Understanding the differences between guardianship and power of attorney

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For those in the long term care spectrum, virtually all of the residents have some level of diminished function. For some, this is very limited, while others are completely incapacitated. Unfortunately, some people put off dealing with this eventual period of incapacity until the storm in upon them. At that point, it may be too late to use the preferred options, which would be a power of attorney document.

What is a power of attorney?

While this might seem like a basic questions, I have found that many people do not fully understand what exactly a power of attorney document is designed to allow or not allow. The core function of a power of attorney is for someone (the principal) to designate another (the agent or attorney-in-fact) to make certain decisions for them. Typically we see two major categories of decisions, financial and health. These can be done in one document or two separate documents. I prefer to do two separate ones.

What does a power of attorney not do?

A power of attorney is a permissive document, it allows someone to help the principal, as long as the principal desires the help (or at least does not object). This means that a power of attorney does not give the agent the power to make the principal do or not do something. It also does not give the agent the authority to force placement or medical care on the principal. It also does not give the agent the authority to do "anything they want." At all times, the agent is acting as a fiduciary for the principal, which means that they are under an obligation to be acting in the best interests of the principal.

Are there different types of power of attorney documents?

As stated above, it is fairly common to see a separate document for health care and financial matters. As you would expect, the health care power of attorney can't make financial decisions and vice versa. But there are also limited power of attorney

documents (I allow you to sell my car next week while I am on vacation). The document can be limited down to any purpose or duration that is desired. In the absence of specific limitation, the power of attorney is considered to be a general power of attorney. A general power of attorney does not need to list specific activities that may or may not be done by the agent (but they usually have some type of list- this is not exclusive). However, there are 11 actions that have to be specifically authorized in order for the agent to be able to undertake these actions. These are:

(1) To execute, amend or revoke any trust agreement;

(2) To fund with the principal's assets any trust not created by the principal;

(3) To make or revoke a gift of the principal's property in trust or otherwise;

(4) To disclaim a gift or devise of property to or for the benefit of the principal;

(5) To create or change survivorship interests in the principal's property or in property in which the principal may have an interest; provided, however, that the inclusion of the authority set out in this subdivision shall not be necessary in order to grant to an attorney in fact acting under a power of attorney granting general powers with respect to all lawful subjects and purposes the authority to withdraw funds or other property from any account, contract or other similar arrangement held in the names of the principal and one or more other persons with any financial institution, brokerage company or other depository to the same extent that the principal would be authorized to do if the principal were present, not disabled or incapacitated, and seeking to act in the principal's own behalf;

(6) To designate or change the designation of beneficiaries to receive any property, benefit or contract right on the principal's death;

(7) To give or withhold consent to an autopsy or postmortem examination;

(8) To make an anatomical gift of, or prohibit an anatomical gift of, all or part of the principal's body under the Revised Uniform Anatomical Gift Act or to exercise the right of sepulcher over the principal's body under section 194.119;

(9) To nominate a guardian or conservator for the principal; and if so stated in the power of attorney, the attorney in fact may nominate himself as such;

(10) To give consent to or prohibit any type of health care, medical care, treatment or procedure to the extent authorized by sections 404.800 to 404.865; or

(11) To designate one or more substitute or successor or additional attorneys in fact.

Unfortunately, many of these activities, particularly #1-6 are frequently needed actions in a lot of elder law planning.

When does the power of attorney document start working?

There are two primary types of power of attorney documents, immediate and springing powers. The immediate power of attorney starts working as soon as the document is executed, even though the principal still has capacity. A springing power of attorney will have some requirement listed in the document to cause the document to "spring" into action. Most commonly, we would see the requirement for one or two doctors to write a letter stating that the principal is incapable of handling their financial affairs and needing assistance. In the absence of something listed to the contrary, a power of attorney is considered to be immediate.

Who can execute a power of attorney document and/or change a power of attorney?

Anyone over age 18 who has mental capacity can execute, change or revoke a power of attorney document. Mental capacity is a general understanding of the nature of the activity undertaken. For a power of attorney, this would be generally:

1) Does the principal know this person they are naming
2) Does the principal know who are other likely candidates for this job? (Do they know their other family members)
3) Does the principal understand that this document will allow the agent to manage any and all of the financial assets

What is a guardianship?

When people say "guardianship", they are frequently using the terms guardianship and conservatorship interchangeably. However, these two roles are distinct from each other. A guardianship is the person who in charge of the physical custody and well-being of an individual (medical decisions). The Conservator is in charge of an incapacitated individual's assets.

How is a guardianship/conservatorship different than a power of attorney document?

