



Durable Power of Attorney Who Decides When You Are Incapacitated?

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Did you know that Durable Powers of Attorney are often used in estate planning to designate a person (the agent) to make financial and other property decisions for you if you were unable to act for yourself? You would not be able to act for yourself if you became legally incapacitated. In that case, the person you designated to act for you would be able to make decisions regarding your property, including the sale of your property.

In most cases, your doctor determines the question of whether or not you are incapacitated. That, however, is not always the case. The person signing the Durable Power of Attorney can establish a different test for determining that person's capacity. In some cases, the person signing the Durable Power of Attorney has signed a separate letter stating that the agent can make the determination of capacity by any means the agent decides is adequate. Under this standard, the agent does not have to obtain a medical opinion to decide that the person is incapacitated.

For example, assume that a parent signs a Durable Power of Attorney that names one of the parent's children as the parent's agent and that the parent also signs a separate letter that allows the child to decide whether or not the parent is incapacitated, by any means that the child decides is adequate. If the child then decides that the parent is incapacitated, the child will be able to take over management of the parent's property, as specified in the Durable Power of Attorney. This will often include the right to sell the parent's property. If the parent disagrees with the child's decision that the parent is incapacitated, the parent might have to go to court and prove that he or she is not incapacitated.

If you have signed Durable Powers of Attorney, it is important that you review that document and any letters regarding how incapacity will be determined. If you are not comfortable with the procedure that is in effect, you should change that procedure as soon as possible.

If you have any questions about this let us know. If you set up an appointment to discuss it and tell us that you saw this article on our website there will be no charge for the first 30 minutes of that initial consultation.