

ESTATE PLANNING

Powerful Ideas: Guardianship



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Guardianship is a formal legal proceeding at which a person is appointed to act for another who has been determined under the law to be incapable of acting for themselves, either in part or in total. Children who have been orphaned or adults who have suffered disability, trauma, or mental infirmity often have guardianships established for them to appoint a legal guardian, conservator, or tutor to act on their behalf for their personal and business matters. A person for whom a guardianship is established is called a ward. A guardianship may establish and include care of the ward's person, estate, or property, or both depending on the extent of the ward's level of incapacity and need.

Once a person is over the age of majority, a person must have the capacity to authorize medical service providers to provide any treatments and medical care they may need. A person must also be able to understand and provide agreement to enter into legally binding contracts and transactions with others for shelter, clothing, transportation, and employment. If a person over the age of majority lacks capacity, unless the person has a designated agent or a guardian to provide the necessary informed consent or agreement, the person may not receive the medical treatment or care they require or may not be able to enter into contracts for the necessities of their life. A guardian provides this safeguard and protection to the ward and to others who interact with the ward.

After a guardianship has been created, a ward no longer has the power or right to exercise the powers and rights that have been given to the guardian to exercise on the ward's behalf. Unlike guardianships, financial powers of attorney and medical powers of attorney do not restrict the powers and rights of a principal but authorize an agent to exercise those powers as well. Durable powers of attorney are often used as effective tool in avoiding costly guardianships. The characterization of a power of attorney as "durable" indicates that the agent retains the powers granted to him or her even if the principal becomes incapacitated after the document's execution.

Establishing documents that contemplate incapacity can provide a caregiver control in the determination of the guardians appointed for a person with special needs in the event a guardianship is ever necessary. Durable powers of attorney for financial transactions and medical care also provide an effective hedge against guardianship proceedings and may negate their necessity, depending on the situation. If necessary, caregivers of a person with special needs should begin the process to have a guardianship established, and in place, several months before the individual with special needs actually reaches adulthood.

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