A guardianship is established by a court instead of the person voluntarily appointing someone. A guardianship is almost always only if the person is incapacitated. A guardianship/conservatorship is the Court finding that the person can no longer make their own decisions and they need someone to oversee them- much like a minor child needs their parent(s) to make decisions for them. A guardian has more power than a power of attorney, but also a higher level of responsibility.

What is the process of establishing a guardianship or conservatorship?

Someone needs to petition the Court where the individual resides. In that petition, the person filing this (Petitioner) states that the individual is incapacitated and needs assistance. Typically, but not always, the petitioner is asking that they be named as the individual's guardian/conservator. Upon receipt of the petition, the Court appoints an attorney to represent the alleged incapacitated individual. This attorney is called the guardian ad litem. The attorney's job is to explain to the individual what having a guardian means for them, and to gather information for the Court as to whether or not the guardianship is in the best interest of the individual. The attorney may also "defend" the alleged incapacitated against this if the individual does not want the guardianship and the attorney feels that the alleged incapacitated is capable of giving an informed opinion. There will be a Court hearing where medical information must be given, and testimony given by family/friends to establish why this is necessary. After the hearing, assuming a successful case has been presented, the Court will enter an Order of Guardianship and/or Conservatorship.

How long does this take?

One of the drawbacks of guardianships and conservatorships is that they are relatively expensive and time consuming. While the amount of time is dependent on the Court circuit, it is at the very least several weeks to get things done, and often 2-3 months before a guardianship can be established. This is for a non-contested guardianship.

After the guardianship/conservatorship what happens?

If just a guardianship is granted, then the guardian will be responsible for all medical decisions, including forced placement, if necessary. The Court will require the guardian

to file a couple page questionnaire each year stating how often the guardian sees the ward, is the current living environment appropriate, etc. This form usually takes less than 15 minutes to complete and send back.

However, if there is a Conservatorship in place because the person has assets/income that need to be managed, then an annual settlement must be filed. This is much more involved and typically takes assistance from the attorney. Every penny that came in and went out must be tracked, verified, and ultimately approved by the Court. Some jurisdictions are more picky than others with this, but it is not unusual for the conservator to need to spend ten or more hours preparing records for the settlement and often costs $1000 or more to have prepared.

What happens if the conservator spends money inappropriately or doesn't have good records?

This varies somewhat by Circuit, but typically the conservator would have had to be bonded for an amount of money roughly equal to the amount of property the ward owns. If the settlement does not meet the approval of the Court, the Court can do any or all of three things. 1) Remove the conservator and appoint someone else to manage the estate; 2) Order the conservator to replace the unaccounted funds out of their own money; 3) File a claim against the bond. If a claim is filed, the insurance company that issues the bond can replace the money and then they will pursue the conservator for recovery of those funds.

To avoid this, we typically have certain predictable expenses approved in advance. For instance, if someone lives in a care facility and we know what the approximate cost is each month, we can ask the Court to approve an amount of monthly maintenance for the facility costs and a reasonable amount for extras.

Can a guardianship/conservatorship be terminated if the person gets better?

It can, but in practice this is pretty rare. Probably because of the length of time and expense to get set up, usually if there is a decent chance of health improvement; then people just don't ask for this to begin with.

What if the person doesn't want/doesn't need a guardian or conservator, or if multiple people want to be named?

If there is a dispute as to whether the guardianship/conservatorship is needed or if multiple family members are requesting to be appointed, then the guardianship is considered to be contested. This will look more like a traditional lawsuit, where the

petitioners will have to be more thorough in how they present evidence. The effect of this is that it typically takes much longer to get through and costs several times as much. For someone who unsuccessfully petitions for guardianship/conservatorship, they are typically going to be responsible for their own attorney's fees and possibly the fees of the guardian ad litem. This is somewhat intentionally done to discourage filings unless they are really necessary.

What is the least restrictive environment?

One of the requirements of guardianships/conservatorships is to only take away the minimum amount of rights necessary to protect the ward. Examples of limiting the authority of the guardian/conservator would be continuing to allow the ward to drive or vote, or perhaps allowing them to manage a small amount of money each month if they are capable. On the healthcare side, the guardian should only use the minimum amount of assisted care as necessary- so if the individual could be in a non-skilled setting (and afford an alternate environment), then the guardian should take steps to make that happen.

Summary

Guardianships and conservatorships absolutely have a place for some individuals. Usually this is because the individual did not take steps ahead of time to prevent needing Court involvement. A quick guardianship would take 45 days, where a power of attorney could theoretically be done the same day for a fraction of the costs. It is typically going to be far preferable to use the power of attorney than a guardianship/ conservatorship for all parties involved. However, sometimes it is too late for anything else, and Court is the only option. Also, the guardianship/conservatorship proceeding is the only way to "force" care upon someone else.