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CONSIDERATIONS OF DURABLE POWERS OF ATTORNEY

Historically, if a person is no longer able to make decisions regarding their health or finances, one had to commence a legal proceeding to have the person declared incompetent. The court then appointed a guardian and, to some degree, played a supervisory role over the guardian's decisions and actions.

People often created Powers of Attorney which would deal with financial issues in particular. So for example, if I was trying to sell my house but then moved out of town, I could create a Power of Attorney to have someone else sign the papers on my behalf. In a more permanent way, I could also create a Power of Attorney to have someone else sign checks for me or engage in other identified financial transactions.

A Durable Power of Attorney is a useful tool chosen by many people to give competent individuals the ability to choose a person to manage their affairs and assets in the event of incompetency. As people age and, for example, as increasing numbers of individuals suffer various affirmaties of old age, the Durable Power of Attorney avoids public court proceedings and provides an individual to help make these difficult decisions.

A Durable Power of Attorney is intended to delegate authority to another even if the person signing the Durable Power of Attorney became incompetent in the future.

In a recent Wisconsin Supreme Court case, one of the justices wrote an opinion to put Durable Powers of Attorney in a larger societal and legal context:

> A Durable Power of Attorney, unlike the Common Law Power of Attorney, survives the principal's disability or incapacity.

Many people now will create Durable Powers of Attorney and name their spouse as a person who can make financial decisions should that become necessary in the future. As the State Supreme Court said:

> [D]urable Powers of Attorney are intended to give competent individuals the

ability to delegate to an agent broad power to manage their affairs and assets in the event of incompetency.

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The Durable Power enhances the autonomy of the principal by enabling a principal to make decisions for himself or herself while competent that will continue to be effective if the principal becomes incompetent.

The Durable Power of Attorney can improve the living conditions of the elderly and provide security for their future care. A Durable Power of Attorney can help a competent principal to handle his or her financial and legal affairs and living arrangements and then can enable the attorney-in-fact, the agent, to handle the principal's finances and day-to-day quality of life without having to declare the principal incompetent and without having to seek court supervision.

Many people would not object to asking their spouse or other trusted family member or friend to serve as a Durable Power of Attorney. Having said that, by merely signing a Durable Power of Attorney, a principal is potentially giving the agent very significant power over one's finances and can even be authorizing the emptying of bank accounts. Further, as time goes by, things might change and the spouse's health might become questionable such that one would want to terminate the Durable Power of Attorney. In that case, one might consider naming an adult child to serve in that capacity.

While Wisconsin has a statute to address some of these issues, there is very little case law interpreting the statute or developing a body of law to assist individuals and attorneys with respect to Powers of Attorney. People considering these issues should contact an attorney who handles elder law issues to explore whether this type of document is appropriate for any individual's situation.

If you have any questions regarding this article, please contact Attorney Randy Nash at O'Neil Cannon at 414-276-5000.