

# SHOULD I HAVE A DURABLE POWER OF ATTORNEY IN NEW YORK?

*If You Don't Take Any Steps to Empower a Representative to Handle Your Financial Affairs in the Event of Your Incapacitation, the State Can Appoint a Guardian to Act on Your Behalf*



MARK S. EHRARI  
NEW YORK ESTATE PLANNING ATTORNEY



A comprehensive estate plan should go beyond the facilitation of asset transfers after your passing.

Most people do not pass away suddenly after being in great health on the day before they expired. When you are planning your estate, you should also consider the latter portion of your life.

## **INCAPACITATION**

There are certain eventualities that we all must face when we reach an advanced age. One of them is the possibility of incapacity. Clearly, people who are suffering from life-threatening illnesses often become unable to communicate at all. There are those who could communicate on a basic level, but they may not be able to handle their own financial affairs.

In addition to physical incapacitation, many seniors experience diminished mental faculties. Alzheimer's disease alone is very attention-getting when you digest the relevant statistics.

A good source of information about Alzheimer's disease is the Alzheimer's Association website. The Alzheimer's Association tells us that over 40 percent of people who are at least 85 have contracted the disease. Approximately 13 percent of all senior citizens are Alzheimer's sufferers, so the disease does strike younger seniors along with the oldest old.

Alzheimer's causes dementia, and those who suffer from advanced forms of dementia are not going to be able to handle their own finances adequately.

Longevity is certainly on the rise. Medical advances and increased awareness with regard to lifestyle choices are having a noticeable impact. The oldest segment of the population is growing faster than any other according to the most recent census.

When you put all these facts together you see that it is very possible that you will live into your 80s, and 40 or 45 percent of people who reach the age of 85 are suffering from Alzheimer's disease. If you cannot make sound decisions on your own, who will make them on your behalf?

### **ADULT GUARDIANSHIP**



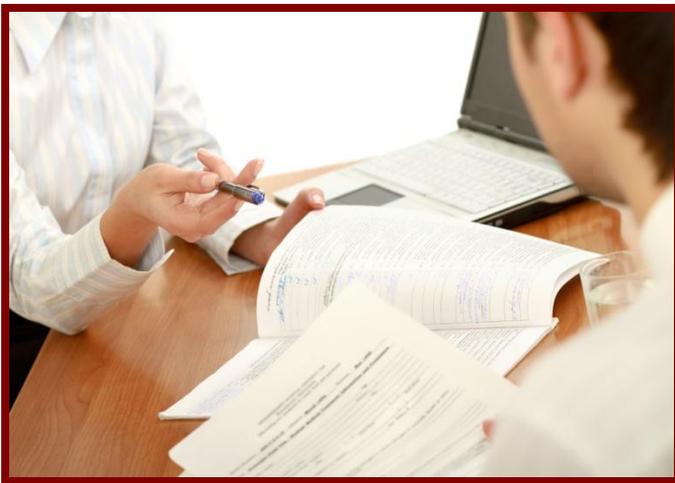
In the state of New York, interested parties could petition the court to appoint a guardian to handle your financial affairs in the event of your incapacitation. On the one hand, this is a positive mechanism that could provide a solution under difficult circumstances.

On the other hand, there are some drawbacks. The individual who is chosen by the court to act as guardian may not be the same person that you would have

chosen if you would have taken action when you were of sound mind.

In addition to the above, everyone in your family may not agree with regard to the appropriate choice of guardian. This can result in hard feelings among your loved ones, and this is certainly not a desirable outcome. The conflict can also prolong the guardianship proceeding as different people provide different testimony.

## **DURABLE POWER OF ATTORNEY**



It is possible to prevent a guardianship and name your own hand-picked decision-makers through the creation of a legally binding document called a durable power of attorney.

You have probably heard of powers of attorney, but you may wonder what the “durable” designation is all about.

A standard power of attorney that is not designated as durable would not remain in effect if the grantor (the person granting the power) was to become incapacitated. A durable power of attorney does remain effective in the event of the incapacitation of the grantor.

The person that you choose to make decisions on your behalf is called the agent or attorney-in-fact. If you were to become incapacitated, your agent would be empowered to handle your financial affairs.

There would be no need for a guardianship hearing, because you would have

stated your wishes in a legally binding manner with regard to a representative.

A durable power of attorney would typically go into effect immediately, because you don't know if or when you will become incapacitated. However, you could choose to execute a springing durable power of attorney. This type of power of attorney would only go into effect if you were to become incapacitated.

When you are selecting an agent, you should consider the age of the candidate relevant to your own, because the agent would likely be called into service late in your life.

Geography is also another consideration. It is best to choose an agent who lives relatively nearby, because ongoing decision-making may be necessary.

## **CONCLUSION**

Incapacity is common among those who have reached an advanced age. If you don't take any steps to empower a representative to handle your financial affairs in the event of your incapacitation, the state can appoint a guardian to act on your behalf.

You can make this decision for yourself by executing a durable power of attorney. If you would like to take action, arrange for a consultation with a licensed estate planning lawyer.

## **REFERENCES**

American Bar Association

[http://www.americanbar.org/groups/real\\_property\\_trust\\_estate/resources/estate\\_planning/power\\_of\\_attorney.html](http://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/power_of_attorney.html)

Alzheimer's Association

<http://alz.org>

## About the Author



### Mark S. Eghrari

Mark S. Eghrari is an attorney in private practice in Smithtown, New York. He has been in practice since 1988. Mark S. Eghrari provides extensive estate and tax planning services to individuals and businesses. Mr. Eghrari's primary focus is helping clients avoid probate, minimize or eliminate Federal and State Estate taxes and protect their assets from the high cost of nursing care, if they become ill. Mr. Eghrari's expertise is in providing unique and innovative estate planning solutions that create a secure future for his clients and their loved ones. Mr. Eghrari is a member of the American Bar Association and New York State Bar Association as well as the National Academy of Elder Law Attorneys and the American Academy of Estate Planning Attorneys.

Mr. Eghrari completed his undergraduate work at Lafayette College in Easton, Pennsylvania and received his MBA in banking and finance from Hofstra University on Long Island. He earned his Juris Doctorate from the Hofstra University School of Law, where he was a member of the Law Review. While in law school, Mr. Eghrari gained practical experience in the corporate tax department of Citicorp in New York city.

### **Mark S. Eghrari and Associates PLLC**

**[www.myestateplan.com](http://www.myestateplan.com)**

50 Karl Avenue, Suite 202

Smithtown, NY 11787

Phone: (631) 265-0599

Fax: (631) 265-0754