

# A difficult decision: Having an elderly parent declared incapacitated

Published on December 29, 2016

If your elderly parent's mental state is deteriorating to the point where he or she is unable to manage day-to-day activities, it may be time to make the difficult decision to have him or her declared incapacitated. But how do you know if such action is necessary?

## 2 key questions

Knowing the answers to these two key questions can help you determine whether it's necessary to have a parent declared incapacitated:

- 1. What's the difference between capacity and incapacity?** The legal definition of "capacity" varies from state to state, but generally it's the mental ability to adequately function. A person is presumed competent unless an adjudication process determines otherwise. That is, a judge must declare a person incompetent. Factors leading to such a decision will depend on the circumstances.

One barometer of whether someone is able to adequately function is the person's ability to understand basic financial matters. Another is whether a person is able to attend to his or her own health needs.

- 2. What's the role of a guardian/conservator?** If you make the decision to have an incapacity determination and the judge agrees that your parent is no longer competent, the court will appoint a guardian/conservator. He or she will be responsible for managing your parent's affairs.

More often than not, an incapacitated person's child is appointed guardian/conservator, but the guardian/conservator doesn't have to be a family member. In some states a person can designate whom he or she wants to act as his or her guardian/conservator.

The guardianship/conservatorship will specify if the guardian/conservator has been appointed for the management of all aspects of your parent's life or a specific aspect of it, such as for solely financial matters. Whatever the decision, the guardian/conservator will owe a duty of care to your parent and will be held accountable by the court for showing that his or her actions are appropriate.

## **Estate planning strategies**

An estate planning technique that may be worth exploring is to have your parent execute a durable power of attorney for property or a living trust. If your parent executes one of these documents, generally the agent or trustee named can manage your parent's financial affairs.

Similarly, a durable power of attorney for health care (a/k/a an advance health care directive or health care proxy), can allow the agent named to make health care decisions on behalf of your parent. These documents can provide the criteria under which your parent will be considered incapacitated so that a costly and time-consuming guardianship/conservatorship proceeding isn't necessary.

Deciding whether to have your parent declared incapacitated can be excruciating. If you're in this situation, please contact us for guidance.

© 2016

The Law Office of Eugene Gorrin, LLC  
17 Watchung Avenue, Suite 204  
Chatham, NJ 07928  
973.701.9300  
[egorrin@gorrinlaw.com](mailto:egorrin@gorrinlaw.com)  
[www.gorrinlaw.com](http://www.gorrinlaw.com)