

What Is A Durable Power Of Attorney?

A Durable Power of Attorney plays an important role in the implementation and integrity of your estate plan. With a Durable Power of Attorney, you can plan for the management of your financial affairs if you become incapacitated.

What is a Power of Attorney? In the estate planning context, a **Power of Attorney** is a grant of power and authority **FROM** YOU, in your capacity as the *Principal* **TO** a trusted relative or friend, who is known as your *Agent* (or your *Attorney-in-Fact*), with which power and authority your Agent is able to manage some or all of your financial affairs on your behalf. The ability to create a Power of Attorney enables you to protect your property and prevent it from being wasted or lost if you become unable to look after your own financial affairs.

What Makes a Power of Attorney a DURABLE Power of Attorney? Generally, if the Principal becomes incapacitated, the power of the Agent to act is terminated **UNLESS** the Power of Attorney contains a provision clearly stating that powers that are granted to the Agent remain in effect **even if** you later become incapacitated and can no longer manage your own affairs.

Is a Power of Attorney Effective After My Death? No. Upon your death, a power of attorney, a durable power of attorney, automatically terminates and, except in very rare and unusual cases, your Agent's authority to act on your behalf is also terminated.

To Whom Would I Grant Such Power To Act On My Behalf? Usually, you would appoint your spouse, adult child, relative, friend, or some other adult to act as your Agent. However, whomever you appoint to serve as **your Agent must be someone whom you trust completely**. You may authorize an Agent to act on your behalf in almost all matters involving the management of the property you own, including your cash in bank accounts, your investments, your retirement-related assets, your insurance policies, and your real property. The powers you give to your Agent to manage your property can be very broad (“**I give my Agent the power to manage all of my property on my behalf**”) or the powers can be very specific (“**I give my Agent the power to manage those funds in my bank account, Number 445-990870, at Bank of America**”).



The person you appoint to serve as your Agent should have a thorough knowledge of your financial and family affairs (or be able easily to learn this information), so that s/he will be sensitive and responsive to your personal circumstances and estate planning objectives.

You may appoint more than one person to act on your behalf (referred to as *Co-Agents*) and empower them to act either separately or unanimously on your behalf (although having more than one person acting on your behalf can—from an administrative perspective—add a layer of complication that you may later regret.) In addition, the **DPA** can include provisions for *successor* Agents, who will act on your behalf if your initial Agent is unable or unwilling to act on your behalf (due to death, unavailability, resignation, etc.).

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Immediately Effective DPAs vs. Springing DPAs. Generally, there are two kinds of DPAs. The first and more common kind of DPA is one that is effective *immediately* after you execute the DPA (the “*immediately effective DPA*”). The second and less common kind of DPA is not effective immediately; the Agent’s powers under the DPA *spring* into effect only upon your incapacity (the “*springing DPA*”).

Immediately Effective DPAs. With an *immediately effective DPA*, you grant to your Agent the authority to act on your behalf immediately, even if you still have capacity to act (and do act) on your own behalf. Of course, because the DPA is *durable*, the power of the Agent to act remains in effect if you subsequently lose your mental capacity. Powers granted to an Agent by an *immediately effective DPA* are much easier to exercise because s/he *need not prove* that you are unable to handle your own affairs due to mental incapacity. It is important to remember that, by executing an *immediately effective DPA*, you do not relinquish your authority and ability to act on your own behalf. Indeed, so long as you retain your capacity, *either you or your Agent* may act on your behalf. However, since you should appoint only those persons whom you trust implicitly to act on your behalf, this should not be a concern. In our experience, the *immediately effective DPA* is the more convenient DPA to use and is therefore more commonly used by our clients, for the reasons explained below.



Springing DPAs. With a *springing DPA*, you grant to your Agent the authority to act on your behalf *only* upon the occurrence of one of the following events: (1) Your mental incapacity; or (2) A *triggering event*. Upon the happening of either of these events, the authority for a person to act on your behalf is transferred from you to the Agent (i.e., the Agent’s power *springs* into effect). Of course, the most common triggering event for a *springing DPA* is the Principal’s incapacity. However, this is not always the case. Therefore, the provisions of the *springing DPA* should clearly specify the following: (1)

What specific triggering event is necessary to transfer power to the Agent; (2) *Who* is to determine that the triggering event has occurred; and (3) *How* such determination is made. For example, the provisions of a *springing DPA* might indicate that the triggering event is your mental incapacity (*what* causes your Agent’s powers to *spring* into effect), that your mental incapacity must be certified in writing (*how* the triggering event is verified) by your treating physician (*who* has the power to indicate the triggering event has occurred).

Based on the foregoing description, you might prefer a *springing DPA* over an *immediately effective DPA*. After all, you only need someone to act on your behalf if you are incapacitated or otherwise unavailable (e.g., out of the country, which itself could be a triggering event), right? Why have an *immediately effective DPA*, which results in at least two people – you and your Agent – having powers over your property? These are reasonable questions to ask. Unfortunately, as the saying goes, ***the devil is in the details***, and the details involved in honoring an Agent’s authority under a *springing DPA* are substantial.

We have found that, over the past several years, the effectiveness and even the validity of *springing DPAs* have been substantially compromised, especially, as if the triggering event is one’s mental incapacity, as is usually the case. This is due, in large measure, to the difficulty in proving that one is incapacitated and when such incapacity began. In addition, proof of one’s incapacity usually requires a physician or medical provider to reveal the Principal’s personal medical information to financial institutions that are hesitant to honor a Agent’s authority unless they have clear proof that the Principal is incapacitated. This information is often quite difficult to obtain because many doctors are unwilling to attest to a patient’s capacity for fear that doing so would violate *privacy protections* provided by the **Health Insurance Portability and Accountability Act (HIPAA)**, a federal statute, or California’s **Confidential Medical Information Act (CMIA)**. Violations of these laws could expose medical providers to substantial liability. Therefore, the usefulness of a *springing DPA* is limited if your doctor refuses to provide information about your capacity

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or if there is disagreement regarding your capacity among your doctors (or among the beneficiaries of your estate). For this reason, along with the difficulty of determining exactly when one has lost one's capacity, we rarely advise our clients to use *springing DPAs*.

