

## Three Lessons on Durable Powers of Attorney[\[1\]](#)

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Durable Powers of attorney are an essential ingredient in a complete estate plan, which allow for continued financial management in the event of incapacity. Under a durable power of attorney, an attorney in fact makes financial decisions on behalf of the principal. The attorney in fact can be given broad and sweeping powers. Conversely, powers granted by a durable power of attorney can be limited to particular assets or powers. Accordingly, the level of control given to the attorney in fact should reflect the particular requirements of the estate as well as the principal's comfort with a broad grant of authority. In this article, the author teaches three lessons on effective execution and implementation of durable powers of attorney.

### First Lesson: Why would I Need One Now?

The legality of durable powers of attorney stems from the law of agency. Under agency law principals, an individual with capacity may give an agent powers-to contract, to represent the principal or to revoke or amend a trust, for instance. In the case of a non-durable power, the agency terminates upon the principal's incapacity. Durable powers survive incapacity, but the principal must have capacity at the time of execution in order to effect a valid power.

Accordingly, executing a durable power of attorney for financial management should be done prior to incapacity. Waiting until one becomes unable to coherently express one's wishes with regards to financial management decisions is too late, and a court-appointed conservatorship may become necessary. What about the successor trustee designated in my trust, or the executor of my will? Would they be able to step in? Since the principal does not die at incapacity, only an attorney in fact designated under a properly executed power of attorney may step in to make financial management decisions. A last-minute durable power of attorney executed during incapacity would not survive a court challenge, however expensive or damaging the result.

### Second Lesson: Consider making the Power Immediately Effective

Often, unwary estate planners will execute "springing durable powers of attorney," which only become effective upon the incapacity of the principal. Incapacity is determined according to a test set out in the power, such as a determination made by a medical doctor or a court rendered decision. But who wants to go through the expense, difficulty, and uncertainty of initiating a legal procedure to determine incapacity? Isn't one of the goals of estate planning to prevent unnecessary expense and delay? Moreover, doctors frequently hesitate to make determinations of incapacity because of liability they may face.

In most cases, a better strategy would be to execute an immediately effective durable power of attorney, which gives an attorney in fact the power to make decisions on behalf of the principal without any finding of incapacity. Many are fearful of an immediately effective power of attorney, reasoning that no one should be given such power over their financial affairs unless they are totally incompetent. If they have such a lack of trust for the attorney in fact, why are they executing a power of attorney in the first place? One would think that even more trust would be required when the principal is incompetent and has little influence over the attorney in fact.

Finally, simple measures can be taken to avoid disasters before incapacity. Consider sealing a copy of the durable power of attorney in an envelope labeled "do not open until my incapacity." In addition to oral instructions, this can help to avoid the scenario of a run-away attorney in fact who uses the power of attorney to access financial accounts before incapacity.

### Third Lesson: What powers should the Attorney-in-Fact be given?

The powers given to an attorney in fact depend upon the principal's desires and the particular concerns that stem from the types of assets held. The durable power of attorney should be coordinated with the will, trust and advance health care directive to ensure that they do not contradict each other. Namely, should the attorney in fact have the power to create trusts? To rescind or amend existing trusts? Should the attorney in fact have a power to make gifts to himself or to others? These powers can help ensure that preparation for long term care (medical) or tax planning can take place even after incapacity.

Before executing a power of attorney, individuals should be fully informed of the powers that they are granting, and the possible consequences of such sweeping grants of power. In all cases, it's best to consult with an attorney who can advise on specific risks.

### Conclusion

Durable Powers of Attorney are one of the five essential documents in estate planning discussed in this article series. Unlike a will or trust, which mostly deals with decisions that are made upon one's death, the durable power of attorney deals with life-time financial management and estate planning questions. Individuals should be aware of the risk in waiting to execute the power of attorney; the hazards of "springing" powers; the range of powers that can be given to the attorney in fact; and the risks associated with a sweeping grant of authority to the attorney in fact.

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[1] This article is intended to provide general information about estate planning strategies and should not be relied upon as a substitute for legal advice from a qualified attorney. Treasury regulations require a disclaimer that to the extent this article concerns tax matters, it is not intended to be used and cannot be used by a taxpayer for the purpose of avoiding penalties that may be imposed by law.

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