

Elder Law Guys: Guardianships vs. Powers of Attorney

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With all the media buzz about guardians stealing money from those whom they are meant to protect and overall financial abuse issues involving seniors, it's a good moment to revisit how surrogate decision-making works. And how to protect yourself as you or a loved one ages or loses the ability to handle financial and medical decisions.

Simply stated, a guardianship is a court-authorized assignment of a surrogate decision-maker for the benefit of a person who has lost the ability to make informed decisions (often called an "incapacitated person"). This can be in a broad or narrow context of decision-making.

The guardian appointed by the court can be from a wide range of relationships to the incapacitated person — including no prior relationship, i.e., a stranger.

What this means is it is possible that if you became incapacitated (usually through a gradual decline of cognitive ability or sudden traumatic event), a judge could appoint a person or even an organization you've not heard of before to handle your health care and financial decisions, and your property.

That's a bit scary, to say the least. However, a guardianship can be a necessary process because so many people have not planned in advance to legally appoint a surrogate decision-maker, or what we describe below as an "agent."

It is important to realize that once a guardian is appointed to protect the interests of the incapacitated person that this relationship can continue for the rest of the person's life. That means annual accountings and requests to the court, as well as legal fees and other professional services that may be needed.

To add insult to the process, as we've seen over the years, there are some bad actors out there who take advantage of those persons they are entrusted to protect.

Being a guardian is a tough job and there is often a shortage of them available.

The use of a power-of-attorney document generally avoids the need for a court-monitored guardianship. So why don't more people get such documents drawn up?

Here's some of the reasons we suspect:

1. People aren't aware of the importance of the power of attorney,
2. People can't afford or don't want to spend the money or don't look for a lawyer who will prepare one for them,
3. People don't have a trusted person in mind who is willing to take on the role as agent,
4. People just don't want to think about or discuss the possibility of future disability and don't think it will happen to them.

In contrast to a court-supervised lifetime guardianship proceeding, a properly drafted power of attorney can provide for an agent to make a variety of financial and medical decisions.

Interestingly, the agent can serve for the lifetime of the principal (much like a guardian). But the unique thing here is that the principal names the agent in advance in the power of attorney document and then could literally leave the document in her/his desk for years and it would still be valid — all without stepping into a courthouse.

From an administrative perspective, using the power of attorney versus a guardianship is one of the purest forms of proactive-versus-reactive planning in the legal world.

It is true that sometimes it is difficult to find a close family member or trusted person to act as an agent, but “times are a changing,” as they say, and now there are individuals and organizations who will act as an agent under the power of attorney.

Finally, remember that when you prepare a power of attorney, you can change your mind. You can always change the document — without having to go to court.

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