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C O U N S E L L O R S   A T   L A W

## When a Power of Attorney isn't Enough a Guardianship may be Needed

September 8, 2011 by [Deirdre Wheatley-Liss](#)



[Stacey Crowell Maiden, Esq.](#) was the speaker at the 2011-2012 opening meeting of the Estate and Financial Planning Council of Central New Jersey (EFPCCNJ) on September 7, 2011, presenting the topic: **Guardianships & Conservatorships: Court Strategies When You Question Your Client's Capacity.**

The goal of the presentation was to educate estate and financial planners of the court procedures involved if a client's diminished capacity prevents effective representation of the client.

We always encourage our estate planning clients to execute comprehensive Powers of Attorney and Living Wills/Advanced Health Care Directives to appoint surrogate decision makers of their choosing to handle financial and medical affairs during their life, along with their Wills, which address disposition of assets after death. **If properly drafted, a Power of Attorney and Living Will/Advanced Health Care Directive can supply all of the authority**

**required to obviate the need for a court proceeding to appoint a legal guardian.**

**However, the mere existence of a Power of Attorney does not bar the need for a legal guardian.**

Sometimes, the reasons are benign, such as the agent named has passed away and there is no successor agent named, or the Power of Attorney prepared in New Jersey does not comply with the requirements of another state. Other times, there are disputes among multi-party agents, e.g., son and daughter disagreeing as to how mom's finances should be managed or spent. Unfortunately, there are also situations where the appointed agent under the Power of Attorney is not acting in accordance with the fiduciary standards imposed by New Jersey Statute or generally not in the best interests of the principal.

There is another legal aspect of a Power of Attorney, which may rise to the need for a guardianship. **It is important to realize that executing a Power of Attorney does not mean that the person cannot continue to act of his or her own behalf.** That person may continue to enter into contracts, withdraw large sums of money from bank accounts, take out credit cards, purchase items, gift assets, and execute stock trades, to name just some of the transactions that a person with diminished capacity might engage in to potential personal and family harm. Comments from members of the EFPCCNJ indicated that this is not an uncommon issue. **Even though a Power of Attorney is in place, a guardianship action still may be required to foreclose the client with diminished capacity from acting on his own behalf to the detriment of his or herself and family.**

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