

# UNDERSTANDING DURABLE POWERS OF ATTORNEY, HEALTH CARE POWERS OF ATTORNEY AND LIVING WILLS

Presented by:

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and

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# OUR AGING POPULATION'S DIMINISHING INTELLECTUAL CAPACITY IN AN INCREASINGLY COMPLEX SOCIETY

- Most Americans who live to their sixty fifth birthday will not die as a consequence of sudden trauma or accident
- Unfortunately, neither are they likely to pass away peacefully in their own bed nor suffer a catastrophic heart attack or stroke
- Rather, census data suggests that they are likely to live, on average, another twenty or so years while enjoying good, albeit diminishing, physical and mental health

# STATISTICS ON MENTAL CAPACITY

- MORE THAN 50% OF PERSONS AGE EIGHTY-FIVE YEARS OR OLDER SUFFER FROM ALZHEIMER'S DISEASE AND ANOTHER 10% SUFFER FROM VASCULAR DISEASE DEMENTIA.
- CONSEQUENTLY AMERICANS HAVE BETTER THAN A 50% CHANCE OF ENDURING A LENGTHY PERIOD OF COGNITIVE INCAPACITY



# WHAT IF THERE IS NO PLAN?

- Guardianship Proceedings.
- Incapacity is defined by PA statutes as follows:

“The lack of sufficient capacity for a person to make or communicate decisions concerning himself.”

A “Guardianship Hearing” must be held to determine if a person is incapacitated

# STEPS TO A GUARDIANSHIP HEARING

- An interested person must petition the Court
- A medical professional must be available and have examined the alleged incapacitated person (the “AIP”)
- AIP must be personally served at least 20 days prior to the hearing
- All intestate heirs must be also be served at least 20 days before the hearing
- The AIP must be present at the hearing unless medically excused

# Disadvantages of Guardianship

- Time – Guardianship proceedings are at least 60 days from start to finish but can do an emergency petition if time is truly of the essence
- Cost – legal fees are incurred for pleadings and court appearances, doctor examinations and depositions even if uncontested (In a contested case doctors fees can easily reach into the thousands)
- Follow up – once appointed Guardian must file an inventory and then an annual inventory
- Significantly limited powers – Guardian must obtain court approval for a wide range of mental health and financial activities on behalf of the AIP
- Ongoing Intestate Heirs Involvement – Notice is required every time you file a petition with the court. Any objection they file can change a routine petition into a contested hearing driving up the costs.



# Guardianships continued

I have specifically not included in this discussion the particular problems that one may have when serving a person with the Guardianship proceeding papers. This will most likely be viewed as very confrontational. Also not included here is what must be done when a person must be involuntarily committed as a consequence of Alzheimer's or some other type of mental disorder.

I will discuss these items here briefly

# Powers of Attorney



- A power of attorney is a document where one person, the principal, nominates another, the agent, to act on behalf of the principal for the items set forth in the document creating the relationship
- A general power of attorney is terminated when the principal becomes incapacitated



# DURABLE POWERS OF ATTORNEY

- These documents are created by statute and their powers have the ability to grant to the agent all of the financial abilities of the principal and equally importantly, the agent can continue to act even if the principal is incompetent
- If an agent holds a valid durable power of attorney in almost all instances there will be no need for guardianship proceedings

# DURABLE POWERS OF ATTORNEY CONTINUED

- Agent acting under a durable power of attorney can carry out almost all of the financial transactions that could have been undertaken by the principal up to the time of the principal's death – remember the principal's incapacity does not invalidate the durable power of attorney, only death of the principal
- Common examples include the payment of bills and other obligations, investment of funds and the collection of debts
- Other less common duties include the making of gifts, if so provided under the power of attorney, and suing on behalf of the principal

# DURABLE POWERS OF ATTORNEY CONTINUED

- Therefore the benefits of a durable power of attorney substantially outweigh the onerous baggage associated with the use of a guardianship proceeding
- I have enclosed for your use a check list to provide to clients who may be picking an agent for their durable powers of attorney
- One thing to keep in mind when talking with clients is that normally they always want to have the spouse as agent but they may also want to have someone else because normally the agent spouse is too busy taking care of the principal spouse when things need to be done
- A person can have more than one durable power of attorney

# YOUR CLIENT AND HIS DURABLE POWER OF ATTORNEY

- Each and every financial business has a distinct set of rules they apply when confronted with someone who is using a durable power of attorney
- Understanding these rules and reviewing them with your client in advance of their need should be part of your representation of each and every client
- By reviewing these matters in advance, and explaining any deviation that your particular firm may have in applying durable powers of attorney you will have “smoothed the waters” for your client and not have had to confront particularly difficult issues at a time when your client can least afford to deal with them

# YOUR CLIENT AND HIS DURABLE POWER OF ATTORNEY, CONT.

- Additionally, if you are dealing with an agent who may not be the spouse (i.e., a child or other relative or a friend) now is the time to meet that person with your client attending the meeting and in full mental capacity
- This provides you with the opportunity to discuss issues with the agent and principal in advance (i.e. Investment strategy and needed withdrawals for your client that may be made by the agent), and
- It will allow the agent to become more familiar with you and your business, understand why your client has retained you to provide him or her with financial services and to hopefully continue to use you when called upon under the terms of the durable power of attorney
- It is hoped that after this class you will be able to more fully comprehend the need for and therefore implement with your clients durable powers of attorney. This should elevate your status as a provider of the services to your clients

