they agree. Springing means they don’t have the power until an event-for instance a doctor says you can no longer handle your affairs. The present power is easier to use and should be given to someone you trust. The springing is harder to use since the person may have to prove the event has happened, but it may protect you more.

7. What happens to a Durable Power of Attorney when I die?

The power immediately ends when the principal dies and the agent knows the principal is deceased. That’s why it is important to plan not just for lifetime problems, but also for what happens after you die.

Timothy R. Loff has a law office in the Four Corners area of Newton on Beacon Street. His practice focus is on Probate matters, representing individuals and families on Estate and Healthcare planning and issues. His areas of practice include Disability and Long-term Care Planning, Medicaid; Wills and Trusts; Powers of Attorney and Health Care Proxies; Guardianship and Conservatorship; Estate Administration, and other related probate matters. He is a Director of the Massachusetts Chapter of the National Academy of Elder Law Attorneys, and a member of the Public Policy Committee. He is also the Chairman of the Long Term Care Insurance Committee, Co-Chair of the Ethics Committee, and Chairman of the Public Relations Committee for that organization.