Lowndes

Insights

Guardianship: Overview and alternatives

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The prospect of a guardianship is often mentioned when a family member or loved one begins to struggle to manage their affairs or show signs of cognitive decline.

Mental faculties and cognitive capacity can deteriorate gradually over the course of time, or can be taken suddenly through a traumatic injury. When either occurs, it can leave an individual without the ability to manage their financial affairs, make medical decisions, or even attend to the basic activities of daily life.

Guardianship is a legal proceeding in which the court determines: 1) whether a person is mentally incapacitated 2) whether that person needs a guardian to make decisions on their behalf, and 3) who should serve as guardian. Although often necessary, guardianship is an involved legal process that requires time and resources. Even after a guardian is appointed, there is ongoing court oversight to make sure that the incapacitated person's rights are protected, and their resources are not exploited.

Guardianship involves court oversight that can be intrusive as well as costly. Because of this, it is often advisable to endeavor to avoid a guardianship by taking precautionary steps when an individual is still able to make decisions for themselves. Executing legal documents, often known as "advanced directives" can allow someone to establish safeguards that will authorize trusted individuals to manage a person's affairs if they become incapacitated.

The most commonly used advanced directive is known as a durable power of attorney. A durable power of attorney is a document that appoints someone as your "agent" in matters pertaining to your property, finances and business. The appointed agent must follow your known wishes, and only act in your best interest.

With this authority, an agent may interact with banks and financial institutions on your behalf. If a durable power of attorney is in place before someone becomes incapacitated, it can alleviate the need for a guardian.

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Along with a durable power of attorney, an individual can execute a document called a health care surrogate. This document appoints someone as your surrogate decision maker for medical and health care matters. If you are no longer able to make decisions for yourself, your health care surrogate can step in on your behalf. Like a power of attorney, this role also requires the agent

If an individual has these legal documents in place before they become incapacitated, guardianship is often not required because there is someone already in place with the authority and direction to act on behalf of the incapacitated person. Courts will always look to any "less restrictive alternatives" to guardianship, and a durable power of attorney and health care surrogate are frequently sufficient to prevent guardianship being necessary.

However, there may be situations in which a durable power of attorney and health care surrogate are not sufficient to protect someone who is incapacitated, or those documents have been misused to take advantage of that person. When this occurs, guardianship offers avenues to protect the incapacitated person and stop any exploitation that may be occurring. For example, a guardian could request the court to suspend the authority of an agent who is abusing authority or is stealing assets.

Whether guardianship is necessary is a very factually specific determination, involving an assessment of the individual's cognitive capacity, as well as the particular living situation the individual is in. An experienced guardianship attorney can be invaluable in helping you determine what is appropriate in your circumstances.