# THE GOOD GOES BAD – THE AGENT IS MISBEHAVING

- Assume the following facts:

Your client, Mrs. X, has an estate of approximately \$1,500,000 that consists of a securities account with you in the amount of \$1,300,000 and a home worth \$200,000. She receives an annual pension from her husband's former employer and social security income that equal approximately \$35,000 per year. Her income from the investments in the account maintained with you equal approximately \$65,000. Almost the entire account is invested in fixed income securities. Thus her total available annual income is approximately \$100,000. Her annual living expenses, including taxes are approximately \$50,000. She has two children, A her daughter, and B her son. A lives nearby and is always visiting with Mrs. X. You have been previously informed by Mrs. X that A is 46 years old, has a "small drinking problem", is married, and A and her husband live beyond their means. B is 35, lives far away, is unmarried and is controller at a small start up company that has been quite successful. He has no bad habits that you are familiar with. You haven't spoken to Mrs. X for about 4 months but the last time you spoke she forgot during the conversation the total value of her account and instead of listening to your investment advice instead began to talk about her childhood on the farm. The conversation lasted about 15 minutes and you got off the phone as quickly as you could. Neither A nor B know the full extent of Mrs. X's net worth. Mrs. X has never made any gifts to either A or B since Mr. X died five years ago. Mrs. X has never driven and has always taken a cab or bus to get where she needed to go.



# Problems with Agents, continued

- What would you do in the following situations:
  1. Mrs. X comes to visit you at your office and brings A with her. A informs you that she is going to help her mom make financial decisions and will be named in a durable power of attorney. You attempt to speak with Mrs. X about the value of her account and certain decisions that need to be made in the presence of A. Mrs. X is nonresponsive to your discussion and instead talks about how proud she is of B, her son, or stares out into your office. You do not believe Mrs. X has understood a word you have said. A insists that she will help out her mom and explain everything to her later. The meeting is concluded and you give A your business card.

# Continued



- Five days later A stops by your office and provides you with a durable power of attorney naming her as agent for Mrs. X. She then states that she wants you to liquidate \$50,000 from Mrs. X account and send the check to her so that she can make some needed improvements to Mrs. X home. As she is leaving your office you notice that she is driving a 1994 Ford Taurus. You call Mrs. X an hour later to speak with her about A's request, A answers the phone and asks why you have called. You make some excuse about needing another copy of the durable power of attorney and hang up. Two weeks later, after you have forwarded the check for \$50,000 to A she shows up again at your office stating that she again needs another \$50,000, this time for a new automobile for Mrs. X. You agree. This time as you look out the window as A is leaving you see she is driving a new \$40,000, two seat Audi sports car. Two weeks later A calls you this time and states that she needs for you to forward to her a check in the amount of \$85,000. She gives you no reason.
- What should you do, if anything?



Continued.

- Write your response here:

# Continued



- Same facts as in the preceding matter except that after the first meeting with A and Mrs. X, A stops by your office two weeks later with a durable power of attorney naming her as agent only this time she asks that you liquidate the entire account, make a check payable to Mrs. X and forward it to A at the address she gives you.
- What do you do in this instance?

A decorative graphic consisting of two rows of circles. The top row has three circles: a solid light purple circle on the left, a hollow light purple circle in the middle, and a solid light purple circle on the right. The bottom row has three circles: a solid light purple circle on the left, a hollow light purple circle in the middle, and a solid light purple circle on the right. The word "Continued" is written in black text over the first two circles of the top row.

Continued

- Place your answer here.



# Durable Health Care Powers of Attorney and Living Wills

- You must understand that there is a difference between the “Durable Health Care Power of Attorney” and a “Living Will”

# Continued



- A “Living Will” is an advanced directive given by an individual providing direction to health care providers as to how they want to be treated in the event of incompetency, permanent unconsciousness or an incurable or irreversible medical condition which in the opinion of the medical professional to a reasonable degree of medical certainty, results in death regardless of whether life sustaining treatment would prolong the individual’s life ***(From a practical perspective the condition precedent, controlled by attending physician, leaves the incapacitated patient in the sole control of the attending physician)***
- In Pennsylvania it does not take effect until the person is effectively at the end of their life (see above)



# Continued

- A Durable Medical Power of Attorney grants to another individual, the agent, the power to make health care decisions for the client – either all inclusive or as limited by the principal
- This includes the refusal to commence treatment that the principal would not have authorized, it is effective immediately upon signature by the principal, can be as limited or as expansive as desired by the principal, endures throughout the incapacity of the principal - even if that is for years, and allows the agent to respond to changes in medical technologies that might improve the principal's odds for cognitive capacity



# DURABLE HEALTH CARE POWERS OF ATTORNEY AND DURABLE POWERS OF ATTORNEY

- Durable health care powers of attorney and durable powers of attorney should be put on separate documents for a number of reasons.



# Thank you for attending!

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