

PLANNING AHEAD, DIFFICULT DECISIONS

Durable Power of Attorney



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Lifetime financial planning frequently poses the issue of how to ensure effective management of your property and financial affairs after you become incapable of managing them on your own. Important events affecting a person's finances and property should not be put on hold simply because the person is unconscious, lacks the mental or physical capability of acting on his or her own, or is missing. Durable powers of attorney provide a flexible and relatively low-cost option for planning for such situations.

Background

At its most basic, a power of attorney is a document that gives another person the authority to take some action on the signer's behalf.¹ Powers of attorney have long been used for a variety of purposes. For example, a person who is out of the country on business can appoint an agent to sign a real estate purchase contract on her behalf. The power of attorney gives the agent the right to bind the purchaser to the contract, as if the purchaser had signed it.

Traditionally, powers of attorney have not provided an effective means of planning for a person's incompetence (also known as incapacity). This is because traditional (or common law) powers of attorney become ineffective when the person who signs the document becomes incompetent.² A person is generally considered incompetent when he or she is unable, unassisted, to properly manage and take care of his or her property as a result of a variety of factors, including physical or mental illness, advanced age, and disability.³ A common law power of attorney therefore provides few opportunities for disability planning. Consequently, many states have adopted statutes to fill the gap, providing individuals of all backgrounds with a greater degree of flexibility in planning for their financial affairs in the event that they become incompetent.⁴ Wyoming has adopted the Uniform Power of Attorney Act, which provides greater specificity in the requirements of a valid appointment and an agent's

powers and duties. This Act also goes beyond the traditional meaning of "incompetence," and now defines "incapacity" as the inability to manage property or business affairs because the person:

- A. Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or
- B. Is:
 - III. Missing;
 - IV. Detained, including incarcerated in a penal system; or
 - V. Outside the United States and unable to return.⁵

What is it?

A Durable Power of Attorney, or DPOA, is a document that allows the principal (the person granting the power) to appoint an agent (the person receiving the power) to make decisions on his or her behalf. Unlike a common law power of attorney, a DPOA does not terminate when the principal becomes incompetent,⁶ hence the addition of the word "durable." A DPOA may also be known as a Power of Attorney for Finances, a Letter of Attorney, or a Power of Attorney with Durable Provisions.

Why do I need one?

Without a DPOA, court appointment of a guardian or conservator for the incompetent person (known as the "ward") may be the only real option available to manage a person's property and financial affairs when the person becomes incompetent or disabled (see Guardianships and Conservatorships Bulletin 1250.9 for more information about guardianships and conservatorships). Obtaining appointment of a guardian or conservator can have several drawbacks when compared to a DPOA. First, appointment of a guardian or conservator can be costly due to legal fees and costs of complying with court procedure.

1 2A C.J.S. *Agency*, § 37 (2024).

2 Restatement (Second) of Agency § 122 (1958).

3 Wyo. Stat. Ann. § 3-1-101(a)(ix), (xii).

4 Wyo. Stat. Ann. §§ 3-9-101 *et seq.*; Nat. Conf. of Comm'rs on Unif State Laws, Uniform Power of Attorney Act, (2006), <https://tinyurl.com/35crd3ve>.

5 Wyo. Stat. Ann. § 3-9-102(a)(v).

6 Wyo. Stat. §§ 3-9-101(a)(i), 3-9-104.

A DPOA on the other hand, is a one-time fee paid when an attorney creates the document. Second, court appointment can be a slow and cumbersome process, especially when the court disagrees with the parties or requires them to do extra work. Court-appointed guardians and conservators must file regular reports with the court and remain subject to its jurisdiction.⁷ With a DPOA, the powers are active at or before the time of incapacity, so there is no wait time between incapacity and the ability of the agent to act (See Types of DPOAs below). Third, a court-appointed guardian or conservator is given all powers that the court sees fit,⁸ while a principal can limit what powers are given to the agent through a DPOA. Finally, obtaining an appointment through the court can be embarrassing for the ward. A majority of court records are public,⁹ meaning that anyone could obtain copies of a petition or other documents associated with a guardianship or conservatorship action.

When creating a DPOA, the only people who have access to the principal's personal information are the attorney creating the document and those to whom the principal provides copies. Overall, a DPOA allows the same financial and property powers conferred by a traditional guardianship or conservatorship without the stress, hassle, or cost of going through the court system.

Appointment of a conservator does not terminate a DPOA or alter an agent's authority unless limited, suspended, or terminated by the court.¹⁰ A principal may use a DPOA to nominate a guardian or conservator, which a court will typically honor absent good cause for disqualifying a particular agent.

