ELDER LAW TODAY

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Powers of Attorney vs. Guardianships

WE commonly have clients ask us questions about Powers of Attorney and Guardianships, so this newsletter is devoted to that topic. The one thing that both have in common is the appointment of one person to take care of another, usually during a period of incapacity. There are however, several differences:

Powers of Attorney – A Power of Attorney is at its basic level, a permission slip, wherein one person grants another the power to act on their behalf. The principal (person granting the power) may revoke the agent's (person acting on behalf of the principal) authority at any time by notifying the agent.

Types of Powers of Attorney -The power can be limited, such as exists in the case where one person authorizes another to act on their behalf in selling their house while they are out of town. A general power of attorney is the most common. This document grants broad powers to the agent to act on behalf of the principal in many matters. A power of attorney can also be a springing power, which means that it "springs" into effect upon the happening of a certain event, such as a person's incapacity (which is also usually identified in the document. A durable power of attorney is one that is effective even after a person has become incapacitated. If the power of attorney is not "durable" it ceases to be effective upon incapacity.

Health Care Powers of Attorney – The powers of attorney discussed above are those which relate to property or financial matters. A Health Care Power of Attorney (HCPOA) is one is which a person appoints another as their attorney in fact for purposes of making health care decisions for themselves in the event of an incapacity. This HCPOA may incorporate a Living Will or the agent may simply be asked to make more routine health care decisions for the principal if the principal is not able to make those decisions for themselves. **A.C.A. § 20-13-104 et. seq.**

Time Period - A power of attorney may be established to last for the remainder of a person's life or it can be established to terminate upon the happening of a certain event or to be effective only for a certain period of time. In every case, the power of attorney lapses upon a person's death.

Capacity – The primary reason that a power of attorney cannot be prepared for a client is lack of capacity. Many times, "children" have brought their parents into our office to have a power of attorney or other estate planning documents drafted after the person has slipped into the grips of Alzheimer's or has lost the capacity to reason. It is usually obvious at this point that these documents should have been prepared long ago and that it is now too late. When the person loses capacity we can no longer do a power of attorney – we have to move to the next level of intrusiveness, which is called 'guardianship'.

Guardianship – A Guardianship proceeding results when a person petitions the Court for authority to act on behalf of another. The primary difference between a Power of Attorney and Guardianship is Court involvement and oversight. Another is that the ward (the person which is incapacitated) has no authority to revoke the guardianship without going back into Court. A guardianship proceeding strips a ward of all of his/her rights (except those retained by law) and hands them to guardian, which is the person now acting on the ward's behalf.

Commonly asked questions:

Q1: When should I pursue a guardianship?
A: Guardianship should not be something that should be rushed into without pursuing other options first. If a person still has capacity, they should execute a property and health care power of attorney. If such powers of attorney are done, the guardianship can usually be avoided. However, if a person has not prepared any such documents and has lost capacity, a guardianship may become necessary to protect their rights.

Q2: How do we know whether the guardianship is acting honestly and in the best interest of the ward?
A: The guardian acts under authority of the Court and has to file an annual accounting which is reviewed by the Court. A guardian has a ***fiduciary duty*** when acting on behalf of his/her ward. This means that they are to act in the best interest of the ward and not in their (the guardian's) best interest.

Q3: Are guardians personally responsible for a ward's debts? What if a ward runs out of money and can't pay his bills?
A: A guardian has no personal responsibility for paying the bills of the ward. A guardian is only obligated to use the ward's money for the ward's benefit as best they can and pursuant to the Orders of the Court. Upon petition of the ward, the Court will usually approve attorney's fees for establishing a guardianship, or reimbursement to the guardian if the guardian has pre-paid these fees.

Q4: When can the ward become eligible for Medicaid to pay nursing home expenses?
A: Provided the ward is medically eligible, when a ward's assets have been "spent down" to a certain level, they will normally become eligible for Medicaid, which would pay medical bills and long term care costs, such as nursing home expenses. If a ward is not medically eligible to receive Medicaid, they may still be qualify for other governmental benefits programs, such as Medicare, VA Benefits or other assistance. The guardian should contact an elder law attorney, life care planner, elder care coordinator or other knowledgeable professional to determine, what if any, benefits may be available.

Q5: How can I find out what property or money the ward owns?
A: Once a person has been appointed as guardian, they may contact the ward's banks and other financial institutions to discover any of the ward's financial information. When a person is appointed as guardian by the Court, ***Letters of Guardianship*** are issued. This document identifies the person appointed as guardian. The guardian must produce Letters of Guardianship to any financial institution or other entities to prove their authority to act on behalf of the ward.

Q6: How can we keep the ward's house and personal items within the family?
A: A power of attorney and guardianship both "quit working" when the incapacitated person dies. The only way to ensure that the ward's assets go to the persons of his/her choosing is for the ward to have a properly drafted will or trust. Of course, such a document must have been signed by the ward while competent. If the person has been declared incompetent by doctors or the Courts, it is usually too late to do traditional estate planning. In the absence of documents, assets would pass by operation of law, know as intestate succession.

Q7: Can I be paid for acting as a person's guardian?
A: Yes. The law provides that a guardian may be reasonably compensated for their time and necessary expenses, subject to Court approval.

Summary – Obviously, a guardianship is a drastic measure, which can be avoided in most cases with proper advance planning. The lesson to be learned is PLAN AHEAD!