

Alternatives to Guardianship

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Guardianships, because they are so powerful, should be used sparingly. Other less restrictive forms of assistance may be more appropriate. This NebGuide, sixth in a series of seven, discusses legal Guardianship.

Sometimes obtaining a Guardian for a person who is having difficulty in making decisions in one or more areas of his or her life is an appropriate solution. Guardianship allows a responsible person to substitute judgment for someone who cannot make or communicate decisions. Without Guardianship the person may be unprotected and lack the ability to find and use services. Even so, Guardianship should be used sparingly, precisely because Guardians have so much power.

Guardianship is one form of surrogate decision making—a term used to describe situations in which one makes decisions on behalf of someone else. It is the most restrictive choice when decision making assistance is needed. There are many more ways help can be given before proceeding to Guardianship. The following is a description of less-restrictive forms of assistance listed in order of degree of restriction from the least to the most restrictive.

Representative Payee is a person appointed by the Social Security Administration to receive and manage benefits administered through Social Security. A representative payee is sought when a person is unable to manage the funds and do the necessary reporting required.

Protective Payee is an individual assigned by the Nebraska Department of Health and Human Services to receive public assistance payments on behalf of another person. The protective payee has a supervisory and teaching role. A payee is assigned when it has been determined that the person is unable to manage funds from the department or has previously mismanaged those funds.

Fiduciary is an individual or legal entity (such as a bank or nursing home, guardian, conservator trustee) “who is acting under authority from a court or under authority other than a court appointment who has control of money or property of the ward pursuant to that legal authority.” This includes an individual appointed by the Veterans Administration to manage VA benefits for a veteran who is incompetent or for a minor dependent of a veteran who is incompetent. The VA determines that a person is incompetent when he/she lacks the mental capacity to conduct or manage his/her own affairs, including the disbursement of funds.

Power of Attorney is a document that authorizes one to act on another’s behalf. It is the delegation from the person creating the document (the principal) to the person to whom he/she is granting the power to act (the agent). Powers of attorney can be either limited or general depending on the principal’s wishes. A limited power of attorney gives authority to act only with regard to very specific matters. A general power of attorney authorizes the agent to act on behalf of the principal in a wide variety of actions. A power of attorney is also terminated by the principal’s death, disability or incompetence.

Durable Power of Attorney is a power of attorney that lasts beyond the disability or incapacity of the principal. Otherwise it is just like a power of attorney. It can be revoked or modified at any time as long as the principal is competent.

Advance Directives inform others of a person's choices for medical treatment that were made prior to the need for treatment. The most common types of advance directives are living wills, health care power of attorney, code/no code orders and medical directives.

- A Living Will is a written statement that describes the type of care a person wishes to receive in the event he/she is suffering from a terminal illness or is in a persistent vegetative state. A person can change his or her mind and revoke the living will at any time, regardless of mental or physical condition.
- Health Care Power of Attorney is, quite simply, a durable power of attorney through which a principal authorizes an agent to make health care decisions on his/her behalf. If a person is competent, he/she can cancel the health care power of attorney at any time.
- Code/No Code Orders are directions one gives regarding his/her wishes in relation to CPR and other emergency medical procedures. These are common in nursing homes and hospitals. The patient is generally asked upon admission whether or not he/she wants emergency procedures undertaken should a medical situation warrant the need for such procedures.
- A Medical Directive is a specific list of medical procedures on which a person may check various procedures that he/she wants, does not want or is not sure about. A medical directive is quite specific and is often incorporated into either a living will or a health care power of attorney.

Many of the options for help with the various types of decisions can be voluntary and entered into by a person, with that person often choosing the type of assistance wanted and who will be the surrogate decision maker. When one is no longer able to make a conscious choice regarding

the type of surrogate decision making that is most appropriate for the situation, it may be necessary to pursue a more restrictive option of conservatorship or Guardianship.

Conservator is an individual or corporation appointed by the court to manage the estate, property and/or other business affairs of an individual whom the court has determined is unable to do so for himself/herself.

Guardianship provides for the care of someone who is not able to care for himself/herself. The court may appoint a Guardian if there is clear and convincing evidence that he/she requires continuing care or supervision. Nebraska law allows for, and favors, the appointment of a limited Guardian. This is a Guardian who looks after a limited number of the person's personal needs. The court is required to look at 10 items listed in the Guardianship law and state with which of the individual items the person needs assistance. A limited Guardianship is less restrictive than a full Guardianship. A full Guardianship is established when it is determined that surrogate decision making is needed in all of the areas the court is required to review.

References

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