DPOAs vs. Revocable Trusts

Individuals of somewhat more substantial wealth often use revocable trusts (also known as "standby trusts") for disability planning.¹¹ In a typical standby trust arrangement, the trust's creator (called the "settlor") will cease to act as trustee once the settlor becomes

incompetent. A successor trustee will then manage property held by the trust while the person is alive and incompetent according to the directions provided by the document creating the trust.

Like a DPOA, a revocable trust can prevent the need for assets to be managed by a guardian or conservator. Unlike a DPOA, a trust continues to exist after the settlor dies, making it a possible tool for distributing the settlor's property after death. However, trust planning can be expensive and may not be a feasible option for individuals with limited financial resources. In such situations, a DPOA can be a more cost-effective means of disability planning. Even individuals who have executed revocable trusts can benefit for DPOAs to provide for the management of property not yet transferred to their trusts. If a DPOA and trusteeship are both in effect, the principal and trustee will need to coordinate regarding management of the principal's property.

Powers granted under a DPOA

The agent's authority is generally determined by the terms of the DPOA.¹² While a DPOA may grant an agent specific powers, it may also grant the agent general authority, which will include most powers a principal could exercise on their own.¹³ Examples of powers falling under an agent's general authority include the following:

- Property collection powers;
- Real and personal property management powers;
- Contract powers;
- Banking powers;
- Tax return powers;
- Safe deposit box access powers;
- Employment powers, such as accountants, attorneys, financial advisers, etc.;
- Motor vehicle title and transfer powers;
- Settlement powers;
- Lawsuit powers;

7 Wyo. Stat. Ann. §§ 3-1-102, 3-2-109, 3-3-901 to -902.

8 Wyo. Stat. Ann. §§ 3-2-201, 3-3-606.

9 See Wyo. R. Gov. Acc. to Ct. Records, https://www.courts.state.wy.us/court_rule/wyoming-rules-of-governing-access-to-case-records/.

10 Wyo. Stat. Ann. § 3-9-108.

11 Sidney Kess & Bertil Westlin, *CCH Estate Planning Guide* 207 (1989).

12 Wyo. Stat. Ann. § 3-9-201.

13 Wyo. Stat. Ann. §§ 3-9-201(c), 3-9-204 through 3-9-216.

- Powers involving stock and other interests in business entities;
- Insurance powers;
- Governmental benefit powers;
- Borrowing, lending, debt, and expense powers;
- Investment powers; and
- Annuity and retirement account powers.

A general grant of authority does not include certain powers unless they are expressly stated in a DPOA. Examples of such powers include the following:

- Creating, amending, revoking, or terminating a trust;
- Making gifts;
- Creating or changing beneficiary designations;
- Delegating the agent's authority; and
- Disclaiming property.

A principal may not grant certain powers to an agent in a DPOA because most courts consider them too personal to be assignable. These powers include, but are not limited to, making a will for the principal, voting in a government election, entering into a marriage or obtaining a divorce, and making health care decisions unless specifically authorized (see Advanced Health Care Directive Bulletin 1250.10 for information about Advance Directives and Health Care Powers of Attorney).

Certain DPOA powers may raise federal transfer tax consequences, such as the agent's power to make gifts. Individuals with large estates that may be subject to the federal estate tax will often seek to utilize their lifetime and annual gift exemptions to pass on as much property as possible free of federal transfer taxes. This strategy can be interrupted if a person becomes incompetent and has not executed a DPOA. The IRS has advised that powers of attorney should expressly authorize the ability of the agent to make gifts.¹⁴ Tax considerations in drafting a DPOA can be complex and should be discussed with a licensed tax attorney.

Things to consider when choosing an agent

When choosing an agent, the principal should consider many factors that affect the nature and effectiveness of the principal-agent relationship. Paramount concerns involve the agent's skill, time, willingness, and ability to carry out the tasks and powers assigned by the DPOA. Other relevant factors include potential friction within the family that may result if certain members are appointed; whether different powers should be split and assigned to different agents; how appointing one's spouse may be affected by potential divorce or separation; whether to have one agent with sole discretion or multiple agents that must act in unison; who will become successor agent should the original agent be unable to fulfill the role; and whether a commercial agent (i.e., a bank or corporation) or an individual person would better serve you.