General DPAs vs. Specific DPAs: The More Specific The Powers Granted, The Better.



In the past, your **DPA** could contain very general provisions by which you granted your Agent broad authority to act on your behalf. Third parties, including banks and other financial institutions, usually honored your Agent's authority under such **DPAs**. However, in the last decade or so, financial institutions and other third parties, fearful of liability (i.e., being sued by one's beneficiaries for relying on an invalid or improperly drafted **DPA**), have refused to honor an Agent's authority to act on behalf of a Principal *unless* the **DPA** contains *very specific language* under which an Agent may act on behalf of a Principal. For example, certain financial institutions require that the Principal's financial accounts over which an Agent has authority to act must be clearly listed and described in the **DPA** before they will honor the Agent's authority to exercise any powers over those accounts. Therefore, we routinely insert specific language in a client's **DPA** so that the **DPA** is custom-tailored to a client's specific circumstances.

For example, if a client owns a small business and has several bank accounts held in the name of the business, we include specific language in her **DPA** to ensure that her Agent's powers include the power to safeguard her business, including the financial accounts held in the name of the business. Alternatively, if another client has no business and has no plans to start or invest in any business but instead has three life insurance policies and two retirement plans, we include specific language in his **DPA** to ensure that his Agent's powers include powers over each retirement plan and insurance policy (which is listed and described in the **DPA**) and remove references to a business. Time and again, financial institution representatives have commented that an Agent's authority under a custom-tailored **DPA** is more easily and quickly honored because it provides greater assurance that the Principal actually intended that the Agent have such authority.

DPAs Are A Necessary Part of Your Estate Plan. Occasionally, a client will ask me, "*Since I have a revocable trust and my property is held in the trust, I don't need a durable power of attorney, right?*" **Wrong!** Even if you have a revocable trust and hold most of your property in your trust, you still need a **DPA**. A **DPA** allows you to authorize your Agent to address myriad issues that are not even related to your trust (e.g., your taxes, claims against you, claims you have against others, non-trust assets, etc.). For example, the Trustee of your trust has the power to manage and administer *only* the assets held in your trust. The Trustee cannot manage assets that are normally held outside of your trust, such as your retirement account or life insurance policy. But your Agent acting under your **DPA** would have the authority to manage such assets.

Your Agent could also have the authority to transfer into your trust any assets that should be in your trust but, for some reason, were left out – due to neglect or acquisition after your trust was established. Your Trustee does not have such power. Moreover, your Trustee cannot represent your interests in a lawsuit if you are incapacitated – but your **DPA** provides your Agent with such authority. Your **DPA** can even be given the power to amend the terms of your trust if your family's circumstances change after your incapacity (i.e., amending your trust to provide for the disability of a child). There are a number of powers your Agent might have over your estate and personal care that are not available to the Trustee of your trust.

DPAs Are Easy To Implement and To Revoke. You can execute a **DPA** quickly and easily. Since the Agent's powers under your **DPA** remain effective even if you become incapacitated, the use of a **DPA** may preclude the necessity of a conservatorship of your estate, which is a very costly, time-

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consuming, cumbersome, and highly public manner of protecting your estate if you are incapacitated. Your **DPA** can contain provisions that authorize your Agent to make gifts of your property (if necessary to fulfill your estate planning objectives or to qualify you for much needed long term care governmental benefits), to make tax decisions on your behalf, to complete the transfer of assets to your trust, and to disclaim inherited property (if such were in keeping with your estate planning objectives). A **DPA** can be executed even when your death is imminent; the only requirement is that you have sufficient mental capacity when you sign the **DPA**.

The **DPA** is also easy to revoke. As long as you have your capacity, you remain in ultimate control of your estate because you have the power to revoke the Agent's power to act on your behalf by executing a simple document revoking the **DPA** and providing the document to any third party who may rely (or have relied) on the **DPA**.

Periodic Review and Re-Execution of DPAs Are Necessary. DPAs are quite flexible; they can be drafted very broadly to address a vast array of situations and circumstances OR they can be drafted very narrowly to address the management of one specific asset or even to address one specific power over a specific asset. And, DPAs are easy to implement.

However, while the power of an Agent who is appointed under a **DPA** remains in effect for an unlimited period of time (terminating only upon your death), we strongly advise our clients to periodically review their existing DPAs, both to re-confirm the appropriateness of the provisions of their DPAs as well as to re-confirm the appropriateness of the particular person(s) they have appointed to serve as their Agents. Finally, even if no substantive changes to your **DPA** appears necessary, we recommend that you regularly re-execute your **DPA** (every two years or so) to ensure its continued acceptance by third parties, especially financial institutions. This is because many title companies and other financial institutions may refuse to honor an Agent's power to act on behalf of a Principal if the **DPA** is *stale*. A **DPA** may be considered *stale* if it was executed more than two years before the date an Agent attempts to exercise his/her powers under the **DPA**, *even if the DPA is correctly drafted in all respects*. This refusal can be quite frustrating, especially since one can imagine the urgent circumstances surrounding an Agent's proposed use of the **DPA** (the incapacity or illness of the Principal and the need to act quickly on his/her behalf).JC



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