

# Planning Strategies

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## The Importance of Having a Durable Power of Attorney

This is the first full installment in our [2022 Estate Planning Series](#), covering the basics of five essential estate planning documents.

A **durable power of attorney** is a legal document that allows you to choose someone to act on your behalf as to certain legal and financial matters in the event you are unavailable or are incapable of doing so yourself.



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### Why do I need a durable power of attorney?

A durable power of attorney is an essential document because there always is a possibility that a person could become unable to manage their personal financial affairs due to illness, cognitive decline, disability, or unavailability. Examples of critical financial affairs include:

- Paying Bills
- Filing and Paying Taxes
- Managing Investments
- Dealing with real estate
- Making gifts to charity and annual exclusion gifts
- Collecting assets that belong to you

## What is a durable power of attorney?

A power of attorney (“POA”) is a legal document by which you (*as the principal*) grant authority to someone to act on your behalf (*as your agent*) regarding your financial and legal affairs. The power can be broad or limited and, in some cases, only will take effect when a future event occurs. Most often, a POA is broad and covers many things related to your finances.

A **durable** POA allows the agent to begin managing affairs on your behalf as soon as the document is created – and remains in effect if you become incapacitated in the future. A non-durable POA only is in effect while you are able to handle your own affairs. For example, you might assign a non-durable POA if you cannot be physically present to sign a legal document.

Because of the broad nature of the durable POA and because it involves management of your bank and investment accounts when you are incapacitated, it is important that you choose an agent whom you trust and who is responsible with financial matters. This can be a close family member or friend. Having a back-up agent is a good idea too.

If you prefer not to grant your agent the power to manage your affairs unless you become incapacitated, you can opt to nominate a springing power of attorney. A springing POA remains inactive until you become incapacitated.

## What happens if I become incapacitated?

If you become incapacitated to the point where you can no longer attend to your financial affairs, the consequences could be serious. Your bills might go unpaid, your investments may not be managed properly, your taxes could become delinquent, your credit score can be affected, and so forth.

Moreover, the institutions that you deal with (such as banks, investment firms, or the IRS) might not be able to deal with someone else on your behalf absent a legal basis to do so. However, if you have a durable POA in place, they can deal with the agent you have appointed.<sup>1</sup> For this reason, it’s often a good idea to provide a copy of your durable POA to your financial institutions.



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## Who determines if I am incapacitated?

There are certain behavioral “red flags” that banks and financial institutions look out for to determine if a client may lack mental capacity to deal with their accounts. These flags include:

- Memory lapses
- Lack of organization
- Missing appointments
- Difficulty with basic math or other concepts
- Falling behind on bills
- Drastic changes in managing financial affairs
- Acting out of character, exhibiting confusion, or experiencing drastic mood swings

In cases where someone (usually an elderly person) is exhibiting these signs, the financial institution may seek the advice of the agent named in the POA, if one exists or a “trusted contact” as designated in the financial account documentation. A “trusted contact” is someone who can receive information about your account but is not necessarily authorized to make changes or transactions in your accounts. A POA would allow your agent not only to receive information but also to transact on your behalf.

## What happens if I don’t have a POA?

If you become incapacitated and don’t have a durable POA, then your family may have no choice but to go to court in order to have a conservator or guardian appointed for you. This is an arduous and costly process. A durable POA is usually the better path.

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<sup>1</sup> A POA will not operate as to any fiduciary appointments where you are acting as trustee or executor. However, the POA may allow the agent to resign such positions for you so that another fiduciary can be appointed. A durable POA also has no effect on health care matters. A separate Health Care Proxy or (Health Care POA) is used for that purpose.

## Can my agent make gifts for me?

A POA may authorize your agent to make gifts on your behalf. Gifting authority is often limited to the annual gift exclusion amount (now \$16,000 per person per year in 2022) or to charity in accordance with past giving patterns. However, the authority granted under a POA can be broader or narrower than that.

## When does a POA end?

A durable POA will expire upon your death. You also can revoke it at any time, as long as you are competent to do so. A court of law also can also remove a rogue agent and hold them to task.

## How do I get a power of attorney?

A lawyer should prepare a durable POA. The good news is that the basic type of POA has a standard form, and a lawyer can draft it quickly and affordably. In New York, for example, most people follow a statutory form durable POA. The New York form was updated in June 2021.

We advise everyone to have a durable POA in place and to provide a copy to your financial institution. It is a good idea to refresh your POA every three to five years or when you update your estate plan.

As always, if you have further questions, don't hesitate to reach out to your team at 1919 Investment Counsel for advice.



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Warwick M. Carter, Jr. is a Managing Director at 1919 Investment Counsel based in New York. As a Senior Wealth Advisor, his primary focus is generational wealth planning for high net worth individuals and families. He also advises on philanthropic planning. When giving advice, Warwick takes a comprehensive approach to assessing all aspects of a client's tax, financial and family situation. Warwick works closely with Portfolio Managers and Client Advisors in all of our offices to integrate wealth strategies with a client's investments. He regularly meets with outside advisors to devise appropriate solutions that will help grow wealth in a tax-aware way over the long term.

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## About 1919 Investment Counsel

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