

Have You Got the Power (of Attorney)?

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The New York Durable Power of Attorney is an integral part of every estate plan, but it is also the one document that clients are most trepidatious about signing. Their concern is not unfounded. The Power of Attorney quite literally grants someone else the power to make decisions about another's finances, property, business matters, taxes, gifts, investments and all things related.

Why Do I need a Power of Attorney?

Anyone over the age of 18 who has a bank account should have a Power of Attorney. If you own assets in your name, no one else can assist you in managing those assets if you cannot manage the assets yourself due to a short-term illness or incapacity, without a Power of Attorney. Many incorrectly presume that a spouse or family member can simply step-in and make any necessary financial transaction for another without a Power of Attorney in place; this is not the case. In fact, retirement assets, real property (even if owned jointly,) and solely-owned assets may not be accessed by anyone, including a spouse, unless she has a Power of Attorney signed by you, giving her permission to access those assets – even for simple tasks like paying bills.

How Does the Power of Attorney Work?

The Durable Power of Attorney allows you, the principal, to appoint another person, an agent, to make financial decisions for you. The decisions that you allow your agent to make can be tailored to your specific situation. Sounds easy, right? Not exactly. There is a tension that exists between giving your agents all the powers available under the law to act for you and very narrowly tailoring those powers to specific situations. Make the Power of Attorney too broad and your agent could step into your shoes and make any and all financial decisions on your behalf – decisions that you might not want another person to make for you. An overly restrictive Power of Attorney could very well leave your agent in a position where she cannot assist you in managing your assets in the way that you intended or in your best interest, rendering the Power of Attorney useless. Another important point is that Powers of Attorney are effective the moment you sign them, even prior to your incapacity. Practically speaking, your agent has the ability to use the Power of Attorney right away, which can be a worrying prospect. As such, it is vital that you choose someone who will act in your interest and not outside of the scope of what you intended. It should be noted that Powers of Attorney can be revoked at any time if the principal has the mental capacity to do so, and it is no longer effective upon the death of the principal.

Who Should be your Power of Attorney?

The *who* is the most important part of the Power of Attorney. Because your agent can be granted sweeping powers under your

Power of Attorney if you allow it. She must be someone that you trust implicitly to make decisions based on the guidance you provided to the agent, and if you never gave direction, then the agent must act with your best interest in mind. Your agent should be responsible, honest and detail-oriented. The good news is that when New York State amended the law relating to the Power of Attorney in 2009 (and again in 2010,) it included the provision that the agent you appoint must also sign the Power of Attorney accepting your appointment of her and recognizing that she has a fiduciary obligation to the principal. The form explicitly advises the agent that in accepting the role, any transaction that she makes must be done in the best interest of the principal, not of the agent. The agent also has a fiduciary duty to keep receipts and documentation for transactions made under your Power of Attorney, never to co-mingle funds with theirs, and to avoid conflicts of interest. If your agent does not follow your wishes, or acts against your best interest, your agent could be held liable for violating the law.

What Happens Without a Power of Attorney in Place?

If you become incapacitated and you never got around to signing a Power of Attorney, or because you were too fearful of trusting someone as your agent, the only option is guardianship. A guardianship proceeding is a very serious legal process in which another party is required to appear in court and prove to a judge with medical evidence that you are not able to manage your own finances. The judge may appoint a family member, a friend, or a lawyer (whom you never met before) to take control of your finances. The court proceeding itself, while not only emotionally difficult for those involved, is quite expensive and should be avoided if at all possible.

It is crucial that the option of a Power of Attorney be discussed with your estate planning lawyer. You should take great care in considering not only *who* should fill the role as agent, but also *which powers* you may wish to grant the agent.