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Guardianship and Conservatorship

Frequently I receive a telephone call with the typical following message: "My aunt just had a massive stroke and no one is on her checking account or any of her accounts. The social worker at the hospital said I need to call a lawyer and get a power of attorney. Can you prepare a power of attorney for me, maybe today?"

The problem is the person, who is now incapacitated, must have sufficient capacity or competence to understand what they want done, what a power of attorney is and is not, who they want to make decisions, and many other questions before they are legally able to sign a power of attorney. If the person is unable to understand, make informed decisions and communicate those decisions, the power of attorney option is no longer a viable option.
The only legal option is for someone to petition a court (usually the probate court or division where the incapacitated person is a resident) to have a guardian appointed to handle healthcare and personal decisions and a conservator appointed to make financial decisions and manage assets and property. This is not a pleasant process nor is it an inexpensive process. The petitioner usually must have private legal counsel to file the petition. Medical testimony (sometimes in the form of a letter or affidavit from a physician but sometimes live testimony of a physician in court) as to the condition and capacity of the patient and whether the physician believes the person is capable of making informed decisions, must be provided to the court. In the clear cases of complete incapacity, such as a coma or persistent vegetative state, proving the basis for the guardianship and conservatorship is not as difficult to establish in court.

In the cases of what I term as "The Twilight Zone" cases—the person is not totally incapacitated, but is barely capable of understanding reality or capable of making reasonable personal and financial decisions--the process to obtain a guardianship and conservatorship becomes more difficult. Additional witnesses may be necessary to prove the case, and sometimes the person demands a jury trial!

If the court appoints a guardian and/or a conservator (the same person may be appointed to serve in both capacities, or different persons appointed to serve as guardian and conservator), the conservator may have to "post a bond" through a surety company to cover the value of the incapacitated person's income and assets. The conservator and the guardian will have to make periodic reports to the probate division. The reports include an inventory of the incapacitated person's assets and property, an annual accounting of all income received and all expenditures made, and a report as to where the incapacitated person is residing and other pertinent information. If advance permission from the court to spend the incapacitated person's income and

assets in a way that is not authorized by law is not obtained, the conservator may have to explain to the court the basis for the expenditure, or the court may require the bond company or the conservator to pay the money back into the estate!

All of this may be avoided in advance of any health situation with a properly prepared durable power of attorney for financial and legal matters and a durable power of attorney for healthcare matters. The person who failed to sign such documents because they feared the cost would be shocked (if they could realize now that they are incapacitated) at the expenses they incurred. The cost of these essential planning documents is so small compared to the costs of obtaining a guardianship and conservatorship and the ongoing costs of the conservatorship.

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