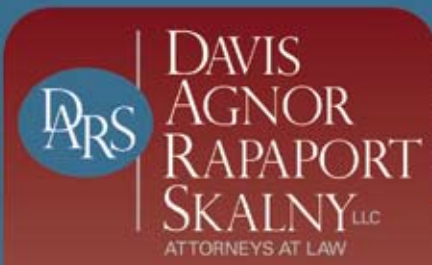


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LEGAL BRIEFS

Guardianships: An Avoidable Headache

When a person can no longer manage his own affairs, what can a family do to help? Maybe the disabled family member suffers from dementia, maybe there was an accident that has rendered the person unable to make decisions, or maybe there is some other medical condition that has rendered that person unable to fend for themselves. Whatever the case, something must be done. But what?

Assuming that the person did not previously sign a general financial power of attorney or a health care power of attorney, there really is only one answer – a guardianship.

A guardianship is a court process where a judge can appoint someone to act on behalf of the court to manage a disabled person's life care or property. In order to establish a guardianship, it must be proven that a person has a physical or mental disability that interferes with that person's ability to make responsible decisions regarding that his health care, food, clothing, shelter or the administration of that person's property.

Any determination of a disability must be based on supporting medical evidence from qualified health care providers. In order to prove disability, two physicians or psychologists must provide to the court verified certificates that set forth opinions, based on actual physical or mental examinations, that describe the medical or psychological diagnoses for the disability. Additionally, the nature, cause, extent and probable duration of the disability should be outlined. These certificates must be completed fully and completely since, in most cases, the court will make a decision based on the information contained in these certificates.

Establishing a guardianship is a formal, public process. It is initiated when someone petitions a court to be appointed guardian for a disabled person. The court, in turn, then appoints another attorney to represent the disabled person. This is required to insure that the disabled person's due process rights are not violated in the proceedings. But it also means that at least two attorneys are involved in the

guardianship case, one for the guardian and one for the disabled person.

The attorney for the disabled person fills two roles. One role is to perform an independent investigation of the facts alleged in the petition for guardianship, and then report back to the court on whether the guardianship is justified. The other role is to provide representation to the alleged disabled person; the attorney must present to the court any objections or concerns that the disabled person may have regarding the proceedings.

Besides determining disability, the court must determine who would be the best person to appoint as the guardian for the disabled person. Most often, either the disabled person previously nominated someone in the family or a friend to serve as guardian or the family has come to agreement about who should serve. However, there are times when more than one person want so serve as guardian. In those cases, each prospective guardian must present his or her case to the court through a public hearing, and the court will then choose which person to serve.

Once appointed, the involvement of the court does not end. Since any guardian serves as such at the pleasure of the court, every guardian for property must provide an annual accounting to the court of the disabled person's income, expenses and assets. If a person was appointed guardian for the person, the guardian must provide an annual report to the court updating the court on the health and living arrangements of the disabled person.

Planning with an attorney prior to a disability can reduce, if not eliminate, the need for enduring the very public and expensive guardianship process. General powers of attorney, revocable trusts, convenience bank accounts, and advance medical directives are but a few of the tools that, if properly drafted and implemented, can avoid the need for guardianships. The guardianship process, in fact, is one process that can be and most often should be avoided.