

Issue Number: 2025-5. Not All Powers Are the Same: Using a Durable Power of Attorney Rather Than a Form 2848 in Tax Matters

Normally, a taxpayer must sign an IRS Form 2848, *Power of Attorney and Declaration of Representative*, to allow another individual to represent them in a tax matter with the IRS, and generally the representative must also have certain professional credentials, such as a law or CPA license or enrollment to practice before the IRS as an enrolled agent. Sometimes, however, a taxpayer is unable to complete and sign a Form 2848 because they have become physically or mentally incompetent, and thus lack the legal capacity to appoint a representative. See BLACK'S LAW DICTIONARY, *Incapacity* (12th ed. 2024) (defining “incapacity” as a “[l]ack of physical or mental capabilities” or a lack of “ability to have certain legal consequences attach to one's actions.” “Also termed *legal incapacity*.”); *Id.*, *Incompetency* (“Lack of legal ability in some respect, . . .”).¹

What can you do to prepare for the day when you or someone you know may be in that situation? **Plan ahead.** In particular, a “durable power of attorney,” which is often used for estate planning or other purposes, can be used to overcome a legally incompetent taxpayer’s inability to complete a Form 2848.

Durable powers of attorney give a designated agent or “attorney-in-fact” authority to make healthcare and financial decisions for the individual granting the authority, the “principal.” The word “durable” means the authorization has staying power and will remain in effect if the principal later become incompetent. The durable power of attorney must, of course, be created before you become physically or mentally incompetent. For a durable power of attorney to work for federal tax matters, certain specific information, required under the Internal Revenue Code and regulations, needs to be included. The requirements related to acceptance and use of durable power of attorneys in federal tax matters are stated in IRS Procedural Rule 601.503(b) (Title 26, Code of Federal Regulations (CFR), section 601.503), which can be found in Publication 216, *Conference and Practice Requirements*, click below.

Note: By their nature, nearly all durable powers of attorney will not specify all of the required items for federal tax purposes – notably, a description of the matter (or matters) for which the representation is authorized, including the type of tax involved (such as income tax, gift tax, or civil penalties unrelated to an income or other tax return), tax form number, and specific tax year(s) or period(s) involved.²

¹ See also *Stephan v. Millennium Nursing & Rehab Ctr., Inc.*, 279 So. 3d 532, 539 (Ala. 2018) (explaining that the “standard for determining whether a person is competent to execute a power of attorney is whether that person is able to understand and comprehend his or her actions.”) (internal citation and quotation marks omitted); *Testa v. Roberts*, 542 N.E.2d 654, 658 (Ohio App. 6th 1988) (a requirement to the “creation of a power of attorney” is that the granter “be mentally competent at the time the power is executed”).

² See section 601.503(a) (26 CFR) (Publication 216, p.3).

**** The durable power of attorney nevertheless can still be used if the taxpayer's appointed agent completes and signs a Form 2848 on the taxpayer's behalf that contains the missing information.**

**** But it is crucial that the scope of the durable power of attorney extends to the handling of federal tax matters. A broad authorization will suffice (e.g., authority to perform any and all acts that the principal could, but for their incapacity), though more ideally, federal taxes should be explicitly referenced in some manner in the power of attorney.³**

³ For example, see Georgia's "Statutory Form Power of Attorney"(excerpted below), derived from the Uniform Power of Attorney Act, which the Georgia General Assembly enacted in 2017. Ga. Laws, Act 186, § 2-1 (eff. Jul. 1, 2017).

A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by this chapter.

State of Georgia

County of _____

STATUTORY FORM POWER OF ATTORNEY

....

DESIGNATION OF AGENT

....

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects . . . :

(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

....

☐ Banks and other financial institutions

....

☐ Retirement plans

☐ Taxes [◀◀ Note, this could be more detailed, such as "Federal, state, and local taxes."]

☐ All preceding subjects

Ga. Code § 10-6B-70. *See also* 23A West's Legal Forms, Agen. & Indep. Contr. § 3:133, *Power of attorney (durable) (NJ)* (authorizing the principal's agent to, among other acts, "prepare, sign, and file federal, state, or local income, gift or other tax returns of all kinds, claims for refund, requests for extensions of time, petitions to the tax court or other courts regarding tax matters and any and all other tax related documents . . . ; to exercise any elections I may have under federal, state, or local tax law; and generally to act in my behalf in all tax matters of all kinds and for all periods before all persons representing the Internal Revenue Service and any other taxing authority, including receipt of confidential information and the posting of bonds, and to represent me in all such proceedings.").

Although the description is extensive, broad terms like, "any," "any and all," "all periods," and "all kinds" do not meet the requirements of the IRS procedural rule. So if the appointed agent intends use the power of attorney to represent the taxpayer in a matter before the Service, the agent will need to complete, sign, and submit a Form 2848 tailored to the matter, by entering the type of tax(es) involved (such as individual income tax or the trust fund recovery penalty under IRC 6672), the applicable tax years/periods ("2022 and 2023," "2020 – 2023," etc.), and the

If care isn't taken in preparing the durable power of attorney, it may not be sufficient to authorize the agent to act for you, or whoever is the appointing taxpayer, in dealings with the IRS. If so, the agent may also have to be appointed a guardian or similar fiduciary, which is typically done by a state court and can be a lengthy process. Once the agent is designated as fiduciary, they would then have to file an additional form (Form 56) that informs the IRS of the fiduciary relationship.

For more information about using durable powers of attorney as a substitute Form 2848 and about Form 56, please click on the links below.

- National Taxpayer Advocate Blog: [When to Use a Durable Power of Attorney to Authorize Representation Before the IRS](#)

- IRS Office of Professional Responsibility: [Can You Use that Durable Power of Attorney before the IRS? Form 2848 vs. Durable Power of Attorney](#)

- Form 2848, *Power of Attorney and Declaration of Representative*

- Use [Form 2848](#) to authorize an individual to represent you before the IRS
- [Instructions](#) (see "Substitute Form 2848," page 3)

- [Publication 216, Conference and Practice Requirements](#)

- Form 56, *Notice Concerning Fiduciary Relationship*

- Use [Form 56](#) to notify the IRS of the creation or termination of a fiduciary relationship under IRC 6903 or to give notice of qualification as an executor under section 6036
- [Instructions](#)

applicable forms (e.g., "Form 1040," "Form 709" (United States Gift (and Generation-Skipping Transfer) Tax Return), "Form 8857" (Request for Innocent Spouse Relief)). See the "Line 3. Acts Authorized" discussion in the *Instructions for Form 2848* as a guide.