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AVOID GUARDIANSHIP - PLAN IN ADVANCE

Planning is an integral part of life. We plan to buy a house or car, to send our kids to college, or even a vacation! Have you planned for your care in the event you are in an accident, become ill or are unable to care for yourself? It is hard to imagine that, one day, we may be unable to handle our personal or financial affairs. Many people incorrectly assume that a spouse or “next of kin” will have legal authority to manage in the event of an emergency. Without proper planning, if you become ill or incapacitated, a Guardianship will be necessary to manage your affairs.

What is Guardianship?

Guardianship is the process by which a Court appoints a representative, called a Guardian, to make personal and property management decisions for an individual who is ill or incapacitated (the “IP”) and has not done *advance* planning. It requires a Court proceeding. It is costly, time-consuming and intrusive on affairs that most of us would prefer to keep private. It restricts the legal rights of the IP. The Court declares that the IP is unable to handle personal and/or financial affairs and needs special protection. The process starts with the filing of a Petition, with notice to family members and others. The Court appoints a Court Evaluator to conduct an investigation. A hearing is held to determine whether a Guardian is required and, if so, who should serve in that capacity - not necessarily the person whom the IP would have selected. The process ordinarily takes several months. An attorney customarily represents the Petitioner and an attorney may be appointed to represent the IP. Court fees, attorneys fees and the Court Evaluator’s fee must be paid. A Guardian typically is required to post a bond or other security and to pay annual premiums to keep the bond current. A Guardian must file an accounting of monies collected and spent on behalf of the IP. The administration of the Guardianship is supervised by the Court. Frequently, a Guardian must obtain Court approval before acting on behalf of the IP.

What are the alternatives?

In order to authorize another to make medical, health or financial decisions on your behalf, you must do so, *in advance*, and in writing. The legal documents that establish how and by whom your financial affairs will be managed and health care decisions made in the event your incapacity are the Power of Attorney, Health Care Proxy and Living Will.

A Power of Attorney (POA) permits you, the “principal,” to name another, the “agent,” to make financial and property management decisions for you. The NYS Legislature has recently propounded a new POA, effective on September 1, 2009. A POA executed before that date is still valid but may be difficult to enforce. The POA can be designed so that it remains in effect if you become incapacitated due to advanced age, illness or injury. It can authorize the agent to handle a wide range of matters or be limited to a single transaction. You may name more than one agent. You should always appoint a successor or back-up agent if your first choice cannot perform the required duties.

A Health Care Proxy (HCP) appoints an agent to make health and medical decisions for you if you are unable to communicate your wishes. The agent may be given authority to authorize or refuse surgery, antibiotics, cardiac and pulmonary resuscitation, respiratory support, and artificially administered feeding and fluids. In New York, you may only appoint one agent at a time, but may appoint successor agents. A Living Will (LW) contains information for your agent as to your end-of-life wishes. A LW and HCP help to avoid conflict among your family members. Armed with appropriate instructions, your agent can ensure that you receive only the treatment which you desire.

Proper planning in advance, and implementing a POA, HCP and LW, the “Advance Directives,” can eliminate the need for a Guardianship proceeding. You can select your agent(s), direct their decision-making and, on most matters, avoid Court involvement. Your health and financial matters remain private. Advance Directives enable us to plan for the possibility that we may become ill or incapacitated. By utilizing these effective tools, we can maintain control for as long as possible and then ensure that our wishes will be carried out by those we trust.

Advance Directives are sophisticated estate planning devices. While pre-printed forms are available in bookstores and on line, they are often outdated and sometimes inappropriate for the jurisdiction in which you reside or the goals you wish to accomplish. You should seek the assistance of a qualified estate planning attorney in preparing these documents. We will be happy to help you and afford counsel as to your choice of agent(s), the powers that are appropriate for your situation and the manner in which the various documents must be executed in order that they will be valid and enforceable.