Considerations for drafting a DPOA

At a minimum, the DPOA document must be in writing and signed by the principal.¹⁵ If properly notarized, the principal's signature will be presumed to be genuine. Notarization may also be necessary if the DPOA ever needs to be recorded, such as to provide notice that the agent had authority to convey real property on the principal's behalf.¹⁶ DPOAs signed after January 1, 2018, are automatically durable unless the document says otherwise.¹⁷ Earlier DPOAs require language demonstrating that the principal intended for the agent's power to exist while the principal is incompetent. For example, it may say

“This power of attorney shall be and remain effective regardless of my subsequent disability or incapacity”; or

“This power of attorney shall only become effective if I become disabled or incapacitated.”

14 See I.R.S. Tech. Adv. Memo. 9736004.

15 Wyo. Stat. Ann. § 3-9-105.

16 Wyo. Stat. Ann. § 34-1-104.

17 Wyo. Stat. Ann. § 3-9-104.

The instrument should clearly describe all of the powers given to the agent, the conditions under which the agent can exercise those powers, and those powers reserved by the principal.

Types of DPOA

A principal can execute two types of DPOA. The first is an Immediate DPOA. An Immediate DPOA becomes effective the moment the principal signs the document. People often use this type of DPOA when they already have difficulty managing their affairs, or for couples who own all of their assets jointly. Additionally, some people may use this type of DPOA to grant an agent temporary power to act for them, such as when they leave the country for a period.

The second type is a Springing DPOA. A Springing DPOA only comes into effect once a specific condition is met, such as on a certain date or when the principal becomes incapacitated. In other words, the agent may not act on behalf of the principal until the condition has been satisfied. It is common to make a DPOA Immediate regarding the primary agent (often a spouse), but Springing regarding successor agents (e.g., the principal's children).

A person cannot sign a DPOA once they have been declared incompetent. It is therefore important to create one before such a situation arises.

Implementing a DPOA

As discussed above, a DPOA becomes effective either immediately, or when the principal becomes incapacitated. Often, the document will require a certification by one or more physicians that the principal has lost capacity. Otherwise, Wyoming law allows incapacity to be certified by a physician or licensed psychologist.¹⁸ An attorney, judge, or government official may certify that a principal is incapacitated because he or she is missing, detained, or outside the United States and

unable to return. Whichever requirements apply, they should be closely followed to ensure that the agent has the required authority to act.

The document should be accessible to the people who need it, including the agent and his or her attorneys. Under Wyoming law, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.¹⁹ The agent may be expected to show the document to the principal's banks, investment companies, stock transfer agents, insurance companies, accountants, etc. It may also be necessary to record the document with the county clerk to demonstrate the agent's authority to buy and sell real estate. Wyoming law provides remedies where a person refuses to recognize the authority of a valid DPOA.²⁰

A DPOA creates a strict relationship of trust between the principal and agent.²¹ To that end, an agent has a variety of duties, including loyalty, good faith, competence, and impartiality. The agent must avoid conflicts of interest and act in the principal's best interest. Failure to do so can result in liability.²² Wyoming law entitles the agent to reasonable compensation and reimbursement of expenses unless waived by the DPOA.²³

Unless the DPOA says otherwise, an agent may resign by providing notice to the principal. If the principal is incapacitated, notice may be provided, as appropriate, to a conservator, guardian, co-agent, caregiver, another interested person, or a governmental agency.²⁴

Revocation and revision of a DPOA

While a variety of situations may terminate a DPOA, the most common are when the principal passes away or revokes the DPOA.²⁵ An individual agent's authority terminates when the principal revokes it; the agent dies, becomes incapacitated, or resigns; or, where the principal and agent are married, an action is filed for divorce or annulment. Keep in mind that a principal

18 Wyo. Stat. Ann. § 3-9-109.
19 Wyo. Stat. Ann. § 3-9-106(d).
20 Wyo. Stat. Ann. §§ 3-9-116, 3-9-120.
21 Wyo. Stat. Ann. § 3-9-114.
22 Wyo. Stat. Ann. § 3-9-117.
23 Wyo. Stat. Ann. § 3-9-112.
24 Wyo. Stat. Ann. § 3-9-118.
25 Wyo. Stat. Ann. § 3-9-110.

may only create or revoke a DPOA if they have capacity. In addition, an agent acting in good faith may continue to act on a principal's behalf until the agent learns about the termination.

When a new DPOA is signed, it is typically advisable for it to revoke all prior powers of attorney.

Do I need an attorney?

A variety of resources exist for drafting and executing a DPOA for yourself, including the statutory form included with this brochure. However, DPOAs are legal documents with substantial effects on your rights. A generic DPOA form may be inappropriate if the principal has specific issues not addressed by the form. It is therefore advisable to consult a licensed attorney before drafting and executing a DPOA.

