

Disability Rights Nebraska

Protection and Advocacy for People with Disabilities

This is basic information and does not constitute legal advice.

Substituted Judgment - Durable Power of Attorney

What is substituted judgment?

Substituted judgment can be used if you need help making decisions about your care or property. There are several types of substituted judgment you can choose. The best type of substituted judgment is one that allows you to be as independent as possible.

What are the types of substituted judgment?

There are many types of substituted judgment you can choose. The different types include: health care power of attorney, representative payee, power of attorney, durable power of attorney, conservatorship, and guardianship. The types are listed in order from allowing you the most independence (health care power of attorney) to the least independence (guardianship).

Durable Power of Attorney

What is a durable power of attorney?

A durable power of attorney is a paper that creates a relationship between a “*principal*” and an “*attorney in fact*.” The principal is the person who needs help in making decisions about finances or property. The principal chooses an attorney in fact to make decisions for the principal. The attorney in fact makes sure that the principal’s needs are met. For example, Jane (the *principal*) may appoint Joe (the *attorney in fact*) to make decisions about her finances or property if she cannot make those decisions herself. Neb. Rev. Stat. §30-3402 (2006).

When is a durable power of attorney used?

A durable power of attorney is used when you cannot make decisions regarding your finances or property. The attorney in fact will make those decisions for you. The attorney in fact can begin to make decisions for you when you become disabled or incapacitated. This is called a Present Durable Power of Attorney. If you already have a durable power of attorney, the attorney in fact can continue to make decisions for you even if you become disabled or incapacitated. This is called a Contingent Durable Power of Attorney. The type of durable power of attorney will depend on how you write it. (See “Power of Attorney” form (attached)). Neb. Rev. Stat. §§30-2665; 30-2666 (2006).

How is a durable power of attorney created?

To create a durable power of attorney, you must choose a person to be your attorney in fact. You must state the person's name in writing and you must also have the words:

- “This power of attorney shall not be affected by subsequent disability or incapacity of the principal,” **or**
- “This power of attorney shall become effective upon the disability or incapacity of the principal,” **or**
- Other words that show you want the attorney in fact to make decisions for you if you become disabled or incapacitated.

Using these words will make sure that the durable power of attorney will be effective even if you are disabled. Neb. Rev. Stat. §30-2665 (2006).

How does a durable power of attorney work?

A durable power of attorney works much like a power of attorney (see “Power of Attorney” material), except that it will be in effect even if you are disabled or incapacitated. Neb. Rev. Stat. §30-2666 (2006).

What are the duties of a durable power of attorney?

The attorney in fact may sometimes be appointed as a *fiduciary*. A *fiduciary* is someone who is supposed to make decisions in your best interests. Examples of a fiduciary are a conservator, guardian, or other person you choose who is in charge of managing your finances or property.

How does a durable power of attorney end?

A durable power of attorney can end in one of two ways:

- When you die;
- If you cancel it and you are competent. When you cancel it, it becomes a matter of public record and the durable power of attorney ends. Neb. Rev. Stat. §§49-1523; 49-1560 (2006).

If the attorney in fact makes decisions for you without knowing that you have died, the decision will still be in effect. Neb. Rev. Stat. §30-2668 (2006).

POWER OF ATTORNEY

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_____, a domiciliary of _____ County, Nebraska, Principal desiring and intending to establish a Power of Attorney operative under the Nebraska Short Form Act, does hereby appoint, constitute, and designate

_____, a _____ of or with an office in _____ County, Nebraska, Agent, the lawful and true Agent and attorney in fact for Principal; and Principal does hereby further provide and stipulate in connection therewith as follows:

1. This Power of Attorney is, as marked, a

Durable Power of Attorney and a

Contingent Durable Power of Attorney, upon the contingency of,

Incompetence of Principal, or

Other

Contingency: _____, or

Present Durable Power of Attorney

Nondurable Power of Attorney

2. By this Power of Attorney, Principal confers upon and grants to Agent plenary power, plenary power subject to limitations, or all and each of the listed general powers as individually marked:

Plenary Power; or

Plenary Power Subject to Limitations, exclusive of General Powers for Domestic and Personal Concerns and for Fiduciary Relationships and

No Other Restrictions, or

Other Restrictions: _____; or

General Power for Bank and Financial Transactions.

General Power for Business Interests.

General Power for Chattels and Goods.

General Power for Disputes and Litigation.

General Power for Domestic and Personal Concerns. (

) General Power for Fiduciary Relationships.

General Power for Governmental and Other Benefits.

General Power for Insurance Coverages and Policies.

General Power for Proprietary Interests and Materials.

General Power for Real Estate.

General Power for Securities.

General Power for Records, Reports, and Statements.

3. By this Power of Attorney, Principal makes the following additional provision or provisions:

4. This Power of Attorney revokes and supersedes all prior executed instruments of like import and remains operative until revoked.

EXECUTED AT _____,
County, Nebraska, on _____, 20__.

Principal

STATE OF NEBRASKA)
) SS.
COUNTY OF _____)

The foregoing instrument was acknowledged before me on _____
_____, 20__, by the Principal _____.

Notary Public