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C O U N S E L L O R S A T L A W

Avoid a Guardianship - Acquire a Power of Attorney

October 15, 2010 by [Deirdre Wheatley-Liss](#)



Many times estate planning is focused on "what happens when I die"? Often overlooked is the element of estate planning for while you are alive - namely designating and empowering someone to make decisions for you if you can't make them for yourself. Guest blogger [Stacey Crowell Maiden, Esq.](#) describes below why a Power of Attorney and Living Will/Health Care Proxy are so important, because the alternative, a Guardianship proceeding, can be so painful.

When a client consults with us to prepare an estate plan, we encourage the client to make sure he also has in place a Power of Attorney and Living Will/Health Care Proxy. While there are a number of reasons to have these documents, one that we stress particularly in conjunction with our Elder Law practice is their value in a potential Guardianship action.

The possibility of becoming mentally incapacitated is not something most people like to consider. But unfortunately, a decline or diminishment in cognitive abilities to the point of no longer having capacity to handle financial and medical affairs can happen gradually, such as with Alzheimer's, or suddenly, as a result of a stroke for example. If the afflicted person has not appointed someone to act for him under a Power of Attorney or Health Care Proxy, then a Guardian must be appointed by the Court to act on his behalf.

A Guardianship action is brought by filing a Complaint in Court. Generally, two physicians must certify that the alleged incapacitated person is unable to handle medical and financial affairs and is in need of a legal guardian. An attorney is appointed by the Court to represent the alleged incapacitated person, and is paid from the incapacitated person's funds. In most cases, a hearing is held in Court. Once a Judgment of Guardianship is entered, the guardian will have to post a bond, also paid from the incapacitated person's assets. The guardian must account to the Court as to the finances and well being of the incapacitated person.

As you can see, a Guardianship action is costly, time consuming and a matter of public record. In addition to offering considerable cost savings, allowing for efficient administration of your affairs, and maintaining privacy, preparing a Power of Attorney and Living Will/Health Care Proxy allows you to control who you wish to act for you, rather than a Court.

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