APPENDIX A

STATE OF WYOMING STATUTORY FORM POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act, W.S. 3-9-101 through 3-9-403.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney, or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions. This form provides for designation of one (1) agent. If you wish to name more than one (1) agent, you may name a co-agent in the Special Instructions. Co-agents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I, _____, name the following person as my agent:

Name of Agent: _____

Agent’s address: _____

Agent’s Telephone Number: _____

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent: _____

Successor Agent’s Address: _____

Successor Agent’s Telephone Number: _____

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent: _____

Second Successor Agent’s Address: _____

Second Successor Agent’s Telephone Number: _____

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act, W.S. 3-9-101 through 3-9-403:

(INITIAL each subject you want to include in the agent’s general authority. If you wish to grant general authority over all of the subjects you may initial “All Preceding Subjects” instead of initialing each subject.)

	Real Property
	Tangible Personal Property
	Stocks and Bonds
	Commodities and Options
	Banks and Other Financial Institutions
	Operation of Entity or Business
	Insurance and Annuities
	Estates, Trusts, and Other Beneficial Interests
	Claims and Litigation
	Personal and Family Maintenance
	Benefits from Governmental Programs or Civil or Military Service
	Retirement Plans
	Taxes
	All Preceding Subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

	Create, amend, revoke, or terminate an inter vivos trust
	Make a gift, subject to the limitations of the Uniform Power of Attorney Act, W.S. 3-9-217, and any special instructions in this power of attorney
	Create or change rights of survivorship
	Create or change a beneficiary designation
	Authorize another person to exercise the authority granted under this power of attorney
	Waive the principal’s right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
	Exercise fiduciary powers that the principal has authority to delegate
	Disclaim or refuse an interest in property, including a power of appointment

LIMITATION ON AGENT’S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF CONSERVATOR OR GUARDIAN (OPTIONAL)

If it becomes necessary for a court to appoint a conservator of my estate or guardian of my person, I nominate the following person(s) for appointment:

Name of Nominee for conservator of my estate: _____

Nominee’s Address: _____

Nominee’s Telephone Number: _____

Name of Nominee for guardian of my person: _____

Nominee’s Address: _____

Nominee’s Telephone Number: _____

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

Your Signature and Date: _____

Your Name Printed: _____

Your Address: _____

Your Telephone Number: _____

State of:

County of:

This document was acknowledged before me on _____,

by _____.

(Seal, if any)

Signature of Notary: _____

My commission expires: _____

IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You shall:

1. Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
2. Act in good faith;
3. Do nothing beyond the authority granted in this power of attorney; and
4. Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(Principal's Name) by (Your Signature) as Agent

Unless the Special Instructions in this power of attorney state otherwise, you shall also:

1. Act loyally for the principal's benefit;
2. Avoid conflicts that would impair your ability to act in the principal's best interest;
3. Act with care, competence, and diligence;
4. Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
5. Cooperate with any person who has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
6. Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

Termination of Agent's Authority

You shall stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

1. Death of the principal;
2. The principal's revocation of the power of attorney or your authority;
3. The occurrence of a termination event stated in the power of attorney;
4. The purpose of the power of attorney is fully accomplished; or
5. If you are married to the principal, a legal action is filed with a court to end your marriage or for your legal separation, unless the Special Instructions in this power of attorney state that such action will not terminate your authority.

Liability of Agent

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act, W.S. 3-9-101 through 3-9-403. If you violate the Uniform Power of Attorney Act, W.S. 3-9-101 through 3-9-403, or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

This form is based on the statutory form contained in the Uniform Power of Attorney Act codified at Wyo. Stat. Ann. § 3-9-301.

APPENDIX B

AGENT’S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT’S AUTHORITY

State of:

County of:

I, _____, certify under penalty of perjury that _____ granted me authority as an agent or successor agent in a power of attorney dated _____.

1. I further certify that to my knowledge:
2. The Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney, and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;
3. If the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;
4. If I was named as a successor agent, the prior agent is no longer able or willing to serve; and
5. (Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

Agent’s Signature: _____

Date: _____

Agent’s Name Printed: _____

Agent’s Address: _____

Agent’s Telephone Number: _____

State of:

County of:

This document was acknowledged before me on _____, by _____.

(Seal, if any)

Signature of Notary: _____

My commission expires: _____

This optional form is used by an agent to certify facts concerning a DPOA and is contained in the Uniform Power of Attorney Act codified at Wyo. Stat. Ann. § 3-9-302.