

Incapacitated Patient: Durable Power Of Attorney Invalid.

When the family cannot agree and a court must make decisions affecting the property or living arrangements of an infirm elderly person, the court, rather than forcing its own decision, may rule instead who among the family members has sole legal authority to make decisions for the incapacitated person.

In a recent case two daughters of an eighty-one year-old nursing home resident became dissatisfied with the care she was receiving and wanted to move their mother to a different facility.

The resident's husband, however, disagreed and wanted her to stay where she was. He pointed to a durable power of attorney for healthcare decisions which his wife had signed which he said gave him authority to make decisions for her.

The two daughters have proven by clear and convincing evidence that their mother was already incapacitated at the time she signed a durable power of attorney appointing her husband as her agent.

NEW YORK SUPREME COURT
APPELLATE DIVISION
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The New York Supreme Court, Appellate Division, however, pointed out that a durable power of attorney endures from the time when the person still can make decisions to the time after he or she can no longer. It must be signed while the person is still competent to make decisions.

A durable power of attorney signed when the person is already incapacitated is not valid. ***In re Susan Jane G.***, ___ N.Y.S. 2d ___, 2006 WL 2925210 (N.Y. App., October 10, 2006).