

DO I NEED A POWER OF ATTORNEY WHILE MY SPOUSE IS STILL LIVING?

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I hear this question frequently. It is a common misconception that your spouse will be able to handle everything on your behalf, should you become incapacitated. That is simply not the case. There are several areas where costly problems are created if there is not a Durable Power of Attorney in place. A Power of Attorney document designates an Agent (in this case, your spouse) to act on your behalf during any period of your incapacitation. One area where a Power of Attorney is often required involves transferring, selling, or refinancing your real property. If you and your spouse own property jointly, and you become incapacitated, your spouse will not be able to sell or transfer the property without your signature. Without a Power of Attorney appointing an Agent to step in and act for you, someone would have to petition the Court to be appointed as your guardian in order to transfer that property. The same would apply to any stocks or bonds which you hold jointly and may need to sell or transfer.

In addition, the lack of a Power of Attorney can be a significant problem with regard to retirement benefits. If you become incapacitated, your spouse would not be able to request, change or stop distributions for any Individual Retirement Accounts or employment retirement accounts. Again a court order appointing a guardian would be required.

Another area where the lack of a Power of Attorney can create problems is in healthcare decision-making. If you have not designated someone to make healthcare decisions on your behalf during any period of incapacity, it can be a significant problem. Healthcare providers will sometimes honor the wishes of a spouse, or other family members, but there are instances where they want an authorized decision maker to make the final decisions on care. Again, a Durable Power of Attorney should be in place to deal with these situations. As with the other problem areas, your family could be required to seek a Court Order appointing someone to act for you.

On average, guardianship proceedings take two months and can be quite costly in that they involve court filing fees, attorney's fees, physician's deposition fees and court reporter fees. The solution to these problems is to have a Durable Power of Attorney drafted to meet your needs. Capacity is an issue; one must fully understand the document and the implications of the document. So, trying to obtain a Power of Attorney when someone is already incapacitated may be impossible. Remember, a well-drafted Power of Attorney can save you time and money, and avoid a delay.