



## **“Seeking Guardianship for a Loved One”**

***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.

Any individual age 18 and over is presumed to be competent in the eyes of the law unless a judge declares that person as “incapacitated” and appoints a guardian to make decisions concerning that individual’s personal and/or financial affairs. It is a common misperception that where an individual is intellectually or physical disabled, the person’s next of kin (such as the parent of a child who reaches age 18 or the children of an elderly person who suffers a loss of cognitive function) “automatically” becomes that person’s “guardian”. To the contrary, the legal presumption that every person age 18 or over is competent can only be addressed through a formal guardianship proceeding. But it is also not true that every person who is “incapacitated”, i.e., unable to make and communicate responsible decisions concerning his/her welfare, is in need of guardianship services.

In the early 1990s, Pennsylvania amended its guardianship law in several important ways. First, the legislature made clear that in at least some circumstances, persons who are incapacitated do not need the services of a full, or “plenary” guardian. Pennsylvania’s guardianship law now states that if alternative approaches such as a valid Power of Attorney, Trust documents, and family supports are sufficient to protect the interests of the incapacitated person, a guardianship may not be necessary. Naturally, for a Power of Attorney to be valid, the incapacitated person, at some earlier point must have possessed sufficient cognitive capacity to enter into a Power of Attorney, because only an individual who possesses at least a

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basic understanding of the rights and authorities being given to another individual under a Power of Attorney can validly execute such a document.

Since the advent of HIPPA, hospitals and physicians have become increasingly reluctant to provide medical services to individuals who have questionable legal capacity to provide informed consent. Absent a legally effective Power of Attorney, a guardianship may be necessary to manage the health care needs of an incapacitated person. Moreover, many banks and financial institutions are unwilling to permit family members to manage the financial affairs of a disabled person absent either a clearly valid Power of Attorney or a Guardianship Order.

Consequently, in circumstances where a child with disabilities reaches 18, or an aging family member is in early stages of loss of cognitive functioning, it is important to discuss this matter with competent counsel at the earliest possible date to determine whether a Power of Attorney can be executed rather than pursuing Guardianship, the latter of which is far more complicated and involves a judicial proceeding. In contrast to Guardianship proceedings, the execution of a Power of Attorney usually involves one relatively brief visit to an attorney's office by the individual who is providing the Power of Attorney and the individual who will be acting under the Power of Attorney (the "attorney-in-fact"). As discussed below, Guardianship proceedings in Pennsylvania involve several formal steps designed to protect the rights of the person with disabilities, and which require careful oversight by an attorney skilled in these matters.

The 1992 Amendments to Pennsylvania's Guardianship law also established "Limited Guardianship" in this Commonwealth. Under a Limited Guardianship, the Court can grant the guardian certain specified authorities such as the power to make decisions regarding surgery under general anesthesia or financial decisions over \$1,000.00, as an alternative to the "plenary" or "full guardianship" under which the Guardian has complete authority to make all personal, medical, and/or financial decisions. In theory, Limited Guardianship is the preferred form of Guardianship in Pennsylvania, but courts seldom exercise this authority to issue orders of Limited Guardianship, as interpretation and oversight of such Guardianships can sometimes be challenging for all parties. This reluctance to utilize Limited Guardianships may also be the result of additional judicial oversight pursuant to the 1992 Amendments to Pennsylvania's Guardianship law, which require annual reporting regarding the personal and financial affairs of the incapacitated person by the Guardian.

Only a Court can appoint a guardian. A parent cannot, without judicial oversight, appoint a guardian for an adult child, and even the naming of a guardian under a Will for a minor child requires a Court Order to effectuate the Guardianship. Parents cannot name a guardian for an adult child under their Will, as Pennsylvania's guardianship procedures are the exclusive means by which a guardianship can be created.

