

Plan Now So Guardianship Is Not Necessary

Here's a scenario that some family members sadly face: They contact our office to explain that an elderly relative is no longer able to care for himself or herself. Perhaps the family members just went to visit the loved one and found filthy living conditions, bills piled up, and little food in the home.

"We want to be able to help," they tell us. "What can we do?"

We ask them: "Do you have a power of attorney so you can handle financial matters or a power of attorney or health care proxy so you can make medical decisions?"

Unfortunately, the elderly relatives may tell us they never got around to executing those documents.

Because no one has a power of attorney or health care proxy, the family can turn to a court to have someone appointed as a guardian. (In some states, guardians are called "guardians of the person" who handle personal issues or "conservators" who handle financial issues.) If desired, there can be more than one person appointed — one to handle financial matters and another to handle health care issues.

But the guardianship process can be time consuming, contentious, and expensive. It should be seen as a last resort after less drastic measures are examined.

Here are the basics of what happens when an individual wants to be appointed a guardian.

Before petitioning the court for guardianship, family members (or in some cases, concerned third parties) need to compile some documentation that shows the individual "lacks capacity" to care for him or herself. The process generally involves an evaluation from one or more physicians and other medical professionals, as well as sworn statements from witnesses and other written documentation. This evidence will be used in an attempt to prove to the court that the person is incapacitated.

Next, a petition is filed with the court. The individual (sometimes called a potential "ward") and other interested parties will be served with a summons or given notice of the proceeding. An incapacity hearing will be held to present the evidence. The potential ward has the right to an attorney and he or she (as well as other interested parties) can dispute the evidence.

Ultimately, the court will decide:

- If the individual is incapacitated;
- Who will serve as guardian; and
- What the responsibilities of the guardian will be.

Documents to Plan Ahead

A durable power of attorney is a legal document that enables one individual to designate another person to act on his or her behalf in the event the individual becomes disabled or incapacitated.

- A financial power of attorney allows an individual to make decisions such as paying bills, handling investments and filing tax returns.
- A power of attorney for health care, or a health care proxy, designates someone to make medical decisions for you if you are unable to do so.

A living will specifies which life-prolonging measures an individual does, and does not, want to be taken if he or she becomes terminally ill or incapacitated. These written instructions are made while an individual is still competent.

The requirements for these documents vary from state to state. If you move to another state or own homes in more than one state, check with your attorney to ensure your documents are valid.

The process can take weeks or months. (The family may be able to get an emergency guardian appointed on a temporary basis.) The court costs and legal fees can be expensive.

The court will examine the guardian's ability to be trusted to make either financial or health care decisions — or both.

In some states, there are requirements to become a guardian. For example, a criminal background check may be required and a guardian may have to take a class after appointment to learn about the responsibilities. The guardian may need to be a state resident or a lineal descendant.

What if more than one person wants to serve as a guardian? In these cases, the court decides who is best suited for the position.

After an appointment is made, the guardian is monitored by the court and generally must file periodic reports. The guardian or guardians must make decisions about where the ward will live, what kind of medical care should be administered, and how finances should be handled.

This is a basic overview of the process. There are different types of guardianship and the exact procedures depend on state law.

Petitioning for guardianship is usually a difficult and painful decision. The elderly loved one may be angry about the decision and the loss of independence. In those cases, the proceedings can become adversarial.

How Can You Avoid this in Your Family?

In order to avoid court intervention, you should have certain legal documents drafted as soon as possible (see right-hand box on prior page). Choose the person(s) *you* want to make financial and health care decisions on your behalf. Having these documents in place is an inexpensive alternative to going to court for guardianship. Once a person is incapacitated and unable to make responsible day-to-day decisions, it's too late to get these routine documents drafted.

A guardian or conservator appointment can cost 10 times as much (or more) as getting the alternative documents executed. This is truly an example of why it is better to plan in advance, rather than waiting until a situation is out of control. Contact us for more information.

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