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## **WHY ARE DURABLE POWERS OF ATTORNEY IMPORTANT?**

When Mrs. White\* reached an advanced stage of Alzheimer's Disease, her husband had to place her into a nursing home so that she could receive proper and necessary care. He then faced the high cost of nursing home care without any long term care insurance coverage. Mrs. White had never signed a power of attorney naming an agent to make decisions for her in the event of serious disability. She was now too confused to sign one. Although Mr. White had been paying Mrs. White's bills from their joint bank accounts for years, he discovered that he was not legally authorized to access her IRA, stocks and bonds, in order to pay mounting expenses. Therefore, he had to seek appointment as his wife's legal guardian in order to gain access to Mrs. Whites separate investments.

Before the Court would appoint him as guardian, Mr. White had to obtain a special doctor's report, have his lawyer prepare and file a court petition stating that Mrs. White was mentally incapable of handling her own affairs. Copies of the petition and a notice form had to be sent to their adult children, Mrs. White's brothers and sisters, and the nursing home. A lawyer, called a Guardian Ad Litem, was appointed by the court to inform Mrs. White of her rights (although she did not comprehend much of what the lawyer told her) and to investigate the need for guardianship.

After Mr. White was appointed guardian for Mrs. White, additional court hearings were required. First, there was a court date for the filing of an inventory of Mrs. White's property and income. All of the information about their joint bank accounts and other joint property became a matter of court record. He also had to have his lawyer prepare and present to the court petitions seeking authorization to spend his wife's money to pay her bills, and to pay household expenses. He had to provide the court with documentation about the expenses to justify the use of her money to pay the bills. The lawyer's services were also needed to prepare and present annual accountings to the Court, to show every penny received and spent by Mr. White as guardian for Mrs. White.

All of the papers filed in the guardianship case, except for the doctor's report, are now public records in the Court Clerk's office. Significant costs were also incurred, including court filing fees, the Guardian Ad Litem's fees, and legal fees. This loss of privacy, intrusion of the court into the Whites' private affairs, and expense, might have been avoided if Mrs. White had signed a durable power of attorney prior to the onset of her disability. A power of attorney is a legal document which shows that a person has appointed someone else to act as her representative.

\* This story is fictitious, for the purpose of illustration only, a composite of several different individuals and situations.

Some years ago, the Illinois legislature changed the law to allow “durable” powers of attorney, which are specifically designed to remain in effect after the persons who sign them become incompetent to handle their own affairs. In fact, most people intend that a durable power of attorney will not be used until they are unable to make decisions for themselves.

Mrs. White could have signed a power of attorney when she was mentally capable of understanding the document, and able to make responsible judgments about choosing a trustworthy agent. Mr. White, the most likely person to have been appointed as her agent, would then have had clear legal authority to act on Mrs. White’s behalf. If Mrs. White did not exercise her right to modify or revoke the power of attorney at any time, the document would remain in effect until its termination date or her death.

A power of attorney document signed by Mrs. White would have determined the type and extent of powers granted to Mr. White as agent. It is likely that Mrs. White would have granted broad powers to her husband, as agent, including most of the powers adults normally exercise themselves, including opening and closing bank accounts, writing checks, paying bills, filing tax returns, prosecuting and defending legal claims, buying and selling property, and making investments.

If the power of attorney document were signed after she was diagnosed with Alzheimer’s Disease, Mrs. White would probably have been advised by her lawyer to include some special powers to assure that Mr. White would be able to engage in estate planning on her behalf, and to make gifts. Mrs. White would have had the right to limit her agent’s powers, if she wanted to, such as by requiring her agent to give periodic reports on his activities to another person.

Had Mrs. White signed a power of attorney for health care decisions, she would have been able to control who made such decisions for her. Not only could she have designated her husband as agent, but she could have designated successor agents to act in his absence. Without guardianship or a health care power of attorney, the law would allow Mr. White. If Mr. White were unable to make medical decisions for her, the law would allow her children, by majority vote, to make health care decisions, regardless of the quality of their relationship with her. If Mr. White, as guardian, became unable to handle medical decision-making for his wife, more court proceedings would be necessary to appoint a successor guardian.

Although she could have legally prepared the power of attorney document herself, Mrs. White would not have been aware of the legal consequences of the powers omitted from the standard form, and probably would not have achieved her goals and objectives. Also, she may have needed other legal documents to achieve her goals, either in addition to the power of attorney, or instead of it. Without an experienced legal advisor, if Mrs. White had prepared the power of attorney form herself, she would not have known of potential problems until it was too late to correct them.