

What You Should Know about Guardianships and Advance Care Planning

Q: I am the legal guardian for my brother. I have been advised that I should do “advance care planning” for him. What, exactly, is advance care planning?

A: Advance care planning is done by a person while still competent, and directs how that person’s finances and health care decisions will be handled after he or she becomes ill, disabled, mentally incompetent or incapacitated. As your brother’s legal guardian, the court has already entrusted you with the care of him and his finances. If your brother had executed advance care planning documents before the guardianship, this would have allowed him to state his own wishes about medical treatment and to privately appoint you to act as his agent in financial and/or health care matters if and when he could not make his wishes known. The most common and simplest advance care planning documents are durable powers of attorney for financial and health care matters, and living wills, but wills and trusts also can be used for these purposes.

Q: What is the difference between a guardianship and a power of attorney?

A: A guardianship is a public process handled through the probate court in a situation where a person is already incompetent. The probate court appoints and oversees the guardian, who handles the finances and care of another (the “ward”). This relationship includes a legal obligation to properly manage the ward’s finances (a “fiduciary” relationship). A power of attorney is a written document prepared by a person while still competent, and remains a private matter with no court involvement. A power of attorney can allow the agent named in the document (the “attorney-in-fact”) to make financial and/or health care decisions for the person signing the document (the “principal”).

Q: My father is unable to care for himself. Will the probate court appoint me as his guardian?

A: It depends on three factors. First, the probate court must be convinced that your father is mentally incompetent. You, as the proposed guardian, must give the court a medical doctor’s expert evaluation form (provided by the probate court) that states your father is mentally incompetent.

Second, the court must be convinced that your father needs a guardian, meaning there is no less restrictive alternative. If there is such an alternative, the probate court will deny the guardianship. For example, the court may find that your father’s care can be managed through one or more powers of attorney (financial and/or health care) rather than through a guardianship.

Third, the probate court must be convinced you are suitable to serve as guardian. Family members generally are the preferred guardians.

Q: My mother is incompetent and needs help to make medical decisions. She does not need help with financial matters as her assets are managed in a trust. Can a probate court appoint a guardian who would only make health care decisions and manage her care?

A: Yes. A probate court can appoint a “guardian of the person,” who controls only where the ward lives and what health care he or she receives. It can also appoint a “guardian of the estate,” who only manages the ward's finances, must be bonded, and must file accountings of the ward's assets in the court. Although the court usually appoints a guardian of both the person and the estate, a person can apply to be guardian of just one or the other.

Q: If I am appointed my mother’s “guardian of the person,” will I be able to make “end-of-life decisions”?

A: Yes. A guardian may agree or refuse to authorize medical care for the ward.

Q: I am the attorney-in-fact under my father’s powers of attorney, but my sister recently has been appointed my father’s guardian. Are the powers of attorney now revoked or ineffective?

A: No. The appointment of a guardian by the probate court does not automatically revoke a validly executed power of attorney. However, the law allows a guardian to revoke all or any part of the power and authority of any attorney-in-fact. Therefore, you have continuing authority to act on your father’s behalf until and unless your sister, as his guardian, revokes the powers of attorney.

Q: In brief, what is the relationship between guardianships, powers of attorney and advance care planning?

A: Generally, a guardianship is a public court proceeding necessary because the ward did not make an advance care plan and/or execute powers of attorney. A power of attorney is a private contract between the principal and his or her attorney-in-fact. Advance care planning consists of executing documents that remove the need for a court-imposed guardianship.

3/14/2013

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