

The Power Of Planning: Legal Tools You Can Use To Avoid Guardianship and Conservatorship

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In last month's issue of *The Healthcare Ledger*, I discussed the role, purpose and function of guardians and conservators. In this article, I will highlight the important legal documents that must be included in a properly designed plan for the future. They will help you eliminate the need for court-ordered guardians and conservators, and sidestep the potentially wrenching, time consuming and public legal proceedings that can accompany their appointment.

These legal documents include

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the following: *health care proxy*, *power of attorney* and *standby guardianship*. Understanding these documents, and including them in your planning for the future, is essential to ensure your needs and wishes are carried out if you become unable to handle your own financial, health and other affairs.

A health care proxy is a document that legally designates another person (called a *health care agent*) to make your health care decisions in the event you are incompetent and unable to make decisions on your own behalf. Incapacity is generally determined by the

physician(s) caring for you. If you are deemed incompetent, then the person(s) you have named in your healthcare proxy will have the authority to step into your shoes and act on your behalf. If you regain competence at any point in time, you then resume the ability to control your own medical decisions.

It is important to take extreme care in selecting a healthcare agent or *attorney in fact* (again, a person who will carry out your healthcare decisions) as you are giving her or him the power and responsibility to make life-affecting decisions. In addition to making routine medical decisions, the health care agent may be required to decide to terminate life-sustaining measures.

This is reality, because health care proxies normally contain "living will" language that outlines the principal's end of life decisions (the principal is the person executing the health care proxy). The document can specifically state that the principal does not want any extraordinary medical means to be used if recovery is unlikely.

Many people choose a spouse, partner or significant other as the primary agent, with children or other responsible family or friends as alternates. However, regardless of the person(s) you appoint, make sure she or he is

able to honor your health decisions. Have a frank and open conversation about what those decisions should be.

In the absence of the health care proxy, a guardian would need to be appointed to make these decisions. Not only would you lose the ability to name the person you want to act on your behalf, you would also be unable to set forth special requests such as "do not resuscitate" and "do not intubate." Finally, you would also give up the ability to set forth any special requests you may have with regard to your funeral or disposition of your bodily remains.

The companion to the health care proxy is the *durable power of attorney*, and it gives authority to another person to act on your behalf and handle any and all of your financial decisions and day-to-day affairs. The powers granted under this document, though limited in a small number of cases, are generally broad and encompass anything a person could do on their own behalf. Once it is signed, this document is in full force and effect with the expectation that it will not be used unless and until you are unable to handle your own financial affairs. When considering who should be appointed, be sure to select a person you trust—someone who is also likely to make decisions similar to the ones you would make on your own behalf.

A *standby guardian* is an important legal tool in planning for your child's care in the event you are ill and unable to care for your child, or upon your death. You can choose, with court approval, the person who shall serve as the standby guardian for your child and give that person the legal authority to act for your offspring. One of the many benefits of having a standby guardian is that the number of times a standby

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guardian can go in and out of “standby” status is unlimited. This is clearly a benefit for parents who may have an illness that requires them to visit the hospital on more than one occasion.

Practically speaking, it makes sense to begin the standby guardianship process while you are healthy, rather than waiting until a crisis arises. The process requires the parent to think carefully about whom to name. Take time to speak at length with a potential standby guardian to determine the person’s willingness to act as the guardian. Be sure he or she clearly understands your goals, your wishes and philosophies of raising your child.

Once the standby guardian is identified, the appropriate forms and documents must be prepared and brought before the probate court for approval. Even after a standby guardian is approved by the court, that person still does not have authority to act on behalf of the child(ren) until:

- the parent agrees in writing that the standby guardian can exercise their guardianship duties

- the parent’s physician determines that the parent is incapacitated and currently unable to care for their child
- the parent dies.

The question is often raised when discussing standby guardianships: “Why not just name the guardian in my will?” While we advise all people to have a will executed on their behalf, keep in mind that a will is designed to address issues following your death; it is not consulted or referred to while you are alive no matter how ill you are.

The act of naming a guardian in a will means that the proposed guardian does not receive legal authority to act as the guardian of the child(ren) until after the parent(s) have died and the court has approved the appointment of the guardian. By comparison, a standby guardian has the legal authority to act upon death as well as upon illness of the parent and/ or written consent of the parent.

Ask yourself what would happen to your child(ren) if you were unable

to care for them due to sickness or death. Chances are, if left to fate, you would not like the answer. In the absence of a standby guardian, someone will likely step forward to take care of the child. You should, however, be concerned that the person who steps forward may not be the person you would want. And in the event that no one can care for the child, custody is granted to a state agency such as the Department of Social Services.

By properly implementing the health care proxy, durable power of attorney and standby guardianship, you can provide for your own care as well as the future care of your minor children. What could be a very difficult process can be made simpler by addressing these issues now, while you are healthy—or at least healthy enough to make your own decisions. ■

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