



## **“Guardianship vs. Power of Attorney”**

***By Dennis C. McAndrews, Esquire***

Pennsylvania law expresses a preference to use a Power of Attorney over Guardianship where appropriate. The appointment of a Guardian for an adult individual requires a court Order that the person is “incapacitated” which requires the Court to determine that the individual’s ability to receive and evaluate information effectively, and to communicate decisions, is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet the essential requirements for his physical health and safety. Naturally, an adjudication of incapacity and the appointment of a Guardian removes from the incapacitated person the ability to make major life decisions regarding personal and financial affairs. Such restrictions on personal liberty are granted only where the individual is not competent to enter into a Power of Attorney, the document in which a competent person grants authority to another individual to act on his/her behalf.

A Power of Attorney is a document whereby the maker of the Power of Attorney (“maker”) appoints another individual as his/her agent or “Attorney-In-Fact”. The Attorney-In-Fact need not be an attorney, but can be any adult competent individual. Although Pennsylvania law does not explicitly identify the level of competency an individual must possess to enter into a Power of Attorney, it is generally accepted by most legal observers that the maker of a Power of Attorney must possess sufficient understanding of the authority being granted to the Attorney-In-Fact so as to be able to make a knowing, intelligent, and voluntary decision to enter into the Power of Attorney.

The determination of capacity to enter into a Power of Attorney is highly individualized, and depends upon the mental state of the maker of the Power of Attorney. Where significant questions exist regarding the capacity of the maker of the Power of Attorney, the legal counsel who drafts Powers of Attorney should conduct a basic mental status examination to determine that the maker of the Power of Attorney is generally oriented as to time, purpose and place, and understands the nature of the act being undertaken, and the consequences of executing the Power of Attorney.

It is important to recognize that Pennsylvania recognizes a number of documents by which a competent individual can provide authority to another individual to act in his/her place. This can involve a traditional Power of Attorney which typically involves authority to make personal,

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financial, or medical decisions on behalf of the maker of the Power of Attorney. However, any Power of Attorney can be crafted and limited as desired by the maker of the Power of Attorney, and not all of the Powers noted need be included in a Power of Attorney. Moreover, Powers of Attorney are generally "durable", which means that the Attorney-In-Fact can continue to act on behalf of the maker of the Power of Attorney even after the maker has become incapacitated. Under Pennsylvania law, Powers of Attorney are presumed to be durable unless the Power of Attorney document explicitly directs otherwise.

A Power of Attorney can also be drafted as a "springing" power, which means that the Power of Attorney only comes into effect upon some specified circumstance, most commonly the incapacity of the maker of the power. Many attorneys discourage the use of a springing Power of Attorney except in extraordinary circumstances, because interpretation of the circumstances by which the Power "springs" into effect can sometimes be problematic.

Pennsylvania also expressly recognizes Powers of Attorney which are limited to medical circumstances, and which do not include financial situations. Since 2004, Pennsylvania has also recognized "Mental Health Powers of Attorney" which provide authority to direct Mental Health treatment in certain circumstances, as well as "Mental Health Declarations" which direct caregivers to provide certain specified mental health interventions when certain conditions (such as incapacity) are met. Finally, Pennsylvania recognizes "living wills", which are otherwise known as "Advance Medical Directives", and which direct the care that is to be provided to the maker of the document when the attending physician certifies that the patient is in an end-of-life situation and will not recover. The determination of capacity for these additional forms of documents has not been specifically tested under Pennsylvania law but is anticipated to involve a similar level of competency for Powers of Attorney in general.

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