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When the Court appoints guardians for the incapacitated person, the court identifies a "Guardian of the Person" which makes the guardian responsible for personal decisions of the incapacitated person, including medical decisions, as well as a "Guardian of the Estate" which provides decision-making authority to the guardian over the financial affairs of the incapacitated person. A Guardianship involves only decision-making authority, and does not create any additional responsibility to financially support the incapacitated person by the guardian. Two or more responsible persons can act as Co-Guardians.

The process of obtaining a Guardianship Decree begins with the filing of a petition in the local county court which, in Pennsylvania, is known as the Court of Common Pleas. The Petition provides relatively detailed information with regard to the incapacitated person, such as his name, address, next of kin, financial resources, personal situation, and the nature of the disability of the alleged incapacitated person. The web site of the author of this article includes a questionnaire which sets forth the information necessary for counsel to draft the petition seeking a Guardianship over an incapacitated person. At the same time that counsel prepares the Guardianship petition, a statement of a physician or psychologist who is familiar with the alleged incapacitated person must be obtained which sets forth the nature of the disability of that individual, and sets forth the reasons why a Guardianship is necessary. Most courts in Pennsylvania require a relatively detailed written statement by the physician or psychologist, and in the experience of the author, the most efficient, cost-effective, and expeditious manner of obtaining the statement is for the attorney to draft the statement for the review and signature of the medical/psychological professional based upon the medical/psychological records of the disabled individual.

After the Petition for Guardianship is filed, the Court issues a Preliminary Decree which establishes a hearing date before the Court, and orders counsel for the Petitioner (the individual seeking guardianship over the alleged incapacitated person) to provide notice to all next of kin. If residential services are provided to the alleged incapacitated person, that service provider must also receive notice of the petition and the hearing.

Counsel provides the required notice to interested parties by certified mail, return receipt requested, and typically provides an affidavit to those individuals that they are in agreement with the Guardianship. Counsel also provides the court with a copy of the physician/psychologist's written statement regarding the person's incapacity, and often requests that the Court excuse from the hearing the attendance of the medical professional and (where appropriate) the person with a disability, so long as the medical/psychological professional has stated in the opinion that it is not in the interest of the person with disabilities to attend the hearing. In most circumstances, the Court will not require the attendance of the medical/psychological professional or the person with disabilities, so long as the statement presented to the Court provides a justification for acting in that manner.

Counsel is also required to serve the alleged incapacitated person with the Petition and to review the Petition with that individual in a manner most likely to be understood by that

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person. Counsel will provide the Court with an Affidavit concerning the notice provided to the alleged incapacitated person and next of kin, and will also advise the Court of any circumstances which might require the appointment of an attorney for the alleged incapacitated person.

The court hearing in uncontested Guardianship proceedings is generally straightforward and involves only brief testimony before the Court. Since most guardianship Petitions are uncontested, and the medical/psychological statement is clear regarding the need for a Guardianship, the court proceeding is generally not burdensome or difficult. Since Guardianship hearings are sometimes part of a longer list of matters before the Court, the participants in a Guardianship hearing should plan to spend one to three hours in the Courthouse on the day of the hearing, although in many cases the stay is much shorter.

After the court issues a Decree appointing one or more guardians for the person with disabilities, counsel must then cause the person with disabilities to be served with the Order, with an explanation of the effect of that Order in language most likely to be understood by the incapacitated person. Under Pennsylvania law, certain authorities cannot be provided to the guardian, including the power to admit the incapacitated person to an inpatient facility or state center for the mentally retarded or to consent, on behalf of the incapacitated person, to the relinquishment of the person's parental rights. Counsel must then provide a Certificate of Service with the Court which describes the manner of service of the order upon the incapacitated person.

Within ninety (90) days of the appointment of guardians, the individuals appointed to hold this position must provide a report to the Court regarding the financial and personal status of the incapacitated person on forms provided by the Court. The Guardians must also provide an Inventory to the court of the assets of the person with disabilities. The personal and financial reports concerning the guardians must thereafter be provided to the Court on an annual basis.

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